

Exhibit B

FINAL BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1234 (AND CONSOLIDATED CASES)

BAIS YAAKOV OF SPRING VALLEY, ET AL.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. BAER
ASSISTANT ATTORNEY GENERAL

ROBERT B. NICHOLSON
STEVEN J. MINTZ
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

JONATHAN B. SALLET
GENERAL COUNSEL

DAVID M. GOSSETT
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

MATTHEW J. DUNNE
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

Except for Public Citizen, Inc., all parties, intervenors, and amici appearing in this Court are listed in the Joint Brief for Class Action Defendant Petitioners and Intervenors.

2. Rulings under review.

The ruling under review is *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 29 FCC Rcd 13,998 (2014) (JA1302) (“*Order*”), released on October 30, 2014

3. Related cases.

This Court consolidated the following petitions for review in this proceeding: Nos. 14-1234, 14-1235, 14-1239, 14-1243, 14-1270, 14-14-1279, 14-1292, 14-1293, 14-1294, 14-1295, 14-1297, 14-1299, and 14-1302. Respondents are not aware of any other related cases.

TABLE OF CONTENTS

Table of Authorities.....	iii
Glossary.....	viii
Jurisdiction	1
Questions Presented	1
Statutes and Regulations	2
Counterstatement.....	2
A. The TCPA and the FCC’s Implementing Rules.....	2
B. The Junk Fax Prevention Act and the <i>Junk Fax Order</i>	4
C. Private Lawsuits and Petitions to the Agency.....	7
D. <i>The Order</i>	8
Summary of Argument.....	12
Standard of Review	16
Argument.....	17
I. The FCC Reasonably Interpreted The Statute to Permit the Requirement of an Opt-Out Notice for Fax Ads Sent with Permission.	17
A. The Notice Requirement Protects Against Unsolicited Faxes by Ensuring Recipients Can Revoke Their “Prior Express Invitation or Permission.”	17
B. The Opt-Out Notice Requirement Appropriately Implements the TCPA’s Prohibition of Unsolicited Fax Advertisements.....	21
C. The Opt-Out Notice Requirement Does Not Raise First Amendment Concerns.	24

II. The FCC Reasonably Waived the Opt-Out Notice Requirement	28
A. The FCC Reasonably Balanced Fairness to Advertisers and the Public Interest In Granting the Waiver.....	28
1. Reasonable advertisers may have been confused.	29
2. Waiver served the public interest.....	33
3. The agency reasonably made the waiver retroactive.	34
B. The Commission Reasonably Assumed That Its Waiver Would Limit Liability for the Waiver Petitioners.....	38
1. The private right of action is predicated on the agency's control over its own regulations.....	38
2. The waiver does not intrude impermissibly on the courts' power to decide private lawsuits.....	40
Conclusion.....	41

TABLE OF AUTHORITIES

CASES

<i>Adams Fruit Co. v. Barrett</i> , 494 U.S. 638 (1990).....	40
<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001).....	38
* <i>AT & T Corp. v. FCC</i> , 448 F.3d 426 (D.C. Cir. 2006).....	29, 35
<i>AT&T Co. v. FCC</i> , 454 F.3d 329 (D.C. Cir. 2006).....	36
<i>AT&T Wireless Servs., Inc. v. FCC</i> , 270 F.3d 959 (D.C. Cir. 2001).....	28
<i>Bais Yaakov of Spring Valley v. Alloy, Inc.</i> , 936 F. Supp. 2d 272 (S.D.N.Y. 2013)	19
<i>Bd. of Trs. of the State Univ. of NY v. Fox</i> , 492 U.S. 469 (1989)	25
<i>Biggerstaff v. FCC</i> , 511 F.3d 178 (D.C. Cir. 2007).....	5
<i>Blanca Tel. Co. v. FCC</i> , 743 F.3d 860 (D.C. Cir. 2014).....	34
<i>Cablevision Systems Corp. v. FCC</i> , 649 F.3d 695 (D.C. Cir. 2011).....	22
<i>Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York</i> , 447 U.S. 557 (1980)	25
<i>Cheney R.R. Co. v. ICC</i> , 902 F.2d 66 (D.C. Cir. 1990).....	22
<i>Chevron U.S.A. Inc. v. NRDC</i> , 467 U.S. 837 (1984)	16
<i>Cincinnati v. Discovery Network, Inc.</i> , 507 U.S. 410 (1993)	24
<i>City of Arlington, Tex. v. FCC</i> , 133 S. Ct. 1863 (2013)	16
<i>Clark-Cowlitz Joint Operating Agency v. FERC</i> , 826 F.2d 1074 (D.C. Cir. 1987)	36
<i>Conference Grp., LLC v. FCC</i> , 720 F.3d 957 (D.C. Cir. 2013).....	34

<i>Destination Ventures Ltd. v. FCC</i> , 46 F.3d 54 (9 th Cir. 1995).....	26
<i>FCC v. Schreiber</i> , 381 U.S. 279 (1965).....	32
<i>FCC v. WNCN Listeners Guild</i> , 450 U.S. 582 (1981)	33
<i>General Elec. Co. v. EPA</i> , 53 F.3d 1324 (D.C. Cir. 1995).....	31
<i>Ira Holtzman, C.P.A. v. Turza</i> , 728 F.3d 682 (7 th Cir. 2013).....	7
<i>Keller Commc'ns, Inc. v. FCC</i> , 130 F.3d 1073 (D.C. Cir. 1997).....	28
<i>Landsman & Funk PC v. Skinder-Strauss Assocs.</i> , 640 F.3d 72 (3d Cir. 2011)	3
<i>MetroPCS California, LLC v. FCC</i> , 644 F.3d 410 (D.C. Cir. 2011).....	33
<i>Missouri ex. rel. Nixon v. Am. Blast Fax, Inc.</i> , 323 F.3d 649 (8 th Cir. 2003).....	3, 26
<i>Morris Communications, Inc. v. FCC</i> , 566 F.3d 184 (D.C. Cir. 2009).....	35
<i>Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.</i> , 463 U.S. 29 (1983).....	17
<i>Mountain Solutions, Ltd. v. FCC</i> , 197 F.3d 512 (D.C. Cir. 1999).....	17, 34
<i>NAB v. FCC</i> , 569 F.3d 416 (D.C. Cir. 2009)	39
<i>Nack v. Walburg</i> , 715 F.3d 680 (8 th Cir. 2013).....	7, 30
<i>Nat'l Oilseed Processors Ass'n v. OSHA</i> , 769 F.3d 1173 (D.C. Cir. 2014).....	17
<i>Natural Resource Defense Council v. EPA</i> , 749 F.3d 1055 (D.C. Cir. 2014)	40, 41
<i>NCTA v. Brand X</i> , 545 U.S. 967 (2005).....	16
<i>Northeast Cellular Tel. Co. v. FCC</i> , 897 F.2d 1164 (D.C. Cir. 1990).....	28

<i>Omnipoint Corp. v. FCC</i> , 78 F.3d 620 (D.C. Cir. 1996).....	28, 30
<i>Physicians Healthsource, Inc. v. Stryker Sales Corp.</i> , 65 F. Supp. 3d 482 (W.D. Mich. 2014), as amended (Jan. 12, 2015).....	19, 41
<i>Reed v. Town of Gilbert</i> , 135 S. Ct. 2218 (2015).....	25
<i>Retail, Wholesale & Department Store Union v. NLRB</i> , 466 F.2d 380 (D.C. Cir. 1972).....	36
<i>Rural Cellular Ass’n v. FCC</i> , 588 F.3d 1095 (D.C. Cir. 2009).....	17, 32
<i>Spirit Airlines, Inc. v. U.S. Dep’t of Transp.</i> , 687 F.3d 403 (D.C. Cir. 2012)	25
<i>Thorpe v. Hous. Auth. of the City of Durham</i> , 393 U.S. 268 (1969)	36
<i>Trans Union Corp. v. FTC</i> , 267 F.3d 1138 (D.C. Cir. 2001).....	25
<i>Trinity Broad. of Florida, Inc. v. FCC</i> , 211 F.3d 618 (2000)	31
<i>Turner Broad. Sys. v. FCC</i> , 520 U.S. 180 (1997).....	28
* <i>WAIT Radio v. FCC</i> , 418 F.2d 1153 (D.C. Cir. 1969).....	11, 28, 33
STATUTES	
1 U.S.C. § 109	37
28 U.S.C. § 2342	1
47 U.S.C. § 154(i)	18
47 U.S.C. § 227	2
47 U.S.C. § 227(a)(5)	1, 3, 9, 18, 24
47 U.S.C. § 227(b).....	1, 38, 39
47 U.S.C. § 227(b)(1)(C)	1, 3, 18, 22
47 U.S.C. § 227(b)(1)(C)(i).....	4
47 U.S.C. § 227(b)(1)(D)	22, 23
* 47 U.S.C. § 227(b)(2)	3, 9, 17, 21, 23

