No. 13-486

In the Supreme Court of the United States

DOUGLAS P. WALBURG

Petitioner,

v.

MICHAEL R. NACK,

Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE ANDA, INC. AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

J. SCOTT BALLENGER
Counsel of Record
MATTHEW A. BRILL
MATTHEW T. MURCHISON
LATHAM & WATKINS LLP
555 11TH STREET, NW
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200
Scott.Ballenger@lw.com
Counsel for Anda, Inc.

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE ANDA, INC.

This case presents an issue of considerable practical and constitutional importance, and amicus curiae Anda, Inc. is particularly well-suited to provide additional insight into the broad implications of the decision below for businesses across the country. Anda timely notified counsel of record for both parties that it intended to submit the attached brief more than 10 days prior to filing. Counsel for petitioner consented to the filing of this brief, and that letter of consent has been lodged with the Clerk of this Court. Counsel for respondent declined to grant such consent. Therefore, pursuant to Supreme Court Rule 37.2(b), Anda respectfully moves this Court for leave to file the accompanying brief of amicus curiae in support of petitioner.

Like petitioner, Anda faces class action lawsuits seeking massive statutory penalties under a rule adopted by the Federal Communications Commission ("FCC") requiring that a fax advertisement sent with the recipient's prior express consent include the same detailed opt-out notice as an unsolicited advertisement. Anda has attempted to raise statutory and constitutional challenges to the FCC's rule, both before the courts adjudicating these private damages actions and in a petition filed at the FCC. But in the wake of the Eighth Circuit's decision in this case, courts are increasingly declining to consider such challenges, interpreting the Administrative Orders Review Act, 28 U.S.C. § 2342, as requiring affected parties to seek relief at the FCC. At the same time, the FCC has refused to take any final, appealable action on Anda's petition—even though the petition has now been

pending for three years—and has expressly disclaimed any duty to do so. Thus, if the Eighth Circuit's decision stands, Anda will be left with no viable opportunity to challenge the FCC's rule in court, and will continue to face the prospect of enterprise-crippling damages for alleged violations of this *ultra vires* and possibly unconstitutional rule.

Anda's experiences not only underscore the practical and constitutional implications of the Eighth Circuit's decision, but also demonstrate that Anda is exceptionally well-positioned to elaborate on these implications for the Court's benefit. Anda therefore seeks leave to file the attached brief of amicus curiae urging the Court to grant the petition.

Respectfully submitted,

J. SCOTT BALLENGER
Counsel of Record
MATTHEW A. BRILL
MATTHEW T. MURCHISON
LATHAM & WATKINS LLP
555 11TH STREET, NW
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200
Scott.Ballenger@lw.com

Counsel for Anda, Inc.

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INTEREST OF AMICUS CURIAE[1]

Anda, Inc. is one of many businesses from a wide range of industries that rely on facsimile ("fax") transmissions to communicate with existing and potential customers. Anda is a distributor of generic pharmaceuticals to thousands of small pharmacies, many of which require that Anda send price sheets and other important information (including weekly specials) via fax.

Like Walburg, Anda has been the target of opportunistic lawsuits seeking massive statutory penalties stemming from the transmission of faxes to customers, despite the customer's prior express consent. The sole basis for these lawsuits is a rule adopted by the Federal Communications Commission ("FCC") requiring that a fax advertisement sent with the recipient's prior express consent include the same detailed opt-out notice as an unsolicited advertisement. In its defense, Anda has attempted to raise challenges to the rule similar to the challenge raised below—pointing out that the rule arose from an internally contradictory FCC order, conflicts with the governing statute, and poses serious First Amendment concerns. But now, in the wake of the Eighth Circuit's decision in this case, courts are increasingly declining to consider such challenges, and instead are latching onto the

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[1] Pursuant to this Court's Rule 37, Anda states that no counsel for any party authored this brief in whole or in part, and no person or entity other than Anda made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified more than 10 days prior to filing, and while Petitioner consented to the filing of this brief, Respondent declined to grant such consent. Accordingly, Anda is also submitting a motion for leave to file this brief.

erroneous notion that the Administrative Orders Review Act, 28 U.S.C. § 2342(1) ("Hobbs Act"), forecloses litigants from challenging the validity of FCC rules—both facially and as-applied—in actions for damages.

