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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the district court have jurisdiction to invalidate 47 C.F.R. § 64.1200(a)(4)(iv), a codified regulation promulgated by the Federal Communications Commission, where 28 U.S.C. § 2342 states, "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?"

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Plaintiff-Respondent, Michael R. Nack, responds to Defendant-Petitioner, Douglas P. Walburg's petition for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals.

OPINIONS BELOW

The Eighth Circuit's opinion below is reported at *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013). The opinion of the district court below is unpublished but can be found at *Nack v. Walburg*, No. 4:10CV00478, 2011 WL 310249 (E.D. Mo. Jan. 28, 2011).

STATUTES AND REGULATIONS INVOLVED

I. 47 C.F.R. § 64.1200(a)(4)(iv).

> A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.

II. The Hobbs Act, 28 U.S.C. § 2342.

> Jurisdiction of court of appeals.
>
> The court of appeals (other than the United

States Court of Appeals for the Federal Circuit) 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;

***

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

III. 47 U.S.C. § 402.

Judicial review of Commission's orders and decisions.

(a) Procedure

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) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

STATEMENT OF THE CASE

Respondent-Plaintiff Michael R. Nack submits the following response to Petitioner-Defendant Douglas P. Walburg's Statement of the Case to correct its mischaracterizations of the Statutory and Regulatory Background. Nack does not otherwise dispute the basic accuracy of Walburg's recitation of the relevant facts and procedural history of the case.

Walburg asserts, "In regulating fax communications, Congress has consistently declined to impose restrictions on advertisements sent with the recipient's express consent." Pet, p. 2. Walburg's assertion is contrary to the legislative history of the Junk Fax Prevention Act of 2005 ("JFPA"), Pub. L. No. 109-21, 119 Stat. 359.

The Telephone Consumer Protection Act ("TCPA") was enacted in 1991 to prohibit, *inter alia*, sending "unsolicited" fax advertisements. 47 U.S.C. § 227. Shortly thereafter, the Federal Communications Commission determined that a fax sent pursuant to an "established business relationship" ("EBR") would not be considered "unsolicited" under the Act. *In the Matter of the Rules and Regulations Implementing the Tel. Consumer Protection Act of 1991*, 7 FCC Rcd 8752, at 8779, ¶ 54, n.87 (Oct. 16, 1992). In 2003, the FCC proposed to reverse its interpretation of the term "unsolicited" with a regulation that would render illegal advertising faxes sent pursuant to an EBR and require written permission. *In the Matter of the Rules and Regulations Implementing the Tel. Consumer Protection Act of 1991* 18 FCC Rcd 14014, 14127-28, ¶ 189 (July 3, 2003).

The JFPA was, in part, a response to the FCC's proposal to deem EBR faxes "unsolicited." S. Rep. No. 109-76, pp. 1-7 (2005). The JFPA codified the view that a fax sent with the implicit permission of an EBR could be legal. *Id.* The Senate Report states:

> This legislation is designed to permit legitimate businesses to do business with their established customers and other persons with whom they have an established relationship without the burden of collecting prior written permission to send these recipients commercial faxes. Nonetheless, in reinstating the EBR exception, the Committee determined it was necessary to provide recipients with the ability to stop future unwanted faxes sent pursuant to such relationships.

Ibid. at 6-7. The Senate Report shows that Congress still was concerned with the consumer's ability to stop "future unwanted faxes," even if they were sent legally in compliance with the TCPA. In denying a petition to reverse the opt-out notice requirement for all fax advertisements, the FCC explained this point in detail as follows:

> [W]e also take this opportunity to note that we find unpersuasive Petitioner's argument that the TCPA could not have given the Commission authority to adopt the rule [47 C.F.R § 64.1200(a)(4)(iv)]. Section 227 defines an unsolicited advertisement as certain advertising material "transmitted to any person with that person's prior express invitation or permission" when there is no EBR [established business relationship], but the statute does not define "prior express invitation or permission." The *Junk Fax Order* [21 F.C.C.R. 3787 (officially adopting 47 C.F.R

> § 64.1200(a)(4)(iv) after public notice and an opportunity for comment)] thus properly addresses how such prior express invitation or permission can be obtained from, and revoked by, a consumer in that context. Among other things, the Commission held that "express permission need only be secured once from the consumer in order to send facsimile advertisements to that recipient *until the consumer revokes such permission by sending an opt-out request to the sender*. Further, the Commission required that "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." The content of the required notice is designed both to ensure that the consumer has the necessary contact information to opt out of future fax transmissions (*i.e.*, revoke prior permission to send such fax advertisements) and to ensure that the fax sender can account for all such requests and process them in a timely manner by ensuring consumers use the contact information specified by the sender on the opt-out notice. The *Junk Fax Order* thus specifically tied the opt-out notice requirement to the purpose of section 227.

In the Matter of Junk Fax Prevention Act of 2005, 27 FCC Rcd 4912, ¶ 7 (F.C.C. May 2, 2012).

Here, Walburg's assertion that Congress has consistently declined to impose restrictions on advertisements sent with permission is simply not true. *Ibid.* Congress's aim has always been to prevent all unwanted fax advertisements. *Ibid.* This aim cannot be achieved if a consumer, upon receipt of a fax advertisement sent with permission or pursuant to an EBR, has no way to opt-out of future fax advertisements. *Ibid.* That is the purpose of the opt-out notice requirement and that is why, when the FCC prescribed regulations pursuant to the JFPA, it expressly required the opt-out notice on all fax advertisements, even if they are sent with express permission.

REASONS FOR DENYING THE PETITION

I. There Is No Circuit Split.

Walburg incorrectly argues that the decision he seeks to appeal from the Eighth Circuit and an earlier decision by the Seventh Circuit, *CE Design, Ltd. v. Prism Business Media, Inc.*, 606 F.3d 443 (7th Cir. 2011), are in conflict with the decision by the Sixth Circuit in *Leyse v. Clear Channel Broadcasting, Inc.*, 697 F.3d 360 (6th Cir. 2012). Petition, pp. 8-11. Walburg's argument fails because the Sixth Circuit has amended and superseded its *Leyse* opinion so that it is not in conflict with the decision below or *CE Design*. *Leyse v. Clear Channel Broadcasting, Inc.*, __ Fed. Appx. __, 2013 WL 5926700 (6th Cir. Nov. 5, 2013). In fact, the amended

Leyse opinion expressly follows *CE Design* and removes all of the passages and reasoning that Walburg quoted and relied upon in his petition. *Compare* Pet., pp. 8-9 with 2013 WL 5926700 at *10.

Walburg seizes upon the phrase "made reviewable by section 402(a)" in the Hobbs Act to argue the Act does not bar a collateral attack upon the validity of an FCC regulation in a suit, so long as the "central object" of the suit is money damages between private parties and is not to "'enjoin, set-aside, annul, or suspend' an order of the FCC." Pet, p. 9 (quoting *Leyse*, 697 F.3d at 373, *amended and superseded by* 2013 WL 5926700.) Walburg's argument is based on the part of the original *Leyse* opinion that was later amended and superseded. *Compare* 697 F.3d at 372-376-377 *with* 2013 WL 5926700 at *7, *10-*11.

The final opinion in *Leyse* holds, "[T]he Hobbs Act's jurisdictional limitations are equally applicable whether [a party] wants to challenge the rule directly … or indirectly, by suing someone who can be expected to set up the rule as a defense in the suit." 2013 WL 5926700 at *15 (quoting *CE Design*, 606 F.3d at 448).

This is perfectly in accord with the Eighth Circuit's decision below, which states:

> Here, there was no administrative proceeding because the plaintiff filed a private action. In response, the defendant pursued summary judgment and has not yet elected to

seek a stay of litigation to pursue administrative remedies through the FCC. However, "[w]here the practical effect of a successful attack on the enforcement of an order involves a determination of its validity," such as a defense that a private enforcement action is based upon an invalid agency order, "the statutory procedure for review provided by Congress remains applicable." *Sw. Bell Tel. v. Ark. Pub. Serv. Comm'n,* 738 F.2d 901, 906 (8th Cir. 1984), *vacated and remanded on other grounds,* 476 U.S. 1167 (1986). To hold otherwise merely because the issue has arisen in private litigation would permit an end-run around the administrative review mandated by the Hobbs Act. Such an end run could result in a judicial determination of a regulation's invalidity without participation by the agency and upon a record not developed by the agency.

