

**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	)	CG Docket No. 02-278
	)	
Petitions for Declaratory Ruling and	)	CG Docket No. 05-338
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	)	

**APPLICATION FOR FULL COMMISSION REVIEW**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

INTRODUCTION .....1

APPLICANT’S STANDING TO SEEK FULL COMMISSION REVIEW .....1

SUMMARY OF PRIOR PROCEEDINGS .....4

    A. Commission Proceedings.....4

    B. Source Media’s Petition for Waiver.....5

ARGUMENT .....6

I

    THE BUREAU’S WAIVER ORDER SHOULD BE REVERSED BECAUSE  
    THE COMMISSION LACKS AUTHORITY TO RETROACTIVELY WAIVE  
    PRE-EXISTING STATUTORY CAUSES OF ACTION FOR VIOLATION OF  
    THE OPT-OUT REGULATION .....6

II

    1 U.S.C. § 109 PRECLUDES CONGRESS AND THE COMMISSION FROM  
    RETROACTIVELY EXTINGUISHING LIABILITIES CREATED UNDER  
    THE TCPA’S PRIVATE RIGHT OF ACTION IN THE ABSENCE OF  
    EXPRESS AUTHORITY TO DO SO .....7

III

    THE BUREAU’S WAIVER ORDER VIOLATES TWO SEPARATION OF  
    POWERS PRINCIPLES .....8

IV

    THE BUREAU ISSUED A LEGISLATIVE RULE THAT LACKS THE  
    CONGRESSIONAL AUTHORIZATION REQUIRED TO BE APPLIED  
    RETORACTIVELY .....10

V

    EVEN IF THE WAIVER ORDER WERE DEEMED AN ADJUDICATORY  
    RULE, IT CANNOT BE APPLIED RETROACTIVELY BECAUSE IT DOES  
    NOT SATISFY THE *RETAIL WHOLESAL*E TEST .....11

VI

THE BUREAU FAILED TO ARTICULATE AN APPROPRIATE STANDARD  
AND MAKE THE INDIVIDUAL FACTUAL FINDINGS REQUIRED TO  
ISSUE ANY TYPE OF WAIVER OF A COMMISSION RULE.....13

RELIEF REQUESTED.....17

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Adams Fruit Co., Inc. v. Barrett</i> , 494 U.S. 638 (1990).....	6, 7, 9, 10
<i>Bowen v. Georgetown University Hospital</i> , 488 U.S. 204 (1988).....	11
<i>Brown v. Gardner</i> , 513 U.S. 115 (1994).....	7
<i>Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984).....	7
<i>City of Arlington, Texas v. F.C.C.</i> , 133 S. Ct. 1863 (2013).....	10
<i>Dusenbery v. U.S.</i> , 534 U.S. 161 (2002).....	2
<i>Landgraf v. USI Film Products</i> , 511 U.S. 244 (1994).....	11
<i>Lepre v. Department of Labor</i> , 275 F.3d 59 (D.C. Cir. 2001).....	3
<i>Liberty Media Holdings, LLC v. Sheng Gan</i> , No. 11 cv 02754, 2012 WL 5022265 (D. Col. 2013) .....	2, 3
<i>Logan v. Zimmerman Brush Co.</i> , 458 U.S. 422 (1982).....	1
<i>Mennonite Bd. Of Missions v. Adams</i> , 462 U.S. 791 (1983).....	2, 3
<i>Mullane v. Central Hanover Bank &amp; Trust Co.</i> , 339 U.S. 306 (1950).....	1, 2, 3
<i>Nack v. Walburg</i> , 715 F.3d 680, <i>cert. denied</i> , 134 S. Ct. 1539 (2014).....	15
<i>National Ass’n of Broadcasters v. F.C.C.</i> , 569 F.3d 416 (D.C. Cir. 2009).....	7

