No. 13-486

In the
Supreme Court of the United States

DOUGLAS P. WALBURG,
Petitioner,
v.
MICHAEL R. NACK,
Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO PARTICIPATE AND BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE*

The undersigned *amici* move for leave to file a brief in support of the appellant in this case.[1] The *amici* are law professors who study and teach federal procedure and administrative law, and they are interested here because they believe that a private defendant sued under a Federal Communications Commission regulation should not be precluded by

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[1] Ten days prior to filing, counsel for the *amici* notified the appellee, Michael R. Nack, through counsel, of their intent to file a brief in this case. Appellee Nack withheld consent to such filing. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

the Hobbs Act from directly challenging that regulation as *ultra vires*. *Amici* are also interested because of the broad and adverse practical effects that flow from limiting such challenges in the present context of the Telephone Consumer Protection Act ("TCPA").

Professor A. Christopher Bryant teaches federal procedural and constitutional law at the University of Cincinnati. He has written on issues including the constitutional review of statutes, federalism, and federal procedure.

Professor Dru Stevenson teaches administrative law at the University of South Texas. He has published in areas including the non-delegation doctrine and administrative law, and previously moderated a blog for administrative law professors.

The *amici* will assert in their brief that the decision of the Eighth Circuit below precluding review of a regulation by a defendant in a private action is inconsistent with the language of the relevant jurisdiction-stripping statute, as well as constitutionally, equitably, and practically problematic.

Amici first analyze the language of the Communications Act and the Hobbs Act as relevant here to show that, by their plain language, these statutes permit the challenge that the Eighth Circuit barred below. *Amici* also analyze precedents of this Court and the circuit courts *permitting* similar challenges to regulations even in settings where the Hobbs Act does limit review by its plain language. *Amici* argue that this line of cases reflects the constitutional requirement that parties affected by

regulations be given an opportunity to challenge those regulations as invalid.

Amici also address the practical impact of the Eighth Circuit's decision below. They note that because the substantive statute at issue here, the Telephone Consumer Protection Act, includes a strict-liability private cause of action, federal class actions under TCPA regulations have been piling up by the hundreds. Under the Eighth Circuit's jurisprudence, thousands of private defendants will thus be wrongfully barred from challenging the relevant regulations. Such an inequity favors prompt action by this Court.

Amici therefore request that the Court grant them leave to file an *amicus* brief in this case.

Respectfully submitted,

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BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF DOUGLAS P. WALBURG

SUMMARY OF ARGUMENT

The Eighth Circuit held below that when a defendant is sued by a private party under a Federal Communications Commission ("FCC") regulation, the defendant may not challenge the regulation as beyond the agency's delegated authority. The Eighth Circuit reached this conclusion notwithstanding agreement among the courts of appeals that when *the FCC* enforces its regulations, a defendant may challenge such an *ultra vires* regulation by simply appealing the relevant enforcement order.

The Eighth Circuit's limitation on review is both wrong as a legal matter and fundamentally

destabilizing in practice. To begin, the plain language of the jurisdiction-stripping statute, the Hobbs Act, does not even apply here. But even if the statutory language were to apply on its face, the constitutional doctrine of non-delegation would demand a narrower interpretation. That doctrine requires that a party be able to challenge an agency's *ultra vires* law to avoid serious constitutional questions. But the Eighth Circuit's limitation on review prevents this, in conflict with the precedents of this Court and most other circuits.

The practical effect of the Eighth Circuit's decision will be significant and quickly felt. The statute granting the private right of action here, 47 U.S.C. § 227, creates strict liability for violations of rigorous rules not only for the sending of faxes, but for automated telephone calls and text messages, as well. Private class actions against businesses big and small for allegedly unlawful text messages have already reached a fever pitch, and will only continue to proliferate under new, exacting rules that took effect last month. Defendants in the Eighth Circuit—where plaintiffs' attorneys presumably will flock—will face this strict liability without any opportunity to challenge the validity of the relevant regulations. The Court should therefore grant certiorari, and bring the Eighth Circuit's jurisprudence into line with constitutional requisites and the law of the other circuits.

