No. 14-1234 (consolidated with Nos. 14-1235, 14-1239, 14-1243, 14-1270, 14-1279, 14-1292, 14-1293, 14-1294, 14-1295, 14-1297, 14-1299, and 14-1302)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BAIS YAAKOV OF SPRING VALLEY, ROGER H. KAYE, ROGER H. KAYE, MD PC, MENACHEM RAITPORT, CROWN KOSHER MEAT MARKET, INC.; SANDUSKY WELLNESS CENTER, LLC, MEDICAL WEST BALLAS PHARMACY, LTD., GOODLAND FOODS, INC., LANCILOTI LAW OFFICES, IRISH SISTERS, INC., ST. LOUIS HEART CENTER, INC., PHYSICIANS HEALTHSOURCE, INC., MILWAUKEE OCCUPATIONAL MEDICINE, S.C., VANCE MASCI, DOUGLAS BURIK, WHITEAMIRE CLINIC, P.A., INC., WILLIAM P. SAWYER, M.D., CRITCHFIELD PHYSICAL THERAPY, P.C., AROUND THE WORLD TRAVEL, INC., and MICHAEL R. NACK,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of the October 30, 2014 Final Order of the United States Federal Communications Commission

INTERVENORS' PETITION FOR REHEARING EN BANC

AYTAN Y. BELLIN, ESQ. (55661) BELLIN & ASSOCIATES LLC 50 Main Street, Suite 1000 White Plains, New York 10606 (914) 358-5345	ROGER FURMAN, ESQ. (55849) 7485 Henefer Avenue Los Angeles, California 90045 (310) 568-0640

Counsel for intervenors Bais Yaakov of Spring Valley, Roger H. Kaye, Roger H. Kaye, MD PC, Menachem Raitport, and Crown Kosher Meat Market, Inc.
(For continuation of appearances, see inside cover)

GLENN L. HARA, ESQ. (55675)
ANDERSON + WANCA
3701 Algonquin Road, Suite 500
Rolling Meadows, Illinois 60008
(847) 368-1500

Counsel for intervenors Medical West Ballas Pharmacy, Ltd. and Michael R. Nack

David M. Oppenheim, Esq. (52928)
BOCK. HATCH, LEWIS & OPPENHEIM, LLC
134 N. La Salle Street, Suite 1000
Chicago, Illinois 60602
(312) 658-5500

Co-counsel for intervenor Medical West Ballas Pharmacy, Ltd.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT PURSUANT TO FED R. APP. P. 35(b)

In the two-to-one panel decision for which Petitioners seek en banc review, Judges Randolph and Kavanaugh, with Judge Pillard dissenting, issued a ruling retroactively invalidating an agency's 11 year-old regulation. The majority's ruling radically conflicts with decades of the Supreme Court's and this Court's *Chevron* step one precedent. The panel correctly acknowledged that under Congress's broad delegation of authority to "prescribe regulations to implement the requirements" of the Telephone Consumer Protection Act of 1991 (the "TCPA") — which prohibits sending unsolicited fax advertisements — the Federal Communications Commission *had the authority* to issue a regulation requiring that (i) senders of solicited fax advertisements honor opt-out requests properly made by persons who wish to revoke their prior permission to receive fax advertisements and (ii) recipients opt out in the manner specified by the FCC. But the majority incongruously held that the FCC *did not have the authority* to issue a regulation (47 C.F.R § 64.1200(a)(4)(iv) (the "Opt-Out Regulation")) requiring senders of solicited fax advertisements to include notices on their fax advertisements describing how recipients can opt out in the first place.

The majority gave two reasons for its conclusion: (1) that Congress had not *specifically* authorized the FCC to regulate solicited fax advertisements, and (2) that the TCPA regulated, and required opt-out notices on, only unsolicited fax

advertisements, but was silent on the subject of solicited fax advertisements. As Judge Pillard's dissent explained, the majority's decision severely misinterprets *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), and directly conflicts with decades of precedent in the Supreme Court and this Court.

The majority's first rationale ignores the general conferral of rulemaking authority "to implement the requirements of" the TCPA that Congress gave to the FCC in 47 U.S.C. § 227(b)(2), and conflicts with well-settled Supreme Court authority that holds that (a) Congress's "general conferral of rulemaking authority" on an agency is a sufficient delegation of authority "to support *Chevron* deference within that agency's substantive field," and (b) courts cannot additionally require that "*every* agency rule [] be subjected to a *de novo* judicial determination of whether the *particular issue* was committed to agency discretion." *City of Arlington, Texas v. F.C.C.*, 133 S. Ct. 1863, 1874 (2013) (emphasis in original); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 372-73 (1973) (same).

The majority's second rationale is based on the canon *expressio unius est exclusio alterius* — which posits that where a statute imposes a requirement in one specific situation, Congress intended to preclude an administrative agency from imposing such a requirement in other situations. The majority's reliance on this

canon ignores numerous longstanding precedents of this Court that hold that "the contrast between Congress's mandate in one context with its silence in another suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion. Such a contrast (standing alone) can rarely if ever be the 'direct' congressional answer required by *Chevron*." *Cheney R. Co., Inc. v. I.C.C.*, 902 F.2d 66, 69 (D.C. Cir.) (emphasis in original), *cert. denied*, 498 U.S. 985 (1990); *National Ass'n of Manufacturers v. S.E.C.*, 748 F.3d 359, 367 (D.C. Cir. 2014) (same)[1]; *Texas Rural Legal Aid, Inc. v. Legal Services Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) (same).

Because the majority's decision irreconcilably conflicts, in these two ways, with binding precedent by this Court and the U.S. Supreme Court, "consideration by the full court is . . . necessary to secure and maintain uniformity of the court's decisions." Fed. R. App. P. 35(b)(1)(A). Moreover, if courts are able to invalidate federal agency actions based on the majority's untenable reasoning, agencies will be at a loss to know when they may regulate concerning matters not explicitly mentioned in a statute. And, armed with the majority's decision, litigants will likely flood this Court and other circuit courts with appeals contending that regulations issued by various federal agencies – such as the EPA, SEC, CMS, and

[1] *National Ass'n of Manufacturers* was partially overruled on unrelated grounds in *American Meat Institute v. U.S. Dep't of Agriculture*, 760 F.2d 18, 22-23 (D.C. Cir. 2014).

FDA – are invalid simply because Congress authorized such regulations in a different context but not in that particular context, or because Congress did not specifically authorize those regulations. Accordingly, the likely profound effect of the majority's bases for invalidating an FCC rule on all federal agencies' actions and appeals to this Court relating to those actions raises "questions of exceptional importance" that the full D.C. Circuit should rehear pursuant to Fed. R. App. P. 35(b)(1)(B).

STATEMENT OF THE CASE

The petitioners on this petition for rehearing are the plaintiffs in numerous private TCPA actions filed between 2009 and October 2014 and the intervenors on this appeal regarding the FCC's authority to issue the Opt-Out Regulation. Petitioners have alleged TCPA claims in those private actions based on, among other conduct, the defendants' sending purportedly "solicited" fax advertisements that do not contain opt-out notices in compliance with 47 C.F.R. § 64.1200(a)(4)(iv) (the "Opt-Out Regulation"). That Regulation provides:

> A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section [which describes the type of opt-out notice the required in permissible unsolicited fax ads].

The TCPA makes every violation of TCPA regulations a violation of the TCPA itself. 47 U.S.C. § 227(b)(3).

While these private TCPA actions have been pending, numerous of the defendants filed petitions with the FCC (a) contending that the FCC did not have the authority to issue the Opt-Out Regulation; and (b) requesting that, in any event, they be granted retroactive "waivers" from that Regulation because of purported "confusion" when it first was issued.

In an Order dated October 30, 2014, the FCC confirmed its authority to issue the Opt-Out Regulation. 29 FCC Rcd. 13998, 2014 WL 5493425 (rel. Oct. 30, 2014). The FCC reasoned that Congress's broadly worded authorization in 47 U.S.C. § 227(b)(2) – which "grants the Commission authority 'to prescribe regulations to implement the requirements of [the TCPA's fax advertisement provisions]'" – empowered the FCC to promulgate the Opt-Out Regulation. 29 FCC Rcd. at 14006, ¶ 19.