<i>Natural Resources Defense Council v. E.P.A.</i> , 749 F.3d 1055 (D.C. Cir. 2014).....	7
<i>NetworkIP, LLC v. F.C.C.</i> , 548 F.3d 116 (D.C. Cir. 2008).....	13
<i>Northeast Cellular Telephone Co., L.P. v. F.C.C.</i> , 897 F.2d 1164 (D.C. Cir. 1990).....	13
<i>Retail, Wholesale and Department Store Union, AFL-CIO v. N.L.R.B.</i> , 466 F.2d 380 (D.C. Cir. 1972).....	11, 13
<i>In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005,</i> CG Docket Nos. 02-278 & 05-338, DA 15-1402 (December 9, 2015).....	1
<i>Utility Air Regulatory Group v. E.P.A.</i> , 134 S. Ct. 2427 (2014).....	9
<i>WAIT Radio v. F.C.C.</i> , 418 F.2d 1153 (D.C. Cir. 1969).....	13, 15, 16
<i>Washington Metropolitan Area Transit Authority v. Beynum</i> , 145 F.3d 371 (D.C. Cir. 1998).....	8
<i>Williams Natural Gas Co. v. F.E.R.C.</i> , 3 F.3d 1544 (D.C. Cir. 1993).....	12
<b>Statutes</b>	
1 U.S.C. § 109.....	7, 8
47 U.S.C. § 227(b)(2)(B).....	6
47 U.S.C. § 227(b)(2)(C).....	6
47 U.S.C. § 227(b)(2)(D).....	6
47 U.S.C. § 227(b)(2)(E).....	6
47 U.S.C. § 227(b)(2)(F).....	6

47 U.S.C. § 227(b)(2)(G).....	6
47 U.S.C. § 227(b)(3) .....	4
47 U.S.C. § 227(b)(3)(A).....	6
47 U.S.C. § 227(b)(3)(B) .....	6

**Other Authorities**

47 C.F.R. § 1.3 .....	7, 13, 16
47 C.F.R. § 1.115 .....	1, 3
47 C.F.R. § 64.1200(a)(4)(iv) .....	<i>passim</i>

## **INTRODUCTION**

Pursuant to 47 C.F.R. § 1.115, Morgan & Curtis Associates, Inc. (“Applicant” or or “Morgan & Curtis”) hereby requests full Federal Communications Commission (“Commission”) review of the December 9, 2015 Order issued by the Acting Chief, Consumer and Governmental Affairs Bureau (the “Bureau”) in *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278 & 05-338, DA 15-1402 (December 9, 2015) (the “Waiver Order”).

### **APPLICANT’S STANDING TO SEEK FULL COMMISSION REVIEW**

Applicant is a plaintiff in a pending TCPA class-action litigation in which it has asserted claims for violations of the 47 C.F.R. § 64.1200(a)(4)(iv) (the “Opt-Out Regulation”) against Source Media LLC (“Source Media”) to whom the Bureau has just granted retroactive waivers of those violations. Therefore, Applicant is an aggrieved person who has standing pursuant to 47 C.F.R. § 1.115 to seek full Commission review of the Waiver Order. While Applicant did not participate in the proceeding that led to the Waiver Order, Applicant did not do so because neither the Bureau nor Source Media gave Applicant constitutionally adequate notice that the Bureau was going to consider attempting to eviscerate Applicant’s private cause of action against Source Media for violating the Opt-Out Regulation.

It is well settled that “a cause of action is a species of property protected by the Fourteenth Amendment’s Due Process Clause.” *Logan v. Zimmerman Brush Co.*, 458 U.S. 422, 428 (1982). *Accord Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 311-315 (1950). Therefore, before a party’s property interest in a cause of action may be eliminated or otherwise affected, the party must be given “constitutionally adequate notice and hearing procedures. . . .” *Logan*, 458 U.S. at 429; *Mullane*, 339 U.S. at 314-315 (before the government

may engage in an action that will affect a person's property interest in a cause of action, the government must provide that person with "notice reasonably calculated under all of the circumstances to apprise interested parties of the pendency of an action and afford them an opportunity to present their objections."). The same due process requirements of notice and opportunity to be heard apply to both federal and state actions that affect an interest in property. *See Dusenbery v. U.S.*, 534 U.S. 161, 167-168 (2002) (Fifth and Fourteenth Amendment Due Process standards the same on this issue).

