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 Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	

REPLY COMMENTS OF ANDA, INC.

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REPLY COMMENTS OF ANDA, INC.

Anda, Inc. ("Anda") hereby submits these reply comments in response to the opening comments filed pursuant to the Commission's recent Public Notice in the above-captioned proceedings.[1]

INTRODUCTION

The record developed in these proceedings confirms that the Commission's rule requiring opt-out notices on faxes sent with express consent, adopted in 2006 and now codified at 47 C.F.R. § 64.1200(a)(4)(iv), is inconsistent with the governing statute, presents grave First Amendment issues, and poses serious equitable and public interest concerns by subjecting parties engaging in consensual communications to potentially crushing liability. Over a dozen parties—representing both large and small businesses from a wide variety of industry segments—have called for the Commission to take immediate remedial action to address these serious concerns. As Anda has explained, and as all of the petitioners and multiple commenters agree, the Commission can and should grant relief by issuing either a blanket retroactive waiver of the rule or a declaratory ruling clarifying that the rule was not "prescribed under" 47 U.S.C. § 227(b).

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[1] *See* Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338, DA 14-120 (rel. Jan. 31, 2014).

Either path would realign the regulatory regime with the text of Section 227(b) of the Communications Act (the "Act") and the protections of the First Amendment and would help put an end to the rising tide of abusive class action lawsuits under the Commission's rule.

Not surprisingly, the very class action lawyers that are responsible for these lawsuits have filed comments opposing any form of relief under the Commission's rule, including a waiver or declaratory ruling, but their arguments are unavailing. While these commenters variously argue that petitioners' "self-interest" in a waiver should preclude such relief, such arguments are wrong as a matter of law and entirely ignore the unique and substantial equitable and public interest considerations identified in the record in support of a waiver. These commenters also argue that a waiver should be denied because of factual disputes they allegedly have with individual petitioners over whether express consent exists in particular cases—thus apparently missing the point of the petitions, which do not ask the Commission to weigh in on such evidentiary issues, but rather seek a ruling that faxes *found by a trier of fact* to have been sent with express consent need not include the same opt-out notice that is required for unsolicited advertisements. Moreover, these commenters attempt to justify an opt-out notice requirement for solicited faxes on policy grounds, asserting that such notices are necessary to enable consenting recipients of faxes to revoke their consent. But as explained below, the asserted policy benefits are illusory, and in any event cannot overcome the serious legal and equitable concerns posed by the ongoing application of the rule.

Plaintiffs' class action lawyers and allied parties also raise a variety of objections to the declaratory ruling sought by Anda and other petitioners, but these objections are meritless as well. These commenters' assertions that Section 227(b) "directed" the Commission to regulate solicited faxes are belied by the plain language of the statute itself, and their efforts to defend this

strained reading of the statute against First Amendment scrutiny are unavailing. Their alternative argument that the rule was a "gap-filling" measure only confirms that the rule's statutory basis was *not* Section 227(b), but at best was Sections 4(i) and 303(r) of the Act, two grants of ancillary authority that do not give rise to private rights of action. The remaining objections raised by these commenters—that there is no "controversy" or "uncertainty" regarding the rule's statutory basis, and that the petitions constitute "improper collateral attacks" on the rule—conveniently ignore recent judicial determinations that the rule's statutory basis is indeed "questionable," and that the only forum for resolving such questions is at the Commission. Thus, for the reasons set forth by Anda and other petitioners and commenters, the Commission should now seize this opportunity to resolve these issues by granting either a blanket retroactive waiver or the declaratory ruling Anda initially sought.

DISCUSSION

I. THE RECORD IN THIS PROCEEDING STRONGLY SUPPORTS THE GRANT OF A BLANKET RETROACTIVE WAIVER

As explained in Anda's opening comments, the Commission has broad authority to grant waivers of its rules "for good cause shown,"[2] and the unique circumstances present here—including the procedural irregularities surrounding the adoption of the opt-out notice rule for solicited faxes, the substantive questions over the rule's validity under the statute and the Constitution, and the serious equitable and public interest concerns posed by the continued application of the rule—plainly warrant a blanket retroactive waiver.[3] Numerous parties to this proceeding agree. Nearly every petition identified in the Public Notice urges the Commission to

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[2] 47 C.F.R. § 1.3.