47 U.S.C. § 227(b)(2)(D)	5
47 U.S.C. § 227(b)(3).....	7, 38
47 U.S.C. § 227(b)(3)(A)	38
47 U.S.C. § 227(d)(1)(B)	20
47 U.S.C. § 402(a).....	1
Junk Fax Prevention Act, Pub. L. No. 109-21, 119 Stat. 359 (2005)	5
Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991)	2

REGULATIONS

47 C.F.R. § 1.3	28, 29, 41
47 C.F.R. § 64.1200(a)(4)(iv)	6, 24
47 C.F.R. § 64.1200(f)(1).....	24

ADMINISTRATIVE DECISIONS

<i>Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 10 FCC Rcd 12391 (1995)</i>	3
<i>Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 FCC Rcd 14014 (2003)</i>	4
<i>Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd 8598 (Consumer Gov. Aff. Bur. 2015)</i>	32
<i>Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 7 FCC Rcd 8752 (1992)</i>	4
<i>Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, DA 15-1402, 2015 WL 8543949 (Consumer & Gov. Affairs. Bur., rel. Dec. 9, 2015)</i>	33

<i>Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25967 (2006)</i>	<i>7, 31</i>
---	--------------

OTHER AUTHORITIES

H.R. Rep. No. 317, 102d Cong., 1st Sess. (1991).....	3, 4
S. Rep. No. 76, 109th Cong., 1st Sess. (2005).....	23

** Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

Defendant Petitioners	Petitioners who challenge the FCC’s opt-out notice requirement; they are defendants in class-action lawsuits alleging violations of that requirement
Established Business Relationship (EBR)	“a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.” 47 C.F.R. § 64.1200(f)(6).
fax advertisement	a facsimile communications “advertising the commercial availability or quality of any property, goods, or services.” 47 C.F.R. § 64.1200 (f)(1).
<i>Junk Fax NPRM</i>	<i>Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005</i> , 20 FCC Rcd 19758 (2005) (JA49)
<i>Junk Fax Order</i>	<i>Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005</i> , 21 FCC Rcd 3787 (2006) (JA107)
<i>Junk Fax Prevention Act</i>	Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359
<i>Order</i>	<i>Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991</i> , 29 FCC Rcd 13,998 (2014) (JA1302)
Plaintiff Petitioners	Petitioners who challenge the FCC’s waiver of the opt-out notice requirement in the <i>Order</i> ; they are plaintiffs in class-action lawsuits alleging violations of that requirement

unsolicited
advertisement

“any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.” 47 U.S.C. § 227(a)(5).

TCPA

Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394

JURISDICTION

The Order under review, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 29 FCC Rcd 13,998 (2014) (JA1302) (“*Order*”), was released on October 30, 2014. Each of the petitions was timely filed within 60 days of that date. This Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342.

QUESTIONS PRESENTED

The Telecommunications Consumer Protection Act of 1991 (“TCPA”), as amended by the Junk Fax Prevention Act, generally prohibits the sending of “unsolicited” fax advertisements, i.e., those sent without a recipient’s “prior express invitation or permission.” 47 U.S.C. § 227(b)(1)(C) & (a)(5). In implementing these provisions, the FCC adopted a rule requiring senders to place a notice on fax advertisements sent by invitation or permission that advised recipients of their option to “opt out” of future faxes and the procedure by which to do so. Several parties subject to class action lawsuits under the statute’s private right of action premised on the failure to provide such a notice petitioned the Commission to (1) declare it did not have authority to adopt the rule under 47 U.S.C. § 227(b) (the provision to which the private right of action attaches), or to (2) retroactively waive prior violations of the rule. The Commission reaffirmed its authority for the rule,

but granted the petitions for retroactive waiver. This case presents the following issues:

1. Whether the TCPA unambiguously prohibits the Commission from requiring advertisers to include an opt-out notice on fax advertisements sent with prior invitation or permission in order to prevent future unsolicited faxes.

2. Whether the Commission had, and reasonably exercised, authority to retroactively waive violations of the opt-out notice requirement, given the impact of that waiver on private litigation under the TCPA.

STATUTES AND REGULATIONS

Relevant statutes and regulations are reproduced in an Addendum to this brief.

COUNTERSTATEMENT

A. The TCPA and the FCC's Implementing Rules

Congress addressed the problem of abusive telemarketing practices, including the transmission of unwanted advertisements via fax machines, in the Telephone Consumer Protection Act of 1991 ("TCPA"), Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227). As Congress understood, because fax machines "are designed to accept, process, and print all messages which arrive over their dedicated lines," fax advertising imposes burdens on unwilling recipients above the burdens imposed by most other

types of telemarketing. H.R. Rep. No. 317, 102d Cong., 1st Sess. 10 (1991). *See Missouri ex. rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003). Among other things, recipients of fax advertising must pay “the cost of the paper used, the cost associated with the use of the facsimile machine, and the costs associated with the time spent by the facsimile machine when receiving a facsimile advertisement during which the machine cannot be used by its owner to send or receive facsimile transmissions.” *Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 10 FCC Rcd 12391, 12405 ¶ 29 (1995); *see also Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72, 76 (3d Cir. 2011); *Am. Blast Fax*, 323 F.3d at 654-55.

The TCPA therefore prohibits the “use [of] any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement.” 47 U.S.C. § 227(b)(1)(C). The TCPA defines “unsolicited advertisement” as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.” 47 U.S.C. § 227(a)(5). The act does not define “prior express invitation or permission.”

In exercising its authority to “prescribe regulations to implement the requirements of” the TCPA, 47 U.S.C. § 227(b)(2), the FCC declared that

faxes sent by business with an “established business relationship” with the recipient could “be deemed to be invited or permitted by the recipient” and so not within the scope of the ban on “unsolicited faxes.” *Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd 8752 ¶ 54 n.87 (1992) (“1992 Order”). The agency cited to legislative history indicating that, even where there is an established business relationship, “[i]f a subscriber asks [the] company...not to call again, the company has an obligation to honor the request and avoid further contacts.” *See id.* ¶ 34 n.64 (citing H.R. Rep. No. 102–317, pp. 13–17).

In 2003, based on an updated record that customers felt “besieged” by unsolicited faxes and that opt-out requests were often ignored, the FCC reversed its conclusion that an established business relationship provided the necessary express permission to send a fax. *Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd 14014, 14127 ¶ 189 (2003). Instead, the new rules required that customers provide consent to faxes in writing. *Id.* ¶ 191.

B. The Junk Fax Prevention Act and the *Junk Fax Order*

Congress thereafter passed the Junk Fax Prevention Act of 2005, which reinstated the established business relationship exception for fax advertisements. 47 U.S.C. § 227(b)(1)(C)(i). The statute also required that

such faxes contain a notice that a recipient may opt out—i.e., request that the sender not send more faxes—as well as contact phone and fax numbers and a cost-free mechanism to opt out. *Id.* § 227(b)(2)(D).

The Junk Fax Prevention Act, like the TCPA, required the agency to issue implementing regulations. *See* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, § 2(h). The agency did so in the *Junk Fax Order*. *See Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005*, 21 FCC Rcd 3787 (2006) (“*Junk Fax Order*”) (JA107), *petition for review dismissed*, *Biggerstaff v. FCC*, 511 F.3d 178 (D.C. Cir. 2007). The Notice of Proposed Rulemaking for that order had centered on “modifications to the Commission’s rules on unsolicited facsimile advertisements,” and had not discussed requirements for fax advertisements sent with invitation or permission. *See Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005*, 20 FCC Rcd 19758, 19758 ¶ 1 (2006) (“*Junk Fax NPRM*”) (JA49). However, commenters requested clarification of what constitutes “prior express invitation or permission.” *Junk Fax Order* ¶ 45 (JA131). In response, the agency made clear that such consent need not be written, and that advertisers could not rely on a “negative option.” *Id.*

The FCC further clarified that “[e]xpress permission [to receive a fax advertisement] need only be secured once from the consumer...until the consumer revokes such permission by sending an opt-out request to the sender.” *Id.* ¶ 46 (JA132). Given this scheme, the order stated that “entities that send facsimile advertisements to consumers from whom they obtained permission, must include on the advertisements their opt-out notice and contact information to allow consumers to stop unwanted faxes in the future.” *Id.* ¶ 48 (JA132).

Section 64.1200(a)(4)(iv) of the Commission’s rules thus requires that “[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission” must include an opt-out notice, like that required for faxes sent pursuant to an established business relationship. 47 C.F.R. § 64.1200(a)(4)(iv). This opt-out notice must (1) be “clear and conspicuous” on the first page of a fax, (2) provide a telephone and fax number (as well as a cost free mechanism to opt-out, such as a web address, if those numbers are not toll-free), (3) state that a recipient may opt out, and that failure to comply with that request within 30 days is unlawful, and (4) describe how a recipient can opt out. *See id.* & *id.* §1200(a)(4)(iii).

