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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (47 U.S.C. 227), authorizes the Federal Communications Commission to require that solicited fax advertisements include the same opt-out notices that the statute requires for unsolicited fax advertisements.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 852 F.3d 1078. The order of the Federal Communications Commission (Pet. App. 20a-83a) (*2014 Order*) is reported at 29 FCC Rcd. 13,998.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2017. A petition for rehearing was denied on June 6, 2017 (Pet. App. 84a-85a). The petition for a writ of certiorari was filed on September 5, 2017 (the Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, 105

Stat. 2394 (47 U.S.C. 227), to curb abusive telemarketing practices, including the transmission of unwanted advertisements via fax. See *Mims* v. *Arrow Fin. Servs., LLC*, 565 U.S. 368, 370-373 (2012). The TCPA prohibits, among other practices, the "use [of] any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. 227(b)(1)(C). An "unsolicited advertisement" is one "transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. 227(a)(5).

In the Junk Fax Prevention Act of 2005 (JFPA), Pub. L. No. 109-21, 119 Stat. 359 (47 U.S.C. 227), Congress created an exception to the TCPA's ban on unsolicited fax advertisements. That exception applies when the sender of an unsolicited fax advertisement has "an established business relationship with the recipient," obtains the recipient's fax number through certain specified means, and includes on the fax an opt-out "notice." 47 U.S.C. 227(b)(1)(C)(i)-(iii). The notice must be "clear and conspicuous," appear "on the first page of the unsolicited advertisement," inform the recipient of the right to opt out of "any future unsolicited advertisements," and provide a contact number and cost-free mechanism to opt out. 47 U.S.C. 227(b)(2)(D).

2. In 2006, the Federal Communications Commission (FCC or Commission) issued an order adopting regulations to implement the JFPA. See *Rules & Regulations Implementing the TCPA: JFPA*, 21 FCC Rcd. 3787 (*Junk Fax Order*). The order clarified that a fax is not "unsolicited" if its recipient has consented to receive faxes from the sender at least once and has not "revoke[d] such permission by sending an opt-out request to the sender." *Id.* ¶ 46. To make it easier for

recipients to revoke permission, the order and accompanying rules required senders of solicited fax advertisements to include the same opt-out notices that the TCPA requires on unsolicited fax advertisements. *Id.* ¶ 48; see 47 C.F.R. 64.1200(a)(4)(iii)-(iv).

Although the regulations clearly required opt-out notices on solicited fax advertisements, see 47 C.F.R. 64.1200(a)(4)(iii)-(iv), a footnote in the *Junk Fax Order* stated that "the opt-out notice requirement only applies to communications that constitute unsolicited advertisements," ¶ 42 n.154. The order did not reconcile this potentially "confusing and inconsistent assertion" with "the plain language of the regulation." *Nack* v. *Walburg*, 715 F.3d 680, 684 (8th Cir. 2013), cert. denied, 134 S. Ct. 1539 (2014).

3. After the FCC issued its 2006 rule, a number of persons who had consented to receive fax advertisements brought private class-action lawsuits against the senders of the faxes, seeking statutory damages for alleged failures to include opt-out notices. See, *e.g.*, *Nack*, 715 F.3d at 682 (class action based on the receipt of one solicited fax that lacked opt-out notice). Several defendants in such lawsuits petitioned the FCC for a declaratory ruling that (1) the Commission lacked statutory authority for its rule requiring opt-out notices on solicited fax advertisements, or (2) private damages actions were not available for violations of the rule, because it was based on statutory authority other than 47 U.S.C. 227(b). *2014 Order* ¶¶ 6-10; Pet. App. 27a-32a; see 47 U.S.C. 227(b)(3)(A) (creating private right of action for "a violation of this subsection or the regulations prescribed under this subsection"). Several defendants also sought retroactive waivers of the rule. *2014 Order* ¶ 11; Pet. App. 32a.

