No. 17-351

In the
Supreme Court of the United States

BAIS YAAKOV OF SPRING VALLEY, *et al.*,

Petitioners

v.

ANDA, INC., *et al.*,

Respondents.

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

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

While respondents try to explain away the split D.C. Circuit panel's decision in this case as "routine," "straightforward" and "context-based," the decision is a radical, result-oriented re-writing of step one of *Chevron* that uses discredited *expressio unius* reasoning to infer that Congress's silence on a specific regulatory issue evinces Congress's intent to prohibit regulation on that issue – where the reality is that no such intent exists.

The D.C. Circuit panel's specific sin was to disobey *Chevron* step one's command that because Congress – while granting the FCC broad authority to "implement" the TCPA – has not "directly spoken" to the FCC's ability to issue the Opt-Out Regulation, the court must proceed to step two and determine whether the regulation constitutes a reasonable exercise of the FCC's authority.[1] Instead, the panel construed Congress's silence on whether opt-out notices should appear on solicited fax ads, together with Congress's requirement that such opt-out notices appear on fax ads sent to consumers who purportedly have an established business relationship with the sender, as an affirmative statement by Congress that the FCC could not issue the same kind of regulation regarding purportedly solicited fax ads.

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[1] *See* 47 C.F.R. § 64.1200(a)(4)(iv) (requiring opt-out notices in solicited fax advertisements).

Because precedent in other circuits and this Court (a) gives agencies having broad power to implement a statute the authority to regulate in specific areas in which Congress has been silent, and (b) discredits use of the *expressio unius* doctrine as a "feeble helper" in the agency context, the D.C. Circuit panel's decision conflicting with that precedent will likely result in a large growth of *Chevron*-related certiorari petitions. Even more alarmingly, the D.C. Circuit's decision will call into doubt, and will likely cause exponential growth in litigation regarding, the authorization for thousands of federal agency regulations issued over the three-plus decades since this Court decided *Chevron*.

Attempting to belittle the importance of this appeal, respondents refer to the FCC's current leadership's press releases stating that the FCC no longer intends to enforce the Opt-Out Regulation, and urge that this Court's reversal of the D.C. Circuit's decision would have no practical impact. However, this policy choice by current agency leadership does not lessen the importance of this case to hundreds of TCPA plaintiffs who, like petitioners here, have been pursuing their statutory right to enforce the Opt-Out Regulation – a right that Congress has given and encouraged those plaintiffs to pursue as private attorneys general. *Holtzman v. Turza*, 728 F.3d 682, 688 (7th Cir. 2013) (TCPA "authorizes private litigation" so consumers "need not depend on the FCC" for enforcement), *cert. denied*, 134 S. Ct. 1318 (2014).

Respondents alternatively argue that this Court's re-validating the Opt-Out Regulation would have no practical significance because the FCC in any event granted the private respondents retroactive waivers from complying with the Regulation. That argument assumes that the D.C. Circuit would uphold those waivers on remand – an unwarranted assumption given that the majority did not rule on them. Moreover, the dissent explicitly found the waivers to be *invalid*, principally because the FCC had accepted the private respondents' ludicrous contention that they were "confused" about whether the Regulation applied to solicited fax ads based on an inaccurate footnote buried in an order implementing the Regulation that not a single waiver applicant could aver it had read. Indeed, this case enables this Court to underscore that an agency should grant a waiver only where "special circumstances warrant a deviation from the general rule and such deviation will serve the public interest." *Northeast Cellular Tel. Co., L.P. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

I. The D.C. Circuit's Decision Upsets Critical Precedent in Numerous Circuits on step one of *Chevron* and on Use of the *Expressio Unius* Doctrine in the Administrative Agency Context

Respondents try to downplay the D.C. Circuit panel's rewriting of *Chevron* by ignoring important caselaw, arguing that any *Chevron* determination depends on "context," and urging that the panel's

analysis was "routine" and "straightforward." None of respondents' arguments justifies this radical distortion of *Chevron.*

A. The D.C. Circuit Ignored Caselaw Demonstrating that in Exercising Its Broad Authority in 47 U.S.C. § 227(b)(2) to Implement the TCPA's Prohibition Against *Unsolicited* Fax Advertisements, the FCC has Authority to Regulate Both *Unsolicited and Solicited* Fax Ads

The first flaw in respondents' position, and the D.C. Circuit panel's reasoning, is their contention that, notwithstanding the FCC's broad statutory authority under 47 U.S.C. § 227(b)(2) "to implement the requirements of" the TCPA's fax advertising provisions, the TCPA's *prohibition* against sending unsolicited fax advertisements permits the FCC to *regulate* only unsolicited fax ads. They reason that because the TCPA does not *prohibit* sending solicited fax ads, the FCC lacks authority to *regulate* solicited fax ads.

