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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

When Respondent brought this class action seeking crippling damages under an FCC regulation, the Eighth Circuit held that Petitioner could not raise the regulation's invalidity as a defense. Respondent wrongly contends that determination is not the subject of a circuit split, and he wrongly contends that the decision is not worthy of this Court's review. Indeed, Respondent barely addresses the arguments raised by Petitioner and his amici.

As Petitioner's Supplemental Brief explains, the Eighth Circuit's decision is in conflict with the Sixth Circuit's amended opinion in *Leyse*. *See Leyse v. Clear Channel Broad., Inc.*, No. 10-3739, 2013 WL 5926700 (6th Cir. Nov. 5, 2013) ("*Leyse II*"), *replacing Leyse v. Clear Channel Broad., Inc.*, 697 F.3d 360 (6th Cir. 2012) ("*Leyse I*"). Although the *Leyse* amended opinion held that the Hobbs Act barred the particular challenge raised in that case, the court of appeals reviewed and reaffirmed Sixth Circuit precedent holding that a defendant *may* defend against civil liability by raising an as-applied, substantive challenge to a regulation. Respondent does not address these points. And had Petitioner had the benefit of the Sixth Circuit's rule, he would have been able to bring his as-applied challenge to the regulation at issue here. Certiorari is warranted to address that split of authority.

The question presented is also of critical importance. As Petitioner's three amici explain, numerous other parties are in the same situation as Petitioner: facing staggering liability from a regulation that they had no meaningful opportunity to challenge

when it was promulgated, or, in the Eighth Circuit's view, when it was invoked against them in a civil suit. It is no answer, as Respondent claims, that Petitioner and other parties may petition the FCC for relief. The FCC itself takes the position that, after the 30-day time period for seeking agency reconsideration of a rule has passed (as it did here many years ago), it will consider a challenge to a rule's validity only in a new rulemaking proceeding – a proceeding that cannot provide retroactive relief necessary to avoid civil liability. Petitioning the FCC, therefore, is far from the equivalent of being able to raise the invalidity of the regulation as a defense to liability in an as-applied enforcement action. This Court should decide whether the latter option is available.

ARGUMENT

I. The Question Presented Is the Subject of a Circuit Split

1. Respondent argues that the circuit split identified in the Petition was reconciled when the Sixth Circuit issued an amended opinion in *Leyse*. But the split remains even after the *Leyse* opinion. As explained in Petitioner's Supplemental Brief, the *Leyse* amended opinion made clear that the Sixth Circuit does *not* agree with the radical interpretation of the Hobbs Act adopted by the Eighth Circuit in the decision below.

Leyse argued that an FCC rule "should be set aside because of *procedural* deficiencies in its promulgation." *Leyse II*, 2013 WL 5926700, at *13 (emphasis added). The original opinion held that Leyse was permitted to assert such a challenge in a civil action notwithstanding

the Hobbs Act. *See Leyse I*, 697 F.3d at 372-77. The amended opinion held that the Hobbs Act did bar Leyse's challenge. *See Leyse II*, 2013 WL 5926700, at *10-15.

Critically, however, the amended opinion emphasized that the Hobbs Act stood as a bar only because Leyse made a "facial" challenge raising "procedural" objections to the rule. *See id.* at *13. In rejecting Leyse's challenge, the court of appeals acknowledged and reaffirmed that Sixth Circuit precedent *does* permit a defendant to raise the invalidity of a regulation as a defense in circumstances like those here. As *Leyse* explained, when an FCC rule is applied in a civil action, the defendant may, consistent with the Hobbs Act, defend against liability on the ground that the FCC rule is unconstitutional or *ultra vires*. *See Leyse II*, 2013 WL 5926700, at *10-11 (citing *United States v. Any and All Radio Station Transmission Equipment*, 204 F.3d 658 (6th Cir. 2000) ("*Maquina Musical*")). Thus, *Leyse II* recognized "limits to the extent the Hobbs Act . . . appl[ies] to some *constitutional* defenses" and other substantive challenges, and the court doubted that the Hobbs Act's strictures would apply to "*as-applied* arguments." *Id.* at *13 (emphasis added).

Accordingly, if this action had been pending in the Sixth Circuit, Petitioner would have been permitted to defend against liability on the ground that the FCC's opt-out regulation is *ultra vires*. Unlike Leyse, who raised a facial attack on an FCC regulation, Petitioner's challenge to the opt-out regulations is unquestionably as-applied – Petitioner is challenging the application of

those regulations to impose potentially devastating civil liability in this particular case. And unlike Leyse, who raised merely procedural challenges to a regulation, Petitioner argues that the FCC's opt-out regulation is void as *ultra vires*. Under Sixth Circuit precedent, such a challenge is not barred by the Hobbs Act.