The FCC also reasoned that 47 U.S.C. § 227(a)(5) "defines an unsolicited advertisement as certain advertising material 'transmitted to any person *without that person's prior express invitation or permission*,'" but does not define "prior express invitation or permission," enabling the FCC to fill that "gap" under *Chevron* by providing such a definition, providing a procedure for revoking such invitation or permission, and ensuring the consumers are aware of the procedure. 29 FCC Rcd. at 14006, ¶¶ 19-20 (emphasis in original). The record before the FCC demonstrated that if consumers are not informed about how to revoke their

prior express permission, consumers "could be confronted with a practical inability to make senders aware that their consent is revoked," and consumers would be forced to continue to receive fax advertisements against their will. *Id.* at 14007, ¶ 20.

While the FCC confirmed its authority to issue the Opt-Out Regulation, it granted retroactive waivers of that Regulation to all that had sought them. Notwithstanding the clarity of the Opt-Out Regulation itself, the FCC granted those waivers because of purported "confusion among affected parties" resulting from a misstatement buried in footnote 154 of a 2006 order implementing the Opt-Out Regulation, and from the FCC's failure to specifically identify the Opt-Out Regulation in a 2005 notice of proposed rulemaking. 29 FCC Rcd. at 14009-10, ¶¶ 24-26.

On November 10, 2014 and afterwards, both sets of parties filed appeals with this Court. The litigation defendants challenged the FCC's authority to issue the Opt-Out Regulation, and the litigation plaintiffs challenged the FCC's issuance of blanket waivers of the Regulation to all that had sought them.

This Court's panel issued its opinion on March 31, 2017, with Judges Kavanaugh and Randolph in the majority and Judge Pillard dissenting. *Bais Yaakov of Spring Valley v. Federal Communications Commission*, 852 F.3d 1078 (D.C. Cir. 2017) (Item 1 in the attached Appendix). The majority concluded that

the Opt-Out Regulation was invalid under *Chevron* step one, reasoning that the TCPA did not delegate to the FCC the authority to require fax advertisers to place opt-out notices on fax advertisements sent with prior express permission or invitation. *Id*. at 1082.

At the same time, the majority also recognized that "Congress has authorized the FCC to issue regulations to implement the [TCPA]." 852 F.3d at 1080 (citing 47 U.S.C. 227(b)(2)). Moreover, the majority conceded that pursuant to that authorization, the FCC had the power to reasonably define the phrase "prior express invitation or permission," and also could regulate senders of solicited fax advertisements by requiring them to honor a person's properly-made request to "revoke previously granted permission." *Id.* at 1081, 1082 (citing 47 C.F.R. § 64.1200(a)(4)(vi)).

Nevertheless, because the TCPA specifically regulates and requires opt-out notices on unsolicited fax advertisements, but says nothing about opt-out notices on solicited fax advertisements, the majority decreed that "Congress drew a line in the text of the statute between unsolicited fax advertisements and solicited fax advertisements," and therefore the FCC was not authorized to issue the Opt-Out Regulation. 852 F.3d at 1082. The majority held that to have conferred that power to the FCC, the TCPA must have contained a *specific* grant of authority regarding solicited fax advertisements; and that the general grant of authority to the FCC

contained in 47 U.S.C. § 227(b)(2) is insufficient. *Id*. at 1083 ("The text of the Act does not grant the FCC authority to require opt-out notices on solicited faxes.").[2]

Judge Pillard dissented, finding that that the FCC did have the power to issue the Opt-Out Regulation pursuant to the broad authority Congress granted to the FCC in 47 U.S.C. § 227(b)(2). 852 F.3d at 1083, 1084. Judge Pillard pointed out that"[b]eyond clarifying that the permission need not be in writing, Congress had said nothing about how 'prior express invitation or permission' might be elicited, or when it might lapse or be withdrawn." *Id*. at 1083.

Judge Pillard also opined that in order to make meaningful the right to revoke permission to be sent fax advertisements — which the entire panel agreed the FCC had the power to require by regulation — the FCC reasonably concluded that "advertisers need to make clear how that may be done[.]" 852 F.3d at 1084. Judge Pillard rejected the majority's argument that "by banning unsolicited ads, Congress implicitly forbade regulation of ostensibly solicited ads. . . ." *Id*. at 1085. She pointed out that "the very purpose and effect of the [Opt-Out] [R]egulation is to refine the definition of which ads count as solicited (and so permitted), and which are banned as unsolicited." *Id*. Citing cases from this Circuit dating back to 1990, Judge Pillard criticized the majority's reliance on the "*expressio unius est*

[2] Because the majority ruled that the Opt-Out Regulation was invalid, it dismissed the petitions concerning the FCC's waivers of the Opt-Out Regulation as moot. 852 F.3d at 1083, n.2.

exclusio alterius canon" because that canon "is an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Id*. (citations and internal quotation marks omitted).

Judge Pillard also found that the Opt-Out Regulation was justified because the FCC was reasonably concerned that Congress's 2005 amendment to the TCPA — which permitted prior express invitation or permission to be obtained "in writing *or otherwise*" — would result in some in some senders erroneously or fraudulently claiming they had recipients' permission to send facsimile advertisements. 852 F.3d at 1084. Judge Pillard maintained that "[t]he opt-out notice was one response to that concern; it would give recipients an easy way to make clear their consent *vel non*." *Id*.[3]

ARGUMENT

I. THE MAJORITY'S INFERENCE THAT THE TCPA'S LACK OF *SPECIFIC* AUTHORIZATION FOR THE FCC TO ISSUE THE OPT-OUT REGULATION PRECLUDES THE FCC FROM ISSUING THAT REGULATION IGNORES THE TCPA'S BROAD *GENERAL* GRANT OF AUTHORITY TO THE FCC, AND THEREFORE CONFLICTS WITH *CITY OF ARLINGTON*

Because the TCPA says nothing about how "prior express invitation or permission" to receive fax advertisements may be elicited, lapse, or be withdrawn,

[3] Judge Pillard also opined that the waivers of the Opt-Out Regulation, which the FCC granted, were invalid. 852 F.3d at 1085-86.

the majority and Judge Pillard agreed that, pursuant to the broad authority Congress gave the FCC in 47 U.S.C. § 227(b)(2) "to implement the requirements of this subsection [banning unsolicited fax ads]," the FCC could regulate *senders of solicited fax advertisements*. 852 F.3d at 1082, 1083-84. Specifically, the majority and Judge Pillard concluded that the FCC had the power (1) to prohibit *senders of solicited fax advertisement*s from continuing to send them to persons who have revoked their permission; and (2) to regulate how recipients of solicited fax advertisements can opt out of receiving them in a way that the senders of those solicited fax advertisements must honor. *Id.*

However, the majority incongruously decided that, notwithstanding this broad grant of authority, the FCC does not have the power to require *senders of solicited fax advertisements* to include an opt-out notice informing recipients of their right to opt-out and the required-content of an enforceable opt-out request. 852 F.3d at 1082. The majority's argument contradicts decades of precedent from the Supreme Court and this Court.

In *City of Arlington*, 133 S. Ct. at 1874, the Supreme Court ruled that Congress's "general conferral of rulemaking authority" on an agency is a sufficient delegation of authority "to support *Chevron* deference within that agency's substantive field." The Court emphasized that courts cannot *additionally* require, as the majority did in this case with regard to the Opt-Out Regulation, that "*every*

agency rule [] be subjected to a *de novo* judicial determination of whether the *particular issue* was committed to agency discretion." *Id.*

Numerous decisions have followed this principle in contexts analogous to this case. *E.g.*, *Mourning*, 411 U.S. at 372-73 (because Congress granted agency broad authority to issue regulations, statute specifying disclosure requirement in one circumstance did not foreclose the agency from issuing regulation requiring such disclosure in another circumstance); *American Trucking Ass'ns, Inc., v. United States*, 344 U.S. 298, 309-10 (1953) ("Our function [in determining whether an agency may regulate a particular practice] does not stop with a section-by-section search for the phrase 'regulation of [a particular] practice[]' among the literal words of the statutory provisions. . . . prescience [by statute's drafters of 'every evil sought to be corrected'], either in fact or in the minds of Congress, does not exist."); *National Fuel Gas Supply Corp. v. F.E.R.C.*, 811 F.2d 1563, 1569 (D.C. Cir.) ("[w]hen Congress leaves gaps . . . explicitly by authorizing the agency to adopt implementing regulations, . . . it has explicitly . . . delegated to the agency the power to fill those gaps"), *cert. denied*, 484 U.S. 869 (1987).

