No. 17-351

IN THE
Supreme Court of the United States

BAIS YAAKOV OF SPRING VALLEY, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR THE PRIVATE RESPONDENTS IN OPPOSITION

Matthew E. Price
Counsel of Record
Samuel L. Feder
JENNER & BLOCK, LLP
1099 New York Ave., NW
Washington, DC 20001
mprice@jenner.com
(202) 639-6873

Counsel for Richie Enterprises, LLC and Donald P. Walburg

William M. Jay
Counsel of Record
Brian T. Burgess
GOODWIN PROCTER LLP
901 New York Ave., NW
Washington, DC 20001
wjay@goodwinlaw.com
(202) 346-4000

Counsel for Anda, Inc.

(Additional counsel listed on inside cover)

January 16, 2018

Thomas R. McCarthy
Counsel of Record
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
tom@consovoymccarthy.com
(703) 243-9423

Helgi C. Walker
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., NW
Washington, DC 20036

Counsel for Staples, Inc. and Quill Corp.

Marie Tomassi
Counsel of Record
Charles M. Harris
Alicia H. Koepke
TRENAM, KEMKER, SCHARF, BARKIN, FRYE, O'NEILL & MULLIS
200 Central Ave., Suite 1600
St. Petersburg, FL 33701
mtomassi@trenam.com
(727) 820-3952

Counsel for TechHealth, Inc.

Blaine C. Kimrey
Counsel of Record
Bryan K. Clark
VEDDER PRICE P.C.
222 N. LaSalle Street
Chicago, IL 60601
bkimrey@vedderprice.com
(312) 609-7865

Counsel for ZocDoc, Inc.

Robert A. Long, Jr.
Counsel of Record
Yaron Dori
Michael Beder
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
rlong@cov.com
(202) 662-5612

Counsel for Allergan Sales, LLC, Gilead Palo Alto, Inc., Gilead Sciences, Inc., Masimo Corp., Purdue Pharma LP, Purdue Pharma, Inc., Purdue Products LP, and Unique Vacations, Inc.

Kim E. Rinehart
Counsel of Record
Jeffrey R. Babbin
WIGGIN AND DANA, LLP
265 Church Street
P.O. Box 1832
New Haven, CT 06508
krinehart@wiggin.com
(203) 498-4400

Counsel for Merck & Co., Inc.

Joseph R. Palmore
Counsel of Record
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
jpalmore@mofo.com
(202) 887-1500

Counsel for McKesson Corp.

QUESTION PRESENTED

The Telephone Consumer Protection Act of 1991 (TCPA), as amended, generally makes it unlawful to send "an unsolicited advertisement" to a telephone facsimile machine unless certain conditions are satisfied. 47 U.S.C. § 227(b)(1)(C). An "unsolicited advertisement" is an advertisement transmitted without the recipient's "prior express invitation or permission." *Id.* § 227(a)(5). To send such an advertisement to a fax machine, the sender must, among other things, provide a notice of how the recipient may opt out of receiving future unsolicited advertisements. *Id.* § 227(b)(1)(C)(iii), (b)(2)(D).

This petition involves a rule issued by the Federal Communications Commission (FCC) that placed restrictions on *solicited* fax advertisements. The FCC's "Solicited Fax Rule" required senders of *all* fax advertisements to include an opt-out notice, even though the statute's notice requirement applies only to *unsolicited* fax advertisements. The D.C. Circuit held that the Solicited Fax Rule is unlawful because the TCPA does not grant the FCC authority to require opt-out notices on fax advertisements that the recipient had expressly invited or permitted.

The question presented is: Does the TCPA authorize the FCC to impose opt-out notice requirements for solicited fax advertisements?

RULE 29.6 STATEMENT

Anda, Inc. is a wholly owned subsidiary of Anda Holdco Corp., and Anda Holdco Corp. is a wholly owned subsidiary of Teva Pharmaceuticals Industries Ltd. Teva Pharmaceuticals Industries Ltd. is publicly traded. No other publicly held company holds 10% or more of the stock of Anda, Inc.

Effective January 1, 2018, pursuant to an internal corporate restructuring, Forest Pharmaceuticals, Inc., merged with and into a corporate affiliate, Allergan Sales, LLC, with Allergan Sales, LLC as the surviving entity. Allergan Sales, LLC is an indirect wholly owned subsidiary of Allergan plc, a public limited company incorporated in Ireland and traded on the New York Stock Exchange under the ticker symbol AGN. No publicly held company owns 10% or more of the stock of Allergan plc.

Gilead Palo Alto, Inc., is a wholly owned subsidiary of Gilead Sciences, Inc. Gilead Sciences, Inc., is a research-based biopharmaceutical company that discovers, develops and commercializes a wide range of pharmaceutical products. Gilead Sciences, Inc., is publicly held, and no publicly held company has a 10% or greater ownership interest in Gilead Sciences, Inc.

