No. _____

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

Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990) 18

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988).......... 13

CE Design, Ltd. v. Prism Business Media, Inc., 606 F.3d 443 (7th Cir. 2011).......... 9, 11

City of Arlington v. FCC., 133 S. Ct. 1863 (2013) 18

Commonwealth Edison Co. v. Untied States Nuclear Regulatory Commission, 830 F.2d 610 (7th Cir. 1987).......... 17

Functional Music, Inc. v. FCC, 274 F.2d 543 (D.C. Cir. 1958).......... 17

Holden v. Hardy, 169 U.S. 366 (1898).......... 16

ICORE, Inc. v. FCC, 985 F.2d 1075 (D.C. Cir. 1993).......... 13

Leyse v. Clear Channel Broadcasting, Inc., 697 F.3d 360 (6th Cir. 2012).......... 8, 9, 10, 16, 17

Marbury v. Madison, 5 U.S. 137 (1803) 18

National Association of State Utility Consumer Advocates v. FCC, 457 F.3d 1238 (11th Cir. 2006), *modified on other grounds on denial of reh'g*, 468 F.3d 1272 (11th Cir. 2006).......... 12

Nelson v. Adams USA, Inc., 529 U.S. 460 (2000) 16

Yale Broadcasting Co. v. FCC, 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), *reprinted in* 2005 U.S.C.C.A.N. 319........ 2

OTHER AUTHORITIES

Order, *In re Anda, Inc.*, 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., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953) ... 18

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 (CGB 2012) ... 13, 14

In re Motions For Declaratory Rulings Regarding Commission Rules And Policies For Frequency Coordination In The Private Land Mobile Radio Services, 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

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) 3, 19

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) 3, 4

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) 14

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 Eight 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 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,

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

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

APPENDIX

APPENDIX A

EIGHTH CIRCUIT COURT OF APPEALS ORDER AND JUDGMENT, MAY 21, 2013

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 11-1460

Michael R. Nack, Individually and on behalf
of all others similarly situated

Plaintiff-Appellant

v.

Douglas Paul Walburg

Defendant-Appellee

Appeal from United States District Court for
the Eastern District of Missouri-St. Louis

Submitted: September 19, 2012
Filed: May 21, 2013 (Corrected May 21, 2013)

Before WOLLMAN, MELLOY, and COLLOTON, Circuit Judges.

MELLOY, Circuit Judge.

Plaintiff Michael Nack appeals the district court's grant of summary judgment in this case arising under

the Telephone Consumer Protection Act of 1991 ("TCPA"), Pub. L. No. 102-243, 105 Stat. 2394, as amended by the Junk Fax Prevention Act of 2005 ("JFPA"), Pub. L. No. 109-21, 119 Stat. 359. Nack bases his claims upon the receipt of one fax advertisement from Defendant Douglas Walburg, which Nack's agent undisputedly consented to receive. The one fax Nack received did not contain opt-out language that he argues was mandated by federal regulation. 47 C.F.R. § 64.1200(a)(3)(iv). He asserts class-action claims on behalf of persons similarly situated and does not base claims upon any party's receipt of an *unsolicited* fax advertisement. The parties offered competing interpretations of the regulation, and the district court held the regulation did not apply in the current circumstances.

After one round of oral arguments that focused upon regulatory interpretation, our court solicited the input of the Federal Communications Commission ("FCC"). The FCC responded with an *amicus* brief explaining its interpretation of its own regulation. According to the FCC, the contested opt-out language is required, even on faxes sent after obtaining a potential recipient's consent. Although this interpretation is consistent with the plain language of the regulation, it is questionable whether the regulation at issue (thus interpreted) properly could have been promulgated under the statutory section that authorizes a private cause of action.

Nevertheless, based upon the FCC's interpretation, and for the reasons discussed below, we must reverse the grant of summary judgment. The Administrative

Orders Review Act ("Hobbs Act"), 28 U.S.C. § 2342 *et seq.*, precludes us from entertaining challenges to the regulation other than on appeals arising from agency proceedings (except arguably in extenuating circumstances not at issue in this case). Without addressing such challenges, we may not reject the FCC's plain-language interpretation of its own unambiguous regulation. Our reversal today, therefore, places the parties back before the district court where Walburg faces a class-action complaint seeking millions of dollars even though there is no allegation that he sent a fax to any recipient without the recipient's prior express consent.

I. Background

After consenting to receive and then receiving the fax advertisement at issue in this case, Nack filed the present complaint against Walburg. According to Nack's complaint, the key statutory and regulatory provisions at issue are 47 U.S.C. § 227(b)(3) and 47 C.F.R. § 64.1200(a)(3)(iv). No party argues additional facts bear upon the case at this stage of the proceedings. Accordingly, we describe the statutory and regulatory provisions at issue, describe the procedural history of the present case, and move directly to our discussion of the merits.

The TCPA, as amended by the JFPA, defines the term "unsolicited advertisement" to mean "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C.

§ 227(a)(5) (2006).[1] In relevant part, the statute prohibits the "use [of] any . . . device to send, to a telephone facsimile machine, an unsolicited advertisement, unless . . . the unsolicited advertisement contains a notice meeting the requirements under paragraph 2(D)." *Id.* § 227(b)(1)(C) & (C)(iii). The notice must be conspicuous, provide a domestic telephone number, and identify a cost-free mechanism for the recipient to opt-out of receiving future "unsolicited advertisements." *Id.* § 227(b)(2)(D)(i), (iv)(I)-(II). The sender must also make the opt-out mechanism available "any time on any day of the week." *Id.* § 227(b)(2)(D)(v). Finally, the TCPA as amended by the JFPA creates a private cause of action based upon § 227(b) or upon regulations promulgated under § 227(b), as follows:

> A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—
>
>> (A) an action *based on a violation of this subsection or the regulations prescribed under this subsection* to enjoin such violation,
>>
>> (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

1. Neither the statute nor the regulation use or define the term "solicited" fax advertisements, but we employ it in this opinion to refer to a fax sent after obtaining the recipient's consent. We also refer to such faxes as permissive or consented-to faxes.

(C) both such actions.