Although the regulation itself was clear enough, a footnote to an earlier section of the *Junk Fax Order* stated, contradictorily, that “the opt-out notice

requirement only applies to communications that constitute unsolicited advertisements.” *Junk Fax Order* at n.154 (JA130). The order did not reconcile this footnote with the opt-out notice requirement for faxes sent with permission set out in the regulations and described elsewhere in the order. To make matters worse, the substance of the conflicting footnote was reprinted in the *Federal Register* summary in a parenthetical. *Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005*, 71 Fed. Reg. 25967, 25971 (2006).

C. Private Lawsuits and Petitions to the Agency

Section 227 creates a private right of action for violations of the statute or the FCC’s implementing regulations, with damages of up to \$500 for each violation of the statute, subject to trebling for a willful or knowing offense. 47 U.S.C. § 227(b)(3). Numerous parties availed themselves of the statute’s private right of action to file suit against entities that sent fax advertisements without the opt-out notice required by the Commission’s rule. *See, e.g., Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013); *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682 (7th Cir. 2013).

In 2010, Anda, Inc., a defendant in one such suit, petitioned the Consumer and Government Affairs Bureau of the Commission for a declaratory ruling that either (1) the Commission lacked authority to adopt a

rule requiring an opt-out notice on fax ads sent with the recipient's prior consent, or (2) that Section 227(b) of the Act is not the statutory basis for the rule. *Order* ¶ 6 (JA1305).

The Bureau denied Anda's petition. It found that Anda's assertion that the agency lacked authority was an improper collateral attack on the rule, propounded four years earlier, and also that the Commission had cited Section 227 as statutory authority in the *Order*. *Order* ¶ 7-8 (JA1305).

Anda petitioned the full Commission for review. Anda's petition was followed by petitions for declaratory ruling from many other parties, all generally arguing that the Commissions did not have authority under Section 227 to regulate fax ads sent with a recipient's invitation or permission. *Order* ¶ 9-10 (JA1306). In addition, several parties sought retroactive waivers of the rule for faxes sent with prior permission. *Id.* ¶ 11 (JA1307). Finally, Staples petitioned the agency to initiate a new rulemaking to repeal the rule as poor policy and in excess of the agency's authority. *Id.* ¶ 12 (JA1307).

D. *The Order*

After extensive comment, the agency issued the *Order* on review, denying in part and granting in part the petitions. *Order* ¶ 14 (JA1308).

1. The agency confirmed that Section 227 was a statutory basis for the rule in question, as the *Junk Fax Order* had stated. *Id.* ¶ 18 (JA1310). The

agency next reaffirmed its conclusion that Section 227 in fact supplies the authority for such a rule, because Section 227(b)(2) grants the Commission authority “to prescribe regulations to implement the requirements of [the TCPA’s fax advertisement provisions].” *Order* ¶ 19 (JA1310) (quoting 47 U.S.C. § 227(b)(2)).

More specifically, the Commission explained, the Act defines an “unsolicited advertisement” as one “transmitted...without [the recipient’s] prior express invitation or permission,” 47 U.S.C. § 227(a)(5), but does not define “prior express invitation or permission.” The agency stated that “in order to prescribe whether a fax ad is unsolicited under the TCPA...the Commission defined the scope of such prior express permission” by clarifying that express permission need only be secured once—rather than anew for each transmission—“until the consumer revokes such permission by sending an opt-out request to the sender.” *Order* ¶ 19 (JA1310) (citing *Junk Fax Order* ¶ 45-48 (JA131)). Therefore, “whether the recipient has exercised the right to opt out of future fax ads” is “[n]ecessary to the determination as to whether the sender of a fax advertisement retains the recipient’s prior express permission at the time after the initial fax advertisement is sent.” *Id.* ¶ 20 (JA1310). An opt-out requirement was thus “important to determine whether prior express permission remains in place.” *Id.*

The record confirmed that, without an opt-out notice, “recipients could be confronted with a practical inability to make senders aware that their consent is revoked.” *Id.* At a minimum, consumers might be forced to spend “considerable time and effort to determine how to properly opt out...., assuming that such a means even exists.” *Id.* In some cases, the lack of such a notice “would effectively lock in their consent at a point where they no longer wish to receive such faxes.” *Id.*

2. Although the agency denied the petitions challenging its legal authority to issue the rule, it found good cause to grant petitioners a retroactive waiver for faxes sent with a recipient’s permission but without the required opt-out notice. *Id.* ¶ 22 (JA1312). First, the agency observed, footnote 154 of the *Junk Fax Order* created potential confusion by stating, in conflict with the regulations and the rest of that order, that the opt-out notice requirement applied only to unsolicited faxes—a fact that each waiver petitioner referenced. *Order* ¶ 24 (JA1313). Second, the *NPRM* for the rule did not expressly propose to apply an opt-out rule to fax advertisements sent with permission; instead the rule grew out of the comments submitted. The absence of clarity created by the contradictory footnote, against the background of the lack of explicit notice, “resulted in a confusing situation for businesses or one that caused businesses mistakenly to believe that the

opt-out notice requirement did not apply.” *Id.* ¶ 27 (JA1314). Moreover, it “left some businesses potentially subject to significant damage awards under the TCPA’s private right of action or possible Commission enforcement.” *Id.*

The Commission emphasized that a “risk of substantial liability in private rights of action” is not “an inherently adequate ground for waiver,” but rather is only “a factor for [its] consideration, in conjunction with other considerations.” *Id.* ¶ 28 (JA1315). Given that the notice requirement would be in effect going forward, the Commission noted that consumers would not “be deprived of the rule’s value.” *Id.* The Commission emphasized that it has a duty in considering a waiver to “seek out the ‘public interest’ in particular...cases,” *id.* ¶ 27 (JA1314) (quoting *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969)), and may waive a rule where “enforcing the rule [would be] unjust or inequitable,” *id.* ¶ 28 (JA1315). Here, it concluded that “[c]onfusion or misplaced confidence about the rule” stemming from the agency’s own order “warrants some relief from its potentially substantial consequences.” *Id.*

Because the Commission waived the opt-out notice requirement only for the parties before it, it stated that “[o]ther similarly situated parties may also seek waivers.” *Id.* ¶ 30 (JA1315). It made clear that “all future waiver

requests will be adjudicated on a case-by-case basis,” and that the agency did “not prejudge the outcome of future waiver requests.” *Id.* n.102 (JA1316).

These petitions for review followed.

SUMMARY OF ARGUMENT

The Commission’s opt-out notice requirement for fax advertisements sent with the permission of the recipient is a reasonable exercise of its authority to implement the TCPA’s ban on unsolicited fax advertisements: it establishes a mechanism by which recipients can revoke their permission and thus stop the flow of unwanted faxes. But as the Commission acknowledged, the requirement was promulgated in a manner that gave rise to reasonable industry confusion, creating the potential for considerable liability under the TCPA’s private right of action. Because of these special circumstances, the Commission reasonably exercised its power to waive the requirement retroactively, while adhering to the requirement going forward.

I.A The TCPA prohibits unsolicited fax advertisements, i.e., those sent without “express invitation or permission.” 47 U.S.C. §227(b)(1)(C), (a)(5). To determine if a fax is unsolicited, advertisers and the Commission must know if it is permitted by recipients. And permission, once given, can later be revoked. The Commission’s opt-out notice requirement for faxes sent with permission provides recipients an efficient, cost-free means to effectuate that

revocation. And the record showed that without such a requirement, it would sometimes be difficult or impossible to opt out.

I.B The Class Action Defendant Petitioners (“Defendant Petitioners”) argue that the Commission could not impose an opt-out notice requirement on faxes sent with permission because the TCPA prohibits only unsolicited faxes. But the point of the opt-out notice requirement is to prevent unsolicited faxes in the future. To implement that goal, the agency found it necessary to require an opt-out notice on faxes sent with permission, including the first such fax. To be sure, as the Defendant Petitioners observe, Congress explicitly required an opt-out notice for unsolicited faxes sent under the “established business relationship” exception to the general prohibition on such faxes. But that statutorily mandated notice requirement does not mean that the Commission may not implement the statute by requiring the same type of notice on faxes sent with permission. Defendant Petitioners’ contrary reading of the statute mistakes the statutory floor for a ceiling. Indeed, the notice requirement for fax ads sent with permission serves a similar aim as the notice requirement for “established business relationship” faxes: allowing consumers to stop the flow of unwanted fax advertisements.