The panel majority's holding — that Congress's broad delegation of regulatory authority to the FCC in 47 U.S.C. § 227(b)(2) did not empower the FCC to promulgate the Opt-Out Regulation on the ground that that subsection does not *expressly* mention such a power — thus flies in the face of this Supreme Court and

D.C. Circuit authority. The panel majority did not mention or attempt to distinguish that well-settled precedent. 852 F.3d at 1079-83.

Moreover, the majority mistakenly characterized Petitioners' (and the FCC's) position by stating that Petitioners are urging that "an agency may take an action – here, requiring opt-out notices on solicited fax advertisements – so long as Congress has not *prohibited* the agency action in question. That theory has it backwards . . . . The FCC may only take action that Congress has *authorized*." 852 F.3d at 1082. To the contrary, Petitioners' position has been not simply that Congress did not prohibit the FCC from issuing the Opt-Out Regulation, but that Congress *affirmatively authorized* the FCC to regulate "prior express invitation or permission," including how it may be acquired and revoked, by directing it to "implement the requirements of this subsection." 47 U.S.C. § 227(b)(2).

Further, as Judge Pillard recognized, the Opt-Out Regulation constitutes a valid exercise of the FCC's authority to fill in "gaps" in the TCPA regarding the term "unsolicited advertisement," which is defined as an advertisement sent without "prior express invitation or permission, in writing or otherwise" in 47 U.S.C. § 227(a)(5) and used in 47 U.SC. § 227(b). As Judge Pillard observed (and even the majority acknowledged): "Beyond clarifying that the permission need not be in writing, Congress had said nothing about how 'prior express invitation or

permission' might be elicited, or when it might lapse or be withdrawn." 852 F.3d at 1083, 1082.

II. THE MAJORITY'S OPINION IS BASED ON *EXPRESSIO UNIUS* REASONING, WHICH THIS COURT HAS DISCREDITED FOR DECADES IN THE ADMINISTRATIVE CONTEXT

The majority's attempt to justify its holding — using the *expressio unius* canon — by pointing out that TCPA explicitly regulates, and requires opt-out notices on, only unsolicited fax advertisements, but is silent on a similar requirement for solicited fax advertisements, also conflicts with well-settled law. This Court and others have repeatedly held for almost three decades that the *expressio unius* canon is

> an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved. . . . [T]he contrast between Congress's mandate in one context with its silence in another suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion. Such a contrast (standing alone) can rarely if ever be the "direct" congressional answer required by *Chevron*.

Cheney, 902 F.2d at 69; *National Shooting Sports Foundation, Inc. v. Jones*, 716 F.3d 200, 211 (D.C. Cir. 2013) (rejecting *expressio unius* canon, and holding that Bureau of Alcohol, Tobacco and Firearms had authority to issue demand letter for reports on sales of non-handguns even though the statute required such reports only for handguns: "Simply because the Congress imposes a duty in one circumstance does not mean that it has necessarily foreclosed the agency from

imposing another duty in a different circumstance."); *Texas Rural*, 940 F.2d at 694 (upholding regulation issued by Legal Services Corporation prohibiting recipients of its funding from using that funding for redistricting activities, and rejecting as "too thin a reed" plaintiff's *expressio unius* argument that statutory prohibition against engaging in certain other types of activities prevented LSC from prohibiting redistricting activities); *National Ass'n of Manufacturers*, 748 F.3d at 367 (notwithstanding that statute imposed due diligence requirements only on companies that "manufacture" certain products, SEC issued valid regulation imposing such requirements on companies that both "manufacture" and "contract to manufacture" such products); *Creekstone Farms Premium Beef, L.L.C. v. Dep't of Agriculture*, 539 F.3d 492, 500 (D.C. Cir. 2008) (rejecting *expressio unius* canon because statute "contain[ed] broad language authorizing the agency to promulgate the regulations necessary to 'carry out' the statute").

Moreover, the Supreme Court has "not read the enumeration of one case to exclude another unless it is fair to suppose that *Congress considered the unnamed possibility and meant to say no to it*. . . .[T]he canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by *deliberate* choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (internal

quotation marks and citations omitted). First, there is no "group or series" to which the TCPA applies the opt-out notice requirement, and for that reason as well the *expressio* canon does not support the majority's ruling.

Second, there is absolutely no evidence that Congress considered whether opt-out notices should be required on solicited fax advertisements "and meant to say no to [that requirement]." 537 U.S. at 168. In fact, the legislative history of the TCPA — which is an aid in determining the applicability of *expressio unius*, *Martini v. Federal Nat'l Mortg. Ass'n*, 178 F.3d 1336, 1343 (D.C. Cir. 1999), *cert. dismissed*, 528 U.S. 1147 (2000) — indicates otherwise.

Specifically, the 1991 legislative history of the TCPA states that the legislation was passed because consumers were inundated with millions of unwanted fax advertisements and automated telephone calls. H.R. Rep. 102-317 at 5-7 (1991), 10; S. Rep. 102-178 at 1-3 (1991). Accordingly, it is unthinkable that Congress intended to *prevent* the FCC from requiring that senders of solicited fax advertisements that consumers no longer wish to receive inform consumers how to opt out of continuing to receive them. Furthermore, the legislative history concerning the TCPA's 2005 amendment, which requires senders of unsolicited fax advertisements to include opt-out notices, demonstrates that Congress intended to "provide notice of a recipient's ability to opt out of receiving any future faxes containing unsolicited advertisements and a cost-free mechanism for recipients to

opt out pursuant to that notice." S. Rep. 109-76 at 1, 6-7 (2005). It cannot reasonably be construed *to prohibit* the FCC from requiring opt-out notices on solicited fax advertisements to help consumers stop receiving no longer consented-to fax advertisements.[4]

[4] The principal cases the majority cites do not support its striking down the Opt-Out Regulation. In *Utility Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2444-46 (2014), the Court held that an EPA regulation allowing sources of certain newly recognized types of "air pollution," i.e., greenhouse gases, to potentially emit up to 100,000 tons of those air pollutants without having to obtain permits was invalid because it violated the Clean Air Act's explicit numerical permit requirement for sources of air pollution that emitted more than "100" or "250" tons of pollutants. The Opt-Out Regulation, by contrast, does not contradict any provision of the TCPA. In *American Library Ass'n v. F.C.C.*, 406 F.3d 689, 698, 702-03 (D.C. Cir. 2005), this Court invalidated an FCC regulation that regulated matters "outside the compass of communication by wire or radio," which the courts have long held are outside the FCC's authority. In this case, the Opt-Out Regulation does regulate communications by wire, which are unquestionably within the FCC's jurisdiction.

CONCLUSION

For all these reasons, Petitioners request that this Court rehear this appeal en banc. Even if the FCC, with its new leadership, chooses not to join this petition for rehearing or file a petition on its own, this Court should grant this request by Petitioners, who indisputably have had standing to pursue this appeal. *E.g.*, *National Wildlife Federation v. Lujan*, 928 F.2d 453, 456 n.2 (D.C. Cir. 1991) (intervenors who supported administrative agency's position that it had power to issue regulation had standing to appeal district court decision striking down regulation, even though agency did not appeal). If the full D.C. Circuit does not overrule the majority's decision, agencies will be at a loss to know when they may regulate concerning matters not explicitly mentioned in a statute. This Court and other Circuit Courts also will be inundated with appeals contending that

regulations issued by various federal agencies are invalid simply because Congress authorized such regulations in a different context but not in that particular context, or because Congress did not specifically authorize those regulations.