> If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

47 U.S.C. § 227(b)(3) (emphasis added).

The statute itself does not expressly impose similar limitations or requirements on the sending of solicited or consented-to fax advertisements. The most pertinent regulation in this case, however, read most naturally and according to its plain language, extends the opt-out notice requirement to solicited as well as unsolicited fax advertisements:

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

47 C.F.R. § 64.1200(a)(3)(iv).

In the district court, the parties framed their arguments in terms of regulatory interpretation. Based upon the limited reach of the actual statute, the district court doubted that the above-quoted language from 47

C.F.R. § 64.1200(a)(3)(iv) should be interpreted to apply to faxes other than unsolicited faxes. Looking at other regulatory provisions, headers, titles, and the general organizational structure of the regulation (including the placement of section 64.1200(a)(3)(iv) within a section dealing generally with unsolicited facsimiles), the district court held that the regulation applied only to unsolicited faxes and did not apply in the present case.

In reaching this conclusion, the district court reviewed commentary including an FCC order from 2006 discussing the regulation of permissive or solicited fax advertisements under the JFPA. In that commentary, the FCC described the purpose of the regulation at issue in a manner largely consistent with the plain language of the regulation, stating:

> In addition, entities that send facsimile advertisements to consumers from whom they obtained permission, must include on the advertisement their opt-out notice and contact information to allow consumers to stop unwanted faxes in the future.

In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Junk Fax Prevention Act of 2005, 21 FCC Rcd 3787, 3812 (2006) ("2006 Order"). As noted by the district court, however, the FCC also set forth a confusing and inconsistent assertion in the 2006 Order. In direct contradiction to the plain language of the regulation and the passage quoted above, the FCC stated, "the opt-out notice requirement only applies to communications

that constitute unsolicited advertisements." 2006 Order at 3808 n. 154.

After an initial round of briefing and arguments, we solicited the views of the FCC as an *amicus*. In its brief, the FCC confirmed its plain-language interpretation of its regulation. The FCC explained that the regulation reached faxes for which the recipient had granted consent because consent, once granted, need not be interpreted as permanent. The FCC sought to ensure that even recipients who consented to receive a fax could easily and without expense stop the sending of any possible future faxes. The FCC acknowledged, but did not attempt to explain, the inconsistent passage from the 2006 Order.

Through supplemental briefing in response to the FCC's brief, and through a second round of arguments, Walburg's position evolved to reflect the shifting landscape around him. Although he initially argued primarily that the regulation could not be interpreted as applying to "solicited" faxes, he now focuses his argument upon the validity of the regulation and the scope of the private right of action. He argues that the regulation could not have been properly promulgated pursuant to the authorizing statute because the statute itself does not reach solicited fax advertisements. He also argues that, even if the FCC otherwise possessed the authority to promulgate the regulation at issue, the FCC's statutory authority for the regulation of solicited fax advertisements could not come from the particular statutory section that authorizes the private cause of action. Further, he argues for the first time on appeal that the regulation, as interpreted by the

FCC, is an unconstitutional abridgement of the First Amendment.

Finally, we have received *amicus* briefing from another party involved in different private litigation under the TCPA. That party, Anda, Inc., has pursued administrative resolution of some of the questions presently before our court. Specifically, Anda petitioned for a declaratory ruling from the FCC concerning the statutory source of authority for the regulation governing solicited faxes and the scope of the private right of action. The FCC dismissed Anda's administrative petition on procedural grounds, holding that Anda's "[p]etition identifies no controversy to terminate or uncertainty to remove, a condition precedent to the Commission issuing a declaratory ruling." *In the Matter of Junk Fax Prevention Act of 2005*, 27 FCC Rcd. 4912, 4912 (May 2, 2012) (Order by the Acting Chief, Consumer & Governmental Affairs Bureau).

II. Discussion

A. Regulatory Interpretation

When an agency is specifically charged with enforcing a statute and promulgating regulations to implement that statute, we "defer to [the] agency's interpretations . . . unless we find that a 'regulation is contrary to unambiguous statutory language, that the agency's interpretation of its own regulation is plainly erroneous or inconsistent with the regulation, or that application of the regulation [is] arbitrary or capricious.'" *United States v. J & K Market Centerville, LLC,* 679 F.3d 709, 712 (8th Cir. 2012) (quoting *Ballanger v. Johanns,* 495 F.3d 866,

872 (8th Cir. 2007)). We generally extend this deference to the agency even if the agency's interpretation of its own regulation is expressed merely in a brief to the court rather than through some other means. *See Talk Am., Inc. v. Mich. Bell Tel. Co.,* 131 S. Ct. 2254, 2261, 180 L. Ed. 2d 96 (2011) ("[W]e defer to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is 'plainly erroneous or inconsistent with the regulation[s]' or there is any other 'reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'" (quoting *Chase Bank USA, N.A. v. McCoy,* 131 S. Ct. 871, 880, 881, 178 L. Ed. 2d 716 (2011))).

Setting aside any concerns regarding the validity of 47 C.F.R. § 64.1200(a)(3)(iv) or the scope of the private right of action, we believe that the regulation as written requires the senders of fax advertisements to employ the above-described opt-out language even if the sender received prior express permission to send the fax. This plain-language interpretation of the regulation is consistent with the FCC's proffered interpretation of its own regulation and is largely consistent with the 2006 Order (other than the confusing passage identified by the district court). In this circumstance, we must defer to the FCC's plain-language interpretation of its own regulation unless the regulation is "contrary to unambiguous statutory language" or "application of the regulation [is] arbitrary or capricious." *Ballanger,* 495 F.3d at 872.

Given the procedural posture of the present case, these two exceptions provide no basis for our court to reject the FCC's proffered interpretation. An argument that this

unambiguous regulation is "contrary to unambiguous statutory language," *id.*, is, in our view, a direct challenge to the validity of the regulation. Similarly, because Nack seeks application of the regulation in a manner consistent with the regulation's plain language, any challenge asserting that "application of the regulation [is] arbitrary or capricious," *id.*, appears to be a challenge to the validity of the regulation itself. As explained below, the Hobbs Act precludes us from entertaining such challenges at the present stage. As such, we must interpret the regulation in a manner consistent with its plain language and the FCC's interpretation.

B. Challenges to the Regulation

The Hobbs Act provides that the courts of appeals have exclusive jurisdiction to determine the validity of FCC orders. 28 U.S.C. § 2342 (2006) ("The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47[.]"); 47 U.S.C. § 402(a) (2006) ("Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28."). 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. *FCC v. ITT World Commc'ns, Inc.,* 466 U.S. 463, 468, 104 S. Ct. 1936, 80 L. Ed. 2d 480 (1984). "[T]he procedural path designed by Congress

serves a number of valid goals: It promotes judicial efficiency, vests an appellate panel rather than a single district judge with the power of agency review, and allows 'uniform, nationwide interpretation of the federal statute by the centralized expert agency created by Congress' to enforce the TCPA." *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010) (quoting *N.Y. Co. v. N.Y Dep't of Labor,* 440 U.S. 519, 528, 99 S. Ct. 1328, 59 L. Ed. 2d 553 (1979) (plurality opinion)).