Here, however, the Eighth Circuit followed the Seventh Circuit in holding that the Hobbs Act bars even as-applied challenges claiming that a regulation is unconstitutional or *ultra vires*. *See* Pet. App. 10a-14a (following *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010)). Thus, the Eighth Circuit refused to permit Petitioner to raise his *ultra vires* challenge as a defense to liability. That created a clear split of authority with the Sixth Circuit.

2. Respondent makes no attempt to respond to that account of the circuit split. After the *Leyse* amended opinion was issued, Petitioner submitted a Supplemental Brief explaining that a circuit split persists because the amended opinion made clear that the Sixth Circuit does *not* interpret the Hobbs Act to bar a challenge such as Petitioner's. Although Petitioner filed his Supplemental Brief twelve weeks before Respondent filed his Brief in Opposition, Respondent declined to respond to any of the arguments in the Supplemental Brief (or even cite the Supplemental Brief). Instead, Respondent attacked the Petition's reliance on the original *Leyse* opinion. *See* Opp. 6-7. But that is a straw man. The amended opinion still makes clear that the Sixth Circuit rejects the extreme reading of the Hobbs Act under which the

Eighth Circuit refused to permit Petitioner to raise an as-applied, *ultra vires* challenge to the regulation as a defense to liability. This Court's intervention is necessary to resolve this split of authority.

II. The Question Presented Is of Considerable Practical and Constitutional Importance

As set forth in the Petition, the proper interpretation of the Hobbs Act in this context raises issues of considerable practical and constitutional importance. By prohibiting Petitioner from raising the invalidity of the FCC's opt-out regulations as a defense to liability, the effect of the Eighth Circuit's rule is to subject parties such as Walburg to staggering liability – here, tens of millions of dollars – for class actions premised on invalid agency regulations. Respondent has no persuasive answer to these concerns.

1. Respondent first argues that the question presented is not important because, in Respondent's view, Petitioner "violated a clear regulation." Opp. 9. But the regulation was by no means "clear." As set forth in the Petition, the FCC's notice of proposed rulemaking did not indicate that the FCC was considering applying an opt-out-notice requirement to solicited faxes, instead indicating that any such requirement would be limited to unsolicited faxes. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking and Order, 20 FCC Rcd 19,758, 19,767-68 ¶¶ 19-20 (2005) (proposing adoption of rules requiring "senders of unsolicited facsimile advertisements to include" an opt-out notice). And in the final rule, the opt-out regulation was buried in the

middle of a sentence governing unsolicited faxes. The regulation's lack of clarity was so great that the district court in this case concluded that the rule did *not* to apply to solicited faxes. *See* Pet. App. 25a-26a.

The notion that Petitioner "ignored" a "clear" FCC rule, therefore, bears little resemblance to reality. Petitioner had little reason to know the rule applied to him until Respondent brought this action. And other parties were similarly caught unaware by the FCC's regulation of solicited faxes until they were suddenly faced with the prospect of substantial civil liability. *See* Anda Amicus Br. 5-11; Law Professors' Amicus Br. 16-18.[1]

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[1] Nor is there any merit to Respondent's contention that Congress has authorized the FCC to regulate *solicited* faxes. *See* Opp. 6. In enacting the Telephone Consumer Protection Act of 1991, Congress permitted civil liability only for sending "unsolicited advertisements" by fax, 47 U.S.C. § 227(b)(1)(C), and Respondent has never disputed that he expressly agreed to receive the faxes at issue here. Congress has never imposed restrictions on solicited faxes, and it did not do so in the Junk Fax Prevention Act of 2005 ("JFPA"), 47 U.S.C. § 227, as Respondent contends. *See* Opp. 3. The JFPA created a regulatory exception for certain types of *un*-solicited faxes – faxes sent without express permission but pursuant to an "established business relationship." *See* 47 U.S.C. § 227(b)(1), (b)(1)(C)(i) ("It shall be unlawful for any person . . . to use any telephone facsimile machine . . . to send . . . an *unsolicited* advertisement, unless . . . the *unsolicited* advertisement is from a sender with an established business relationship with the recipient . . . ." (emphasis added)). The JFPA did not regulate solicited faxes. Yet here, the FCC's opt-out regulations improperly imposed restrictions on solicited faxes in clear contravention of its statutory authority.

Moreover, even if the regulation were "clear," that would not make the Eighth Circuit's decision less important or more correct. The Eighth Circuit adopted an extreme interpretation of the Hobbs Act that prohibits defendants in civil lawsuits from raising the invalidity of agency rules as a defense to liability. Its holding applies whether or not the regulation is clear. Nor is the profound injustice of the Eighth Circuit's rule in any way lessened when the regulation is clear. A rule that permits liability on the basis of an unconstitutional or *ultra vires* regulation is manifestly unjust even if the regulation is clear.