[3] *See* Comments of Anda, Inc., CG Docket Nos. 02-278, 05-338, at 6-10 (filed Feb. 14, 2014) ("Anda Comments").

grant such a waiver.[4] Moreover, Staples, Inc. and Quill Corp., whose petition was the only one identified in the Public Notice that did not expressly seek a waiver,[5] have now filed comments affirming their strong support for such a remedy.[6] The waiver proposal also finds support among non-petitioners; Merck Corp., for instance, filed comments explaining that it, too, is "presently defending a lawsuit brought by a serial TCPA-class action plaintiff," and urging the Commission to grant "a broad, retroactive waiver to all parties," including "businesses and individuals who have not yet" filed petitions with the Commission.[7]

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4 *See* Petition of Forest Pharmaceuticals, Inc., for Declaratory Ruling and/or Waiver, CG Docket No. 05-338, at 11-12 (filed Jun. 27, 2013) ("Forest Petition"); Petition for Declaratory Ruling and/or Waiver of Gilead Sciences, Inc., and Gilead Palo Alto, Inc., CG Docket Nos. 02-278, 05-338 (filed Aug. 9, 2013), at 11-12 ("Gilead 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, at 13-15 (filed Aug. 19, 2013) ("Walburg Petition"); Petition of Futuredontics, 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, at 13-14 (filed Oct. 18, 2013) ("Futuredontics Petition"); Petition of All Granite & Marble Corp. 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, at 10 (filed Oct. 28, 2013) ("All Granite 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, at 17-19 (filed Dec. 12, 2013) ("Purdue 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, at 13-15 (filed Dec. 17, 2013) ("Prime Health 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, at 15-16 (filed Jan. 6, 2014) ("TechHealth Petition").

5 *See* 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 (filed Jul. 19, 2013) ("Staples Petition").

6 *See* Comments of Staples, Inc. and Quill Corp., CG Docket Nos. 02-278, 05-338, at 2-8 (filed Feb. 14, 2014) ("Staples Comments").

7 *See* Comments of Merck Corp., CG Docket Nos. 02-278, 05-338, at 2 (filed Feb. 14, 2014).

Plaintiffs' class action lawyers and their allies raise various objections to a waiver, but none of these objections has merit. As an initial matter, these commenters seek to impugn the waiver requests by arguing that they are motivated solely by petitioners' "self-interest in not being held financially liable" for alleged violations of the rule.[8] But petitioners' "self-interest," whatever it may be, is irrelevant to the Commission's waiver analysis, and certainly does not preclude the grant of a waiver here. Indeed, *every* petitioner that comes to the Commission seeking relief naturally has an interest in the favorable resolution of the issue at hand, just as the plaintiffs' lawyers and their allies have a significant, financially motivated "self-interest" in arguing against the grant of a waiver in this proceeding. The relevant question, according to the D.C. Circuit, is whether a waiver would "serve[] the public interest" and whether "special circumstances" warranting a waiver are present.[9] And as the record reflects, Anda and other petitioners have demonstrated a substantial public interest in eliminating abusive and extortionate lawsuits brought pursuant to the TCPA in the absence of any harm, and have identified several "special" circumstances that independently justify a waiver.[10] The comments

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8 Comments of Bellin & Associates LLC, CG Docket Nos. 02-278, 05-338, at 33 (filed Feb. 13, 2014) ("Bellin Comments"); *see also* Comments of Anderson & Wanca, CG Docket Nos. 02-278, 05-338, at 22 (filed Feb. 13, 2014) ("Anderson & Wanca Comments"). Anderson & Wanca also represents two other commenters (G.M. Sign and Nack) and has retained a third commenter (Biggerstaff) as an expert in over one hundred TCPA class actions. *See, e.g., Reliable Money Order, Inc. v. McKnight Sales Company, Inc.*, No. 10-CV-242, ECF No. 162, at 68-69 (E.D. Wis.).

9 *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *see also NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008) (holding that the FCC may grant waivers where it can "explain why deviation better serves the public interest, and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation" (internal citations and quotation marks omitted)).

10 *See* Anda Comments at 6-10; *see also, e.g.*, Purdue Petition at 18; Walburg Petition at 14-15.

filed by the plaintiffs' class action lawyers entirely fail to grapple with these issues, and thus cannot rebut the justifications offered by Anda and others for a waiver.