Here, there was no administrative proceeding because the plaintiff filed a private action. In response, the defendant pursued summary judgment and has not yet elected to seek a stay of litigation to pursue administrative remedies through the FCC. However, "[w]here the practical effect of a successful attack on the enforcement of an order involves a determination of its validity," such as a defense that a private enforcement action is based upon an invalid agency order, "the statutory procedure for review provided by Congress remains applicable." *Sw. Bell Tel. v. Ark. Pub. Serv. Comm'n,* 738 F.2d 901, 906 (8th Cir. 1984), *vacated and remanded on other grounds*, 476 U.S. 1167, 106 S. Ct. 2885, 90 L. Ed. 2d 973 (1986). To hold otherwise merely because the issue has arisen in private litigation would permit an end-run around the administrative review mandated by the Hobbs Act. Such an end run could result in a judicial determination of a regulation's invalidity without participation by the agency and upon a record not developed by the agency.

The Seventh Circuit has confronted this issue and agrees that it "makes no difference" if the question of validity arises in a suit between two private parties

because "the Hobbs Act's jurisdictional limitations are 'equally applicable whether [a litigant] wants to challenge the rule directly . . . or indirectly.'" *CE Design,* 606 F.3d at 448 (quoting *City of Peoria v. Gen. Elec. Cablevision Corp. (GECCO),* 690 F.2d 116, 120 (7th Cir. 1982)). Finally, although not in the context of a private action, we have held clearly that "[a] defensive attack on the FCC regulations is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction." *United States v. Any & All Radio Station Transmission Equip.,* 207 F.3d 458, 463 (8th Cir. 2000). We hold, therefore, that the Hobbs Act generally precludes our court from holding the contested regulation invalid outside the statutory procedure mandated by Congress.[2]

C. Scope of the Private Right of Action

The private right of action authorized by 47 U.S.C. § 227(b)(3) extends to violations of § 227 and also to "the regulations prescribed under" § 227(b). Walburg argues correctly that if the agency's promulgation of the

---

2. Walburg has not attempted to challenge the validity of 47 C.F.R. § 64.1200(a)(3)(iv) either through a petition for reconsideration under 47 U.S.C. § 405(a), *cf. Tri-State Motor Transit Co. v. ICC,* 739 F.2d 1373, 1375 n.2 (8th Cir. 1984), or a petition for rulemaking to repeal the rule pursuant to 47 C.F.R. § 1.401. We therefore need not consider at this juncture whether a refusal of the agency to consider a substantive challenge to the regulation would allow this court to exercise jurisdiction over such a challenge. *Cf. Any & All Radio Station Transmission Equip.,* 207 F.3d at 463 (suggesting that a court of appeals "might" have jurisdiction under those circumstances).

regulation was *ultra vires* or was pursuant *exclusively* to some statutory authority other than § 227(b), the private right of action could not reach violations of the regulation. *See, e.g., Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.,* 550 U.S. 45, 47-48, 127 S. Ct. 1513, 167 L. Ed. 2d 422 (2007) (holding that Congress rather than the FCC creates the private right of action, but in linking that right of action to a regulation, Congress created a right that extends to lawfully enacted regulations as well); *Alexander v. Sandoval,* 532 U.S. 275, 290-93, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) (holding that the scope of a private right of action is limited to the scope set forth in the statutory language creating the private right of action and that no private right exists to enforce regulations promulgated under a different statutory section for which Congress did not create such a right). We hold that, on the facts of the present case, these arguments are, in effect, impermissible challenges to the regulation.

For reasons that require no further elaboration, it is clear that the *ultra vires* argument is wholly indistinguishable from a direct challenge. A challenge that concedes the regulation's validity but asserts that the regulation was not promulgated pursuant to § 227(b) is distinct. Such a challenge, however, involves the same need for deference to the agency and nationally uniform determinations as a direct, Hobbs Act challenge. The rationale for the regulation, as set forth in the 2006 Order and as discussed in the FCC's *amicus* brief, arguably brings the regulation within range of what § 227(b) authorized the FCC to regulate. We do not believe that, in this circumstance, it is possible or prudent for

our court to resolve this issue without the benefit of full participation by the agency. *See, e.g., Fla. Power & Light Co. v. Lorion,* 470 U.S. 729, 743, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985) ("In the absence of specific evidence of contrary congressional intent, however, . . . review of orders resolving issues preliminary or ancillary to the core issue in a proceeding should be reviewed in the same forum as the final order resolving the core issue.").

D. Constitutional Challenge

Finally, Walburg argues that, if the regulation must be interpreted as urged by the FCC, then it is unconstitutional. We held in *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.,* 323 F.3d 649, 660 (2003), that the TCPA provisions regarding unsolicited fax advertisements were not an unconstitutional restriction upon commercial speech. Applying the commercial speech test of *Central Hudson Gas & Electric Corporation v. Public Service Comm'n,* 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), we concluded that, on balance, the TCPA's restrictions on commercial speech represented a sufficiently narrowly tailored restriction in pursuit of a substantial governmental interest. *Am. Blast Fax,* 323 F.3d 655-60. Suffice it to say, the analysis and conclusion as set forth in *American Blast Fax* would not necessarily be the same if applied to the agency's extension of authority over solicited advertisements. Nevertheless, this issue was not raised below and, as such, is not properly before us at this time.

III. Conclusion

We reverse the judgment of the district court and remand for further proceedings. On remand, the district court may entertain any requests to stay proceedings for pursuit of administrative determination of the issues raised herein.

APPENDIX B

DISTRICT COURT'S MEMORANDUM, ORDER, AND JUDGMENT, FEBRUARY 7, 2011

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:10CV00478 AGF

MICHAEL R. NACK, individually and
on behalf of all others similarly situated,

Plaintiff,

v.

DOUGLAS PAUL WALBURG,

Defendant.

MEMORANDUM AND ORDER

This removal action matter is before the Court on Defendant's Motion for Summary Judgment (Doc. #19). At issue is whether there is a private cause of action under the Telephone Consumer Protection Act for failing to include an opt-out notice on an advertising fax that was not "unsolicited," but rather was sent after receiving the express approval of the recipient. Because the Court finds there is no such requirement under the applicable statute or regulations, the motion shall be granted.

