

ORAL ARGUMENT NOT YET SCHEDULED

No. 14-1234 (and consolidated cases)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

**BRIEF FOR *AMICI CURIAE* NATIONAL FEDERATION OF
INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER
AND CONSUMERS' RESEARCH SUPPORTING CLASS ACTION
DEFENDANT-PETITIONERS**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The undersigned attorney of record, in accordance with D.C. Cir. R. 28(a)(1), hereby certifies as follows:

A. Parties and Amicus

All parties and intervenors appearing before the FCC and this Court are listed in the Brief for the Class Action Defendant-Petitioners.

B. Rulings under Review

Petitioners seek review of the final order of the Federal Communications Commission captioned *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; 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, 05-338, FCC 14-164 (rel. Oct. 30, 2014).

C. Related Cases

Related cases include case numbers 14-1239, 14-1243, 14-1270, 14-279, 14-1292, 14-1293, 14-1294, 14-1295, 14-1297, 14-1299, and 14-1302.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the National Federation of Independent Business (“NFIB”) Small Business Legal Center and Consumers’ Research respectfully submit the following corporate disclosure statements:

The NFIB Small Business Legal Center has no parent corporation and has issued no stock.

Consumers’ Research has no parent corporation and has issued no stock.

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GLOSSARY

FCC

Federal Communications Commission

NFIB

National Federation of Independent Business

TCPA

Telephone Consumer Protection Act

INTEREST OF *AMICI CURIAE*¹

1. The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources to small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents about 325,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about \$500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Small Business Legal Center frequently files briefs in cases

¹ On September 10, 2015, the Court granted NFIB Small Business Legal Center's motion for leave to participate as *amicus curiae*. Counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

that will impact small businesses, including in cases involving the Telephone Consumer Protection Act (“TCPA”).

The NFIB Legal Center—representing the interest of the nation’s small business community—has a great interest in this case. Because small businesses must navigate through perpetually evolving multifarious regulatory requirements—and usually without resources to hire in-house compliance officers—small business owners are especially vulnerable to opportunistic civil lawsuits predicated upon alleged violations of obscure federal regulations. The regulation at issue in this case—the FCC’s “Solicited Fax Rule”—has spawned class action lawsuits against NFIB’s members across the country.

Douglas Walburg, Petitioner in case number 14-1243, is an NFIB member who has been sued for allegedly violating the FCC’s Solicited Fax Rule. As the Eighth Circuit explained, “Walburg faces a class-action complaint seeking millions of dollars even though there is no allegation that he sent a fax to any recipient without the recipient’s prior express consent.” *Nack v. Walburg*, 715 F.3d 680, 682 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 1539 (2014). The Solicited Fax Rule has a disproportionate impact on NFIB members like Mr. Walburg, which often lack the resources to defend against multi-million dollar class action lawsuits. Because the Solicited Fax Rule exposes small businesses to potentially crippling

damages, this case raises a matter of serious concern to the small business community.

2. Consumers' Research, founded in 1929, is an independent organization focused on consumer education and consumer welfare. Unnecessary regulations slow the economy and harm consumers. Consumers' Research opposes the FCC's Solicited Fax Rule because it will increase burdens on businesses and promote vexatious and unproductive litigation, thereby driving up costs for consumers, without providing any identifiable benefit. The Rule also unnecessarily interferes with communications between consenting consumers and businesses, potentially stifling the mutually beneficial exchange of information and transactions.

SUMMARY OF THE ARGUMENT

The FCC's Solicited Fax Rule violates the First Amendment. It compels individuals and businesses to include detailed, scripted opt-out notices on faxes that consumers have expressly consented to receive. While courts have upheld the TCPA's regulation of *unsolicited* fax advertisements, the FCC's regulation of *solicited* fax advertisements is constitutionally infirm. The Solicited Fax Rule reaches beyond the "junk faxes" that Congress targeted. It unnecessarily imposes an onerous burden on senders of solicited fax advertisements, impeding their First Amendment right to communicate with consumers and changing the content of that communication. And it subjects speakers to potentially ruinous liability for

communications with consenting customers—based on minor omissions, and in spite of substantial, good faith compliance and other regulations mandating the inclusion of the sender’s contact information.