Anda also has attempted to seek relief at the FCC, by filing a petition seeking a declaratory ruling that, at a minimum, the rule cannot give rise to a private right of action under 47 U.S.C. § 227(b). Other parties facing lawsuits under the FCC's rule have filed similar petitions. But the FCC has refused to take any final, appealable action on these petitions—even though, in Anda's case, its petition has now been pending for three years—and it has asserted that it has no duty to respond to such petitions. Thus, if the Eighth Circuit's decision stands, Anda and other similarly situated defendants face the prospect of enterprise-crippling damages for alleged violations of an *ultra vires* and possibly unconstitutional administrative rule, with no viable opportunity to challenge the rule in court. Anda therefore has a strong interest in this Court's review and eventual reversal of the decision below.

SUMMARY OF ARGUMENT

As Walburg's petition demonstrates, the Eighth Circuit's interpretation of the Hobbs Act as precluding a defendant in a private damages action from challenging the validity an FCC rule—or even from disputing the extent to which it gives rise to a private right of action—ignores the plain language of the statute and presents grave constitutional concerns. Anda submits this brief to underscore the implications of the Eighth Circuit's erroneous ruling for the

numerous legitimate businesses across the country that are facing or could face financially crushing class action lawsuits premised on administrative agency regulations that are *ultra vires* but placed beyond the reach of judicial review by an overly aggressive and unconstitutional interpretation of the Hobbs Act.

According to the Eighth Circuit, its interpretation of the Hobbs Act would allow parties faced with lawsuits brought under FCC rules to petition the FCC and, if the agency were to issue an order denying relief, to seek judicial review of that order. But when Anda and others have filed such petitions, the FCC has declined to take any final, appealable action in response, and in fact has expressly disclaimed any obligation to do so. The decision below also suggests that an interested party could bring a challenge to an FCC rule within 60 days of its initial adoption. But Anda, like Walburg, did not have notice of the proposed rule, did not participate in the FCC's rulemaking proceeding, and therefore lacked standing to bring such a challenge during the 60-day Hobbs Act period. Indeed, the Eighth Circuit's construction of the Hobbs Act precludes a party from asserting defenses that challenge the validity of an FCC rule even if the party was not in existence when the rule was adopted. Thus, as a practical matter, the decision below effectively forecloses *all* paths to judicial review of this FCC rule, while Walburg, Anda, and other defendants continue to face the prospect of massive damages in lawsuits brought pursuant to the rule.

This Court has increasingly recognized the importance of as-applied challenges as a means of vindicating constitutional rights when facial challenges are impracticable. But barring Walburg, Anda, and

other defendants across the country from raising *any* challenges to the FCC's rule as a defense to massive liability, including as-applied challenges, would deprive those defendants of due process and prevent courts from exercising their Article III duties. Indeed, the constitutional implications of the Eighth Circuit's ruling extend far beyond the rule at issue in this case, as the decision could shield a wide variety of agency rules from challenge, no matter how glaring the statutory or constitutional defects.

The FCC cannot defend the decision below by asserting an interest in administrative "finality." Such an interest cannot trump fundamental due process and Article III interests. And in any event, the notion that allowing defensive challenges to FCC rules somehow unravels the "finality" of administrative rulemaking is a red herring. Courts have long recognized (and the FCC concedes) that parties are free to challenge FCC rules in enforcement proceedings brought by the agency itself, notwithstanding the FCC's asserted "finality" interest. And Congress's parallel interest in the "finality" of legislation has never prevented a party sued under a *statute* from being able to challenge the validity of the statute in its defense. There is no reason to accord administrative rules any greater protection than enactments of Congress.

Anda therefore urges this Court to grant certiorari to determine whether the Hobbs Act precludes a party sued under an FCC rule from challenging the rule in its defense, particularly where, as here, no other meaningful opportunity for judicial review exists.

ARGUMENT

THE ENORMOUS PRACTICAL AND CONSTITUTIONAL IMPLICATIONS OF THE EIGHTH CIRCUIT'S DECISION UNDERSCORE THE NEED FOR REVIEW

Anda's experiences powerfully confirm Walburg's observation that the decision below effectively seals off the FCC rule at issue from judicial review. Absent any meaningful opportunity for review, Walburg, Anda, and other defendants risk losing hundreds of millions of dollars in damages without due process of law, and in proceedings where courts cannot fulfill their Article III duties. Together, these considerations demonstrate not only the importance of reviewing the Eighth Circuit's decision, but also the need for reversal.