I.C The Commission’s opt-out notice requirement also easily passes First Amendment review. As a regulation of speech that is wholly

commercial, it is subject to intermediate scrutiny. Although the rule is imposed on fax ads sent with permission, it protects against the transmission of unsolicited faxes. As Defendant Petitioners essentially concede (Br. 23), there is a substantial government interest in ensuring that consumers are not burdened with the costs from unwanted fax advertisements. The notice requirement directly advances that interest because, as the record showed, consumers would otherwise sometimes have trouble opting out. It is narrowly tailored because the burden of including the notice is minimal. And if customers exercise their right to opt out, that simply demonstrates that further advertisements were unwanted.

II.A Contrary to the contentions of the Class Action Plaintiff

Petitioners (“Plaintiff Petitioners”), the FCC was equally reasonable in granting retroactive waivers in the cases before it. A footnote in the *Junk Fax Order* adopting the opt-out notice requirement erroneously stated that the requirement did *not* apply to faxes sent with permission. The agency found, based on the record, that the internal inconsistency in that order could have led a reasonable advertiser to be confused about the requirement or to have a misplaced confidence that the requirement did not apply. The agency concluded that the public interest was best served by waiving the rule to avoid exposing advertisers to Commission enforcement or to the stiff

statutory penalties that could result from violation of the rule during a period in which its application—because of the agency’s own statements—had been rendered unclear. Waivers, as adjudications, are presumptively retroactive, and it is not uncommon for the agency to promote the public interest by avoiding otherwise inequitable results by means of such a waiver.

II.B The agency also reasonably assumed that a retroactive waiver of its opt-out notice requirement would remove the basis for liability in private suits based on violation of that requirement. The TCPA establishes a private right of action for a “violation” of the agency’s rules implementing the general prohibition on unsolicited faxes. 47 U.S.C. § 227(b)(3). In doing so, the statute renders the private cause of action dependent on the existence of an enforceable Commission rule. Clearly, if the agency had not issued the rule, or if it had concluded in 2014 that the rule did not apply to fax ads of the type at issue in the lawsuits, a court would be bound to conclude that there was no violation of the regulation, and advertisers were therefore not liable under the TCPA. Here, the agency exercised its authority to waive its regulation, but the effect is the same: the rule having been waived, there can be no enforceable “violation” of the agency’s regulation to give rise to liability.

The Commission's waiver does not impermissibly intrude into the province of the judiciary. Congress created a cause of action predicated on a violation of the agency's regulations against a background of the agency's well-recognized authority to waive violations of those regulations. By exercising that authority, the Commission acted within—not outside—the bounds of the private right of action that Congress created.

STANDARD OF REVIEW

1. This Court reviews the Commission's determination that the opt-out notice requirement for fax advertisements sent with the permission of the recipient falls within the agency's authority to implement the TCPA's ban on unsolicited advertisements under the principles set forth in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). Under those principles, where a "statute is silent or ambiguous with respect to the specific issue, the question for the [Court] is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If so, this Court will "accept the agency's construction of the statute, even if the agency's reading differs from what the [Court] believes is the best statutory interpretation." *NCTA v. Brand X*, 545 U.S. 967, 980 (2005). This is so even where an interpretation "concerns the scope of the agency's statutory authority (that is, its jurisdiction)." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1868 (2013).

2. The FCC's decision to retroactively waive the opt-out notice requirement is subject to the arbitrary and capricious standard of the Administrative Procedure Act. *See, e.g., Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512, 517 (D.C. Cir. 1999). That standard is deferential. The court's role "is a limited one, and we will not substitute our judgment for that of the agency." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009). The Commission need only "articulate a 'rational connection between the facts found and the choice made.'" *Id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)).

3. This Court reviews *de novo* the Defendant Petitioners' claim that the opt-out notice rule violates the First Amendment, and Plaintiff Petitioners' claim that the retroactive waiver violates separation of power principles. *Nat'l Oilseed Processors Ass'n v. OSHA*, 769 F.3d 1173, 1179 (D.C. Cir. 2014) (constitutional challenges are subject to *de novo* review).

ARGUMENT

I. THE FCC REASONABLY INTERPRETED THE STATUTE TO PERMIT THE REQUIREMENT OF AN OPT-OUT NOTICE FOR FAX ADS SENT WITH PERMISSION.

A. The Notice Requirement Protects Against Unsolicited Faxes by Ensuring Recipients Can Revoke Their "Prior Express Invitation or Permission."

Section 227(b)(2) of the Act mandates that the "Commission shall prescribe regulations to implement the requirements of...subsection" 227(b).

See also 47 U.S.C. § 154(i). The opt-out notice requirement results from the FCC’s implementation of the statute’s ban on “unsolicited [fax] advertisements.” 47 U.S.C. § 227(b)(1)(C); *see Order* ¶ 19 (JA1310). The statute defines an unsolicited fax as one sent without a recipient’s “prior express invitation or permission.” 47 U.S.C. § 227(a)(5) & (b)(1)(C). Thus, in order for advertisers and the Commission to determine whether a particular fax advertisement is unsolicited (and therefore banned by the TCPA), they must be able to determine whether the advertisement was transmitted without the recipient’s permission.

Moreover, permission, once given, can be revoked. *See Order* ¶ 19 (JA1310) (“prior express permission remains in place only if it has not been subsequently revoked by the recipient”); *Junk Fax Order* ¶ 46 (JA132). As the Commission recognized, “[s]ome recipients, after initially consenting to receive fax ads, will decide that they no longer wish to receive future faxes because, for example, they have found another vendor they prefer or no longer need the product or service being advertised.” *Order* ¶ 20 (JA1311). For example, a person looking for a house might ask a real estate firm to fax over property listings. Until she buys a house, she may well want to receive periodic updates with new listings. Once she buys a house, though, she may have no use for further updates and wish to revoke her permission to receive

additional fax advertisements. *See Bais Yaakov of Spring Valley v. Alloy, Inc.*, 936 F. Supp. 2d 272, 287 (S.D.N.Y. 2013) (The requirement “comports with the notion that fax recipients may change their minds about various products or services every day, and therefore should be provided with an opportunity to withdraw their prior consent.”).¹

The Commission’s opt-out notice requirement thus provides recipients with an efficient, cost-free means to revoke permission for further faxes. This is important because, as the Commission explained, “absent a requirement to include an opt-out notice on fax ads sent with prior express permission, recipients could be confronted with a practical inability to make senders aware that their consent is revoked.” *Order* ¶ 20 (JA1311); *see id.* n.69 (JA1311) (consumer advocate commenter noted that, without an opt-out notification, “a subsequent fax cannot be said to have been ‘solicited,’ as opposed to the result of the recipient not knowing...how to ‘opt out’”).

¹ *See also Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 497 (W.D. Mich. 2014), as amended (Jan. 12, 2015) (“Given the inherent ambiguity in what is ‘solicited’ or ‘unsolicited’..., Congress and the FCC could reasonably conclude that the unequivocal requirement of a simple opt-out notice on every fax was the only way to give practical effect to the purpose of the TCPA.”).

The Commission’s finding that an opt-out notice is necessary—despite the separate statutory requirement for all faxes to include the sender’s name and fax number, *see* 47 U.S.C. §227(d)(1)(B)—is amply borne out by the record. One commenter stated that before the opt-out notice requirement, when he had called a telephone number that appeared on the fax to try to opt out of future faxes, the person answering the phone had no knowledge that the company was even sending faxes or how a recipient could opt out. *Order* n.69 (JA1311). Similarly, the Attorneys General of several states explained in the *Junk Fax* proceeding that many larger fax advertisers set up fax machines dedicated to “send-only” use. As a result, a recipient could not opt out by calling, or even faxing, the number that had sent the advertisement. *See* Comments of the Attorneys General of Arkansas, Connecticut, Kentucky, and New Mexico 19 (January 18, 2006) (JA95).

“At best,” the Commission thus stated in the *Order*, the lack of an opt-out notice “could require...consumers to take, potentially, considerable time and effort to determine how to properly opt out.” *Order* ¶ 20 (JA1311). “At worst, it would effectively lock in their consent at a point where they no longer wish to receive such faxes.” *Id.* “The opt-out notice requirement,” the Commission concluded, “ensures that the recipient has the necessary contact

information to opt out of future fax ads and can do so in a timely, efficient and cost-free manner.” *Id.*²

B. The Opt-Out Notice Requirement Appropriately Implements the TCPA’s Prohibition of Unsolicited Fax Advertisements.

The Defendant Petitioners argue that because the TCPA bans “unsolicited” fax advertisements, it necessarily prohibits the Commission from requiring an opt-out notice on faxes sent with permission. Def. Pet. Br. 16-17.³ But the Commission has broad authority to “prescribe regulations to implement the requirements of” that prohibition, 47 U.S.C. § 227(b)(2). And

² The Commission could have eliminated the need for an opt-out mechanism by interpreting “prior express invitation or permission” to require that a recipient give permission for each fax advertisement before it is transmitted to that recipient. Such a regime would be highly burdensome for both advertisers and recipients. The advertiser would be deprived of the ability to send a series of faxes to a recipient who would otherwise be willing to receive them, and recipients would be unnecessarily burdened by repeating, fax by fax, a permission that they wished to give. The Commission reasonably concluded that “[e]xpress permission need only be secured once from the consumer in order to send facsimile advertisements...until the consumer revokes such permission by sending an opt-out request.” *Junk Fax Order* ¶ 46 (JA132).

