

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

In the Matter of)	
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 05-338
)	
Rules and Regulations Implementing the Telephone)	CG Docket No. 02-278
Consumer Protection Act of 1991)	

**TCPA PLAINTIFFS' COMMENTS ON PETITIONS CONCERNING THE
COMMISSION'S RULE ON OPT-OUT NOTICES ON FAX ADVERTISEMENTS**

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Executive Summary

The Commission should reaffirm the position it has consistently maintained in response to prior challenges to its statutory authority to adopt the rule requiring opt-out notice on fax advertisements sent with “prior express invitation or permission” for each of the following reasons:

1. The challenges are improper under Commission Rule 1.2 because there is no “controversy” or “uncertainty” that the Commission adopted the rule pursuant to Congress’s direction to “prescribe regulations to implement” the TCPA under 47 U.S.C. § 227(b)(2).
2. The challenges are “improper collateral attacks” on the statutory basis for the rule that may be raised only in a petition for reconsideration, the time limit on which expired more than seven years ago under 47 U.S.C. § 405(a) and Commission Rule § 1.429(d).
3. The challenges fail on the merits because the opt-out rule, 47 C.F.R. § 64.1200(a)(4)(iv), is part of a suite of rules properly filling in gaps in the undefined statutory term “prior express invitation or permission” by prescribing (a) how a sender may obtain such permission, (b) what the sender must do to maintain that permission (include opt-out instructions on its faxes), and (c) how the consumer may revoke that permission (follow the opt-out instructions).

The Commission should reject the requests to “interpret” the rule to allow “substantial compliance” with the opt-out requirement because it would be contrary to the plain language of the rules, the strict-liability nature of the TCPA, and prior decisions on the matter by the Commission and the federal courts. The petitioners’ assertions that the required opt-out information is “minor, technical,” and “immaterial” cannot be reconciled with the corresponding rule—which industry advocated for—allowing a fax advertiser to ignore consumer opt-out requests that do not include specific information.

The Commission should also reject the requests for retroactive waivers sought by petitioners for the express purpose of escaping liability in pending TCPA actions because the Commission is not tasked with picking winners and losers in private litigation, and the petitioners fail to meet the “good cause” standard for such waivers (*e.g.*, explaining why they failed to comply with a rule adopted over seven years ago or what remedial steps they have taken to prevent future violations).

Finally, the Commission should reject the request by Staples, Inc. to repeal the opt-out rule because it is part of a comprehensive regulatory scheme governing how “prior express invitation or permission” may be obtained, maintained, and revoked. Excising the rule would allow advertisers to send fax advertisements unchecked without giving consumers the tools they need to stop future advertisements.

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**TCPA Plaintiffs' Comments on Petitions Concerning
the Commission's Rule on Opt-Out Notices on Fax Advertisements**

The commenters here are Plaintiffs in private TCPA actions against seven of the nine petitioners.¹ The petitioners sent millions of fax advertisements without compliant opt-out notice years after the Commission adopted the rule requiring such notice. Now, they ask the Commission to retroactively absolve them of civil liability for their violations, seeking declaratory rulings and waivers they plan to present to the courts presiding over their cases. The Commission should decline this extraordinary request because it is not in the business of picking winners and losers in private litigation, the request is time-barred, and the Commission had unmistakable statutory authority to fill

¹ See *Petition of Forest Pharms. Inc., for Declaratory Ruling and/or Waiver Regarding Substantial Compliance with Section 64.1200(a)(4)(iii) of the Commission's Rules and for Declaratory Ruling Regarding the Statutory Basis for the Commission's Opt-Out Notice Rule with Respect to Faxes Sent with the Recipient's Prior Express Invitation or Permission*, CG Docket No. 05-338 (June 27, 2013) (Forest Petition); *Petition for Declaratory Ruling and/or Waiver of Gilead Sciences, Inc., and Gilead Palo Alto, Inc., Regarding Substantial Compliance with Section 64.1200(a)(4)(iii) of the Commission's Rules and for Declaratory Ruling Regarding the Statutory Basis for the Commission's Opt-Out Notice Rule with Respect to Faxes Sent with the Recipient's Prior Express Invitation or Permission*, CG Docket Nos. 02-278, 05-338 (Aug. 9, 2013) (Gilead Petition); *Purdue Pharma Petition for Declaratory Ruling Regarding the Statutory Basis for the Commission's Opt-Out Notice Rule with Respect to Solicited Faxes, and/or Regarding Substantial Compliance with Section 64.1200(a)(4)(iii) and (iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (Dec. 12, 2013) (Purdue Pharma Petition); *Petition of Prime Health Services, Inc. for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver*, CG Docket Nos. 02-278, 05-338 (Dec. 17, 2013) (Prime Health Petition); *Petition of Staples, Inc. and Quill Corp. for a Rulemaking to Repeal Rule 64.1200(a)(3)(iv) and for a Declaratory Ruling to Interpret Rule 64.1200(a)(3)(iv)*, CG Docket Nos. 02-278, 05-338 (July 19, 2013) (Staples Petition); *Petition of TechHealth, Inc. for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver*, CG Docket Nos. 02-278, 05-338 (Jan. 6, 2014) (TechHealth Petition); *Petition of Douglas Paul Walburg and Richie Enterprises, LLC, for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver*, CG Docket Nos. 02-278, 05-338 (Aug. 19, 2013) (Walburg Petition).

in the gaps in the undefined statutory term, “prior express invitation or permission”² by prescribing (1) how a sender may obtain such permission, (2) what the sender must do to maintain that permission (include opt-out instructions on its faxes), and (3) how the consumer may revoke that permission (follow the opt-out instructions).

One of the petitioners, Staples, Inc., also asks the Commission to prospectively repeal the rule. The Commission should decline this request as well because compliant opt-out notice is essential to enable consumers to revoke their permission to receive fax advertisements. Tellingly, Staples does not seek repeal of the rule imposing obligations on the consumer who wishes to opt out of future fax advertisements. Granting Staples’s request would leave a regulatory scheme where consumers shoulder the burden of compliance rather than advertisers, undermining the pro-consumer stance of the TCPA.

I. There is no such thing as a “solicited fax.”

Each of the petitions uses the term “solicited fax” to refer to fax advertisements sent with “prior express invitation or permission” under 47 U.S.C. § 227(a)(5). There is no such thing as a “solicited fax.” The TCPA does not use the term “solicited,” and the Commission uses the statutory language, “prior express invitation or permission,” or simply “permission,” when discussing this issue.³ The term “solicited” implies that Plaintiffs affirmatively sought out the petitioners’ fax advertisements. But what the petitioners really claim is that they obtained “permission” to send fax advertisements when *they* contacted the Plaintiffs, apparently by telephone, although the petitions are

² 47 U.S.C. § 227(a)(5).

³ *E.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Notice of Proposed Rulemaking and Order, FCC 05-206 (rel. December 9, 2005) (“JFPA NPRM”) ¶ 30 (seeking comment on “the phrase ‘prior express invitation or permission’ in the definition” and asking “should the facsimile sender bear the burden of proof to demonstrate that it had the consumer’s prior express invitation or permission?”).

so vague about the details it is impossible to tell.⁴ Even if the petitioners are correct—and Plaintiffs do not concede that they are—a consumer acquiescing to receiving a fax in response to a solicitation from the sender does not mean the consumer “solicited” the advertisement.

