Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 Junk Fax Prevention Act of 2005 Petitions for Reconsideration and/or Declaratory Ruling and Retroactive Waiver of 47 CFR § 64.1200(a)(4)(iv) Regarding the Commission's Op-Out Notice Requirement for Faxes Sent with the Recipient's Prior Express Permission	CG Docket No. 02-278 CG Docket No. 05-338

Opposition to Application for Review

Ohio National Mutual Holdings, Inc., on behalf of itself and its subsidiaries, (collectively "Ohio National"), by and through their undersigned counsel, and pursuant to Section 1.115(d) of the Federal Communications Commission's (the "Commission") Rules,[1] respectfully files this Opposition in response to Application for Review filed by the TCPA Plaintiffs (the "Application") seeking full Commission review of the Order released November 14, 2018 by the Consumer and Governmental Affairs Bureau (the "Bureau")[2] "eliminat[ing] the Commission's rule requiring opt-out notices on faxes sent with the recipients' prior permission or consent" and "dismiss[ing] as moot ten pending petitions for retroactive waiver of the rule and two petitions

[1] 47 C.F.R. § 1.115.

[2] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, Petitions for Reconsideration and/or Declaratory Ruling and Retroactive Waiver of 47 CFR § 64.1200(a)(4)(iv) Regarding the Commission's Op-Out Notice Requirement for Faxes Sent with the Recipient's Prior Express Permission*, Order, CG Docket Nos. 02-278, 05-338, FCC 18-1159 (rel. Nov. 14, 2015) (the "*November 14 Order*").

for reconsideration of orders enforcing the rule."[3]

There is no Basis Provided to Support Full Commission Review

Pursuant to 47 C.F.R. § 1.115(b)(2), an application for review must specify "with particularity" which of five factors "warrant Commission consideration of the questions presented."[4] In their Application, the TCPA Plaintiffs fail to specify with particularity which factor(s) warrant full Commission review, asserting broadly that the *November 14 Order* is based on "assumptions [that] are incorrect": that the majority opinion of the D.C. Circuit in *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017) contains a "non-discretionary mandate" to eliminate 47 C.F.R. § 64.1200(a)(4)(iv) and that "the D.C. Circuit 'vacated' the 2006 Solicited Fax Rule.'"[5] But these so-called "assumptions" the Bureau is alleged to have made are not assumptions at all: they are the application by the Bureau of the plain language of the *Bais Yaakov* opinion. The Bureau correctly applied the majority opinion in *Bais Yaakov* in the *November 14 Order.* There is absolutely no reason the Commission should expend its valuable resources reviewing the Bureau's Order and addressing arguments from the TCPA Plaintiffs that courts repeatedly have rejected.

A. The Bureau Correctly Read the *Bais Yaakov* Holding.

The Bureau correctly noted in the *November 14 Order* that the D.C. Circuit "declared unlawful and vacated the 2006 Solicited Fax Rule."[6] This was not (as the TCPA Plaintiffs contend) an "assumption," but rather a recitation of the actual *Bais Yaakov* holding: "We hold

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[3] *Id.* at ¶ 1.

[4] 47 C.F.R. § 1.115(b)(2) (identifying the factors as "The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy"; "The action involves a question of law or policy which has not previously been resolved by the Commission"; "The action involves application of a precedent or policy which should be overturned or revised"; "An erroneous finding as to an important or material question of fact"; and "Prejudicial procedural error").

[5] Application at 2.

[6] *November 14 Order* at ¶ 5.

that the FCC's 2006 Solicited Fax Rule is unlawful to the extent that it requires opt-out notices on solicited faxes."[7] The TCPA Plaintiffs nevertheless argue that this holding means something different from what it says because the D.C. Circuit supposedly invalidated ***only*** the Commission's *2014 Anda Commission Order*[8] applying 47 C.F.R. § 64.1200(a)(4)(iv), but not the prior or subsequent orders creating or applying 47 C.F.R. § 64.1200(a)(4)(iv).[9] This is the same argument counsel to the TCPA Plaintiffs has made to the Sixth, Seventh, and Ninth Circuit Court of Appeals, none of which has accepted it.[10] The Commission should not accept it either. As the Ninth Circuit explained, "It is, of course, true that *Bais Yaakov* reviewed a 2014 FCC order. But the validity of the 2014 order depended on the validity of the 2006 Solicited Fax Rule, and the court in *Bais Yaakov* squarely held that the underlying Solicited Fax Rule was invalid."[11] There is no mistaken assumption that needs to be addressed by the full Commission on review.

B. The Bureau Correctly Applied the *Bais Yaakov* Holding.

The Bureau correctly eliminated 47 C.F.R. § 64.1200(a)(4)(iv) in its *November 14 Order* based on the fact that the "the rule has been vacated by the court in an order that has become

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[7] *Bais Yaakov*, 852 F.3d at 1083.

[8] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, 29 FCC Rcd. 13998 (2014) (the "*2014 Anda Commission Order*").

[9] Application at 13-14.