Moreover, the Supreme Court has repeatedly held that "notice by publication [is] not reasonably calculated to provide actual notice of [a] pending proceeding and [is] therefore inadequate to inform those who could be notified by more effective means such as personal service or mailed notice." *Mennonite Bd. Of Missions v. Adams*, 462 U.S. 791, 795, 797 (1983)(citing cases); *Mullane*, 339 U.S. at 315 (discussing constitutional inadequacy of notice of publication in a newspaper and holding that "[i]n weighing its sufficiency with actual notice we are unable to regard this as more than a feint."). *See also Liberty Media Holdings, LLC v. Sheng Gan*, No. 11 cv 02754, 2012 WL 5022265, \*3-\*4 (D. Col. 2013)(publication on the internet is constitutionally inadequate notice under *Mullane*).

Here, Source Media never served Applicant, by mail or otherwise with Source Media's September 21, 2015 Petition requesting a waiver. Moreover, the Consumer and Governmental Affairs Bureau ("the Bureau") never served Applicant, by mail or otherwise with its September 25, 2015 notice seeking comment on Source Media's petition, notwithstanding the fact that Source Media's petition specifically informed the Bureau that Applicant was the Plaintiff in a class action against Source Media claiming Source Media's violation of the Opt-Out Regulation. Source Media Petition at 3. Finally, as is apparent from the case law cited above, the Bureau's

publication of its September 25, 2015 notice on the FCC website was not constitutionally adequate notice that the Bureau was considering taking actions that would attempt to eviscerate Applicant's private cause of action against Source Media. *See, e.g., Mennonite*, 462 U.S. at 795, 797; *Mullane*, 339 U.S. at 315; *Liberty Media*, 2012 WL 5022265, \*3-\*4.

The Courts have held that when an agency has failed to give a person constitutionally adequate notice of a proceeding, but then after the proceeding provides constitutionally adequate notice, "the availability of agency reconsideration and appeal provide sufficient avenues of redress and rectification to meet the requirements of due process." *Lepre v. Department of Labor*, 275 F.3d 59, 71 (D.C. Cir. 2001). A fortiori, in this case, when Applicant was never provided constitutionally adequate notice, Applicant is entitled to utilize the appeal provisions of 47 U.S.C. § 1.115 at this time to make its arguments.<sup>1</sup>

Moreover, Applicant contends, that under these circumstances, it has shown good cause why it was not possible for it to participate in the earlier stages of this proceeding. *See* 47 C.F.R. § 1.115(a).

In sum, Applicant is entitled to bring this Application for Full Commission Review. Indeed, because Applicant did not receive constitutionally adequate notice that Source Media's was requesting waiver or that the Bureau was going to consider granting that waiver, Applicant is entitled to make all of its arguments concerning the waiver at this time.

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<sup>1</sup> Applicant has also filed a Petition for Reconsideration of the Waiver Order with the Bureau.

## SUMMARY OF PRIOR PROCEEDINGS

### **A. Commission Proceedings**

Over the course of several years, a variety of parties filed 25 petitions challenging the FCC's authority to issue the Opt-Out Regulation and, in the alternative, seeking retroactive waivers of the Opt-Out Regulation's application to them. The openly admitted objective of those parties was to thwart various plaintiffs in then pending litigations from prevailing on claims against them for violation of the Opt-Out Regulation, which constitutes a violation of the TCPA itself. 47 U.S.C. § 227(b)(3).

On October 30, 2014, the Commission issued its Waiver Ruling, reconfirming its authority to issue the Opt-Out Regulation, but granting the waiver requests then before it – and thereby purported to retroactively and prospectively waive almost nine years of violations of the Opt-Out Regulation, from its August 6, 2006 effective date through April 30, 2015, for those who had sought waivers. *Petition 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, 29 FCC Rcd 13998 (2014) (“*Waiver Ruling*”) ¶¶ 1-3. In support of its grant of waivers, the Commission found that a notice of proposed rulemaking it had issued back in 2005 (the “NPRM”) and a footnote in its 2006 implementing order issuing the final Opt-Out Regulation (the “Implementing Order”) “led to confusion or misplaced confidence on the part of petitioners,” and that this “confusion or misplaced confidence” justified a waiver of the Regulation. *Id.*, ¶ 26.

The Commission's Waiver Ruling also invited others to file additional waiver requests until April 30, 2015: “Other, similarly situated parties may also seek waivers such as those

granted in this Order. . . . We expect parties making similar waiver requests to file within six months of the release of this Order.” *Waiver Ruling*, ¶¶ 30, 2. The Commission explicitly stated, however, that “all future waiver requests will be adjudicated on a case-by-case basis,” and that it was “not prejudg[ing] the outcome of future waiver requests in this Order.” *Id.*, ¶ 30, n.102.