4. The FCC denied the requests in part and granted them in part. *2014 Order* ¶ 14; Pet. App. 37a.

a. By a divided vote, the Commission determined that its rule was authorized by 47 U.S.C. 227(b)(2), which directs the FCC "to prescribe regulations to implement the requirements of" the TCPA's fax-advertisement provisions. *2014 Order* ¶ 19; Pet. App. 41a-42a. The Commission stated that requiring opt-out notices on solicited fax advertisements helps to ensure that the recipient's "prior express permission"—without which the fax would be "unsolicited," 47 U.S.C. 227(a)(5)—"remains in place," *2014 Order* ¶ 20; Pet. App. 42a. The Commission added that "giving consumers a cost-free, simple way to withdraw previous consent is good policy." *2014 Order* ¶ 20; Pet. App. 44a-45a.

The Commission unanimously found good cause to grant retroactive waivers from compliance with the rule. *2014 Order* ¶ 22; Pet. App. 47a. *Inter alia*, the Commission cited potential confusion resulting from footnote 154 of the *Junk Fax Order*, which may have "caused businesses mistakenly to believe that the opt-out notice requirement did not apply" to solicited fax advertisements. *2014 Order* ¶ 27; Pet. App. 52a.

b. Commissioners Pai and O'Rielly dissented in part. Pet. App. 62a-83a. Then-Commissioner (now Chairman) Pai argued that the TCPA's opt-out notice requirement "unambiguous[ly]" applies "only" to unsolicited fax advertisements sent pursuant to 47 U.S.C. 227(b)(1)(C), not to solicited fax advertisements. Pet. App. 69a. Commissioner O'Rielly likewise concluded that the statutory opt-out notice requirement does "not apply to *solicited* fax advertisements," and that the FCC "lacked authority" to impose such a requirement

by regulation. *Id.* at 78a-79a. Both Commissioners agreed with the grant of waivers. See *id.* at 62a, 82a.[1]

5. Two different groups petitioned for review of the *2014 Order*. First, a group of defendants in TCPA class actions challenged the FCC's conclusion that its rule was authorized by Section 227(b)(2). Second, a group of plaintiffs in TCPA class actions (petitioners in this Court) challenged the FCC's grant of waivers for past violations.

a. A divided panel of the court of appeals granted the class-action defendants' petition, holding that the TCPA did not authorize the Commission to require opt-out notices on solicited fax advertisements. Pet. App. 1a-10a. The court found that the TCPA "provides a clear answer to the question presented in this case" because "Congress drew a line in the text of the statute between unsolicited fax advertisements and solicited fax advertisements." *Id.* at 8a. The court explained that, under the TCPA, "[u]nsolicited fax advertisements must include an opt-out notice. But the Act does not require (or give the FCC authority to require) opt-out notices on solicited fax advertisements." *Ibid.*

The court of appeals rejected the suggestion that the "agency may take an action—here, requiring opt-out notices on solicited fax advertisements—so long as Congress has not *prohibited* the agency action in question." Pet. App. 8a-9a. That theory, the court stated, "has it backwards as a matter of basic separation of powers and administrative law. The FCC may only take action that Congress has *authorized*." *Ibid.* (citing *Utility Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2445 (2014)).

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[1] Since the adoption of the *2014 Order*, Commissioner Pai has been designated Chairman, former Chairman Wheeler has left the agency, and Brendan Carr has been confirmed as a Commissioner.

The court of appeals also rejected the FCC's contention that the need to define the statutory term "prior express invitation or permission" justified the Commission's issuance of the rule. Pet. App. 9a (quoting 47 U.S.C. 227(a)(5)). The court explained that this term merely defines "what it may take for a fax to be considered solicited rather than unsolicited," and does not provide authority for imposing additional requirements on solicited fax advertisements. *Id.* at 9a-10a. Even if the rule was "good policy," the court added, that "does not change the statute's text," which "does not grant the FCC authority to require opt-out notices on solicited faxes." *Id.* at 10a.