Several of these commenters also attempt to justify the continued application of the rule by arguing that the concept of "solicited" faxes is either illusory or subject to factual disputes,[11] and that it is therefore simpler for class certification purposes for the opt-out notice requirement apply to *all* faxes, even those sent with express consent.[12] This argument is a red herring. As an initial matter, the plaintiffs' class action lawyers cannot seriously seek to justify an *ultra vires* and potentially unconstitutional rule based solely on the notion that it simplifies the class certification process. Moreover, at least in Anda's case, there is no serious dispute that Anda *did* indeed obtain prior express consent from the recipients of its faxes.[13] Indeed, Anda has submitted unrebutted evidence in the courts demonstrating not only that the recipients consented to such faxes, but that they *prefer* faxes over other forms of communication.[14]

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[11] *See, e.g.*, Comments of the National Association of Consumer Advocates, CG Docket Nos. 02-278, 05-338, at 1 (filed Feb. 14, 2014) ("NACA Comments"); Anderson & Wanca Comments at 2-3.

[12] *See, e.g.*, Bellin Comments at 10 (asserting that granting relief would make it "all too easy for fax advertisers to concoct stories that they have obtained consent, and then to use those assertions of consent to try to defeat certification of classes based on purported individualized issues of consent that need to be determined . . . .").

[13] Sworn testimony verifying Anda's policy of obtaining prior express consent has been memorialized in the following documents of public record in *Physicians Healthsource, Inc. v. Anda, Inc.*, No. 12-CV-60798 (S.D. Fla.) ("*Physicians*"): ECF No. 81-2 (at ¶ 4); ECF No. 81-3 (at ¶ 4); ECF No. 81-4 (at 12:18-21); ECF No. 81-5 (at 41:20-22); ECF No. 81-6 (at ¶ 7); and ECF No. 81-14 (at 46). This sworn testimony was supported by, among other things, sale records showing that fax recipients placed more than 3 million orders with Anda for the years 2008 through 2012. *See Physicians*, ECF No. 81-1 (at 7). Notably, the evidence supporting Anda's policy of obtaining express consent before sending any faxes was never challenged in the TCPA lawsuit filed by one of the commenters, Anderson & Wanca.

[14] *See, e.g.*, *Physicians*, ECF No. 81-9 (at ¶¶ 5, 9) (pharmacy technician attesting that she finds "faxes sent by Anda to be useful and helpful in identifying products [the pharmacy] needs and can purchase from Anda" and that she "actually prefer[s] to receive faxes,

In any event, none of the petitions before the Commission asks the agency to resolve factual disputes over the existence of prior express consent in particular cases. Rather, these petitions seek a ruling, based on legal and policy considerations, that faxes *found by a trier of fact* to have been sent with express consent need not include the same opt-out notice that is required for unsolicited advertisements. The courts adjudicating these lawsuits will remain responsible for examining the evidence presented and making factual findings as to whether prior express consent existed for each fax at issue. Absent evidence showing that the faxes in question in a given case were sent with express consent, a retroactive waiver or declaratory ruling applicable to such consensual faxes would be inapplicable.

Relatedly, these commenters also argue that the rule should not be waived because, in their view, entities that have consented to receive fax communications need an opt-out notice in order to preserve their ability to revoke such consent.[15] This argument fails on many levels. First, as Anda has explained, there is no reason to suspect that recipients who have *opted in* to receiving faxes need special notices informing them of how to *opt out*.[16] Indeed, the TCPA's technical standards require that all fax machines print "the telephone number of the sending machine" on the first page of every fax[17]—thus enabling a recipient that has provided consent in

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which provide a convenient way for [the pharmacy] to receive information from vendors without having it interrupt the work day"); ECF No. 81-10 (at ¶¶ 4, 8) (head pharmacist attesting that he finds the "faxes sent by Anda to be useful and helpful in identifying products [the pharmacy] needs and can purchase from Anda").

15 *See, e.g.,* Bellin Comments at 18; Comments of Robert Biggerstaff, CG Docket Nos. 02-278, 05-338, at 3 (filed Feb. 14, 2014) ("Biggerstaff Comments").

16 *See* Petition for Declaratory Ruling, *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*, CG Docket No. 05-338, at 5 (filed Nov. 30, 2010) ("Anda Petition").

17 47 U.S.C. § 227(d)(2).

the past to reach out to the sender's business account representative and revoke consent.[18] Moreover, if an entity wishes to receive only a single fax, or to receive faxes only for a set time period, it can easily provide such limited consent at the outset and thereby arrange for automatic revocation once that consent expires. And contrary to the assertion that recipients "would have no way to legally enforce their right to stop such faxes" absent an opt-out notice,[19] the act of revoking consent would render any future faxes "unsolicited," and thus would subject those communications to the restrictions in the TCPA and the Commission's rules.