ARGUMENT

I. BACKGROUND

We presume that the Court is familiar with the facts of this case and its procedural posture. However, we highlight as particularly relevant that the petitioner in this case was sued by a private party under a regulation applicable to *solicited* marketing faxes, while the statute granting authority to promulgate regulations here relates only to *unsolicited* marketing faxes. The petitioner's primary affirmative defense, then, is that the relevant regulation is *ultra vires* or, at least, not authorized by the statutory provision that permits private causes of action. The Eighth Circuit below agreed that the authority for the regulation was suspect, *see* Pet. at 2a ("it is questionable whether the regulation at issue (thus interpreted) properly could have been promulgated under the statutory section that authorizes a private cause of action"), but held that the Hobbs Act precluded the district court from considering the petitioner's challenge. This absolute bar on challenges to the agency's authority to adopt a regulation is troubling in the specific context of this case, and even more so in its general application.

II. BY ITS PLAIN LANGUAGE, THE HOBBS ACT DOES NOT APPLY HERE.

Even without addressing the broader policy and constitutional issues at stake in this case, the relevant statutory language demonstrates that the Eighth Circuit's rule conflicts with this Court's precedents.

This Court has consistently interpreted statutes purporting to limit judicial review of agency action narrowly. Starting with *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), the Court has interpreted the Administrative Procedures Act to permit broad judicial review, noting that "only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." (internal citation omitted). Later, in *Johnson v. Robison*, 415 U.S. 361, 366 (1974), the Court interpreted veterans' benefits legislation similarly, finding that construing the relevant statute to cut off judicial review of constitutionality "would, of course, raise serious questions concerning the constitutionality of [the relevant jurisdictional provision]." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), also narrowly construed a limitation on judicial review of Medicare regulations, discussing the "strong presumption that Congress intends judicial review of administrative action." Likewise, in *Webster v. Doe*, 486 U.S. 592, 603 (1988), the Court interpreted a provision of the National Security Act to allow constitutional review of agency action, stating that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."

The courts of appeals have repeatedly applied these precedents to avoid the constitutional questions that would arise from broad construction of jurisdiction-stripping statutes. For example, in *Wayne State University v. Cleland*, 590 F.2d 627, 632 (6th Cir. 1978), the Sixth Circuit applied the holding in *Johnson*, 415 U.S. at 366, and found that interpreting a jurisdiction-stripping statute to

preclude *ultra vires* challenges "would also raise serious doubts about the statute's constitutionality." Likewise, in *Terran ex rel. Terran v. Secretary of Health & Human Services*, 195 F.3d 1302, 1311 (Fed. Cir. 1999), the Federal Circuit interpreted a jurisdiction-stripping provision related to vaccination compensation that, like the Hobbs Act, also states a 60-day limitation period for review. That court held that this did not preclude an otherwise out-of-time challenge to a regulation, noting that, with regard to similar statutes, "[o]ne important exception is that when a party seeks to challenge a regulation on substantive grounds of invalidity, such as that the regulation was not authorized by legislation, review may still be had." *Id.*

Applied here, this standard calls for a statutory interpretation that permits review of the regulation in the present case. The Hobbs Act and the Communications Act provide in relevant part:

47 U.S.C. § 402(a) (Communications Act):

> Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section [which is not applicable here]) shall be brought as provided by and in the manner prescribed in [the Hobbs Act].

28 U.S.C. § 2342 (Hobbs Act):

> The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of— (1) all final orders of the Federal

> Communications Commission made reviewable by section 402(a) of title 47.
>
> **28 U.S.C. § 2344 (Hobbs Act):**
>
> On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.

Construed together, these provisions certainly do not unambiguously preclude petitioner's *ultra vires* challenge. The Hobbs Act provides that the courts of appeals have exclusive jurisdiction to determine the validity of "orders of the [FCC] made reviewable by section 402(a)." But Section 402(a) lists types of "proceeding[s]" that must be "brought" pursuant to the Hobbs Act, not types of orders that are reviewable. Section 402(a) thus appears to at least limit the orders that it effectively "makes reviewable" to orders that are reviewed when someone has "brought" a "proceeding" to challenge them.