Dated: April 28, 2017

Respectfully submitted,

/s/ Aytan Y. Bellin
Aytan Y. Bellin

BELLIN & ASSOCIATES LLC

/s/ Roger Furman
Roger Furman

ROGER FURMAN, ESQ.

/s/ Glenn L. Hara
Glenn L. Hara

ANDERSON + WANCA

/s/ David M. Oppenheim
David M. Oppenheim

BOCK, HATCH, LEWIS & OPPENHEIM, LLC

CERTIFICATE OF COMPLIANCE

This Intervenors' Petition for Rehearing En Banc complies with the type-volume limitations of Federal Rule of Appellate Procedure 35(b)(2)(A) because it contains 3,890 words as determined by the word-count function of Microsoft Word 2010, excluding parts of the Petition exempted by Federal Rule of Appellate Procedure 32(f).

This Petition also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of

Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced, 14-point, Times New Roman typeface using Microsoft Word 2010.

Dated: April 28, 2017

/s/ Glenn L. Hara
Glenn L. Hara
ANDERSON + WANCA
3701 Algonquin Road, Suite 760
Rolling Meadows, Illinois 60008
Telephone: (847) 368-1500
Facsimile: (847) 368-1501
Email: ghara@andersonwanca.com

/s/ Aytan Y. Bellin
Aytan Y. Bellin
BELLIN & ASSOCIATES LLC
50 Main Street, Suite 1000
White Plains, New York 10606
Telephone: (914) 358-5345
Facsimile: (212) 571-0284
Email: aytan.bellin@bellinlaw.com

David M. Oppenheim, Esq.
BOCK. HATCH, LEWIS & OPPENHEIM, LLC
134 N. La Salle Street, Suite 1000
Chicago, Illinois 60602
Telephone: (312) 658-5500
Facsimile: (312) 658-5555
Email: david@classlawyers.com

ROGER FURMAN, ESQ.
7485 Henefer Avenue
Los Angeles, California 90045
Telephone: (310) 568-0640
Facsimile: (310) 694-9083
Email: roger.furman@yahoo.com

APPENDIX (D.C. CIRCUIT RULE 35(c))

Table of Contents

ITEM 1 OF APPENDIX

852 F.3d 1078
United States Court of Appeals,
District of Columbia Circuit.

BAIS YAAKOV OF SPRING VALLEY, et al., Petitioners
v.
FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents
Quill Corporation, et al., Intervenors

No. 14-1234
|
Consolidated with 14-1235, 14-1239, 14-1243, 14-1270, 14-1279, 14-1292, 14-1293, 14-1294, 14-1295, 14-1297, 14-1299, 14-1302
|
Argued November 8, 2016
|
Decided March 31, 2017

Synopsis

Background: Businesses that sent fax advertisements petitioned for review of an order of the Federal Communications Commission (FCC), 2014 WL 5493425, challenging FCC rule that required businesses to include opt-out notices on solicited fax advertisements as outside FCC's authority under Junk Fax Prevention Act.

[Holding:] The Court of Appeals, Kavanaugh, Circuit Judge, held that FCC lacked authority to promulgate rule which required businesses to include opt-out notices on solicited fax advertisements.

Vacated and remanded.

Pillard, Circuit Judge, filed dissenting opinion.

West Headnotes (2)

[1] Telecommunications
Advertising, canvassing and soliciting; telemarketing

Junk Fax Prevention Act's requirement that businesses include opt-out notices on unsolicited fax advertisements did not grant the Federal Communications Commission (FCC) the authority to promulgate rule which required businesses to include opt-out notices on solicited fax advertisements; Congress drew a clear line in the text of the statute between unsolicited fax advertisements, which were required to include an opt-out notice, and solicited fax advertisements, for which the Junk Fax Prevention Act neither required nor gave the FCC authority to require opt-out notices. Communications Act of 1934 § 227, 47 U.S.C.A. § 227(b); 47 U.S.C.A. §§ 227(a)(5), 227(b)(1)(C), 227(b)(2)(D); 47 C.F.R. § 64.1200(a)(4)(iv).

1 Cases that cite this headnote

[2] Telecommunications
Powers and duties

Federal Communications Commission (FCC) may only take action that Congress has authorized.

Cases that cite this headnote

West Codenotes

Held Invalid
47 C.F.R. § 64.1200(a)(4)(iv)

On Petitions for Review of an Order of the Federal Communications Commission

Attorneys and Law Firms

Matthew A. Brill argued the cause for Class Action Defendant Petitioners. With him on the briefs were Matthew T. Murchison, Jonathan Y. Ellis, Samuel L. Feder, Matthew E. Price, Robert A. Long, Yaron Dori, Michael Beder, Washington, DC, Marie Tomassi, St. Petersburg, FL, Joseph R. Palmore, Washington, DC, Thomas R. McCarthy, Arlington, VA, Helgi C. Walker, Washington, DC, Kim E. Rinehart, Jeffrey R. Babbin, New Haven, CT, Blaine C. Kimrey, Chicago, IL, and Bryan K. Clark.

Megan L. Brown and Brett A. Shumate, Washington, DC, were on the brief for amici curiae National Federation of Independent Business Small Business Legal Center

and Consumers' Research in support of the Class Action Defendant Petitioners. Karen R. Harned, Nashville, TN, entered an appearance.

Aytan Y. Bellin argued the cause for Waiver Petitioners Bais Yaakov of Spring Valley, et al. With him on the briefs were Roger Furman, Los Angeles, CA, ***1079** Phillip A. Bock, and Glenn L. Hara, Chicago, IL. David M. Oppenheim entered an appearance.

Allison M. Zieve and Scott L. Nelson, Washington, DC, were on the brief for amicus curiae Public Citizen, Inc. in support of the Waiver Petitioners.

Matthew J. Dunne, Counsel, Federal Communications Commission, argued the cause for respondent. With him on the brief were William J. Baer, Assistant Attorney General, U.S. Department of Justice, Robert B. Nicholson and Steven J. Mintz, Attorneys, Jonathan B. Sallet, General Counsel, Federal Communications Commission, David M. Gossett, Deputy General Counsel, and Jacob M. Lewis, Associate General Counsel. Kristen C. Limarzi, Attorney, U.S. Department of Justice, and Richard K. Welch, Deputy Associate General Counsel, Federal Communications Commission, entered appearances.

Aytan Y. Bellin argued the cause for intervenors Bais Yaakov of Spring Valley, et al. in support of the respondent on the statutory authority issue. With him on the brief were Roger Furman, Los Angeles, CA, Phillip A. Bock, and Glenn L. Hara, Chicago, IL.

Robert A. Long argued the cause for intervenors in support of the respondent on the waiver issue. With him on the brief were Yaron Dori, Michael Beder, Matthew A. Brill, Matthew T. Murchison, Jonathan Y. Ellis, Washington, DC, Marie Tomassi, St. Petersburg, FL, Joseph R. Palmore, Washington, DC, Blaine C. Kimrey, Chicago, IL, Bryan K. Clark, Samuel L. Feder, Matthew E. Price, Washington, DC, Thomas R. McCarthy, Arlington, VA, Helgi C. Walker, Washington, DC, Kim E. Rinehart, and Jeffrey R. Babbin, New Haven, CT.

Before: Kavanaugh and Pillard, Circuit Judges, and Randolph, Senior Circuit Judge.

Opinion

Dissenting opinion filed by Circuit Judge Pillard.

Kavanaugh, Circuit Judge:

Believe it or not, the fax machine is not yet extinct. Some businesses send unsolicited advertisements by fax. This case arises out of Congress's efforts to protect consumers from unsolicited fax advertisements.