Because the court of appeals found the rule unlawful, it dismissed as moot the petitions challenging the FCC's retroactive waivers of that rule. Pet. App. 3a, 10a n.2

b. Judge Pillard dissented. Pet. App. 11a-19a. She would have held that the rule was authorized by the TCPA's conferral of authority for the FCC to "prescribe regulations to implement" the statutory prohibition on sending fax ads absent the recipients' "prior express invitation or permission." *Id.* at 12a (quoting 47 U.S.C. 227(a)(5), (b)(2)). She would also have found that the agency's waivers of past violations were not supported by good cause. *Id.* at 16a-19a.

c. Petitioners sought rehearing en banc. The court of appeals denied the petition, with no member asking for a vote. Pet. App. 85a.

ARGUMENT

Petitioners contend (Pet. 10-29) that the decision below is incorrect and conflicts with decisions of this Court and other courts of appeals about "the meaning of statutory silence in the agency context." Pet. 20. Whatever the merits of the court of appeals' decision, that ruling

does not warrant this Court's review. Contrary to petitioners' contention, the courts of appeals agree that the import of "statutory silence"—*i.e.*, Congress's failure explicitly to grant or to withhold authority for an agency to exercise a specific power—cannot be determined on the basis of any per se rule, but rather depends on the larger statutory context.

The decision below is the only one to address the significance of the TCPA's distinction between solicited and unsolicited fax advertisements in determining the agency's authority to impose an opt-out notice requirement. Although that decision forecloses one basis for agency action under a specific statute in a highly limited area, it leaves open the possibility that the FCC could promulgate the same rule under a different font of statutory authority. And even if the Court granted review and ruled in petitioners' favor on the question presented, petitioners might not achieve the practical result they seek, because the FCC granted retroactive liability waivers to respondents who violated the Commission's rule. The limited practical consequences of a decision in petitioners' favor underscore the absence of any need for this Court's review.

1. Neither the reasoning nor the result of the court of appeals' decision conflicts with any decision of this Court or of any other court of appeals. Petitioners' contrary arguments lack merit.

a. Petitioners assert (Pet. 11) that the TCPA "does not say *anything* one way or the other regarding whether opt-out notices must or must not appear on fax ads sent with prior express permission," and that the court of appeals' decision "effectively rewrites * * * step one" of *Chevron U.S.A. Inc.* v. *Natural Resources*

Defense Council, Inc., 467 U.S. 837 (1984), by "interpreting statutory 'silence' as a prohibition." That argument reflects a misunderstanding of the court of appeals' analysis, and of this Court's decisions concerning the import of so-called "statutory silence."

In *Chevron* itself, this Court emphasized that the "question whether Congress has directly spoken to the precise question at issue"—that is, the *Chevron* step one inquiry—can be answered only after "employing traditional tools of statutory construction." 467 U.S. at 842, 843 n.9; see, *e.g.*, *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). Contrary to petitioners' suggestion, the absence of an express statutory statement "one way or the other" on a specific issue, Pet. 11, does not necessarily mean that the statute as a whole is "silent or ambiguous with respect to" that issue, *Chevron*, 467 U.S. at 843. Rather, inferences from statutory silence necessarily depend on "context." *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009). In many instances, a statute taken as a whole will unambiguously grant or deny authority for an agency to take a particular step, even though no provision is specifically directed at that question. That is simply one application of the interpretive principle that, in construing a particular statutory provision, a court should be cognizant of the provision's place in the larger statutory scheme. See, *e.g.*, *Torres* v. *Lynch*, 136 S. Ct. 1619, 1625-1626 (2016).

In some cases, "statutory silence, when viewed in context, is best interpreted as limiting agency discretion." *Entergy*, 556 U.S. at 223. In others, "silence is meant to convey nothing more than a refusal to tie the agency's hands." *Id.* at 222. For example, in *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001), this

Court found that a provision of the Clean Air Act, 42 U.S.C. 7409(a), "interpreted in its statutory and historical context and with appreciation for its importance to the [Act] as a whole, unambiguously bars" the Environmental Protection Agency from considering costs in setting air quality standards, even though the provision contains no explicit ban on the agency's consideration of costs. 531 U.S. at 471. In *Entergy*, by contrast, the Court found, after "extended consideration" of a provision of the Clean Water Act, 33 U.S.C. 1326(b), that was also silent on cost considerations, that the agency *could* conduct a cost-benefit analysis in setting standards. 556 U.S. at 223; see Pet. 12-16 (identifying other cases in which statutory context led this Court to conclude that Congress had permitted an agency to regulate).

