No. 13-486

In The Supreme Court of the United States

DOUGLAS PAUL WALBURG,

Petitioner,

v.

MICHAEL R. NACK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, CATO INSTITUTE AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

Karen R. Harned
Counsel of Record
Luke A. Wake
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, NW, Suite 200
Washington, DC 20004
(202) 314-2048
karen.hared@nfib.org
luke.wake@nfib.org

Counsel for Amicus Curiae NFIB Small Business and Legal Center

Ilya Shapiro
CATO INSTITUTE
100 Massachusetts Avenue, NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Amicus Curiae Cato Institute

Dated: November 15, 2013

(Counsel Continued Inside Cover)

THE LEX GROUP[DC] ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

No. 13-486

John C. Eastman
Anthony T. Caso
CENTER FOR
CONSTITUTIONAL JURISPRUDENCE
c/o Chapman University School of Law
One University Drive
Orange, California 92886
(714) 628-2666
jeastman@chapman.edu
caso@chapman.edu

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence

THE LEX GROUP[DC] ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

MOTION OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND CATO INSTITUTE FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Supreme Court rule 37.2(b), the National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center"), Cato Institute ("Cato"), and the Center for Constitutional Jurisprudence ("CCJ") respectfully request leave to file an *amici curiae* brief in this matter. In support of the motion, *amici* state:

1. On behalf of the *amici curiae*, the NFIB Legal Center requested the consent of both Petitioner and Respondent to file the proposed *amici curiae* brief. This request was timely, in accordance with Supreme Court Rule 37.2. The Petitioner granted consent in writing. The Respondent has withheld consent.

2. The NFIB Legal Center and Cato seek leave to file in this matter because this case raises an important issue of nationwide concern, and a question over which the lower courts are split. *Amici* believe that the proposed brief offers valuable perspective and expertise. Specifically, the proposed brief speaks to the procedural due process issues presented by this case, and addresses doctrinal confusion among the circuits in a manner that helps put this case—

and its importance to the regulated community—in perspective. As such, the proposed brief will aid the Court in reviewing this petition.

3. The NFIB Legal Center—representing the interest of the nation's small business community—has a great interest in this case. Likewise, Cato in its role as an advocate of individual rights and CCJ as a proponent of constitutional principles, have pressing interests in this case. At issue is the basic right of a defendant to mount a full and adequate defense when charged with violating a potentially *ultra vires* federal regulation. The right to immediately raise a constitutional *ultra vires* defense is important to anyone charged with violating federal law.

4. Since small businesses must navigate through perpetually evolving multifarious regulatory requirements—and usually without resources to hire in-house compliance officers—small business owners are especially vulnerable to civil lawsuits predicated upon alleged violations of obscure federal regulations. In such a case, it is fundamentally important that small business owners be allowed to contest the legality of a regulation that they have been charged with violating. Unfortunately the Eighth and Sixth

Circuits now hold—due to the technical mechanics of the Hobbs Act, 28 U.S.C. § 2342 (2006)—that defendants, in privately initiated civil suits, are without jurisdiction to raise *ultra vires* defenses to enforcement of FCC regulations. *See Nack v. Walburg*, 715 F.3d 680 (2013); *United States v. Szoka*, 260 F.3d 516 (6th Cir. 2001). As such, this case raises a matter of grave concern to the small business community, and frankly for any American who might be charged with violating an illegally adopted regulation.

5. *Amici* have submitted respective statements of interest more fully explaining their organizational interest in this case.

Amici curiae respectfully request leave to file the attached brief.

Respectfully submitted,

KAREN R. HARNED, *Counsel of Record*
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, NW Suite 200
Washington, DC 20004
Telephone: (202) 314-2048
Facsimile: (615) 916-5104
karen.harned@nfib.org

Luke A. Wake, *Of Counsel*
NFIB SMALL BUSINESS LEGAL CENTER
921 11th St., Suite 400
Sacramento, CA 95814
Telephone: (916) 448-9904
Facsimile: (615) 916-5104
luke.wake@nfib.org

Ilya Shapiro
CATO INSTITUTE
100 Massachusetts Avenue
Washington, DC 20001
Telephone: (202) 842-0200
ishapiro@cato.org

John C. Eastman
Anthony T. Caso
CENTER FOR
CONSTITUTIONAL JURISPRUDENCE
c/o Chapman U. Sch. of Law
One University Drive
Orange, CA 92886
Telephone: (714) 628-2666
jeastman@chapman.edu
caso@chapman.edu

QUESTIONS PRESENTED

The Supreme Court has repeatedly affirmed that due process "fundamental[ly]" requires "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). The questions presented here are:

(1) Whether, in conformance with the fundamental requirements of due process, Chapter 7 of the Administrative Procedures Act, 5 U.S.C. § 704, should be interpreted as authorizing a defendant—facing severe financial liabilities—an opportunity to contest the legality of a regulation under which he or she has been sued, where the plaintiff initiated the lawsuit after expiration of the time for regulated parties to bring any direct administrative challenge to the asserted *ultra vires* regulation;

(2) Whether due process requires that a defendant must be allowed an opportunity to contest the legality of an asserted *ultra vires* regulation, as an affirmative defense to a private action, when the plaintiff invokes the regulation after the time has already expired for the regulated community to bring any direct administrative challenge to the contested regulation?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

REGULATION

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37, the National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center"), Cato Institute ("Cato"), and the Center for Constitutional Jurisprudence ("CCJ") submit this brief *amici curiae* in support of Petitioner Douglas Walburg.

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents about 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs

---

[1] The Petitioner in this matter has expressly consented to the filing of this brief. The Respondent has withheld consent; however, for the reasons stated in the foregoing motion, *amici* respectfully ask this Court to accept this filing. In accordance with Rule 37.6, *amici* state that no counsel for a party authorized any portion of this brief and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files briefs in cases that will impact small businesses, including in cases challenging *ultra vires* government actions. NFIB Legal Center files here because the basic right to raise a constitutional defense to enforcement of an *ultra vires* regulation is at issue.

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*. This case is of central concern to Cato because it implicates the Due Process Clause.

The Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to uphold and restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the foundational proposition that the powers of the national government are few and defined, with the residuary of sovereign authority reserved to the states or to the people. In addition to providing

counsel for parties at all levels of state and federal courts, the Center and its affiliated attorneys have participated as *amicus curiae* or on behalf of parties before this Court in several cases, including *Koontz v. St. Johns River Water Mgmnt Dist*., No. 11-447; *Arkansas Fish & Game Comm'n v. United States*, __ U.S. __, 133 S. Ct. 511 (2012); *Sackett v. Environmental Protection Agency*, ___ U.S. ___, 132 S. Ct. 1367 (2012); *Stop the Beach Renourishment v. Florida Department of Environmental Affairs*, 560 U.S. ___, 130 S. Ct. 2592 (2010); *Rapanos v. United States*, 547 U.S. 715 (2006); and *Kelo v. City of New London, Connecticut*, 545 U.S. 469 (2005). The Center believes the issue before the Court in this matter is one of special importance to the scheme of individual liberty enshrined in the Constitution.

SUMMARY OF ARGUMENT

This case raises an issue of great importance to all Americans because it concerns the fundamental requirements of due process. In *Sackett v. EPA* this Court recently held that Chapter 7 of the Administrative Procedures Act (APA), 5 U.S.C. § 704, must be interpreted so as to allow individuals an opportunity to contest a federal agency's jurisdiction where the agency has issued a compliance order without providing an opportunity to contest its jurisdiction. 132 S. Ct. 1367, 1374 (2012). Since *Sackett* held that individuals may have their day in court to challenge a compliance order under the APA, there was no occasion for this Court to address the procedural due process issues lingering in the background. But, the Eighth Circuit's decision in this case demonstrates that

there is still substantial confusion over *when* the APA should be interpreted as conferring jurisdiction and even greater confusion over when denying an opportunity for judicial review violates due process.

In both *Sackett* and the present case, ordinary citizens are caught in a regulatory net with no apparent way to raise a constitutional argument. Faced with the threat of $75,000 per day fines, the Sacketts simply wanted a day in court to contest EPA's jurisdiction over their property. *Id.* at 1370. Similarly, in this case Douglas Walburg, a small business owner, seeks the basic right to contest the legality of a regulation under which he has been sued for $16-48 million dollars. Pet. for Cert. at 5, No. 13-486 (2013). As in *Sackett*, Walburg faces ruinous regulatory penalties and is without any meaningful way to seek judicial relief. Such a result is constitutionally repugnant.

In patent conflict with the Eleventh Circuit's decision in *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236 (2003)—but consistent with the Ninth Circuit's now repudiated decision in *Sackett*—the Eighth Circuit's decision in this case ignores the constitutional infirmities inherent in a rule that effectively forecloses any meaningful opportunity for judicial review. The decision holds that a defendant facing severe financial liabilities under a potentially illegal FCC regulation is without any right to raise a constitutional defense to the regulation outside of the context of a *separate* administrative proceeding. *Nack v. Walburg*, 715 F.3d 680, 686 (8th Cir. 2013). This Court's review is necessary to make clear that civil defendants have an immediate due process

right to contest the validity of a regulation under which they have been sued.