Masimo Corporation is a publicly traded global medical technology company that develops and manufactures noninvasive patient monitoring technologies, including medical devices and a wide array of sensors. Masimo has no parent companies. The only publicly held company that holds an aggregate 10% or greater ownership interest in Masimo Corporation is Blackrock Inc.

McKesson Corporation is a publicly traded company. McKesson Corporation has no parent company, and no publicly held corporation owns 10% or more of its stock.

Merck & Co., Inc. is a publicly traded company. Merck certifies that it has no parent corporation and is unaware of any individual or entity that owns 10% or more of its common stock.

Purdue Pharma L.P. and Purdue Products L.P. are nongovernmental Delaware limited partnerships; Purdue Pharma Inc. is a nongovernmental New York corporation. Purdue Holdings L.P., a Delaware limited partnership, holds 100% of the limited partnership interests in Purdue Pharma L.P. Purdue Pharma Inc. is the general partner of both Purdue Pharma L.P. and Purdue Holdings L.P. Purdue Pharma Inc. has no parent corporations, and no publicly traded company has a 10% or greater interest in Purdue Pharma Inc. Purdue Pharma L.P. holds 100% of the limited partnership interests in Purdue Products L.P., and the general partner of Purdue Products L.P. is Purdue Products Inc., a nongovernmental New York corporation. Purdue Products Inc. has no parent corporations, and no publicly traded company has a 10% or greater interest in Purdue Products Inc. Purdue is engaged in the research, development, production, sales, and licensing of prescription and non-prescription (over-the-counter) medicines and hospital products.

Quill Corporation is a subsidiary of Staples, Inc. No publicly held company owns 10% or more of Quill Corporation's stock.

Richie Enterprises, LLC is a Kentucky-based small business that connects pharmacies with drug manufacturers concerning discount drugs and drug closeouts. Richie Enterprises, LLC is not publicly owned and has no parent company. No publicly owned company owns 10% or more of its shares.

Staples, Inc. is a subsidiary of Arch Parent Inc., and Arch Parent Inc.'s ultimate beneficial owner is Sycamore Partners II, L.P. No publicly held company owns 10% or more of Staples, Inc.'s stock.

TechHealth, Inc. is wholly owned by One Call Medical, Inc. OC Medical Holdings, Inc. owns 100% of the stock in One Call Medical, Inc. Opal Acquisition, Inc. owns 100% of the stock in OC Medical Holdings, Inc. No publicly held company has a 10% or greater ownership interest in these companies.

Unique Vacations, Inc., is a nongovernmental corporation that provides marketing and advertising services for Caribbean hotels. UVI's parent company is Unique Vacations, Inc., a Panamanian corporation. No publicly held company holds a 10% or greater ownership interest in UVI.

ZocDoc, Inc. is a privately held corporation. ZocDoc is an online medical care scheduling service that aims to improve the healthcare experience through various search and appointment tools provided free-of-charge for patients and by integrating information about health systems, medical practices and providers for efficient patient access. ZocDoc does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

BRIEF FOR THE PRIVATE RESPONDENTS IN OPPOSITION

Petitioners seek review of a straightforward statutory-interpretation decision that does not implicate any division of authority. Congress adopted a statute regulating *unsolicited* advertisements sent by fax machine. The D.C. Circuit held that the Federal Communications Commission exceeded its authority under that statute by imposing notice requirements on *solicited* fax advertisements—advertisements that the recipient had expressly opted to receive. Conspicuously, the FCC did not seek review of the D.C. Circuit's decision. In fact, its Chairman *endorsed* the court's "[r]ebuke of FCC [o]verreach."[1] Moreover, because the FCC has not suggested that regulating fax-machine communications is a current policy priority, plenary review of the statutory issue posed here would offer no real benefit to the Commission or the public. Even Petitioners, who want to revive the rule to pursue TCPA statutory damages against the Private Respondents, are unlikely to benefit from further review in this Court, because the FCC unanimously waived retrospective application of its rule as to the Private Respondents. In short, there is no reason for this Court to invest its resources reviewing the vacatur of an agency rule

[1] Statement of FCC Chairman Ajit Pai on the Latest D.C. Circuit Rebuke of FCC Overreach (Mar. 31, 2017) (Chairman Pai Statement), *available at* http://bit.ly/2q8aAYh; *see also* Statement of Commissioner Michael O'Rielly on Court Rejection of FCC Anda Order (Mar. 31, 2017) (Commissioner O'Rielly Statement) (referring to FCC's "TCPA overreach"), *available at* http://bit.ly/2qty6Ba.

that the agency itself has no interest in reviving, even if it had authority to do so.

Even aside from the FCC's opposition, a grant of certiorari is not warranted here because this case involves only a narrow (and splitless) question of statutory interpretation. Contrary to Petitioners' assertion, the D.C. Circuit's routine application of this Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), does not conflict with any decision from this Court or from any other circuit. The D.C. Circuit simply applied Step One of the *Chevron* framework and held that Congress's delegation of authority to the FCC to regulate *unsolicited* fax advertisements does not empower the Commission to dictate notice requirements for *solicited* fax advertisements. The decision did not break any new conceptual ground, but simply interpreted the statute at issue—and did so correctly.