The Seventh Circuit has confronted this issue and agrees that it "makes no difference" if the question of validity arises in a suit between two private parties because "the Hobbs Act's jurisdictional limitations are 'equally applicable whether [a litigant] wants to challenge the rule directly ... or indirectly.'" *CE Design,* 606 F.3d at 448 (quoting *City of Peoria v. Gen. Elec. Cablevision Corp. (GECCO),* 690 F.2d 116, 120 (7th Cir. 1982)). Finally, although not in the context of a private action, we have held clearly that "[a]

> defensive attack on the FCC regulations is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction." *United States v. Any & All Radio Station Transmission Equip.,* 207 F.3d 458, 463 (8th Cir. 2000). We hold, therefore, that the Hobbs Act generally precludes our court from holding the contested regulation invalid outside the statutory procedure mandated by Congress.

Pet. App. 11a-12a (*Nack*, 715 F.3d at 686).

In short, there is no circuit split. Every circuit that has addressed the issues raised in Walburg's petition has agreed that a defendant cannot challenge the validity of an FCC regulation like 47 C.F.R. § 64.1200(4)(iv), in defense of a private action for money damages. Walburg's argument is contrary to all circuit court authority. Walburg's petition should be denied because there is no split in authority and the unanimous decisions of the Circuit Courts of Appeal are correct.

II. The Question Presented Is Not of Practical or Constitutional Importance.

A. Walburg faces liability only because he violated a clear regulation.

Walburg complains that he faces "staggering liability," but Walburg faces that liability only because he violated a perfectly clear FCC regulation enacted in 2006. 47 C.F.R. § 64.1200(a)(4)(iv); *In re*

Rules and Regulations Implementing the Tel. Consumer Protection Act of 1991, 21 FCC Rcd 3787, 3812 (2006). The regulation states:

> A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section. [47 C.F.R. § 64.1200(a)(4)(iv).]

Walburg admits he did not provide the opt-out notice required by the 2006 regulation when he sent his fax advertisement to Nack in 2007. Pet., p. 5; Pet. App., p. 2a. Walburg has defended this case based solely on Nack's consent to receive the fax advertisement, but the 2006 regulation plainly makes consent irrelevant to Walburg's obligation to include the required opt-out notice. 47 C.F.R. § 64.1200(a)(4)(iv).

Reduced to its essence, Walburg's argument is that parties subject to FCC regulations should be entitled to ignore them, and when caught violating them be free to challenge their validity in any proceeding brought against them by any injured person. Pet., p. 11. Walburg's position illustrates exactly why the Hobbs Act would become meaningless if his position were adopted as the law. It would enable private parties to challenge FCC regulations without FCC participation. Pet. App., p. 11a ("Such an end run could result in a judicial determination of a regulation's invalidity without any participation by the agency and upon a record not developed by the agency.")

Walburg complains about the practical difficulties faced in challenging an FCC regulation after it has been promulgated. Pet., pp. 11-13. While there may be practical hurdles, Walburg ignores the ease with which he could have complied with the regulation in the first place. *Ibid.* Similarly, Walburg complains that even if he can challenge the validity of the regulation by filing an action before the FCC, he cannot get retroactive relief. Pet, p. 13. Once again, he would not need retroactive relief if he had initiated an administrative challenge instead of simply violating the existing regulation.

As the FCC explained in its two briefs below, parties should not be free to violate FCC regulations. Resp. App., pp. A1 and A29. They should obey them and file a challenge under the Hobbs Act, rather than violating them first and challenging them by collateral attack when sued in some trial court later. *Ibid.* at A43 ("Had they contested the validity of section 64.1200(a)([4])(iv) under the Hobbs Act, and prevailed in that challenge *before* engaging in conduct that may have violated the rule, they would not be subject to liability in a private civil action.")

B. Walburg is pursuing his administrative remedies under the Hobbs Act, and this case has been stayed pending the outcome.

Walburg admits that he and many others have filed administrative proceedings with the FCC challenging the validity of 47 C.F.R. § 64.1200(a)(4)(iv). Pet, pp. 15-16. Walburg also admits that this case has been stayed pending resolution of those proceedings. *Ibid.*, p. 12. Nevertheless, Walburg asserts that any administrative remedy is so difficult as to be "illusory" rendering the regulation "insulated from judicial review." Pet., p. 16. Walburg's assertion is refuted by his own admissions. His administrative proceedings have not yet concluded, and when they do, he can appeal them to the appropriate circuit court of appeals as allowed by the Hobbs Act. 28 U.S.C. § 2342.

C. The jurisdictional limits of the Hobbs Act do not violate due process.

For the first time in these proceedings, Walburg argues in his petition for certiorari that the jurisdictional limits of the Hobbs Act somehow deprive him of due process. Pet., pp. 16-19. Walburg cites the superseded opinion in *Leyse*, but the portions of the opinion upon which Walburg relies were deleted and replaced with a contrary view. *Compare* Pet., p. 17 (citing 697 F.3d at 376) *with Leyse,* 2013 WL 5926700 at *13-*15.

Congress is vested with virtually unfettered discretion to define the jurisdiction of federal courts, and that is all the Hobbs Act does. U.S. Const. Art. III § 1; *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) ("The Congressional power to ordain and establish inferior courts includes the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.") This includes the power to limit jurisdiction to a particular court and then only after a party has exhausted administrative remedies. *Id.* The Eighth Circuit's decision below is perfectly in line with this principle as the Hobbs Act is a congressionally imposed limitation on the jurisdiction of federal district courts as contemplated under section 1 of Article III.

Walburg argues, "Congress has expressly established the *Judiciary*, and not the [executive agencies] as the adjudicator of private rights of action arising under the statute." Pet., p. 18 (quoting *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-650 (1990) (emphasis added)). But *Adams Fruit* did not consider the Hobbs Act or its jurisdictional limitations, and the Eight Circuit did not hold that private rights of action arising under the TCPA could not be adjudicated in federal district courts.

The question presented in Walburg's petition is not whether federal district courts can hear TCPA claims. Everyone knows they can. *Mims v. Arrow Fin. Servs., LLC*, __ U.S. __, 132 S. Ct. 740 (2012).

The question is whether when hearing such a claim the district courts have jurisdiction to declare a substantive FCC regulation invalid. As the Court explained in *City of Arlington v. FCC*:

> *Adams Fruit* stands for the modest proposition that the Judiciary, not any executive agency, determines 'the scope'—including the available remedies—'of judicial power vested by' statutes establishing private rights of action. *Id.,* at 650, 110 S. Ct. 1384. *Adams Fruit* explicitly affirmed the Department's authority to promulgate the substantive standards enforced through that private right of action.

__ U.S. __, 133 S. Ct. 1863, 1871, n.3 (2013). *City of Arlington* shows that federal agencies are not free to define the scope of their own jurisdiction over private rights of action, but they are free to define the "substantive standards" governing a statute when that power is delegated to them by Congress. The Eight Circuit's decision below did not improperly vest the FCC with discretion to define its own jurisdiction over private rights of action arising under the TCPA. It simply construed the Hobbs Act, an act of Congress, not an FCC regulation, to bar district courts from invalidating the "substantive standards" established by FCC regulations prescribed under the TCPA as they must be applied in a private right of action in court as allowed by the Act. This does not deprive Walburg of due process and is well within Congress's power under Article III to do. *City of Arlington*, 133 S. Ct. at 1871, n.3.

