STATEMENT OF
COMMISSIONER AJIT PAI
CONCURRING IN PART AND DISSENTING IN PART

Re: *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278; *Junk Fax Prevention Action of 2005*, CG Docket No. 05-338; *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*.

What information must a solicited fax advertisement contain to be lawful? The Telephone Consumer Protection Act (TCPA) gives one answer; our rules give another. Unsurprisingly, these divergent answers have sparked vigorous disputes in the courts and in our own halls.

I concur with my colleagues that strict enforcement of our rules in these circumstances would contravene the public interest. But I cannot support either the Commission's attempt to retroactively justify our rules as comporting with the TCPA or its attempt to evade judicial review by claiming that no controversy exists. My position is simple. To the extent that our rules require solicited fax advertisements to contain a detailed opt-out notice, our regulations are unlawful. And to the extent that they purport to expose businesses to billions of dollars in liability for failing to provide detailed opt-out notices on messages that their customers have specifically asked to receive, they depart from common sense. Therefore, I concur in part and dissent in part.

I.

Two separate provisions of the TCPA—sections 227(b) and (d)—set forth the information that fax advertisements must contain to be lawful. Accordingly, I will begin "where all such inquiries must begin: with the language of the statute itself."[1]

Section 227(d) sets forth a general requirement that fax advertisements must contain sender-identification information. Specifically, each fax advertisement must "clearly mark[], in a margin at the top or bottom . . . on the first page of the transmission, the date and time it is sent and an identification of the business . . . sending the message and the telephone number of the sending machine or of such business."[2] For twenty years, Congress has required manufacturers to design fax machines to facilitate compliance with this law.[3]

Section 227(b), in contrast, lays out a much more detailed opt-out notice. That notice (1) must be "clear and conspicuous" and "on the first page of the unsolicited advertisement," (2) must state that the recipient may opt out from "future unsolicited advertisements," (3) must note that a failure by the "sender of the unsolicited advertisement" to comply with an opt-out request is unlawful, (4) must include a domestic contact number and fax number for the recipient to send an opt-out request, (5) must include a cost-free mechanism to send an opt-out request "to the sender of the unsolicited advertisement," (6) must instruct the recipient that a "request not to send future unsolicited advertisements" is valid only if sent to the "number of the sender of such an unsolicited advertisement" identified in the notice, identifies the opt-out number, and thereafter the recipient does not expressly invite fax advertisements, and (7) must also comply "with the requirements of subsection (d)."[4]

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[1] *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

[2] 47 U.S.C. § 227(d)(1)(B).

[3] 47 U.S.C. § 227(d)(2).

[4] 47 U.S.C. § 227(b)(2)(D)–(E).

Sections 227(b) and 227(d) also differ in their coverage. Section 227(d) applies broadly to "*any* message [sent] via a telephone facsimile machine."[5] In contrast, section 227(b) applies only to a more limited set of messages: "unsolicited advertisement[s],"[6] i.e., fax advertisements "transmitted to any person without that person's prior express invitation or permission, in writing or otherwise."[7] Indeed, the TCPA uses the phrase "unsolicited advertisement" *nine separate times* in describing the detailed opt-out notice of section 227(b), making clear Congress's intent that this notice *only* applied to unsolicited advertisements.[8]

In other words, the text of the TCPA does not require solicited fax advertisements to contain the same detailed opt-out notice required of unsolicited advertisements.[9]

Nor could it be construed otherwise. In the TCPA, Congress confronted the task of "balancing the privacy rights of the individual and the commercial speech rights of the telemarketer."[10] And when Congress added the detailed opt-out notice provisions to section 227(b) in the Junk Fax Prevention Act of 2005, its focus was balancing the need of "legitimate businesses to do business with their established customers" with the need of "recipients . . . to stop future unwanted faxes sent pursuant to such relationships."[11] As part of those amendments, Congress decided to impose detailed notice requirements on "unsolicited advertisements" but not other fax advertisements. When the legislature passes a statutory scheme that precisely traces a congressional compromise, interpreters must respect the contours of that compact.[12] Indeed, reading section 227(b)'s notice requirements to cover all fax advertisements would effectively read the phrase "unsolicited" out of that subsection.[13]

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[5] 47 U.S.C. § 227(d)(1)(B) (emphasis added).

[6] 47 U.S.C. § 227(b)(1)(C)(iii) (making it unlawful "to send . . . an unsolicited advertisement, unless . . . the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D)"); 47 U.S.C. § 227(b)(2)(D) ("[A] notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if . . . .").

[7] 47 U.S.C. § 227(a)(5).