#### **B. Source Media’s Petition for Waiver**

On September 21, 2015, almost eleven months after the *Waiver Ruling*, Source Media filed a cursory five-page petition for waiver of the Opt-Out Regulation. In that Petition, Source Media admitted that the Opt-Out Regulation clearly required opt-out notices on fax advertisements sent with the permission or invitation of the intended recipients (“permission-based fax advertisements”). Source Media Petition at 2. Nevertheless, Source Media pointed out that footnote 154 of the *Waiver Ruling* stated that the opt-out notice requirement only applied to permission-based fax advertisements, and that “this apparent conflict led to considerable confusion.” *Id.* Nowhere in its petition did Source Media claim that it had ever read footnote 154 of the *Waiver Ruling*, nor did it ever claim that it had been actually confused by footnote 154 or anything else as to its obligation to place opt-out notices on permission-based fax advertisements.

Source Media admitted that it communicated with its “customers and others by sending facsimiles that describe its products and services,” but that “[t]hese customers have consented to receiving such facsimiles.” *Id.* at 3. Source Media also specifically informed the Bureau that it was the defendant in the class action against it brought by Morgan & Curtis, which asserted, among other things, that Source Media violated the Opt-Out Regulation. *Id.*

Source Media claimed that it should get a waiver of the Opt-Out Regulation because “[t]he Commission has determined that confusion over the Regulation was generated by the apparent inconsistency between” between footnote 154 and the wording of the Opt-Out Regulation. *Id.* at 4. Moreover, without specifying its financial status, Source Media claimed that it should be granted a waiver of the Opt-Out Regulation because it “[f]aced potentially ruinous class-action litigation” in the class action Morgan & Curtis brought against it and because it was allegedly similarly situated to the entities to whom the Commission had granted a waiver in the Waiver Ruling. *Id.* at 4-5.

On December 9, 2015, the Bureau issued an order which, among other things, granted Source Media’s request for a waiver of the Opt-Out Regulation.

### **ARGUMENT**

#### **I. THE BUREAU’S WAIVER ORDER SHOULD BE REVERSED BECAUSE THE COMMISSION LACKS AUTHORITY TO RETROACTIVELY WAIVE PRE-EXISTING STATUTORY CAUSES OF ACTION FOR VIOLATION OF THE OPT-OUT REGULATION**

The Bureau based its Waiver Order on its understanding that the Commission has the power to retroactively waive statutorily created causes of action under the TCPA. It does not.

The TCPA’s private right of action based on violation of the Commission’s regulations is authorized in the TCPA – a statute enacted by Congress. *See* 47 U.S.C. § 227(b)(3)(A) & (B). That section of the TCPA does not provide the Commission with any authority to waive or otherwise impair a private cause of action that arises under it.

Moreover, none of the TCPA’s other provisions that do delegate authority to the Commission gives the Commission any right to impair that congressionally created private right of action. 47 U.S.C. § 227(b)(2)(B)-(G). Nor can the Commission claim any implied delegation of such authority. *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990) (“Although agency

determinations within the scope of delegated authority are entitled to deference, it is fundamental ‘that an agency may not bootstrap itself into an area in which it has no jurisdiction’”). Nor can the Bureau find any authority for impairing that private right of action in 47 C.F.R. § 1.3, which generally enables the Commission to waive the requirements of a *regulation*, but not a cause of action already accrued under a *statute* for violation of a regulation. *E.g.*, *National Ass’n of Broadcasters v. F.C.C.*, 569 F.3d 416, 426 (D.C. Cir. 2009) (“the Commission has authority under its rules, *see* 47 C.F.R. § 1.3, to waive requirements not mandated by statute where strict compliance would not be in the public interest. . . .”).<sup>2</sup>

Where, as is the case with the TCPA, a statute creates a private right of action and does not give an agency any authority to impair it, the Courts have been vigilant about preventing an agency from overstepping its authority. *E.g.*, *Natural Resources Defense Council v. E.P.A.*, 749 F.3d 1055, 1063 (D.C. Cir. 2014) (EPA lacked authority to create affirmative defense to private right of action established by Clean Air Act); *Adams Fruit, supra*, 494 U.S. at 649-50. The Bureau’s Waiver Order violates this well settled precedent because the Bureau lacked any authority to impair the private right of action asserted by plaintiffs against the parties whose waiver requests the Bureau has granted.