III. This Case Is Not an Ideal Vehicle to Resolve Any Split of Authority.

As explained above there is no split in authority because the Sixth Circuit amended and superseded its initial decision in *Leyse* with one that followed the Seventh Circuit's decision in *CE Design*. In addition, the very issue that Walburg wants to raise in this action on remand is currently before the FCC as it must be under the Hobbs Act. Pet., pp. 11-12. This issue should be left to the administrative process in the first instance where it can be appealed with the FCC as a party as contemplated by the Hobbs Act. 28 U.S.C. § 2342(1).

CONCLUSION

The Court should deny Walburg's petition in this case because the appellate court's decision was correct and consistent with every other circuit court of appeals decision to have addressed the same issue.

Respectfully submitted,

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AMICUS BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION URGING REVERSAL

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NO. 11-1460

MICHAEL R. NACK, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

PLAINTIFF-APPELLEE,

V.

DOUGLAS PAUL WALBURG,

DEFENDANT-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION CASE NO. 4:10-CV-00478-AGF THE HONORABLE AUDREY G. FLEISSIG, UNITED STATES DISTRICT COURT JUDGE

AMICUS BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION URGING REVERSAL

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IN THE UNITED STATES COURT OF APPEALS
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MICHAEL R. NACK, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

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AMICUS BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION URGING REVERSAL

STATEMENT OF INTEREST

This case involves the interpretation of Section 64.1200(a)(3)(iv) of the FCC's rules, which implement the Junk Fax Prevention Act of 2005 ("JFPA"), Pub. L. No. 109-21, 119 Stat 359 (2005), by requiring that an "opt2 out" notice be provided on certain advertisements transmitted by facsimile machines. 47 C.F.R. § 64.1200(a)(3)(iv). The FCC has an interest in ensuring that the JFPA and Section 64.1200(a)(3)(iv) are interpreted correctly.

STATEMENT OF ISSUE PRESENTED

This Court invited the FCC to file an *amicus* brief that addresses the "the meaning and scope of 47 CFR Section 64.1200(a)(3)(iv) and it application to the facsimile issue in this case." Order of the Ct. (Jan. 11, 2011). Pertinent authorities are:

47 C.F.R. 64.1200(a)(3)(iv).

Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254 (2011).

United States v. Any and All Radio Station Transmission Equip., 207 F.3d 458 (8th Cir. 2000).

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

Congress first addressed the growing problem of abusive telemarketing practices, including the transmission of unwanted advertisements via facsimile machines, in the Telephone Consumer Protection Act of 1991 ("TCPA"), Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227). As the legislative history explained, because facsimile machines "are designed to accept, process, and print all messages which arrive over their dedicated lines," facsimile advertising imposes burdens on unwilling recipients that are distinct from the burdens imposed by other types of advertising. H.R. Rep. No. 317, 102d Cong., 1st Sess. 11 (1991). *See Missouri ex. rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004) ("*Am. Blast Fax*"). Among other things, recipients of facsimile advertising must pay the expenses associated with receipt, including "the cost of the paper used, the cost associated with the use of the facsimile machine, and the costs associated with the time spent by the facsimile machine when receiving a facsimile advertisement during which the machine cannot be used by its owner to send or receive facsimile transmissions." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12405 (¶ 29) (1995); *see also Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72, 76 (3d Cir. 2011); *Am. Blast Fax*, 323 F.3d at 654-55.

The TCPA accordingly prohibits 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 defined in the TCPA as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(5).

The TCPA provides for a private right of action in state courts for violations of the statute or the FCC's implementing regulations. 47 U.S.C. § 227(b)(3).[1] If a violation is established, Section 227(b)(3) entitles private litigants to recover the greater of actual monetary losses or statutory damages of up to $500 (subject to trebling for a willful or knowing offense) for each violation of the statute. *Id.*

In 2005, Congress amended the facsimile advertising provisions of the TCPA in the JFPA. Among other provisions, the JFPA excludes from the general ban on unsolicited advertisements those facsimiles that are transmitted to persons with whom the sender has an "established business relationship" ("EBR"). 47 U.S.C. § 227(b)(1)(C)(i).[2] To

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[1]Consumers alleging a violation of the TCPA also can file a complaint with the FCC requesting enforcement action. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, 8780 (¶ 55 & n.89) (1992), *recon. granted in part*, 10 FCC Rcd 12391, *further recon. granted in part*, 12 FCC Rcd 4609 (1997). In addition, state attorneys general may bring civil enforcement actions under the TCPA to enjoin prohibited practices and recover damages on behalf of their citizens. 47 U.S.C. § 227(g). *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 746 (2012).

[2]An "established business relationship" is defined as:

> [A] prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

come within the statutory exclusion, the sender must include, among other things, specified information on the advertisement that enables the recipient to "opt-out" of any future facsimile advertisements from that sender. 47 U.S.C. § 227(b)(1)(C)(iii).

In April 2006, pursuant to Congress' direction, the FCC amended its TCPA regulations to implement the JFPA. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) ("*2006 Rulemaking Order*"), *petition for review dismissed*, *Biggerstaff v. FCC*, 511 F.3d 178 (D.C. Cir. 2007), *recon. granted in part*, 23 FCC Rcd 15059 (2008). The amended regulations provide that:

> No person or entity may: . . . (3) [u]se a telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine, unless . . . (iii) [t]he advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements.

47 C.F.R. § 64.1200(a)(3)(iii). *See also id.* § 64.1200(a)(3)(iii)(A)-(E) (specifying content of opt-out notice)

In the provision at issue in this case, the amended regulations further provide that "[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender" likewise must include an

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47 C.F.R. § 64.1200(f)(5).

opt-out notice. 47 C.F.R. § 64.1200(a)(3)(iv). The opt-out notice required by Section 64.1200(a)(3)(iv) for facsimile advertisements sent with prior express invitation or permission must contain the same information as the notice required for unsolicited facsimile advertisements sent to recipients on the basis of an EBR. *See* 47 C.F.R. § 64.1200(a)(3)(iv).

In the text of the order adopting Section 64.1200(a)(3)(iv), the FCC explained that it was requiring opt-out notices on "facsimile advertisements to consumers from whom they obtained permission" so as to provide a mechanism "to allow consumers to stop unwanted faxes in the future." *2006 Rulemaking Order*, 21 FCC Rcd at 3812 (¶ 48). Similarly, in declining to exempt nonprofit professional or trade associations from the requirement to include an opt-out notice in any unsolicited facsimiles sent to their members, the Commission emphasized that its rules provide consumers with "the necessary tools to easily opt-out of unwanted faxes." 21 FCC Rcd at 3809-10 (¶ 42) ("we believe the benefits to consumers of having opt-out information readily available outweigh any burden in including such notices"). A footnote to this determination, however, stated (without further explanation) that "the opt-out notice requirement only applies to communications that constitute unsolicited advertisements." *Id.* at 3810 n.154.[3]

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[3] A summary of the *2006 Rulemaking Order* was printed in the Federal Register. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 71 Fed. Reg. 25967 (2006); that summary of the *2006 Rulemaking Order* is cited in the parties' briefs in this case. The substance of footnote 154 of the *2006*

After the enactment of Section 64.1200(a)(3), the FCC published a consumer guide to its facsimile advertising rules on its website: http://www.fcc.gov/guides/fax-advertising. In that description, the FCC specified that "[s]enders of permissible fax advertisements (those sent under an EBR or with the recipient's prior express permission) must provide notice and contact information on the fax that allows recipients to 'opt-out' of future faxes." *Id.*

B. This Proceeding

1. Nack's Lawsuit. Michael Nack filed a class action in a Missouri state court for damages alleging, *inter alia*, that Douglas Walburg, d/b/a Mariposa Publishing, violated the JFPA and the FCC's implementing regulations by sending Nack and more than 40 other recipients facsimiles that advertised a legal reference manual and that did not contain an opt-out notice. *See* J.A. 34-36, 46-48. On Walburg's motion, the case subsequently was removed to federal district court. *See* J.A. 173.

