

13-486

No. _____

Supreme Court, U.S.
FILED

OCT 15 2013

OFFICE OF THE CLERK

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

PETITION FOR A WRIT OF CERTIORARI

Matthew S. Hellman
Samuel L. Feder
Matthew S. McKenzie
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001

T. Michael Ward
Counsel of Record
Russell F. Watters
Timothy J. Wolf
Robert L. Carter
BROWN & JAMES, P.C.
800 Market St.
Suite 1100
St. Louis, Missouri 63101
(314) 421-3400
tward@bjpc.com

October 15, 2013

QUESTION PRESENTED

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). For several reasons, including substantial First Amendment concerns, Congress has never imposed restrictions on *solicited* faxes.

Yet the FCC has promulgated a regulation governing the form of solicited faxes, requiring that solicited faxes contain a notice that recipients may “opt out” of receiving such faxes. The FCC provided no notice to the industry that it was considering regulating solicited faxes, and it buried the “opt-out” requirement in a lengthy rule that otherwise addresses only *unsolicited* faxes.

As the case comes to this Court, it is undisputed that Petitioner Douglas Walburg sent faxes only to prospective customers who expressly agreed to receive them. Yet Respondent Michael Nack, one such prospective customer, brought a TCPA class action seeking tens of millions of dollars on the ground that Walburg’s faxes lacked the “opt-out” notice.

As a defense to liability, Walburg argued that the FCC regulation exceeded the FCC’s statutory authority. But the Eighth Circuit held that it was barred from considering the validity of the regulation by the Hobbs Act, 28 U.S.C. § 2342(1), which vests exclusive jurisdiction in the courts of appeals over any “proceeding to enjoin, set aside, annul, or suspend” an order of the FCC, 47 U.S.C. § 402(a), and imposes a 60-day time period for bringing such a challenge. In so doing, the Eighth Circuit split with the Sixth Circuit, and adopted a rule in which an unconstitutional and

illegal FCC regulation may form the basis of hundreds of millions of dollars of civil liability.

The question presented is whether the Hobbs Act prohibits a defendant from raising the invalidity of an FCC regulation when that regulation forms the basis of a class action brought by a private party seeking crippling monetary damages.

PARTIES TO THE PROCEEDING

Petitioner Douglas P. Walburg does business as a sole proprietorship called Mariposa Publishing, which publishes and sells a handbook providing contact information for courts and government offices. Petitioner markets the handbooks to attorneys and law firms in six states, Missouri, Georgia, Iowa, Minnesota, North Carolina, and Ohio.

Respondent Michael R. Nack is an individual who expressly consented to receive fax advertisements from Petitioner and subsequently received such a communication. Neither party is a corporation.

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING	iii
TABLE OF AUTHORITIES.....	vi
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	2
I. Statutory and Regulatory Background	2
II. Factual Background and Proceedings Below	5
REASONS FOR GRANTING THE PETITION	7
I. The Eight Circuit's Decision Conflicts with Sixth Circuit Precedent	8
II. The Question Presented Is of Considerable Practical and Constitutional Importance	11
III. This Case Presents an Ideal Vehicle to Resolve the Split of Authority on the Question Presented.....	19
CONCLUSION	21

Appendix A

Nack v. Walburg, 715 F.3d 680 (8th Cir. 2013) 1a

Appendix B

Nack v. Walburg, No. 4:10CV00478 AGF,
2011 WL 310249 (E.D. Mo. Feb. 7, 2011) 16a

Appendix C

Denial of Rehearing, *Nack v. Walburg*, No.
11-1460 (8th Cir. July 16, 2013)..... 31a

Appendix D

47 U.S.C. § 227 33a

Appendix E

47 C.F.R. § 64.1200 41a

Appendix F

28 U.S.C. §§ 2342 and 2344 33a

Appendix G

47 U.S.C. §§ 402 and 405 48a

Appendix H

*In re Rules and Regulations Implementing
the Telephone Consumer Protection Act of
1991*, Report and Order and Third Order on
Reconsideration, 21 FCC Rcd 3787 (2006)..... 51a