The term “solicited” is also designed to distract from the Commission’s statutory authority for the rule. That authority does not turn on a distinction between “solicited” and “unsolicited” faxes. It turns on the Commission’s authority to define the contours of how a sender may obtain “prior express invitation or permission” and—in making such permission valid only so long as the sender informs the consumer of how to opt out—how that permission may be maintained and revoked.

II. Statutory and Regulatory Background

The petitions give short shrift to the origins of the opt-out rule during the Commission’s rulemaking in 2006. That history demonstrates the Commission adopted the rule as part of a suite of rules fleshing out the undefined statutory term, “prior express invitation or permission.” It also demonstrates that industry commentators, including Staples, participated in the rulemaking process, that the rule did not come as a surprise to anyone, and that once the rule was adopted, fax advertisers had ample opportunity to challenge it in a petition for reconsideration but waived their right to do so.

⁴ See Forest Pet. at 7–8; Gilead Pet. at 8–9; Prime Health Pet. at 6; Purdue Pharma Pet. at 14; Walburg Pet. at 5. TechHealth asserts the plaintiff in its case “entered into a contract” in which it “consented to TechHealth communicating with it via fax.” TechHealth Pet. at 6. Consenting to “communicating” via fax is not the same as consenting to fax *advertisements*.

A. The TCPA and the JFPA.

In 1991, Congress enacted the TCPA, prohibiting the sending of any “unsolicited advertisement” by fax.⁵ As enacted, the statute defined “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.”⁶ In the Junk Fax Prevention Act of 2005 (“JFPA”), Congress amended the definition to provide that a sender may obtain permission “in writing or otherwise.”⁷ Neither the TCPA nor the JFPA define “prior express invitation or permission” or specify how permission can be (1) obtained by the sender, (2) maintained by the sender, or (3) revoked by the consumer. Instead, Congress granted the Commission authority to “prescribe regulations to implement the requirements of this subsection” in § 227(b)(2).⁸

The JFPA also codified an exclusion from the prohibition on unsolicited fax advertisements where the sender and recipient have an “established business relationship” (“EBR”).⁹ To qualify for this statutory exclusion, the JFPA requires the sender to include specific notice on the fax advertisement providing the consumer with the means to “opt out” of future fax advertisements.¹⁰ Congress directed the Commission to prescribe regulations to specify what instructions the sender must give the consumer regarding how to opt out and what information the consumer must give the sender in order to effectively opt out.¹¹

⁵ Pub. L. No. 102–243, § 3(a), 105 Stat. 2394 (codified at 47 U.S.C. § 227(b)(1)(C)).

⁶ *Id.* (originally codified at 47 U.S.C. § 227(a)(4)).

⁷ Pub. L. No. 109–21, § 2(g), 119 Stat 359 (codified at 47 U.S.C. § 227(a)(5)).

⁸ 47 U.S.C. § 227(b)(2).

⁹ *Id.* § 227(b)(1)(C)(i).

¹⁰ *Id.* § 227(b)(1)(C)(iii).

¹¹ *Id.* § 227(b)(2)(D) & (E).

B. The Commission's JFPA rulemaking proceedings.

On December 9, 2005, the Commission issued a notice of proposed rulemaking to implement the JFPA, seeking comment on whether “the sender of a facsimile advertisement” should be required to “provide specified notice and contact information on the facsimile that allows recipients to ‘opt-out’ of any future facsimile transmissions from the sender” and “the circumstances under which a request to ‘opt-out’ complies with the Act.”¹² The Commission also sought comment on the phrase “prior express invitation or permission,” asking, “[i]n addition to written permission, what other forms of permission should be allowed” and, if oral permission is allowed, whether the sender should “bear the burden of proof to demonstrate that it had the consumer’s prior express invitation or permission.”¹³ The Commission noted existing law required senders of all fax messages “to identify themselves on the message, along with the telephone number of the sending machine or the business, other entity, or individual sending the message,” and sought comment on the “interplay” between that requirement and the proposed opt-out-notice requirement.¹⁴

In response to the notice, Westfax, Inc., one of the largest fax broadcasters in the United States, submitted comments arguing that “[t]he opt out notice should be included on all facsimile advertisements.”¹⁵ Since “[t]he JFPA and the TCPA collectively prohibit facsimile advertisements without prior express invitation or permission,” Westfax reasoned, “[s]pecific contact information is required on each facsimile as well as an opt out provision.”¹⁶ The least burdensome way to implement this global opt-out requirement, Westfax submitted, would be to (1) “[m]inimize the

¹² JFPA NPRM ¶ 7.

¹³ *Id.* ¶ 30.

¹⁴ *Id.* ¶ 21 (citing 47 C.F.R. § 68.318(d); 47 U.S.C. § 227(d)(1)(B)).

¹⁵ *In the Matter of Rules and Regulations Implementing the Junk Fax Prevention Act of 2005*, Comments by Westfax, Inc., CG Docket No. 05-338 (Jan. 18, 2006) at 13 (“Westfax JFPA Comments”).

¹⁶ *Id.* at 3.

information required” and (2) “[s]tandardize the identification and opt out requirements so they may be automatically ‘stamped’ on all facsimile advertisements.”¹⁷

Several fax advertisers urged the Commission to rule that permission may be “obtained by means other than a signed written statement.”¹⁸ For example, Staples—one of the petitioners here—asked the Commission to “interpret broadly” the JFPA’s addition of the words “or otherwise” and allow “oral permission” to receive fax advertisements.¹⁹ Staples explained it would benefit from a relaxed rule for obtaining permission because it “uses facsimiles advertisements as part of a comprehensive marketing program to communicate with both existing and potential customers.”²⁰ Staples also represented that it “strives to implement immediately any do-not-fax request it receives, and usually is able to do so within 30 days,” agreeing the Commission’s proposed 30-day period to honor opt-out requests was reasonable.²¹

Industry commenters insisted opt-out requests should be effective only if the consumer complies with the sender’s instructions in the opt-out notice on the fax. For example, the National Federation of Independent Businesses argued that “[t]he sender should only be required to honor a request made by the method prescribed in the opt-out notice” and that “[i]f a recipient contacts the sender by another means then the sender should not be liable if the recipient continues to receive faxes.”²²

¹⁷ *Id.* at 12.

¹⁸ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3812 ¶ 45 (rel. Apr. 6, 2006) (“2006 Junk Fax Order”).

¹⁹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, Comments of Staples, Inc., CG Docket No. 02-278, 05-338 (Jan. 18, 2006) (“Staples JFPA Comments”) at 6–7.

²⁰ *Id.* at 1.

²¹ *Id.* at 6.

²² *In re: Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991*, 47 FCR Part 64 (Dkt No 02-278), Comments of National Federation of Independent Businesses (Jan. 18, 2006) at 5.