On August 9, 2010, Walburg filed a motion for summary judgment. Walburg did not dispute that he had transmitted a facsimile advertisement to Nack that did not contain an opt-out notice. *See* J.A. 69. Instead, Walburg asserted that he was entitled to judgment as a matter of law because the facsimile advertisement had been transmitted with Nack's prior express permission. J.A. 52-53. For purposes of the summary judgment motion, Nack stipulated that Walburg had received prior express approval to

Rulemaking Order is reprinted in the Federal Register summary as a parenthetical. 71 Fed. Reg. at 25971.

transmit the facsimile advertisement from Nack's answering service. J.A. 138-139.

In the memorandum accompanying his summary judgment motion, Walburg acknowledged that the FCC's rules state that "both 'unsolicited' faxes as well as faxes sent with 'express invitation and permission' shall contain an opt-out notice." J.A. 63 (citing 47 C.F.R. § 64.1200(a)(3)(iv)). Walburg argued, however, that the rule was (1) "inconsistent" with the *2006 Rulemaking Order*, and (2) contrary to 47 U.S.C. § 227(b)(1), which applies only to "unsolicited" facsimile advertisements. J.A. 63-65.

In his response to Walburg's summary judgment motion, Nack contended that Section 64.1200(a)(3) requires an opt-out notice on all facsimile advertisements, including those sent with the recipient's prior express permission, and that there was no dispute that Walburg's facsimile advertisements lacked such notice. J.A. 146. Nack pointed out that paragraph 48 of the *2006 Rulemaking Order* (as well as the FCC's consumer guide) expressly state that facsimile advertisements sent with the recipient's consent must contain an opt-out notice to enable consumers to stop unwanted facsimile advertisements in the future. J.A. 147.

2. The District Court's Opinion. The district court granted summary judgment for Walburg. J.A. 172-82. The district court agreed that Nack could bring a private action under the TCPA if Section 64.1200(a)(3)(iv) required an opt-out notice for facsimile advertisements sent with the recipient's permission. J.A. 179. The district court concluded,

however, that "the regulation, while wholly valid, does not apply to the facts of this case." J.A. 183.

In the district court's view, Section 64.1200(a)(3)(iv) applies only to "unsolicited" facsimile advertisements. J.A. 180. The district court reasoned that Section 64.1200(a)(3)(iv) is numbered as a subsection of Section 64.1200(a)(3), a rule prohibiting the transmission of "unsolicited" facsimile advertisements. *Id.* (quoting 47 C.F.R. § 64.1200(a)(3). The district court also relied upon the Federal Register summary of the statement in footnote 154 of the *2006 Rulemaking Order* that the notice requirement "only applies to communications that constitute unsolicited advertisements." *Id.* The court recognized that the text of the FCC's order makes clear that "the opt-out notice requirement is not expressly limited to unsolicited faxes," but it nonetheless concluded that the regulation does not "appl[y] to a fax advertisement that is sent, as here, pursuant to the recipient's express and specific permission." J.A. 181.[4]

3. Appellate Proceeding. Nack appealed the district court's judgment to this Court. Following briefing and oral argument, the Court invited the FCC to file a brief *amicus curiae* "regarding the

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[4] While observing that it was "not called upon to determine when and how the regulation requiring opt-out language would apply," the district court appeared to read Section 64.1200(a)(3)(iv) as applying only in situations where "at some previous point in time, perhaps pursuant to an EBR, permission was given." J.A. 181. In the court's view, "[a]ny such sender who thereafter sent an 'unsolicited' fax, in reliance on the earlier permission, would need to include an opt-out notice . . . for the later fax." *Id.*

meaning and scope of 47 CFR Section 64.1200(a)(3)(iv) and its application to the facsimile issue in this case." Order of the Ct. (Jan. 11, 2012). The FCC submits this brief in response to the Court's invitation.

SUMMARY OF ARGUMENT

1. The plain language of 47 C.F.R. § 64.1200(a)(3)(iv) requires facsimile advertisements sent with the recipient's consent to contain an opt-out notice. Moreover, reading the FCC's regulation in accordance with its terms both advances the consumer protection policies underlying the TCPA and the JFPA, and comports with the FCC's published description of its facsimile advertisement regulations. By contrast, construing the regulation to apply only to unsolicited faxes – as the court below held – would render it entirely duplicative of the separate opt-out notice requirement applicable to such faxes contained in 47 C.F.R. § 64.1200(a)(3)(i)-(iii). Because the district court's reading of the FCC's regulation is inconsistent with its text, and undermines the goals of Congress and the FCC in regulating abusive telemarketing practices, the decision below should be reversed.

2. The Administrative Orders Review Act (commonly known as the Hobbs Act) provides the exclusive jurisdictional basis for a challenge to the validity of final action taken in an FCC rulemaking order. Because this case does not involve direct judicial review of FCC action pursuant to the Hobbs Act, the Court lacks jurisdiction over Walburg's collateral challenge to Section 64.1200(a)(3)(iv) –

which Walburg contends was promulgated without statutory authority – in this case.

ARGUMENT

I. STANDARD OF REVIEW

The courts owe substantial deference to an agency's construction of its own regulations. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2260-61 (2011); *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 879 (8th Cir. 2011). Indeed, the FCC's construction of its own regulation is controlling unless that construction is "'plainly erroneous or inconsistent with the regulation[]' or there is any other 'reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'" *Talk Am.,* 131 S. Ct at 2261 (quoting *Chase Bank, N.A., v. McCoy*, 131 S. Ct. 871, 881 (2011)); *see also Beeler v. Astrue*, 651 F.3d 954, 961 (8th Cir. 2011). As the Supreme Court repeatedly has stated, such deference applies to the FCC's interpretation of a rule that is set forth in an *amicus curiae* brief. *Talk Am.*, 131 S.Ct. at 2261 (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)). *Accord Chase Bank*, 131 S.Ct. at 881; *Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan*, 555 U.S. 285, 296 n.7 (2009). *See also Ramirez-Peyro v. Holder*, 574 F.3d 893, 900 (8th Cir. 2009). Moreover, courts defer to an agency's reasonable construction of its own rule even if an alternative construction also is reasonable. *See*, *e.g.*, *Ramirez- Peyro*, 574 F.3d at 900.

II. SECTION 64.1200(A)(3)(IV) REQUIRES A FACSIMILE ADVERTISEMENT SENT WITH THE

RECIPIENT'S PRIOR EXPRESS PERMISSION TO INCLUDE AN OPTOUT NOTICE.

1. The starting point in the interpretation of a statute or agency rule[5] is its language. "Absent a clearly expressed . . . intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). *See United States v. Big Crow*, 327 F.3d 685, 688 (8th Cir. 2003).

Section 64.1200(a)(3)(iv), in its entirety, states:

> A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(3)(iii) of this section.

47 C.F.R. § 64.1200(a)(3)(iv). There is no reason to think that Section 64.1200(a)(3)(iv) does not mean exactly what it says: a "facsimile advertisement" sent with the recipient's "prior express invitation or permission" must "include an opt-out notice." *Id.*

2. This construction of Section 64.1200(a)(3)(iv) not only accords with its plain language, it also advances the legislative purposes underlying the TCPA and JFPA. As this Court has

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[5] It is well-established that the "tenets of statutory construction apply with equal force to the interpretation of regulations." *Boeing Co. v. United States*, 258 F.3d 958, 967 (9th Cir. 2001) (citing *Black & Decker Corp. v. Comm'r*, 986 F.2d 60, 65 (4th Cir. 1993)).

pointed out, Congress enacted that legislation in order to protect consumers from the costs and burdens associated with receiving unwanted facsimile advertisements. *E.g.*, *Am. Blast Fax*, 323 F.3d at 654-55. *See Landsman & Funk*, 640 F.3d at 76. In adopting the opt-out notice requirement in Section 64.1200(a)(3)(iv), the FCC recognized that consumers that have provided prior express consent to the receipt of a facsimile advertisement might subsequently choose to withdraw that consent. The FCC's construction of Section 64.1200(a)(3)(iv) provides protection against unwanted facsimile advertisements by ensuring that consumers who receive facsimile advertisements transmitted with their consent (1) are informed of their right to withdraw that consent, and (2) are provided with a cost-free mechanism by which to opt out of future facsimile advertisements if they decide to exercise that right. 47 C.F.R. § 64.1200(a)(3)(iv). As the Commission explained in the *2006 Rulemaking Order*, requiring an opt-out notice on faxes even when permission is granted serves to "allow consumers to stop unwanted faxes in the future." 21 FCC Rcd at 3812 (¶ 48).