The use of the terms "proceeding" and "brought" in Section 402(a) are important here, because they signify that Section 402(a) applies only to offensive challenges to regulations. To "bring a proceeding" is to sue; it is not to assert, for example, an affirmative defense. *See, e.g.*, Black's Law Dictionary (9th ed. 2009) (providing the sole definition for "bring an action" as "[t]o sue; institute legal proceedings."). Thus, an affirmative defense that a regulation is

invalid falls outside the scope of Section 402(a), and in turn falls outside the scope of the Hobbs Act.

This reading of the statutes is also consistent with their history. The Hobbs Act was amended to its present form, including the reference to Section 402(a), in 1950. *See* 64 Stat. 1129 (1950). But Section 402(a) was not amended to its relevant form until 1952. *See* 66 Stat. 711 (1952). Section 402(a) was thus written with the Hobbs Act as background, and is best read as a limitation to that statute. Congress could have written in 1952 that "all final orders of the Commission are reviewable as provided in the Hobbs Act," and by that have encompassed all challenges to regulations, both offensive and defensive. But instead, Congress elected to frame the rule in terms of "proceeding[s]" that are "brought," thereby limiting the effect of the law. The most natural reading of the statutes, then, favors permitting the challenge excluded below.

Again, however, even if there were a strained reading of these statutes that could apply here, the *Abbott Laboratories* rule requiring a "clear and convincing" showing of Congressional intent to deprive review thus precludes any such reading. 387 U.S. at 141. In fact, the statutory evidence suggests that Congress intended *not* to limit review of regulations in a private defensive challenge. Importantly, it is not sufficient to assert that because review of the relevant regulation here is permitted within 60 days of its promulgation, the "clear and convincing" requirement of *Abbott Laboratories* does not apply to the limitation of review after that period. We discuss case law that dispels this notion below, but as a logical matter, limitation of later

review—even when prior review was available—raises the same equitable concern: that an invalid regulation could be applied to a party without that party having a *practical* opportunity to contest the regulation. It is this that is disfavored, and to which the "clear and convincing" standard applies.

III. CONSTITUTIONAL AND EQUITABLE CONSIDERATIONS FAVOR REVIEW OF THE EIGHTH CIRCUIT'S DECISION.

Along with the statutory language, constitutional and equitable considerations also favor review here. To be sure, some courts have resisted permitting challenges to regulations (mostly procedural challenges) based on policy concerns like finality or uniformity. Here, however, such considerations should give way to the need for a party to be able to effectively challenge a substantively improper regulation before being subject to judgment. In a case like the present one, where the primary challenge is that a regulation is *ultra vires*, this is further buttressed by the constitutional limitation on Congress's power to preclude review of such regulations.

The circuits' case law bears this out. Of course, the large majority of regulations subject to the Hobbs Act have no attendant private right of action, and are thus administered solely by the promulgating agency. The circuit courts have therefore historically had more opportunity to interpret the jurisdiction-limiting provisions of the Hobbs Act (and other similar statutes) with an agency present than in private lawsuits. So, in one such case where an agency was present, *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), the D.C. Circuit

established the rule that prevails today. There, the appellant, Functional Music, appealed the denial of a petition that it had filed with the FCC, challenging not only the immediate denial, but an older regulation as well. *Id.* Functional Music's challenge to the older regulation thus satisfied one provision of the Hobbs Act—that a challenge to a regulation be brought before the courts of appeals—but the plain language of the Hobbs Act requires challenges to regulations to be brought within 60 days of promulgation, and Functional Music's appeal was long past that deadline. Nevertheless, the D.C. Circuit chose to ignore this limitation. It stated instead that "administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *Id.* The D.C. Circuit reached this conclusion notwithstanding the fact that Functional Music had existed at the time of the initial promulgation of the rule and plainly had an interest in the rulemaking at that time.

