Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	CG Docket No. 02-278
	)	
Petition of the American Association for Justice for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules	)	CG Docket No. 05-338

OPPOSITION TO APPLICATION FOR REVIEW

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I. Executive Summary

The American Association for Justice (AAJ®), respectfully opposes the Application for Review filed by Bais Yaakov of Spring Valley; Roger H. Kaye; and Roger H. Kaye MD PC; and the Application for Review filed by Beck Simmons, LLC; Physicians Healthsource, Inc.; Radha Geismann, M.D., P.C.; Sandusky Wellness, LLC; Alan L. Laub, DDS, Inc.; North Branch Pizza & Burger Co.; True Health Chiropractic, Inc.; Alan Presswood, D.C., P.C.; Carradine Chiropractic Center, Inc.; Christopher Lowe Hicklin, DC, PLC; J. Barrett Company; Central Alarm Signal, Inc.; St. Louis Heart Center, Inc.; Eric B. Fromer Chiropractic, Inc.; Arnold Chapman; Shaun Fauley; Keith Bunch Associates, LCC; Michael C. Zimmer, D.C., P.C.; Wilder Chiropractic, Inc.; Law Office of Stuart R. Berkowitz; Proex Janitorial, Inc.; and Italia Foods, Inc. (collectively for both applications, the "Applicants").[1]

The Applicants seek full Commission review and vacatur of the August 28, 2015 Order granting AAJ a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) with respect to facsimiles transmitted with the prior express permission of the recipients. The Applicants, however, are not aggrieved parties with respect to AAJ and they, therefore, lack standing to challenge the waiver granted to AAJ. Moreover, the Applicants merely raise arguments that have already been addressed by the Commission and/or are pending before the D.C. Circuit Court of Appeals, which are not appropriate bases for review.

Accordingly, AAJ respectfully requests that the Applicants' petitions be denied.

II. Background

AAJ, formerly the Association of Trial Lawyers of America (ATLA®), is a voluntary national bar association registered as a 501(c)(6) not-for-profit corporation. AAJ works to enhance the practice of law by promoting collaboration among its members through networking and educating lawyers to be excellent advocates for their clients. AAJ also advocates for trial attorneys and their clients on a broad range of issues through lobbying and public education.

The AAJ Extras program offers AAJ members exclusive discounts from third-party service providers. These services include, but are not limited to, insurance, financial, shipping, and travel-related services.

AAJ may communicate with its members by facsimile with promotional messages or advertisements about these products as well as AAJ continuing legal education programs, conventions, legal research products, publications, membership updates or other special offers and information. AAJ obtains prior express permission from members to communicate by facsimile.

The Telephone Consumer Protection Act of 1991 (TCPA) provides that all unsolicited facsimile advertisements must include an opt-out notice that complies with the requirements of Section

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[1] To the extent any other applications seek vacatur of AAJ's waiver, AAJ opposes those applications for the reasons set forth herein.

64.1200(a)(4)(iv).[2] As the Commission recognized in its *Solicited Fax Order,* "inconsistency between a footnote contained in the *Junk Fax Order* and the rule caused confusion or misplaced confidence regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission."[3] The *Solicited Fax Order* made clear that the opt-out notice requirement applies to all facsimile advertisements, whether solicited or unsolicited. The *Solicited Fax Order*, however, granted the petitioners a retroactive waiver of this requirement for solicited facsimile advertisements and a six-month window within which to come into compliance.[4] In the *Solicited Fax Order*, the Commission expressly invited similarly situated entities to request similar retroactive waivers.

AAJ has always believed its conduct was, and always intended its conduct to be, in compliance with the TCPA. However, prior to October 30, 2014, solicited facsimile advertisements sent with the recipients' prior permission may have been sent by or on behalf of AAJ that did not fully comply with Section 64.1200(a)(4)(iv) as clarified by the *Solicited Fax Order.* Accordingly, AAJ timely submitted a request for a retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited facsimile advertisements sent by or on behalf of AAJ, its member groups, providers, or affiliated entities with the prior express permission of the recipient(s).

Timothy Blake, the only individual or entity involved in litigation with AAJ regarding this issue, opposed AAJ's application. AAJ replied disproving Mr. Blake's claims and unequivocally establishing that AAJ reasonably believed it was, and intended to be, in compliance with Section 64.1200(a)(4)(iv) when sending solicited facsimile advertisements, but may have not fully complied with that rule as clarified by the *Solicited Fax Order.*

AAJ's petition[5] was granted on August 28, 2015.[6]

On August 31, 2015, Mr. Blake informed the United States District Court for the Southern District of Florida that he "will not be appealing the FCC's grant of Defendants' waiver

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[2] 47 U.S.C. § 227(b)(2)(D).

[3] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Action of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 ¶ 24 (October 30, 2014)(*"Solicited Fax Order"*)(citing *infra* note 11).

[4] *Id.* ¶¶ 1-2.

[5] AAJ incorporates by reference the arguments and facts made in its Petition. *In the Matter of Petition of the American Association of Justice for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338, Petition for Waiver (filed Nov. 26, 2014).

[6] *See Junk Fax Order; Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding the Commission's Opt-out Notice Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (August 28, 2015) ("*Waiver Order*").

petitions." *Blake v. AAJ*, 14-23781 [Doc. No. 43] at n.10 (S.D. Fla. Aug. 31, 2015); *id.* at 20 ("Plaintiff is not appealing that decision.").