2. Respondent next argues that this case does not merit certiorari because the proceedings below have been stayed pending resolution of an administrative petition to the FCC. Opp. 12. But as set forth in the Petition, the FCC has delayed for years in ruling on similar administrative petitions. *See* Pet. 13-14. The FCC has also stated that after the 30-day time period for seeking reconsideration of a rule has passed, it will *not* consider the rule's validity in an adjudicatory proceeding. *See* FCC Opp. to Pet. for Writ of Mandamus at 18, *In re Anda, Inc.*, No. 12-1145 (D.C. Cir. May 24, 2012) ("Anda cannot ... ask the Commission to invalidate section 64.1200(a)(3)(iv) in an adjudicatory proceeding for a declaratory ruling."). Instead, the FCC has stated that it would consider such a challenge only in a new rulemaking proceeding. *Id.* ("Anda can raise its challenge to the validity of [the regulation] in a petition to the Commission to amend or repeal the rule."). But a rulemaking proceeding could provide only *prospective* relief at best. *See generally*

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."). In other words, even if Petitioner could convince the FCC to rule on the validity of the regulation, any relief would be solely prospective and provide no defense to liability in this case.

While the FCC might conceivably provide relief short of declaring the rule invalid, such as a retroactive waiver, the decision to award such relief is wholly within the agency's discretion, and would receive a nearly insuperable level of deference in the event of judicial review. *See BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1181 (D.C. Cir. 2003) ("Our review of an agency's denial of a waiver is extremely limited; we vacate such denials only when 'the agency's reasons are so insubstantial as to render that denial an abuse of discretion.'" (quoting *Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512, 517 (D.C. Cir. 1999)); *see also id.* at 1182 (noting that whether to grant a waiver is discretionary and "the Commission's rules never *compel* the Commission to grant a waiver"). Administrative grace is no substitute for judicial review under the *Chevron* standard in the underlying civil action. Thus, contrary to Respondent's contentions, the effect of the Eighth Circuit's rule is to leave Petitioner no adequate avenue to challenge the legality of a regulation that exposes Petitioner to millions of dollars of liability.

3. Respondent's answer to Petitioner's due process argument is likewise meritless. Whatever the extent of Congress's power to determine the jurisdiction of federal courts, *see* Opp. 13, Congress cannot constrict federal courts' jurisdiction in a manner that violates due process. Indeed, as the D.C. Circuit has recognized in the context of an FCC enforcement action, "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." *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958). The same is true in civil class actions such as this: the Eighth Circuit's holding below "effectively den[ies] many parties ultimately affected by the rule the opportunity to question its validity." *Id.*; *see also Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466, 468 (2000) (due process requires, at a minimum, "an adequate opportunity to defend against the imposition of liability"); *Holden v. Hardy*, 169 U.S. 366, 389-90 (1898) (same).

Moreover, if Congress vests federal courts with jurisdiction to enforce the TCPA, it must allow courts to "say what the law is" in a TCPA action. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Eighth Circuit's rule violates that principle by reading the Hobbs Act to prohibit courts from deciding the validity of the regulations they are enforcing under the TCPA. That effectively turns every regulation into the unreviewable law of the land once the Hobbs Act's 60-day window expires, regardless of whether the regulation is at odds with the Constitution or a federal

statute. Respondent cites no precedent even remotely supporting that outcome. Rather, the better interpretation of the Hobbs Act would avoid any constitutional problem by permitting a defendant to challenge the validity of a regulation in a civil action. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("The courts will . . . not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.").

III. This Case Presents an Ideal Vehicle to Resolve the Circuit Split

Respondent makes no real effort to respond to Petitioner's argument that this case presents an ideal vehicle to resolve the split of authority on the question presented. Respondent merely restates his argument that the *Leyse* amended opinion resolved the circuit split, Opp. 15, but as set forth above, *see supra* Part I, that opinion made clear that the Sixth Circuit does not agree with the extreme reading of the Hobbs Act adopted by the Eighth Circuit here. Respondent also argues that Petitioner's *ultra vires* challenge "should be left to the administrative process," Opp. 15, but as discussed above, *see supra* Part II, the FCC has taken the position that it will not hear such a petition in a proceeding that could provide meaningful relief. *See* FCC Opp. to Pet. for Writ of Mandamus at 18, *In re Anda, Inc.*, No. 12-1145 (D.C. Cir. May 24, 2012). The administrative remedies available to Petitioner, therefore, are no substitute for raising the invalidity of the regulation in federal court as a defense to liability.

And given the proliferation of lawsuits under the FCC regulations at issue here, *see* Anda Amicus Br. 5-11; Law Professors' Amicus Br. 16-18, certiorari is warranted to resolve the split of authority on the important question presented and to correct the unjust rule adopted below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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