As a result, the Bureau’s Waiver Order conflicts with the TCPA, the regulations thereunder, and the case law construing it. Accordingly, the Commission should overturn the Waiver Order and deny all of the requested waivers.

## **II. 1 U.S.C. § 109 ALSO PRECLUDES CONGRESS AND THE COMMISSION**

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<sup>2</sup> Nor is the Bureau’s effort to cast its ruling as simply an “interpretation” of the TCPA entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). *E.g.*, *Brown v. Gardner*, 513 U.S. 115, 116-121 (1994) (because agency’s regulation required higher standard of proof than statute to collect benefits, regulation was not entitled to *Chevron* deference and was invalidated: “the text and reasonable inferences from the statute give a clear answer against the Government ‘agency’s regulation’”) (citations omitted).

**FROM RETROACTIVELY EXTINGUISHING LIABILITIES CREATED UNDER THE TCPA'S PRIVATE RIGHT OF ACTION IN THE ABSENCE OF EXPRESS AUTHORITY TO DO SO**

1 U.S.C. § 109 provides in pertinent part that the repeal of any statute does not retroactively extinguish liabilities previously accrued under the statute unless the statute expressly, or by plain import, provides for such extinguishment. Accordingly, if Congress had desired to allow itself or the Commission to retroactively extinguish private causes of action created by the TCPA, Congress would have had to do so explicitly in the TCPA. *E.g.*, *Washington Metropolitan Area Transit Authority v. Beynum*, 145 F.3d 371, 372-73 (D.C. Cir. 1998) (claim for compensation for injury incurred before repeal of workers' compensation law should be decided under repealed law because new workers' compensation law did not retroactively extinguish such liability under old statute, as required by 1 U.S.C. § 109).

Because Congress did not explicitly state that the private right of action under the TCPA for violation of the Commission's regulations could be retroactively repealed by Congress, much less that that private right of action could be abrogated by an administrative agency such as the Commission, the Bureau's attempt to extinguish private plaintiffs' right of action to pursue TCPA claims for past violations of the Opt-Out Regulation conflicts with 1 U.S.C. § 109 and the caselaw construing it, and applies a policy of granting waivers of liability that should be overturned.

**III. THE BUREAU'S RULING VIOLATES TWO SEPARATION OF POWERS PRINCIPLES**

The Bureau summarily rejected the contention that any ruling purporting to retroactively waive preexisting private parties' liability for TCPA claims asserted in pending litigations violates separation of powers principles. The Bureau reasoned that it was simply interpreting a statute, the TCPA, over which Congress provided the Commission authority as the expert

agency, and further that it has authority, as the expert agency, to define the scope of when and the Commission's rules apply. That reasoning is specious.

The Bureau's issuance of retroactive waivers does not just "interpret" a statute, but effectively nullifies a statute creating a private right of action. Moreover, issuing retroactive waivers is not just defining the scope of when and how the Commission's rules apply, but instead is attempting to retroactively constrict the scope of a private right of action which the Bureau lacks any authority to constrict. Accordingly, the Bureau's wholesale grant of waivers to Source Media and others of statutory private rights of action asserting violations of the Opt-Out Regulation in pending litigations plainly implicates separation of powers concerns.

Not only is the Bureau's Waiver Order subject to separation of powers scrutiny, but it violates two separation of powers dividing lines: between the Commission and Congress, and between the Commission and the Judiciary. First, by issuing a Waiver Order that purports to categorically extinguish preexisting liability incurred by Source Media and other parties who filed waiver petitions, the Bureau has intruded into Congress's power to enact and repeal legislation creating private rights of action. *E.g., Utility Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2445 (2014) ("Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution's separation of powers. Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them.").