In any event, whatever the *policy* merits of imposing opt-out notice requirements on senders of solicited faxes, the fact remains that, as a *legal* matter, Section 227(b) does not authorize the Commission to adopt such a requirement. As Anda and others have repeatedly explained, Section 227(b) mandates opt-out notice rules only for "unsolicited advertisement[s]" sent pursuant to an established business relationship—and not for faxes sent with express consent.[20] Bellin places tremendous weight on a reference in the statute to "future unsolicited advertisements," and argues that, by using this language, "Congress was directing the Commission to promulgate new regulations concerning . . . fax advertisements to persons who had previously consented to receiving fax advertisings [sic] but who did not want to receive 'future unsolicited advertisements.'"[21] But the notion that a stray use of the word "future" *implicitly* confers blanket authority to regulate faxes sent with express consent—and cancels out

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18 Indeed, Anda customers have attested to the fact that they speak to their Anda sales representatives on a regular basis. *See Physicians*, ECF No. 81-9 (at ¶ 7) (customer talks to her Anda sales representative "twice a week"); ECF No. 81-10 (at ¶ 6) (customer talks to his Anda sales representative "three to five times a week"); ECF No. 81-8 (at ¶ 7) (customer talks to his Anda sales representative "every day").

19 Biggerstaff Comments at 7.

20 47 U.S.C. § 227(b)(2)(D).

21 Bellin Comments at 17 (quoting 47 U.S.C. § 227(b)(2)(E)).

over a dozen *explicit* references to "unsolicited advertisements" in the statute—is simply untenable. Indeed, as the Supreme Court has made clear, Congress does not "hide elephants in mouseholes" or "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."[22] And even if there were some colorable basis to conclude that the word "future" granted such authority, the balance of the equities—from the procedural, substantive, and constitutional issues with the rule identified by Anda, to the ongoing public interest harms posed by the rule—strongly supports the grant of the blanket retroactive waiver sought by petitioners.

II. THE RECORD ALSO DEMONSTRATES THAT THE DECLARATORY RULING SOUGHT BY ANDA AND OTHERS IS ENTIRELY JUSTIFIED

The record further demonstrates that there are strong grounds supporting the issuance of a declaratory ruling clarifying that the rule at issue here was not "prescribed under" Section 227(b), and thus cannot give rise to a private right of action under Section 227(b)(3). Anda's submissions make clear that Congress expressly limited the opt-out notice requirements under Section 227(b) to *unsolicited* advertisements,[23] and that a broader reading of the statute that would sweep in faxes sent with express consent would present serious First Amendment issues.[24] Indeed, these considerations also support the alternative approach suggested by Staples and others—that the Commission issue an order declaring that the rule was *ultra vires* when adopted and cannot be enforced by the courts or the Commission.[25]

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22 *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

23 *See* Anda Comments at 4; Anda Petition at 5, 8-10 (citing the statutory opt-out notice requirement at 47 U.S.C. § 227(b)(2)(D), which applies only to "unsolicited advertisement[s]" sent pursuant to an established business relationship).

24 *See* Anda Comments at 4; Anda Petition at 10-11.

25 *See* Letter of Matthew A. Brill, Counsel for Anda, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 02-278, 05-338, at 3 (filed Dec. 5, 2013); *see also* Petition of Staples, Inc. and Quill Corporation for a Rulemaking to Repeal Rule 64.1200(a)(3)(iv)

The record reflects widespread support for Anda's request for a declaratory ruling. *All* of the petitions identified in the Commission's Public Notice expressly request the very same declaratory relief sought in Anda's Petition.[26] Such relief finds support among non-petitioners as well.[27] Merck agrees with Anda and other petitioners that such a declaratory ruling is warranted because Section 227(b) "unambiguously regulate[s] unsolicited faxes and did not give the FCC authority to regulate solicited faxes."[28] As Merck correctly points out, the Supreme Court's decision in *Brown & Williamson* is instructive; just as the Court rejected the FDA's reading of "safe" as including "unsafe," here the Commission cannot read "unsolicited" to include "solicited."[29] Howmedica likewise urges the Commission to issue the declaratory ruling sought by Anda and others, noting that "[i]f Congress wanted to create a burden on consensual conduct that posed the potential for massive civil liability, it is reasonable to presume that it would have done so explicitly."[30]

The various objections to such declaratory relief raised by plaintiffs' class action lawyers and their allies are without merit. As noted above, Bellin is simply wrong in asserting that Section 227(b) "direct[s] the Commission to promulgate regulations concerning" faxes sent with

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and for a Declaratory Ruling to Interpret Rule 64.1200(a)(3)(iv), at 17, CG Docket Nos. 02-278, 05-338 (filed Jul. 19, 2013).