³ The Commission correctly determined that the various petitions for declaratory ruling that challenged the Commission’s authority to promulgate the opt-out notice rule—filed years after Federal Register publication of the rule—were time-barred. *Order* ¶ 17 (JA1309). The issue remains live for this Court’s review because petitioner Staples filed a petition for rulemaking raising the issue, which the Commission denied on the merits. *Id.* ¶ 32 (JA1316).

again, the Commission's requirement of an opt-out notice on fax ads sent *with* permission allows recipients to later revoke that permission and therefore prevent future *unsolicited* faxes. The opt-out rule for fax advertisements sent with permission is therefore an appropriate exercise of the Commission's power to implement the statute's general prohibition against the faxing of an "unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C).

Defendant Petitioners contend that because the TCPA mandates an opt-out notice for unsolicited faxes advertisements sent pursuant to an established business relationship, see 47 U.S.C. § 227(b)(1)(C), (D), but does not impose such a requirement for faxes sent with permission, "Congress...left no doubt that the opt-out notice requirement could apply *only* to unsolicited advertisements." Def. Pet. Br. 17. That conclusion is unwarranted. "Congress's mandate in one context with its silence in another suggests...simply a decision not to mandate any solution in the second context, i.e., to leave the question to agency discretion." *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990). *See Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 705 (D.C. Cir. 2011) (concluding that grant of authority to the FCC in the Communications Act "establishes a floor rather than a ceiling").

The Commission's mandate to "implement the requirements of" Section 227(b) by rule is broad and unqualified. 47 U.S.C. § 227(b)(2). While the statute makes clear that unsolicited fax advertisements sent pursuant to an established business relationship must contain an opt-out notice, 47 U.S.C. § 227(b)(1)(D), it nowhere suggests that the Commission is not permitted to adopt additional rules to ensure that the general prohibition against unsolicited faxes is not circumvented.

Nor have Defendant Petitioners explained why Congress would have affirmatively prohibited such a requirement for fax ads sent with permission, while instituting that requirement for established-business-requirement faxes. The two requirements serve similar purposes. As Defendant Petitioners themselves point out, Congress required an opt-out notice for business-relationship fax ads because it recognized a need "to provide recipients with the ability to provide recipients with the ability to stop future *unwanted faxes* sent pursuant to such relationships." Def. Pet. Br. 18-19 (quoting S. Rep. No. 109-76, at 6-7 (emphasis added by Petitioners)). In other words, defendants explain, "*presuming* consent based on an established business relationship could lead to unwanted faxes where a recipient did not provide actual and affirmative consent." Def. Pet. Br. 19 (emphasis in original). So too here. The agency chose to presume that consent, once given, continues in effect

unless withdrawn. Without an opt-out notice and mechanism, the Commission determined, that presumption could prove baseless and burden consumers with unwanted faxes despite the TCPA's protections. That determination was an entirely reasonable exercise of the agency's broad power to implement the statute's general prohibition against unsolicited fax advertisements.

C. The Opt-Out Notice Requirement Does Not Raise First Amendment Concerns.

Defendant Petitioners argue that the statute must be interpreted to forbid an opt-out notice for faxes sent with permission to avoid "serious First Amendment concerns." Def. Pet. Br. 21. In fact, the regulation easily passes constitutional muster.

The opt-out notice requirement applies only to "facsimile advertisement[s]," i.e., those "advertising the commercial availability or quality of any property, goods, or services." 47 C.F.R. § 64.1200(a)(4)(iv) & (f)(1); *see* 47 U.S.C. § 227(a)(5). The rule therefore covers only commercial speech, and is therefore subject to intermediate First Amendment scrutiny. *See Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993) ("[C]ommercial speech can be subject to greater governmental regulation

than noncommercial speech” because of the government’s “interest in preventing commercial harms.”).⁴

Under this standard, a court asks (1) whether the regulation advances “a substantial interest,” (2) whether the regulation “directly advances” that interest, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 564, 566 (1980), and, relatedly, (3) “whether the fit between the government’s ends and the means chosen to accomplish those ends ‘is not necessarily perfect, but reasonable,’” *Spirit Airlines, Inc. v. U.S. Dep’t of Transp.*, 687 F.3d 403, 415 (D.C. Cir. 2012) (quoting *Bd. of Trs. of the State Univ. of NY v. Fox*, 492 U.S. 469, 480 (1989)).

The opt-out notice requirement easily passes this bar. The regulation serves to shield consumers from unwanted fax advertising. *Order* ¶ 32 (JA1316). As we have explained, while the opt-out notice must appear on fax

⁴ Defendant Petitioners briefly contend that because the opt-out notice rule applies to commercial speech, it is “a content-based regulation” subject to “strict scrutiny” under the First Amendment. Def. Pet. Br. 22 (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)). But restrictions on commercial speech have never been thought to be subject to strict scrutiny even though they are defined by the subject matter of the speech. Instead, “the Supreme Court’s commercial speech doctrine...creates a category of speech defined by content but afforded only qualified protection.” *Trans Union Corp. v. FTC*, 267 F.3d 1138, 1141-42 (D.C. Cir. 2001). *Reed* did not involve commercial speech, and the *Reed* Court gave no indication it intended, *sub silentio*, to void the settled framework of constitutional analysis for commercial speech regulation.

advertisements that have initially been sent with the recipient's consent, the rules serves to prevent the transmission of fax advertisements after consent has been withdrawn. The rule thus serves the goal of ensuring that recipients do not receive unwanted fax advertisements. That is precisely the same goal that Congress sought to advance in adopting the TCPA's statutory ban on unsolicited faxes.

It is settled—and Defendant Petitioners essentially concede (Br. 23)—that the government has a “substantial interest in restricting unsolicited fax advertisements in order to prevent the cost shifting and interference such unwanted advertising places on the recipient.” *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 655 (8th Cir. 2003); *see also Destination Ventures Ltd. v. FCC*, 46 F.3d 54, 57 (9th Cir. 1995) (“government’s substantial interest in preventing the shifting of advertising costs to consumers” uncontested).

In this case, the opt-out notice requirement for fax ads sent with permission directly advances the government’s interest by ensuring that recipients have an effective way of communicating the withdrawal of their consent, and so ensuring that future unwanted fax advertisements will not be received. And it does so in a narrowly tailored way, requiring only a brief statement informing recipients they can opt out and how to do so, along with

phone and fax numbers to make this possible. Where a recipient wishes to receive further faxes, the notice requirement does not prevent future transmissions. And if customers exercise their right to opt out, that simply demonstrates that further advertisements were unwanted.⁵

Defendant Petitioners assert that there is no “reason to believe” consumers would have trouble opting out without the regulation. Def. Pet. Br. 24. But the record shows that prior to the rule, recipients encountered difficulties in figuring out how to communicate the revocation of their consent. *See* pp. 19-20 *supra*. Defendant Petitioners also contend that the statutory requirement that all faxes provide the identification of the sender and the telephone number of the sending fax machine is “an obvious and significantly less restrictive alternative” to the opt-out notice rule. Def. Pet. Br. 24-25. But the record also showed that the telephone numbers provided in compliance with that notice did not necessarily connect a caller to a person (rather than a machine), much less an employee who could stop the unwanted faxes. *See* p. 20 *supra*.

⁵ Moreover, if the Commission had eliminated the need for the opt-out requirement by interpreting the statute to require explicit permission or invitation on a fax-by-fax basis, the burden on fax advertisers would have been far greater. *See* note 2 *supra*.

Under intermediate First Amendment scrutiny, “the Government may employ the means of its choosing” as long as its regulation promotes a substantial interest “that would be achieved less effectively absent the regulation” and “does not burden substantially more speech than is necessary” to further that interest. *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 213 (1997). The Commission has done that here.