A. The Experiences of Anda Highlight the Error of the Eighth Circuit's Decision

The Eighth Circuit's decision to bar Walburg's challenge to the FCC's rule rests, in no small part, on the assumption that judicial review of the rule would be available through other avenues.[2] According to the

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[2] Notably, the Sixth Circuit recently revised its decision in *Leyse v. Clear Channel Broadcasting, Inc.*—a case discussed at length in Walburg's petition—after the court determined that the party in that case would have been "able to raise [its challenge to the FCC rule] in other proceedings." 697 F.3d 360 (6th Cir. 2012) (internal quotation marks and citation omitted), *as amended*, 2013 WL 5926700, at *12 (6th Cir. Nov. 5, 2013). The unusual circumstances of that revision more than a year after the fact underscore the need for this Court's resolution of the interplay between the Hobbs Act and private damages actions. But in all events, the revised *Leyse* decision does not disturb the Sixth

court below, its construction of the Hobbs Act would allow a party wishing to challenge the validity of an FCC rule to "petition the agency itself and, if denied, appeal the agency's disposition directly to the Court of Appeals as provided by the statute." Pet. App. 10a. In practice, however, this assumption has proven false. Anda and others have filed such petitions before the FCC and, in each case, the agency has exercised its discretion not to issue a final, appealable order addressing these petitions.

Anda, which participated as amicus curiae in the proceedings below, filed the first of these FCC petitions in November 2010. *See* Petition for Declaratory Ruling, *Petition for Declaratory Ruling To Clarify That 47 U.S.C. § 227(b) Was Not the*

Circuit's determination that defensive challenges to FCC rules are permitted (notwithstanding the Hobbs Act) where the party "'had no other forum in which to present his constitutional defenses.'" *Id.* at 373-74 (quoting *United States v. Szoka*, 260 F.3d 516, 528 (6th Cir. 2001); *see also United States v. Any & All Radio Station Transmission Equip.*, 204 F.3d 658, 667 (6th Cir. 2000). Indeed, whereas the Eighth Circuit construed the Hobbs Act as barring *all* arguments that would challenge the validity of an FCC rule in a private damages action, the Sixth Circuit continued to recognize that the Hobbs Act may not apply to "*as-applied* arguments" and pointed to other cases suggesting that "a regulation or rule may be challenged after the expiration of a statutory limitations period where the rule is blatantly unconstitutional or *ultra vires*." *Leyse*, 2013 WL 5926700, at *13. The importance of preserving such challenges is particularly evident where, as here, the *defendant* is faced with the application of the rule—as opposed to the scenario in *Leyse*, where the *plaintiff* sought to invalidate the rule and would not have been subject to legal sanction under the rule—as only the former circumstance calls on a court to exercise its Article III function in an unconstitutional manner. *See infra* at 11-15.

Statutory Basis for Commission's Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient's Prior Express Consent, CG Docket No. 05-338 (filed Nov. 30, 2010) ("Anda Petition"). Anda's petition asked the FCC to identify the statutory authority, if any, for the rule requiring opt-out notices on faxes sent with express consent. Anda explained that it is unclear that the FCC had authority to adopt a rule requiring an opt-out notice on fax advertisements sent with the recipient's express prior consent, because Congress expressly limited statutory opt-out notice provisions to unsolicited advertisements. *Id.* at 5, 8-10 (citing the statutory opt-out notice requirement at 47 U.S.C. § 227(b)(2)(D), which applies only to "unsolicited advertisement[s]" sent pursuant to an established business relationship). Anda also pointed to legislative history confirming that Congress intended to mandate opt-out notices only with respect to "'unsolicited facsimile advertisement[s].'" *Id.* at 9 & n.32 (quoting S. Rep. No. 109-76, at 7 (2005)).

Anda further noted that a contrary reading of the statute raises serious First Amendment concerns. While courts have upheld statutory requirements applicable to *unsolicited* faxes by citing "'a substantial interest'" in preventing "'the cost shifting and interference such *unwanted* advertising places on the recipient,'" that interest vanishes when the recipient provides express consent to receive such faxes. *Id.* at 10-11 (quoting *Missouri ex rel. Nixon v. American Blast Fax, Inc.*, 323 F.3d 649, 655 (8th Cir. 2003) (emphasis added), *cert. denied*, 540 U.S. 1104 (2004)); *see also Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 56, 57 (9th Cir. 1995) (articulating "the government's substantial interest in preventing the shifting of

advertising costs to consumers" and finding that "unsolicited fax advertisements shift significant advertising costs to consumers"). In light of these infirmities in the rule, Anda asked the FCC to clarify that, at a minimum, 47 U.S.C. § 227(b) was not the statutory basis for the regulation, and accordingly cannot give rise to a private right of action under § 227(b)(3). Anda Petition at 11.