Second, because the Bureau's Waiver Order impairs TCPA claims that Morgan & Curtis and others already have asserted in pending judicial proceedings throughout the United States, that ruling intrudes upon the province of the Judiciary. *Adams Fruit, supra*, 494 U.S. at 650 (rejecting Secretary of Labor's position limiting liability under statute "because Congress has

expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute”).<sup>3</sup>

Accordingly, the Waiver Order conflicts with constitutional separation of powers principles and the caselaw construing them, and applies a policy of granting waivers of pre-existing liability that should be overturned.

#### **IV. THE BUREAU ISSUED A LEGISLATIVE RULE THAT LACKS THE CONGRESSIONAL AUTHORIZATION REQUIRED TO BE APPLIED RETROACTIVELY**

As a matter of administrative law, the Waiver Order is the equivalent of a “legislative rule” that repeals an existing rule. That is because, first of all, the only support the Bureau cited for its Ruling are two “legislative facts” – the NPRM and the Implementing Order – which the Bureau found to cause “confusion” warranting blanket waivers. Those facts are legislative because they apply equally to everyone, not to specific parties in a specific factual context. Consistent with the legislative nature of its ruling, the Bureau did not cite any individual evidence from any parties requesting a waiver as to why that waiver applicant is entitled to a waiver. Indeed, the Bureau did not even see any need to address whether any of the parties requesting waivers were even aware of the NPRM or Implementing Order, much less relied on those items.

Further, the Waiver Order granted waiver requests of Source Media and others after seeking comment from the public on those requests. Indeed, among the waiver requests granted in the Bureau’s Waiver Order, were several that had been filed after the April 30, 2015 deadline

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<sup>3</sup> See also *City of Arlington, Texas v. F.C.C.*, 133 S. Ct. 1863, 1871 n.3 (2013) (reaffirming that “*Adams Fruit* stands for the modest proposition that the judiciary, not any executive agency, determines ‘the scope’ — including the available remedies — ‘of judicial power vested by’ statutes establishing private rights of action.”).

for filing requests the Commission had set in its original Waiver Ruling.<sup>4</sup> These circumstances further confirm that the Waiver Order is effectively a retroactive legislative repeal of the Opt-Out Regulation.

Because the Waiver Order is a legislative rule, it may not be applied retroactively to impair any “vested rights,” such as causes of action, under the U.S. Supreme Court’s decision in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) (“a statutory grant of legislative rulemaking authority will not, as a general matter be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms”); *see also Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994).

Accordingly, by purporting to apply retroactively to impair existing causes of action, the Waiver Order conflicts with administrative law statutes and caselaw construing legislative rules and should be overturned.

**V. EVEN IF THE WAIVER ORDER WERE DEEMED AN ADJUDICATORY RULE, IT CANNOT BE APPLIED RETROACTIVELY BECAUSE IT DOES NOT SATISFY THE *RETAIL, WHOLESAL*E TEST**

Even if the Bureau’s Waiver Order could alternatively be considered an adjudicatory rule, it would also be improper because it does not satisfy the requirements for retroactive applications of adjudicatory rules. As the D.C. Circuit held in *Retail, Wholesale and Department Store Union, AFL-CIO v. N.L.R.B.*, 466 F.2d 380, 390 (D.C. Cir. 1972):

“[R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. . . .”

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<sup>4</sup> Indeed, the fact that Source Media submitted its waiver request almost four months after the six-month deadline set by the Commission had been reached, and provided no explanation for its delay, is itself a reason that the Bureau erred in granting Source Media a waiver. The Bureau’s Order improperly ignores the Commission’s six-month deadline by holding that any entity similarly situated to the entities in the Commission’s October 2014 Waiver Ruling are entitled to a waiver, regardless of how long the entity takes to request it.

Among the considerations that enter into the resolution of the problem are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party; and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

*See also Williams Natural Gas Co. v. F.E.R.C.*, 3 F.3d 1544, 1554 (D.C. Cir. 1993) (citations omitted) (where an adjudicatory rule “substitu[tes] new law for old law that was reasonable clear. . . . it may be necessary to deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule.”).