The petition for certiorari should be denied.

STATEMENT

1. The Telephone Consumer Protection Act of 1991 (TCPA) generally makes it unlawful (subject to certain exceptions) "to send, to a telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C). The TCPA defines an "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." *Id.* § 227(a)(5).

The FCC first adopted rules implementing the TCPA in 1992. Those rules exempted from the statutory prohibition certain *unsolicited* faxes—*i.e.*, those sent pursuant to an established business relationship between the sender and the recipient. *See* Report and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8779-80 ¶ 54 (1992). The FCC did not seek to regulate *solicited* faxes at all—*i.e.*, those faxes sent with "prior express invitation or permission." 47 U.S.C. § 227(a)(5).

In 2003, however, the FCC changed its rules to eliminate the established-business-relationship exception for unsolicited faxes. Report and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 18 FCC Rcd. 14,014, 14,127-28 ¶ 189 (2003). The FCC also required, for faxes sent with prior express permission, that such permission be in writing and include the recipient's signature. *See id.* at 14,126-28 ¶¶ 187-189.

In 2005, Congress responded by enacting the Junk Fax Prevention Act (JFPA), Pub. L. No. 109-21, 119 Stat. 359 (codified at 47 U.S.C. § 227). Congress overruled the FCC's requirement that prior express permission be in writing, providing that it may be "in writing or otherwise." 47 U.S.C. § 227(a)(5). The JFPA also restored the ability to send unsolicited faxes pursuant to an established business relationship. *See id.* § 227(b)(1)(C). At the same time, Congress required that such unsolicited faxes contain a notice explaining how the recipient can opt out of receiving future unsolicited faxes from the sender. *See id.* § 227(b)(1)(C)(iii), (b)(2)(D). The

statute directs the FCC to "prescribe regulations" governing the statutory opt-out notice to be contained "in an unsolicited advertisement." *Id.* § 227(b)(2)(D). Among other things, the opt-out notice must be conspicuous, provide a domestic telephone number, and identify a cost-free mechanism for the recipient to opt out of receiving future "unsolicited advertisement[s]." *Id.* § 227(b)(2)(D)(i), (iv)(I)-(II).

The JFPA unambiguously limits this opt-out notice requirement to "unsolicited advertisements." *Id.* § 227(b)(2)(D). Indeed, in each of the 27 instances in which Congress referenced fax advertisements in § 227, the statutory text is *always* limited to "unsolicited" fax advertisements. By contrast, the statute never mentions the regulation of solicited fax advertisements.

2. Despite Congress's express and specific focus on *unsolicited* fax advertisements, the FCC promulgated a new rule in 2006. The new rule required *solicited* fax advertisements sent *with* the recipient's prior express invitation or permission to include the same opt-out notice that Congress had required only of *unsolicited* fax advertisements sent pursuant to an established business relationship. *See* 47 C.F.R. § 64.1200(a)(4)(iv) (the "Solicited Fax Rule"); Report and Order and Third Order on Reconsideration, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 21 FCC Rcd. 3787 (2006) (the "2006 Order").

Confusingly, however, the 2006 Order also included a statement that "the opt-out notice requirement only applies to communications that

constitute *unsolicited* advertisements." *Id.* at 3810 ¶ 42 n.154 (emphasis added). Moreover, the Order went beyond the FCC's notice of proposed rulemaking, which had said nothing that would have alerted the public that the FCC was considering requiring opt-out language on faxes sent with the prior express permission of the recipient. Pet. App. 49a-50a. Adding to the confusion, the 2006 Order did not identify the specific source of statutory authority that the FCC relied on to promulgate the Solicited Fax Rule. Instead, the FCC listed 11 statutory provisions on which it might have relied, including § 227. *See* 21 FCC Rcd. at 3817 ¶ 64. The statutory basis for the Solicited Fax Rule is critical, because only § 227(b) provides a private right of action that allows a plaintiff to seek statutory damages for violations of rules promulgated thereunder. *See* 47 U.S.C. § 227(b)(3). Thus, if the Rule were supported by some statutory provision other than § 227(b), private plaintiffs could not seek statutory penalties for purported violations.

3. The Respondents joining this brief are large and small businesses that use, or have used, faxes to communicate with third parties, including customers and potential customers. They have been sued in putative class actions that collectively seek billions of dollars in statutory damages for sending faxes that the recipients expressly consented to receive, but which allegedly failed to include the opt-out language of the Solicited Fax Rule. In some cases, these businesses have been sued even when they included opt-out language in their faxes that complied substantially with the FCC's requirements.