After almost a year and a half of FCC inaction on Anda's petition, Anda sought mandamus at the D.C. Circuit, and the court directed the FCC to file a response. *See* Order, *In re Anda, Inc.*, No. 12-1145 (D.C. Cir. Apr. 24, 2012). Shortly thereafter, the FCC's staff issued an eight-paragraph order dismissing Anda's petition on procedural grounds on May 2, 2012. *See 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 ¶ 5 (CGB 2012) ("*Anda Bureau Order*"). The staff order declined to offer a definitive ruling clarifying the rule's legal basis, and instead simply concluded that there is "no controversy to terminate or uncertainty to remove." *Id.* ¶ 1.

After Anda filed an application for review by the full Commission, the FCC took the position in its mandamus response that it had no duty to address the merits of Anda's petition at the Commission level—*i.e.*, that it had no obligation to issue a final, appealable order in response to the sort of petition the Eighth Circuit held out as the proper means of asserting substantive challenges to an agency rule underlying damages actions. *See* Opp. of the Fed. Commc'ns

Comm'n to Pet. for Writ of Mandamus at 15-16, *In re Anda, Inc.*, No. 12-1145 (D.C. Cir. May 24, 2012). The FCC still has not taken action on Anda's application for review, and while that application is pending Anda is prohibited from seeking judicial review of the Bureau's order. *See Int'l Telecard Ass'n v. FCC*, 166 F.3d 387, 388 (D.C. Cir. 1999) ("Ongoing agency review renders an order nonfinal for purposes of judicial review.").

Others have faced similar roadblocks in their efforts to obtain relief at the FCC. As noted in Walburg's petition, several similarly situated parties have filed petitions seeking declaratory rulings that the rule is unlawful, cannot give rise to a private right of action, or does not apply under a particular set of factual circumstances. Pet. 15-16. But the FCC has not even taken the perfunctory step of issuing public notices seeking comment on these petitions under Section 1.2(b) of its rules. *See* 47 C.F.R. § 1.2(b) (providing that "[t]he bureau or office to which a petition for declaratory ruling has been submitted or assigned by the Commission ... should seek comment on the petition via public notice").

These experiences demonstrate that the path to judicial review identified by the Eighth Circuit is illusory. Parties subject to litigation under an *ultra vires* and potentially unconstitutional FCC rule cannot rely on the FCC to issue a final, appealable order in response to a petition challenging that rule. Such an action is purely discretionary in the FCC's view, and given the FCC's apparent institutional interest in protecting its rules from scrutiny, its unwillingness to issue such an order is unsurprising.

Nor does the option of seeking judicial review within 60 days of the rule's adoption provide an

adequate opportunity to challenge the rule in many circumstances. As Walburg's petition explains, a company subject to a rule might not have been in existence at the time the rule was adopted, or (as in this case) the agency may have failed to provide proper notice of the rule before adopting it. Pet. 12. In either scenario, an interested party would not have participated in the administrative proceeding and would lack standing to bring a direct challenge. *Id.* (citing *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1247 (11th Cir. 2006), *modified on other grounds on denial of reh'g*, 468 F.3d 1272 (11th Cir. 2006), *cert. denied*, 552 U.S. 1165 (2008)). Like Walburg, Anda did not have standing to challenge the rule when it was adopted in 2006. As a result, Anda has not had the opportunity to challenge the FCC rule and, if the Eighth Circuit's ruling stands, may never have such an opportunity, even as it faces enterprise-crippling liability for alleged violations of the rule.

Even where a party had standing to challenge an FCC rule upon adoption, that initial opportunity to raise a *facial* challenge cannot obviate the need to bring an as-applied challenge to a particular (and often unforeseen) application of the rule years later. Courts have acknowledged that "the fact that a rule has gone into effect may not be sufficient to make ripe an as-applied challenge." *Brubaker Amusement Co. v. United States*, 304 F.3d 1349, 1357 (Fed. Cir. 2002) (citing *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 187 (1985)), *cert. denied*, 538 U.S. 921 (2003). Indeed, that is why the Hobbs Act, by its terms, addresses only certain *facial* challenges to FCC rules—that is, actions to "enjoin, set aside, suspend," or otherwise invalidate an FCC rule *in*

its entirety. 28 U.S.C. § 2342(1); *see also* 47 U.S.C. § 402(a) (limiting Hobbs Act procedures to "proceeding[s] to enjoin, set aside, annul or suspend any order of the Commission"). Walburg's challenge is more akin to an *as-applied* challenge to a particular application of the rule. *See* Pet. 9 (explaining that a challenge like Walburg's "would not, if successful, invalidate the rule"); *id.* at 6 (noting that Walburg successfully argued before the district court that the rule could not properly be applied under the facts of this case). The notion, inherent in the Eighth Circuit's holding, that the Hobbs Act prohibits even as-applied challenges to FCC rules not only ignores plain statutory language, but also overlooks the practical need to preserve as-applied challenges as a path to judicial review.