[10] *See* True *Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923 (9th Cir. 2018); *Brodsky v. HumanaDental Ins. Co.*, __ F.3d __, Nos. 17-3067/3506, 2018 WL 6295126 (7th Cir. Dec. 3, 2018); *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460 (6th Cir. 2017), *as corrected on denial of reh'g en banc* (Sept. 1, 2017), *cert. denied*, 138 S. Ct. 1284 (2018).

[11] *True Health*, 896 F.3d at 930. *See also Brodsky*, __ F.3d __, 2018 WL 6295126, at *4 (holding that the *Bais Yaakov* decision was binding pursuant to the Hobbs Act, but declining to address the scope of *Bais Yaakov* because the Seventh Circuit's ruling did not "turn[] on the ultimate binding impact of the D.C. Circuit's decision with respect to the 2006 Order"); *Sandusky*, 863 F.3d at 467-68 (rejecting argument that "the D.C. Circuit struck down *only* the FCC's 2014 Order validating the Solicited Fax Rule" and holding that "it was the Solicited Fax Rule itself that was struck down").

final and nonreviewable."[12] The TCPA Plaintiffs nevertheless argue that the Bureau was wrong to eliminate 47 C.F.R. § 64.1200(a)(4)(iv) because the *Bais Yaakov* decision supposedly "did not direct the Commission to do anything in particular" and because the Bureau and the Commission were supposedly free to ignore the decision in *Bais Yaakov* under the "doctrine of agency 'nonacquiescence.'"[13] These arguments are meritless, and have been rejected repeatedly by courts.

The holding in *Bais Yaakov* was that "the FCC's 2006 Solicited Fax Rule is unlawful to the extent that it requires opt-out notices on solicited faxes" because "the text of the [TCPA] does not grant the FCC authority to require opt-out notices on solicited faxes."[14] Contrary to the TCPA Plaintiffs' assertions, this language ***was*** a "non-discretionary mandate" that ***did*** require the Commission and the Bureau to do something specific—to stop acting beyond their statutory authority by maintaining rules that exceeded that authority. The Bureau corrected that problem by eliminating 47 C.F.R. § 64.1200(a)(4)(iv), which had purported to require that "[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."[15] And because the D.C. Circuit's decision had become final and non-appealable, the Bureau's "elimination" of 47 C.F.R. § 64.1200(a)(4)(iv) was purely ministerial. As a result, the Bureau was correct to proceed without notice and comment because "seeking notice and comment . . . "would [have] serve[d] no purpose" and would have been "contrary to the public interest."[16]

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[12] *November 14 Order* at ¶ 9.

[13] Application at 10-11.

[14] *Bais Yaakov*, 852 F.3d at 1083.

[15] *November 14 Order* at ¶ 9.

[16] *Id.*

The TCPA Plaintiffs' argument that the Commission is free to disregard the decision in *Bais Yaakov* under the doctrine of "agency 'nonacquiescence' merely recycles and expands another argument that federal courts of appeal have rejected universally—that the decision in *Bais Yaakov* is not binding outside of the D.C. Circuit.[17] Having lost each of these arguments (with the courts of appeals universally holding that the combination of the JPML process and the Hobbs Act made *Bais Yaakov* binding nationwide), the TCPA Plaintiffs nevertheless reassert these same arguments to the Commission, now claiming that *Bais Yaakov* is not binding even ***within*** the D.C. Circuit. But none of the authority the TCPA Plaintiffs cite supports these arguments.

First, neither the D.C. Circuit's decisions in *National Environmental Development Association's Clear Air Project v. Environmental Protection Agency*, 891 F.3d 1041 (D.C. Cir. 2018) and *American Telephone and Telegraph Company v. FCC*, 978 F.2d 727 (D.C. Cir. 1992) nor the Seventh Circuit's decision in *Atchison, Topeka and Santa Fe Railway Company v. Pena*, 44 F.3d 437 (7th Cir. 1994), nor the Second Circuit's decision in *Ruppert v. Bowen*, 871 F.2d, 1172 (2nd Cir. 1989) were the products of JPML consolidation of a Hobbs Act appeal designed to ensure nationwide uniformity.[18] On the contrary, for example, the D.C. Circuit noted in

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[17] *Brodsky*, __ F.3d __, 2018 WL 6295126, at *4 (explaining that "[t]he parties have engaged in a lengthy debate over the question whether *Bais Yaakov* is formally binding on this court, or if our obligation is only to give it that respectful consideration we would accord to any of our sister circuit's decisions," and holding that the D.C. Circuit's decision "is binding on all courts of appeals through the Hobbs Act"); *True Health Chiropractic*, 896 F.3d at 929-30 (holding that "True Health's argument fails because the Solicited Fax Rule has been held invalid by the D.C. Circuit," and "[t]he decision of that court is then binding on all circuits" under the Hobbs Act because the *Bais Yaakov* decision was the product of transfer and consolidation by the Judicial Panel on Multidistrict Litigation ["(JPML")] of multiple appeals before the D.C. Circuit); *Sandusky*, 863 F.3d at 467 ("Once the [JPML] assigned petitions challenging the Solicited Fax Rule to the D.C. Circuit, that court became 'the sole forum for addressing . . . the validity of the FCC's rule[]. And consequently, its decision striking down the Solicited Fax Rule became 'binding outside of the [D.C. Circuit]." (internal citation omitted)).