ARGUMENT

I. *CERTIORARI* SHOULD BE GRANTED BECAUSE THE RULE ADOPTED BY THE EIGHTH CIRCUIT WILL HAVE A SIGNIFICANT NATIONWIDE IMPACT

1. The Case Concerns a Grave Matter

Douglas Walburg is a defendant in what may well be a frivolous lawsuit. He has been charged with violating a Federal Communications Commission (FCC) regulation, 47 C.F.R. § 16.1200(a)(3)(iv) ("Consensual-Facsimile Regulation"), because he sent a fax to someone who had *expressly* given him permission. Now he faces a class action lawsuit and a potential liability of between $16,042,500 and $48,127,000 in penalties for—at worst—an innocuous mistake.[2]

His alleged mistake was in failing to provide information on how the recipient could opt-out of future faxes; however, at this point it still remains unclear whether there is *any* basis in law for requiring an opt-out notice on previously authorized faxes. *See Nack v. Walburg*, 715 F.3d 680, 686 (2013) (concluding that the court lacks jurisdiction to consider a substantive challenge to the Consensual-

[2] The Plaintiff, representing himself and similarly situated individuals, seeks $500 per fax, and $1,500 for each "knowing" violation of the Consensual-Facsimile Regulation. *See* Pet. App. 4a, 40a.

Facsimile Regulation). Walburg has been denied the opportunity to contest the legality of the Consensual-Facsimile Regulation—notwithstanding the fact that he has been charged with violating the regulation. Despite recognizing that there may be a legitimate basis for his contention that the Consensual-Facsimile Regulation was *ultra vires*, the Eighth Circuit held that the Hobbs Act, 28 U.S.C. § 2342 (2006), precludes the court from even considering the argument.[3] Accordingly, the court remanded the case for further proceedings in a manner that leaves the district court with no choice but to enforce the Consensual-Facsimile Regulation—and its heavy-handed penalties—notwithstanding the significant possibility that there is no actual basis in law for the contested regulation.[4]

---

[3] *See Nack*, 715 F.3d at 685 ("Setting aside any concerns regarding the validity of [the Consensual Facsimile Regulation] or the scope of the private right of action" and holding that "the Hobbs Act precludes us from entertaining such challenges at the present stage.").

[4] The opinion holds out the possibility that "the district court may entertain [a] request[] to stay proceedings" so as to allow the defendant to initiate a separate administrative action to attain judicial review of the regulation's validity. *Nack*, 715 F.3d at 687. As such, Walburg has pursued a stay in litigation in order to initiate a petition to amend or repeal the Consensual-Facsimile Regulation. But, the petition for *certiorari* raises the issue of whether a civil defendant should have to initiate a separate administrative proceeding in order to have an opportunity to raise a constitutional defense to enforcement of a regulation under which he or she has been sued. *Amici* urge the Court to take this case in order to make clear that a defendant has an *immediate* right to raise all potential defenses once subject to an enforcement action—regardless of whether privately initiated or not.

Of course there should be no doubt that if the FCC had brought an enforcement action against Walburg for allegedly violating the Consensual-Facsimile Regulation he would have the right to contest its legality.[5] But here Walburg has been sued in a private class action. For this reason the FCC maintains—and the Eighth Circuit now holds—that Walburg has no right to raise his *ultra vires* defense without initiating a separate administrative action. *Nack*, 715 F.3d at 686. Under this precedent, any challenge to a FCC regulation—regardless of whether raised by a Plaintiff as a sword, or invoked by a defendant as a shield—must be advanced, under the Hobbs Act, through prescribed administrative channels before a court may consider the validity of a potentially *ultra vires* regulation.

Yet setting aside the technical mechanics of the Hobbs Act, this case presents an issue of grave concern for all Americans because it implicates the fundamental requirements of due process. Anytime a citizen faces potentially ruinous penalties for allegedly violating a federal law, he or she should be given a meaningful opportunity—as a matter of due process—to raise constitutional defenses. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.') (citations omitted). This principle was implicitly invoked in Justice Alito's concurrence in *Sackett v. EPA*, 132 S. Ct. 1367, 1375

---

[5] Even FCC acknowledges that the Court would have jurisdiction to consider this defense in a federal enforcement action. Br. of Amicus Curiae FCC at 22, 715 F.3d 680 (2013) (filed Feb. 24, 2012).