This facile reasoning ignores that implementing the TCPA's prohibition against sending unsolicited fax ads legitimately entails regulating both unsolicited *and* solicited fax ads – (a) by enabling purportedly solicited fax ad recipients who are in fact unsolicited fax ad recipients to stop receiving such unsolicited fax ads, and (b) by enabling recipients of legitimately solicited fax ads who no

longer wish to receive them in the future to opt out of receiving such unsolicited fax ads.

Respondents also try to divert attention from 47 U.S.C. § 227(b)(2) by incorrectly stating – just as the D.C. Circuit panel did – that petitioners' position is that the TCPA's provision requiring opt-out notices in unsolicited fax ads sent to persons having an established business relationship with the sender set forth in 47 U.S.C. § 227(b)(2)(D) is the source of the FCC's authority to issue the Opt-Out Regulation concerning solicited fax ads. (Private Respondents' Opposition ("PO") at 13; Petition Appendix ("Pet. App.") at 3a). Petitioners do *not* so argue. Instead, petitioners' argument is based principally on the TCPA's broad grant of authority to the FCC to "implement the requirements of this section [regarding unsolicited fax advertising]" in 47 U.S.C. 227(b)(2). As dissenting Judge Pillard put it, "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." (Pet. App. at 13a–14a).

Respondents also lack a reasoned response to petitioners' argument that the FCC had authority under *Chevron* principles to issue the Opt-Out Regulation based on silence, or "gaps," in the TCPA regarding (1) the definition of the statutory term "prior express invitation or permission" in 47 U.S.C. 227(a)(5); (2) whether such consent may be revoked;

and (3) how such consent may be revoked. (Pet. at 15-16). Even the D.C. Circuit panel acknowledged that the FCC had authority under the TCPA (1) to define the concept of "prior express permission or invitation," and (2) to issue a rule indicating that such consent may be revoked only by sending a request to the sender that follows the instructions in the opt-out notice. (Pet. App. at 9a). However, the panel concluded that (3) the FCC lacks authority to require a sender to include a notice on its fax ads informing a party precisely how to revoke that very consent. Petitioners respectfully submit that authority to do (1) and (2) is inconsistent with a lack of authority to do (3). Neither the D.C. Circuit nor respondents explain this contradiction.

The private respondents also incorrectly assert that petitioners "do not identify any decision from this Court" to support their argument that the FCC had authority to issue the Opt-Out Regulation. (PO at 14). To the contrary, Petitioners identified *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 372-73 (1973) (because Congress granted agency broad authority to issue regulations, statute specifying disclosure requirement in one circumstance did not foreclose agency from issuing regulation requiring such disclosure in another circumstance), and *American Trucking Ass'ns, Inc. v. United States*, 344 U.S. 298, 309-10 (1953) (while statute granting agency broad authority to implement statute did not expressly delegate power to agency to regulate leasing practices, agency had

such power, as Congress need not, and often cannot, specifically identify "every evil sought to be corrected" by statute). (Pet. at 14).

Instead of addressing *Mourning*, the private respondents try to discredit *Mourning* by pointing out that it was decided prior to *Chevron*. (PO at 14). That argument incorrectly presumes that *Chevron* overruled, rather than synthesized, all pre-existing caselaw on agency authority. Nothing in *Chevron* or any other Supreme Court decision explicitly overrules *Mourning*, and this Court's precedents are not overruled by implication. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Moreover, *Mourning* dealt with the type of issue that would later become *Chevron* step one – whether a statute requiring a disclosure in one circumstance forecloses the agency from issuing a regulation requiring such a disclosure in other circumstances.