The D.C. Circuit and other circuit courts have consistently followed *Functional Music*, extending its holding to include challenges to underlying regulations when an agency takes enforcement action against a party. *See Indep. Cmty. Bankers of Am. v. Bd. of Governors of Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C. Cir. 1999) ("We have frequently said that a party against whom a rule is applied may, at the time of application, pursue substantive objections to the rule, including claims that an agency lacked the statutory authority to adopt the rule, even where the petitioner had notice and

opportunity to bring a direct challenge within statutory time limits," and citing cases); *Commonwealth Edison Co. v. United States Nuclear Regulatory Comm'n*, 830 F.2d 610, 614 (7th Cir. 1987) (finding that, under the Hobbs Act, "indirect challenges to the rule brought when the rule is applied to a particular individual are within the court's jurisdiction."); *Texas v. United States*, 730 F.2d 409, 415 (5th Cir. 1984) ("When an agency applies a previously adopted rule in a particular case, the Hobbs Act does not bar judicial review of the substance of the rule, even if more than sixty days have elapsed since its issuance."); *see also Tri-State Motor Transit Co. v. Interstate Commerce Comm'n*, 739 F.2d 1373, 1375 n.2 (8th Cir. 1984) (allowing a challenge to agency action and stating that "we hold that the Hobbs Act does not bar judicial review on the substantive validity of the rule, even if more than sixty days have elapsed since its issuance"); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 714 (9th Cir. 1991) (interpreting the APA's statute of limitations, and noting that "[o]ther circuits have concluded that an agency regulation or other action of continuing application may be challenged after a limitations period has expired if the ground for challenge is that the issuing agency acted in excess of its statutory authority.").

However, courts generally limit this review to challenges to rules as unconstitutional, *ultra vires*, or otherwise substantively deficient, while declining to permit untimely challenges to the rulemaking procedures. *See, e.g., Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 (D.C. Cir. 1981) (noting that "we have permitted such

indirect challenges when an agency is alleged to have issued regulations which are not authorized by their parent legislation," but denying a challenge based solely on an allegation of non-compliance with the Administrative Procedures Act). This makes sense: the Hobbs Act nominally precludes *all* proceedings brought to challenge a rule after the 60-day period, and the courts will construe that limitation narrowly only to preserve the constitutionally weighty right to challenge the substance of a regulation when it is applied.

The reason for permitting substantive review is generally expressed as equitable, obliquely implicating due process rights. Courts often explain that, while the dictates of finality support limiting late procedural challenges, it violates a basic doctrine of fairness to punish parties using rules that they now can't substantively challenge—even if an earlier, preemptive challenge was possible. *See, e.g., Functional Music*, 274 F.2d at 546. This concern should be no less applicable—indeed, it should be more applicable—when the party "enforcing" the regulation is a private plaintiff.

Further, while less commonly discussed, an additional constitutional consideration also underlies this judicial instinct, specifically when the challenge is that a regulation is unauthorized by law. The Constitution requires that no branch cede its power to another branch, and this means that Congress cannot delegate its legislative function to the executive. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 371–84 (1989) (generally discussing the non-delegation doctrine). But when Congress limits parties' ability to effectively challenge *ultra vires*

regulations, it violates that doctrine, effectively granting executive agencies power to legislate. *See, e.g.,* Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 Tul. L. Rev. 733, 752–53 (1983) ("The constitutional equivalent to ultra vires review of rulemaking authority is the nondelegation doctrine, which prohibits Congress from granting agencies unlimited legislative power. Separation of powers analysis asks the question whether Congress impermissibly gave away its legislative power when it transferred authority to an administrative agency . . . . This analysis amounts to a sub-nondelegation doctrine, which ensures that Congress' legislative power, presumably satisfactorily delegated initially, is not redelegated beyond its intended limits."). Thus, here, there is an additional constitutional reason to allow the petitioner's defense that the relevant regulation is *ultra vires*.

The Eighth Circuit suggested below that one response to this is that judicial review *was* and even *is* available to parties situated as the petitioner is here—it is just not available in federal district court. Specifically, the court noted that the defendant here had not "attempted to challenge the validity" of the regulation "either through a petition for reconsideration" or a "petition for rulemaking to repeal the rule," and that, had the defendant been frustrated in these other avenues of challenge, it *might* have had jurisdiction over the present challenge. Pet. at 12a n.2.

