ORAL ARGUMENT NOT YET SCHEDULED

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

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BAIS YAAKOV OF SPRING VALLEY, *et al.*

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

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

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BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC. IN SUPPORT OF THE BAIS YAAKOV PETITIONERS (APPEALS OF FCC'S GRANT OF RETROACTIVE WAIVERS)

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November 16, 2015

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(1) Parties and Amici. All parties, intervenors, and amici appearing in this Court are listed in the Brief for Petitioners Bais Yaakov of Spring Valley, *et al.* (petitioners challenging the grant by the Federal Communications Commission ("FCC") of retroactive waivers in Case Nos. 14-1234 and 14-1235), with the exception of Public Citizen, Inc., which has concurrently filed a representation of consent to file an amicus curiae brief in support of the Bais Yaakov petitioners.

(2) Rulings Under Review. The rulings under review appear in the Brief for Petitioners Bais Yaakov of Spring Valley, *et al.*

(3) Related Cases. A listing of related cases appears in the Brief for Petitioners Bais Yaakov of Spring Valley, *et al.*

(4) Corporate Disclosure Statement. Amicus curiae Public Citizen, Inc. is a non-profit organization that has not issued shares or debt securities to the public and that has no parents, subsidiaries, or affiliates that have issued shares or debt securities to the public. The general purpose of the organization is to advocate for the public interest on a range of issues, including for the judicial protection of consumers' legal rights.

(5) Statement Regarding Filing of Separate Brief. This brief is being filed with the consent of all parties under Federal Rule of Appellate Procedure 29(a) and Circuit Rule 29(b). Counsel for amicus curiae Public Citizen are not aware of any

other amicus curiae supporting the petitioners in Nos. 14-1234 and 14-1235 who challenge the FCC's waiver order, so certification of the reasons for filing a separate brief does not appear necessary. This Court's briefing order contemplated the filing of one amicus brief supporting the industry petitioners in the consolidated cases who challenge the FCC's opt-out rule but support the waiver that is challenged by the petitioners in Nos. 14-1234 and 14-1235, and another amicus curiae has also filed a motion for leave to file a brief supporting the industry petitioners. To the extent that the Court may consider that a certification of the need for filing a separate brief is required because of the existence of amici supporting the other side in the consolidated petitions, counsel certify that a separate brief is necessary because it would be impracticable to prepare a joint brief with amici who take diametrically opposed positions concerning the FCC's actions. This brief complies with the word limit imposed by the Court's briefing order on the amicus brief supporting the industry petitioners (3,500 words) and is filed in accordance with the time specified for the filing of that amicus brief.

/s/ Allison M. Zieve
Allison M. Zieve

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GLOSSARY

FCC	Federal Communications Commission
TCPA	Telephone Consumer Protection Act

INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a nonprofit organization with more than 350,000 members and supporters nationwide, is devoted to research, advocacy, and education on a wide range of issues, including consumer protection, administrative law, and consumer access to the courts. Public Citizen is interested in the effective enforcement of consumer-protection laws, including the Telephone Consumer Protection Act ("TCPA"). Public Citizen often represents consumer interests in litigation and regularly files amicus curiae briefs in the U.S. Supreme Court and the federal appellate courts. Public Citizen's familiarity with administrative law and consumer-protection statutes may assist this Court in determining whether the Federal Communications Commission ("FCC") permissibly waived compliance with its TCPA opt-out regulation, 47 C.F.R. § 64.1200(a)(4)(iv), negating private rights of action provided to consumers by Congress.

BACKGROUND

In 1991, Congress passed the TCPA to provide consumers relief from abusive practices related to telephone and fax technology. Congress prohibited or strictly limited these practices, instructed the FCC to pass implementing

[1] This brief was not authored in whole or in part by counsel for a party. No person or entity other than Public Citizen, Inc., or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

regulations, and gave consumers a private right of action for injunction or damages for violations of the statute or regulations. 47 U.S.C. § 227(b)(1)-(3) (1991).

In 2005, Congress amended the TCPA. In recognition of the FCC's recent findings "that consumers felt 'besieged by unsolicited faxes' and that 'advertisers continue to send faxes despite [consumers' requests] to be removed from senders' fax lists,'" S. Rep. 109-76, at 3 (2005), Congress required companies to provide identifying and contact information on fax advertisements and to heed consumers' requests to opt out of future advertisements, 47 U.S.C. § 227(b)(1)(C), (b)(2)(D) (2005).