For example, Respondent Douglas Walburg, who owns a small business that publishes a legal practitioner's reference manual, was sued in a putative class action seeking millions of dollars in statutory damages based on a single fax advertisement sent by Walburg's company that allegedly lacked an opt-out notice—even though the recipient undisputedly had consented to receive it. *See Nack v. Walburg*, 715 F.3d 680, 682 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 1539 (2014). In defending against that suit, Walburg argued that there was no private right of action because § 227(b) does not apply to solicited faxes. *Id.* at 686-87. He prevailed in the district court, but the Eighth Circuit reversed. *Id.* at 687. The court of appeals expressed skepticism regarding the FCC's authority to adopt the Solicited Fax Rule, *id.* at 684-85, but it held that Walburg was barred from challenging the Rule's legal validity in defending against a private action, *id.* at 685-87. The court of appeals noted, however, that Walburg was free to file an appropriate petition with the FCC. *Id.* at 686-87 & n.2.

4. Such a petition already was pending with the FCC. In 2010, Respondent Anda, Inc., asked the FCC to issue a declaratory ruling clarifying that the Solicited Fax Rule was not promulgated pursuant to § 227(b), and therefore that violations of the Rule do not give rise to a private right of action for damages. Numerous additional parties, including Walburg and many of the other Respondents joining this brief, filed petitions with the FCC in 2013 seeking similar declaratory relief. Various Respondents requested retroactive waivers of any liability under the Solicited Fax Rule.

In the order under review (the "Order"), the FCC denied the petitions for declaratory relief, asserting (for the first time) that it had "clearly relied upon its section 227 authority in promulgating" the Solicited Fax Rule and that § 227(b)(2) authorizes the Rule. Pet. App. 40a-41a. Two members of the FCC dissented from this determination, including the current FCC Chairman. Pet. App. 62a-77a (Statement of Comm'r Pai); *id.* 78a-83a (Statement of Comm'r O'Rielly).

The FCC nevertheless unanimously concluded that the conflicting statements in its 2006 Order had "resulted in a confusing situation for businesses or one that caused businesses mistakenly to believe that the opt-out notice requirement did not apply" to solicited faxes. Pet. App. 52a. Accordingly, the FCC determined that it served the public interest to grant waivers of the Solicited Fax Rule to the parties who had requested them. Pet. App. 53a, 55a. The FCC further explained that it would grant waivers to other "similarly situated parties" that filed timely requests. Pet. App. 55a.

Various parties filed petitions for review of the Order in the D.C. Circuit. As relevant here, Respondents challenged the denial of declaratory relief, and Petitioners (who are plaintiffs seeking statutory damages in various TCPA cases around the country) intervened to defend that aspect of the Order.

5. The D.C. Circuit vacated the Order and remanded for further proceedings. Pet. App. 1a-10a. The D.C. Circuit held that the JFPA does not "grant the FCC authority to require opt-out notices on

solicited fax advertisements." Pet. App. 8a. The court noted that "[t]he precise question here . . . is whether Section 227(b) authorizes the opt-out notice requirement for solicited fax advertisements," as the FCC in these proceedings "has not claimed that any other provision of the Act could authorize" the requirement. *Id.* n.1.[2] The court concluded that the statutory text provides a clear answer to this question: the TCPA "does not require (or give the FCC authority to require) opt-out notices on solicited fax advertisements." Pet. App. 8a.

The D.C. Circuit rejected the argument that the Solicited Fax Rule is a reasonable interpretation of the statutory definition of "unsolicited advertisement" as an advertisement sent "without [the recipient's] prior express invitation or permission." Pet. App. 9a (quoting 47 U.S.C. § 227(a)(5)). The court recognized that the FCC "can reasonably define" what qualifies as "express invitation or permission" "within statutory boundaries," and can also provide that a recipient may revoke previously granted permission. *Id.* "But what the FCC may not do under the statute," the D.C. Circuit held, "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

---

[2] Petitioners also have not attempted to ground the Solicited Fax Rule in any other source of statutory authority. That is presumably because winning that argument would not advance their interests. As noted, p. 5, *supra*, the TCPA creates a private right of action (with accompanying statutory damages) *only* for violations of "regulations prescribed under" Section 227(b), not under any other grants of authority. 47 U.S.C. § 227(b)(3).

permission of the recipient." Pet. App. 9a-10a. Because the court held that the Solicited Fax Rule is unlawful, it did not reach Petitioners' challenge to the FCC's waivers of the Rule for fax advertisements sent before April 30, 2015. Pet. App. 10a n.2.

Judge Pillard dissented. *See* Pet. App. 11a-19a. She concluded that the FCC is authorized to require opt-out notices on solicited faxes, and that the FCC's waivers were not adequately justified.

REASONS FOR DENYING THE WRIT

The D.C. Circuit's decision vacating the Solicited Fax Rule relies on well-established principles of statutory interpretation. There is no division of authority regarding the interpretation of any of the TCPA provisions at issue. Moreover, the agency that promulgated the Rule does not seek review, and the current FCC leadership does not support it.

Petitioners try to manufacture a circuit split by claiming that courts are divided over how to apply Step One of *Chevron*. That argument is meritless. Determining whether Congress has clearly spoken to a particular issue for purposes of *Chevron* requires a case-by-case determination that necessarily turns on the language and structure of the statute at issue. Here, the D.C. Circuit correctly concluded that when Congress imposed restrictions on *unsolicited* fax advertisements, it did not authorize the Commission to extend those restrictions (*e.g.*, particular notice requirements) to *solicited* fax advertisements. That is a statute-specific application of *Chevron*, and it does not conflict with the decision of any other court. Not only is the decision entirely correct, it also avoids

a substantial First Amendment issue that would have doomed the Rule in any event.