The Waiver Order constitutes a “case of first impression” because the Bureau has, after nine-plus years of having the Opt-Out Regulation on the books, deemed that the Opt-Out Regulation has effectively been a nullity for those nine years. For the same reason, the Bureau’s Ruling represents “an abrupt departure from well established practice.” In addition, the parties “against whom the new rule is applied” – Source Media and the other plaintiffs in TCPA litigations who have asserted claims against those seeking waivers – have plainly “relied on the former rule” by pursuing litigation claims based on that former rule. Further, because Source Media and others have spent years extensively litigating those TCPA claims in complex litigation, the “degree of burden” the Waiver Order has imposed upon them, by undermining important claims in those cases, is unquestionably severe. Finally, the “statutory interest in applying a new rule” – in this case the abrogation of an existing rule – is nonexistent. To the contrary, the Bureau’s Ruling discourages private parties from enforcing the TCPA and increases the burden on the Commission to police junk fax advertising.

Accordingly, even if the Bureau’s Waiver Order were deemed to announce an

adjudicatory rule, it fails to satisfy each and every one of the five factors in the *Retail, Wholesale* test, and thus cannot apply retroactively as the Bureau intends. As a result, the Waiver Order conflicts with administrative law statutes and caselaw construing adjudicative rules and should be overturned.

**VI. THE BUREAU FAILED TO ARTICULATE AN APPROPRIATE STANDARD AND TO MAKE THE INDIVIDUAL FACTUAL FINDINGS REQUIRED TO ISSUE ANY TYPE OF WAIVER OF A COMMISSION RULE**

The Commission's rules generally provide that "[a]ny provision of the [Commission's] rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown." 47 C.F.R. § 1.3. To demonstrate good cause, a person requesting a waiver of a Commission rule "must plead with particularity the facts and circumstances which warrant" a waiver instead of making "generalized pleas." *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 & n.9 (D.C. Cir. 1969). The person requesting a waiver must "adduce concrete support, preferably documentary," of "special circumstances" warranting a waiver. *Id.*; *NetworkIP, LLC v. F.C.C.*, 548 F.3d 116, 127 (D.C. Cir. 2008).

To grant a waiver, the Commission must first "articulate a relevant standard" it is following. *WAIT Radio, supra*, 418 F.2d at 1159. Second, the Commission must make a specific finding of "special circumstances." *Northeast Cellular Telephone Co., L.P. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). And third, the Commission must find that the waiver "will serve the public interest." *Id.*

Nowhere in the Waiver Order has the Bureau articulated a "relevant standard" for determining when it will and when, if ever, if will not grant a waiver.<sup>5</sup> Nor has the Bureau made

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<sup>5</sup> While the Bureau did refuse to grant waivers where it found that the entity requesting it had no knowledge of the TCPA whatsoever, that refusal was completely inconsistent with the Bureau's grant of waivers to entities such as Amicus Mediation & Arbitration Group, Inc. in an August 28,

any individualized findings of “special circumstances.” Nor could it because the parties requesting waivers have not provided the Bureau with any specific facts upon which to make such findings. Instead, the Bureau simply concluded that the existence of the NPRM and footnote 154 of the Implementing Order, by themselves, create a “presumption” of confusion about the existence and nature of the Opt-Out Regulation that constitutes special circumstances for the purpose of the waiver requests the Bureau granted. However, those two legislative “facts,” by themselves, are woefully insufficient to demonstrate special circumstances for numerous reasons.

First, no party has shown that it actually read, much less relied on, the NPRM or footnote 154 of the Implementing Order in coming to the conclusion that no regulation requires that opt-out notices appear on permission-based fax ads. Second, and more to the ultimate issue, no party