Consistent with the language of the rule — and the explanation in the order adopting it — the consumer guide to fax advertising on the FCC's website similarly has stated at least since March 2007 that "[s]enders of permissible fax advertisements (those sent under an EBR or with the recipient's prior express permission) must provide [an opt-out notice]." *See* http://www.fcc.gov/guides/fax-advertising.

Contrary to the district court's understanding in this case (*see* J.A. 180), the fact that Section 64.1200(a)(3)(iv) appears in the FCC's rules as a subsection of Section 64.1200(a)(3), which otherwise concerns "unsolicited" facsimile advertisements, does not demonstrate that Section 64.1200(a)(3)(iv)'s opt-out notice is also limited to unsolicited facsimile advertisements. In contrast with Section 64.1200(a)(3) and its first three subsections, *see* 47 C.F.R. § 64.1200(a)(3)(i)-(iii), all of which mention "unsolicited advertisements," Section 64.1200(a)(3)(iv) by its terms applies to "[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender." 47 C.F.R. § 64.1200(a)(3)(iv). That Section 64.1200(a)(3)(iv) embodies a stand-alone requirement is further supported by the punctuation of the rule. There is a period after subsection (3)(iii), which suggests a break in the connection between the preceding subsections and subsection (3)(iv). Thus, the language and punctuation of Section 64.1200(a)(3) show that Section 64.1200(a)(3)(iv) was not directed at the unsolicited advertisements to which the prior portions of Section 64.1200(a)(3) apply.

That understanding of the regulation appropriately gives each of its sub-sections independent meaning. *See Westfeld v. Indep. Processing, LLC*, 621 F.3d 819, 824 (8th Cir. 2010) (applying well-established principle that a regulation should not be interpreted "in a manner that renders any section . . . superfluous or fails to give effect to all of the words."). Section 64.1200(a)(3)(i)-(iii) already requires *unsolicited* facsimile advertisements that are transmitted to persons with whom the sender has an EBR to contain an opt-out notice. 47 C.F.R. § 64.1200(a)(3)(i)-(iii). The only unsolicited facsimile advertisements permitted under the JFPA, however, are those in which the sender has an EBR with the recipient. 47 U.S.C.§ 227(b)(1)(C)(i). Thus, the portion of Section 64.1200(a)(3) preceding subsection (iv) — Section 64.1200(a)(3)(i)-(iii) — already requires all permitted unsolicited facsimile advertisements to contain an opt-out notice. Interpreting subsection (iv) as applying only to unsolicited facsimile advertisements — and requiring such advertisements to contain an opt-out notice — would render that subsection duplicative of Section 64.1200(a)(3)(i)-(iii) and deprive it of independent meaning.[6]

Walburg argues that its construction of Section 64.1200(a)(3)(iv) is necessary to harmonize the rule with the language and purpose of the TCPA as amended by the JFPA. Walburg Brief at 22-24. That argument is without merit. In enacting 47 U.S.C. § 227(b), Congress concluded that a

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[6] The district court construed Section 64.1200(a)(3)(iv) to apply to what it believed to be a specific type of "unsolicited" facsimile advertisements, *i.e.*, the second (and subsequent) advertisements sent to a recipient who had given express permission to the transmission of an earlier facsimile advertisement. *See* J.A. 181. Under the FCC's rules, however, express permission, once obtained, applies "until the consumer revokes such permission by sending an opt-out request to the sender." *2006 Rulemaking Order*, 21 FCC Rcd at 3812 (¶ 46). Thus, the facsimile advertisements that the district court believed to be governed by Section 64.1200(a)(3)(iv) are not "unsolicited" advertisements at all, but instead are a subgroup of advertisements transmitted with the consent of the recipient.

prohibition on unsolicited facsimile advertisements is "the *minimum* necessary to protect unwilling recipients from receiving fax messages that are detrimental to the owner's uses of his or her fax machine." S. Rep. No. 178, 102d Cong., 1st Sess. 6 (1991), 1991 U.S.C.C.A.N 1969, 1975-76 (emphasis added). By mandating a ban on the transmission of unsolicited facsimile advertisements, Congress did not preclude the FCC from adopting measures not expressly mandated by statute to protect consumers from receiving unwanted facsimile advertisements. Instead, Congress was silent on the mechanism by which consumers would be notified of their right to withdraw their consent to receive facsimile advertisements. "Congress's mandate in one context with its silence in another suggests . . . simply a decision not to mandate any solution in the second context, *i.e.*, to leave the question to agency discretion." *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990). *See Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 705 (D.C. Cir. 2011) (concluding that grant of authority to the FCC in the Communications Act "establishes a floor rather than a ceiling."). Because there is no conflict in this case between the statute and the FCC's opt-out notice rule, the Court should reject Walburg's invitation to "interpret" the agency's rule in a manner inconsistent with its plain language.

Finally, the court below erred in concluding that footnote 154 of the FCC's *2006 Rulemaking Order* demonstrates that Section 64.1200(a)(3)(iv) applies only to unsolicited advertisements. To be sure, that footnote states, without explanation, that "the opt-out notice requirement only applies to communications that constitute unsolicited advertisements." 21 FCC Rcd at 3810 n.154. *See* 71 Fed. Reg. at 25971. But the text of the *2006 Rulemaking Order* states explicitly that "entities that send facsimile advertisements to consumers from whom they obtained permission, must include on the advertisements [an] opt-out notice" to enable "consumers to stop unwanted faxes in the future." 21 FCC Rcd at 3812 (¶ 48). Furthermore, other parts of that order state without qualification that facsimile advertisements must include an opt-out notice. *See 2006 Rulemaking Order*, 21 FCC Rcd at 3788, 3824 (¶¶ 1, 70). Where, as here, a conflict exists between the text and a footnote in the same agency order, "the text of the [agency's] decision controls." *United Steelworkers of Am., AFL-CIO v. NLRB*, 389 F.2d 295, 297 (D.C. Cir. 1967). That principle applies with particular force here because the text in question — in contrast with the unexplained footnote — construes the rule in a manner compelled by the language in the regulation itself. [7] The FCC's reasonable reading of its own regulation and order is entitled to deference. *See Talk Am.,* 131 S. Ct at 2261.

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[7] It is irrelevant to this case that the *2006 Rulemaking Order* stated that the Commission was amending its rules to "require that all unsolicited facsimile advertisements contain a notice on the first page of the advertisement stating that the recipient is entitled to request that the sender not send any future unsolicited advertisements." 21 FCC Rcd at 3800 (¶ 24). *See* Walburg Brief at 18. There is no dispute that the FCC's rules require an opt-out notice on all unsolicited facsimile advertisements. *See* 47 C.F.R. § 64.1200(a)(3)(i)-(iii). The issue here is whether Section 64.1200(a)(3)(iv) likewise requires an optout notice on facsimile advertisements that are transmitted with the recipient's consent.

III. SECTION 64.1200(A)(3)(IV) IS ENFORCEABLE IN THIS PRIVATE CIVIL ACTION.

The TCPA authorizes persons to bring an action for damages or injunctive relief in state court "based on a violation of [47 U.S.C. § 227(b)] *or* the regulations prescribed under [that statute]." 47 U.S.C. § 227(b)(3) (emphasis added).