Appendix I

S. Rep. No. 109-76 (2005), *reprinted in* 2005
U.S.C.C.A.N. 319..... 61a

TABLE OF AUTHORITIES

CASES

<i>Adams Fruit Co. v. Barrett</i> , 494 U.S. 638 (1990)	18
<i>Bowen v. Georgetown University Hospital</i> , 488 U.S. 204 (1988).....	13
<i>CE Design, Ltd. v. Prism Business Media, Inc.</i> , 606 F.3d 443 (7th Cir. 2011).....	9, 11
<i>City of Arlington v. FCC.</i> , 133 S. Ct. 1863 (2013)	18
<i>Commonwealth Edison Co. v. United States Nuclear Regulatory Commission</i> , 830 F.2d 610 (7th Cir. 1987).....	17
<i>Functional Music, Inc. v. FCC</i> , 274 F.2d 543 (D.C. Cir. 1958).....	17
<i>Holden v. Hardy</i> , 169 U.S. 366 (1898).....	16
<i>ICORE, Inc. v. FCC</i> , 985 F.2d 1075 (D.C. Cir. 1993).....	13
<i>Leyse v. Clear Channel Broadcasting, Inc.</i> , 697 F.3d 360 (6th Cir. 2012).....	8, 9, 10, 16, 17
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803)	18
<i>National Association of State Utility Consumer Advocates v. FCC</i> , 457 F.3d 1238 (11th Cir. 2006), <i>modified on other grounds on denial of reh'g</i> , 468 F.3d 1272 (11th Cir. 2006).....	12
<i>Nelson v. Adams USA, Inc.</i> , 529 U.S. 460 (2000)	16

<i>Yale Broadcasting Co. v. FCC</i> , 478 F.2d 594 (D.C. Cir. 1973).....	14
---	----

STATUTES AND REGULATIONS

5 U.S.C. § 554(e).....	14
28 U.S.C. § 1254(1).....	1
28 U.S.C. § 2342(1).....	1, 4
28 U.S.C. § 2344	4, 12
47 U.S.C. § 227	1
47 U.S.C. § 227(a)(2)	2
47 U.S.C. § 227(a)(5)	2, 20
47 U.S.C. § 227(b)	5, 6
47 U.S.C. § 227(b)(1)(C)	2, 20
47 U.S.C. § 227(b)(2)(D)	2
47 U.S.C. § 227(b)(3).....	2, 6
47 U.S.C. § 402(a).....	1, 4, 10
47 U.S.C. § 405(a).....	11, 12, 13
Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 3, 105 Stat. 2394, 2395	2
Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359	2
47 C.F.R. § 64.1200(a)(3).....	3
47 C.F.R. § 64.1200(a)(3)(iv).....	3

LEGISLATIVE MATERIALS

S. Rep. No. 109-76 (2005), <i>reprinted in</i> 2005 U.S.C.C.A.N. 319	2
---	---

OTHER AUTHORITIES

Order, <i>In re Anda, Inc.</i> , No. 12-1145 (D.C. Cir. Apr. 24, 2012).....	14
Forest Pharmaceuticals Petition for Declaratory Ruling and/or Waiver, CG Docket No. 05-338 (FCC filed June. 27, 2013).....	15
Gilead Sciences Petition for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278, 05-338 (FCC filed Aug. 9, 2013).....	15
Henry M. Hart, Jr., <i>The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic</i> , 66 Harv. L. Rev. 1362 (1953)	18
<i>In re Junk Fax Prevention Act of 2005 Petition For Declaratory Ruling To Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission's Rule Requiring an Opt-Out Notice for Fax Advertisements Sent With Recipient's Prior Express Consent</i> , Order, 27 FCC Rcd 4912 (CGB 2012).....	13, 14
<i>In re Motions For Declaratory Rulings Regarding Commission Rules And Policies For Frequency Coordination In The Private Land Mobile Radio Services</i> , Memorandum Opinion and Order, 14 FCC Rcd 12,752 (1999)	15
Petition of Douglas Paul Walburg and Richie Enterprises, LLC, for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278, 05-338 (FCC filed Aug. 19, 2013)	15-16

Petition of Staples, Inc. and Quill Corp. for Rulemaking and Declaratory Ruling, CG Docket Nos. 02-278, 05-338 (FCC filed July. 19, 2013).....	15
<i>In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking and Order, 20 FCC Rcd 19,758 (2005)</i>	<i>3, 19</i>
<i>In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006)</i>	<i>3, 4</i>
<i>In re Service Rules For The 698-746, 747-762, And 777-792 MHZ Bands, Memorandum Opinion Order on Reconsideration, 28 FCC Rcd 2671 (2013)</i>	<i>14</i>