(2012), when he said it was "unthinkable" that citizens—facing $75,000 per day fines for allegedly violating federal law—would be denied the opportunity to contest an agency's jurisdiction upon receiving a compliance order. But, in that case the Court never got to the underlying due process issues because *Sackett* held that Chapter 7 of the Administrative Procedures Act (APA) conferred jurisdiction on Mike and Chantelle Sackett to challenge EPA's jurisdiction over their land, since they had no other adequate remedy at law. *Id*. at 1374.

Accordingly, this case raises important questions in the wake of *Sackett*: (a) whether the APA also gives individuals an opportunity to immediately contest the legality of a regulation that they have been charged with violating in a privately initiated civil lawsuit, or (b) whether fundamental constitutional principles require courts to consider *ultra vires* defenses in such a case. It is simply "unthinkable" that a civil defendant—facing crippling penalties—would be prohibited from raising an *ultra vires* defense in "a nation that values due process." *See Sackett*, 132 S. Ct. at 1375 (Alito concurring). As with *Sackett*, it is safe to say that, if the facts of this case were relayed to ordinary Americans, most "would say this kind of thing can't happen in the United States[.]" Transcript of Oral Argument at 37, *Sackett* 132 S. Ct. 1367 (No. 10-1062).

2. The Eighth Circuit's Interpretation of the Hobbs Act Denies Defendants in Privately Initiated Lawsuits Any Meaningful Opportunity to Raise Constitutional Defenses to FCC Regulations

According to the FCC's *amicus* filings in the Eighth Circuit, the Hobbs Act allows for only three ways to challenge the validity of a FCC regulation: (a) contest the validity of the regulation in a timely petition for reconsideration [*i.e.* within 30 days of promulgation]; (b) petition FCC to amend or repeal the regulation; or (c) wait until the agency brings an enforcement action, at which point the defendant may contest the agency's jurisdiction. Br. of Amicus Curiae FCC at 22. The Eighth Circuit definitely adopted this interpretation of the Hobbs Act, therein holding that it was without jurisdiction to consider Walburg's *ultra vires* defense. *Nack*, 715 F.3d at 686. In doing so, the Eighth Circuit denied him the opportunity to be heard "'at a meaningful time and in a meaningful manner.'" *Eldridge,* 424 U.S. at 333.

i. Walburg Could Not Have Petitioned for Reconsideration

As the FCC pointed out in its *amicus*, "[t]he 30-day time limit for seeking reconsideration of FCC's 2006 adoption of [the Consensual-Facsimile Regulation] has long since expired." Br. of Amicus Curiae FCC at 22. Thus, from the beginning of this lawsuit, it was impossible for Walburg to pursue a

petition for reconsideration. *Id*. To be sure, he did not even send out the fax in question until 2006, more than a year after FCC finalized the regulation. Pet. App. 17a-18a.

At this juncture Walburg simply asks for an opportunity to raise a constitutional defense—namely that he is being subjected to financial penalties without any basis in law. But this constitutional injury, if indeed the regulation is *ultra vires*, did not even occur until the lawsuit was initiated, long after the close of the short window for seeking a petition for reconsideration. *See* Timothy Sandefur, *The Timing of Facial Challenges*, 43 Akron L. Rev. 51, 77 (2010) (explaining that while "challenge[s] to a law's constitutionality must be within the limitations period after" the injury occurs, it is "very rare[] [that] the injury occur[s] through the mere enactment of the law."). Accordingly, there is something grievously wrong with the assumption that Walburg should have pursued this avenue.[6]

---

[6] The ripeness doctrine holds that one cannot seek judicial relief until the point at which the plaintiff's injury is certain because until that time it cannot be said that "all factors necessary to state a claim are present…" Sandefur, 43 Akron L. Rev. at 55 (2010). But, for a defendant facing an enforcement action under an *ultra vires* regulation, the injury necessarily arises at the instant the enforcement action is initiated because at that point it is clear that the defendant faces an immediate threat of being subjected to a judicial order taking life, liberty or property without any basis in law. Of course, it is absurd to think that a defendant in an enforcement action should have to initiate a separate action to have an opportunity to vindicate his or her interest in obtaining a judicial declaration that is no basis in law to enforce that regulation. *See Horne v. Dept. of Agriculture*, 133 S. Ct. 2053, 2063 (2013) (suggesting such a requirement "would make little sense").

ii. The Right to Initiate a Separate Administrative Action, Does Not Amount to an Adequate Remedy