C. The Commission regulations implementing the JFPA.

On April 5, 2006, the Commission issued its regulations implementing the JFPA.²³ In response to the suggestions by Staples and others that it allow senders to obtain permission orally, the Commission stated it was “concerned that permission not provided in writing may result in some senders erroneously claiming they had the recipient’s permission to send facsimile advertisements.”²⁴ Nevertheless, the Commission agreed to allow oral permission, with the warning that “the burden of proof rests on the sender to demonstrate that permission was given.”²⁵ The Commission also agreed with industry commenters that an opt-out request “must be made using the telephone number, facsimile number, website address or email address provided by the sender in its opt-out notice.”²⁶ It granted industry requests to impose an obligation on the consumer to “identif[y] the telephone number or numbers of the telephone facsimile machine or machines to which the request relates.”²⁷

In exchange for these concessions, the Commission imposed one requirement: that prior express permission is valid only “until the consumer revokes such permission by sending an opt-out request to the sender”²⁸ and that the fax advertiser must give the consumer “the necessary tools to easily opt-out of unwanted faxes”—*i.e.*, to “revoke” prior permission.²⁹ Accordingly, the Commission issued the regulation challenged in this proceeding, § 64.1200(a)(4)(iv),³⁰ which states, “[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or

²³ 2006 Junk Fax Order ¶ 1.

²⁴ *Id.* ¶ 46.

²⁵ *Id.*

²⁶ *Id.* ¶ 34.

²⁷ 47 C.F.R. § 64.1200(a)(4)(v)(A).

²⁸ 2006 Junk Fax Order ¶ 46.

²⁹ *Id.* ¶ 42.

³⁰ The opt-out regulations were originally codified in § 64.1200(a)(3), which was renumbered to § 64.1200(a)(4) in October 2013.

permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.”³¹

The Commission reiterated in its order accompanying the regulation 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.”³² The rule requires the opt-out notice to be “clear and conspicuous” and inform the consumer both of the right to make an opt-out request and the details of *how* to make an effective request.³³ The Commission stated in its order, “the benefits to consumers of having opt-out information readily available outweigh any burden in including such notices.”³⁴ It also published a consumer guide on its website, explaining, “[s]enders of permissible fax advertisements (those sent under an EBR or with the recipient’s prior express permission) must provide notice and contact information on the fax that allows recipients to ‘opt-out’ of future faxes.”³⁵ Finally, the Commission noted the “interplay” between the existing identification requirements for fax messages and the new notice requirements, concluding, “senders that provide their telephone number and facsimile number as part of the opt-out notice will satisfy the Commission’s identification rule so long as they also identify themselves by name on the facsimile advertisement.”³⁶

The Commission issued public notice of the opt-out regulations on July 27, 2006, announcing that the new rules “require the sender of a facsimile advertisement to provide specified notice and contact information on the facsimile that allows recipients to ‘opt-out’ of any future

³¹ 47 C.F.R. § 64.1200(a)(4)(iv).

³² 2006 Junk Fax Order ¶ 47.

³³ 47 C.F.R. § 64.1200(a)(4)(iii).

³⁴ 2006 Junk Fax Order ¶ 42.

³⁵ <http://www.fcc.gov/guides/fax-advertising> (last modified June 21, 2013).

³⁶ 2006 Junk Fax Order ¶ 33.

facsimile transmissions from the sender” and that the opt-out notice must “specify the circumstances under which a request to ‘opt-out’ complies with the Junk Fax Prevention Act.”³⁷ That language is verbatim from the Commission’s request for comments seven months earlier.³⁸ The order cites § 227 for its statutory authority.³⁹ The effective date of the new rules (August 1, 2006) was published in the Federal Register.⁴⁰

No interested party petitioned the Commission to reconsider its statutory authority to adopt the opt-out rule within the 30-day period required by 47 U.S.C. § 405(a) and Commission Rule 1.429(d). No party sought judicial review of the rule within the time period required by 47 U.S.C. § 402(a) or the Hobbs Act.⁴¹

D. The Commission’s prior rejections of challenges to the opt-out rule.

On November 30, 2010, more than four years after the Commission adopted the opt-out rule, Anda, Inc. filed a petition challenging the Commission’s statutory authority for the rule.⁴² Anda styled its petition as a request for a declaratory ruling “clarifying” that § 227 was not the source of the Commission’s authority (a ruling Anda perceived would retroactively insulate it from liability in a pending TCPA case by erasing the private right of action).⁴³ Anda argued that § 227 “authorizes the

³⁷ *Consumer & Governmental Affairs Bureau Announces August 1st Effective Date of Amended Facsimile Advertising Rules*, CG Docket Nos. 02-278, 05-338, Public Notice, DA 06-1530 (rel. July 27, 2006).

³⁸ JFPA NPRM ¶ 7.

³⁹ 2006 Junk Fax Order ¶ 64.

⁴⁰ 71 Fed. Reg. 42297.

⁴¹ 47 U.S.C. § 402(a); 28 U.S.C. § 2342.

⁴² *Petition for Declaratory Ruling to Clarify that 47 U.S.C. § 227(b) was not the Statutory Basis for Commission’s Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient’s Prior Express Consent*, Petition for Declaratory Ruling (Nov. 30, 2010) (“Anda Petition”).

⁴³ Anda Pet. at 8.

Commission to adopt opt-out notice rules only for *unsolicited* fax advertisements,” complaining that the courts had “erroneously concluded” it was the source for the rule.⁴⁴

The Commission’s Consumer & Governmental Affairs Bureau denied Anda’s petition for three reasons. First, it ruled there was no “controversy” or “uncertainty” for the Commission to resolve regarding the source of statutory authority for the rule, as required under Commission Rule 1.2.⁴⁵ The 2006 Junk Fax Order adopting the opt-out regulation, the order stated, clearly specified § 227 as the statutory basis for the rule.⁴⁶ Second, the order concluded that, to the extent the petition was a challenge to the Commission’s statutory authority, it was “an improper collateral challenge to the rule that should have been presented in a timely petition for reconsideration” of the 2006 Junk Fax Order.⁴⁷ The time period for such reconsideration had long since passed by the time Anda filed its petition in November 2010.⁴⁸

Third, although the petition was dismissed on procedural grounds, the order addressed the argument that the Commission lacked authority to adopt the opt-out-notice rule on the merits, stating the argument was “unpersuasive” because the 2006 Junk Fax Order “specifically tied the opt-out notice to the purposes of section 227.”⁴⁹ The order noted that the TCPA prohibits faxes sent without “prior express invitation or permission,” but it “does not define” that term.⁵⁰ Since “agencies have authority to fill gaps where the statutes are silent,” the order explained, the 2006 Junk Fax Order “properly addressed how such prior express permission can be obtained from, *and revoked*

⁴⁴ *Id.* at 2.

⁴⁵ *Petition for Declaratory Ruling to Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission’s Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient’s Prior Express Consent*, Order, CG Docket No. 05-338 (May 2, 2012) (“Anda Order”) ¶ 5.

⁴⁶ Anda Order ¶ 5.

⁴⁷ *Id.* ¶ 6.

⁴⁸ *Id.*

⁴⁹ *Id.* ¶ 7.