I. The D.C. Circuit's Decision Lacks Prospective Significance And Does Not Warrant Further Review.

1. Petitioners seek to revive the FCC's Solicited Fax Rule, but the Commission itself no longer defends that Rule on either policy or legal grounds. This fact alone counsels against this Court's review.

The FCC did not ask this Court to review the D.C. Circuit's decision, nor did it petition the D.C. Circuit for rehearing en banc. Moreover, members of the FCC, including the current Chairman, are on record disavowing the Solicited Fax Rule and supporting the D.C. Circuit decision. As noted, p. 7, *supra*, two current FCC Commissioners dissented from the 2014 FCC decision that is on review. Chairman Pai argued that the Solicited Fax Rule was "unlawful" and "depart[ed] from common sense" because it required businesses "to provide detailed opt-out notices on messages that their customers have specifically asked to receive." Pet App. 63a. Similarly, Commissioner O'Rielly argued that the Solicited Fax Rule "suffers from a fundamental flaw: the FCC lacked authority to adopt it." Pet. App. 78a. Both Chairman Pai and Commissioner O'Rielly have recently reaffirmed their views, as both issued statements supporting the D.C. Circuit's decision.[3]

There also has been no indication that the FCC plans to replace the Solicited Fax Rule with another

---

[3] *See* Chairman Pai Statement, *supra* note 1; Commissioner O'Rielly Statement, *id*.

regulation of solicited fax communications. As a result, there is no reason to believe that further guidance concerning the Commission's statutory authority on this issue would be useful. The FCC has not identified fax communications—"a technology that is waning in use," Pet. App. 78a (Statement of Comm'r O'Rielly)—as a policy priority. To the contrary, Chairman Pai has explained that "the claimed public policy impetus" for regulating solicited fax communications "just doesn't exist." Pet. App. 71a. In fact, his view is that "good policy counsels *against* applying a detailed opt-out notice and private right of action to solicited faxes," as such a rule would "[s]ubject[] small businesses to crippling suits" without any compensating public benefits. Pet. App. 71a-72a.

2. Not only has the FCC declined to petition for certiorari, but Petitioners themselves are unlikely to benefit from a favorable ruling by this Court. Certiorari is unwarranted for this reason as well.

Petitioners are class-action plaintiffs who have brought TCPA claims against Respondents and others. *See* Pet. 6. Their interest in the Solicited Fax Rule stems from their attempt to obtain statutory damages from Respondents for not including opt-out notices on previous fax communications that Petitioners had solicited. *See, e.g.*, Pet. App. 6a ("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."). But as discussed above, p. 7, *supra*, the FCC *unanimously* decided to waive the Solicited Fax Rule as to Respondents' pre-2015 fax advertisements, and

to apply that waiver retroactively. Pet. App. 47a-56a, 62a, 78a. Thus, even if the Solicited Fax Rule were reinstated, the FCC's waiver decision would still block Petitioners' TCPA claims.

It is unlikely that Petitioners could overcome this unanimous waiver decision on remand, and certainly this bare possibility is not a basis to grant certiorari when the FCC opposes further review of the Solicited Fax Rule. The FCC has authority to waive requirements of rules it issues that are not mandated by statute "in whole or in part" "for good cause shown." 47 C.F.R. § 1.3. And judicial review of the FCC's decision to waive its own rules "is deferential." *AT&T Corp. v. FCC*, 448 F.3d 426, 431 (D.C. Cir. 2006).

Here, the FCC concluded that application of the Solicited Fax Rule to Respondents is not in "the public interest." Pet. App. 51a-54a. The FCC explained that internal inconsistencies and procedural irregularities in its 2006 Order had created significant "confusion" about whether the Order's opt-out-notice rules applied to solicited fax advertisements. Pet. App. 48a-50a. The FCC accordingly decided that a retroactive waiver was necessary to avoid exposing Respondents to "significant damage awards" for "inadvertent violations" of the Commission's rule. Pet. App. 50a-53a. That judgment was reasonable, and is an additional reason to deny the petition.

II. The Decision Below Does Not Conflict With Any Decisions Of Either This Court Or Any Other Court of Appeals.

The D.C. Circuit's decision is a routine application of *Chevron* to a particular statutory provision and is fully consistent with the decisions of this Court. No methodological disputes about *Chevron* are presented by the case. Rather, the petition presents only a context-specific dispute under *Chevron* Step One about whether a particular statutory provision governing fax communications is ambiguous.

1. The question before the D.C. Circuit was "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." Pet. App. 2a-3a. Based on the unambiguous text of the statute, the D.C. Circuit held that "the answer is no." Pet. App. 3a. As the D.C. Circuit explained, § 227 does not impose *any* requirements for solicited fax advertisements for the FCC to implement. Pet. App. 8a. "Congress drew a line in the text of the statute between unsolicited fax advertisements and solicited fax advertisements," and it only authorized the FCC to regulate the former. Pet. App. 8a.