The Junk Fax Prevention Act of 2005 bans most unsolicited fax advertisements, but allows unsolicited fax advertisements in certain commercial circumstances. When those unsolicited fax advertisements are allowed, the Act requires businesses to include opt-out notices on the faxes. *See* 47 U.S.C. § 227(b).

In 2006, the FCC issued a rule that requires businesses to include opt-out notices not just on *unsolicited* fax advertisements, but also on *solicited* fax advertisements. The term "solicited" is a term of art for faxes sent by businesses with the invitation or permission of the recipient.

In this case, businesses that send solicited fax advertisements contend that the FCC's new rule exceeds the FCC's authority under the Act. The question is whether the Act's requirement that businesses include an opt-out notice on *unsolicited* fax advertisements authorizes the FCC to require businesses to include an opt-out notice on *solicited* fax advertisements. Based on the text of the statute, the answer is no.

We hold that the FCC's 2006 Solicited Fax Rule is therefore unlawful to the extent that it requires opt-out notices on solicited faxes. The FCC's Order in this case interpreted and applied that 2006 Rule. We vacate that Order and remand for further proceedings.

***1080** I

In 1991, Congress passed and President George H.W. Bush signed the Telephone Consumer Protection Act. *See* Pub. L. No. 102-243, 105 Stat. 2394 (codified as amended at 47 U.S.C. § 227). In 2005, Congress passed and President George W. Bush signed the Junk Fax Prevention Act, which amended the 1991 Act. *See* Pub. L. No. 109-21, 119 Stat. 359 (codified at 47 U.S.C. § 227). For simplicity, we will refer to the combined and amended legislation as "the Act."

The Act generally prohibits the use of "any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C). The Act defines "*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, in writing or otherwise*." *Id.* § 227(a)(5) (emphasis added).

The Act contains an exception that allows certain unsolicited fax advertisements. The statute permits unsolicited fax advertisements where (1) "the unsolicited advertisement is from a sender with an established business relationship with the recipient"; (2) the sender obtained the recipient's fax number through "voluntary communication" with the recipient or "the recipient voluntarily agreed to make" his information available in "a directory, advertisement, or site on the Internet"; and (3) the unsolicited advertisement "contains a notice meeting the requirements under paragraph (2)(D)." *Id.* § 227(b)(1)(C)(i)-(iii). Paragraph (2)(D), in turn, provides, among other things, that the notice must be "clear and conspicuous" and "on the first page of the unsolicited advertisement," must state that the recipient may opt out from "future unsolicited advertisements," and must include a "cost-free mechanism" to send an opt-out request "to the sender of the unsolicited advertisement." *Id.* § 227(b)(2)(D).

That third requirement—the opt-out notice—is central to this case.

Congress has authorized the FCC to issue regulations to implement the Act. *See id.* § 227(b)(2). Fax senders face a stiff penalty for violating the FCC's regulations. Importantly, the Act supplies a private right of action to fax recipients for them to sue fax senders that send unsolicited fax advertisements in violation of FCC regulations. *See id.* § 227(b)(3). The Act allows plaintiffs to obtain from fax senders at least $500 for each violation. *See id.* Those penalties can add up quickly given the nature of mass business faxing.

In 2006, the FCC issued a new rule governing *solicited* faxes. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 71 Fed. Reg. 25,967, 25,971-72 (May 3, 2006) (now codified at 47 C.F.R. § 64.1200(a)(4)(iv)). We will refer to that rule as the Solicited Fax Rule. The Solicited Fax Rule requires a sender of a fax advertisement to include an opt-out notice on the advertisement, even when the advertisement is sent to a recipient from whom the sender "obtained permission." 71 Fed. Reg. at 25,972. In other words, the FCC's new rule mandates that senders of *solicited* faxes comply with a statutory requirement that applies only to senders of *unsolicited* faxes.

Petitioner Anda is a company that sells generic drugs. As part of its business, Anda faxes advertisements to small pharmacies. Anda's fax advertisements convey pricing information and weekly specials to the pharmacies. Many pharmacies have given permission to Anda for Anda to send those faxes.

***1081** In 2010, Anda sought a declaratory ruling from the FCC clarifying that the Act does not require an opt-out notice on solicited fax advertisements—that is, those that are sent with the recipient's prior express permission. *See* Anda Petition for Declaratory Ruling, CG Docket No. 05-338 (Nov. 30, 2010).

That issue was of great importance to Anda. In 2008, Anda had been sued in a class action in Missouri state court for alleged violations of the FCC's Solicited Fax Rule. Many of the plaintiff pharmacies in that case admitted that they had expressly given permission to Anda for Anda to send fax advertisements to the plaintiffs. But those plaintiffs nevertheless sought over $150 million in damages from Anda because Anda's fax advertisements allegedly did not include opt-out notices that complied with the Solicited Fax Rule's requirements.

Let that soak in for a minute: Anda was potentially on the hook for $150 million for failing to include opt-out notices on faxes that the recipients had given Anda permission to send. If the Act actually provides the FCC with the authority to issue the Solicited Fax Rule, then Anda could be subject to that large class-action damage award. But if the Act does not provide the FCC with the authority to issue the Solicited Fax Rule, then Anda would be off that hook. Several other businesses facing similar class-action lawsuits joined Anda's petition to the FCC.

In response to Anda's petition, the FCC adhered to its interpretation of the Act as providing the FCC with the authority to require opt-out notices on

solicited faxes as well as unsolicited faxes (although the FCC said it would waive application of the rule to businesses that sent solicited faxes before April 30, 2015). *See* Order, *Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, 29 FCC Rcd. 13,998 (2014). Commissioner Pai and Commissioner O'Rielly dissented in relevant part. Commissioner Pai stated that the FCC's statutory approach reflected "convoluted gymnastics." *Id.* at 14,018 (Pai, concurring in part and dissenting in part). Anda and the other companies then filed a petition for review in this Court. This Court has jurisdiction over the petition under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

II

[1] The FCC says that the Act's requirement that businesses include opt-out notices on *unsolicited* fax advertisements grants the FCC the authority to also require businesses to include opt-out notices on *solicited* fax advertisements—that is, those fax advertisements sent with the permission of the recipient. We disagree with the FCC.

The relevant provision of the Act provides: "It shall be unlawful for any person within the United States ... to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an *unsolicited* advertisement." 47 U.S.C. § 227(b) (emphasis added). The Act defines "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, in writing or otherwise*." *Id.* § 227(a)(5) (emphasis added). Pursuant to regulation, a fax recipient may revoke previously granted permission by sending a request to the sender. *See* 47 C.F.R. § 64.1200(a)(4)(vi).

The Act contains an exception that allows certain unsolicited fax advertisements. As relevant here, the Act allows a business to transmit an unsolicited fax advertisement when, among other things, the ***1082** fax "contains a notice" that the recipient may opt out from "future unsolicited advertisements." *Id.* § 227(b)(1)(C), (b)(2)(D).

Although the Act requires an opt-out notice on unsolicited fax advertisements, the Act does not require a similar opt-out notice on *solicited* fax advertisements—that is, those fax advertisements sent with the recipient's prior express invitation or permission. Nor does the Act grant the FCC authority to require opt-out notices on solicited fax advertisements.

The text of the Act provides a clear answer to the question presented in this case. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 & n.9, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Congress drew a line in the text of the statute between unsolicited fax advertisements and solicited fax advertisements. Unsolicited fax advertisements must include an opt-out notice. But the Act does not require (or give the FCC authority to require) opt-out notices on solicited fax advertisements. It is the Judiciary's job to respect the line drawn by Congress, not to redraw it as we might think best. [1]

1 The precise question here, to be clear, is whether Section 227(b) authorizes the opt-out notice requirement for solicited fax advertisements. The FCC has not claimed that any other provision of the Act could authorize an opt-out notice requirement on solicited fax advertisements.

[2] The FCC and the dissent seem to suggest that the agency may take an action—here, requiring opt-out notices on solicited fax advertisements—so long as Congress has not *prohibited* the agency action in question. That theory has it backwards as a matter of basic separation of powers and administrative law. The FCC may only take action that Congress has *authorized*. *See Utility Air Regulatory Group v. EPA*, —— U.S. ——, 134 S.Ct. 2427, 2445, 189 L.Ed.2d 372 (2014); *American Library Association v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005). Congress has not authorized the FCC to require opt-out notices on solicited fax advertisements. And that is all we need to know to resolve this case.