In 2006, the FCC implemented these new statutory requirements by promulgating a rule, codified at 47 C.F.R. § 64.1200(a)(4)(iv), which provides: "A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice …." The duty to include an opt-out notice on fax advertisements despite prior express permission has thus been clearly stated for nearly a decade, as has been a sender's potential liability in a private action for violating the regulation under § 227(b)(3).

In 2014, in response to vague allegations of "confusion" and lack of notice by certain members of the regulated industry, and despite acknowledging that the language of its opt-out regulation was unambiguous, the FCC granted 25 petitions for retroactive waivers of the regulation. *In re TCPA Rules and Regulations*, 29

FCC Rcd. 13998, 14013 (2014) ("Waiver Ruling"); *see* Yaakov Ptrs.' Br. at i-ii. The FCC then invited all similarly situated companies to apply for retroactive waivers of the opt-out regulation and waived compliance with the regulation prospectively for another six months, until April 30, 2015. Waiver Ruling, 29 FCC Rcd. at 14013. In all, the FCC granted 142 retroactive waivers. *See* Yaakov Ptrs.' Br. at ii; *see also In re TCPA Rules and Regulations*, 30 FCC Rcd. 8598 (2015) ("Supplemental Waiver Ruling").

ARGUMENT

The Administrative Procedure Act requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), this Court established a framework for analyzing the arbitrary-and-capricious standard in the waiver context. *See also Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (1990) (applying framework and holding waivers arbitrary and capricious); Waiver Ruling, 29 FCC Rcd. at 14008 & n.82 (conceding framework applies). The Court held that although an agency must give "meaningful consideration" to waiver applications, waiver is appropriate only in limited circumstances. *WAIT Radio*, 418 F.2d at 1159. The Court cautioned that "[a]n applicant for a waiver faces a high hurdle even at the starting gate," *id.* at 1159, and instructed that a waiver is appropriate only when three conditions are fulfilled: (1) Special circumstances

must justify the waiver, and the waiver applicant must "plead with particularity the facts and circumstances which warrant" a waiver. *Id.* (2) The waiver must be "in the public interest," as identified by the statute and agency regulation; that is, the waiver must "not undermine the policy, served by the rule that has been adjudged in the public interest." *Id.*; *see also id.* at 1160 n.21. (3) Waivers must be used in "particular, individualized cases," "pursuant to a relevant standard … that obviates discriminatory approaches" and does not "eviscerat[e] [the] rule by waivers." *Id.* at 1157, 1159.

The FCC's Waiver Ruling fails to satisfy each of these conditions.

I. The FCC's explanations of "confusion" and lack of notice are irrational.

The FCC conceded that it must show "special circumstances" to justify a waiver of the opt-out regulation, but the two special circumstances it invoked are chimerical. First, the FCC posited that regulated companies were "confus[ed]" or had "misplaced confidence that the opt-out notice rule did not apply to fax ads sent with the prior express permission of the recipient." Waiver Ruling, 29 FCC Rcd. at 14009. Second, the FCC noted that "some commenters question[ed] whether the Commission provided adequate notice of its intent to adopt section 64.1200(a)(4)(iv)." *Id.* The FCC's explanation for its waivers is arbitrary and capricious and does not satisfy the special-circumstances requirement.

A. In light of the unambiguous regulatory text, the FCC's contention that companies were confused about the duty to comply with the regulation was arbitrary and capricious.

Because the language of the opt-out regulation is unambiguous, the FCC acted arbitrarily and capriciously in crediting the companies' vague recitations of confusion. The regulation states: "A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice …." 47 C.F.R. § 64.1200(a)(4)(iv). Given this straightforward language, the FCC could not have rationally credited the waiver applicants' contentions that they believed the "opt-out notice rule did not apply to fax ads sent with the prior express permission of the recipient." *See* Waiver Ruling, 29 FCC Rcd. at 14009.