The D.C. Circuit's decision to enforce the line drawn by Congress is entirely consistent with this Court's *Chevron* precedents. "Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always 'give effect to the unambiguously expressed intent of Congress.'"

Utility Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2445 (2014) (quoting *Nat'l Assn. of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 665 (2007)). Or, as the D.C. Circuit put it, "[t]he FCC may only take action that Congress has authorized." Pet. App. 8a-9a. A considered decision by Congress to withhold authority from an agency is not a statutory gap, much less an implicit delegation to the agency of the power to fill it. Rather, "an agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S 355, 374 (1986).

Petitioners do not identify any decision from this Court that supports a different conclusion. Several of the cases they cite are off-point because they do not involve Step One of *Chevron* at all. For example, Petitioners cite (at 12) *City of Arlington v. FCC*, 569 U.S. 290 (2013), but there the Court addressed a "*Chevron* Step Zero" question concerning whether certain types of agency decisions could qualify for *Chevron* deference at all. Here, the D.C. Circuit did not dispute that the *Chevron* framework applies to the statutory interpretation at issue, but held that the statute is clear. Pet. App. 8a-9a. Petitioners also rely (at 14) on pre-*Chevron* precedent (*e.g.*, *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356 (1973)), which does not support their contention that the D.C. Circuit misapplied Step One of *Chevron*.

In the cases that Petitioners discuss that involved the *Chevron* doctrine (including *Chevron* itself), the Court merely held that Congress had not dictated how the agency should regulate in an area that was squarely committed to its authority. *See EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584,

1603-04, 1607 n.21 (2014) (holding that EPA could consider costs when imposing requirements for interstate air-pollution reductions); *Chevron*, 467 U.S. at 866 (holding that EPA could adopt a plant-wide definition of a "source" for the purpose of setting air-pollution controls). Here, the D.C. Circuit held that the TCPA provision on which the FCC had relied did not give the Commission authority to regulate solicited fax advertisements *at all*. That statute-specific decision does not conflict with precedent recognizing the general principle that agencies may be delegated authority to exercise policymaking discretion in the interstices of statutes.

2. Nor does the D.C. Circuit's decision invalidating the Solicited Fax Rule conflict with a decision from any other circuit. To the contrary, while correctly holding that the D.C. Circuit's decision is binding nationwide, the Sixth Circuit noted its "agreement with the majority in *Bais Yaakov* that, per the clear text of the TCPA, the FCC does not have the authority to regulate solicited faxes" and that "the Solicited Fax Rule was properly invalidated." *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 467 & n.1 (2017), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Nov. 30, 2017) (No. 17-803).

Petitioners still try (at 21-25) to generate a split of authority by characterizing the decision below as depending on *expressio unius* reasoning, and arguing that reliance on this familiar canon of construction is somehow improper under *Chevron* Step One. In their view, courts are "precluded from using *expressio unius* reasoning in the administrative context," and

the D.C. Circuit's reliance on this canon creates a circuit split. Pet. ii, 21-25.

This line of argument fails because the D.C. Circuit did not even mention—much less rely on—the *expressio unius* canon. Rather, the D.C. Circuit examined the text of § 227(b)(2), which authorizes the FCC to "implement the requirements of this subsection," and it concluded that "the requirements of this subsection" do not encompass any "requirements" related to solicited faxes. In other words, the court decided that a statutory provision granting the FCC authority to regulate unsolicited fax advertisements—a provision the FCC relied on as its sole source of authority for the Solicited Fax Rule—could not reasonably be read to authorize the FCC to regulate solicited fax advertisements. The only legal principle required for that analysis is the bedrock tenet of administrative law that agencies may take only those actions that Congress has authorized. *See* Pet. App. 8a-9a; *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

In any event, neither this Court nor any circuit court has ever endorsed a categorical rule that bars application of the *expressio unius* canon in the administrative setting. *Cf.* Pet. ii (presenting the question of whether courts "*[m]ay* . . . use *expressio unius* reasoning" to discern congressional intent under *Chevron* Step One) (emphasis added). Rather, courts recognize that whether the canon is an appropriate guide in a particular case depends on the statute at issue. As with other rules of construction, context matters, and inferences that are appropriate based on the overall structure of one statute may not extend to other statutes. *See United States v. Vonn*,

535 U.S. 55, 65 (2002) ("[T]he canon that expressing one item of a commonly associated group or series excludes another left unmentioned is only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives."). Indeed, this Court has itself employed *expressio unius* reasoning in a *Chevron* case. *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86-96 (2002) (employing *expressio unius* reasoning to invalidate an agency regulation); *see also id.* at 102 (O'Connor, J., dissenting) ("The Court's argument . . . seems to be based on something like the maxim *expressio unius est exclusio alterius*.").