In trying to sidestep the statute's language, the FCC argues that it can require opt-out notices on solicited faxes because Congress did not define the phrase "prior express invitation or permission" in the Act. To reiterate, the Act states that an "unsolicited advertisement" is "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, in writing or otherwise." 47 U.S.C. § 227(a)(5) (emphasis added). The FCC argues that it has reasonably defined the phrase "prior express invitation or permission" to mean that prior express permission lasts only until it is revoked, and that all fax advertisements—even solicited fax advertisements—therefore must include a means to revoke that permission.

If you are finding the FCC's reasoning on this point difficult to follow, you are not alone. We do not get it either. The phrase "prior express invitation or permission" tells us what it may take for a fax to be considered solicited rather than unsolicited. The FCC can reasonably define that concept within statutory boundaries. The FCC can also reasonably provide, as it has, that a recipient may revoke previously granted permission by sending a request to the sender. *See* 47 C.F.R. § 64.1200(a)(4)(vi). But what the FCC may not do under the statute is require opt-out notices on solicited faxes—that is, opt-out notices on those faxes that are sent with the prior express invitation or permission of the recipient.

***1083** The FCC responds that giving fax recipients a cost-free, simple way to withdraw prior permission is good policy. The agency says that absent a requirement that senders include an opt-out notice on fax ads sent with prior express permission, some recipients may have trouble figuring out how to revoke their permission. But the fact that the agency believes its Solicited Fax Rule is good policy does not change the statute's text. *See Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 188, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994). The text of the Act does not grant the FCC authority to require opt-out notices on solicited faxes.

* * *

We hold that the FCC's 2006 Solicited Fax Rule is unlawful to the extent that it requires opt-out notices on solicited faxes. The FCC's Order in this case interpreted and applied that 2006 Rule. We vacate that Order and remand for further proceedings. [2]

[2] The FCC waived application of the 2006 Solicited Fax Rule to fax advertisements sent before April 30, 2015. A different set of petitioners challenged the FCC's waiver. In light of our decision that the FCC's Solicited Fax Rule is unlawful, we dismiss the waiver petitions as moot.

So ordered.

Pillard, Circuit Judge, dissenting:

The court holds that the FCC's requirement of opt-out notices on fax ads contravenes the plain text of the statute. The majority shortchanges the FCC's statutory authority to "implement" Congress's ban on "unsolicited" fax ads—those sent without "prior express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(b)(2), (b)(1)(C), (a)(5). The FCC reasonably concluded that opt-out notices are needed on all fax ads so that recipients can easily limit or withdraw their "invitation or permission." Regulation of "unsolicited" advertising requires a mechanism for discerning whether someone who okayed fax ads at some point in the past is still willing to receive an advertiser's further faxes. The likely result of the court's decision is to make it harder for recipients to control what comes out of their fax machines (and so perhaps more hesitant to acquiesce to receive fax ads in the first place)—precisely the sort of anti-consumer harm Congress intended to prevent.

I.

The majority fails to see the FCC's rationale for requiring that all fax ads include an informative opt-out notice. *See* Maj. Op. at 1082–83. Anybody who has ever shared contact information and then suffered a fusillade of annoying and unstoppable advertisements—whether by phone, text, email, or fax—recognizes the nature of the problem the FCC was trying to address. Testing the water is no commitment to an endless swim; it is a reasonable protection of the hesitant swimmer to prohibit hiding the life jackets.

The FCC was authorized to give such protection. Congress directed the FCC to "prescribe regulations to implement" the prohibition on the sending of fax ads absent the recipient's "prior express invitation or permission." 47 U.S.C. § 227(b)(2), (a)(5). Beyond clarifying that the permission need not be in writing, Congress said nothing about how "prior express invitation or permission" might be elicited, or when it might lapse or be withdrawn. Does an advertiser need to secure permission before sending *each* fax ad to a particular recipient? Would permission, once given, last forever? Or must an advertiser provide a spectrum of more nuanced

options between those poles? The statute does not say, and the FCC reasonably determined that, in part to guard against error or ***1084** fraud in identifying who has in fact agreed to accept fax ads, permission would last only "until the consumer revokes such permission by sending an opt-out request to the sender." 21 F.C.C. Rcd. 3787, 3812 (2006).

So far so good; that reasonable statutory interpretation has not been challenged. But this right to opt-out raised a further question: If, for permission to be meaningful, recipients must be able to limit or withdraw it, do advertisers need to make clear how that may be done? The FCC concluded that they do. Requiring all fax ads to include information about opting out would "allow consumers to stop unwanted faxes in the future." 21 F.C.C. Rcd. at 3812. As the FCC further explained in the order under review, the failure to provide opt-out notices could confront fax recipients "with a practical inability to make senders aware that their consent is revoked." 29 F.C.C. Rcd. 13998, 14007 (2014). Indeed, the inclusion of an opt-out notice is part of what makes subsequent faxes "solicited" at all. *See id.* at 14007 n.69. The conspicuous presence of a standardized notice specifying an opt-out mechanism helps to confirm that those recipients who don't opt out actually agree to receive more ads, and are not left fuming and spluttering as they spend "considerable time and effort to determine how to properly opt out." *Id.* at 14007.

Thus, the FCC's regulation must be considered in light of Congress's charge to the FCC to "prescribe regulations to implement" a regime that defines the capacious statutory phrase "prior express invitation or permission." 47 U.S.C. § 227(b)(2), (a)(5). By promulgating this rule, the FCC sought to "implement"—to make meaningful and effective—its unchallenged view that "prior express invitation or permission" encompasses past permission that has not been delimited despite a reasonable opportunity to do so. *See* 29 F.C.C. Rcd. at 14006-07; 21 F.C.C. Rcd. at 3811-12.

The majority misses this because, in its telling, the Junk Fax Prevention Act's requirement of an opt-out notice on unsolicited faxes sent pursuant to an established business relationship "is central to this case." Maj. Op. at 1080. That account makes pivotal what is peripheral. The FCC has authority—pursuant to the general ban on unsolicited faxes and its mandate to implement that ban—to require an opt-out notice on *all* fax ads. The fact that Congress required an opt-out notice as a condition of treating unsolicited ads faxed to an established business partner as if they were solicited does not detract from the FCC's preexisting authority to require opt-out notices on other faxed advertisements.

In my view, a different provision of the Junk Fax Prevention Act is more central to this case: Congress's addition of the qualifier "in writing or otherwise" after "prior express invitation or permission." *See* Pub. L. No. 109-21, § 2(g), 119 Stat. 359 (2005). In rulemaking to implement the Act, the FCC expressed concern that "permission not provided in writing may result in some senders erroneously claiming they had the recipient's permission to send facsimile advertisements." 21 F.C.C. Rcd. at 3812. The opt-out notice was one response to that concern; it would give recipients an easy way to make clear their consent *vel non*. The FCC knew well that without a standardized way to refuse unwanted ads these cases could become, in the words of one district court, a "factual morass" where the line between "solicited" and "unsolicited" is rather hazy. *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F.Supp.3d 482, 497 (W.D. Mich. 2014). That court held that, where advertisers bought lists of potential customers' fax numbers from a professional association ***1085** whose members did not all want their ads, an "unequivocal requirement of a simple opt-out notice on every fax was the only way to give practical effect" to Congress's ban on unsolicited ads. *Id.*

The majority nevertheless maintains that the FCC stepped over the "line" that Congress "drew" separating unsolicited ads (regulable) from solicited ads (non-regulable). Maj. Op. at 1082. But Congress drew no such line. Congress expressly delegated authority to the FCC to implement a prohibition on unsolicited ads, and the opt-out notice requirement does exactly that. The majority appears to assume that, by banning unsolicited ads, Congress implicitly forbade regulation of ostensibly solicited ads—even if the very purpose and effect of the regulation is to refine the definition of which ads count as solicited (and so permitted), and which are banned as unsolicited. We have said that the *expressio unius est exclusio alterius* canon is "an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 367 (D.C. Cir. 2014) (quoting *Cheney R. Co.,*

Inc. v. ICC, 902 F.2d 66, 69 (D.C. Cir. 1990)), *overruled in part on other grounds by Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc). This case reinforces that wisdom: The majority depends entirely on a negative implication from the rule's proscription of "unsolicited" ads, thereby missing the point that the opt-out notice on all fax ads is part of the FCC's simple and effective mechanism for differentiating solicited from unsolicited ads. In short, the opt-out notice requirement represents a means of implementing a given power, not the exercise of an unauthorized power.