The private respondents do not even mention this Court's decision in *American Trucking*. Nor do the government respondents address *Mourning* or *American Trucking*. Even more troubling, the D.C. Circuit panel did not address either decision, despite the fact that petitioners cited and described both in their court filings.

B. *Expressio Unius* Reasoning is the *Only* Basis, and an Inadequate Basis, for the D.C. Circuit Panel's Finding that the FCC Lacked Authority

Instead of following *Chevron*, the panel reasoned that Congress's explicit mandate to the FCC to require opt-out notices on established business relationship fax ads evinces an intent by Congress to prohibit the FCC from also requiring such notices on solicited fax ads. As pointed out in the petition, this reasoning by negative implication constitutes *expressio unius* reasoning, which this Court and numerous circuits have long discredited as a particularly "feeble helper" regarding Congress's intent in an administrative agency setting. *Alliance for Community Media v. F.C.C.*, 529 F.3d 763, 779 (6th Cir. 2008) ("under *Chevron*, Congressional silence is to be construed as creating a gap filling delegation to agencies. Against this presumption, the *expressio* canon emerges as 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."), *cert. denied*, 557 U.S. 904 (2009); *see* additional cases cited in Pet. at 21-22.

Respondents also urge that this Court need not address the majority panel's improper use of *expressio unius* reasoning just because the panel never expressly invoked it in its decision. The panel's choice not to incant "*expressio unius*," however, does not prevent this Court from

addressing the panel's reasoning for precisely what it is – *expressio unius* reasoning. Indeed, the dissenting judge explicitly identified the majority's reasoning as "*expressio unius est exclusio alterius*," and pointed out that such reasoning "is 'an especially feeble helper . . . .'" (Pet. App. at 15a).

Respondents also attempt to overstate petitioners' argument, contending that petitioners are arguing that a court can *never* use *expressio unius* reasoning to support its decision. That is not how petitioners have set forth their argument, which explicitly asserts that such reasoning is a "feeble helper." Moreover, respondents' argument is diversionary because the *only* support the majority panel had for its decision was *expressio unius* reasoning, rendering its decision unsupportable precedent even if *expressio unius* may be of limited help in some cases of statutory interpretation.

Nor does respondents' caselaw support their cause. While the government respondents cite *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009), for the proposition that "inferences from statutory silence necessarily depend on 'context,'" GO at 8, the *Entergy* Court was so stating in describing *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 467-68 (2001). In *Whitman*, "[t]he relevant 'statutory context' included [many] other provisions" governing how and when the EPA could consider the "economic cost of implementing" its air quality standards, and so the EPA could not consider those costs in exercising its mandate to

"protect the public health" in setting the standards. *Entergy*, 556 U.S. at 223; *Whitman*, 531 U.S. at 467-68.

By contrast, in this case the TCPA has *only one* provision that requires the use of opt-out notices, in connection with unsolicited established business relationship fax ads. As this Court has held, and Respondents and D.C. Circuit panel ignore:

> *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) (emphasis added and citations omitted).

Respondents' reliance on *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86-96 (2002), is similarly misplaced. (PO at 17). In *Ragsdale*, the agency attempted to change the *remedies* available for violation of the agency's regulations. *Id.*. at 91–92. The Court distinguished *Mourning*, in which the disclosure requirement was "enforced through the statute's pre-existing remedial scheme." *Id.* at 92. This case is like *Mourning*, and unlike *Ragsdale*, because the Opt-Out Regulation is "enforced through the [TCPA's] pre-existing remedial scheme," allowing for $500 in statutory damages per violation.

In short, based solely on discredited *expressio unius* reasoning – which the D.C. Circuit panel used as its *only* helper – the panel came to two incorrect conclusions. The first is that "Congress drew a line in the text of the statute between unsolicited fax advertisements and solicited fax advertisements," by *requiring* opt-out notices in unsolicited established business relationship fax ads pursuant to 47 U.S.C. §§ 227(b)(1)(C)(iii) & (b)(2)(D), and, by negative implication, *prohibiting* such notices in purportedly solicited fax ads. (Pet. App. at 8a). The panel made the same mistake by ruling that "the Act does not require (or give the FCC the authority to require) opt-out notices on solicited fax advertisements." (*Id.*). The statement in the parenthetical does not follow from the statement in the text that precedes it without the crutch of *expressio unius* reasoning.