The most that Petitioners' cited cases stand for is the proposition that the canon is a "feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Alliance for Community Media v. FCC*, 529 F.3d 763, 779 (6th Cir. 2008) (quoted at Pet. 21). But that falls well short of a categorical rule that courts are "precluded from using *expressio unius* reasoning in the administrative context." Pet. ii. In fact, in many of the decisions that Petitioners identify as supposedly in conflict with the decision below, the court of appeals considered the *expressio unius* canon and declined to apply it in light of the particulars of the respective statutes at issue—not because of any flat bar against "using *expressio unius* reasoning in the administrative context." Pet. ii. *See, e.g.*, *Ron Peterson Firearms LLC v. Jones*, 760 F.3d 1147, 1158 (10th Cir. 2014) ("context persuades" that the statute

was not intended to signal an exclusion); *Exelon Generation Co. v. Local 15, Int'l Bhd. of Elec. Workers*, 676 F.3d 566, 571 (7th Cir. 2012) (explaining that the "wording" of the statute indicates that it should be given an "inclusive rather than exclusive" reading); *Bailey v. Fed. Intermediate Credit Bank of St. Louis*, 788 F.2d 498, 501 (8th Cir. 1986) (concluding that the statutory text and structure "indicates that Congress did not intend its enumeration in section 2072 to be exclusive").

Thus, even aside from the fact that the D.C. Circuit did not employ the *expressio unius* canon, it makes no sense to suggest that the decision below somehow creates a split of authority on the validity of the canon in connection with *Chevron* analysis. For there to be a split, some court would have to have taken Petitioners' side and adopted the categorical rule they espouse—*i.e.*, that courts are absolutely "precluded from using *expressio unius* reasoning" by *Chevron*, Pet. ii. Petitioners identify no decision embracing such a rule. Nor do they identify any decision rejecting reliance on the canon in the context of the specific statute at issue here.

III. The Decision Below Correctly Held That The Rule Is Invalid.

Review also is not warranted because the D.C. Circuit's decision vacating the Solicited Fax Rule is correct. As the court explained, the TCPA does not provide the FCC with authority to require opt-out notices for fax advertisements that the recipient expressly invited or permitted. The Rule also raises

substantial First Amendment issues, which are an independent reason why the Rule cannot survive.

1. As set forth above, pp. 3-4, *supra*, the TCPA generally restricts the sending of "unsolicited advertisement[s]" by fax, but it contains an exemption for certain unsolicited advertisements that contain opt-out notices. *See* 47 U.S.C. § 227(b)(1)(C), (b)(1)(D). The TCPA also authorizes the FCC to "prescribe regulations to implement the requirements of this subsection," *i.e.*, to implement § 227(b). *Id.* § 227(b)(2).

The D.C. Circuit correctly held that the FCC's authority to "prescribe regulations to implement the requirements of this subsection"—which pertain entirely to *unsolicited* advertisements—does not encompass the authority to require opt-out notices on *solicited* advertisements. As the court explained, § 227 does not impose *any* requirements for solicited faxes. Pet. App. 8a. A rule requiring opt-out notices on solicited faxes therefore does not "implement the requirements of this subsection" within the plain meaning of § 227(b)(2). The FCC did not point to any other rulemaking authority that would authorize the Solicited Fax Rule. Pet. App. 8a n.1. Therefore, the D.C. Circuit concluded, "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." *Id.* at 9a.

In defending the Rule in the court of appeals, the FCC emphasized that the phrase "unsolicited advertisement" is defined 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*." 47 U.S.C. § 227(a)(5) (emphasis added). The FCC then argued that the phrase "without that person's prior express invitation or permission" is ambiguous, and that its interpretation of that ambiguous phrase was entitled to deference under *Chevron*. Pet. App. 9a.

The D.C. Circuit properly viewed that argument as a non-sequitur. As the court explained, the FCC can "reasonably define" what the phrase "without that person's prior express invitation or permission" means, and potentially claim deference is due that interpretation. Pet. App. 9a.[4] But any ambiguity in that phrase cannot authorize the FCC to regulate faxes that undisputedly were sent *with* prior invitation or permission, under any reading of those terms. Such a regulation exceeds the FCC's statutory authority to "prescribe regulations to implement the requirements of this subsection"—requirements which, by their terms, apply only to faxes that are sent *without* such invitation or permission. Pet. App. 9a-10a.

Petitioners' contrary argument reflects a misunderstanding of the D.C. Circuit's reasoning. Petitioners begin from the premise that "Congress has given the FCC broad authority to determine" whether "opt-out notices should appear on fax ads

---

[4] If the Court grants the petition for certiorari, Respondents reserve the right to argue that no deference is due in any event, and that before acceding to the agency's (now-abandoned) reading this Court should reconsider whether *Chevron* deference is consistent with the separation of powers. *See, e.g.*, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring).

purportedly sent with prior express permission to inform the recipients of the specific procedure they must follow to revoke their permission to receive such fax ads in the future." Pet. 15. In Petitioners' view, the D.C. Circuit erred by inferring, from Congress' "statutory silence," an implied limitation on that otherwise-broad authority. Pet. 12-16.