[8] 47 U.S.C. § 227(b)(1)(C)(iii) (using the phrase "unsolicited advertisement" twice); 47 U.S.C. § 227(b)(2)(D) (using the phrase five times); 47 U.S.C. § 227(b)(2)(E) (using the phrase twice more).

[9] The commenters vigorously contest the constitutionality of applying section 227(b)'s detailed opt-out notice in addition to the sender-identification notice to solicited faxes. *Compare, e.g.*, Anda Reply at 11 (contending the application would fail the test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of NY*, 447 U.S. 557 (1980)), *with* Bellin Comments at 25 (contending the application would pass the test set forth in *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985)). We need not resolve the issue, however, because the canon of avoidance counsels that if one interpretation of a statute "would raise a multitude of constitutional problems, the other should prevail." *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005). And here, the canon counsels against interpreting the statute to subject voluntary communications to crippling class-action lawsuits if a sender does not strictly comply with a government-mandated detailed disclosure, especially when that disclosure would serve no purpose (such as when a recipient requests, and the sender sends, only a single fax).

[10] Report of the Energy and Commerce Committee, H.R. Rep. 102-317, at 10 (1991).

[11] Report of the Committee on Commerce, Science, and Transportation on S. 714, S. Rep. 109-76, at 6–7 (2005).

[12] *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94 (2002) (explaining that "like any key term in an important piece of legislation, the [statutory provision in question] was the result of compromise between groups with marked but divergent interests in the contested provision" and that "[c]ourts and agencies must respect and give effect to these sorts of compromises"); *see also* John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1309–17 (2010) (arguing that respecting legislative compromise means that courts "must respect the level of generality at which the legislature expresses its policies").

[13] *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect.").

Moreover, Congress's differentiated treatment of solicited and unsolicited faxes matters because the statute provides different remedies for violations. States and the FCC may pursue civil and enforcement actions against any sender that violates section 227(d)'s sender-identification requirements.[14] And while these remedies extend to section 227(b), that subsection also contains a private right of action against those that send unsolicited advertisements in violation of the law, including sending such an advertisement without a proper opt-out notice.[15]

It's not hard to see why Congress treated unsolicited advertisements differently from solicited advertisements. A recipient presumably wants a solicited advertisement; why else would a consumer give his "prior express permission" to a sender? And a recipient may tailor his permission to the circumstances, for example, by giving express consent to receive only a single fax advertisement. In circumstances like those, a detailed opt-out notice would only confuse the recipient—why would he need to opt-out of future faxes if he'd only consented to one? And because 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.

By contrast, there's no particular reason to think that a recipient wants an unsolicited advertisement, and so he is more likely to want to opt out. Because the recipient hasn't consented, he's had no opportunity to put limits on the fax advertisements he might receive, and he may not even realize that opting out is an option. After all, a recipient may reasonably expect a sender that has solicited his consent to respect its revocation, whereas a recipient may have no such expectation about a sender that hasn't bothered to receive prior permission unless notified otherwise.

So if the statute clearly applies one set of notice requirements to unsolicited advertisements and another to solicited faxes, what are we even doing here? In a feat of administrative bravado, the Commission claims that it can countermand the clear line drawn in section 227(b) under its authority to "prescribe regulations to implement the requirements of" that very same subsection.[16] Indeed, the Commission claims that solicited faxes must contain *precisely* the same opt-out information as unsolicited faxes and are subject to precisely the same private rights of action absent strict compliance.[17]

That cannot be right. Normally the statute directs the agency, not the other way around. Or as the Supreme Court has said, "the language of the statute and not the rules must control."[18] The black-letter law is that an agency has discretion in interpreting a statute only when filling in gaps and clarifying ambiguities; when a statute both asks and answers a particular question, there is no gap to fill, no ambiguity to clarify.[19] Here, the question is which faxes must comply with the detailed opt-out notice of section 227(b) and may be subject to private rights of action. The statute's unambiguous answer: only unsolicited advertisements.

The Commission tries to avoid this answer with a peculiar chain of logic. It seizes on Congress's failure to define "prior express invitation or permission" in section 227(a)(5). It claims that the FCC's

[14] 47 U.S.C. § 227(g).

[15] 47 U.S.C. § 227(b)(3).

[16] *Anda Order* at para. 19.

[17] *Id.* at para. 33; *id.* at n.71 ("We note that the content of the opt-out notice required for fax ads sent with prior express permission is identical to that Congress required for faxes sent with an EBR [i.e., unsolicited advertisements].").

[18] *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 (1979).