Even the court below, then, shows some concern for protecting a party's practical ability to challenge a regulation. But the Eighth Circuit's nod to this concern is wholly insufficient. Neither of the options

proposed by the Eighth Circuit permit the FCC to retroactively invalidate a regulation, *see* Pet. at 13 (citing cases), and neither requires either the federal court to stay an action or the FCC to act promptly. To the contrary, under the Eighth Circuit's system, it is not just possible, but likely that a party sued privately under a regulation will be subject to a judgment without having its challenge heard by a court, and that no further proceeding will be available to annul the judgment. This is not satisfactory.

A related error in the Eighth Circuit's approach is that it latches onto an idiosyncrasy of how the law in this area developed in other contexts. The court below thus recognized its previous holding that "'administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.'" *Tri-State Motor Transit Co.*, 739 F.2d at 1375 n.2 (quoting *Texas v. United States*, 730 F.2d at 415). But the court here nevertheless did not focus on the disposal of the 60-day time limit in that case when it impeded meaningful review, but instead concentrated on the fact that, in that specific setting, the appealing party had participated in proceedings before an agency. The court thus failed to separate the wheat from the chaff: the meaning of the *Functional Music* line of cases (of which *Tri-State Motor Transit* is one) is that the Hobbs Act must give way to the necessities of effective review. It is not that the 60-day time limit may be ignored but the requirement for prior agency petition is inviolable.

To be sure, the Eighth Circuit explained that various additional policy considerations underlie its decision. But none of those considerations are actually relevant here. The court, for example, expressed concern that review of a regulation in private litigation would be improper because it would take place "without participation by the agency and upon a record not developed by the agency." Pet. at 11a. Setting aside the fact that the FCC has participated extensively in *this* case, this concern ignores the fact that the present challenge is to the statutory authority for the regulation. While the agency's views on this might be helpful, this is a question of the law of statutory interpretation, and is not an area where the technical expertise of the agency should dominate. Nor should a further-developed record concerning the basis for a regulation affect whether Congress authorized the rule in the first place.

The Eighth Circuit also relied heavily on a Seventh Circuit decision, *CE Design, Ltd. v. Prism Business Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010), in articulating its policy concerns. That case held that a private plaintiff seeking to challenge a regulation in its suit for money damages must do so by first petitioning the relevant agency, and noted that the reason for this included a preference for national uniformity and efficiency. Pet. at 10a–11a (citing *CE Design, Ltd.*, 606 F.3d at 450). But those concerns applied in that case only because it involved a private *plaintiff* who, as part of its suit, sought to invalidate a regulation. By contrast, the Seventh Circuit law that the Eighth Circuit should have focused on is *Commonwealth Edison Co.*, 830 F.2d at 614. There, the Seventh Circuit held that a challenge

to a regulation at the time of enforcement is permissible, notwithstanding the concern for uniformity and efficiency.

The distinction between a plaintiff's challenge to a regulation and a defendant's challenge is obvious. A plaintiff may always delay his suit and challenge the rule before the agency (and appeal to the courts if necessary), whereas a defendant—or the subject of an enforcement action—has no such luxury. Nevertheless, the Eighth Circuit below denies this distinction, stating that a defendant in a private lawsuit must pursue remedies with the promulgating agency before defensively challenging a regulation—even when the practical effect is that the regulation in question will be applied before any challenge matures.

The Eighth Circuit thus applied the precedent backwards. It read cases that ignored the literal 60-day limitation in the Hobbs Act and used them to conclude that here, where the literal language of the Hobbs Act does not apply, review should nevertheless be precluded. This is the opposite of what the case law teaches. Courts should construe jurisdiction-stripping statutes as narrowly as their language permits, and when a significant inequity or constitutional concern is implicated, construe them even contrary to their literal meaning. The Eighth Circuit thus not only reached the wrong outcome but, as discussed directly below, established a rule that will impose inequitable outcomes in a broad and growing array of cases. This Court should grant certiorari to bring the Eighth Circuit into line with the prevailing law.

IV. THE PRACTICAL EFFECTS OF THE EIGHTH CIRCUIT'S RULE BARRING *ULTRA VIRES* CHALLENGES MERIT A GRANT OF CERTIORARI.

The practical effects of the Eighth Circuit's decision warrant prompt review by this Court.