Notably, the FCC did not—and could not—argue that the text of its regulation is ambiguous. Rather, the FCC based its conclusion that companies may have been "confused" on footnote 154 (out of 261 footnotes) on the twenty-fourth page of an approximately fifty-page order through which the FCC released its final rules in 2006. *In re Junk Fax Prevention Act*, 21 FCC Rcd. 3787 (2006) ("Junk Fax Order"). Footnote 154 states: "We note that the opt-out notice requirement only applies to communications that constitute unsolicited advertisements." *Id.* at 3810 n.154. According to the FCC, this sentence may have caused some companies to think the opt-out regulation did not apply to them *in spite* of the clear language stated in the final rule itself and published in the Code of Federal Regulations. The

FCC's suggestion is implausible. The plain meaning of the regulation controls over any arguably inconsistent statement made by the agency in promulgating it. *See Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984). And the regulation's plain meaning is reinforced by clear language in the text of the Junk Fax Order, which unequivocally states: "[E]ntities that send facsimile advertisements to consumers from whom they obtained permission, must include on the advertisements their opt-out notice and contact information to allow consumers to stop unwanted faxes in the future." 21 FCC Rcd. at 3812. As this Court has held, where a footnote in an order and the text of the order are seemingly in conflict, the footnote should be "disregarded." *United Steelworkers of Am. v. NLRB*, 389 F.2d 295, 297 (D.C. Cir. 1967); *see also* Waiver Ruling, 29 FCC Rcd. at 14010 n.97 (conceding this point).

The FCC itself recognized that any "confidence" any sender may have felt that the regulation did not actually require an opt-out notice to recipients who had given prior consent would have been entirely "misplaced." *Id.* at 14009-11. The FCC fails to explain why such wishful thinking justifies an industry-wide exemption from an unambiguous requirement.

The FCC also failed to examine whether *any* of the waiver applicants could show evidence of actual "confusion"—aside from their noncompliance with the FCC regulation. Indeed, the FCC granted all the pending waiver applications (and

indicated it would grant waivers for similarly situated parties) based merely on the fact that "all petitioners make reference to the confusing footnote language in the record." *Id.* at 14009. Such "conclusory statements" as to special circumstances do not meet this Court's requirements. *Ne. Cellular*, 897 F.2d at 1166.

The Supreme Court has recognized that where the agency's "explanation for its decision" is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise," the agency's decision is arbitrary and capricious and should be overturned. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983). Thus here, the FCC's decision to grant retroactive waivers of its clearly stated rule must be overturned.

B. The claim that the FCC gave inadequate notice regarding the opt-out regulation cannot provide "special circumstances."

As a second "special circumstance," the FCC stated that "some commenters question[ed] whether the Commission provided adequate notice of its intent to adopt section 64.1200(a)(4)(iv)." Waiver Ruling, 29 FCC Rcd. at 14009. Even while granting 25 waiver petitions on this basis, the FCC gave no credence to the notice argument and summarily disposed of it with one line: "[W]e find the notice adequate to satisfy the requirements of the Administrative Procedure Act." *Id.* A challenge to the adequacy of notice is long time-barred in any event. As the FCC explained elsewhere, "to allow Anda and other parties to challenge the validity of the rule via a request for declaratory ruling years after a rule has been promulgated

would effectively circumvent the statutory channels for review of Commission rules." *Id.* at 14006. Notably, the FCC cited only *two* comments in support of the inadequate-notice justification for waiver, yet it granted waivers for *all* 25 applications (and invited more). *Id.* at 14009 & n.87. The FCC's second argument for "special circumstances" lacks merit, further showing its waivers to be arbitrary and capricious.

II. The FCC's waivers are not in the public interest because they undermine statutory and regulatory policy.

The FCC also cannot show that retroactive waivers to all fax advertisers are in the "public interest" as required by *WAIT Radio*. In its ruling, the FCC stated that the "confusion" caused by footnote 154 and the potential for significant liability based on possible "inadvertent violations" of the FCC's rule satisfied the public interest requirement (as well as the special-circumstances prong). *Id.* at 14010. The FCC's importation of its flawed "confusion" rationale into the public-interest analysis disregards that the public interest must be determined with reference to the purpose of the governing statute and the general agency rule. *See WAIT Radio*, 418 F.2d at 1160 n.21. That is, the FCC may grant waivers only to "those applicants who, although technically in violation of a Commission rule, will not be undermining the purpose or policy which the rule was designed to further." *Id.*; *see also State Farm*, 463 U.S. at 48, 54-56 (agency acted arbitrarily and capriciously when its explanation for revoking regulation did not adequately

consider the statute's overriding goal of passenger safety). "[S]tatutes do not simply dictate or prohibit choices; they also suggest the values that must inform agency decisions that fall within statutory 'gaps.'" Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 Va. L. Rev. 271, 285 (1986); *see also* 47 U.S.C. § 154(i) (FCC may issue necessary orders "not inconsistent with this chapter").