⁵⁰ *Id.*

by, a consumer in that context.”⁵¹ It emphasized that, although a sender need only secure permission once, that permission is valid only “until the consumer revokes such permission by sending an opt-out notice to the sender.”⁵² Opt-out notice is essential, the order states, “to ensure that the consumer has the necessary contact information to opt out of future fax transmissions (*i.e.*, revoke prior permission to send such fax advertisements)” and “to ensure that the fax sender can account for all such requests and process them in a timely manner by ensuring that consumers use the contact information specified by the sender of the opt-out notice.”⁵³ With its conclusion that the Commission securely “tied the opt-out notice requirement to the purposes of section 227,” the petition was dismissed.⁵⁴

In *Nack v. Walburg*, a private TCPA action, the defendant—one of the petitioners here—asked the court to rule that the Commission could not have adopted the opt-out rule pursuant to § 227, the same argument rejected in the *Anda* Order.⁵⁵ The Eighth Circuit invited the Commission’s views, and it filed an amicus brief explaining that the opt-out rule for faxes sent with permission was “promulgated under the grant of authority that Congress gave the FCC under . . . Section 227(b)(2)”⁵⁶ and that the rule was tied to § 227(b) in that it “allow[s] consumers to stop unwanted faxes in the future.”⁵⁷ It also stated the defendant’s argument against a private right of action was “a thinly veiled challenge” to the rule’s validity and was barred by the Hobbs Act.⁵⁸ The Commission reasoned the defendant’s challenge could be brought only (1) in a timely petition for reconsideration, the time for which had long since passed, as in *Anda*, (2) in a petition to the Commission to amend

⁵¹ *Id.* (citing *Nat’l Cable & Telecomms. Ass’n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002)).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 715 F.3d 680, 682 (8th Cir. 2013).

⁵⁶ Comm’n Amicus Br., *Nack v. Walburg*, No. 11-1460 (8th Cir), 2012 WL 725733, at 20.

⁵⁷ *Id.* at 6.

⁵⁸ *Id.* at 20.

or repeal the statute prospectively, or (3) in response to an FCC order against the defendant.⁵⁹ The Eighth Circuit held the Commission’s “rationale for the regulation, as set forth in the 2006 Order and as discussed in the FCC’s amicus brief, arguably brings the regulation within range of what § 227(b) authorized the FCC to regulate” and rejected the challenge as barred by the Hobbs Act.⁶⁰

III. The petitioners’ requests for retroactive immunity in pending private TCPA litigation should be denied.

All nine petitioners ask the Commission for a retroactive declaratory ruling that the Commission lacked statutory authority to adopt § 64.1200(a)(4)(iv) under § 227, a ruling they hope to use to escape liability in pending private litigation.⁶¹ Eight of the petitioners—not Staples—ask the Commission to grant retroactive waivers for the same purpose.⁶² Petitioners cite no authority for this extraordinary relief, and they are not entitled to it.

A. Petitioners’ request for a declaratory ruling that the Commission lacked authority to adopt the rule under § 227 should be denied for the same reasons as the Anda Petition.

All the petitioners seek a declaratory ruling under 47 C.F.R. § 1.2(a) that the rule is not authorized by § 227. This is exactly the same relief sought in the Anda Petition,⁶³ and the petitions here should be dismissed for the same reasons: (1) there is no “controversy” or “uncertainty”

⁵⁹ *Id.* at 20, 22.

⁶⁰ *Nack*, 715 F.3d at 687.

⁶¹ All Granite Pet. at 6–9; Forest Pet. at 12–16; Futuredontics Pet. at 6–13; Gilead Pet. at 12–17; Prime Health Pet. at 7–13; Purdue Pharma Pet. at 8–12; Staples Pet. at 17–20; TechHealth Pet. at 7–13; Walburg Pet. at 7–13.

⁶² All Granite Pet. at 10; Forest Pet. at 11–12; Futuredontics Pet. at 13–14; Gilead Pet. at 11–12; Prime Health Pet. at 13–15; Purdue Pharma Pet. at 17–19; TechHealth Pet. at 15–16; Walburg Pet. at 13–14.

⁶³ *E.g.*, Anda Pet. at 1 (arguing § 227 “authorizes the Commission to adopt opt-out notice rules only for *unsolicited* fax advertisements”); *id.* at 2 (arguing courts have “erroneously concluded that the rule arises out of Section 227(b)”); *id.* at 3 (seeking declaratory ruling that § 227 “authorizes such a requirement only for *unsolicited* fax advertisements”); *id.* at 15 (“[T]he Commission cannot permit courts to proceed under the erroneous assumption that it promulgated [the rule] pursuant to Section 227(b) of the Act, as that provision does not supply the requisite authority.”).

requiring resolution, (2) the time period to challenge the Commission’s authority retroactively has long since expired, and (3) the Commission securely “tied the opt-out notice requirement to the purposes of section 227.”⁶⁴

1. The petitions do not present any “controversy” or “uncertainty” for the Commission to resolve.

Under Rule 1.2(a), the Commission may “issue a declaratory ruling terminating a controversy or removing uncertainty.” As the Anda Order found, there is no genuine controversy or uncertainty over whether the Commission relied on § 227 in adopting the opt-out rule.⁶⁵ The 2006 Junk Fax Order cites § 227 for its statutory authority.⁶⁶ It goes on to explain that the rule is part of a set of rules taking an undefined statutory term, “prior express invitation or permission,” and defining its contours by specifying (1) how a sender may obtain such permission, (2) what the sender must do to maintain that permission (include opt-out instructions), and (3) how the consumer may revoke that permission (follow the opt-out instructions).⁶⁷ The rule “implement[s]” the statutory definition, as Congress directed the Commission to do in § 227.⁶⁸ The Commission reiterated that position in its amicus brief in *Nack*.⁶⁹

Petitioners argue the Anda Order was wrongly decided because the 2006 Junk Fax Order “cited 11 separate statutory provisions—including Section 227,” and assert that it is unclear which one provides the authority for the rule.⁷⁰ That argument myopically focuses on the ordering clauses

⁶⁴ Anda Order ¶¶ 5–7.

⁶⁵ *Id.* ¶ 5.

⁶⁶ 2006 Junk Fax Order ¶ 64.

⁶⁷ *Id.* ¶¶ 46–47.

⁶⁸ 47 U.S.C. § 227(b)(2).

⁶⁹ Comm’n Amicus Br. at 20 (explaining statutory basis for rule was Congress’s direction to “prescribe regulations to implement the requirements of this subsection” under § 227(b)(2)).

⁷⁰ Forest Pet. at 15; *see also* All Granite Pet. at 9; Futuredontics Pet. at 12; Gilead Pet. at 16; Prime Health Pet. at 12; Purdue Pharma Pet. at 12; TechHealth Pet. at 14; Walburg Pet. at 12.

at the end of the order and ignores the body of the order explaining the context of the opt-out rule. No one reading the order as a whole could be confused that the Commission issued the opt-rule pursuant to § 227.

2. The request for declaratory ruling is time-barred.

Like the Anda Petition, the petitions here present “an improper collateral challenge” that can be raised only in a petition for reconsideration under 47 U.S.C. § 405(a).⁷¹ This principle long predates the dismissal of the Anda Petition. For example, in *In re Sioux Valley Rural Television, Inc.*,⁷² the Commission held a petition challenging certain bidding rules on constitutional and procedural grounds was a collateral attack on the validity of a rule required to be raised in a petition for reconsideration. Under Commission Rule § 1.429(d), a petition for reconsideration must be filed within 30 days of the date of public notice of the action. “Collateral challenges to agency regulations made outside the applicable statutory limitations period are not permitted” because they “would undermine Congress’ determination that the agency’s interest lies in the prompt review of agency regulations and the notion of finality.”⁷³

The Anda Petition was untimely because public notice of the regulation was issued April 5, 2006, while the Anda Petition “was not filed until November 30, 2010, over four year later.”⁷⁴ The earliest-filed petition here (Forest) was filed June 27, 2013, two-and-a-half years after the Anda

⁷¹ Anda Order ¶ 6.