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2015 Order, 30 F.C.C.R. 8598 (August 28, 2015), where the parties opposing the waiver had proven by record evidence that the entity requesting the waiver had no knowledge of the TCPA when it sent out its fax advertisements. *See December 12, 2014 Comments of Bais Yaakov of Spring Valley, Roger H. Kaye and Roger H. Kaye MD, PC*, at 3 & Exhibit A at 85-86; *December 15, 2014 Corrected Comments of Bais Yaakov of Spring Valley, Roger H. Kaye and Roger H. Kaye MD, PC*, at 3 & Exhibit A at 85-86. The Bureau’s refusal to grant these waivers was also inconsistent with the full Commission’s Waiver Ruling, which, when granting waivers, never distinguished between parties that had knowledge of the TCPA and those that did not. Thus, the denial of waivers by the Bureau did not set any “relevant standard” for waivers as required by the caselaw, but rather was an attempt, as part of a litigation strategy, to make it appear that it was setting a relevant standard, even though the Bureau well knew that that supposed “relevant standard” was completely inconsistent with the full Commission’s and the Bureau’s previous rulings. In any event, if the Bureau was setting such a relevant standard, Morgan & Curtis, as well as the other opponents to the requests for waivers had no way to know about that standard a priori and were not given any opportunity to depose the waiver applicants, or cross-examine them at a hearing to determine whether the waiver applicants had any knowledge of the TCPA before sending out their fax advertisements. Accordingly, Bureau’s ruling violated the due process rights of Morgan & Curtis and the other opponents of the waivers. *See McClelland v. Andrus*, 606 F.2d 1278, 1285-1286 (D.C. Cir. 1979)(holding that failure of agency to allow discovery of a report prior to an administrative hearing could be violate of due process). Morgan & Curtis as well as the other waiver opponents should be given an opportunity to depose the waiver applicants, or at the very least cross-examine the waiver applicants at a hearing regarding the waiver applicants’ knowledge of the TCPA prior to sending out their fax advertisements.

has shown, and the Bureau has refused to consider, that it actually was confused about the existence and nature of the Opt-Out Regulation. Third, no party could credibly show that it actually was confused about the nature of the Opt-Out Regulation because the Regulation itself requires, in abundantly clear text, that fax ads sent to recipients who have agreed to receive them “must include an opt-out notice . . . .” 47 C.F.R. § 64.1200(a)(4)(iv); *Nack v. Walburg*, 715 F.3d 680, 683 (ruling that the Opt-Out Regulation, “read most naturally and according to its plain language, extends the opt-out notice requirement to solicited as well as unsolicited fax advertisements”), *cert. denied*, 134 S. Ct. 1539 (2014).

Fourth, by ruling that the NPRM and Implementing Order create a “presumption” of confusion, and requiring that the parties opposing waivers come forward with evidence rebutting such a presumption, the Bureau improperly watered down the waiver petitioners’ proof requirements articulated in *WAIT Radio*, which mandate that a party *seeking* a waiver – not the party opposing a waiver – satisfy a “high hurdle even at the starting gate” and submit individualized “concrete support” to support the waiver. 418 F.2d at 1157 & n.9.

Finally, the Bureau concluded that granting Source Media and others waivers was in the public interest, but did not cite any evidence to support that conclusion. Nor, even for those who contended that the public interest requires that they be shielded from “ruinous” liability, is there any underlying factual proof in the record to show such consequences if they are held liable for violating the TCPA, as *WAIT Radio* requires. Moreover, the Bureau failed even to give lip service to the other side of the coin regarding the public interest in enforcing the Opt-Out Regulation – that the TCPA itself requires that it be enforced for the benefit of persons who receive millions of unwanted fax ads from those who are seeking waivers; that persons who receive purportedly permission-based fax ads should be instructed on how to follow the specific

steps that the TCPA requires for opting out of receiving future unwanted fax ads; and that fax advertisers may erroneously or fraudulently contend that they have received permission to send fax ads to persons who do not want to receive them.

At the end of the day, the Bureau abdicated its obligation to individually analyze the requests for waivers it granted before it by simply concluding that those waiver petitioners are “similarly situated” to the initial set of parties that obtained waivers from the Commission in its Waiver Ruling, based only on the (1) inconsistency between an Implementing Order footnote and the rule, and (2) the NPRM provided prior 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. This “similarly situated” finding is no substitute for the individualized factual evidence and findings required by *WAIT Radio* and its progeny for granting a waiver.

As a result, the Bureau’s finding that waiver petitions should be granted conflicts with 47 C.F.R. § 1.3 and the caselaw precedent of *WAIT Radio* and its progeny, involves application of a policy of making grants of waivers that should be overturned, and makes several erroneous findings as to important and material questions of fact regarding whether special circumstances exist to support grants of those waivers, and whether the public interest supports those grants of waivers.

**RELIEF REQUESTED**

For all the foregoing reasons, the Commission Should (a) review the Bureau's grant of waivers to Source Media and other entities in the Waiver Order, and (b) reverse by denying all of the waivers granted by the Bureau.

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Respectfully submitted,

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