The Solicited Fax Rule cannot survive First Amendment scrutiny, due to the same regulatory overreach that renders the rule infirm under administrative law principles. In the TCPA, Congress directed the FCC to regulate “unsolicited advertisements” sent by fax. 47 U.S.C. § 227. While the government has a substantial interest in preventing the cost shifting and interference that unwanted advertising via facsimile can place on recipients, *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 655 (8th Cir. 2003), this justification does not extend to *solicited* fax advertisements, *Nack*, 715 F.3d at 687. The FCC’s imposition of a mandatory message on solicited faxes is unnecessary and unjustified. The Court should vacate the Solicited Fax Rule to remove this burden on protected speech.

ARGUMENT

THE SOLICITED FAX RULE VIOLATES THE FIRST AMENDMENT.

A. The Rule Is Subject To Heightened Scrutiny, Which It Cannot Survive.

Individuals and businesses have a First Amendment right to speak with their customers, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and fax advertisements are “a form of protected speech under the First Amendment,” *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1233 (10th Cir. 1999).

The Solicited Fax Rule infringes this protected speech by compelling individuals and businesses to include detailed, scripted opt-out notices on fax advertisements requested by their customers.

While strict scrutiny presumptively governs analysis of forced speech and content-based regulation,² the Solicited Fax Rule cannot survive even under the intermediate standard generally applicable to commercial speech regulation.³ Under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), the government must demonstrate that a regulation of non-misleading commercial speech regarding lawful activity “directly advances” a “substantial” government interest and is “not more extensive than is necessary to serve that interest,” *id.* at 566; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993) (explaining that there must be a “‘reasonable fit’ between”

² A regulation compelling commercial speakers to engage in speech they would not otherwise make is subject to strict scrutiny. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Calif.*, 475 U.S. 1 (1986) (applying strict scrutiny to requirement to put unwanted third party communication in customers’ bill inserts); *Riley v. Nat’l Fed’n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795 (1988) (mandating speech that a speaker would not otherwise make “necessarily alters the content of the speech”); *Wooley v. Maynard*, 430 U.S. 705, 714–16 (1977) (explaining that the First Amendment’s protection “includes both the right to speak freely and the right to refrain from speaking at all”). And content-based regulations are subject to strict scrutiny. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).

³ The FCC purports to satisfy this standard. *See Order* ¶ 32 (justifying the Rule by reference to *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994)).

the government’s “legitimate interests” and “the means chosen to serve those interests” (internal quotation marks omitted)). To regulate commercial speech, the government “must demonstrate that the harms it recites are real *and* that its restriction will in fact alleviate them to a material degree.” *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (emphasis added). The existence of “less-burdensome alternatives . . . is certainly a relevant consideration in determining whether the ‘fit’ between ends and means is reasonable.” *City of Cincinnati*, 507 U.S. at 417 n.13; *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 529 (1996) (O’Connor, J., concurring).

1. The FCC Has No Interest In Requiring Opt-Out Notices On Solicited Fax Advertisements.

In the *Order*, the FCC claimed that the Solicited Fax Rule “is not only necessary but essential to further the governmental interest in protecting consumer[s] from unwanted fax ads.” *Order* ¶ 32. According to the FCC, Congress “expressed a strong governmental interest in protecting consumers from the costs and annoyance of unwanted fax ads.” *Id.*

Be that as it may, the FCC has no interest in regulating *solicited* fax advertisements.⁴ Courts have upheld the TCPA’s restrictions on *unsolicited* fax