The majority laments that petitioner Anda was "potentially on the hook" for $150 million in damages for failing to include an opt-out notice on "solicited" ads. Maj. Op. at 1081. But any such award would simply reflect Congress's decision that, to prompt compliance, the requirement needed bite in the form of at least $500 in statutory damages for each violation. Congress wanted to put an end to unsolicited fax advertising. What is truly striking is how simply fax advertisers like Anda could have avoided such exposure by following the letter of the regulation and adding a few words to their standard faxes. *See* J.A. 986-89 (examples of compliant ads). While emphasizing the litigation risk faced by the fax-ad industry, the majority ignores Congress's actual policy choice: to protect recipients from unwanted ads that waste their supplies, clutter their fax intake, and delay receipt of desired faxes. *See* H.R. REP. NO. 102-317, at 25 (1991); S. REP. NO. 102-178, at 2 (1991). Congress decided that its policy could best be enforced through a private right of action, and that statutory damages were necessary to encourage plaintiffs' counsel to invest in private enforcement actions—an approach it apparently preferred over either non-enforcement or enlarged federal administrative capacity. If that policy is to be reversed, Congress—not this Court—must make that decision.

II.

Because its statutory ruling moots the issue, the majority does not reach the FCC's decision to waive the opt-out notice requirement for all faxes sent before April 30, 2015. Maj. Op. at 1083 n.2. I would hold that the FCC failed to establish good cause for that sweeping, retroactive waiver.

"The FCC has authority to waive its rules if there is 'good cause' to do so." *Ne. Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (quoting 47 C.F.R. § 1.3). A waiver is appropriate ***1086** "only if [1] special circumstances warrant a deviation from the general rule and [2] such deviation will serve the public interest." *Id.* "The reason for this two-part test flows from the principle that an agency must adhere to its own rules and regulations, and *ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned." *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008) (internal quotation marks and alterations omitted). Thus, an agency may grant waivers "only pursuant to a relevant standard" and "may not act out of unbridled discretion or whim in granting waivers any more than in any other aspect of its regulatory function." *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). A waiver applicant "faces a high hurdle even at the starting gate" and must "plead with particularity the facts and circumstances which warrant" a waiver. *Id.* at 1157.

Here, the FCC did not establish that special circumstances and the public interest favor a broad retroactive waiver.

First, the FCC overstated the confusion that regulated parties reasonably could have experienced on reviewing the FCC's handiwork—the sole "special circumstance" it identified. As the Eighth Circuit has noted, the "plain language" of the FCC regulation, as published in the Code of Federal Regulations, unambiguously required "solicited" faxes to include the opt-out notice. *Nack v. Walburg*, 715 F.3d 680, 683 (8th Cir. 2013). In light of the plain regulatory language, an errant footnote in the FCC's explanatory order could not have caused significant reasonable confusion. As the FCC has conceded, "where a conflict exists between the text and a footnote in the same agency Order, established precedent provides that 'the text of the [agency's] decision controls.' " 29 F.C.C. Rcd. at 14010 n.97 (quoting *United Steelworkers of Am., AFL-CIO v. NLRB*, 389 F.2d 295, 297 (D.C. Cir. 1967)). Here, where the conflict was between *the text of a published regulation* and a mere footnote in the agency's explanatory order, surely a prudent regulated party would undertake to follow the regulation. Nevertheless, the FCC did not require waiver-seekers to demonstrate that they were actually confused, or even that there was general confusion in the industry. Instead, the FCC accepted a waiver-seeker's mere "reference to the confusing footnote language" as sufficient to establish "reasonable confusion" and, thus, special circumstances. *Id.* at 14009-10. The FCC thereby threw open the door

to opportunistic waiver-seekers whose unsubstantiated claims could be surmounted only by (impossible-to-obtain) evidence that they were not actually confused.

Second, the FCC failed to explain how its broad waiver serves the public interest. The FCC barely even discussed the public interests served by its opt-out notice requirement, much less did it explain how granting a windfall to waiver-seekers with records of wholesale, prolonged violations of that requirement is consistent with those interests. The FCC asserted that the waiver would rescue confused businesses from the possibility of "significant damage awards." 29 F.C.C. Rcd. at 14011. But the interest of regulated parties in avoiding congressionally authorized damages is not a "public" interest of the sort contemplated by our precedents. We have explained that public-interest waivers are for applicants whose conduct "will not undermine the policy, served by the rule, that has been adjudged in the public interest." *WAIT Radio*, 418 F.2d at 1157. In other words, waivers are justified by reference to the same public interest that supports the general requirement—not by reference to regulated parties' interest in avoiding costs the statute imposes as part of its enforcement mechanism. For instance, the FCC perhaps could have justified a targeted ***1087** waiver for advertisers who violated some specifics of the requirement despite providing a reasonably clear but technically noncompliant means for recipients to opt out. *See, e.g.*, J.A. 991-93. In any event, assuming a private interest might be one factor for the agency's consideration, the FCC itself acknowledged it was not "an inherently adequate ground for waiver"—even as it failed to offer any adequate ground. 29 F.C.C. Rcd. at 14011.

In my view, the FCC thus "eviscerat[ed]" its own rule via waiver, rather than employing the "limited safety valve" authorized by this Court's precedents. *WAIT Radio*, 418 F.2d at 1159.

III.

Because the FCC validly implemented the congressional ban on "unsolicited" fax ads by requiring an opt-out notice on all fax ads, and failed to justify retroactively and indiscriminately waiving that requirement, I respectfully dissent.

All Citations

852 F.3d 1078

End of Document

ITEM 2 OF APPENDIX

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rules 28(a)(1)(A)-(C) and 35(c), intervenors Bais Yaakov of Spring Valley, Roger H. Kaye, Roger H. Kaye, MD PC, Menachem Raitport, Crown Kosher Meat Market, Inc., Medical West Ballas Pharmacy, Ltd., and Michael R. Nack (collectively, "Intervenors") certify the following:

(A) Parties, Intervenors and Amici.

(1) Before the FCC: The following parties, intervenors, and/or amici filed petitions with the FCC challenging the FCC's authority to issue 47 C.F.R. § 64.1200(a)(4)(iv)-(vi) (the "Opt-Out Regulation") and seeking other relief that the FCC ruled upon in its October 30, 2014 Final Order (the "*Authority Ruling*"): Anda, Inc.; Forest Pharmaceuticals, Inc.; Staples, Inc.; Quill Corporation; Gilead Sciences, Inc.; Gilead Palo Alto, Inc.; Douglas Paul Walburg; Richie Enterprises, LLC; Futuredontics, Inc.; All Granite & Marble Corp.; Purdue Pharma, L.P.; Purdue Pharma, Inc.; Purdue Products L.P.; Prime Health Services, Inc.; TechHealth, Inc.; Crown Mortgage Company; Magna Chek, Inc.; Masimo Corporation; Best Buy Builders, Inc.; S&S Firestone, Inc. d/b/a S&S Tire; Canon & Associates LLC D/B/A Polaris Group; Stericycle, Inc.; American CareSource Holdings, Inc.; CARFAX, Inc.; Merck and Company, Inc.; UnitedHealth Group, Inc.; MedLearning, Inc.; Medica, Inc.; Unique Vacations, Inc.; and Power Liens, LCC (collectively, the "Class Defendants").