II. THE FCC REASONABLY WAIVED THE OPT-OUT NOTICE REQUIREMENT

A. The FCC Reasonably Balanced Fairness to Advertisers and the Public Interest In Granting the Waiver.

“The Commission’s rules allow it ‘at any time’ to waive requirements for good cause,” *Keller Commc’ns, Inc. v. FCC*, 130 F.3d 1073, 1076 (D.C. Cir. 1997) (citing 47 C.F.R. § 1.3), where “particular facts would make strict compliance inconsistent with the public interest.” *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *see also AT&T Wireless Servs., Inc. v. FCC*, 270 F.3d 959, 965 (D.C. Cir. 2001); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996). As this Court has emphasized, “the agency’s discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.” *WAIT Radio*, 418 F.2d at 1157. A waiver under the FCC’s

rules may be retroactive. *See AT & T Corp. v. FCC*, 448 F.3d 426, 433 (D.C. Cir. 2006) (“*AT&T*”).

The agency found good cause to waive its regulation here because it found (1) special factual circumstances warranted a deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule. *Order* ¶ 22 (JA1312) (citing 47 C.F.R. § 1.3). Both findings were reasonable and supported by the record.

1. Reasonable advertisers may have been confused.

The Commission first found that a reasonable advertiser could have been confused about the regulatory requirements. *Order* ¶¶ 24-26 (JA1312-1314). A footnote in the *Junk Fax Order* stated that the opt-out notice requirement only applies to unsolicited faxes, in flat contradiction to the regulation and the rest of the *Junk Fax Order*. *Order* ¶ 24 (JA1313). The record showed that this contradiction may have confused parties. *Id.* & n.86 (citing over 20 petitions discussing the contradiction). Moreover, the notice of proposed rulemaking that led to the rule did not “make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient,” which the Commission found may have further “contributed to confusion or misplaced confidence.” *Id.* ¶ 25 (JA1313).

Plaintiff Petitioners fail to show that the agency's findings were unreasonable. *See Omnipoint Corp.*, 78 F.3d at 631. To be sure, the text of the rule itself, "read most naturally and according to its plain language," requires an opt-out notice on faxes sent with permission. *See Nack*, 715 F.3d at 683 . But the FCC's finding of the potential for confusion was based not on an ambiguity in the regulation itself, but rather on the contradiction between that regulation and the footnote in the *Order* (amplified by a lack of explicit notice in the NPRM that such a rule would be proposed). That is, the FCC's conclusion was not that the requirement did not apply, but only that a reasonable advertiser may have been confused as to its application.

Plaintiff Petitioners label this conclusion "fanciful" (Br. 27), but offer no reading of the *Order* that would reconcile the footnote with the regulation. Similarly, while amicus Public Citizen argues that the text of a regulation controls over a contradictory explanatory statement or footnote (Public Citizen Br. 6), that does not mean that a reasonable regulated party cannot be confused by such a contradiction.

Plaintiff Petitioners also suggest that the record was insufficient to support the Commission's finding of confusion because the waiver applicants did not submit "sworn statement[s]" that they read and were confused by the footnote "buried" in the *Order*. Pl. Pet. Br. 26-27. But there is no general

requirement in the Commission's rules or in the Administrative Procedure Act that waiver applicants submit such statements, and the Commission was entitled to find that regulated parties not only read the text of its rules, but the *Orders*, including footnotes, promulgating those rules.⁶ Indeed, this Court, in deciding whether parties have sufficient notice of a regulation, looks to “the regulations *and other public statements issued by the agency.*” *Trinity Broad. of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (2000) (quoting *General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995)) (emphasis added).

Here, the Commission reasonably found that the *Order* was confusing on its face, noted that every waiver applicant referred to the confusing footnote, and established a presumption of good cause for waiver based on those factors and its evaluation of the public interest. It then noted that nothing in the record overcame that presumption for the parties then before it. *Order* ¶ 26 (JA1314). It invited “similarly situated parties” to also petition for waiver, but emphasized these would likewise “be adjudicated on a case-by-case basis.” *Order* ¶ 30 & n.102 (JA1315). This was not a misallocation of

⁶ The substance of the contradictory footnote was also published in the Federal Register summary. *Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005*, 71 Fed. Reg. 25967, 25971 (2006) (“The Commission notes that the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.”).

the burden of proof (Pl. Pet. Br. 28-29), but rather a reasonable exercise of its discretion to make factual determinations based on facts likely common to all waiver applications, while still allowing that a waiver could be unmerited in particular cases. *See generally FCC v. Schreiber*, 381 U.S. 279, 289 (1965) (Communications Act delegates broad authority to “make ad hoc procedural rulings in specific instances”).

Plaintiff Petitioners refer to a bureau-level order—issued after the *Order* on review—which granted additional waivers as purported evidence that the *Order* was a rulemaking in disguise. Pl. Pet. Br. 23 (citing *Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd 8598 (Consumer Gov. Aff. Bur. 2015) (“*Supplemental Waiver Order*”). In the first place, a court reviews an “agency’s decision on the basis of the record before the agency at the time it made its decision.” *Rural Cellular Ass’n*, 588 F.3d at 1107. Subsequent developments are beside the point. In any case, in the subsequent proceeding, the Bureau adjudicated each case on the facts before it, including weighing allegations that specific advertisers knew or should have known about the notice requirement. *See Supplemental Waiver Order* ¶ 18. And in an even more recent order, the Bureau denied certain waiver applications because they pled simple ignorance of the rule, rather than reasonable confusion. *See Rules and Regulations Implementing*

the Tel. Consumer Prot. Act of 1991, DA 15-1402, 2015 WL 8543949 ¶ 2 (Consumer & Gov. Affairs. Bur., rel. Dec. 9, 2015).

2. Waiver served the public interest.

The FCC also found that a waiver would best serve the public interest, because it would avoid the “unjust or inequitable” result of “potentially substantial damages, as well as possible liability for forfeitures under the Communications Act” for “inadvertent violations” due to “a confusing situation for businesses.” *Order* ¶¶ 27, 28 (JA1314-1315). Conversely, the Commission found that, because it did not waive the rule indefinitely, it would continue to have “value” in protecting consumers going forward. *Id.* ¶ 28 (JA1315).

This Court accords “substantial judicial deference to the FCC’s judgments on the public interest.” *MetroPCS California, LLC v. FCC*, 644 F.3d 410, 412-13 (D.C. Cir. 2011) (quoting *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981)). The agency’s conclusion regarding the public interest was reasonable here. Waiver authority exists precisely to “take into account considerations of hardship [and] equity..., considerations that an agency cannot realistically ignore.” *WAIT Radio*, 418 F.2d at 1159. Here, it was reasonable for the Commission to find that parties who may have been confused about their obligations under the rule due to the Commission’s own

contradictory *Order* should not be subjected to enforcement of the rule during the period of confusion.

3. The agency reasonably made the waiver retroactive.

Plaintiff Petitioners advance two arguments that the Commission erred in waiving the violations retroactively. Both fail.

First, the Plaintiff Petitioners contend that the Commission's waiver ruling is a "legislative rule" that cannot be made retroactive absent statutory authorization. Pl. Pet. Br. 16-20. On the contrary, the Commission's waiver ruling, which applied only to the parties before the Commission based on the facts of their petitions, was an adjudication. *See, e.g., Mountain Solutions*, 197 F.3d at 519 (waiver is "in the nature of an adjudicatory decision rather than the announcement of a new rule").

Plaintiff Petitioners argue that the agency "transform[ed] the multiple adjudicatory proceedings into an essentially legislative proceeding" by treating 25 waivers together. Pl. Pet. Br. 17. But considering multiple petitions at once and setting out the "the factors that [the FCC] would consider in adjudicating" them does not convert an adjudication into "effectively adopt[ing] a new 'rule'" *Blanca Tel. Co. v. FCC*, 743 F.3d 860, 866-67 (D.C. Cir. 2014); *see also Conference Grp., LLC v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013); *Mountain Solutions*, 197 F.3d at 519 n.12 (waiver

was adjudication even when it announced for the first time a “policy rationale that formed the primary basis for granting or denying the waiver”). And to the extent that each of the petitioners experienced similar confusion, the Commission is under a general responsibility to treat like parties alike. *See Morris Communications, Inc. v. FCC*, 566 F.3d 184, 188 (D.C. Cir. 2009).

As a fallback argument, Plaintiff Petitioners contend that the waiver, even if an adjudication, should not have been retroactive. Pl. Pet. Br. 20-21. But it is not uncommon for waivers to be retroactive. In *AT&T*, for example, an FCC bureau issued an order excluding certain costs from local exchange carriers’ rates. 448 F.3d at 429. Several years later, the Commission overturned the staff decision as erroneous. *Id.* In order to “undo what was wrongfully done,” the full Commission waived a deadline for retroactive rate increases—a deadline that otherwise would have barred new charges for that past period—so that carriers could be compensated for the portion of rates they were wrongfully denied. *Id.* at 433. Over protests from AT&T, which as a ratepayer was forced to bear the retroactive increase, this Court upheld the waiver as a reasonable exercise of the Commission’s discretion to “ameliorate[] the harm...created by the staff error.” *Id.* at 434-45. So too here, the Commission determined that only a retroactive waiver could correct for the agency’s previously lack of clarity.