[18] *National Environmental Development* was a consolidation by the Clerk of the D.C. Circuit of three appeals of EPA rule-making, all of which were originally filed before the D.C. Circuit. *See generally* 891 F.3d at 1041. *American Telephone and Telegraph* was an appeal filed in the D.C. Circuit seeking review of the dismissal of a complaint filed by AT&T against MCI. *See* generally 978 F.2d at 729. *Atchison* was an appeal of the Federal Railroad Administration's ("FRA") changes to its interpretation of the Hours of Service Act, and the Seventh

National Environmental Development that the Clean Air Act, 42 U.S.C. § 7601, specifically assigned "challenges to any . . . final action . . . which is locally or regionally applicable . . . to the United States Court of Appeals for the appropriate circuit," and explained that "[u]nder this statutory scheme, it is hardly surprising that judicial review of EPA actions sometimes results in circuit court rulings that are inconsistent with other circuit court rulings applicable to different EPA regions."[19] And in *Atchison*, the Seventh Circuit conceded that its decision could "create an enforcement nightmare resulting from [a] split between circuits," but explained that the judicial procedures under Title 49 for review of the FRA's orders allowed for such an outcome.[20]

The procedural mechanisms in play in the cases cited by the TCPA Plaintiffs are far different from the "procedural mechanism Congress has provided for challenging [the Commission's] rules" under the Hobbs Act.[21] As the Sixth Circuit explained in *Sandusky*, "[b]y requiring petitioners to first bring a direct challenge before the FCC, the statute allows this expert agency to weigh in on its own rules, and by consolidating petitions into a single circuit court, the statute promotes judicial efficiency and ensures uniformity nationwide."[22]

Second, the so-called "oft-cited law review article" invoked by the TCPA Plaintiffs actually undercuts their argument that "the Bureau's reasoning contradicts the doctrine of agency 'nonacquiescence.'"[23] In the article, the authors explain that an agency's "nonacquiescence can

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Circuit's decision overruling the FRA created a circuit split that was eventually resolved by the Supreme Court. *See Bhd. of Locomotive Engineers v. Atchison, Topeka & Santa Fe R. Co.*, 516 U.S. 152, 153-56 (1996). *Ruppert* was an appeal of a single District Court opinion from the Eastern District of New York that addressed multiple related cases, all of which were pending before the same District Court Judge. *See Ruppert v. Sec'y of U.S. Dep't of Health & Human Servs.*, 671 F. Supp. 151, 157 (E.D.N.Y. 1987), *aff'd in part, rev'd in part sub nom. Ruppert v. Bowen*, 871 F.2d 1172 (2d Cir. 1989).

[19] *Nat'l Envtl. Dev.*, 891 F.3d at 1044–45.

[20] *See Atchison*, 44 F.3d at 444-45.

[21] *Sandusky*, 863 F.3d at 467.

[22] *Id.*

[23] Application at 11.

be justified" only in narrow circumstances: (i) "only as an interim measure that allows the agency to maintain a uniform administration of its governing statute at the agency level," (ii) "only while federal law on the subject remains in flux" and (iii) only so long as "the agency is making reasonable attempts to persuade the courts to validate its position."[24] Not one of those factors is present here, let alone all three. Indeed, immediately after the D.C. Circuit's decision in *Bais Yaakov*, Chairman Pai issued the following statement:

> Today's decision by the D.C. Circuit highlights the importance of the FCC adhering to the rule of law. I dissented from the FCC decision that the court has now overturned because, as I stated at the time, the agency's approach to interpreting the law reflected "convoluted gymnastics." The court has now agreed that the FCC acted unlawfully. Going forward, the Commission will strive to follow the law and exercise only the authority that has been granted to us by Congress.[25]

And consistent with Chairman Pai's position, the Commission predictably and reasonably ***opposed*** the petition for *certiorari* filed by counsel to the TCPA Plaintiffs seeking to overturn *Bais Yaakov*.[26]

Conclusion

The TCPA Plaintiffs have failed to provide any factual, legal or policy reason for the review of the Bureau's order by the full Commission. For the foregoing reasons, Ohio National respectfully requests that the Application be denied.

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[24] Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 683 (Feb. 1989).

[25] Statement of FCC Chairman Ajit Pai On the Latest D.C. Circuit Rebuke of FCC Overreach (Mar. 31, 2017), https://docs.fcc.gov/public/attachments/DOC-344186A1.pdf

[26] *See* Brief for the Federal Respondents in Opposition, *Bais Yaakov of Spring Valley v. FCC*, No. 17-351 (U.S. filed Jan. 16, 2018), https://www.supremecourt.gov/DocketPDF/17/17-351/28012/20180116171249250_17-351%20Bais%20Yaakov.pdf

December 31, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on December 31, 2018, the foregoing **Opposition to Application for Review** was served via First Class U.S. Mail, postage prepaid, on the applicants at the following address:

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