BACKGROUND

Plaintiff Michael Nack filed this action in state court individually and on behalf of all others similarly situated, against Defendant Douglas Paul Walburg, the sole proprietor of Mariposa Publishing. Plaintiff alleges in his second amended complaint that Defendant sent an "unsolicited" fax advertisement that did not include an "opt-out" notice as allegedly required by the Federal Communications Commission ("FCC"), under 47 C.F.R. § 64.1200(a)(3)(iv), promulgated under the Telephone Consumer Protection Act of 1991 ("TCPA"), as amended by the Junk Fax Prevention Act of 2005 ("JFPA"), 47 U.S.C. § 227. Plaintiff seeks damages under the TCPA.[1] The action was removed by Defendant to this Court under the Class Action Fairness Act, 28 U.S.C. § 1332(d).

For purposes of the summary judgment motion, the facts are as follows. Mariposa Publishing publishes and offers for sale in six states, including Missouri, an Attorney's Handbook which serves as a reference manual listing judges and their support staff, filing fees, etc. One of Defendant's employees makes cold calls to law firms in an attempt to sell the Handbook, and offers to fax them marketing material describing it. Before faxing the marketing material, the potential customer must give permission to fax the material and must supply Defendant's employee with the potential customer's fax number.

---

1. After Defendant filed its motion for summary judgment, Plaintiff voluntarily dismissed Counts II and III of the Second Amended Complaint [Doc. #23], leaving only Plaintiff's claim under the TCPA.

On May 10, 2007, Defendant's employee called Plaintiff's office and spoke with his answering service. Defendant's employee asked if she could fax the marketing material about the Handbook to Plaintiff's office. The answering service secretary answered in the affirmative and supplied Defendant's employee with Plaintiff's fax number. Plaintiff's contract with the answering service authorized Plaintiff's fax number to be given out on demand. The marketing materials were thereafter faxed to Plaintiff on that same day. The marketing materials did not contain a notice informing the recipient how to "opt-out" from receiving future fax advertisements.

In support of its motion for summary judgment, Defendant asserts that the uncontroverted facts establish that the fax was not "unsolicited"; that "clear and unambiguous Congressional intent" demonstrates that the TCPA only applies to unsolicited faxes; and that no private cause of action exists for failing to include an opt-out notice on a permissive fax. Although Plaintiff now concedes that the fax from Defendant was sent to his office with permission, Plaintiff asserts that the fax still violates the Act because it failed to contain an opt-out notice. As such, Plaintiff asserts, the fax was sent in violation of 47 C.F.R. § 64.1200(a)(3)(iv), which states that "[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(3)(iii) of this section."

In support of his reading of the regulation, Plaintiff argues that "people change their minds about, or lose

interest in or need for, various products or services everyday. Consequently, Congress and the FCC empowered consumers by mandating opt-out notices." Plaintiff further argues that Defendant's position rests on the "logical fallacy" that "permission given once by anyone is permission given forever and may not be retracted." Plaintiff maintains that he has standing to sue for failure to include an opt-out notice on a permissive fax because § 227(b)(3) of the TCPA expressly and explicitly provides a private right of action for either a violation of the statute or a violation of the FCC regulations enacted under the statute. Furthermore, Plaintiff argues that the FCC regulation is a "necessary and a reasonable interpretation" of the TCPA. Defendant asserts that the regulation, so interpreted, is contrary to the statute and that the court should refuse to find an intent by Congress to provide a private cause of action for its violation. Plaintiff responds that this court lacks jurisdiction to decline enforcement, as pursuant to the Hobbs Act, 28 U.S.C. § 2342, Defendant can only challenge the validity of the FCC regulation in the federal courts of appeals.

DISCUSSION

Summary Judgment Standard

Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *First S. Co. v. Jim Lynch Enterps., Inc.,* 932 F.2d 717, 718 (8th Cir. 1991). The moving party has the burden to establish both the absence of a genuine issue of material

fact and that it is entitled to judgment as a matter of law. *United Fire & Cas. Co. v. Gravette*, 182 F.3d 649, 654 (8th Cir. 1999). In ruling on a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party and that party must be given the benefit of all reasonable inferences that can be drawn from the facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Here, there is no dispute as to the facts. Plaintiff now acknowledges that Defendant received express permission to send the particular fax at issue, and that the fax was not "unsolicited" within the meaning of the TCPA.

The TCPA and 47 C.F.R. § 64.1200

The TCPA of 1991 prohibited, inter alia, the sending of an "unsolicited advertisement" via a fax machine. An "unsolicited" fax advertisement was defined as one transmitted without the recipient's "prior express invitation or permission." In 1992, the FCC, in adopting rules to implement the TCPA, concluded that fax advertisements "from persons or entities who have an established business relationship [EBR] with the recipient can be deemed to be invited or permitted by the recipient." In re Rules and Regulations Implementing the TCPA of 1991, 7 F.C.C.R. 8752, 8779 n. 87 (1992), 1992 WL 690928.

In July 2003, the FCC issued new junk fax provisions, in which the FCC reversed its prior position on the effect of an EBR, "effectively eliminating the EBR exception to the general prohibition on unsolicited fax advertisements. Instead the FCC concluded that a recipient's express

invitation or permission must be in writing . . . . " S. Rep. 109-76, 2005 WL 3751936, at *2 (June 7, 2005).

In response to the FCC's announced intention essentially to eliminate the EBR exception, Congress, in 2005, enacted the JFPA, which amended the TCPA and codified the EBR exception that the FCC had adopted prior to 2003. Section 227(b)(1)(C), now makes it unlawful:

> (C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless —
>
> > (i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;
> >
> > (ii) the sender obtained the number of the telephone facsimile machine through —
> >
> > > (I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or
> > >
> > > (II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

Except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

> (iii) the unsolicited advertisement contains a [clear and conspicuous notice on the first page of the unsolicited advertisement, with said notice stating that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements].

Subsection 227(b)(3) provides for a private right of action as follows:

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that state —

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

The TCPA definition of an "unsolicited" fax advertisement can now be found at § 227(a)(5) as one "which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise."