Plaintiff Petitioners contend that the multi-part balancing test set out in *Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972), governs “whether to give retroactive effect to an adjudicatory rule.” *See* Pl. Pet. Br. 20-22. But the *Retail, Wholesale* test centers on when it is fair to apply a new rule of decision that emerges through adjudication to past conduct. *See, e.g., id.* at 387-88 (retroactive application of ruling on unfair labor practice); *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc) (retroactive application of ruling on competing preferences in licensing decision). It is inapplicable to the waiver here, which does not set out new substantive law, but rather declines to apply an existing rule to particular circumstances.

Even if the *Retail, Wholesale* framework were germane, it would support the Commission. “Retroactivity is the norm in agency adjudications no less than in judicial adjudications,” *AT&T Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006), and “retrospective application can properly be withheld” only where it “would work a ‘manifest injustice.’” *Clark-Cowlitz*, 826 F.2d at 1081 (quoting *Thorpe v. Hous. Auth. of the City of Durham*, 393 U.S. 268, 282 (1969)). Plaintiff Petitioners cannot meet this high burden. Indeed, they ignore the unfairness that would result absent a waiver: advertisers would be

subject to stiff penalties for violations of an obligation that the agency itself has found was unclear. *Order* ¶ 27 (JA1314).

Plaintiff Petitioners point to the expenses they have incurred in pursuing claims based on asserted violations of the Commission’s opt-out notice rule (Br. 21), but they pursued these claims and incurred those costs when the clarity of the advertisers’ obligation had been clouded by the conflicting statements in the *Junk Fax Order*.

In any event, in the *Order* under review, the agency considered the “public interest to consumers... to defray the cost imposed on them by unwanted fax ads,” and concluded that, “[o]n balance” “it serves the public interest in this instance to grant retroactive waivers to ensure that any...confusion” created by the agency’s own actions would not lead to inequitable liabilities. *Order* ¶ 27 (JA1314).⁷

⁷ Plaintiff Petitioners argue (Br. 15-16) that the General Savings Statute, 1 U.S.C. § 109, bars the FCC from extinguishing liability under the TCPA by waiving one of its rules retroactively. But that law is irrelevant here. This case does not involve the “repeal” of a “statute.” *Id.* It involves the waiver of a rule. In any event, section 109 permits liabilities to be released or extinguished if the repealing Act “expressly provide[s],” *id.*, and there is no doubt that the agency intended the waiver to have retroactive effect.

B. The Commission Reasonably Assumed That Its Waiver Would Limit Liability for the Waiver Petitioners.

1. The private right of action is predicated on the agency's control over its own regulations.

The Plaintiff Petitioners argue that the Commission could not waive the opt-out notice rule because the agency may not “extinguish” liability from lawsuits under Section 227(b). Pl. Pet. Br. 8. But the TCPA creates a cause of action for violations of “regulations prescribed” by the Commission under the statute. 47 U.S.C. § 227(b)(3)(A). If there is no violation of a rule prescribed under Section 227(b)(3), by the terms of the statute, there can be no liability. As the Supreme Court has stated: “A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.” *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001).

Thus, if the FCC had not issued the rule at issue, there could be no violation and no damages. Likewise, if the FCC had determined that the rule did not cover faxes of the type at issue in Plaintiff Petitioners’ lawsuits, those lawsuits presumably could not lead to damages. As the Commission reasonably assumed, the same result should obtain when the agency waives the rule upon which the private suit would be based. *See Order* ¶ 27 (JA1314) (taking into account that the rule, if not waived, “could subject parties to

potentially substantial damages”); *id.* ¶ 28 (JA1315) (recognizing as a “factor for...consideration,” “the risk of substantial liability in private rights of action”). Once the agency has waived, there is no longer an enforceable “violation” to support a claim under Section 227(b).

Plaintiff Petitioners apparently envision a way-one ratchet, by which the agency can pass regulations, but cannot subsequently speak to the enforceability of those regulations once passed. But Congress created this cause of action for violations of the FCC’s regulations against the backdrop of the agency’s well-established authority to waive its regulation for good cause. As Plaintiff Petitioners concede, the FCC “has authority under its rules...to waive requirements *not mandated by statute.*” Pl. Pet. Br. 12 (quoting *NAB v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009) (emphasis Petitioners’)). The opt-out notice requirement for fax advertisements sent with permission is not “mandated” by the TCPA, only permitted. The Commission was therefore free to speak to the meaning and effect of those regulations once passed, including through its authority to waive regulations in the public interest.

Plaintiff Petitioners’ contrary reading would place the agency in an untenable situation by which it is powerless to correct the private liability effects of regulatory confusion resulting from the agency’s own conflicting

statements. The agency was reasonable in concluding instead that it had the power to avoid that illogical and inequitable situation here.

2. The waiver does not intrude impermissibly on the courts' power to decide private lawsuits.

Nor does the agency's waiver violate constitutional "separation-of-powers principles," as Plaintiff Petitioners argue. Pl. Pet. Br. 12-13. Unlike the agency in *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) which purported to prevent plaintiffs from filing suit, the Commission's waiver does not seek to "regulate the scope of the judicial power vested by the statute." On the contrary, the Commission's action is fully consonant with Congress' decision to vest private parties with a right to file suit based on a violation of Commission rules. The *Order* simply makes clear that the rule on which the suit would otherwise be based is not enforceable because there is no enforceable violation regarding the opt-out notice.⁸

This case is also unlike *Natural Resource Defense Council v. EPA*, 749 F.3d 1055, 1063-64 (D.C. Cir. 2014), in which this Court invalidated an "affirmative defense" that the Environmental Protection Agency had

⁸ It also does not follow from the waiver that the private lawsuits necessarily must be dismissed; there may be other grounds for liability. Some of the suits allege, for example, that the fax ads actually were sent without permission—an issue the Commission did not reach. *See Order* ¶ 27 n.99 (JA1315).

purported to establish by regulation for citizen suits under the Clean Air Act. The *NRDC* court found that Congress, by explicitly tasking the district court with imposing “appropriate” penalties, had signaled an intent to withdraw any similar role from the agency. *Id.* at 1063. The EPA overstepped its authority when it attempted to control the outcome of such suits—not by exercising its recognized authority to set emission standards, but by purporting to create an affirmative defense to be used in court. Here, by contrast, the TCPA’s private right of action is predicated on “regulations prescribed under” the TCPA, and the FCC exercised its well-established authority to waive violations of those regulations for good cause under 47 C.F.R. § 1.3.⁹

CONCLUSION

The petitions for review should be denied.

⁹ The district court’s statement in *Physicians Healthsource*, 65 F. Supp. 3d at 497, that the FCC “cannot use an administrative waiver to eliminate statutory liability in a private cause of action” is not binding on this Court, and is inconsistent with the language and structure of the TCPA, as we have shown.

WILLIAM J. BAER
ASSISTANT ATTORNEY GENERAL

ROBERT B. NICHOLSON
STEVEN J. MINTZ
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

March 9, 2016

Respectfully submitted,

JONATHAN B. SALLET
GENERAL COUNSEL

DAVID M. GOSSETT
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

/s/ Matthew J. Dunne

MATTHEW J. DUNNE
COUNSEL

FEDERAL COMMUNICATIONS
COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BAIS YAAKOV OF SPRING VALLEY, ET AL.,

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

RESPONDENTS.

No. 14-1234 (AND
CONSOLIDATED
CASES)

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 9,053 words and has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

/s/ Matthew J. Dunne
Matthew J. Dunne
Counsel
Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740 (Telephone)
(202) 418-2819 (Fax)

March 9, 2016

STATUTORY ADDENDUM

	<u>PAGE</u>
1 U.S.C. § 109	2
5 U.S.C. § 706	2
47 U.S.C. § 227	3
47 C.F.R. § 1.3	9
47 C.F.R. § 64.1200	10
Pub. L. No. 102-243, Section 2	14
Pub. L. No. 109-21, Section 2(h)	16

1 U.S.C. § 109

UNITED STATES CODE ANNOTATED
TITLE 1. GENERAL PROVISIONS
CHAPTER 2. ACTS AND RESOLUTIONS; FORMALITIES OF ENACTMENT;
REPEALS; SEALING OF INSTRUMENTS

§ 109. Repeal of statutes as affecting existing liabilities

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

5 U.S.C. § 706

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 7. JUDICIAL REVIEW

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

47 U.S.C. § 227

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

§ 227. Restrictions on use of telephone equipment

(a) Definitions

As used in this section--

* * * * *

(2) The term “established business relationship”, for purposes only of subsection (b)(1)(C)(i) of this section, shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that--

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G))

(3) The term “telephone facsimile machine” means 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.