⁷² 17 FCC Rcd. 19344, 19349 ¶ 13 (rel. Oct. 9, 2002); *see also id.* ¶ 9 (petitioner alleged “remedial bidding credit violates its equal-protection rights because the Commission limited the retroactive application of the credit to small businesses; the ‘conversion’ of race- and gender-based bidding credit to a small business bidding credit is impermissibly motivated because it retains the original race- and gender-based preferences; no record has been established to support the adoption of the small business bidding credit or the rationale for limiting it to small businesses; and the adoption of the remedial bidding credit violated the notice and comment requirement of the Administrative Procedure Act (‘APA’)”).

⁷³ *Id.* ¶ 13.

⁷⁴ Anda Order ¶ 6.

Petition. It should have been filed more than seven years ago. All of the petitions are time-barred to the extent they seek declaratory rulings regarding the statutory basis for the opt-out rule.

Of the nine petitioners, only Staples attempts to grapple with the portion of the Anda Order finding the challenge time-barred.⁷⁵ The other eight petitioners ignore the Anda Order entirely,⁷⁶ or address only the order's ruling that there was no "controversy" or "uncertainty" regarding the statutory basis for the opt-out rule.⁷⁷

Staples concedes the Anda Petition was untimely, but it attempts to distinguish its petition from Anda's on two grounds. First, it argues the Anda Petition merely questioned the "statutory basis" for the rule, whereas Staples questions whether the rule "actually and properly requires" opt-out notice on faxes sent with permission.⁷⁸ That is no distinction at all. Whether the rule "actually" requires opt-out language on permission-based faxes is indisputable. That is why Staples is attacking it—the rule plainly requires opt-out notice on faxes sent with permission. Staples's real argument is that the rule does not "properly" require opt-out notice because it exceeds the Commission's authority under § 227(b).⁷⁹ That is precisely the "collateral challenge" raised in the Anda Petition and rejected as time-barred in the Anda Order.⁸⁰

Second, Staples argues its petition is different because "[w]hereas Anda sought only a declaratory ruling, Staples also seeks prospective relief" through repeal.⁸¹ Staples cites no authority for the proposition that coupling an improper collateral attack with a request for repeal transforms

⁷⁵ Staples Pet. at 19.

⁷⁶ All Granite Pet. at 1–11; Forest Pet. at 1–17.

⁷⁷ Futuredontics Pet. at 6 n.17; Gilead Pet. at 15–16; Prime Health Pet. at 7, n.18; Purdue Pharma Pet. at 11–12; TechHealth Pet. at 14; Walburg Pet. at 7, n.19.

⁷⁸ Staples Pet. at 19.

⁷⁹ *Id.*

⁸⁰ Anda Order ¶ 6.

⁸¹ Staples Pet. at 19.

the attack into something else. No matter how many other claims Staples tags on, its request for declaratory ruling is indistinguishable from Anda's request in 2010, and it is time-barred.

Staples also asserts it “could not have known in 2006” that it “might potentially be subject to class-action lawsuits for failure to include opt-out notices” and that it “should not now be penalized for failing to appeal the order adopting Rule 64.1200(a)(4)(iv) at that time.”⁸² But Staples participated in the rulemaking process in 2006, submitting comments on the opt-out rules, including the standards for “clear and conspicuous” notice and whether a 30-day period to honor opt-out requests was reasonable.⁸³ The public notice Staples responded to sought comment on whether the sender of “a facsimile advertisement”—not just “an *unsolicited* facsimile advertisement”—should be required to include opt-out notice.⁸⁴ At least one other commenter directly addressed that question, suggesting that “opt out notice should be included on all facsimile advertisements.”⁸⁵

Even if Staples could be excused for not anticipating the opt-out rule prior to its adoption, it had actual notice of it after the Commission issued the regulation and the 2006 Junk Fax Order. The rule states unequivocally that a fax sent with “prior express invitation or permission . . . must include an opt-out notice”⁸⁶ If there were any doubt after reading the regulation, the 2006 Junk Fax Order provides the Commission's underlying rationale, explaining that it gave fax advertisers nearly everything they asked for—imposing no limits on how “prior express invitation or permission” may be obtained and requiring consumers to opt out using the method specified by the sender on the fax

⁸² *Id.* at 22. Staples makes this assertion in its argument that the courts should decide the validity of the rule notwithstanding the Hobbs Act. The Commission directed commenters not to respond to that issue, since it “does not request any specific Commission action” *Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements*, Public Notice (rel. Jan. 31, 2014) at 2, n.8.

⁸³ Staples JFPA Comments at 5–6; *see also* Section II.B, above, discussing Staples's involvement in the JFPA rulemaking process.

⁸⁴ JFPA NPRM ¶ 7.

⁸⁵ Westfax JFPA Comments at 13.

⁸⁶ 47 C.F.R. § 64.1200(a)(4)(iv).

and to identify the affected fax number.⁸⁷ In exchange, the Commission ruled that “the burden of proof rests on the sender to demonstrate that permission was given” and that permission is valid only “until the consumer revokes such permission by sending an opt-out request to the sender.”⁸⁸ The opt-out rule merely gives consumers “the necessary tools” they need to revoke permission.⁸⁹

The only reasonable conclusion from the record is that Staples read the opt-out regulation and implementing order in 2006 and waived its right to challenge it in a petition for reconsideration. That Staples has since changed its mind does not alter the conclusion that its request for declaratory ruling is time-barred. As the Commission explained in its supplemental amicus brief in *Nack*, Staples and the other petitioners are subject to civil liability only because “they chose to violate a binding FCC rule in effect at the time without first challenging its lawfulness.”⁹⁰ If they had “contested the validity of section 64.1200(a)(4)(iv) under the Hobbs Act, and prevailed in that challenge before engaging in conduct that may have violated the rule, they would not be subject to liability in a private civil action.”⁹¹

3. The opt-out rule is reasonably tied to the purposes of enabling consumers to opt out of faxes and ensuring that senders honor opt-out requests.

The Anda Order ruled the challenge to the Commission’s authority to adopt the opt-out-notice rule was “unpersuasive” on the merits because the 2006 Junk Fax Order “specifically tied the opt-out notice to the purposes of section 227.”⁹² It explained the TCPA prohibits faxes sent without “prior express invitation or permission” but “does not define” that term, giving the Commission

⁸⁷ 2006 Junk Fax Order ¶ 34.

⁸⁸ *Id.* ¶ 46.

⁸⁹ *Id.* ¶ 47.

⁹⁰ *Nack v. Walburg*, No. 11-1460 (8th Cir.), Comm’n Supp. Amicus Br. (Aug. 21, 2012) at 13.

⁹¹ *Id.*

⁹² Anda Order ¶ 7.

authority to fill in the gaps to prescribe “how such prior express permission can be obtained from, and revoked by, a consumer in that context.”⁹³

The Commission relied on *Nat’l Cable & Telecomms. Ass’n v. Gulf Power Co.*, in which the Court held the Commission had authority to “fill gaps” in the Communications Act to set rates for pole attachments used by cable systems to provide cable service.⁹⁴ Three years later, in *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, the Court held that where “the relevant definitions” did not settle the question of how to classify certain telecommunications service providers, “[t]hat silence suggests . . . that the Commission has the discretion to fill the consequent statutory gap.”⁹⁵ As in *Gulf Power* and *Brand X*, the Commission here filled in statutory gaps in the TCPA to prescribe how a sender may obtain “prior express invitation or permission” (any means), what a sender must do to maintain such permission (include opt-out notice on its faxes), and how a consumer can revoke that permission (follow the instructions in the opt-out notice). It acted squarely within its statutory authority in doing so.