In 2006, to implement the 2005 amendments to the statute, the FCC amended its regulations under the TCPA. The regulation relevant here, 47 C.F.R. § 64.1200, provides as follows:

> (a) No person or entity may:
>
> * * *
>
> > (3) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless —
> >
> > > (i) The unsolicited advertisement is from a sender with an [EBR] with the recipient; and
> > >
> > > (ii) The sender obtained the number of the telephone facsimile machine through [certain specified ways]; and

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

* * *

Analysis

As noted above, in his second amended complaint, Plaintiff claimed that the fax sent by Defendant was unsolicited. However, as Plaintiff acknowledges, this has been refuted by the record; and Plaintiff is opposing the summary judgment motion only on the ground that the fax failed to contain an opt-out notice as set forth in 47 C.F.R. § 64.1200(a)(3)(iv).

Subsection 227(b)(3) of the TCPA, as quoted above, states that a private right of action exists for "an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation" or to recover damages, or both. 47 U.S.C. § 227(b)(3)(A)-(C) (2006). Therefore, if an opt-out notice is required by the regulation, Plaintiff has a right to bring a cause of

action under the TCPA, alleging that Defendant violated this regulation by not including an opt-out notice on a fax advertisement sent with prior express permission.[2]

This Court concludes, however, that 47 C.F.R. § 64.1200(a)(3)(iv) does not apply to the facts of this case, which does not involve an "unsolicited" fax advertisement. Neither party has pointed the Court to evidence of the FCC's own interpretation of its regulation in question. "When a court construes an administrative regulation, the normal tenets of statutory construction are generally applied." *Neb. Pharmacists Ass'n, Inc. v. Neb. Dep't of Soc. Servs.,* 863 F. Supp. 1037, 1046 (D. Neb. 1994) (citing *Black & Decker Corp. v. Comm'r,* 986 F.2d 60, 65 (4th Cir. 1993)). "Additionally, the regulation must of course be 'interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements.'" *Id.* (citations omitted). A "regulation should be interpreted in a manner that effectuates its central purposes." *Anthony v. Poteet Hous. Auth.,* 306 Fed. Appx. 98, 101 (5th Cir. 2009) (citation omitted).

2. Although not raised by the parties, the Court must satisfy itself that it has subject matter jurisdiction over this action. All federal courts of appeals that have considered the question have concluded that federal district courts have federal-question jurisdiction over claims under the TCPA and pendent state law claims, even though the TCPA explicitly provided for a private right of action in state court. *Charvat v. EchoStar Satellite, LLC,* 630 F.3d 459, 2010 U.S. App. LEXIS 26404, 2010 WL 5392875, at *4 (6th Cir. 2010) (citing cases from three other circuits).

Reviewing the regulation as a whole, the provision in question, 47 C.F.R. § 64.1200(a)(3)(iv), purports, on its face, to apply only to unsolicited faxes. The paragraph requiring the opt-out notice, on which Plaintiff relies, is under the paragraph that prohibits the sending of an "unsolicited" fax advertisement.

Even if the plain language of the regulation were ambiguous, this interpretation is supported by the FCC's own explanation. In its May 3, 2006 Rules and Regulations Implementing the [TCPA] of 1991; [JFPA] of 2005, 71 Fed. Reg. 25967-01, 2006 WL 1151584 ("2006 Rules and Regulations"), the FCC states several times that its rule requiring an opt-out notice applies to all *unsolicited* fax advertisements. *See* 71 Fed. Reg. at 25970, 25976 (emphasis added). The clearest statement on the matter appears in parenthesis after the statement that the Commission believes that the benefits to consumers of having opt-out information readily available outweighs any burden of including such matters: "(The Commission notes that the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.)." *Id*. at 25971.

To support its assertion that all faxes, whether solicited or unsolicited, must contain opt-out language, Plaintiff relies on the following paragraph that appears later in the 2006 Rules and Regulations:

> Senders who claim they obtained a consumer's prior express invitation or permission to send them facsimile advertisements prior to the effective date of these rules, will not be in compliance unless they can demonstrate that

> such authorization met all the requirements adopted herein. In addition entities that send facsimile advertisements to consumers from whom they obtained permission must include on the advertisement their opt-out notice and contact information to allow consumers to stop unwanted faxes in the future.

Id. at 25972. The Court notes that the 2006 Rules and Regulations contain other instances where the opt-out notice requirement is not expressly limited to unsolicited faxes. *See id.* at 25974. This language, however, does not persuade the Court that the regulation in question applies to a fax advertisement that is sent, as here, pursuant to the recipient's express and specific permission.

In light of this ruling and the undisputed facts of this case, the Court is not called upon to determine when and how the regulation requiring opt-out language would apply. The Court notes, however, that its interpretation makes sense in the context of the statute and regulations overall. The first sentence of the above-quoted paragraph on which Plaintiff relies references "a consumer's prior express invitation or permission" obtained "prior to the effective date of these rules." The Court believes, therefore, that the situation the FCC was addressing was one in which at some previous point in time, perhaps pursuant to an EBR, permission was given. Any such sender who thereafter sent an "unsolicited" fax, in reliance on the earlier permission, would need to include an opt-out notice as required by 47 C.F.R. § 64.1200(a)(3)(iii) and (iv), for the later fax.

This interpretation is consistent with the TCPA, and with Congress' and the FCC's stated intent to prevent "unsolicited" facsimile advertisements. The second fax posited above is unsolicited to the extent that express permission has not been given on this second occasion, and requiring the opt-out notice in this situation properly addresses Plaintiff's concern that permission once given would be permission forever given.

The only case law cited or found addressing whether, under 47 C.F.R. § 64.1200(a)(3)(iv), an invited fax advertisement must include an opt-out notice is a Missouri state trial court case, *MSG Jewelers, Inc. v. C & S Quality Printing, Inc.*, No. 07AC-028676 E CV, 2008 WL 6790582 (July 17, 2008).[3] The court there concluded that where a party "previously consented to be sent advertising faxes," a fax advertisement sent to the party still had to contain an opt-out notice, pursuant to the above-noted FCC regulation. Id. While the language of the holding in that case is broad, it appears that factually, it was a case in which the recipient had previously consented to be sent fax advertisements, and not a case like the instant one, where the recipient gave permission to send the very fax that gives rise to the claimed violation. Indeed, in such a "previous-consent" case, this Court, too, might hold that an opt-out notice is required. In any event, *MSG Jewelers* is not binding on this Court.