⁴ Indeed, Congress expressly excepted solicited material from the scope of Section 227; the TCPA defines an “unsolicited advertisement” as “any material advertising the commercial availability or quality of any property, goods, or

advertisements because of “a substantial interest in restricting unsolicited fax advertisements in order to prevent the cost shifting and interference such unwanted advertising places on the recipient.” *Am. Blast Fax, Inc.*, 323 F.3d at 655; *see also Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 56-57 (9th Cir. 1995). There is no such interest in the context of a *solicited* fax advertisement because the recipient has *consented* to receiving the fax and thus has agreed to “contribute ink, paper, wear on their fax machines, as well as personnel time” in receiving the fax. *Am. Blast Fax*, 323 F.3d at 652; *see Nack*, 715 F.3d at 687. Consent demonstrates “that a fax advertisement would be welcome,” *Am. Blast Fax*, 323 F.3d at 657, and that the recipient has an “interest in the product or service being advertised,” H.R. Rep. No. 102-317, at 25 (1991). Simply put, fax advertisements sent with the recipient’s consent are not “unwanted advertising” and thus do not present any issue of improper cost shifting or interference. *Am. Blast Fax*, 323 F.3d at 655.

The Eighth Circuit observed that the FCC’s interest in regulating *unsolicited* faxes would likely fail to constitute a substantial interest if extended to regulating *solicited* faxes. While the TCPA authorizes the FCC to regulate “unsolicited fax advertisements,” it “does not expressly impose similar limitations or requirements

services which is transmitted to any person without that person’s prior express invitation or permission.” 47 U.S.C. § 227(a)(5).

on the sending of solicited or consented-to fax advertisements.” *Nack*, 715 F.3d at

683. The court explained that:

. . . on balance, the TCPA’s restrictions on commercial speech represented a sufficiently narrowly tailored restriction in pursuit of a substantial governmental interest. *Am. Blast Fax*, 323 F.3d at 655–60. Suffice it to say, *the analysis and conclusion as set forth in American Blast Fax would not necessarily be the same if applied to the agency’s extension of authority over solicited advertisements.*

Id. at 687 (emphasis added). Accordingly, while the FCC satisfied its burden of showing a substantial governmental interest in the context of unsolicited faxes, its rationale is insufficient to compel speech on *solicited* faxes.

Perhaps recognizing that its legitimate interests evaporate in the context of solicited faxes, the FCC offers an additional gloss. It claims that an “opt-out notice provides consumers who have given prior express permission to be sent faxes the ability to revoke that permission and have them halted, should they decide they no longer wish to receive them.” *Order* ¶ 32. This claimed interest is speculative and attenuated. As explained below, there are ample mechanisms for the recipients of solicited faxes to communicate any change of mind. More fundamentally, the FCC’s claimed interest obliterates the distinction drawn in the statute, and court cases, between unsolicited and solicited faxes. Countenancing such an interest would mean that solicited faxes are no different from unsolicited faxes.

2. The Rule Does Not Directly Advance the Government's Interest in Preventing Harms From Unsolicited Faxes.

The TCPA empowered the FCC to regulate unsolicited faxes, which are burdensome, annoying and costly. A ban on “the sending of some unsolicited faxes surely reduces the costs of receiving unwanted faxes,” *Centerline Equip. Corp. v. Banner Pers. Serv., Inc.*, 545 F. Supp. 2d 768, 774 (N.D. Ill. 2008), but an opt-out notice on a *solicited* fax does not “directly advance[] the legitimate government interest in controlling the costs of unwanted faxes,” *id.* at 777, because the recipient has agreed to receive the fax and thus has agreed to accept any costs associated with its receipt.

3. The Rule Is More Extensive And Burdensome Than Necessary.

The government's interest in preventing cost shifting from unsolicited faxes is fully achieved by the regulation of unsolicited fax advertisements, *Am. Blast Fax*, 323 F.3d at 655, including the requirement that unsolicited fax advertisements contain an opt-out notice, 47 U.S.C. § 227(b)(1)(C)(iii). Indeed, the limitation of the rules to unsolicited faxes has been important to courts upholding the restrictions. Those courts have concluded that the statute's restrictions are sufficiently tailored precisely because solicited faxes remain unregulated, leaving advertisers free to “obtain consent for their faxes” through “telephone solicitation, direct mailing, and interaction with customers in their shops.” *Am. Blast Fax*, 323 F.3d at 659; *see also Centerline*, 545 F. Supp. 2d at 777. By extending the same

speech regulations to solicited fax advertisements, then, the FCC exceeded the very limits that ensured the proper tailoring of the government's restrictions on unsolicited faxes.