Walburg acknowledges that Section 64.1200(a)(3)(iv) was "promulgated under the grant of authority that Congress gave the FCC under . . . Section 227(b)(2)." Walburg Brief at 20. The district court agreed. *See* J.A. 179 ("if an opt-out notice is required by the regulation," Nack would have "a right to bring a cause of action under the TCPA"). Nonetheless, Walburg argues that if Section 64.1200(a)(3)(iv) requires an opt-out notice for facsimile advertisements sent with the recipient's consent, that regulation is not enforceable in this private civil action because the JFPA only authorizes the FCC to adopt an opt-out notice requirement for unsolicited facsimiles. Walburg Brief at 29-33. That argument is a thinly veiled challenge to the validity of Section 64.1200(a)(3)(iv) that is not properly before the Court in this case.

Section 402(a) of the Communications Act, 47 U.S.C. § 402(a), specifies that (with certain exceptions not applicable here) any challenge to final action taken in an FCC rulemaking order must be brought under the Hobbs Act, 28 U.S.C. § 2341 *et seq.* The Hobbs Act, in turn, gives the courts of appeals "*exclusive jurisdiction* to . . . determine the validity of" such action. 28 U.S.C. § 2342(1) (emphasis added). *See FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 467 (1984). Because this case does not involve judicial review of FCC action pursuant to the Hobbs Act, the Court "is without jurisdiction to entertain a challenge to [the] FCC regulation[]." *United States v. Any and All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000). *See Vonage Holdings Corp. v. Minnesota PUC*, 394 F.3d 568, 569 (8th Cir. 2004) ("No collateral attacks on the FCC Order are permitted . . . [because] [t]he case before us is not a Hobbs Act petition for review."). Indeed, one recent appellate decision has squarely held that the Hobbs Act precludes a challenge, like the one here, to the validity of FCC rules promulgated under the TCPA in a private civil action brought under 47 U.S.C. § 227(b)(3). *CE Design, Ltd v. Prism Business Media, Inc.*, 606 F.3d 443 (7th Cir. 2010).

The fact that Walburg's challenge to Section 64.1200(a)(3)(iv) is presented as part of its defense in a civil action does not override the Hobbs Act's jurisdictional limitation. As this Court has pointed out, a "defensive attack on the FCC regulation[] is as much an evasion of the exclusive jurisdiction of the Court of Appeals [that is prescribed in the Hobbs Act] as is a preemptive strike." *Any and All Radio Station Transmission Equip.*, 207 F.3d at 463.

A litigant like Walburg has several avenues to raise a challenge to the lawfulness of an FCC rule consistent with the jurisdictional limitations set forth in the Hobbs Act. First, an aggrieved person can contest the validity of the rule in a timely petition for administrative reconsideration, *see* 47 U.S.C. § 405; if the agency denies the litigant's request, the litigant can seek judicial review of that decision under the Hobbs Act. Second, an aggrieved person at any time can petition the FCC to amend or repeal the rule on the basis that the rule is unauthorized by statute, *see* 47 C.F.R. § 1.401, and obtain judicial review in the court of appeals under the Hobbs Act if the agency denies the petition. Third, if the FCC issues an order applying the rule to a party, that party can seek judicial review of that order under the Hobbs Act and challenge the validity of the rule in that appellate proceeding, provided that the party previously presented the same argument to the FCC in the administrative enforcement proceeding. *See Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir. 1958); 47 U.S.C. § 405(a).

None of those avenues is available to Walburg in this case, however. The 30-day time limit for seeking reconsideration of the FCC's 2006 adoption of Section 64.1200(a)(iv) has long since expired. *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(f)). No party has filed a petition to rescind the rule. Finally, this case does not arise from any action by the Commission applying the rule against Walburg. This Court has no power to permit an "end run" around the "statutory channels" for review of FCC orders. *See Any and All Radio Station Transmission Equip.*, 207 F.3d at 463. Because Congress did not give the court of appeals jurisdiction to entertain a collateral challenge to the lawfulness of an FCC rule on review of a private action under Section 227(b)(3), Walburg's contention that the FCC lacked authority under the JPFA to enact Section 64.1200(a)(3)(iv) is not properly before this Court.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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February 24, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
MICHAEL R. NACK, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

PLAINTIFF-APPELLEE,

v.

DOUGLAS PAUL WALBURG,

DEFENDANT-APPELLANT.

NO. 11-1460

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying *Amicus* Brief for the Federal Communications Commission Urging Reversal in the captioned case contains 4,744 words.

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February 24, 2012

11-1460

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Michael R. Nack, Plaintiff-Appellant

v.

Douglas Paul Walburg, Defendant-Appellee.

CERTIFICATE OF SERVICE

I, Laurel R. Bergold, Jr., hereby certify that on February 24, 2012, I electronically filed the foregoing *Amicus* Brief for the Federal Communications Commission Urging Reversal with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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SUPPLEMENTAL *AMICUS* BRIEF
IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 11-1460

MICHAEL R. NACK, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

PLANTIFF-APPELLANT,

V.

DOUGLAS PAUL WALBURG,

DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION CASE NO. 4:10-CV-00478-AGF THE HONORABLE AUDREY G. FLEISSIG, UNITED STATES DISTRICT COURT JUDGE

SUPPLEMENTAL *AMICUS* BRIEF FOR THE FEDERAL COMMUNICATION COMMISSION URGING REVERSAL

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IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NO. 11-1460

MICHAEL R. NACK, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

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SUPPLEMENTAL AMICUS BRIEF

STATEMENT OF INTEREST

The Federal Communications Commission ("FCC") administers the Telephone Consumer Protection Act of 1991 ("TCPA"), which imposes restrictions on the transmission of advertisements by facsimile machines. The FCC rule at issue in this case, codified at 47 C.F.R. § 64.1200(a)(3)(iv), requires the inclusion of an "opt-out" notice on facsimile advertisements transmitted with the recipient's consent. Judicial review of the FCC's rules, such as section 64.1200(a)(3)(iv), is governed by the Administrative Orders Review Act (commonly known as the Hobbs Act), 28 U.S.C. § 2341, *et seq.*

The FCC has an interest in ensuring that the TCPA, section 64.1200(a)(3)(iv) of the agency's rules, and the Hobbs Act are interpreted correctly.

INTRODUCTION AND SUMMARY ARGUMENT

On July 23, 2012, this Court accepted an *amicus* brief filed by Anda, Inc. presenting a jurisdictional argument that Anda itself acknowledges "has not been raised or discussed by the parties or the FCC." [1] Notwithstanding the review mechanism established in the Hobbs Act, Anda claims that sections 703 and 704 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 703, 704, give this Court jurisdiction to consider a challenge to section 64.1200(a)(3)(iv) of the FCC's rules, 47 C.F.R. § 64.1200(a)(3)(iv), on review of a private action initiated in a district court. That is so, Anda contends, even where the FCC is not a party to – and may not even be aware of – the litigation that challenges the validity of the agency's rules. Anda Brief at 8-11. Anda offers this jurisdictional theory in support of its request for a ruling from this Court the FCC lacked statutory authority to enact section 64.1200(a)(3)(iv) (*id.* at 16) – a ruling that, again, is sought by neither of the parties to this case.

As we explain below, Anda's arguments are not properly before the Court and, in any event, are unfounded. As an initial matter, consistent with its practice, this Court should not reach arguments that neither of the parties to this case has advanced. Appellee Douglas Walburg told the Court that

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[1] Anda, Inc's Motion for Leave to Appear and File *Amicus Curiae* Brief in Support of Appellee at 2.

section 64.1200(a)(3)(iv) is "perfectly valid" and that "the FCC had authority to adopt the regulation." Walburg Response Brief at 12, 15. Appellant Michael Nack likewise agrees that the FCC acted lawfully in enacting section 64.1200(a)(3)(iv). Nack Reply Brief at 3-4. Because an *amicus curiae* may not raise a challenge to the FCC's rulemaking authority that was not raised by the parties themselves, the Court should not address either the validity of the rule or its jurisdiction to consider the validity of the rule. *United States v. Ne. Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 732 n.3 (8th Cir. 1986).