---

3. At least two federal judges have declined to reach this question. *See Practice Mgmt. Support Servs., Inc., v. Appeal Solutions, Inc.,* No. 09 C 1937, 2010 U.S. Dist. LEXIS 17714, 2010 WL 748170, at *4 (N.D. Ill. Mar. 1, 2010); *Clearbrook v. Rooflifters, LLC,* No. 08 C 3276, 2010 U.S. Dist. LEXIS 65128, 2010 WL 2635781, at *4 (N.D. Ill. June 28, 2010).

Pursuant to this Court's interpretation of 47 C.F.R. § 64.1200(a)(3)(iv), there are no material facts in dispute as to Count I of Plaintiff's amended complaint, and Defendant is entitled to judgment as a matter of law. Plaintiff acknowledges that permission was granted to Defendant to send the fax advertisement on May 10, 2007, and it thus did not require an opt-out notice. The Court further notes that Plaintiff's Hobbs Act argument has no application.[4] Here, the Court is not enjoining, setting aside, annulling, or suspending the FCC regulation in question. Rather the Court is simply holding the regulation, while wholly valid, does not apply to the facts of this case.

---

4. The Hobbs Act, 28 U.S.C. § 2342, establishes the jurisdiction of the federal courts of appeals, stating, "[t]he court[s] of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of — (1) all final orders of the [FCC] made reviewable by section 402(a) of title 47." Title 47 U.S.C. § 402(a), in turn, states, "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the [FCC] under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28."

CONCLUSION

Accordingly,

"IT IS HEREBY ORDERED that the motion of Defendant Douglas Paul Walburg for summary judgment on Count I of Plaintiff's Second Amended Complaint is **GRANTED**. [Doc. #19]"

All claims having been resolved, a separate Judgment shall accompany this Memorandum and Order.

/s/
AUDREY G. FLEISSIG
UNITED STATES DISTRICT JUDGE

Dated this 28th day of January, 2011.

APPENDIX C

EIGHTH CIRCUIT COURT OF APPEALS ORDER DENYING PETITION FOR REHEARING AND REHEARING EN BANC, JULY 16, 2013

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 11-1460

MICHAEL R. NACK, Individually and on behalf of all others similarly situated,

Appellant,

v.

DOUGLAS PAUL WALBURG,

Appellee.

Appeal from U.S. District Court for the Eastern District of Missouri-St. Louis (4:10-cv-00478-AGF)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 16, 2013

Appendix C

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/________________________
Michael E. Gans

APPENDIX D

47 U.S.C. §227 (2005-2010) - SELECTED PORTIONS OF THE TELEPHONE CONSUMER PROTECTION ACT OF 1991 AS AMENDED BY THE JUNK FAX PREVENTION ACT OF 2005

47 U.S.C. § 227

Selected Portions of The Telephone Consumer Protection Act of 1991, as Amended by the Junk Fax Protection Act of 2005

Title 47. Telegraphs, Telephones, and Radiotelegraphs

§ 227. Restrictions on use of telephone equipment

Effective: July 9, 2005 to December 21, 2010

(NOTE: Asterisks identify when portions of the statute have been omitted.)

(a) Definitions

As used in this section—

*****

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i) of this section, shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that—

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G))

(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

*****

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

*****

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

Appendix D

It shall be unlawful for any person within the United States, or any person outside of the United States if the recipient is within the United States –

*****

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through—

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if

the sender possessed the facsimile machine number of the recipient before such date of enactment; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

*****

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

*****

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes—

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d) of this section;

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

*****

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

*****

APPENDIX E

47 C.F.R. §64.1200 (2008) - SELECTED PORTIONS OF THE FCC'S REGULATION IMPLEMENTING AMENDMENTS TO THE TELEPHONE CONSUMER PROTECTION ACT

47 C.F.R. § 64.1200

Selected Portions of the Federal Communications Commissions Regulations Implementing the Junk Fax Prevention Act Amending the Telephone Consumer Protection Act of 1991

Title 47 Telecommunication
§ 64.1200 Delivery restrictions

Effective: December 14, 2006 to November 13, 2008

(NOTE: Asterisks identify when portions of the statute have been omitted.)

(a) No person or entity may:

*****

(3) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless--

(i) The unsolicited advertisement is from a sender with an established business relationship, as defined in paragraph (f)(5) of this section, with the recipient; and

(ii) The sender obtained the number of the telephone facsimile machine through--

(A) The voluntary communication of such number by the recipient directly to the sender, within the context of such established business relationship; or

(B) A directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution. If a sender obtains the facsimile number from the recipient's own directory, advertisement, or Internet site, it will be presumed that the number was voluntarily made available for public distribution, unless such materials explicitly note that unsolicited advertisements are not accepted at the specified facsimile number. If a sender obtains the facsimile number from other sources, the sender must take reasonable steps to verify that the recipient agreed to make the number available for public distribution.

*****

(C) This clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005 if the sender also possessed the facsimile machine number of the recipient before July 9, 2005. There shall be a rebuttable presumption that if a valid

established business relationship was formed prior to July 9, 2005, the sender possessed the facsimile number prior to such date as well; and

(iii) The advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements.

*****

(D) The notice includes—

(*1*) A domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and

(*2*) If neither the required telephone number nor facsimile machine number is a toll-free number, a separate cost-free mechanism including a Web site address or email address, for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number; and

(E) The telephone and facsimile numbers and cost-free mechanism identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, 7 days a week.

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

*****

(f) As used in this section:

*****

(5) The term *established business relationship* for purposes of telephone solicitations means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

*****

(6) The term *established business relationship* for purposes of paragraph (a)(4) of this section on the sending of facsimile advertisements means a prior or existing relationship formed by a voluntary two-

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

APPENDIX F

28 U.S.C. §§2342 AND 2344 (2006) - SELECTED PORTIONS OF THE ADMINISTRATIVE ORDERS REVIEW ACT ("HOBBS ACT")

28 U.S.C. §§ 2342 and 2344

Selected Portions of the Administrative Orders Review Act ("Hobbs Act")

Title 28. Judiciary and Judicial Procedure
§ 2342. Jurisdiction of court of appeals

Effective: October 6, 2006

(NOTE: Asterisks identify when portions of the statute have been omitted.)

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

> **(1)** all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47.

*****

Appendix F

Title 28. Judiciary and Judicial Procedure
§ 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.

*****

APPENDIX G

47 U.S.C. §§402 AND 405 (2010) - SELECTED PORTIONS OF THE COMMUNICATIONS ACT OF 1934

47 U.S.C. §§ 402 and 405

Selected Portions of the Communications Act of 1934

Title 47 Telegraphs, Telephones, and Radiotelegraphs
§ 402 Judicial review of Commission's orders and decisions

Effective: October 8, 2010

(NOTE: Asterisks identify when portions of the statute have been omitted.)