Fundamentally, the rule fails First Amendment "fit" analysis. Existing (and far less burdensome) disclosure requirements are sufficient to provide recipients of solicited fax advertisements with a means to opt out of receiving future fax advertisements.

The TCPA already requires all faxes to contain,

in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

47 U.S.C. § 227(d)(1)(B); 47 C.F.R. § 68.318(d) (same). "[B]ecause section 227(d) already requires a solicited fax to identify the sender's fax number, a recipient has a ready means to contact the sender and revoke his consent." *Order* at 20 (Dissenting Statement of Commissioner Pai). This statutory requirement is less burdensome than the elaborate opt-out requirements of the Solicited Fax Rule, yet still ensures that recipients of solicited faxes have a simple way of opting out of future messages from a sender from whom they previously invited a fax

advertisement. *See Order* ¶ 32.⁵ The availability of this obvious, workable, and significantly less restrictive alternative demonstrates that the Rule is “too imprecise to withstand First Amendment scrutiny.” *44 Liquormart, Inc.*, 517 U.S. at 529 (O’Connor, J., concurring).

The FCC insists on use of its opt-out notice requirements, and rejected a modest request to clarify that substantial compliance would suffice. *Order* ¶ 10 & n.38 (describing request and noting examples of suits based on minor deviations); *id.* ¶ 33 (denying request). Given the available alternatives, this gratuitous rule is a trap. As explained to the FCC, a hyper-technical approach serves no purpose other than making businesses “susceptible to class action lawsuits” that are “premised solely on the fact that the fax advertisements at issue do not contain opt-out notices or contain opt-out notices that plaintiffs deem inadequate.”⁶ “Many of these lawsuits seek millions of dollars in damages, despite the fact that the plaintiffs fully and freely admit that they expressly agreed to receive the faxes.”⁷ This,

⁵ *See also Order* ¶ 11 (quoting victims of lawsuits that noted recipients of solicited faxes know how to reach the senders, “and could have easily requested” that previously consented-to faxes cease. “Under such circumstances, the goal of allowing consumers to stop unwanted faxes would not have been furthered by including opt-out notices on the faxes.”).

⁶ *Petition of S&S Firestone, Inc., d/b/a S&S Tire for Declaratory Ruling and/or Waiver* at 8, CG Docket Nos. 02-278, 05-338 (filed May 7, 2014).

⁷ *Petition of Douglas Paul Walburg and Richie Enterprises, LLC, for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule*

“notwithstanding the facts that solicited faxes are expressly excluded from coverage under the TCPA” and the plaintiffs suffer “no actual harm.”⁸ This regime is not compatible with the First Amendment.

B. *Zauderer* And “Disclosure” Cases Confirm The Rule’s Fatal Flaws.

The FCC purports to satisfy intermediate scrutiny. *Order* ¶ 32. For the reasons stated above, the FCC’s rule fails that test. The government sometimes argues that mandatory disclosures and informational requirements should receive less demanding scrutiny. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and other “disclosure” cases are inapt here,⁹ but they nonetheless show that the Solicited Fax Rule is unjustified and unnecessary.

In *Zauderer*, the Supreme Court upheld a requirement that attorney advertising disclose certain “purely factual and uncontroversial information” because “the [government’s] disclosure requirements” were “reasonably related to

64.1200(a)(3)(iv) and/or for Waiver at 5, CG Docket Nos. 02-278, 05-338 (filed Aug. 19, 2013).