Contrary to Petitioners' contention, however, the D.C. Circuit did not equate statutory silence with an implied limitation on the FCC's otherwise-broad authority. Rather, the D.C. Circuit held that Congress had spoken: the FCC's authority under the TCPA, by its unambiguous terms, does not extend to solicited faxes. Pet. App. 8a-9a. Notably, and unlike other statutes delegating authority to the FCC, the TCPA does not confer on the FCC far-ranging power to enact regulations in the public interest. *Cf.* 47 U.S.C. § 201(b); *City of Arlington*, 569 U.S. at 293. Rather, the TCPA provision on which the FCC relied grants the Commission only the authority to issue regulations that "implement the requirements *of this subsection*." 47 U.S.C. § 227(b)(2) (emphasis added). The D.C. Circuit correctly held that a rule regulating *solicited* faxes does not "implement the requirements of this subsection," which apply only to *unsolicited* fax advertisements. Pet. App. 8a-9a.

2. Petitioners' remaining arguments lack merit. Petitioners point (at 23-24) to legislative history describing how "consumers were inundated with millions of unwanted fax advertisements and automated telephone calls." This history has nothing to do with *solicited* faxes, and it contains nothing to suggest that the FCC has authority to regulate them. Petitioners also accuse (at 25) the D.C. Circuit of

"distorting *Chevron*" by virtue of its "policy preferences." But the court's opinion is based on its interpretation of the plain text of § 227(b)(2). Pet. App. 8a-9a. That interpretation is correct and should not be disturbed.

3. The D.C. Circuit's decision is also necessary to avoid grave First Amendment doubts that would be raised by a contrary interpretation. The Rule cannot survive First Amendment scrutiny because Congress never even *considered* allowing the FCC to require opt-out notices on solicited faxes, much less identified any substantial governmental interest that such a notice could promote.

The Rule imposes a significant burden on consensual speech. It exposes businesses to crippling class-action liability for *consensual* faxes merely because they do not include a detailed opt-out notice on the first page. Businesses have been sued even for minor technical defects, such as the failure to recite that an opt-out request must be honored within thirty days—even where there is no allegation that requests were not timely honored.

Because the Rule imposes this burden exclusively on advertising, it is a content-based restriction subject to strict scrutiny. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015); *Sorrell v. IMS Health, Inc*, 564 U.S. 552, 566-71 (2011). Even under intermediate scrutiny, however, the Rule would fail as it does not advance a substantial government interest and any interest easily could be achieved by a more limited restriction on speech. *E.g.*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980). The legislative history

indicates that Congress had no interest in requiring opt-out notices on consensual faxes: just the opposite. Moreover, *all* faxes already are required to include the identity and number of the sender—which is more than sufficient to ensure that individuals who have consented to receive faxes can opt out if they later change their minds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

Matthew E. Price
Counsel of Record
Samuel L. Feder
JENNER & BLOCK, LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
mprice@jenner.com
(202) 639-6873

Counsel for Richie Enterprises, LLC and Donald P. Walburg

Thomas R. McCarthy
Counsel of Record
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
tom@consovoymccarthy.com
(703) 243-9423

Helgi C. Walker
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., NW
Washington, DC 20036

Counsel for Staples, Inc. and Quill Corp.

William M. Jay
Counsel of Record
Brian T. Burgess
GOODWIN PROCTER LLP
901 New York Ave., NW
Washington, DC 20001
wjay@goodwinprocter.com
(202) 346-4000

Counsel for Anda, Inc.

Robert A. Long, Jr.
Counsel of Record
Yaron Dori
Michael Beder
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
rlong@cov.com
(202) 662-5612

Counsel for Allergan Sales, LLC, Gilead Palo Alto, Inc., Gilead Sciences, Inc., Masimo Corp., Purdue Pharma LP, Purdue Pharma, Inc., Purdue Products LP, and Unique Vacations, Inc.

Marie Tomassi
Counsel of Record
Charles M. Harris
Alicia H. Koepke
TRENAM, KEMKER, SCHARF, BARKIN, FRYE, O'NEILL & MULLIS
200 Central Avenue,
Suite 1600
St. Petersburg, FL 33701
mtomassi@trenam.com
(727) 820-3952

Counsel for TechHealth, Inc.

Blaine C. Kimrey
Counsel of Record
Bryan K. Clark
VEDDER PRICE P.C.
222 N. LaSalle Street
Chicago, IL 60601
bkimrey@vedderprice.com
(312) 609-7865

Counsel for ZocDoc, Inc.

Kim E. Rinehart
Counsel of Record
Jeffrey R. Babbin
WIGGIN AND DANA, LLP
265 Church Street
P.O. Box 1832
New Haven, CT 06508
krinehart@wiggin.com
(203) 498-4400

Counsel for Merck & Co., Inc.

Joseph R. Palmore
Counsel of Record
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
jpalmore@mofo.com
(202) 887-1500

Counsel for McKesson Corp.

January 16, 2018