B. The Commission should not declare that “substantially compliant” opt-out notices satisfy the rule.

Three petitioners ask the Commission to “interpret” the rule to provide that faxes containing “substantially compliant” opt-out notice do not violate § 64.1200(a)(4)(iv).⁹⁶ The plain language of the rule forecloses such an interpretation. The rule states that a fax advertisement sent with permission “must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii),” and paragraph (a)(4)(iii) states a notice complies “only if” it is clear and conspicuous and conveys specific instructions on how to avoid future fax advertisements. A substantial-compliance

⁹³ *Id.*

⁹⁴ 534 U.S. 327, 339 (2002).

⁹⁵ 545 U.S. 967, 996–97 (2005).

⁹⁶ Forest Pet. at 10; Gilead Pet. at 9–10; Purdue Pharma Pet. at 13–16.

standard would render the “only if” language superfluous—a result that is impermissible under well accepted rules of statutory and regulatory construction,⁹⁷ and the TCPA’s nature as a strict-liability statute.⁹⁸

Allowing substantial compliance would also conflict with the Commission’s ruling in *In re Response Card Marketing, Inc.*,⁹⁹ where the Commission confirmed that an opt-out notice is insufficient if it “does not satisfy *all* of the statutory and regulatory requirements” and rejected the notion that a party can avoid liability on the grounds that it substantially complied. The opt-out notice on the fax in *Response Card* stated, “Fax removals are easy! 24 hour automated service, call 1-888-662-2677 and enter your reference ID . . . and you will be removed immediately.”¹⁰⁰ The Commission found the opt-out notice inadequate because (1) it did not contain a fax number for opt-out requests, (2) it did not state the consumer must provide the particular telephone number to which the opt-out request relates, and (3) it did not inform the consumer that an opt-out request becomes ineffective if the consumer later consents to receiving fax advertisements from the sender.¹⁰¹ Having made these specific findings, the Commission underscored that because the opt-out notice “did not meet *all*” of the requirements, the sender could not rely on that exception to shield it from TCPA liability.¹⁰²

Also, a federal district court recently rejected a motion to dismiss based on an argument that “substantial compliance with the TCPA’s opt-out requirements is a valid defense.”¹⁰³ The Court rejected the argument, ruling that “[b]y not including this information in its opt-out notice,

⁹⁷ *E.g.*, *Ransom v. FLA Card Servs., N.A.*, 131 S. Ct. 716, 724 (2011); *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004) (holding, “we must give effect to every word of a statute whenever possible”); *Cammarano v. United States*, 358 U.S. 498, 505 (1959) (refusing to read language in regulation as surplusage).

⁹⁸ *See, e.g.*, *Penzer v. Transp. Ins. Co.*, 545 F.3d 1303, 1311 (11th Cir. 2008).

⁹⁹ 27 F.C.C.R. 3895, 3897 ¶¶ 6, 7 (Apr. 10, 2012)

¹⁰⁰ *Id.* ¶ 8.

¹⁰¹ *Id.* ¶¶ 9–10.

¹⁰² *Id.* ¶¶ 11–12.

¹⁰³ *Bais Yaakov of Spring Valley v. Alloy, Inc.*, 936 F. Supp. 2d 272, 287 (S.D.N.Y. 2013).

Defendants failed to satisfy the terms of Section 227(b)(2)(D) and Section 64.1200(a)([4])(iii).¹⁰⁴ In sum, a declaratory ruling allowing substantial compliance with the opt-out rules would run afoul of the unambiguous regulations, the Commission’s prior ruling on the issue in *Response Card*, and the judicial decisions on point. The petitioners are not entitled to such relief.

C. The Commission should not grant any retroactive waivers pursuant to Commission Rule § 1.3.

Each of the petitioners except Staples asks the Commission to grant it a retroactive waiver of compliance with the opt-out rule from its inception to the present.¹⁰⁵ The petitioners plan to take those waivers to the courts where they are defending private TCPA actions, present those waivers to the judge, and ask the court to dismiss the case.¹⁰⁶ No petitioner cites any Commission proceeding or judicial decision where the Commission (or any other agency) has granted a waiver expressly for the purpose of absolving a private litigant from liability.¹⁰⁷ Plaintiff’s counsel were unable to find any such authority.

The Commission is not tasked with deciding which private TCPA actions should survive and which should not. Of course, the Commission has broad authority to grant waivers from *Commission* enforcement, but that does not extend to private TCPA actions, at least the petitioners have not provided any authority for that proposition. The only authority cited by the petitioners is *Rath Microtech Complaint Regarding Elec. Micro Sys., Inc.*¹⁰⁸ In that order, the Commission “decline[d] to take enforcement action” against a manufacturer of emergency elevator telephones based on a complaint

¹⁰⁴ *Id.* at 288.

¹⁰⁵ All Granite Pet. at 10; Forest Pet. at 11–12; Futuredontics Pet. at 13–14; Gilead Pet. at 11–12; Prime Health Pet. at 13–15; Purdue Pharma Pet. at 17–19; TechHealth Pet. at 15–16; Walburg Pet. at 13–14.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Forest Pet. at 11–12; Gilead Pet. at 11–12; Prime Health Pet. at 14; Purdue Pharma Pet. at 18; Walburg Pet. at 14.

filed by one of its competitors alleging the manufacturer mislabeled the phones it sold over a six-month period.¹⁰⁹ The Commission granted a conditional waiver because, otherwise, “the purchasers of the more than ten thousand elevator telephones would have to remove their existing telephones and install new ones”¹¹⁰ The Commission was guided by the “the potential gain in consumer choice and value,” observing there had been “no report of any complaints” and that “the magnitude of this inconvenience to the telephone purchasers would be unjustified” since “no harm has occurred or is likely to occur” as a result of the mislabeling.¹¹¹ The Commission did not issue the waiver to help a civil defendant avoid liability in a private lawsuit; it issued it to protect consumers.

TechHealth relies on *In re Chillicothe Tel. Co.*,¹¹² an order in which the Commission granted waivers from deadlines to file for certain refunds, finding the parties had provided good reason for their failure, that they filed shortly after the deadline, and that they had revised their internal procedures to prevent future problems.¹¹³ It did not involve a waiver granted for the express purpose of avoiding liability in private litigation. In sum, the petitioners have provided no authority supporting their request for waivers to immunize them from liability in pending civil litigation.

Even if the petitions had been filed in the context of Commission enforcement proceedings, as in *Rath Microtech* and *Chillicothe Tel. Co.*, the petitioners do not meet the demanding standard of “good cause” required, such as showing how a waiver would protect consumers, why they failed to comply with the law, or what steps they have taken to avoid future violations.¹¹⁴ A party seeking a waiver from Commission enforcement must show “special circumstances” and “articulate a specific

¹⁰⁹ 16 FCC Rcd 16710, 16714 ¶ 11 (Network Servs. Div. 2005).

¹¹⁰ *Id.* ¶ 17.

¹¹¹ *Id.* ¶ 16, 20.

¹¹² TechHealth Pet. at 15.

¹¹³ WC Docket No. 08-71, 2013 F.C.C. LEXIS 4213 n.17 (Oct. 29, 2013).