Contrary to petitioners' assertion (Pet. 20), those results do not reflect "confusion over the meaning of statutory silence in the agency context." At step one of *Chevron*, courts must analyze a statute's "text, its context, the structure of the statutory scheme, and canons of textual construction" to determine whether the statute as a whole clearly grants or withholds authority for the implementing agency to take a particular step. *City of Arlington* v. *FCC*, 569 U.S. 290, 309 (2013) (Breyer, J., concurring in part and concurring in the judgment). The fact that different judges may reach different conclusions regarding the import of a particular statutory scheme, compare Pet. App. 8a-10a (majority opinion) with *id.* at 11a-16a (Pillard, J., dissenting), does not mean that the courts of appeals disagree as to the basic interpretive framework.

b. Petitioners do not assert that there is a circuit conflict on the FCC's authority to promulgate the spe-

cific rule at issue here. Indeed, no other court of appeals has decided that question.[2] Petitioners instead contend that there is a circuit conflict on the general question of "how to apply *Chevron*" in cases involving statutory silence. Pet. 17. As explained above, that claim lacks merit. Although the courts of appeals have reached divergent conclusions regarding the import of statutory silence in various circumstances, they have consistently recognized that the appropriate inference depends on the specific statutory context rather than on any categorical rule. The decisions cited by petitioners (Pet. 17-20) confirm that understanding.

In *Alexander* v. *Trustees of Boston University*, 766 F.2d 630 (1st Cir. 1985), the court of appeals upheld a Department of Education requirement that students exempt from military service must state whether they have registered for the Selective Service in order to receive federal financial aid. *Id.* at 631. The court relied on a detailed examination of "the statutory and regulatory context," from which the court concluded that the regulation was "reasonably related to the purposes of the enabling legislation and can be said to have been within Congress's contemplation." *Id.* at 632, 637; cf. *id.*

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[2] The Eighth Circuit has stated that "it is questionable whether the regulation [at issue here] * * * properly could have been promulgated under the statutory section that authorizes a private cause of action [*i.e.*, Section 227(b)]." *Nack* v. *Walburg*, 715 F.3d 680, 682 (2013), cert. denied, 134 S. Ct. 1539 (2014). That court held, however, that it lacked jurisdiction to reach that issue under the Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*, which requires a challenge to the validity of a FCC regulation to be brought through a petition for review from agency proceedings, not in a private damages action. *Nack*, 715 F.3d at 682.

at 646 (Breyer, J., dissenting) (concluding that the objecting students had complied substantially with the regulation).

Other court of appeals decisions cited by petitioners (Pet. 19) similarly upheld agency actions based on "textual and contextual evidence of congressional intent," not on statutory silence alone. See *Bowman* v. *United States*, 564 F.3d 765, 771 (6th Cir. 2008) (citation omitted), cert. denied, 558 U.S. 815 (2009); see *Graham Eng'g Corp.* v. *United States*, 510 F.3d 1385, 1389 (Fed. Cir. 2007) (finding regulation valid because rule was "reasonably related to the purposes of the enabling legislation") (citation omitted); *Janik Paving & Constr., Inc.* v. *Brock*, 828 F.2d 84, 91 (2d Cir. 1987) (finding regulation valid because it was not "inconsistent with the language or structure of the statute or its legislative history"). Indeed, petitioners acknowledge that there are "different possible inferences that a court may draw from statutory silence." Pet. 20; see *ibid.* ("Sometimes [statutory] silence is meant to convey nothing more than a refusal to tie the agency's hands * * * [b]ut sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion.") (brackets in original) (quoting *Oregon Rest. & Lodging Ass'n* v. *Perez*, 843 F.3d 355, 360 (9th Cir. 2016) (O'Scannlain, J., dissenting from the denial of rehearing en banc)). Courts of appeals thus reach different results in cases involving statutory silence, not because they disagree about the "meaning of statutory silence," but because they *agree* that the appropriate inference from silence depends on context, which necessarily varies from statute to statute and from case to case. *Ibid.*

c. Petitioners are likewise wrong in arguing (Pet. 21-25) that, by erroneously applying "*expressio unius*

est exclusio alterius reasoning," the court below created a conflict "between the D.C. Circuit * * * and the Sixth, Seventh, Eighth, and Tenth Circuits."