PETITION FOR A WRIT OF CERTIORARI

Douglas P. Walburg respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) in this case is reported at 715 F.3d 680. The opinion and order of the district court (Pet. App. 16a-30a) granting summary judgment for Petitioner is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 2013. Pet. App. 1a. A timely petition for rehearing and for rehearing *en banc* was denied on July 16, 2013. Pet. App. 31a-32a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Telephone Consumer Protection Act of 1991 ("TCPA"), as amended by the Junk Fax Prevention Act of 2005 ("JFPA"), 47 U.S.C. § 227, are reprinted at Pet. App. 33a-40a. Also reprinted in the appendix are the Administrative Orders Review Act, 28 U.S.C. § 2342(1) ("Hobbs Act"), Pet. App. 46a-47a, and Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), Pet. App. 48a-50a.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

1. In regulating fax communications, Congress has consistently declined to impose restrictions on advertisements sent with the recipient's express consent. In 1991, Congress enacted the TCPA, which prohibited the sending of "unsolicited advertisements" via fax. *See Telephone Consumer Protection Act of 1991*, Pub. L. No. 102-243, § 3, 105 Stat. 2394, 2395, *codified at* 47 U.S.C. § 227(b). An "unsolicited advertisement" is one that "is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(5). The TCPA also created a private right of action for claims "based on a violation of this subsection [§ 227(b)] or the regulations prescribed under this subsection." *Id.* § 227(b)(3).

In 2005, Congress enacted the JFPA, which also did not impose any requirements on faxes sent with express consent. *See Junk Fax Prevention Act of 2005*, Pub. L. No. 109-21, 119 Stat. 359. The JFPA created an exception to the prohibition on unsolicited advertisements; it allowed unsolicited fax advertisements where there is already an "established business relationship" ("EBR") with the recipient, as long as the sender of the unsolicited advertisement provides an "opt-out" notice on the fax informing recipients how to stop future faxes. 47 U.S.C. § 227(a)(2), (b)(1)(C), (b)(2)(D). Congress deemed the opt-out notice necessary because the existence of some type of business relationship may not reflect a willingness to receive faxes. *See S. Rep. No. 109-76*, at 6-7 (2005), reprinted in 2005 U.S.C.C.A.N. 319, 325

("[I]n 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."). Congress did not impose an opt-out notice requirement for faxes sent *with* the recipient's express consent.

The FCC proposed regulations implementing the JFPA in December 2005. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking and Order, 20 FCC Rcd 19,758 (2005) ("*JFPA NPRM*"). The proposed rules tracked the statutory language for the EBR exception and its associated opt-out notice requirement, and did not contemplate extending those requirements to fax advertisements sent with the recipient's express permission. *Id.* at 19,767-68 ¶¶ 19-20. Indeed, the proposed rule did not discuss imposing requirements of any nature on solicited faxes.

Nevertheless, when the FCC adopted its final opt-out notice regulations in April 2006, it included a regulation that "[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include [a qualifying] opt-out notice." 47 C.F.R. § 64.1200(a)(3)(iv). The FCC appended this requirement to a regulation that otherwise applies only to unsolicited faxes. *See* 47 C.F.R. § 64.1200(a)(3). And the FCC's accompanying order states contradictorily that "the opt-out notice requirement *only* applies to communications that constitute *unsolicited* advertisements." *In re Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order and Third

Order on Reconsideration, 21 FCC Rcd 3787, 3810 ¶ 42 n.154 (2006) (“*JFPA Order*”) (emphasis added).¹ The FCC did not identify a specific source for its claimed authority to regulate solicited faxes. The JFPA Order only cites generally a series of provisions in the JFPA and the Communications Act of 1934, neither of which address solicited faxes.

2. The Hobbs Act provides that “[t]he court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47.” 28 U.S.C. § 2342(1). Section 402(a) in turn provides that “[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter . . . shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28 [*i.e.*, the Hobbs Act].” 47 U.S.C. § 402(a). Under the Hobbs Act’s procedures, “[a]ny party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.” 28 U.S.C. § 2344.

¹ The JFPA Order contains little discussion of the reason for adopting a requirement for solicited faxes states, stating only 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.” 21 FCC Rcd at 3812 ¶ 48.

II. Factual Background and Proceedings Below

1. The facts of this case are undisputed for purposes of this Petition. Petitioner Douglas Walburg publishes a handbook for attorneys and paralegals containing contact information for courts and government offices. Walburg markets his handbook through an agent, who calls each prospective customer and, if the prospective customer is interested in obtaining advertising material about the handbook, obtains the prospective customer's fax number and sends an advertisement via fax. *See* Pet. App. 17a-18a.