¹¹⁴ 47 C.F.R. § 1.3.

pleading” with “concrete support,” preferably documentary.¹¹⁵ Before the Commission will invoke the good-cause exception, it must (1) “explain why deviation better serves the public interest” and (2) “articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.”¹¹⁶ The public-interest element requires that “there must be a stronger public interest benefit in granting the waiver than in applying the rule.”¹¹⁷ An applicant must “plead with particularity the facts and circumstances” supporting a waiver.¹¹⁸ The Commission “need go no further” if the petitioner fails “in its obligation to plead with particularity the facts and circumstances warranting its requested relief.”¹¹⁹

Here, the petitioners have failed to provide concrete evidentiary support for a waiver, much less articulate a strong public interest. At best, they have established that a waiver is in *their* best interests. No public interest would be served by allowing fax advertisers to avoid informing consumers of the only effective method of opting out of receiving fax advertisements.¹²⁰ Awarding waivers based on the magnitude of the petitioners’ violations would reward entities that have engaged in massive violations of the law and favor them over entities who committed the resources to complying, resulting in the type of “discriminatory application” of waivers the courts have warned against.¹²¹

¹¹⁵ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 n.9 (D.C. Cir. 1969); *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008).

¹¹⁶ *NetworkIP*, 548 F.3d at 127.

¹¹⁷ *In the Matter of Curtiss-Wright Controls Inc.*, 27 FCC Rcd. 234 ¶ 8 (2012).

¹¹⁸ *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968).

¹¹⁹ *In the Matter of Section 68.4(a) of the Comm’n’s Rules Governing 29 Hearing Aid-compatible Telephones*, 23 FCC Rcd. 3352 (2008) ¶ 7.

¹²⁰ 42 C.F.R. § 64.1200(a)(4)(vi) (allowing sender to ignore opt-out requests that do not comply with all the requirements of § 64.1200(a)(4)(v)).

¹²¹ *NetworkIP, LLC*, 548 F.3d at 127.

IV. Staples's request for prospective repeal of the opt-out-notice rule should be denied.

Only Staples asks the Commission to repeal the opt-out regulation. Including a few extra words in its faxes going forward appears to conflict with its “comprehensive marketing program” to send fax advertisements to its “existing and potential customers.”¹²² There is no suggestion Staples intends to change its practices to comply with the law. Instead, it asks the Commission to change the law to comply with its practices. The Commission has no obligation to do so. Nor should it.

A. The rule is squarely within the Commission's authority under § 227.

Staples characterizes the rule as “regulat[ing] solicited fax advertisements.”¹²³ That is inaccurate because there is no such thing as a “solicited fax advertisement.” There are fax advertisements sent *without* “prior express invitation or permission,” which meet the statutory definition of “unsolicited advertisement,” and fax advertisements sent *with* such permission, which are exempted from the definition. The relevant question, therefore, is whether the Commission has authority to regulate what constitutes “prior express invitation or permission,” an undefined term. Congress granted it that authority under § 227(b), and the Commission exercised that authority in a reasonable way in setting the parameters of how permission to receive fax advertisements may be obtained, maintained, and revoked.

B. Repealing the rule would undermine the consumer's ability to opt out of future advertisements and allow senders to ignore opt-out requests for failure to comply with the requirements of the remaining rules.

Staples seeks repeal only of § 64.1200(a)(4)(iv), the rule requiring a sender to include opt-out notice on faxes sent with permission.¹²⁴ It does not seek repeal of § 64.1200(a)(4)(v), the rule

¹²² Staples JFPA Comments at 1.

¹²³ Staples Pet. at 8.

¹²⁴ *Id.* at 7–16.

imposing obligations on the *consumer* in making an opt-out request.¹²⁵ To effectively opt out, that rule requires a consumer to (1) “identif[y] the telephone number or numbers of the telephone facsimile machine or machines to which the request relates” and (2) direct the request to “the telephone number, facsimile number, Web site address or email address identified in the sender’s facsimile advertisement” It further states an opt-out is effective only if the consumer “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.”¹²⁶ A sender is required to honor an opt-out request only if it “complies with paragraph (a)(4)(v) of this section,” and is free to ignore it otherwise.¹²⁷

Staples admits that, “[b]ut for the FCC’s Rule,” it “would not include such opt-out notices” on faxes where it claims to have prior express invitation or permission.¹²⁸ It claims, however, that the pre-JFPA requirement that a fax identify the number of the sending machine and the name of the sender provides consumers with “a simple way of opting out of future messages from a sender from whom they previously invited a fax advertisement.”¹²⁹ That is not the case because, with § 64.1200(a)(4)(v) still in place, fax advertisers will be free to ignore opt-out requests that do not comply with the regulation. Since one of the requirements for an effective opt-out request is that the consumer transmit the request according to the means “identified in the sender’s facsimile advertisement,” the consumer is caught in a Catch-22 if there are no opt-out instructions on the fax. No matter what steps the consumer takes to opt-out, the sender can simply claim the plaintiff did not effectively opt out, since there was no prescribed method on the fax. A consumer cannot follow

¹²⁵ *Id.*

¹²⁶ 47 C.F.R. § 64.1200(a)(4)(v)(C).

¹²⁷ *Id.* § 64.1200(a)(4)(vi).

¹²⁸ Staples Pet. at 11.

¹²⁹ *Id.* at 15.

instructions that do not exist. The only thing preventing this absurd result is the private right of action for a sender's failure to include compliant opt-out instructions under § 64.1200(a)(4)(iv). If that provision is excised from the regulations, as Staples requests, it will cause an avalanche of opt-out-free fax advertisements, both with permission and without.

C. The opt-out-notice requirement does not violate the First Amendment.

Each petitioner argues that requiring a sender who has obtained permission to send fax advertisements provide opt-out notice as a condition of maintaining that permission violates the First Amendment.¹³⁰ As argued below, the petitioners' arguments fail because the rule easily satisfies either the "reasonable relation" test or the "intermediate scrutiny" test. It is not subject to "strict scrutiny," as Staples contends.

1. The rule is not subject to strict scrutiny.

Of the nine petitioners, only Staples argues the opt-out rule is subject to "strict scrutiny."¹³¹ It offers no authority for that proposition.¹³² Instead, it cites portions of dissents and concurring opinions in cases having nothing to do with the TCPA in which all but one court rejected First Amendment challenges to a variety of statutes and rules.¹³³

In the sentence in which Staples claims strict scrutiny applies, it cites *Riley v. Nat'l Fed. of Blind of N.C., Inc.*, 587 U.S. 781, 796–97 (1988).¹³⁴ That case held strict scrutiny applied to a state law

¹³⁰ All Granite Pet. at 8; Forest Pet. at 13; Futuredontics Pet. at 10; Gilead Pet. at 14; Prime Health Pet. at 11; Purdue Pharma Pet. at 9; Staples Pet. at 12–13; TechHealth Pet. at 12; Walburg Pet. at 11.

¹³¹ Staples Pet. at 12.

¹³² *Id.*

¹³³ *Id.* The one case that upheld a First Amendment challenge, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504–05 (1996), involved an absolute ban on advertising liquor prices that the Court reviewed with "special care," since it was a "blanket prohibition" of truthful commercial speech. There is no "blanket prohibition" in the opt-out rule.