In any event, Anda's jurisdictional argument is wrong for two reasons. First, Congress gave the courts of appeals in Hobbs Act proceedings "*exclusive jurisdiction* to . . . determine the validity of" final action in FCC rulemaking orders. 28 U.S.C. § 2342(1) (emphasis added). By making that grant of jurisdiction "exclusive," Congress affirmatively denied to all other courts jurisdiction to make such determinations. *See FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984).

Second, sections 703 and 704 of the APA apply only where "there is *no other* adequate remedy" for the challenge of agency action. 5 U.S.C. § 704 (emphasis added). Walburg or Anda had several avenues to challenge the validity of section 64.1200(a)(3)(iv) under the Hobbs Act. For example, they could have petitioned the court of appeals to review the FCC order adopting the rule. Alternatively, at any time after the rule became effective, they could have petitioned the FCC to rescind the rule and obtained relief from the agency or judicial review if the FCC denied that petition for rulemaking. Walburg and Anda are subject to civil liability only because they failed to timely challenge the validity of the FCC's rule or seek relief under the Hobbs Act before they violated that rule.

ARGUMENT

I. BECAUSE THE PARTIES AGREE THAT SECTION 64.1200(A)(3)(IV) IS A VALID FCC REGULATION, NON-PARTY ANDA'S ARGUMENTS ARE NOT PROPERLY BEFORE THE COURT.

The parties to this appeal do not dispute that the FCC's rule at issue in this case was authorized by statute. Indeed, appellee Douglas Walburg has conceded that "the validity of the FCC's regulation is not at issue here." Walburg Response Brief at 15. Although Walburg now argues that section 227(b) did not authorize the FCC to adopt section 64.1200(a)(3)(iv),[2] he subsequently clarified that the FCC had authority to adopt the rule under different provisions of the Communications Act. Walburg Response Brief at 16-19 (citing 47 U.S.C. §§ 154(i) 303(r)).[3] Appellant Michael Nack agrees that the

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[2]Walburg initially told this Court that section 64.1200(a)(3)(iv) was "promulgated under the grant of authority that Congress gave the FCC under . . . [s]ection 227(b)(2)." Walburg Opening Brief at 20.

[3]In his Responsive Brief, Walburg also appears to have asserted that section 64.1200(a)(3)(iv) violates the First Amendment if the rule was promulgated under the TCPA and subjects Walburg to monetary damages. Because Walburg did not raise that issue in the district court or in his opening brief, that argument is not properly before the Court. *See, e.g.*, *Ritchie Capital Mgmt., L.L.C. v. Jeffries*, 653 F.3d 755, 763 n.4 (8th Cir. 2011) (court declines to consider issue not properly raised

FCC had authority to adopt section 64.1200(a)(3)(iv). *See* Nack Reply Brief at 3-4.

While the parties agree that the FCC's rule is not *ultra vires*, Anda – a non-party *amicus curiae* that purports to support Walburg – flatly contradicts Walburg's position on this issue. *See* Anda Brief at 16 ("the FCC acted *ultra vires* in enacting [section 64.1200(a)(3)(iv)]."). In an effort to interject this new argument into this case, Anda contends that sections 703 and 704 of the APA, 5 U.S.C. §§ 703-04, give the Court jurisdiction to entertain a collateral attack on the validity of section 64.1200(a)(3)(iv) in a private civil action (such as the present case), but only "to the extent this Court concludes . . . that Walburg is challenging the substantive validity of the FCC's [r]egulation." Anda Brief at 4, 8, 11.

It is well-established under this Court's precedent that, "[an] amicus[] cannot raise issues not raised by the parties." *Ne. Pharm. & Chem. Co.*, 810 F.2d at 732. *Accord United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 61 (1981); *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 826 n.6 (8th Cir. 2009). Because Walburg is not challenging "the validity of the FCC's regulation," Walburg Response Brief at 15, and appellant Nack agrees that the FCC's rule is valid, Anda's new arguments are not properly before the Court.[4]

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in district court); *Waldner v. Carr*, 618 F.3d 838, 847 (8th Cir. 2010) (failure to raise issue in opening brief results in waiver); *K.D. v. Cnty. of Crow Wing*, 434 F.3d 1051, 1055 n.4 (8th Cir. 2006) (same).

[4]Anda emphasizes that the FCC in its *amicus* brief stated that Walburg had raised a "'thinly veiled challenge to the validity'"

II. THE COURT LACKS JURISDICTION TO RULE ON THE SUBSTANTIVE VALIDITY OF SECTION 64.1200(A)(3)(IV).

A. The Hobbs Act Precludes A Collateral Challenge To The FCC Rule In A Private Civil Action.

Even if an *amicus* could raise these issues in the context of this case, the issues are not properly presented in this forum. With the exception of certain narrowly defined categories of cases not involved here,[5] section 402(a) of the Communications Act requires "[a]ny proceeding" challenging final action in an FCC order to be brought under the Hobbs Act, 28 U.S.C. § 2341 *et seq.* 47 U.S.C. § 402(a) (emphasis added). In such proceedings, the courts of appeals have "*exclusive jurisdiction* to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" such action. 28 U.S.C. § 2342(1) (emphasis added). To invoke that jurisdiction, a litigant must file a petition for review with the court of appeals within 60 days after entry of the FCC's order. 28 U.S.C. § 2344. As this Court has explained, the Hobbs Act "prescribes the *sole*

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of section 64.1200(a)(3). Anda Brief at 2, 8 n.4 (quoting FCC Brief at 20). The FCC made that statement before Walburg clarified that he is not challenging the validity of the rule. Anda inexplicably ignores Walburg's own disavowal of any intent to challenge the lawfulness of section 64.1200(a)(3).

[5]Section 402(b) gives the District of Columbia Circuit exclusive jurisdiction to review specific categories of cases that primarily involve FCC licensing decisions. 47 U.S.C. § 402(b). Neither Anda, nor either of the parties to this case, suggests that provision applies here.

conditions under which the courts of appeals have jurisdiction to review the merits of FCC orders." *Vonage Holdings Corp. v. Minnesota Pub. Serv. Comm'n*, 394 F.3d 568, 569 (8th Cir. 2004) (emphasis added).

The framework established by the Hobbs Act "ensure[s] [that] review [is] based on an administrative record made before the agency charged with implementation of the statute," *United States v. Any and All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000). It gives the court of appeals, before adjudicating the validity of an FCC regulation, the benefit of the views of the expert agency that promulgated the rule. And it gives the FCC the opportunity to defend its own rule as a party to the case. *See* 28 U.S.C. § 2344. Anda's contention that a litigant in a private civil action brought in district court has "a right to challenge the substantive validity" of section 64.1200(a)(3)(iv), Anda Brief at 3-4, disregards the jurisdictional limitations of the Hobbs Act. By making Hobbs Act jurisdiction "exclusive," Congress "cut[] off original jurisdiction in other courts in all cases covered by that statute." *Telecomm. Res. & Action Ctr. v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984). *See United States v. Neset*, 235 F.3d 415, 421 (8th Cir. 2000). The Hobbs Act thus removes from the district courts (and, as in this case, courts of appeals in reviewing district court rulings) any jurisdiction they otherwise would have to entertain "collateral attacks on . . . FCC order[s]." *Vonage*, 394 F.3d at 569. *See ITT Worldcom*, 466 U.S. at 468-69 ("[l]itigants may not evade" exclusivity provision of Hobbs Act "by requesting the [d]istrict [c]ourt to enjoin action that is the outcome of the agency's order."). As this Court has held, that statutory denial of jurisdiction applies to challenges to an FCC rule (such as the one here) that are presented as a defense in a civil action. *Any and All Radio Station Transmission Equip.*, 207 F.3d at 463 (A "defensive attack on the FCC regulation[] is as much an evasion of the exclusive jurisdiction . . . [prescribed in the Hobbs Act] as is a preemptive strike.").

B. Sections 703 and 704 Of The APA Do Not Permit The Court To Entertain Collateral Challenges To The Substantive Validity Of FCC Rules.