[19] *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

own definition of the scope of that phrase leaves open a further gap (i.e., how to determine "whether the sender of a fax advertisement retains the recipient's prior express permission . . . after the initial fax advertisement"). And it asserts that the Commission may fill this agency-created gap through the prophylactic measure of applying section 227(b)'s detailed opt-out notice to solicited faxes because it is good policy.[20]

These convoluted gymnastics do not work for several reasons. *First*, the text does not support this approach. Although section 227(b)(2) gives the Commission authority to prescribe rules, that authorization is explicitly limited to implementing "this subsection," i.e., subsection (b). The definitional hook for the Commission's argument, however, lies elsewhere, in subsection (a); and while *other* provisions of the Communications Act might let us prescribe rules for section 227(a), the Commission rejects that possibility.[21]

Second, the rule does not—and does not even purport to—fill the supposed statutory gap. Although Congress failed to define "prior express invitation or permission" in section 227(a)(5), neither do our rules.[22] And while it's not hard to imagine a rule that specifies "whether the sender of a fax advertisement retains the recipient's prior express permission . . . after the initial fax advertisement," that's not what the actual rule does.

Third, the claimed public policy impetus just doesn't exist. Despite suggestions that the lack of a detailed opt-out notice could cost consumers "considerable time and effort" or could "effectively lock in their consent,"[23] that is hardly the case. Recall that all faxes are already required to identify the sender, including the sender's fax number,[24] so a recipient will always have a timely, efficient, and direct means to contact the sender to revoke his consent. And while a sender may prefer for that revocation to come through "a contact point designated by the fax sender to process such requests,"[25] a sender can hardly complain if a recipient revokes consent via the fax number identified on a solicited fax that doesn't direct a recipient to revoke consent through a particular means.

If anything, good policy counsels against applying a detailed opt-out notice and private right of action to solicited faxes.[26] Take the case of attorney Michael Nack. He apparently directed the answering service for his office to provide his fax number and expressly consent to receiving a faxed advertisement from anyone who calls. Douglas Paul Walburg's small business stumbled into the trap, forgetting to include a detailed opt-out notice on the fax Nack's office agreed to receive—and now Nack is the lead plaintiff in a class-action suit seeking damages of up to $48,127,000.[27] Subjecting small businesses to crippling suits at the behest of predatory trial lawyers only serves the interests of those self-same lawyers, not the American public.

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[20] *Anda Order* at paras. 19–20.

[21] Notably, only a violation of rules promulgated under section 227(b)(2) would give recipients a private right of action, which is why Anda only asked that the Commission declare that section 227(b)(2) was not the authority for applying a detailed opt-out notice to solicited faxes.

[22] *See* 47 C.F.R. § 64.1200(f) (defining 16 separate terms, but not "prior express invitation or permission").

[23] *Anda Order* at para. 20.

[24] 47 U.S.C. § 227(d).

[25] *Anda Order* at para. 20.

[26] Notably, the Supreme Court has made clear that "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text has created, but it may not create a right that Congress has not." *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001). Here, Congress has created a private right of action only against senders of unsolicited advertisements that violate our rules—not senders of solicited faxes.

[27] *See Nack v. Walburg*, No. 4:10CV00478 AGF, 2011 WL 310249 (E.D. Mo. 2011).

Fourth, one cannot help but notice that this chain of logic leads back to the very thing Congress decided not to do: apply the reticulated notice of section 227(b) to solicited faxes and expose senders of solicited faxes to private rights of action, including class-action lawsuits. "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[28]

For these reasons, I disagree that section 227(b) authorized the Commission to apply the detailed opt-out notice and the private right of action to solicited faxes.

II.

This extended discussion begs another question: Why are we only now discussing the statutory basis of the Commission's decision to adopt a rule that applies the detailed opt-out notice and private right of action to solicited faxes? The short answer: We've never done it before.

When the Commission supposedly proposed the rule, it did "propose amending the Commission's rules to comply with the specific notice requirements on unsolicited facsimile advertisements,"[29] and it sought "comment on the interplay between [the] identification requirement" that section 227(d) requires for "senders of facsimile messages" and "the notice requirement [in section 227(b)(2)] for senders of unsolicited facsimile advertisements."[30] What it did *not* do, however, was "make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient."[31] It accordingly made no attempt to justify such a requirement nor to even hint that one was on the table.[32]

The Commission's explanation when it actually adopted the rule wasn't any better. In full, it stated: "In addition, entities 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."[33] Missing from that *ipse dixit* was any explanation of the statutory basis of the rule or its policy rationale. Indeed, the only citation justifying the Commission's action came in a rote recitation of 11 separate sections of the Communications Act.[34]

What is worse, that same Commission order expressly countermanded the decision to apply the detailed opt-out notice and private right of action to solicited faxes. *First*, the *Junk Fax Order* stated that "the opt-out notice requirement only applies to communications that constitute *unsolicited*

[28] *Whitman v. American Trucking Associations*, 531 U.S. 457, 468 (2001).