* * * * *

(5) The term “unsolicited advertisement” means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States--

* * * * *

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless--

(i) the unsolicited advertisement is from a sender with an established business

relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through--

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

* * * * *

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission--

* * * * *

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if--

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes--

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d) of this section;

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if--

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only--

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements; and

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall--

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

* * * * *

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States--

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that

does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

* * * * *

47 C.F.R. § 1.3

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A. GENERAL
PART 1. PRACTICE AND PROCEDURE
SUBPART A. GENERAL RULES OF PRACTICE AND PROCEDURE
GENERAL

§ 1.3 Suspension, amendment, or waiver of rules.

The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to

the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.

47 C.F.R. § 64.1200

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 64. MISCELLANEOUS RULES RELATING TO COMMON CARRIERS
SUBPART L. RESTRICTIONS ON TELEMARKETING, TELEPHONE
SOLICITATION, AND FACSIMILE ADVERTISING

§ 64.1200 Delivery restrictions.

(a) No person or entity may:

* * * * *

(4) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless—

(i) The unsolicited advertisement is from a sender with an established business relationship, as defined in paragraph (f)(6) of this section, with the recipient; and

(ii) The sender obtained the number of the telephone facsimile machine through—

(A) The voluntary communication of such number by the recipient directly to the sender, within the context of such established business relationship; or

(B) A directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution. If a sender obtains the facsimile number from the recipient's own directory, advertisement, or Internet site, it will be presumed that the number was voluntarily made available for public distribution, unless such materials explicitly note that unsolicited advertisements are not accepted at the specified facsimile number. If a sender obtains the facsimile number from other sources, the sender must take

reasonable steps to verify that the recipient agreed to make the number available for public distribution.

(C) This clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005 if the sender also possessed the facsimile machine number of the recipient before July 9, 2005. There shall be a rebuttable presumption that if a valid established business relationship was formed prior to July 9, 2005, the sender possessed the facsimile number prior to such date as well; and

(iii) The advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements. A notice contained in an advertisement complies with the requirements under this paragraph only if—

(A) The notice is clear and conspicuous and on the first page of the advertisement;

(B) The notice states that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under paragraph (a)(4)(v) of this section is unlawful;

(C) The notice sets forth the requirements for an opt-out request under paragraph (a)(4)(v) of this section;

(D) The notice includes—

(1) A domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and

(2) If neither the required telephone number nor facsimile machine number is a toll-free number, a separate cost-free mechanism including a Web site address or email address, for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number; and

(E) The telephone and facsimile numbers and cost-free mechanism identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, 7 days a week.

(iv) A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.

(v) A request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(A) The request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(B) The request is made to the telephone number, facsimile number, Web site address or email address identified in the sender's facsimile advertisement; and

(C) The person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.

(vi) A sender that receives a request not to send future unsolicited advertisements that complies with paragraph (a)(4)(v) of this section must honor that request within the shortest reasonable time from the date of such request, not to exceed 30 days, and is prohibited from sending unsolicited advertisements to the recipient unless the recipient subsequently provides prior express invitation or permission to the sender. The recipient's opt-out request terminates the established business relationship exemption for purposes of sending future unsolicited advertisements. If such requests are recorded or maintained by a party other than the sender on whose behalf the unsolicited advertisement is sent, the sender will be liable for any failures to honor the opt-out request.

(vii) A facsimile broadcaster will be liable for violations of paragraph (a)(4) of this section, including the inclusion of opt-out notices on unsolicited advertisements, if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.

* * * * *

(f) As used in this section:

(1) The term advertisement means any material advertising the commercial availability or quality of any property, goods, or services.

* * * * *

(3) The term clear and conspicuous means a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures. With respect to facsimiles and for purposes of paragraph (a)(4)(iii)(A) of this section, the notice must be placed at either the top or bottom of the facsimile.

* * * * *

(6) The term established business relationship for purposes of paragraph (a)(4) of this section on the sending of facsimile advertisements means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

(7) The term facsimile broadcaster means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.

* * * * *

(10) The term sender for purposes of paragraph (a)(4) of this section means the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.

* * * * *

(13) The term telephone facsimile machine means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or

images (or both) from an electronic signal received over a regular telephone line onto paper.

* * * * *

(15) The term unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

* * * * *

Pub. L. No. 102–243, Section 2

UNITED STATES PUBLIC LAWS

102nd Congress - First Session

PL 102–243 (S 1462)

105 Stat 2394

December 20, 1991

TELEPHONE CONSUMER PROTECTION ACT OF 1991

SEC. 2. FINDINGS.

The Congress finds that:

(1) The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.

(2) Over 30,000 businesses actively telemarket goods and services to business and residential customers.

(3) More than 300,000 solicitors call more than 18,000,000 Americans every day.

(4) Total United States sales generated through telemarketing amounted to \$435,000,000,000 in 1990, a more than four-fold increase since 1984.

(5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.

(6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.

(7) Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.

(8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations.

(9) Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.

(10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

(11) Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.

(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

(13) While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

(14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce.

(15) The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home, consistent with the constitutional protections of free speech.

* * * * *

Pub. L. No. 109–21, Section 2(h)

UNITED STATES PUBLIC LAWS
109th Congress - First Session

PL 109–21 (S 714)
119 Stat 359
July 9, 2005

JUNK FAX PREVENTION ACT OF 2005

**SEC. 2. PROHIBITION ON FAX TRANSMISSIONS CONTAINING
UNSOLICITED ADVERTISEMENTS.**

(h) REGULATIONS.—Except as provided in section 227(b)(2)(G)(ii) of the Communications Act of 1934 (as added by subsection (f)), not later than 270 days after the date of enactment of this Act, the Federal Communications Commission shall issue regulations to implement the amendments made by this section.

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Bais Yaakov of Spring Valley, et al.)	
Petitioners,)	
v.)	No. 14-1234 (and
)	consolidated cases)
Federal Communications Commission)	
and the United States of America,)	
Respondents.)	

CERTIFICATE OF SERVICE

I, Matthew Dunne, hereby certify that on March 9, 2016, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Aytan Y. Bellin
85 Miles Avenue
White Plains, New York 10606
*Counsel for: Bais Yaakov of
Spring Valley, et al.*

David M. Oppenheim
Glenn L. Hara
Anderson + Wanca
3701 Algonquin road
Suite 760
Rolling Meadows, IL 60008
*Counsel for: Sandusky Wellness
Center, et al.*

Steven J. Mintz
Robert B. Nicholson
U.S. Department of Justice
Antitrust Division, Room 3224
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
Counsel for: USA

T. Michael Ward
Russell F. Watters
Robert L. Carter
Brown & James, P.C.
800 Market Street
Suite 1100
St. Louis, MO 63101
Counsel for: Richie Enterprises

Samuel L. Feder
Matthew E. Price
Jenner & Block, LLP
1099 New York Avenue
Suite 900
Washington, D.C. 20001
Counsel for: Richie Enterprises, et al.

Matthew A. Brill
Matthew T. Murchison
Jonathan Y. Ellis
Latham & Watkins LLP
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004
Counsel for: Anda, Inc.

Richard A. Golden
9437 Wooded Glen Avenue
Burke, VA 22015
Counsel for: Pro Se

Robert A. Long
Yaron Dori
Michael Beder
Covington & Burling LLP
One CityCenter
850 Tenth Street, N.W.
Washington, D.C. 20001
Counsel for: Unique Vacations, et al.

Jeffrey R. Babbin
Kim E. Rinehart
Wiggin and Dana LLP
265 Church Street
P.O. Box 1832
New Haven, CT 06508-1832
Counsel for: Merck & Co.

Joseph R. Palmore
Morrison & Foerster, LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Counsel for: McKesson Corp.

Marie Tomassi
Trenam, Kemker, Scharf, Barkin,
Frye, O'Neill & Mullis
200 Central Avenue, Suite 1600
St. Petersburg, FL 33701
Counsel for: TechHealth, Inc.

Thomas R. McCarthy
Consovoy McCarthy PLLC
3033 Wilson Blvd, Suite 700
Arlington, VA 22201
Counsel for: Staples, Inc., et al.

Helgi C. Walker
Gibson Dunn
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Counsel for: Staples, Inc., et al.

Blaine C. Kimrey
Bryan K. Clark
Vedder Price PC
222 North LaSalle Street
Chicago, Illinois 60601
Counsel for: ZocDoc, Inc.

Megan L. Brown
Brett A. Shumate
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
Counsel for: National Federation of Independent Business, et al.

Allison M. Zieve
Kathryn L. Einspanier
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
Counsel for: Public Citizen, Inc.

/s/ Matthew J. Dunne