On May 20, 2007, Walburg's agent faxed an advertisement for the handbook to Respondent Michael Nack. Nack had expressly consented to receive the fax, and stipulated below that the fax was not an "unsolicited advertisement" under the TCPA. Pet. App. 3a, 18a. The fax at issue, as well as many other thousands of fax advertisements that Walburg sent with the recipients' express permission, did not contain an opt-out notice. *Id.*

2. Nack, on behalf of himself and others similarly situated, brought suit against Walburg under the FCC's rule purporting to require opt-out notices on fax advertisements sent with express consent. Nack's complaint invoked the private right of action in 47 U.S.C. § 227(b) for claims based on alleged violations of "the regulations prescribed under this subsection." *See* Pet. App. 17a, 40a. Nack seeks damages – either the statutory penalty of \$500 per fax, or \$1,500 per fax for "knowing" violations of the TCPA. *See* Pet. App. 4a, 40a. Walburg sent 32,085 fax advertisements during the class period; thus, if found liable, Walburg could

face between \$16,042,500 in damages (statutory penalty) and \$48,127,000 in damages (penalty for “knowing” violations). Either amount would put Walburg out of business.

3. The district court granted summary judgment for Walburg. The court construed the FCC’s opt-out notice rule narrowly, in light of repeated references in the JFPA and the FCC’s implementing order to “unsolicited advertisements,” and found that the rule was inapplicable where, as here, “the recipient gave permission to send the very fax that gives rise to the claimed violation.” Pet. App. 24a-29a.

4. The Eighth Circuit reversed. In addition to concluding that the FCC’s rule applies to the faxes at issue, Pet. App. 8a-10a, the court rejected two other arguments raised by Walburg: first, that the rule exceeds the FCC’s statutory authority and is therefore invalid; and second, that even if the rule were valid, it would not give rise to a private right of action under 47 U.S.C. § 227(b), which permits claims “based on a violation of this subsection [§ 227(b)] or the regulations prescribed under this subsection.” *Id.* § 227(b)(3).

Relying on two briefs filed by the FCC as *amicus curiae*, the court concluded that the Hobbs Act precluded Walburg from challenging Nack’s proposed application of the FCC’s rule as invalid. Pet. App. 10a-12a. Under the court’s expansive construction of the Hobbs Act, a party seeking to challenge the validity of an FCC rule – even in defending against a private party’s action for damages – must “petition the agency itself and, if denied, appeal the agency’s disposition directly to the Court of Appeals” as provided by the

Hobbs Act. Pet. App. 10a. Moreover, while the court acknowledged that it was "questionable" whether the rule in question "properly could have been promulgated" under § 227(b) and thus could give rise to a private right of action, Pet. App. 2a, the court said it could not resolve this threshold question, again relying on Hobbs Act considerations, Pet. App. 12a. The Eighth Circuit subsequently denied Walburg's petition for rehearing. Pet. App. 31a-32a.

REASONS FOR GRANTING THE PETITION

The practical consequence of the Eighth Circuit's decision in this case is to permit parties to obtain crippling monetary damages on the basis of unlawful FCC regulations. That result is based on the Eighth Circuit's expansive interpretation of the Hobbs Act, under which a defendant is prohibited from raising the invalidity of a regulation as a defense to a civil class action even where, as here, the defendant had little reason to know of or participate in the agency's proceedings and review under the Hobbs Act is now time-barred.

In imposing that harsh rule, the Eighth Circuit deepened a split of authority with the Sixth Circuit, which has held that the Hobbs Act does *not* prohibit a party from challenging the validity of an FCC regulation in the context of a civil action between two private parties. The Eighth Circuit's decision also raises considerable constitutional concerns. While the Eighth Circuit apparently believed that a litigant sued under an unlawful regulation could obtain meaningful protection by petitioning the FCC to retroactively declare that regulation unlawful, that premise was in

error. As an earlier failed challenge to the opt-out regulation brought by a party subject to class action suits attests, the FCC has asserted that it has no duty to act on such petitions, much less grant retroactive relief. The effect is that the opt-out regulation is effectively unreviewable in the Eighth Circuit.

This Court should grant certiorari to resolve the split of authority in the courts of appeals, remedy the constitutional concerns raised by the Eighth Circuit's decision, and correct the substantial injustice done by the Eighth Circuit's rule. It simply cannot be that a federal court may impose tens of millions of dollars in civil liability on the basis of unlawful agency regulations, but that is precisely the result the Eighth Circuit has mandated here.