The substantive statute at issue here, the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, creates a strict liability private right of action for violations of its attendant rules. *See id.* § 227(a)(3); *Penzer v. Transp. Ins. Co.*, 545 F.3d 1303, 1311 (11th Cir. 2008) (noting that the TCPA has no intent requirement except in determining treble damages, and citing cases). Although the TCPA and its regulations nominally apply only to fax transmissions and telephone calls, they have been extended to cover text messaging as well. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Report and Order, 27 FCC Rcd. 1830, 1832 n.12 (2012); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009). Substantively, the rules closely regulate the use of autodialing, the provision of opt-out procedures, the collection of consent, and a number of other aspects of marketing by telephone, fax, and text message. *See generally*, 47 C.F.R. § 64.1200. A revision to the rules that took effect October 16, 2013 also added stringent requirements for the form in which a consumer must provide written consent to receive marketing telephone calls and text messages. *Id.* § 64.1200(f)(8).

The specificity of these regulations, coupled with the strict liability private cause of action, has spurred a wave of TCPA class-action lawsuits. *See,*

e.g., Rose v. Bank of Am., Case No. 11-cv-2390, Dkt. No. 59 (N.D. Cal. Sept. 27, 2013) (motion to settle six related TCPA class-action cases against Bank of America for approximately $32 million); *Miller v. DirecTV, LLC*, Case No. 13-cv-2073, Dkt. No. 1 (S.D. Cal. Sept. 5, 2013) (TCPA class action against DirecTV for alleged telemarketing violations); *Spillman v. RPM Pizza, LLC*, Case No. 10-cv-349, Dkt. No. 243 (M.D. La. May 24, 2013) (approving $9.75 million TCPA class-action settlement in case against Domino's Pizza); *Agne v. Papa John's Int'l, Inc.*, Case No. 10-cv-1139, Dkt. No. 389 (W.D. Wash. Oct. 22, 2013) (approving approximately $3 million TCPA class-action settlement against Papa John's Pizza); *see also* Monica Desai et al., *A TCPA for the 21st Century: Why TCPA Lawsuits are on the Rise and What the FCC Should Do About It*, Int. J. of Mobile Marketing, Vol. 8 No. 1 (Summer 2013) (*available at* http://www.pattonboggs.com/ViewpointFiles/27f7b3c8-3e66-442c-8b26-ac5c852bc11c/Monica%20article%20Summer%202013%20IJMM.pdf) (discussing how the application of outdated statutory language in the TCPA to modern technology has encouraged lawsuits).

Indeed, a compilation of court filing data found that 1,332 TCPA lawsuits were filed in the first nine months of 2013 alone, reflecting a 70% increase in TCPA filings from the same period last year. Patrick Lunsford, *TCPA Lawsuits Really Are Growing Compared to FDCPA Claims*, insideARM.com (Oct. 22, 2013), http://www.insidearm.com/daily/debt-buying-topics/debt-buying/tcpa-lawsuits-really-are-growing-compared-to-fdcpa-claims/.

The proliferation of private TCPA lawsuits is, of course, not itself the problem. The problem is that, in the Eighth Circuit (where an increasing number of TCPA suits will presumably be brought) defendants will have no opportunity to effectively challenge the validity of the TCPA regulations—including the very suspect regulation on solicited faxes at issue in this case. This is therefore not an instance where the possibility of additional decisions from the circuit courts supports delay in consideration by this Court. With more than a hundred new TCPA lawsuits filed every month, the Eighth Circuit's decision means that huge numbers of litigants will be unfairly deprived of the ability to effectively challenge these rules. A wait-and-see approach will only exacerbate that harm.

V. CONCLUSION

The rule adopted by the Eighth Circuit below is inconsistent with the plain language of the Hobbs Act and the Communications Act, and with fundamental constitutional and equitable considerations. Because of the nature of the substantive statute at issue, delay in addressing the Eighth Circuit's error will subject hundreds—possibly thousands—of litigants to an unfair and unconstitutional limitation on their right to regulatory review. The Court should therefore grant certiorari here, and reverse the Eighth Circuit.

Respectfully submitted,

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