At this time, the only administrative avenue theoretically available to anyone seeking to contest the validity of FCC's Consensual-Facsimile Regulation would be in a petition asking FCC to amend or repeal the regulation.[7] *See* Br. of Amicus Curiae FCC at 22-23. Of course there is a serious question as to whether a defendant in a privately initiated federal lawsuit should have to initiate a separate administrative proceeding in order to raise a constitutional defense. Whether the right to initiate such a petition constitutes an adequate remedy at law is an important question. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) ("An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.") (internal citations omitted); *see also Horne*, 133 S. Ct. at 2063 (2013) (noting that "[i]n a case of an administrative enforcement proceeding, when a party raises a constitutional defense to an assessed fine, it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of the same money in another proceeding."). Moreover, this is a question capable of

---

[7] Theoretically one might eventually obtain judicial relief through this process; however, as *amicus* Anda Inc. made clear, that procedure has been insufficient for other companies facing similar conundrums in privately initiated Consensual-Facsimile Regulation cases. Br. Amicus Curiae of Anda, Inc., 715 F.3d 680 (2013) (filed Jul. 23, 2012).

repetition because this avenue is *always* available to parties charged with violating federal law.

To be sure, this option was also available to the Sacketts when they were subjected to the threat of ruinous daily fines for allegedly violating the Clean Water Act. Br. of Amicus Curiae FCC at 22 (affirming that "an aggrieved person at any time can petition [an agency] to amend or repeal [a] rule on the basis that the rule is unauthorized by statute."). Surely they could have petitioned EPA to issue clarifying regulations on the scope of the agency's jurisdiction in a manner that would have exonerated them. But, notwithstanding the fact that the Sacketts could have theoretically petitioned for an administrative amendment, or pursued other administrative avenues, this Court held that the family was without any adequate remedy to address their constitutional injury besides seeking judicial review by invoking the APA.[8] *Sackett*, 132 S. Ct. at 1374. Thus, *a fortiori*, the possibility of pursuing a petition for a regulatory amendment—like the possibility of lobbying Congress to amend a statute—cannot constitute an adequate remedy at law for a citizen suffering a constitutional injury under an illegally adopted regulation. *Id.* at 1372 (noting that "[t]he remedy for denial of action that might be sought from one agency does not ordinarily provide an 'adequate remedy' for action already taken…").

[8] Though staking out an aggressive position in Sackett, EPA was not so bold as to raise the argument that the potential for pursuing an administrative amendment could satisfy the family's due process right to be heard.

Furthermore, there are other compelling reasons to conclude that the right to petition for an amendment is an inadequate remedy in such a case. Most significantly there is no guarantee that an amendment—even if adopted—will be given retroactive application, and therefore no guarantee that the amendment process will sufficiently safeguard a civil defendant from *ultra vires* liability.[9] *See Northeast Hosp. Corp. v. Sebelius*, 657 F.3d 1, 14 (D.C. Cir. 2011) (stating that the "rule against retroactive rulemaking applies just as much to amendments to rules as to original rules themselves."). Yet even if the right to petition for an administrative amendment might constitute an adequate available remedy for the purposes of the APA, it is highly questionable whether it is constitutionally permissible to deny a civil defendant, facing ruinous penalties, the basic opportunity to challenge the legality of an *ultra vires* regulation directly as a defense. *See, e.g.*, *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986) (explaining that due process entitles a defendant to a "meaningful opportunity to present a complete defense" at his trial) (citation omitted)); *California v.*

---

[9] The Eighth Circuit's decision implies—but does not expressly state—that Walburg still has an adequate opportunity to raise his defense through the administrative process, notwithstanding the fact that the time for seeking reconsideration has long-since passed. *See Nack*, 715 F.3d at 686. This suggests that the only remaining administrative avenue—a petition for amendment—constitutes a constitutionally adequate remedy. But, in any event, the decision did not consider whether a petition to amend or repeal the regulation would have retroactive effect, or whether such a procedure would satisfy "the fundamental requirement of due process… [that Walburg be given] the opportunity to heard 'at a meaningful time and in a meaningful manner.'" *Eldridge*, 424 U.S. at 333.

Trombetta, 467 U.S. 479, 485 (1984) (explaining that defendants are guaranteed "a meaningful opportunity to present a complete defense"); *In re Oliver*, 333 U.S. 257, 273 (1948) (explaining that due process requires that a defendant be given "reasonable notice of a charge against him, and an opportunity to be heard in his defense").

iii. The Right to Raise a Constitutional Defense in a Privately Initiated Suit Cannot Hinge on When—if Ever—a Federal Agency Will Bring an Enforcement Action

In *Sackett* this Court took issue with the idea that a citizen, facing devastating financial penalties, should have to wait indefinitely for EPA to initiate an enforcement action before challenging the agency's jurisdiction.[10] *Sackett*, 132 S. Ct. at 1374. FCC essentially takes the same position here, except FCC goes even further. *Id*. at 1372 (noting that EPA did not "seriously contend that other available remedies alone foreclose[d] review…"). As in *Sackett*, the agency acknowledges that citizens have a right to contest jurisdiction when the agency initiates an enforcement action. Br. of Amicus Curiae FCC at 22.