I. The Eighth Circuit's Decision Conflicts with Sixth Circuit Precedent

By interpreting the Hobbs Act to prohibit Walburg from challenging the validity of the FCC regulation on which this action is based, the Eighth Circuit deepened a split of authority in the courts of appeals.

In *Leyse v. Clear Channel Broadcasting, Inc.*, 697 F.3d 360 (6th Cir. 2012), the Sixth Circuit held that the Hobbs Act did *not* prohibit a party from challenging the validity of an FCC rule in the context of a TCPA action for monetary and injunctive relief. Looking to the plain language of the Hobbs Act, the Sixth Circuit observed that the courts of appeals possess exclusive jurisdiction only “to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the Federal Communications Commission *made reviewable*

by section 402(a) of title 47.” *Id.* at 373 (quoting 28 U.S.C. § 2342(1) (emphasis in original). “And to be reviewable under § 402(a),” the court noted, “the case must be a ‘proceeding to enjoin, set aside, annul, or suspend’ an order of the FCC.” *Id.* (quoting 47 U.S.C. § 402(a)).

Based on that language, the court reasoned that the case under review was *not* “a proceeding to enjoin or annul an FCC order” because its “central object” was *not* to “enforce or undercut an FCC order.” *Id.* Rather, its “central object” was “to seek damages and an injunction against Clear Channel, a private party, for allegedly violating the TCPA.” *Id.* at 373, 376. Thus, the challenge to the FCC rule in the context of the suit would not, if successful, invalidate the rule; it would merely determine whether one private litigant could obtain monetary and injunctive relief from another. In reaching that conclusion, the Sixth Circuit expressly rejected the Seventh Circuit’s reasoning in *CE Design, Ltd. v. Prism Business Media, Inc.*, 606 F.3d 443 (7th Cir. 2011), because that case had failed to “focus on the phrase *made reviewable by section 402(a) of title 47* that appears in § 2342.” *Leyse*, 697 F.3d at 376-77 (emphasis in original).

Accordingly, if Nack’s TCPA suit had been brought in the Sixth Circuit, Walburg would have been permitted to challenge the validity of the FCC regulation as a defense to Nack’s claims. That is because the “central object” of Nack’s TCPA suit is not to “enforce or undercut an FCC order”; rather, as in *Leyse*, Nack’s suit seeks monetary damages from one private party by another. *Leyse*, 697 F.3d at 376. Thus,

a conclusion that the FCC rule is invalid would have no effect outside this suit; the judgment would merely deny monetary relief to Nack. Under the Sixth Circuit's rule, therefore, Nack's suit is not a "proceeding to enjoin, set aside, annul, or suspend' an order of the FCC," and Walburg's challenge to the FCC's regulation is not barred by the Hobbs Act. *Id.* at 373 (quoting 47 U.S.C. § 402(a)).

Nack, however, brought this suit in the Eighth Circuit, which, in this case, followed the Seventh Circuit in adopting a rule directly at odds with the Sixth Circuit's decision in *Leyse*. Despite the express statutory language limiting the Hobbs Act to "proceeding[s] to enjoin, set aside, annul, or suspend" an order of the FCC, 47 U.S.C. § 402(a), the Eighth Circuit determined that the Hobbs Act applies even to suits in which a private party seeks money damages from another private party. The Eighth Circuit broadly held:

A party challenging an FCC regulation as *ultra vires* must first petition the agency itself and, if denied, appeal the agency's disposition directly to the Court of Appeals as provided by the statute. . . . 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.

Pet. App. 10a-11a. The court did not cite, much less distinguish, the Sixth Circuit's decision in *Leyse*, even though both Walburg and the FCC (as *amicus*) had brought the case to the court's attention. Instead, it relied solely on *CE Design*, the Seventh Circuit case

the Sixth Circuit had rejected in *Leyse*, which also held that a litigant could not defend itself in a private action on the ground that a regulation was unlawful. Pet. App. 11a (citing *CE Design*, 606 F.3d at 450).

The Eighth Circuit's interpretation of the Hobbs Act conflicts squarely with the rule in the Sixth Circuit. Whereas defendants in TCPA class actions in the Sixth Circuit are permitted to defeat liability by showing that the regulation forming the basis of the suit is invalid, defendants in TCPA class actions in the Eighth (and Seventh) Circuit are categorically denied that defense. This Court should grant certiorari to resolve this split of authority.