¹³⁴ *Id.*

requiring charitable fundraisers to disclose to potential donors “the gross percentage of revenues retained in prior charitable solicitations.”¹³⁵ The Court held the statute was subject to strict scrutiny because, unlike laws regulating purely “commercial speech,” which are subject to “more deferential” standards, the rule requiring fundraisers to disclose their profit from prior fundraising efforts was “inextricably intertwined with otherwise fully protected speech” (*i.e.*, charitable fundraising).¹³⁶ The case has no application here, where the speech involved is commercial advertising, and either the “reasonable relation” test or “intermediate scrutiny” test applies.

2. The rule easily satisfies the “reasonable relation” test.

The Supreme Court precedent most closely on point, *Milavetz, Gallop & Milavetz, P.A. v. United States*,¹³⁷ held that a statute requiring debt-relief agencies to disclose in their advertisements that their services included preparing bankruptcy filings—which have “inherent costs”—was subject to, and passed constitutional muster under, the lowest level of “reasonable relation” scrutiny. The Court reasoned that an advertiser’s First Amendment interest “in *not* providing . . . required factual information is ‘minimal,’” that an “advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers,” and that “the disclosures entail[ed] only an accurate statement identifying the advertiser’s legal status and the character of the assistance provided” and did not prevent the advertiser from “conveying any additional information.”¹³⁸

As with the disclosure requirement upheld in *Milavetz*, fax advertisers have a minimal, if not non-existent, interest in *not* providing opt-out notice. The petitioners contend the notice is a “minor,

¹³⁵ *Riley*, 587 U.S. at 785.

¹³⁶ *Id.* at 796.

¹³⁷ 559 U.S. 229, 249–50 (2010)

¹³⁸ *Id.*

technical,”¹³⁹ even “immaterial”¹⁴⁰ requirement. So their only conceivable interest in not providing it would be to mislead consumers who have not given permission or who would like to revoke their permission into (1) believing that they cannot opt out of future advertisements or (2) being confused about *how* to opt out.

The rule is designed to prevent fax advertisers from misleading consumers in this manner by requiring fax advertisements, even those sent with permission, to inform consumers of their right to opt out and of *how* to opt out. Fax advertisers lobbied for a rule requiring them to honor an opt-out request “only if” the request satisfies certain requirements, which the Commission granted in § 64.1200(a)(4)(v). In exchange, the Commission required fax advertisers to tell consumers what those requirements are in § 64.1200(a)(4)(iv). That disclosure is “reasonably related” to preventing consumer deception and confusion, and the rule easily satisfies the “reasonable relation” standard.

3. The rule satisfies “intermediate scrutiny.”

The Supreme Court applied “intermediate scrutiny” to restrictions on truthful commercial speech in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*¹⁴¹ All eight petitioners other than Staples assert that this standard applies here.¹⁴²

The *Central Hudson* Court recognized the “distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech,” holding the Constitution “accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”¹⁴³ Under *Central Hudson*, commercial

¹³⁹ Forest Pet. at 5; Gilead Pet. at 5.

¹⁴⁰ Purdue Pharma Pet. at 4.

¹⁴¹ 447 U.S. 557, 564 (1980).

¹⁴² All Granite Pet. at 8–9; Forest Pet. at 13; Futuredontics Pet. at 10–11; Gilead Pet. at 14–15; Prime Health Pet. at 11–12; Purdue Pharma Pet. at 9–10; TechHealth Pet. at 12–13; Walburg Pet. at 11–12.

¹⁴³ *Id.* at 562–63.

speech regulations need only be justified by a substantial government interest, directly advance that interest, and be narrowly drawn to serve that interest.¹⁴⁴ The *Central Hudson* standard does not require the legislature to employ “the least restrictive means” necessary to accomplish its interest or to achieve a perfect fit between means and ends.¹⁴⁵ The legislature need only achieve a “reasonable fit” by adopting regulations “in proportion to the interest served.”¹⁴⁶

Plaintiffs are unaware of any published federal court decision addressing a First Amendment challenge to the opt-out rule (and the petitioners do not cite one), but two Circuit Courts have squarely addressed First Amendment challenges to the TCPA’s fax-advertising regime in *Missouri v. American Blast Fax, Inc.*¹⁴⁷ and *Destination Ventures, Ltd. v. FCC.*¹⁴⁸

In *Missouri v. American Blast Fax*, the Eighth Circuit reversed a district court’s holding that the TCPA’s restrictions on unsolicited faxes violated the First Amendment.¹⁴⁹ The Court endorsed the use of the *Central Hudson* test for assessing First Amendment challenges to the TCPA, concluding the TCPA met that test because there is “a substantial governmental interest in protecting the public from the cost shifting and interference caused by unwanted fax advertisements,” that “the means chosen by Congress to address these harms directly and materially advances the governmental interest,” and that the statute was “narrowly tailored to create a reasonable fit with its objective.”¹⁵⁰

¹⁵¹ The Ninth Circuit came to the same conclusion in *Destination Ventures, Ltd. v. FCC*. There, the

¹⁴⁴ *Id.* at 566.

¹⁴⁵ *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

¹⁴⁶ *Id.*

¹⁴⁷ 323 F.3d 649, 660 (8th Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004).

¹⁴⁸ 46 F.3d 54, 57 (9th Cir. 1995).

¹⁴⁹ *Am. Fax Blast*, 323 F.3d at 652.

¹⁵⁰ *Id.* at 660.

¹⁵¹ In *Nack*, 715 F.3d at 682, the Eighth Circuit remarked without substantive discussion that “the analysis and conclusion as set forth in *American Blast Fax* would not necessarily be the same” if applied to a rule

court succinctly ruled that “unsolicited fax advertisements shift significant advertising costs to consumers” and that “[t]herefore, we hold that the ban on unsolicited fax advertisements meets the *Central Hudson* and *Fox* test for restrictions on commercial speech.”¹⁵²

A First Amendment challenge to the opt-out rule under *Central Hudson* fails for the same reasons it failed against the TCPA generally—simply because the opt-out rule is part of a comprehensive scheme governing fax advertising. Fax advertisements are commercial speech, and the opt-out rule is motivated by the same “substantial governmental interest in protecting the public from the cost shifting and interference caused by unwanted fax advertisements” underlying the TCPA as a whole, since it merely defines the circumstances under which a fax advertisement is “unsolicited.” The rule “address[es] these harms directly and materially advances the governmental interest” while merely requiring fax advertisers to place a small notice on their advertisements notifying consumers of how to opt out. It in no way restricts the substantive content of a fax advertisement. As such, the rule is narrowly tailored to accomplish its purpose. Accordingly, even if the opt-out rule were subject to intermediate scrutiny under *Central Hudson*, it would easily pass muster.

V. Conclusion

Every petitioner here has attempted to use the existence of this proceeding to derail the underlying private TCPA actions, seeking indefinite stays from the courts pending the Commission’s decision. There is a serious risk that relevant evidence will be lost or destroyed during the pendency of these stays. Plaintiffs respectfully request the Commission reject the petitions as quickly as possible. If the Commission finds it appropriate, Plaintiffs suggest it might first dispose of the

regarding faxes sent with permission. Since the court declined to address the issue, this gratuitous remark is dicta, and the Commission should disregard it.

¹⁵² *Destination Ventures*, 46 F.3d at 57.

petitioners' requests for retroactive relief to erase their liability in pending civil litigation (*i.e.*, declaratory rulings under Rule 1.2 and waivers under Rule 1.3). It could then address Staples's request for prospective repeal of the rule in a later order. Plaintiffs appreciate the opportunity to comment.

Respectfully submitted,

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