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

*****

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in

any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

APPENDIX H

21 F.C.C.R. 3787, 21 FCC RED. 3787, 38 COMMUNICATIONS REG. 167 - SELECTED PORTIONS OF THE FEDERAL COMMUNICATIONS COMMISSION REPORT AND ORDER AND THIRD ORDER ON RECONSIDERATION

21 F.C.C.R. 3787, 21 FCC Rcd. 3787, 38 Communications Reg.

Adopted: April 5, 2006
Released: April 6, 2006

Federal Communications Commission (F.C.C.)
Report and Order and Third Order on Reconsideration

IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991

JUNK FAX PREVENTION ACT OF 2005

(NOTE: Asterisks identify when portions of the statute have been omitted.)

3788 I. INTRODUCTION

1. In this Order, we amend the Commission's rules on unsolicited facsimile advertisements as required by the Junk Fax Prevention Act of 2005 (the Junk Fax Prevention Act).[FN1] Specifically, we (1) codify an established business

relationship (EBR) exemption to the prohibition on sending unsolicited facsimile advertisements; (2) provide a definition of an EBR to be used in the context of unsolicited facsimile advertisements; (3) require the sender of a facsimile advertisement to provide specified notice and contact information on the facsimile that allows recipients to "opt-out" of any future facsimile transmissions from the sender; and (4) specify the circumstances under which a request to "opt-out" complies with the Act. We believe these rules balance the interests of entities that send facsimile advertisements with those of persons that wish to avoid such messages. In addition, we take this opportunity to address certain issues raised in petitions for reconsideration of the 2003 Report and Order[FN2] concerning the Telephone Consumer Protection Act's (TCPA)[FN3] facsimile advertising rules.

II. BACKGROUND

A. Telephone Consumer Protection Act of 1991

2. On December 20, 1991, Congress enacted the TCPA to address a growing number of telephone marketing calls and certain telemarketing practices thought to be an invasion of consumer privacy.[FN4] In relevant part, the TCPA prohibits the use of any telephone facsimile machine, computer, or other device to send an "unsolicited advertisement" to a telephone facsimile machine.[FN5] An unsolicited advertisement is defined as "any material advertising the commercial availability or quality of any **3789** property, goods, or services which is transmitted to any person without that person's prior express invitation

or permission."[FN6] The TCPA also requires those sending any messages via telephone facsimile machines to identify themselves to message recipients.[FN7] The TCPA did not expressly exempt persons with whom the sender has an EBR or tax exempt nonprofit organizations from the prohibition on sending unsolicited facsimile advertisements, although it did create such exemptions from the definition of "telephone solicitation."[FN8]

B. TCPA Orders

3. In 1992, the Commission adopted rules implementing the TCPA, including restrictions on the transmission of unsolicited facsimile advertisements by facsimile machines.[FN9] The Commission's rules on unsolicited facsimile advertisements incorporated the language of the statute virtually verbatim.[FN10] The Commission stated that "the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition" on unsolicited facsimile advertisements.[FN11] The Commission concluded, however, that facsimile transmissions from persons or entities that have an EBR with the recipient can evidence the necessary invitation or permission of the recipient to receive the facsimile advertisement.[FN12] The Commission defined the term "established business relationship" to mean:

> **2** a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential

> subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.[FN13]

4. On July 3, 2003, the Commission revised many of its telemarketing and facsimile **3790** advertising rules under the TCPA.[FN14] The Commission reversed its prior conclusion that an EBR provides companies with the necessary express permission to send facsimile advertisements to their customers.[FN15] Instead, the Commission concluded that the recipient's express permission must be in writing and include the recipient's signature.[FN16] The Commission also revised the definition of an EBR, in the context of telephone solicitations, to limit the duration of that exception to 18 months after the recipient's last purchase or transaction, or three months after the recipient's last application or inquiry.[FN17] Following the release of the *2003 TCPA Order*, several entities filed petitions for reconsideration, most of which were related to the Commission's facsimile advertising rules.[FN18]

5. On August 18, 2003, the Commission issued an *Order on Reconsideration* that delayed, until January 1, 2005, the effective date of the requirement that the sender of a facsimile advertisement first obtain the recipient's prior express permission in writing.[FN19] Comments filed after the release of the *2003 TCPA Order* indicated that many organizations needed additional time to secure this prior written permission.[FN20] On October 3, 2003, the Commission released an order staying the 18-month and three-month time limitations imposed on the duration of

the EBR as applied to the sending of unsolicited facsimile advertisements pending either a decision on this issue on reconsideration or January 1, 2005.[FN21] On October 1, 2004 and June 27, 2005, the Commission further delayed the effective date of these requirements.[FN22]

C. Junk Fax Prevention Act of 2005

6. On July 9, 2005, Congress enacted the Junk Fax Prevention Act of 2005 which amends **3791** the facsimile advertising provisions of the TCPA.[FN23] In general, the Junk Fax Prevention Act: (1) codifies an EBR exemption to the prohibition on sending unsolicited facsimile advertisements;[FN24] (2) provides a definition of an EBR to be used in the context of unsolicited facsimile advertisements;[FN25] (3) requires the sender of a facsimile advertisement to provide specified notice and contact information on the facsimile that allows recipients to "opt-out" of any future facsimile transmissions from the sender;[FN26] and (4) specifies the circumstances under which a request to "opt-out" complies with the Act.[FN27] In addition, the Junk Fax Prevention Act authorizes the Commission to: (1) determine the "shortest reasonable time" that a sender must comply with a request not to receive future facsimile advertisements;[FN28] (2) consider exempting certain classes of small business senders from the requirement to provide a "cost-free" mechanism for a recipient to transmit an opt-out request;[FN29] and (3) consider whether to allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that

do not contain the "opt-out" notice otherwise required by the Junk Fax Prevention Act.[FN30]

7. On December 9, 2005, the Commission released a Notice of Proposed Rulemaking proposing modifications to the Commission's rules on unsolicited facsimile advertisements to implement the amendments required by the Junk Fax Prevention Act.[FN31]

*****

3800
C. Notice of Opt-Out Opportunity

24. Section 2(c) of the Junk Fax Prevention Act adds language to the TCPA that requires senders to include a notice on the first page of the unsolicited advertisement that instructs the recipient how to request that they not receive future unsolicited facsimile advertisements from the sender.[FN87] In accordance with the Junk Fax Prevention Act, we amend our rules to require that all unsolicited facsimile advertisements contain a notice on the first page of the advertisement stating that the recipient is entitled to request that the sender not send any future unsolicited advertisements.[FN88] This notice must include a domestic contact telephone number and a facsimile machine number for the recipient to transmit such a request to the sender and, as discussed below, at least one cost-free mechanism for transmitting an opt-out request.[FN89] We emphasize that including an opt-out notice on a facsimile advertisement alone is not **3801** sufficient to permit the transmission of the fax; an EBR with the recipient must also exist.

