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Briefing Concludes on Cert Petition Seeking Supreme Court Review of D.C. Circuit Fax Decision

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On January 30, 2018, briefing closed on the petition for certiorari filed in the Supreme Court by the class action plaintiffs in *Bais Yaakov of Spring Valley v. FCC*. The class action plaintiffs are seeking review of the D.C. Circuit's March 2017 decision (discussed at length here, here, here) holding that the FCC exceeded its statutory authority when it promulgated regulations in 2006 requiring that a fax advertisement sent with the prior express consent of the recipient include an opt-out notice because "although the Act requires an opt-out notice on unsolicited fax advertisements, the Act does not require a similar opt-out notice on solicited fax advertisements . . . . [nor does it] grant the FCC authority to require opt-out notices on solicited fax advertisements." *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1082 (D.C. Cir. 2017).

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The class action plaintiffs' petition was filed in September 2017 after the D.C. Circuit issued a *per curiam* order in June 2017 denying the class action plaintiffs' request for rehearing *en banc*. The main argument advanced in the petition is that review is needed because the *Bais Yaakov* decision supposedly created a circuit split in its application of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and the doctrine of expression *unius est exclusion alteri*, with the D.C. Circuit's decision conflicting with decisions from the First, Second, Sixth, Seventh, Eighth, Ninth, Tenth, and Federal Circuits.

In *Chevron*, the Supreme Court established a two-step process for reviewing a federal agency's construction of the statute it administers. The first step is to determine "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." 467 U.S. at 842. The second step, "[i]f . . . the court determines Congress has not directly addressed the precise question at issue," is to determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

The class action plaintiffs argue that the D.C. Circuit went astray by ending the analysis at *Chevron*'s step one because, they argue, Congress did not directly address the issue as evidenced by the fact that the "statute 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." They argue that the D.C. Circuit made this error because it "misconstrued the basis of the FCC's authority, framing the question as 'whether the Act's requirement that businesses include an opt-out notice on unsolicited fax advertisements' sent to persons having an established business relationship with the sender 'authorizes the FCC to also require business to include an opt-out notice on solicited fax advertisements,'" rather than framing the question as whether "the TCPA's general conferral of authority in § 227(b)(2) 'to implement the requirements' of the prohibition against sending fax advertisements without 'prior express invitation or permission,'" permitted the FCC to "specify[] rules governing whether (and how) such permission may be revoked."

The respondents (including the FCC, which agreed with the class action plaintiffs' arguments when the case was argued in front of the D.C. Circuit, but reversed course when then-Commissioner Pai became Chairman Pai) all waived their right to respond—a course of action typically used by respondents to telegraph to the Supreme Court that the they believe a petition is frivolous. After distribution for Conference, however, the Supreme Court, requested responses.

On January 16, the FCC filed a short opposition. The FCC's opposition opens by highlighting the fact that the

FCC's 2014 Order was issued "[b]y a divided vote" and that then-Commissioner Pai and Commissioner O'Rielly dissented in part from that Order. The petition notes specifically that "[t]hen-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;" and that "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."

The FCC then points out that there is no circuit split that could justify review for several reasons. First, the D.C. Circuit's decision 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." Second, the rulings in the cases cited by the class action plaintiffs were "based on 'textual and contextual evidence of congressional intent,' not on statutory silence alone," and such evidence varies by statute. The FCC also points out that the D.C. Circuit's ruling does not foreclose the FCC from requiring opt-out notices on solicited facsimile advertisements. Rather the decision merely forecloses the FCC from promulgating that requirement pursuant to that portion of the TCPA which authorizes a private right of action.

The FCC also points out that the petition should be denied because of the "limited practical significance" of the D.C. Circuit's decision. Specifically, even if the Supreme Court granted review and vacated the D.C. Circuit's decision, the D.C. Circuit might nevertheless uphold the validity of the waivers granted by the FCC (an issue that was before the D.C. Circuit but which the court did not reach) which "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 class action defendants also filed an opposition on January 16, echoing the arguments made by the FCC and emphasizing that "the agency that promulgated the Rule does not seek review, and the current FCC leadership does not support it."

On January 30, 2018, the class action plaintiffs filed their reply. The reply ratchets up the rhetoric (asserting for example, that "[t]he D.C. Circuit panel's specific sin was to disobey *Chevron*" and that its decision "will call into doubt, and will likely cause exponential growth in litigation regarding, the authorization for thousands of federal agency regulations issued over the three-plus decades since this Court decided *Chevron*") but treads little new ground.

On January 31, the matter was distributed for Conference. We can expect a decision on the petition shortly, and will provide an update when the Supreme Court issues its decision.

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