Contrary to Anda's contention, sections 703 and 704 of the APA do not create an "exception to the Hobbs Act limits on judicial review" that would permit the Court to entertain a collateral challenge to the validity of section 64.1200(a)(3)(iv). *See* Anda Brief at 4. As the Supreme Court has explained, Congress "did not intend th[e] general grant of jurisdiction [in the APA] to duplicate the previously established special statutory procedures relating to specific agencies." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). Thus, the existence of "another statutory scheme of judicial review," such as the Hobbs Act, "preclude[s] review under the more general provisions of the APA." *Bangura v. Hanson*, 434 F.3d 487, 501 (6th Cir. 2006).[6]

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[6] *See also Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965) ("where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive").

Anda's jurisdictional argument would require the Court to disregard the statutory limits on its subject-matter jurisdiction. That argument, if accepted by the Court, would transform the "exclusive jurisdiction" (28 U.S.C. § 2342(1)) that Congress conferred on the courts of appeals to review final action taken in FCC rulemaking orders under the specific Hobbs Act procedures into a broad grant of jurisdiction to both federal appellate and district courts to review Commission orders in a wide array of cases.[7] Particularly troubling, it would enable litigants to bypass the Hobbs Act procedures in which a court of appeals adjudicates the validity of an FCC rule based upon its review of an FCC record in a case in which the FCC is a respondent. It would permit a litigant to raise a collateral challenge to an FCC rule in a private civil action where the FCC has no opportunity to defend its rule because it is not a party and may not even be aware that the validity of its rule is under attack.

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[7]Anda asserts that this Court in *Any and All Radio Station Transmission Equip.*, 207 F.3d 458, "recognized an exception to the Hobbs Act jurisdictional limits." Anda Brief at 9. Anda misreads that decision. The Court, in affirming the district court's determination that it lacked jurisdiction to entertain a collateral challenge to an FCC rule, squarely held that the Hobbs Act procedures are the sole means by which a litigant can contest the validity of an FCC regulation. The Court pointed out that its holding was supported by "authoritative[]" Supreme Court precedent. 207 F.3d at 463 (citing *ITT Worldcom*, 466 U.S. at 468). Although the Court opined that the case "might" (not would) be different if the litigant "had no way of obtaining judicial review of the regulations," the Court explained that the Hobbs Act in fact provided the litigant with an adequate remedy. *Id.*

C. The Hobbs Act Enables Litigants To Challenge The Substantive Validity Of FCC Rules And Provides Litigants The Opportunity To Obtain Full Relief.

As Anda acknowledges, the APA's general review provisions apply only if "there is *no other* adequate remedy in a court." 5 U.S.C. § 704 (emphasis added). Anda claims that those general review provisions apply here because "parties like Walburg have no way to challenge the substantive validity of [section 64.1200(a)(3)(iv)]. Anda Brief at 4. Anda is wrong.

The Hobbs Act broadly authorizes the courts of appeals "to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" final actions taken in FCC rulemaking orders, 28 U.S.C. § 2342. Had Walburg or Anda wished to challenge the validity of section 64.1200(a)(3)(iv), they could have invoked that jurisdiction in several different ways. Within 30 days after the FCC adopted section 64.1200(a)(3)(iv), they could have challenged the rule's validity in a timely petition for agency reconsideration, *see* 47 U.S.C. § 405; if the FCC denied reconsideration, they could have timely filed a petition for review of the order adopting the rule under the Hobbs Act. *See ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270 (1987). They also could have challenged the validity of section 64.1200(a)(3)(iv) at any time by filing with the FCC a petition to repeal the rule (5 U.S.C. § 553(e); 47 C.F.R. § 1.401); if the FCC denied that rulemaking petition, they could have sought judicial review of that denial under the Hobbs Act. Thus, there is simply no basis for Anda's assertion that it or Walburg lacked any opportunity to challenge the validity of section 64.1200(a)(3)(iv). Anda Brief at 3.[8]

Anda argues in effect that the Hobbs Act remedies are inadequate because a challenge to the validity of section 64.1200(a)(3)(iv) if successful would invalidate the rule only prospectively and thus not relieve Walburg or Anda from civil liability for their past violations of the rule. The prohibition on retroactive agency rulemaking – a basic requirement of due process – does not, however, render inadequate the Hobbs Act remedies. Walburg and Anda are subject to civil liability only if they chose to violate a binding FCC rule in effect at the time without first challenging its lawfulness. Had they contested the validity of section 64.1200(a)(3)(iv) under the Hobbs Act, and prevailed in that challenge *before* engaging in conduct that

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[8]Anda is wrong in claiming that the "FCC's" dismissal of its petition for declaratory ruling shows that the Hobbs Act remedies are inadequate. *See* Anda Brief at 6. To begin with, the FCC's staff in the Consumer & Governmental Affairs Bureau, not the five-member Commission itself, dismissed Anda's petition. Anda has filed a application for review of the FCC staff's order with the full Commission, which has not yet issued a ruling on that application. Anda may file for (Hobbs Act) review if it is aggrieved after the FCC issues its decision. In any event, Anda's request for a declaratory ruling is irrelevant to its arguments before this Court. Anda asked the FCC to declare that it had enacted section 64.1200(a)(3)(iv) under statutory authority other than 47 U.S.C. § 227(b). Anda Petition for Declaratory Ruling, CG Docket No. 05-338 (Nov. 30, 2010) at 1. The FCC's ultimate disposition of that request (whatever that may be) has no bearing on whether Congress in the Hobbs Act provided an adequate remedy to a litigant seeking to challenge the substantive validity of section 64.1200(a)(3)(iv).

may have violated the rule, they would not be subject to liability in a private civil action. "'A legal remedy is not inadequate for purposes of the APA because . . . [a litigant] deprived [himself] of an opportunity to pursue that remedy.'" *Turner v. United States*, 449 F.3d 536, 541 (3d Cir. 2006) (quoting *Town of Sanford v. United States*, 140 F.3d 20, 23 (1st Cir. 1998)).[9]

Finally, Anda's APA argument is similar to the one advanced in *Sable Commc'ns of Calif. v. FCC*, 827 F.2d 640 (9th Cir. 1987). In that case, Sable had argued that the district court had jurisdiction to entertain a challenge to the lawfulness of an FCC rule under section 704 of the APA because the Hobbs Act procedures were inadequate. The court of appeals, in rejecting that claim, held that the Hobbs Act review procedures were adequate, but that Sable had failed to avail itself of those procedures by timely filing a petition for review of the FCC order adopting the rule. The Court explained that "Sable was responsible for its own failure to challenge the regulation in a timely manner." *Id.* at 643. The Court also pointed out that Sable's APA argument, if accepted by the Court, "would effectively obliterate the exclusive jurisdiction provision of [the Hobbs Act]." *Id.*

As in *Sable*, the Hobbs Act provides a fully adequate remedy for a challenge of section 64.1200(a)(3)(iv), but Walburg and Anda chose not to

[9] *See also Mitchell v. United States*, 930 F.2d 893, 897 (Fed. Cir. 1991) ("[T]he question posed by APA [s]ection 704 is whether [there are] adequate remedies, not whether [a particular litigant] will be entitled to receive those remedies.")

pursue that remedy. In such circumstances, sections 703 and 704 do not authorize a collateral challenge to the rule.

CONCLUSION

Because the Court lacks jurisdiction over non-party Anda's challenge to the validity of section 64.1200(a)(3)(iv), it should not consider that challenge.

Respectfully submitted,

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August 21, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MICHAEL R. NACK, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

PLANTIFF-APPELLANT,

v.

DOUGLAS PAUL WALBURG,
DEFENDANT-APPELLEE.

NO. 11-1460

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Supplemental *Amicus* Brief in the captioned case contains 3,190 words.

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August 21, 2012

11-1460

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Michael R. Nack, Plaintiff-Appellant

v.

Douglas Paul Walburg, Defendant-Appellee.

CERTIFICATE OF SERVICE

I, Laurel R. Bergold, hereby certify that on August 21, 2012, I electronically filed the foregoing Motion for Leave to File Supplemental *Amicus* Brief of the Federal Communications Commission with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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