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

In holding that the Hobbs Act deprived it of jurisdiction to consider Walburg's challenge to the FCC regulation, the Eighth Circuit necessarily prohibited parties like Walburg from raising even meritorious challenges to a regulation as a defense to civil liability. The effect of the Eighth Circuit's rule is to subject parties like Walburg to staggering liability – here, tens of millions of dollars – for class actions premised on invalid agency regulations. That unjust outcome is of considerable practical and constitutional importance and merits this Court's review.

1. The Eighth Circuit reasoned that, to comport with the Hobbs Act, a defendant who has been sued under an invalid regulation must “seek a stay of litigation” and file “a petition for reconsideration under 47 U.S.C. § 405(a), or a petition for rulemaking to

repeal the rule.” Pet. App. 12a n.2. But even if such a stay is granted, as it was in this case, a confluence of statutory provisions and administrative rulings makes it extremely difficult for a defendant sued on the basis of an invalid regulation to avoid liability through “administrative remedies.”

As an initial matter, under the Hobbs Act, a party who participated in the administrative proceedings must challenge an agency rule within 60 days of its entry. *See* 28 U.S.C. § 2344. Yet there are numerous circumstances in which an interested party may be unable to comply with that limitation. For example, a company may not have been in existence at the time the rule was issued and thus would have had no opportunity to challenge the rule. Or, as happened here, *see infra* Part III, the agency may have failed to provide proper notice of the rule in the rulemaking, such that interested parties would not know to participate in the administrative proceedings. *See, e.g., Nat’l Ass’n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1247 (11th Cir. 2006) (holding that a party lacks standing to challenge agency rulemaking under the Hobbs Act unless the party “participated in the agency proceeding” (quotation marks omitted)), *modified on other grounds on denial of reh’g*, 468 F.3d 1272 (11th Cir. 2006).²

² Once a rule has been promulgated, a party (including a party that did not participate in the rulemaking) has 30 days to petition the agency for reconsideration. *See* 47 U.S.C. § 405(a). That window does not materially help a litigant not in existence at the time, or one that, as here, faces liability from a regulation buried in rule that otherwise does not apply to it. *See infra* Part III.

In those circumstances – where a party, through no fault of its own, is unable to bring a Hobbs Act challenge – it may be impossible, as a practical matter, to obtain relief through “a petition for reconsideration . . . or a petition for rulemaking to repeal the rule,” as the Eighth Circuit believed, *Pet. App. 12a n.2*. A petition for reconsideration must be brought within 30 days of a rule’s enactment or it is considered time-barred. *See* 47 U.S.C. § 405(a). And a petition for rulemaking – even if successful in convincing the agency to exercise its discretion and reopen the issue – will at best almost always provide exclusively prospective relief, which cannot help a party facing civil damages claims. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (explaining that 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”); *ICORE, Inc. v. FCC*, 985 F.2d 1075, 1080 (D.C. Cir. 1993) (the FCC “does not question the understanding that *Georgetown University Hospital* bars retroactive rulemaking in the absence of congressional assent”).

2. The circumstances surrounding the FCC’s “opt-out” regulation perfectly illustrate the difficulties in petitioning an agency to reopen a rulemaking: When TCPA suits were first brought against solicited faxes under the “opt-out” regulation, a defendant in one such suit filed a petition asking the FCC to clarify the statutory authority, if any, for the rule or to declare the rule invalid. *See In re Junk Fax Prevention Act of*

2005 Petition For Declaratory Ruling To Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission's Rule Requiring an Opt-Out Notice for Fax Advertisements Sent With Recipient's Prior Express Consent, Order, 27 FCC Rcd 4912, 4914 ¶ 4 (CGB 2012). The FCC did nothing with the petition for a year and a half, and the company was forced to seek a writ of mandamus in the D.C. Circuit. *See Order, In re Anda, Inc.*, No. 12-1145 (D.C. Cir. Apr. 24, 2012) (directing the FCC to file a response to the mandamus petition).

