

# United States Court of Appeals For the First Circuit

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No. 20-1537

BAIS YAAKOV OF SPRING VALLEY,  
on behalf of itself and all others similarly situated,

Plaintiff, Appellant,

v.

ACT, INC.,

Defendant, Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Timothy S. Hillman, U.S. District Judge]

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Before

Lynch, Kayatta, and Barron,  
Circuit Judges.

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Aytan Y. Bellin, with whom Bellin & Associates LLC was on  
brief, for appellant.

Robert A. Burgoyne, with whom Perkins Coie LLP, Robert L.  
Leonard, and Doherty, Wallace, Pillsbury & Murphy, P.C., were on  
brief, for appellee.

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August 30, 2021

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**KAYATTA, Circuit Judge.** ACT, Inc., is a non-profit entity that develops and administers the ACT college admissions test. Bais Yaakov of Spring Valley is a small private high school to which ACT sent three one-page faxes in 2012. Bais Yaakov has since pursued ACT with a zeal that would impress even Hugo's Inspector Javert. On behalf of itself and a class of similarly situated recipients of faxes from ACT, Bais Yaakov alleges that the faxes were unsolicited advertisements sent in violation of the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227(b)(1)(C). Bais Yaakov seeks injunctive relief and statutory damages in an amount ACT estimates to exceed \$400,000,000.

After almost eight years of litigation -- including an interlocutory appeal to this court, see Bais Yaakov of Spring Valley v. ACT, Inc., 798 F.3d 46, 46 (1st Cir. 2015) -- the district court entered judgment against Bais Yaakov. It found that class certification was unwarranted and that Bais Yaakov's individual claim was rendered moot by ACT's offer to pay the full amount of that claim (\$46,500) and its promise not to send further faxes to Bais Yaakov. While we see no abuse of discretion in the denial of class certification, we vacate the judgment because Bais Yaakov's own claim for damages is not quite moot. Our reasoning follows.

## I.

In 2005, Bais Yaakov filled out a High School Code Request Form, on which it provided its fax number. Students use the High School Code number to have their ACT test scores reported to their high school. On the form, Bais Yaakov checked a box indicating that it wanted to administer certain standardized tests, that it wanted to receive its students' test scores, and that it wanted to receive SAT or ACT publications.

Seven years later, ACT sent three faxes to Bais Yaakov over the course of three months. The first fax was a one-page flyer stating in large bold letters, "Don't forget to register for the ACT!" Underneath, the fax directed counseling staff to "[r]emind" students of the next ACT test date, which it featured prominently. It listed the registration deadlines for the test date and advised that "[s]tudents can meet the . . . deadline by registering on-line" at a specified ACT web address. In the top-left corner, the fax presented the name "ACT" above the words "advancing lives."

The second fax was identical to the first but with a different test date and corresponding registration deadlines.

The third fax contained what appears to be an image of a crowd cheering at a baseball game, with the words "Give Your Students the Home-Field Advantage" superimposed on one side and "ACT" on the other. The bottom of the image stated, "Become an

ACT Test Center." Beneath the image was more text, which said, among other things: "By offering the ACT at your high school you provide your students with a competitive edge."; "Your school can benefit too. Your school staff will be compensated for assuming the roles of test supervisor, room supervisors, and proctors."; and "The curriculum-based ACT is accepted by all 4-year colleges and universities in the U.S." (emphasis omitted).

Bais Yaakov alleges that these three faxes are among over 28,000 unlawfully faxed advertisements ACT sent to over 7,000 schools across the country between 2008 and 2012.

## II.

### A.

The TCPA prohibits sending advertisements to fax machines, but with two principal exceptions: An advertisement may be sent to a fax machine (1) if the person to whom it is sent has given "prior express invitation or permission, in writing or otherwise," 47 U.S.C. § 227(a)(5); or (2) if certain conditions are satisfied, one of which requires the inclusion of an opt-out notice on the fax, id. § 227(b)(1)(C). None of the faxes at issue in this appeal contains an opt-out notice, so any that are advertisements are unlawful if they were sent without prior express invitation or permission.

By regulation, the Federal Communications Commission (FCC) promulgated a substantial further limitation on sending

advertisements by fax. In its so-called Opt-Out Regulation (also referred to as the Solicited Fax Rule), the agency decreed that even faxes sent with prior express invitation or permission must contain an opt-out notice. See Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25,967, 25,971-72 (May 3, 2006) (formerly codified at 47 C.F.R. § 64.1200(a)(4)(iv)); Bais Yaakov of Spring Valley v. FCC, 852 F.3d 1078, 1080 (D.C. Cir. 2017) (Kavanaugh, J.). ACT included no opt-out notice in any of its faxes, so if the Opt-Out Regulation is valid, prior express invitation or permission would be no defense. Instead, ACT's liability to any recipient would turn entirely on whether the fax was an advertisement.

The FCC defines the term "advertisement" for purposes of the TCPA as "any material advertising the commercial availability or quality of any property, goods, or services." 47 C.F.R. § 64.1200(f)(1); see also 47 U.S.C. § 227(a)(5) (using similar language to define the term "unsolicited advertisement"). To classify a communication as "advertising," the agency looks to the communication's "primary purpose." In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 31 FCC Rcd. 13,289, 13,291 (2016).

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