⁸ *Petition of S&S Firestone, Inc., d/b/a S&S Tire for Declaratory Ruling and/or Waiver* at 8, CG Docket Nos. 02-278, 05-338 (filed May 7, 2014).

⁹ *See AMI*, 760 F.3d at 26 (“[T]o match *Zauderer* logically, the disclosure mandated must relate to the good or service offered by the regulated party.”). The FCC’s regulation of solicited faxes is nothing like product-related disclosures. *See N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (upholding calorie disclosure requirement related to food being sold); *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001) (upholding information requirement related to mercury in lightbulbs).

the State’s interest in preventing deception of consumers.” 471 U.S. at 651. The Supreme Court has only applied *Zauderer*’s less-rigorous “fit” analysis to rules advancing the substantial interest in preventing consumer deception. This Court has opened the door to other applications, using *Zauderer* to evaluate the relationship between country-of-origin meat labeling and “the ‘time-tested consensus’ that consumers want to know the geographical origin of potential purchases.” *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 24 (D.C. Cir. 2014) (en banc). Several doctrinal issues are unsettled, *see Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 528 (D.C. Cir. 2015); *AMI*, 760 F.3d at 23, 25, 27 (explaining that the court “need not decide” or “consider” several issues, including what other interests might be substantial and adequate), but whatever the ultimate reach of these cases, the FCC’s rule fails to satisfy even their demands. The FCC’s rule is not supported by a substantial, adequate interest and does not meet even the arguably more forgiving “fit” analysis used in some disclosure cases.

The government must be pursuing a bona fide, substantial interest. *See, e.g., AMI*, 760 F.3d at 23 (“[T]he interest motivating the 2013 rule is a substantial one”); *NAM*, 800 F.3d at 524 (court must “assess the adequacy” of the government interest) (quotation omitted); *see also Edenfield*, 507 U.S. at 770-71 (government must “demonstrate that the harms it recites are real”). As explained above, the interests legitimately before the FCC are those related to burdens from *unsolicited*

faxes, not solicited faxes.¹⁰ The Solicited Fax Rule does not advance the government's interest in preventing harms from *unsolicited* faxes. An interest in helping consenting customers change their minds and avoid *future* unsolicited faxes is beyond the TCPA's command, attenuated and unsupported. It cannot be substantial. The record does not reveal a problem with consumers receiving solicited faxes being unable to convey their withdrawal of consent.

As for fit, a disclosure must advance the State's interest, be "purely factual and uncontroversial," and not "unjustified or unduly burdensome." *Zauderer*, 471 U.S. at 651. *Zauderer* attaches "a host of requirements." *AMI*, 760 F.3d at 33 (Kavanaugh, J., concurring in the judgment). At bottom, the FCC's Solicited Fax Rule is wholly unnecessary. Mandating the inclusion in *solicited* faxes of detailed language developed to limit *unsolicited* faxes setting is illogical and gratuitous. Information adequate for consumers to contact the sender of a solicited fax is already required. *See supra* p. 10 (citing 47 U.S.C. § 227(d)(1)(B); 47 C.F.R. § 68.318(d) (same)). This rule does not help consumers; it is simply a trap for litigants to exploit.

¹⁰ In the TCPA and the later Junk Fax Protection Act, Congress gave the FCC direction as to the interests the TCPA seeks to vindicate: harms from *unsolicited* faxes.

CONCLUSION

The Solicited Fax Rule is a wholly unnecessary agency creation, venturing beyond the TCPA's delegation to add unwanted speech to communications. It imposes unjustified burdens and litigation risk on businesses seeking to communicate non-misleading information with consenting consumers. It fails any level of scrutiny. This Court should vacate the Solicited Fax Rule under the First Amendment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify the following:

This brief complies with the type-volume limitation of Rule 29(d) of the Federal Rules of Appellate Procedure, as modified by the Court's September 10, 2015 Order, because this brief contains 3,356 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(2).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2010 version of Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that, on November 16, 2015, I electronically filed the foregoing joint brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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