*****

3805
D. Request to Opt-Out of Future Unsolicited Advertisements

34. The Junk Fax Prevention Act requires that a request not to send future unsolicited facsimile advertisements meet certain requirements.[FN126]

*****

3809
42 …. We are not persuaded that consumers will have the necessary tools to easily opt-out of unwanted faxes from trade associations if the faxes received do not contain information on how to opt out. Moreover, we believe the benefits to consumers of having opt-out information readily available outweigh any burden in **3810** including such notices.[FN154]

*****

[inserted out of order, for reader convenience]

FN154. We note that the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.

*****

F. Unsolicited Advertisement

1. Definition

44. The facsimile advertising rules apply to a fax communication that constitutes an "unsolicited advertisement" as defined in the TCPA.[FN158] The Junk Fax Prevention Act amends the term "unsolicited advertisement" by adding "in writing or otherwise" before the period at the end of that section.[FN159] We proposed amending the Commission's rules to reflect the change in the statutory **3811** language.[FN160] No commenter opposed the modification. Accordingly, we amend our rules at 64.1200(f)(10) so that the definition reads as follows:

> The term unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without the person's prior express invitation or permission, in writing or otherwise.[FN161]

2. Prior Express Invitation or Permission

45. Several commenters ask the Commission to explicitly recognize that "prior express invitation or permission" to send a facsimile advertisement may be obtained by means other than a signed written statement.[FN162] CBA urges the Commission not to specify the various other means, for fear that the Commission might overlook certain legitimate methods and forms of permission.[FN163] We clarify that, as an initial matter, a sender that has an

EBR with a consumer may send a facsimile advertisement to that consumer without obtaining separate permission from him.[FN164] In the absence of an EBR, the sender must obtain the prior express invitation or permission from the consumer before sending the facsimile advertisement.[FN165] Prior express invitation or permission may be given by oral or written means, including electronic methods.[FN166]

*****

3815
G. Private Right of Action

56. The TCPA provides consumers with a private right of action in state court for any violation of the TCPA's prohibitions on the use of automatic dialing systems, artificial or prerecorded voice messages, and unsolicited facsimile advertisements.[FN192] Westfax raises concerns about class action lawsuits brought under the TCPA and asks the Commission to clarify the parameters of the private right of action.[FN193] As the Commission has stated in previous orders, Congress provided consumers with a private right of action, "if otherwise permitted by the laws or rules of court of a State. "This language suggests that Congress contemplated that such legal action was a matter for consumers to pursue in appropriate state courts, subject to those state courts' rules.[FN194] We continue to believe that it is for Congress, not the Commission, either to clarify or limit this right of action. Therefore, we decline to make any determinations about the specific contours of the private right of action.

*****

3817
V. ORDERING CLAUSES

64. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1-4, 201, 202, 217, 227, 258, 303(r), and 332 of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151-154, 201, 202, 217, 227, 258, 303(r), and 332; and sections 64.1200 and 64.318 of the Commission's Rules, 47 C.F.R. §§ 64.1200 and 64.318, the *Report and Order and Third Order on Reconsideration* IS ADOPTED, and Part 64 of the Commission's rules, 47 C.F.R. § 64.1200, IS AMENDED as set forth in Appendix A.

65. IT IS FURTHER ORDERED that the rules and requirements contained in this *Report and Order and Third Order on Reconsideration* and in Appendix A SHALL BECOME EFFECTIVE within 90 days of publication in the Federal Register. Those rules and requirements which contain information collection requirements under PRA are not effective until approved by OMB.

*****

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

*****

APPENDIX I

S. REP. NO. 109-76 AT 1, 6-7, (2005) - SELECTED PORTIONS OF THE REPORT OF THE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION ON SENATE BILL 714

S. Rep. 109-76 (2005)

Selected Portions of the Report of the Committee on Commerce, Science, and Transportation on Senate Bill 714

Effective: June 7, 2005

(NOTE: Asterisks identify when portions of the document have been omitted.)

*****

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 714) to amend section 227 of the Communications Act of 1934 (47 U.S.C. 227) relating to the prohibition on junk fax transmissions, having considered the same, reports favorably thereon with amendments and recommends that the bill (as amended) do pass.

PURPOSE OF THE BILL

The purposes of this legislation are to:

- Create a limited statutory exception to the current prohibition against the faxing of unsolicited

advertisements to individuals without their "prior express invitation or permission" by permitting such transmission by senders of commercial faxes to those with whom they have an established business relationship (EBR).

- Require that senders of faxes with unsolicited advertisements (i.e., "junk faxes") provide notice of a recipient's ability to opt out of receiving any future faxes containing unsolicited advertisements and a cost-free mechanism for recipients to opt out pursuant to that notice.

- Require the Federal Communications Commission (FCC) and Comptroller General of the United States to provide certain reports to Congress regarding the enforcement of these provisions.

*****

pg. 6

…Because the Commission may choose not to reverse its new rule removing the EBR exception from the general ban on sending unsolicited facsimile advertisements, S. 714, the "Junk Fax Prevention Act of 2005" specifically creates a statutory exception from the general prohibition on sending unsolicited advertisements if the fax is sent based on an EBR and certain conditions are met. This legislation is designed to permit legitimate businesses to do business with their established customers and other persons with whom they have an established relationship without the

burden of collecting prior written permission to send these recipients commercial faxes. Nonetheless, in reinstating the **pg 7** EBR exception, the Committee determined it was necessary to provide recipients with the ability to stop future unwanted faxes sent pursuant to such relationships. The Committee therefore alsoadded the requirement that every unsolicited facsimile advertisement contain an opt-out notice that gives the recipient the ability to stop future unwanted fax solicitations and that senders of such faxes provide recipients with a cost-free mechanism to stop future unsolicited faxes.

*****