While the mandamus proceeding was pending, an FCC bureau issued a short order dismissing the administrative petition. *Petition for Declaratory Ruling*, Order, 27 FCC Rcd 4912. The bureau ruled that the agency would not exercise its discretion to clarify the statutory basis for the rule because “there is no controversy or uncertainty regarding the statutory basis for the Commission’s authority” and further held that, “to the extent that Petitioner questions the Commission’s statutory authority to adopt such a requirement, we find that it is an improper collateral challenge to the rule that should have been presented in a timely petition for reconsideration of the Commission’s *Junk Fax Order* rather than a request for clarification.” *Id.* at 4914 ¶¶ 5-6. Both of those rulings are consistent with long-standing precedent. *See In re Service Rules for the 698-746, 747-762, and 777-792 MHz Bands*, Memorandum Opinion and Order on Reconsideration, 28 FCC Rcd 2671, 2686 ¶ 41 (“The Commission has discretion whether to issue a declaratory ruling.”); *Yale Broad. Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973) (same); 5 U.S.C. § 554(e) (“The

agency . . . in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.”); *In re Motions for Declaratory Rulings Regarding Commission Rules and Policies for Frequency Coordination in the Private Land Mobile Radio Services*, 14 FCC Rcd 12,752, 12,757-58 ¶ 11 (1999) (“[A]s the Commission has previously held, indirect challenges to Commission decisions that were adopted in proceedings in which the right to review has expired are considered impermissible collateral attacks and are properly denied.”).

Since that time, TCPA class actions under the “opt-out” regulation have proliferated, and petitions to the FCC have been filed by many of the defendants in these actions. *See, e.g.*, Gilead Sciences Petition for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278, 05-338 (FCC filed Aug. 9, 2013); Petition of Staples, Inc. and Quill Corp. for Rulemaking and Declaratory Ruling, CG Docket Nos. 02-278, 05-338 (FCC filed July 19, 2013); Forest Pharmaceuticals Petition for Declaratory Ruling and/or Waiver, CG Docket No. 05-338 (FCC filed June 27, 2013). Walburg himself has filed a petition seeking retroactive relief, but given the FCC’s position in the Eighth Circuit that the rule must be read to apply to solicited faxes and the longstanding FCC precedent holding that a challenge to the validity of the regulation is time barred after the time for reconsideration has expired, Walburg’s petition likely depends on whether the agency chooses to provide discretionary relief, such as a retroactive waiver – a thin reed at best. *See* Petition of Douglas Paul Walburg and Richie Enterprises, LLC, for Declaratory Ruling

and/or Waiver, CG Docket Nos. 02-278, 05-338 (FCC filed Aug. 19, 2013).

Accordingly, the “administrative remedies” the Eighth Circuit claimed Walburg could pursue appear to be illusory and the “opt-out” regulation is effectively insulated from judicial review in that Circuit. It was precisely this concern that led the Sixth Circuit to permit parties to raise the invalidity of regulations in private causes of action. *See Leyse*, 697 F.3d at 376 (“Were we to conclude that the Hobbs Act barred the constitutional defenses, Leyse would be left with no other forum in which to present his . . . defenses . . .” (internal quotation marks omitted)). And the harsh result caused by the Eighth Circuit’s contrary rule is of immense practical importance, imposing tens of millions of dollars in damages on the basis of regulations Walburg is prohibited from challenging. That numerous class action lawsuits have recently been brought under the “opt-out” regulation only heightens the importance of the Eighth Circuit’s decision. This Court should grant certiorari to address the critical issue raised by this case.

3. In light of the practical difficulty of litigants like Walburg to obtain meaningful relief from the FCC in these circumstances, the Eighth Circuit’s refusal to review the FCC’s regulation raises serious constitutional concerns.

At the most basic level, due process requires that a party be afforded an “opportunity to defend against the imposition of liability.” *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466, 468 (2000); *accord Holden v. Hardy*, 169 U.S. 366, 389-90 (1898) (“no man shall be

condemned in his person or property without due notice, and an opportunity of being heard in his defense"). Yet, as described above, there are many circumstances in which a party, through no fault of its own, will be unable to challenge an agency regulation under the procedures set forth in the Hobbs Act.³ The better interpretation of the Hobbs Act would avoid the due process issue by permitting a defendant to challenge the validity of an agency regulation when the regulation forms the basis of the plaintiff's claim for monetary relief. *See Leyse*, 697 F.3d at 376.

Likewise, the Eighth Circuit's refusal to review the validity of the regulation raises serious concerns about the role of the judiciary. Regardless if the question is whether a regulation is permitted by statute or whether the agency has interpreted its own regulation lawfully, it is ultimately the province of the judiciary to

³ Indeed, courts of appeals have long recognized that the validity of an agency regulation may be challenged after the time for review under the Hobbs Act has expired when the agency itself applies that rule against a party. *See, e.g., Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958) ("[U]nlike ordinary adjudicatory orders, 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."); *Commonwealth Edison Co. v. U.S. Nuclear Regulatory Comm'n*, 830 F.2d 610, 614 (7th Cir. 1987) ("The Hobbs Act's sixty-day restriction must mean at least that direct preenforcement challenges to rules brought after the expiration of the time limit are generally beyond the court's jurisdiction. However, the cases interpreting the section establish that indirect challenges to the rule brought when the rule is applied to a particular individual are within the court's jurisdiction.").