---

[10] *See* Damien Schiff, *Sackett v. EPA: Compliance Orders and the Right of Judicial Review*, 2011-2012 CATO SUP. CT. REV. 113, 120 (2012) (writing in a post-script to the Sackett case, their attorney explained that "we argued … the Sacketts should not have to wait until an EPA lawsuit for them to get judicial review [because] that [] would violate the principle of *Thunder Basin* and *Ex parte Young*—that the right to judicial review would be conditioned on the Sacketts' violating the compliance order and thereby risking significant liabilities.").

But, FCC advocated a rule in this case—which the Eighth Circuit adopted—that individuals have no right to raise such a defense when sued in a privately initiated lawsuit.[11] The effect of this rule is to immunize FCC regulations from judicial scrutiny so long as the agency relies on private enforcement mechanisms.[12]

---

[11] FCC argued in the Eighth Circuit that "[T]his case does not arise from any action by the Commission… [and for this reason] this Court has no power to permit an 'end run' around" the requirements of the Hobbs Act." Br. of Amicus Curiae FCC at 22-23.

[12] It is true that a regulated party could pursue an administrative petition to amend a contested regulation and could thus obtain judicial review when the agency denies the petition. But, this is cold comfort for a defendant already charged with violating an illegally adopted regulation. Given the exorbitant costs of legal representation today, ordinary individuals and small business owners are usually without sufficient economic resources to fight a protracted legal battle. Often faced with shock-and-awe legal tactics, most have little choice but to seek a settlement. Given this economic reality, the fundamental principles of due process counsel against requiring a defendant to initiate a separate proceeding in order to vindicate the right to contest enforcement of an *ultra vires* regulation. A defendant should be allowed to directly raise all constitutional defenses without first spinning wheels on a costly procedural merry-go-round. *Sackett*, 132 S. Ct. at1372 (noting that potential to pursue new administrative procedures "[does] not ordinarily provide an 'adequate remedy' for action already taken by another agency.").

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A DEEPENING CONFLICT BETWEEN THE CIRCUITS OVER WHEN DUE PROCESS REQUIRES AN OPPORTUNITY FOR JUDICIAL REVIEW

The petition for *certiorari* in *Sackett* pointed to an existing conflict between the Ninth and Eleventh Circuits on the issue of whether a citizen—faced with the immediate threat of ruinous civil penalties under an administrative compliance order—has a due process right to immediately challenge an agency's jurisdiction. Pet. for Cert. at 15-16, No. 10-1062 (2012) ("Sackett Petition"). The Ninth Circuit's decision in *Sackett* ignored the constitutional infirmities inherent in a rule that effectively forecloses any meaningful opportunity for judicial review. *Sackett v. EPA*, 622 F.3d 1139, 1147 (9th Cir. 2010). As such, the decision stood in conflict with the Eleventh Circuit's decision in *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236 (2003), which had previously held that due process requires a judicial avenue to immediately advance a jurisdictional challenge regardless of whether federal statutes appear to preclude courts from hearing the challenge. *See* Sackett Petition at 15-16 (explaining that—in conflict with the Ninth Circuit's decision in *Sackett*, "[t]he Eleventh Circuit held that enforcement of [a] compliance order would violate the Due Process Clause because the [statute] did not afford any basis for contesting the compliance order.").

Since *Sackett* was resolved on statutory grounds—holding that the APA authorized the

Sackett family to immediately advance their jurisdictional challenge—there was no occasion for the Court to resolve the conflict between the Ninth and Eleventh Circuits over *when* due process requires a court to allow a citizen an opportunity for judicial review. But, in this case the Court is once more presented with an opportunity to address this issue. Specifically, the case presents an opportunity to clarify that either (a) the APA safeguards the right of a civil defendant to raise an *ultra vires* defense to an illegally promulgated federal regulation; or (b) due process requires that a defendant be given an opportunity to raise such a defense without initiating a separate administrative action.