Although Mr. Blake did not appeal or seek review of the decision, the Applicants, who have no relationship with AAJ and are not involved in litigation with AAJ, request the blanket review and vacatur of all 117 petitions granted on August 28, 2015, including the waiver granted to AAJ.

Accordingly, AAJ hereby opposes both applications.

III. Argument

A. The Applicants Lack Standing to Challenge the Order as to AAJ.

Section 1.115(a) of the Commission's Rules provides that applications for review may only be filed by persons aggrieved by actions taken under delegated authority.[7] "[T]o be aggrieved, a party must establish a direct economic or other connection between its interest and the complained of grant of the applications."[8] Moreover,

> in order to establish standing, [the applicant] must allege facts sufficient to demonstrate that allowing [the order] to stand would cause it to suffer a direct injury. Moreover, [the applicant] must demonstrate a causal link between the claimed injury and the challenged action. To demonstrate a causal link, [the applicant] must establish that the injury can be traced to the challenged action and the injury would be prevented or redressed by the relief requested.[9]

The FCC has appropriately denied applications for review when the applicant is not aggrieved, or lacks standing.[10] None of the Applicants are engaged in litigation with AAJ (the sole connection alleged by the Applicants for the petitioners they directly challenge). And none of the Applicants have established, or could establish, that they would suffer a direct injury if AAJ's waiver stands.

Thus, the Applicants are not aggrieved by the retroactive waiver granted to AAJ and lack standing to challenge that waiver. Yet the Applicants seek review and vacatur of all 117 waivers, including the waiver granted to AAJ. Since the Applicants are not aggrieved by the waiver granted to AAJ and lack standing to challenge that waiver, their applications should be denied as they relate to AAJ.

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[7] 47 C.F.R. § 1.115.

[8] *In the Matter of Application of Gray Television Licensee, Inc.*, 23 FCC Rcd 644 (F.C.C. 2008).

[9] *In the Matter of Application for Review of an Order and Consent Decree of the Enforcement Bureau by Diogenes Telecommunications Project,* 29 FCC Rcd 6289 (F.C.C. 2014).

[10] *E.g., In the Matter of Application of Gray Television Licensee, Inc.*, 23 FCC Rcd 644 (F.C.C. 2008).

Denial is particularly appropriate here because the only individual who could possibly be aggrieved – Mr. Blake – has not applied for review and affirmatively reported to the United States District Court for the Southern District of Florida that he was not challenging the FCC's ruling with respect to AAJ. It would be improper to allow unrelated parties to collaterally attack the waiver granted to AAJ when the sole aggrieved party has no interest in challenging the waiver.

B. The Applications Lack Merit and Raise Issues Previously Addressed by the Commission and Presently Before the Court of Appeals.

The applications should also be denied because they raise arguments already addressed by the Commission in the *Solicited Fax Order* that are presently before the United States Court of Appeals for the District of Columbia in *Bais Yaakov of Spring Valley v. FCC*, No. 14-1234 (D.C. Cir. 2014).

The Commission has already ruled that: (1) the application of the opt-out notice requirement to solicited facsimile advertisements was a Commission created rule and not statutory;[11] (2) the FCC has the authority to waive any of its rules for good cause shown; and (3) good cause existed because special circumstances warranted a deviation from the general rule and the waiver would better serve the public interest.[12]

With respect to cause for the waiver, the Commission accurately found that: (1) the footnote contained in the *Junk Fax Order*[13] stating that "the opt-out notice requirement only applies to communications that constitute unsolicited advertisements" was inconsistent with the rule and may have caused confusion as to the Commission's intent to apply the opt-out notice requirement to solicited facsimile advertisements sent with the prior express permission of the recipients; and (2) the notice of the Commission's intent to adopt Section 64.1200(a)(4)(iv) "did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient."[14]

The Commission concluded that the combination of these factors established good cause for a retroactive waiver of the requirements of Section 64.1200(a)(4)(iv) for solicited facsimile advertisements. Since AAJ believed it was, and intended to be, in compliance with Section 64.1200(a)(4)(iv) when sending solicited facsimiles with the recipients' prior permission, but may have not fully complied with that rule as clarified by the *Solicited Fax Order*, AAJ applied

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[11] *See, e.g., Waiver Order* at ¶ 7 ("affirming that the Commission's rules require opt-out notices to appear on all fax ads . . . .").

[12] *Id.* at 14.

[13] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) ("*Junk Fax Order*").

[14] *Solicited Fax Order* ¶¶ 24-25.

for a retroactive waiver of the requirements of Section 64.1200(a)(4)(iv) for solicited facsimile advertisements.

AAJ demonstrated in its submission that it was confused by the inconsistent guidance and the Commission granted AAJ a retroactive waiver as a result.[15] Accordingly, AAJ's waiver petition was properly granted under the Commission's authority.

The grounds for the Commission's decision are being challenged in *Bais Yaakov of Spring Valley v. FCC*, No. 14-1234 (D.C. Cir. 2014), and it would be improper and a waste of resources to reconsider the bases for that decision here.[16]

IV. Conclusion

For the reasons stated above, AAJ respectfully requests that the Commission deny Applicants' Applications for Review.

Respectfully submitted,

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Dated: October 13, 2015

[15] *Waiver Order.*

[16] Applicants' remaining arguments have been previously addressed by the Commission and/or are addressed in the briefs filed by respondents whom Applicants have standing to challenge. *See In the Matter of Petition for Waiver of ACT, Inc.,* CG Docket Nos. 02-278, 05-338, Opposition (filed October 9, 2015). AAJ incorporates those arguments herein.