[29] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Protection Act*, CG Docket Nos. 02-278 and 05-338, Notice of Proposed Rulemaking, 20 FCC Rcd 19758, 19768, para. 20 (2005) (*Junk Fax Notice*).

[30] *Id.* at 19768–69, para. 21.

[31] *Anda Order* at para. 25.

[32] Although the *Anda Order* contains substantial legalese on this point, it does not once attempt to pin down how the Commission provided adequate notice. And it cannot. In full, here is the Notice's discussion of the phrase "prior express invitation or permission," the supposed basis for the rule: "[W]e seek comment on the phrase 'prior express invitation or permission' in the definition. In addition to written permission, what other forms of permission should be allowed by our rules? If permission is given orally, for instance, should the facsimile sender bear the burden of proof to demonstrate that it had the consumer's prior express invitation or permission?" *Junk Fax Notice*, 20 FCC Rcd at 19772, para. 30.

[33] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, *Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3812, para. 48 (2006).

[34] *Id.* at 3817, para. 64 (citing sections 1, 2, 3, 4, 201, 202, 217, 227, 258, 303, and 332 of the Communications Act).

advertisements."[35] *Next*, the *Junk Fax Order* recognized that the TCPA's private right of action only reaches "any violation of the TCPA's prohibitions on . . . unsolicited facsimile advertisements."[36]

Perhaps that's why the rule has caused countless controversies in the courts. Perhaps that's why the Commission feels it necessary to retroactively justify the rule today. Perhaps that's why two dozen companies—and counting—have petitioned the Commission for relief. We know that's part of the reason why every member of the Commission agrees that strict enforcement of the rule would contravene the public interest in these circumstances.

And yet, the Commission nevertheless claims that these circumstances "present no controversy to terminate or uncertainty to remove."[37] Given our forthright acknowledgement that the rule should be waived because of how it was adopted, I do not see how there can be no controversy regarding its adoption. And because our refusal to recognize the controversy that is staring us in the face is nothing more than a litigation strategy, I cannot support it.

Nor can I support the Commission's other attempts to evade judicial review. Anda's petition cannot be time-barred,[38] for example, because our rules do not set a limit on when parties may file petitions for declaratory ruling. Although Anda could have filed a petition for reconsideration, it chose instead to ask which of the 11 statutory provisions identified in the *Junk Fax Order* was the actual statutory basis of the rule. That's not a question of reconsideration; it's instead a classic question of clarification.

The argument that Anda could seek judicial review if it had only filed a petition for rulemaking instead rings hollow given that Anda's compatriots have filed such petitions and the Commission denies them here.[39] The same goes for the Commission's claim that Anda can always seek review if the Commission tries to enforce the rule against it.[40] After all, the Commission was pivotal in ensuring that the Eighth Circuit would not review the rule when a private litigant sought to enforce it, and now the Commission waives the rule—but only long enough to try to foreclose review while holding out the threat of future enforcement. Due process demands more: If a party must comply with a rule, it must also have *some* recourse to determine that law's validity.

Ironically, the Commission now nitpicks the processes Anda used while ignoring the FCC's troubling process in this same matter. After all, Anda filed its petition for declaratory ruling four years ago, and it is getting a judicially reviewable answer only now. What is normally a matter of course—issuing a public notice to seek comment on a petition—was denied to Anda for more than three years. And the FCC received Anda's original petition in November 2010 but waited almost a year to post it online and make it available to the public. These are not the actions of an agency with clean hands, and we should not sully Anda just to make ourselves look better.

For all these reasons, I concur in part and dissent in part.

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[35] *See Junk Fax Order*, 21 FCC Rcd at 3810, n.154 (emphasis added).

[36] *Id.* at 3815, para. 56.

[37] *Anda Order* at para. 18.

[38] *See id.* at paras. 16–17.

[39] *See id.* at para. 17 ("Anda would have had the opportunity to request judicial review if the Commission had denied its petition for rulemaking . . . of the *Junk Fax Order* . . . ."); *see id.* at paras. 32, 35 (denying several petitions for rulemaking).

[40] *Id.* at para. 17 ("Anda would have had the opportunity . . . to challenge the Commission's authority to adopt the rule if the Commission sought to enforce the rule against it.").