Importantly, the Eleventh Circuit's decision in *Tennessee Valley Authority* held that due process requires an *immediate* opportunity for a citizen to contest an agency's jurisdiction when faced with the threat of crippling financial penalties.[13] The possibility of waiting for the agency to take an enforcement action, and the possibility of pursuing a petition to amend regulations governing how the agency enforces the contested regulatory scheme were presumptively insufficient remedies. *Tennessee Valley Auth.*, 336 F.3d 1236, 1259 (11th Cir. 2003) (referring to a statutory regime denying an immediate right of judicial review as a "patent violation of the Due Process Clause"). The Eleventh

[13] Sackett Petition at 16 ("The statutory language, according to the Eleventh Circuit, unambiguously precludes the recipient of a compliance order from raising a jurisdictional defense, and for that reason the order cannot be enforced without first giving the order's recipient an opportunity to contest it.").

Circuit held that denying a right of immediate judicial review would violate the fundamental requirements of due process. *See Tennessee Valley Auth.*, 336 F.3d 1236, 1259 (11th Cir. 2003) (commenting further that "[w]ithout meaningful judicial review, the scheme works an unconstitutional delegation of judicial power."). Accordingly the Eighth Circuit's decision in the present case conflicts with *Tennessee Valley Authority* in so far as it assumes that due process may be satisfied in pursuing indirect administrative channels. Moreover the Eighth Circuit went further than even the Ninth Circuit's decision in *Sackett* because the Ninth Circuit assumed that civil defendants would have a right to raise constitutional defenses if they were subjected to a civil enforcement action.

III. THIS CASE ALSO PRESENTS AN OPPORTUNITY FOR THIS COURT TO ADDRESS SEVERE DOCTRINAL CONFUSION AMONG THE FEDERAL CIRCUITS OVER WHETHER A DEFENDING PARTY BEARS ANY BURDEN TO DEMONSTRATE JURISDICTION

The fundamental doctrinal flaw in the Eighth Circuit's decision was in its assumption that a defending party must prove that the court has jurisdiction to hear a constitutional defense. *See Thomson v. Gaskill*, 315 U.S. 442, 446 (1942) (explaining that the plaintiff bears the burden of demonstrating jurisdictional facts); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)

(holding that "[t]he party invoking federal jurisdiction bears the burden of establishing [Article III standing]."); *Watt v. Energy Action Found.*, 454 U.S. 151, 160 (1981) (holding that once a single plaintiff demonstrates standing, the court has Article III jurisdiction). This errant rule gives way to a miscarriage of justice, as it denies defendants the due process right to be heard at a meaningful time and in a meaningful place. But, the Eighth Circuit is not alone in holding that a defending party bears the burden of demonstrating jurisdiction. Indeed the Sixth Circuit embraced this same faulty assumption in holding that the Hobbs Act prohibits civil defendants from contesting the validity of FCC regulations. *United States v. Szoka*, 260 F.3d 516 (6th Cir. 2001) (holding that the defendant must "pursue his constitutional claims through…the administrative process" and stating that the defendant cannot use "a constitutional claim as a shield in a defense" to an FCC enforcement action).

And of course these rulings conflict with decisions in other circuits. For example, the Third Circuit refused to interpret a statute as a jurisdictional bar to an affirmative defense in *Nat'l Union Fire Ins. Co. of Pittsburg, Pa. v. City of Sav.*, F.S.B., 28 F.3d 376, 394 (3d Cir. 1994). "If parties were barred from presenting defenses and affirmative defenses to claims which have been filed against them, they would not only be unconstitutionally deprived of their opportunity to be heard, but would invariably lose on the merits of the claims brought against them."

Yet this doctrinal confusion is even more systemic than it might appear on the surface. On the same faulty assumption the Seventh, Eighth and D.C Circuits hold that defendant-interveners must satisfy Article III standing requirements to invoke federal jurisdiction, regardless of whether the court is already satisfied as to its jurisdiction to hear a case.[14] *See Mausolf v. Babbit*, 85 F.3d 1295 (8th Cir. 1996) ("In our view, an Article III case or controversy, once joined by intervnors that lack standing, is—put bluntly—no longer an Article III case or controversy."); *Solid Waste Agency of N. Cook County v. U.S. Army Corp. of Eng'rs*, 101 F.3d 503 (7th Cir. 1996) (citing judicial economy as a basis for requiring interveners to demonstrate standing); *Rio Grande Pipeline Co. v. F.E.R.C.*, 178 F.3d 533 (D.C. Cir. 1999) (reasoning that interveners seek to participate on "equal footing" with the original parties). Of course the majority of the circuits squarely reject the notion that interveners bear a