26 *See* All Granite Petition at 1; Forest Petition at 1; Futuredontics Petition at 1; Gilead Petition at 1; Prime Health Petition at 2; Purdue Petition at 1; Staples Petition at 1; TechHealth Petition at 1; Walburg Petition at 1.

27 *See* Merck Comments at 1; Comments of Howmedica Osteonics Corp., CG Docket Nos. 02-278, 05-338, at 2 (filed Feb. 14, 2014) ("Howmedica Comments").

28 Merck Comments at 4.

29 *Id.* at 4-5 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)); *see also MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 225–26 (1994) (holding that the Commission's interpretation of the term "modify" in Section 203(b) of the Communications Act of 1934 was so broad as to be without meaning).

30 Howmedica Comments at 3 (citing *Midlantic Nat'l Bank v. New Jersey Dep't of Envt'l Protection*, 474 U.S. 494, 501 (1986)).

express consent.[31] The scope of Section 227(b) is limited, by its plain and unambiguous terms, to regulating *unsolicited* faxes, and a reference in the statute to preventing "*future* unwanted faxes" cannot be construed as conferring broad authority to regulate consensual fax communications. Indeed, the grave First Amendment concerns presented by the prospect of regulating consensual business communications compel a narrow construction of Section 227(b).[32]

Bellin maintains that an opt-out notice requirement for solicited faxes would survive First Amendment scrutiny under the deferential standard of review applied to disclosure requirements under *Zauderer*.[33] But as Anda and others have explained, the applicable standard here is at least intermediate scrutiny, under *Central Hudson*, not the more lenient level of scrutiny under *Zauderer*.[34] As the D.C. Circuit has explained, *Zauderer* has no application unless the government affirmatively demonstrates that an advertisement threatens to deceive consumers.[35] Unlike instances where disclosures are intended to prevent deceptive speech or similarly harmful omissions, here there is no substantial governmental interest—and the Commission certainly has not identified one—in compelling businesses to provide detailed opt-out instructions to customers who expressly elected to receive information by fax. Moreover, the massive liability

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31 Bellin Comments at 7; *see also* NACA Comments at 1.

32 *See* Anda Comments at 9.

33 Bellin Comments at 25 (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985)).

34 *See* Letter of Matthew A. Brill, Counsel for Anda, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 05-338, at 3 (filed Jun. 4, 2013); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of NY*, 447 U.S. 557, 566 (1980) (developing a four-part First Amendment analysis for commercial speech cases, which demands that when government regulates lawful, non-misleading speech, it have a "substantial" interest which is advanced by regulation that is "not more extensive than is necessary.").

35 *R.J. Reynolds Tobacco v. FDA*, 696 F.3d 1205, 1213-14 (D.C. Cir. 2012).

associated with authorizing class actions to recover automatic damages for each solicited fax sent without a compliant opt-out notice imposes far greater burdens on speech than garden-variety disclosure obligations. Given the lack of deception in solicited fax advertisements, and the extraordinary liability posed by a private right of action, Section 227's disclosure requirement would be subject to intermediate scrutiny at the very least.

Anderson & Wanca asserts that the opt-out notice rule for solicited faxes would "easily" survive the heightened standard of *Central Hudson* because the opt-out rule is part of a "comprehensive scheme governing fax advertising" and preventing "cost-shifting and interference."[36] Although courts have upheld Section 227(b)'s requirements for *unsolicited* faxes,[37] the government's interest in preventing the cost-shifting and interference associated with unwanted fax advertisements disappears when the recipient provides express consent to receive such faxes. Critically, even where courts have found the statute's restrictions to be narrowly tailored, they have done so precisely because advertisers remain free to "obtain consent for their faxes" through "telephone solicitation, direct mailing, and interaction with customers in their shops."[38] There is no reason to believe that once an advertiser has obtained consent the government can continue to impose limits on the advertiser's speech, especially where the failure to comply with those limits would lead to potentially massive liability.[39] Thus, under the constitutional avoidance doctrine, the Commission is required construe Section 227(b) to apply

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36 Anderson & Wanca Comments at 29.