Through their counsel, Intervenors filed extensive comments with the FCC in connection with the challenges to the FCC's authority to issue the Opt-Out Regulation. Numerous others, not listed here, filed different types of comments with the FCC in connection with this matter.

(2) Before this Court. The following parties, intervenors and/or amici have appeared as parties in this Court on this matter:

(i) Petitioners Anda, Inc.; Forest Pharmaceuticals, Inc.; Futuredontics, Inc. (terminated on March 13, 2015); Gilead Palo Alto, Inc.; Gilead Sciences, Inc.; Masimo Corporation; McKesson Corporation; Merck & Company, Inc.; Purdue Pharma LP; Purdue Pharma, Inc.; Purdue Products LP; Quill Corporation; Richie Enterprises, LLC; Staples, Inc.; TechHealth, Inc.; Unique Vacations, Inc.; Douglas P. Walburg; and ZocDoc, Inc.;

(ii) Respondents FCC and United States of America;

(iii) Intervenors Bais Yaakov of Spring Valley; Roger H. Kaye; Roger H. Kaye, MD PC; Menachem Raitport; Crown Kosher Meat Market, Inc.; Medical West Ballas Pharmacy, Ltd.; and Michael R. Nack; and

(iv) Amici National Federation of Independent Business Small Business Legal Center ("NFIB"); Public Citizen, Inc.; Consumers' Research (seeking to join NFIB's amicus brief); and ACA International (filing motion for leave to file amicus brief, and subsequently withdrawing such motion).

(B) Rulings under Review. The opinion of the panel from which Petitioners are seeking rehearing en banc is *Bais Yaakov of Spring Valley v. F.C.C.*, 852 F.3d 1078 (D.C. Cir. 2017).

The underlying agency ruling at issue on these appeals (nos. 14-1239, 14-1243, 14-1270, 14-1279, 14-1292, 14-1293, 14-1294, 14-1295, 14-1297, 14-1299 and 14-1302) is the portion of the final order issued by the FCC on October 30, 2014 re-confirming the FCC's authority to issue the Opt-Out Regulation and denying all challenges thereto (the *Authority Ruling*) in *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, Application for Review filed by Anda, Inc., and Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG docket nos. 02-278 & CG 05-338, 29 FCC Rcd. 13998, FCC 14-164, 2014 WL 5493425 (rel. Oct. 30, 2014) [JA1302-1326].

(C) Related Cases. The Authority Ruling portion of the FCC's October 30, 2014 Order has not previously been substantively addressed by this or any other United States court of appeals, or by any other federal or local court in the District of Columbia. However, as discussed more fully in the text of Petitioners' prior Intervenors' prior brief, in *Nack v. Walburg*, 715 F.3d 680, 682, 685-86 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 1539 (2014), the Eighth Circuit rejected the defendant's attempt to challenge the FCC's authority to issue the Opt-Out Regulation on the ground that the court lacked jurisdiction to do so pursuant to the Hobbs Act, 28 U.S.C. § 2342(1).

Just prior to the filing of these appeals, Intervenors filed their own petitions for review of another portion of the same October 30, 2014 FCC Order that granted

retroactive waivers of the Opt-Out Regulation (the "Waiver Ruling") in this Court, which were given case numbers 14-1234 and 14-1235, and subsequently consolidated with these appeals.

Dated: April 28, 2017

/s/ Glenn L. Hara
Glenn L. Hara
ANDERSON + WANCA
3701 Algonquin Road, Suite 500
Rolling Meadows, Illinois 60008
Telephone: (847) 368-1500
Facsimile: (847) 368-1501
Email: ghara@andersonwanca.com

Counsel for intervenors Medical West Ballas Pharmacy, Ltd. and Michael R. Nack

David M. Oppenheim, Esq.
BOCK. HATCH, LEWIS & OPPENHEIM, LLC
134 N. La Salle Street, Suite 1000
Chicago, Illinois 60602
Telephone: (312) 658-5500
Facsimile: (312) 658-5555
Email: david@classlawyers.com

Co-counsel for intervenor Medical West Ballas Pharmacy, Ltd.

/s/ Aytan Y. Bellin
Aytan Y. Bellin
BELLIN & ASSOCIATES LLC
50 Main Street, Suite 1000
White Plains, New York 10606
Telephone: (914) 358-5345
Facsimile: (212) 571-0284
Email: aytan.bellin@bellinlaw.com

ROGER FURMAN, ESQ.
7485 Henefer Avenue
Los Angeles, California 90045
Telephone: (310) 568-0640
Facsimile: (310) 694-9083
Email: roger.furman@yahoo.com

Counsel for intervenors Bais Yaakov of Spring Valley, Roger H. Kaye, Roger H. Kaye, MD PC, Menachem Raitport, and Crown Kosher Meat Market, Inc.

ITEM 3 OF APPENDIX

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 26.1 and 35(c), each of the entity intervenors (Bais Yaakov of Spring Valley, Roger H. Kaye MD PC, Crown Kosher Meat Market, Inc., and Medical West Ballas Pharmacy, Ltd.) discloses that it has no parent corporation or parent company, and that no publicly held corporation or company owns 10 percent or more of its stock.

The general nature and purpose of each entity intervenor, insofar as relevant to this litigation, is as follows: Bais Yaakov of Spring Valley is a Jewish high school for girls, offering education in religious and secular subjects; Roger H. Kaye MD PC is a Connecticut professional corporation in which Dr. Roger H. Kaye practices medicine; Crown Kosher Meat Market, Inc. is a New York

corporation that operates a butcher shop, sells prepared foods, and does catering; and Medical West Ballas Pharmacy, Ltd. is a Missouri corporation that is a pharmacy.

Dated: April 28, 2017

/s/ Glenn L. Hara
Glenn L. Hara
ANDERSON + WANCA
3701 Algonquin Road, Suite 500
Rolling Meadows, Illinois 60008
Telephone: (847) 368-1500
Facsimile: (847) 368-1501
Email: ghara@andersonwanca.com

Counsel for intervenors Medical West Ballas Pharmacy, Ltd. and Michael R. Nack

David M. Oppenheim, Esq.
BOCK. HATCH, LEWIS & OPPENHEIM, LLC
134 N. La Salle Street, Suite 1000
Chicago, Illinois 60602
Telephone: (312) 658-5500
Facsimile: (312) 658-5555
Email: david@classlawyers.com

Co-counsel for intervenor Medical West Ballas Pharmacy, Ltd.

/s/ Aytan Y. Bellin
Aytan Y. Bellin
BELLIN & ASSOCIATES LLC
50 Main Street, Suite 1000
White Plains, New York 10606
Telephone: (914) 358-5345
Facsimile: (212) 571-0284
Email: aytan.bellin@bellinlaw.com

ROGER FURMAN, ESQ.
7485 Henefer Avenue
Los Angeles, California 90045
Telephone: (310) 568-0640
Facsimile: (310) 694-9083
Email: roger.furman@yahoo.com

Counsel for intervenors Bais Yaakov of Spring Valley, Roger H. Kaye, Roger H. Kaye, MD PC, Menachem Raitport, and Crown Kosher Meat Market, Inc.

CERTIFICATE OF SERVICE

I certify that on April 28, 2017, I electronically filed this Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in these appeals who are registered CM/ECF users will be served by the CM/ECF system.

I also certify that because the participants in this case listed below are not registered as CM/ECF users, on April 28, 2017 I mailed this Petition via first class mail, postage prepaid, to them at the following addresses:

Ms. Karen R. Harned
National Federation of Independent Business
1201 F Street, NW
Suite 200
Washington, DC 20004

Mr. Robert L. Carter
Brown & James
800 Market Street
Suite 1100
St. Louis, MO 63101

Dated: April 28, 2017

/s/ Aytan Y. Bellin
Aytan Y. Bellin
BELLIN & ASSOCIATES LLC
50 Main Street, Suite 1000
White Plains, New York 10606
Telephone: (914) 358-5345
Facsimile: (212) 571-0284
Email: aytan.bellin@bellinlaw.com