The government respondents also try to justify the D.C. Circuit's reasoning on the ground that inferences under *Chevron* regarding what the FCC may regulate depend on "context." (Federal [Government] Respondents' Opposition ("GO") at 7-8). Petitioners do not dispute that the larger context of a statute may be relevant to determining Congress's intent regarding a particular regulatory issue. *E.g.*, *Entergy*, 556 U.S. at 217-18, 219-20. However, the *only* "context" the D.C. Circuit panel analyzed was the TCPA's requirement that opt-out notices appear in fax ads sent to persons having an established business relationship with the sender, which the panel determined, by negative implication,

evinced Congress's intent to preclude the FCC from also requiring that such notices appear on solicited fax ads. Accordingly, the "context" the D.C. Circuit examined was nothing more than a use of discredited *expressio unius* reasoning to construe one statutory provision.

II. This Appeal has Immense Practical Significance for Future *Chevron* Litigations, for Private TCPA Litigations, and for other Private Litigations in which Plaintiffs Enforce a Statute as Private Attorneys General

A. If this Court Does Not Reverse the D.C. Circuit's Decision, the Volume of *Chevron* Litigation Will Greatly Increase

As demonstrated above, the D.C. Circuit's decision both rewrites step one of *Chevron* and improperly uses *expressio unius* reasoning in the agency context, each of which violates numerous decisions in other circuits. (Pet. at 17-19, 21-24). Those conflicts – particularly based on a decision by the D.C. Circuit – are likely to generate a host of additional certiorari petitions to this Court regarding *Chevron* and *expressio unius* reasoning. So too will persons unhappy with untold numbers of agency regulations be emboldened to challenge agency authority in lower courts far more often than in the past.

B. Because Hundreds of Persons Have Been Pursuing TCPA Claims in Pending Private Litigations Based on the Opt-Out Regulation, Whether or Not the FCC Continues to Enforce the Regulation does not Lessen the Importance of this Appeal to Those Persons

The private respondents argue that because the current leadership of the FCC, in two press releases, has indicated that the FCC will not enforce the Opt-Out Regulation, and because that leadership has chosen not to pursue this appeal to vindicate its statutory authority, this Court's deciding this appeal will have no practical impact. (PO at 1, 10-11). Respondents ignore, however, that scores of private plaintiffs, including petitioners in this case, have filed TCPA actions alleging claims for violation of Opt-Out Regulation, which also constitute violations of the TCPA itself, for which private plaintiffs have a right of action. 47 U.S.C. § 227(b)(3). Accordingly, even if the current regime at the FCC will not enforce the Opt-Out Regulation, this Court's re-validating it will enable private parties seeking to enforce it to continue to do so.

C. The FCC's Issuance of Waivers to the Private Respondents Does Not Lessen the Practical Importance of this Appeal Because those Waivers Should Not Survive Judicial Scrutiny

Respondents also argue that even if this Court were to reverse and uphold the validity of the Opt-Out Regulation, the private respondents have obtained retroactive waivers from compliance with the Opt-Out Regulation from a "unanimous" FCC – but not from any court – that are "unlikely" to be reversed on remand. (PO at 12; GO at 4, 7, 13).

On its face, this argument that a federal court would likely uphold the FCC's waivers constitutes rank speculation. Moreover, the D.C. Circuit's decision itself undercuts that argument. While the two-judge majority chose not to address the FCC's grant of retroactive waivers as "moot" (Pet. App. at 10a, n.2), the dissenting judge addressed those waivers at length, finding that "the FCC failed to establish good cause for that sweeping, retroactive waiver." (*Id.* at 16a-19a). Among other things, she concluded that the FCC's finding of "confusion" regarding whether the Opt-Out Regulation applies to solicited fax ads was betrayed by the clear language of the Regulation stating that it did so apply. (*Id.* at 17a). The dissenting judge further found that the buried footnote that purportedly caused that confusion was "errant" and could not have caused any confusion to persons who did not even aver that they ever read it. (*Id.* at 17a-18a).

CONCLUSION

This Court should grant this petition.

Respectfully submitted,

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