37 *See, e.g.*, *Missouri v. AM Blast Fax*, 323 F.3d 649, 655 (8th Cir. 2003).

38 *Id.* at 659.

39 By way of illustration, a fax recipient who was in daily contact with the sender and who expressly requested and received weekly faxes each year for four years would have minimum statutory damages exceeding $100,000.

only to unsolicited advertisements,[40] and a contrary interpretation would not be entitled to *Chevron* deference.[41]

Another set of plaintiffs' class action lawyers, led by attorney John Lowry, asserts that the rule flows from the Commission's "authority to fill gaps where the statutes are silent."[42] But this argument misses the mark for several reasons. As an initial matter, a definitional gap in a statute regarding *unsolicited* fax advertisements hardly qualifies as "authority" to adopt rules regulating *solicited* fax advertisements.[43] Even if the Commission were relying on its authority to "fill gaps" when it adopted the opt-out notice rule for solicited faxes, this means that it was, by definition, *not* relying on the express statutory authority contained in Section 227(b). Instead, as Anda and others have explained, the Commission more likely was relying on Sections 303(r) and 4(i)—two gap-filling statutes that authorize the Commission to adopt rules "as may be necessary" to carry out its functions, but that do not create private rights of action for rules adopted thereunder.[44]

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40 *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 575 (1988) (explaining, in a case where an agency's interpretation of a statute "pose[d] serious questions . . . under the First Amendment," that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems").

41 *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1340 (D.C. Cir. 2002) (holding that "the constitutional avoidance canon of statutory interpretation trumps *Chevron* deference").

42 Comments of John P. Lowry, CG Docket Nos. 02-278, 05-338, at 2-3 (filed Feb. 14, 2014) (citing *Nat'l Cable & Telecommunications Ass'n v. Gulf Power*, 534 U.S. 327, 339 (2002)).

43 *See* Application for Review, *Junk Fax Prevention Act of 2005; 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*, CG Docket No. 05-338, at 15-16 (filed May 14, 2012).

44 47 U.S.C. §§ 303(r), 151(i).

Anderson & Wanca further argues that a declaratory ruling is unwarranted because "there is no 'controversy' or 'uncertainty'" regarding the rule's statutory basis.[45] But that assertion is belied by the record in this proceeding—where the statutory basis of the rule is the subject of sharp dispute—as well as by a growing number of courts' expressing substantial uncertainty on this issue.[46] Anderson & Wanca also asserts that the petitions constitute "improper collateral attacks" on the rule, and that the positions taken by petitioners "can be raised only in a petition for reconsideration under 47 U.S.C. § 405(a)."[47] This argument is more than a little ironic, given that plaintiffs have taken the position in judicial proceedings that the Commission is the sole forum for resolving issues surrounding the rule going forward. While it is true that some courts have held that challenges to Commission rules raised in private lawsuits may constitute "improper collateral attacks,"[48] the Commission has clear authority to issue declaratory rulings or grant waivers with respect to its *own* rules.[49] Thus, petitioners' request for a declaratory ruling remains entirely justified.

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45 Anderson & Wanca Comments at iii; *see also id.* at 13-14.

46 *See* Anda Comments at 8 (citing several recent decisions noting uncertainty as to the rule's statutory basis).

47 Anderson & Wanca Comments at 14.

48 *See, e.g.*, *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013).

49 *See* 47 C.F.R. § 1.2 (providing that the Commission "may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty"); *id.* § 1.3 (providing that "[t]he provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter," and that "[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown"); *see also Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 667 (D.C. Cir. 2009) ("[A]n agency is free to change its mind so long as it supplies 'a reasoned analysis.'") (quoting *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983)).

CONCLUSION

As Anda and the majority of participants in this proceeding have made clear, it is time that the Commission fix the substantial legal and equitable problems posed by its rule requiring opt-out notices on faxes sent with express consent. Thus, for the foregoing reasons, as well as the reasons discussed in Anda's Petition, Application for Review, and opening comments, the Commission should grant relief from the rule, either in the form of a blanket retroactive waiver or in the form of a declaratory ruling that the rule was not "prescribed under" Section 227(b) of the Act.

Respectfully submitted,

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