Here, the TCPA and the opt-out regulation identify a "public interest" in providing consumers with information to allow them to opt out from future unwanted fax advertisements and to provide a private cause of action for consumers who have not been provided required notices. The FCC's Waiver Ruling undermines these policies.

A. Through the TCPA and the opt-out regulation, Congress and the FCC determined that opt-out notices are in the public interest.

In the 2005 amendments to the TCPA, Congress made clear that the Act's protections against unsolicited faxes would be ineffectual unless consumers had the means to communicate with companies and demand that companies stop sending unwanted faxes. Thus, when Congress amended the TCPA to allow some unsolicited fax advertisements where the sender and recipient have an established business relationship, it balanced this exception with "the requirement that every unsolicited facsimile advertisement contain an opt-out notice that gives the recipient the ability to stop future unwanted fax solicitations and that senders of

such faxes provide recipients with a cost-free mechanism to stop future unsolicited faxes." S. Rep. 109-76, at 7. The legislative history reiterates the FCC's findings "that consumers felt 'besieged by unsolicited faxes' and that 'advertisers continue to send faxes despite [their] asking to be removed from senders' fax lists.'" *Id.* at 3. Similarly, as explained in the Junk Fax Order and the Waiver Ruling, without the opt-out regulation, prior express permission would "lock in [consumers'] consent at a point [even after] they no longer wish to receive such faxes." Waiver Ruling, 29 FCC Rcd. at 14007; *see* Junk Fax Order, 21 FCC Rcd. at 3812. When it promulgated the opt-out regulation, the FCC considered the regulation—and still considers it—to be "good policy" and "specifically tied to the Commission's implementation of section 227(b)." Waiver Ruling, 29 FCC Rcd. at 14007.

B. The FCC's waiver ruling conflicts with congressional policy in favor of private enforcement of TCPA violations.

In the TCPA, Congress also explicitly provided that the FCC would *not* be the sole enforcer of its regulations. Thus, the TCPA provides that a person may bring "an action based on a violation of this subsection *or the regulations* prescribed under this subsection" for an injunction or damages. § 227(b)(3) (emphasis added). That is, Congress determined that private parties and states may bring actions to enforce the statute and the FCC's implementing regulations, regardless of the FCC's views as to the desirability of such suits. It is Congress's prerogative to choose the means that it thinks will best effectuate its policies, and

Congress, in the TCPA, reasonably determined "that an actual award of civil [damages] does in fact bring with it a significant quantum of deterrence over and above [the threat of possible government enforcement]." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 186 (2000) (discussing civil-penalty actions brought by private plaintiffs).

Because the FCC's "confusion" justification is implausible, the only possible explanation for the FCC's decision to grant a pardon to 142 companies for violations of unambiguous text is that the FCC sought to ensure that the industry parties would prevail over consumers in private cases pending in the courts. Indeed, the FCC conceded that a strong motivating factor in its decision to grant waivers to fax advertisers was the possibility of "significant damage awards under the TCPA's private right of action." Waiver Ruling, 29 FCC Rcd. at 14010-11. Although the FCC denied that "the risk of substantial liability in private rights of action is, by itself, an inherently adequate ground for waiver," it offered no other plausible explanation for its waiver. *Id.* at 14011. The FCC suggested that "the potential for Commission enforcement" might be another reason to grant the waivers. *Id.* But there is no evidence that the Commission has ever brought or even contemplated bringing an enforcement action based on 47 C.F.R. § 64.1200(a)(4)(iv) for failure to include opt-out notices on faxes sent with prior permission. A footnote supporting the statement that the FCC, in considering

whether to grant waivers, could consider possible enforcement action along with private liability, cites only industry petitions describing fear of private liability; none of the cited petitions identifies concerns about FCC enforcement. *See* Waiver Ruling, 29 FCC Rcd. at 14010 & n.98. Indeed, two of the petitions advocated eliminating the private right of action but *preserving* the FCC's ability to enforce the opt-out regulation. *See* Petition of Best Buy Builders, Inc., CG Docket No. 05-338 (filed Apr. 7, 2014).[2]

More fundamentally, because the FCC always has discretion *not* to bring an enforcement action to remedy a violation, retroactively waiving the regulation is wholly unnecessary to avoid FCC enforcement. If allaying concerns about FCC enforcement were the FCC's real objective, it could simply have indicated that it would not enforce previous violations of the opt-out regulation or violations occurring over the subsequent six months. Thus, it is evident that the FCC's order was principally, if not wholly, aimed at pending *private* litigation. Given the FCC's own recognition that this objective is not sufficient to justify a waiver, the waivers cannot be sustained.