“say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 177 (1803). And in the context of the definition of private rights of action, “Congress has expressly established the *Judiciary* and not the [executive agencies] as the adjudicator of private rights of action arising under the statute,” and “it would be inappropriate to consult executive interpretations of” a cause of action where “Congress established an enforcement scheme independent of the Executive and provided aggrieved [parties] with direct recourse to federal court.” *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990) (emphasis added); see also *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 n.3 (2013).

Here, the Eighth Circuit abdicated its responsibility to determine the scope of liability under the TCPA. That view effectively turns every regulation into the unreviewable law of the land once the Hobbs Act’s 60-day window expires, regardless whether the regulation is at odds with the Constitution or a federal statute. That result simply cannot be reconciled with the most basic structure of our constitutional system; no rule should ever have the effect of forcing a court to apply a regulation that is unconstitutional or illegal. See, e.g., Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1378-79 (1953) (“Name me a single Supreme Court case that has squarely held that, in a civil enforcement proceeding, questions of law can be validly withdrawn from the consideration of the enforcement court where no adequate opportunity to have them determined by a court has been previously accorded. When you do, I’m going back to re-think

Marbury v. Madison.”). Accordingly, the constitutional implications of the decision below merit this Court’s full review.

III. This Case Presents an Ideal Vehicle to Resolve the Split of Authority on the Question Presented

This case presents an ideal vehicle to resolve the split of authority caused by the Eighth Circuit’s decision.

First, this case highlights the injustice of the Eighth Circuit’s rule because the case illustrates how a defendant in a TCPA class action is often unable to challenge the regulation at issue within the strictures of the Hobbs Act. The FCC’s notice of proposed rulemaking did not contain the “opt-out” regulation, nor did it in any way indicate that the FCC was considering regulating solicited faxes. *See JFPA NPRM*, 20 FCC Rcd at 19,767-68 ¶¶ 19-20. Thus, there was no reason for Walburg or any other company or individual who sends *solicited* faxes to participate in the rulemaking or provide comments to the agency questioning the validity of the rule. Once the final rule was issued, the purported regulation of solicited faxes was buried in a rule governing unsolicited faxes, thus again providing effectively no notice that an affected party of the need to petition the agency for reconsideration within 30 days. As explained above, even though Walburg has filed a petition for relief with the FCC, obtaining the retroactive relief needed to avoid damages in this suit hinges almost entirely on whether the FCC chooses to provide a discretionary remedy.

Second, this case is an ideal vehicle to resolve the split because Walburg's challenge to the regulation at issue is reasonably likely to succeed. For many reasons, including constitutional concerns, Congress has never imposed restrictions on *solicited* faxes. See 47 U.S.C. § 227(b)(1)(C). To the contrary, Congress has expressly exempted solicited faxes from the reach of the TCPA. See *id.* § 227(a)(5) ("The term 'unsolicited advertisement' means any material advertising ... which is transmitted to any person *without that person's prior express invitation or permission, in writing or otherwise.*" (emphasis added)). Thus, the FCC's regulation of solicited faxes was plainly *ultra vires*. This is not a case, therefore, in which a defendant is seeking to pursue a quixotic attack on the regulation at issue; rather, if Walburg is permitted to raise the invalidity of the FCC regulation, there is a strong likelihood that his challenge will successfully defeat liability.

Third, and finally, this case demonstrates the immense practical consequences of the Eighth Circuit's rule because of the scale of the potential liability. According to Nack, the putative class would cover 32,085 faxes sent by Walburg. The TCPA establishes statutory penalties of \$500 per fax or \$1500 per "knowing" violation. Thus, Nack seeks between \$16 million and \$46 million in liability, more than enough to drive Walburg's small operation out of business. Such crippling damages should not be awarded without an opportunity for Walburg to challenge the legality of the regulation forming the basis of the suit. This case,

therefore, precisely illustrates the considerable importance of the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Matthew S. Hellman
Samuel L. Feder
Matthew S. McKenzie
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001

T. Michael Ward
Counsel of Record
Russell F. Watters
Timothy J. Wolf
Robert L. Carter
BROWN & JAMES, P.C.
800 Market St.
Suite 1100
St. Louis, Missouri 63101
(314) 421-3400
tward@bjpc.com