[14] The rule in these circuits broadly requires all interveners to demonstrate jurisdictional standing—regardless of the fact that the original parties have demonstrated jurisdiction. But, it should be noted that even within these circuits there has been tension on the issue of whether interveners should be required to demonstrated Article IIII standing. *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (observing that "requiring standing for an applicant wishing to come in on the side of a plaintiff… runs into the doctrine that Article III is satisfied so long as one party has standing," while "[r]equiring standing of someone who seeks to intervene as a defendant… runs into the doctrine that the standing inquiry is directed at those who invoke the court's jurisdiction.") (internal citations omitted); *Habitat Educ. Ctr. v. Bosworth*, 221 F.R.D. 488 (E.D. Wis. 2004) (recognizing the "inconsistent" nature of the Seventh Circuit's position on standing and noting that "Article III represents a limitation on the power of the federal courts—not a requirement of all who seek to come before them.").

duty to demonstrate jurisdiction. This is because the majority view recognizes that the burden of demonstrating jurisdiction rests *exclusively* on those parties initiating a lawsuit. *See U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) (recognizing that there is no need to require an intervenor to have standing where the "case or controversy" has already been established); *Ruiz v. Estelle*, 161 F.3d 814, 832 (5th Cir. 1998) (intervener need not demonstrate standing where seeking the same relief as a subsisting party with standing); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994) (holding that there is no need to demonstrate standing where the plaintiff has established standing); *Perry v. Schwarzenegger*, 630 F.3d 898 (9th Cir. 2011) (noting that standing is not generally required for intervention); *San Juan Cnty, Utah v. U.S.*, 503 F.3d 1163, 1205 (10th Cir. 2007) (*en banc*) (holding that there is no need to establish standing where an intervener supports a party that has already demonstrated standing); *Chiles v. Thornburg*, 865 F.2d 1197, 1213 (11th Cir. 1989) (intervener need not demonstrate standing "as long as there exists a justiciable case and controversy between the parties already in the lawsuit").

This makes sense because it is the plaintiff who invokes the court's jurisdiction, asking for specific judicial relief. *See Roeder*, 333 F.3d at 233 (observing, as doctrine, "that the standing inquiry is directed at those who invoke the court's jurisdiction."); *see also Lujan*, 504 U.S. at 561. As such, once the court's jurisdiction to hear a claim—and provide the requested relief—has been established, there should be no question as to the

right of the defendant to raise all legitimate defenses.[15] *See Chiles*, 865 F.at 1204 (describing "the question of standing" as concerning "the plaintiff's … 'personal stake in the outcome.'") (citing *Baker v. Carr,* 369 U.S. 186, 204 (1962)). Yet, in light of a growing split in authority, it would be proper for this Court to accept *certiorari* in order to address systemic confusion over whether jurisdiction is even an issue once a plaintiff has established jurisdiction. Specifically, this Court should make clear that there is no reason to require a jurisdictional analysis of any other party. In doing so, the Court can make clear that, once a plaintiff invokes the court's jurisdiction, the defendant—having been dragged into the proceeding unwillingly—has an immediate right to mount a full and adequate defense. Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 Yale L. & Pol'y Rev. 1, 8 (2006) ("Briefly stated, the essential element of procedural due process, as clearly established in civil settings, is that notice and a hearing must ordinarily *precede* any governmental deprivation of a liberty or property interest.") (emphasis added).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

---

[15] This also comports with the plain language of Chapter 7 of APA, which confers jurisdiction on a party to initiate a civil lawsuit when there is "no other adequate remedy at law." 5 U.S.C. § 704. Of course, the implication is that Congress believed it was necessary confer jurisdiction on a party who had no other means of obtaining judicial relief. But Congress most likely assumed—and reasonably so—that a civil defendant would already have the right raise constitutional defenses.

Respectfully submitted,

KAREN R. HARNED, *Counsel of Record*
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, NW Suite 200
Washington, DC 20004
Telephone: (202) 314-2048
Facsimile: (615) 916-5104
karen.harned@nfib.org

Luke A. Wake, *Of Counsel*
NFIB SMALL BUSINESS LEGAL CENTER
921 11th St., Suite 400
Sacramento, CA 95814
Telephone: (916) 448-9904
Facsimile: (615) 916-5104
luke.wake@nfib.org

Ilya Shapiro
CATO INSTITUTE
100 Massachusetts Avenue
Washington, DC 20001
Telephone: (202) 842-0200
ishapiro@cato.org

John C. Eastman
Anthony T. Caso
CENTER FOR
CONSTITUTIONAL JURISPRUDENCE
c/o Chapman U. Sch. of Law
One University Drive
Orange, CA 92886
Telephone: (714) 628-2666
jeastman@chapman.edu
caso@chapman.edu