[2] *See also* Petition of Futuredontics, Inc., CG Docket Nos. 02-278, 05-338, at 12-13 (filed Oct. 18, 2013) ("By making clear that Section 64.1200(a)(4)(iv) is not grounded in the Commission's authority under Section 227(b), the Commission could assist businesses by removing the threat of massive class action lawsuits based solely on communications with consenting recipients. At the same time, articulating a different statutory basis for the rule would preserve the Commission's ability to enforce the rule as appropriate using its broad, flexible enforcement powers.").

The Commission recognized that it was required to "balance legitimate business and consumer interests" and paid lip service to the "offsetting public interest to consumers through the private right of action to obtain damages to defray the cost imposed on them by unwanted fax ads." Waiver Ruling, 29 FCC Rcd. at 14010-11. It then rationalized that "[b]ecause we do not waive the rule indefinitely, consumers will not, as a result of our action, be deprived of the rule's value." *Id.* at 14011. The point that the FCC did not abrogate the statute's private right of action for all time, however, does not speak to the balance of consumer and business interests for the eight years to which the waivers apply. The Commission concluded that "[o]n balance, … we find it serves the public interest in this instance to grant a retroactive waiver to ensure that any such confusion did not result in inadvertent violations" of the opt-out rule. *Id.* But it never conducted that balance.

By waiving these clear violations, the FCC threatens the statutory division of power and Congress's policy choice. *See Natural Res. Def. Council v. EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014) (noting that statute providing for private actions "clearly vests authority over private suits in the *courts*, not EPA"). "[T]he Judiciary, not any executive agency, determines 'the scope' … 'of judicial power vested by' statutes establishing private rights of action." *Id.* (quoting *City of Arlington v. FCC*, __ U.S. __, 133 S. Ct. 1863, 1871 n.3 (2013)); *see Adams Fruit*

Co. v. Barrett, 494 U.S. 638, 649 (1990) ("[W]e need not defer to the [agency's] view of the scope of § 1854 because Congress has expressly established the Judiciary and not the [agency] as the adjudicator of private rights of action arising under the statute.").

Because the FCC's waivers are contrary to the policy established by the TCPA and the opt-out regulation, they are not in the "public interest." *WAIT Radio*, 418 F.2d at 1157, 1160 n.21.

III. The FCC's waiver ruling is not limited, does not identify a manageable standard, and eviscerates the opt-out regulation.

The FCC's authority to grant waivers of its rules under certain circumstances "emphatically does not contemplate that [the FCC] must or should tolerate evisceration of a rule by waivers." *Id.* at 1159. Instead, waivers must be used only as a "limited safety valve" in "particular, individualized cases," "pursuant to a relevant standard … that obviates discriminatory approaches." *Id.* at 1157, 1159. The requirements for a "relevant standard" and limited, particularized waivers go hand-in-hand. Here, further confirming that the FCC's "confusion" justification was pretextual and that the waiver decision had no principled limiting factor, the FCC granted *all* of the waiver requests (and invited more). It made no attempt to distinguish between meritorious and frivolous applications; it did not consider individual circumstances or whether any of the companies were actually "confused."

The FCC failed to use its authority to grant waivers as a "limited safety valve" and instead undermined *eight years* of concededly valid statutory and regulatory requirements. Such action is the very exemplar of arbitrary and capricious decisionmaking. *See Ne. Cellular*, 897 F.2d at 1166 (finding FCC's waiver arbitrary and capricious where the waiver applicant's situation had "nothing unique" to distinguish it).

CONCLUSION

This Court should set aside the FCC's order granting waivers of the opt-out regulation, 47 C.F.R. § 64.1200(a)(4)(iv).

Dated: November 16, 2015

Respectfully submitted,

/s/ Allison M. Zieve

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as follows: The type face is fourteen-point Times New Roman font, and the word count is 3,475.

Dated: November 16, 2015

/s/ Allison M. Zieve
Allison M. Zieve

CERTIFICATE OF SERVICE

I certify that on November 16, 2015, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in this case.

Dated: November 16, 2015

/s/ Allison M. Zieve
Allison M. Zieve