

ANDERSON + WANCA
ATTORNEYS AT LAW

3701 ALGONQUIN ROAD, SUITE 760, ROLLING MEADOWS, IL 60008
TEL: (847) 368-1500 * FAX: (847) 368-1501
EMAIL: BUSLIT@ANDERSONWANCA.COM

May 19, 2014

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW - Room TW-A325
Washington, DC 20554

Re: Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax
Advertisements, CG Docket Nos. 05-338 and 02-278

Dear Madam Secretary,

On April 18, 2014, the D.C. Circuit Court of Appeals issued its ruling in *Natural Res. Def. Council v. E.P.A.*, --- F.3d ---, 2014 WL 1499825 (D.C. Cir. Apr. 18, 2014). The ruling came after the comment period on the petitions filed in this matter expired on February 21, 2014.¹ The ruling is dispositive of the petitioners' requests (1) that the Commission create a substantial-compliance defense for violations of the opt-out-notice regulation, 47 C.F.R. § 64.1200(a)(4)(iv), and (2) that the Commission issue a judicially binding, retroactive waiver of the regulation.

In *Natural Resources*, the EPA issued a regulation creating an affirmative defense to the private right of action in the Clean Air Act, 42 U.S.C. § 7604(a), allowing defendants to avoid liability for violations caused by "unavoidable" malfunctions. 2014 WL 1499825, at *3. Environmental groups timely petitioned for review, and the D.C. Circuit held the EPA exceeded its authority in creating the affirmative defense, holding:

(1) that the Act "creates a private right of action, and as the Supreme Court has explained, 'the Judiciary, not any executive agency, determines "the scope"—including the available remedies—"of judicial power vested by" statutes establishing private rights of action,"

¹ See *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 1.

(2) that “EPA’s ability to determine whether penalties should be assessed for Clean Air Act violations extends only to administrative penalties, not to civil penalties imposed by a court,” and

(3) that “[t]o the extent that the Clean Air Act contemplates a role for EPA in private civil suits, it is only as an intervenor” or “as an amicus curiae.”

Id. at *7. These rulings apply with full force here, precluding the Commission from creating a defense for “substantial compliance” or granting the judicially binding waivers the petitioners seek.

First, like the Clean Air Act, the TCPA creates a private right of action for violations of the statute or its implementing regulations. 47 U.S.C. § 227(b)(3). It gives the Commission the power to issue the regulations, but it vests *the judiciary* with the power to determine whether “a violation” has occurred, giving rise to the \$500 minimum statutory damages. *Id.* § 227(b)(3)(B). Moreover, the statute provides, “[i]f the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection,” it may increase the damages up to three times the minimum. *Id.* § 227(b)(3). Thus, as with the Clean Air Act in *Natural Resources*, the TCPA “clearly vests authority over private suits in the *courts*, not [the Commission].”² 2014 WL 1499825, at *7. Creating a substantial-compliance defense for pending lawsuits or issuing a waiver for the express purpose of extinguishing the petitioners’ liability in pending lawsuits would fly in the face of that principle.

Second, just as the Clean Air Act grants the EPA authority to “determine whether penalties should be assessed” only in administrative proceedings, and not in private civil actions, *id.* at *7, the Communications Act grants the Commission authority to determine whether penalties should be assessed for TCPA violations only in the context of forfeiture actions brought pursuant to 47 U.S.C. § 503(b). Like the EPA’s affirmative defense in *Natural Resources*, creating a substantial-compliance defense or granting judicial waivers to extinguish the TCPA’s private right of action would exceed that authority.

Third, while the Clean Air Act allows the EPA to intervene in private actions under 42 U.S.C. § 7604(c)(2), the TCPA does not even go that far. The TCPA allows the Commission to intervene only in enforcement proceedings brought by state governments to seek civil penalties for violations of the caller-identification requirements. 47 U.S.C. § 227(e)(6)(C). There is no provision allowing the Commission to intervene in private actions under § 227(b)(3). If the Commission cannot intervene in a pending lawsuit, it follows it cannot create new defenses midstream or pick winners and losers by immunizing

² Although the statute refers to actions brought “in an appropriate court of that State,” the Supreme Court held in *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 749 (2012), that the federal courts have concurrent jurisdiction over TCPA private actions.

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the defendants from liability. As *National Resources* makes clear, the Commission is limited to participating in private TCPA actions “as amicus curiae,” as it did in *Nack v. Walburg*.

Sincerely,

ANDERSON + WANCA

s/ Brian J. Wanca

cc: Maria Kirby
Adonis Hoffman
Clint Odom
Nick Degani
Amy Bender
Kris Monteith
Mark Stone
Richard Smith
Nancy Stevenson
Aaron Garza
Kurt Schroeder
Jacob Lewis
Suzanne Tetreault
Diane Griffin Holland