As an initial matter, this case is not an appropriate vehicle for considering the interplay between *Chevron* deference and the *expressio unius* canon, because the court of appeals did not invoke that canon. The court reasoned that the "FCC may only take action that Congress has *authorized*," and that "Congress has not authorized the FCC to require opt-out notices on solicited fax advertisements." Pet. App. 8a-9a; cf. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). Based in part on the fact that the statute requires "[u]nsolicited fax advertisements [to] include an opt-out notice," the court concluded that Congress had drawn "a line in the text of the statute between unsolicited and * * * solicited fax advertisements." Pet. App. 8a. That reasoning relies on inferences from the statutory text and structure, but it does not depend "entirely on a [false] negative implication," as petitioners assert. Pet. 21 (emphasis omitted).

In any event, there is no circuit conflict on the role of the *expressio unius* canon in administrative-law cases. "The force of any negative implication" argument, like other inferences from statutory silence, "depends on context." *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (citation omitted); see *Entergy*, 556 U.S. at 223. In the decisions cited by petitioners (Pet. 21-22), the courts of appeals rejected negative-implication arguments based on the specific statutory contexts in which the disputes arose. None of those decisions conflicts with the court of appeals' analysis of the specific statutory context at issue here. And, contrary to petitioners' suggestion (Pet. 24), the D.C. Circuit does not apply a

different understanding of the negative-implication canon than do other courts of appeals. Indeed, in some of the decisions cited by petitioners, other courts of appeals relied in part on D.C. Circuit precedents applying the negative-implication canon. See *Alliance for Cmty. Media* v. *FCC*, 529 F.3d 763, 779 (6th Cir. 2008) (citing *Cheney R.R. Co.* v. *ICC*, 902 F.2d 66, 69 (D.C. Cir.), cert. denied, 498 U.S. 985 (1990)), cert. denied, 557 U.S. 904 (2009); *Ron Peterson Firearms, LLC* v. *Jones*, 760 F.3d 1147, 1158 (10th Cir. 2014) (citing *National Shooting Sports Found., Inc.* v. *Jones*, 716 F.3d 200, 211 (D.C. Cir. 2013)).

2. The specific interpretive question presented in this case—"whether Section 227(b) authorizes the opt-out notice requirement for solicited fax advertisements," Pet. App. 8a n.1—is of slight practical importance. The decision below does not foreclose the Commission from adopting a rule requiring opt-out notices on solicited fax advertisements pursuant to "any other provision of the" Communications Act of 1934, 47 U.S.C. 151 *et seq.*, such as the grant of general rulemaking authority contained in 47 U.S.C. 154(i). Pet. App. 8a n.1. It is also unclear whether petitioners would derive a practical benefit from a decision upholding the FCC's rule as a proper exercise of the Commission's Section 227(b) authority, because the Commission granted retroactive waivers of liability to respondents that sought such relief. See *id.* at 47a-55a; *National Ass'n of Broadcasters* v. *FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009) ("[T]he Commission has authority * * * to waive requirements not mandated by statute where strict compliance would not be in the public interest.").

Because the court of appeals vacated the FCC order that required opt-out notices on solicited faxes, the

court did not determine the validity of those waivers. Pet. App. 10a n.2. If this Court granted certiorari and vacated the judgment below, the court of appeals might hold on remand that those waivers are valid. Such a holding would prevent petitioners from achieving the practical result that they seek—*i.e.*, recovering damages from defendants who received waivers of the regulatory requirement at issue in this case. The limited practical significance of the court of appeals' decision further counsels against this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2018