B. These Considerations Also Underscore the Constitutional Importance of Preserving Defendants' Ability to Raise Challenges to Administrative Rules

The Eighth Circuit's determination that the Hobbs Act bars all defensive challenges to FCC rules in private suits for damages—even as applied challenges—also raises grave constitutional concerns. This Court has consistently acknowledged that the ability to raise as-applied challenges to laws is an important vehicle for vindicating constitutional rights. As-applied challenges "'are the basic building blocks of constitutional adjudication'" because they relieve the court and litigants of having "'to consider every conceivable situation which might possibly arise in the application'" of complex rules and statutes. *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (citations omitted);

see also United States v. Salerno, 481 U.S. 739, 745 (1987) (highlighting importance of as-applied challenges in explaining that "[a] facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid").

By effectively sealing off FCC rules from all challenges, including as-applied challenges, the Eighth Circuit's ruling runs directly counter to the constitutional guarantee of due process. As this Court has explained, "[c]ertainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land." *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966); *see also J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786 (2011) ("The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power."). Commentators have termed this due process principle the "valid rule requirement"—that is, "the notion that everyone has a personal constitutional right not to be subjected to governmental sanctions except pursuant to a constitutionally valid rule of law." Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1331 (2000); *see also id.* at 1332-33 ("Through the history of American constitutionalism, there has been wide debate about which (if any) 'remedies' for constitutional violations are constitutionally required, but never about the proposition that a defendant cannot be sanctioned without the authority of a valid law." (footnotes

omitted)); Henry Paul Monaghan, *Overbreadth*, 1981 Sup. Ct. Rev. 1, 9 (1981) ("A litigant has always had the right to be free from being burdened by an unconstitutional rule . . . .").

By barring as-applied challenges to FCC rules, the Eighth Circuit's decision would have courts ignore whether the rule being applied is in fact a "valid law[]," *Giaccio*, 382 U.S. at 403, or whether the application of the rule is an "exercise of lawful power," *J. McIntyre Mach.*, 131 S. Ct. at 2786. Instead, in the Eighth Circuit's view, the Hobbs Act requires courts to apply administrative rules unquestioningly, even when a party demonstrates that the rule's application is unlawful under the governing statute or the Constitution. This is precisely the kind of outcome that the principle of due process exists to prevent.

The Eighth Circuit suggested that due process is satisfied by allowing parties to bring a direct *facial* challenge to the rule, either within 60 days of the rule's adoption or on review of a later FCC order addressing the rule's validity. *See* Pet. App. 10a. But as discussed above, neither of these paths offers a meaningful opportunity for review for the numerous defendants across the country facing enterprise-threatening lawsuits under the FCC's rule. A civil defendant's ability to defend itself in a class action lawsuit seeking hundreds of millions of dollars in damages cannot turn on the FCC's discretionary decision whether to entertain a challenge to the rule on which the lawsuit hinges. The danger of commending due process rights to agency discretion is particularly evident where, as here, the FCC has made clear that it is unwilling to address any of the petitions filed by Anda, Walburg, or others, even as courts move forward with class

certification proceedings and other adjudicatory action. The Eighth Circuit's determination that the FCC is the *only* entity empowered to determine the validity of its rules following the initial 60-day period for direct review eight years ago deprives civil litigants of any realistic prospect of judicial review.

On top of these fundamental due process problems, the Eighth Circuit's decision also violates Article III of the Constitution. The ruling would require courts to exercise coercive judicial power on the basis of, and in deference to, an unlawful administrative rule, instead of preserving the traditional and authoritative role of the judiciary to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (striking down statute that required federal courts to reopen final judgments and apply new legal standards retroactively, explaining that Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them" based on the court's interpretation of law at the time of judgment). As Walburg's petition points out, such a result is flatly inconsistent with the long-held principle that questions of law cannot "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." 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). By the same token, the Eighth Circuit's holding flies in the face of the principles underlying *Chevron*, which makes clear that the judiciary, not an agency, "is the final authority on issues of statutory construction." *Chevron U.S.A. Inc.*

v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).[3]

Consistent with these principles, this Court has struck down statutes that purport to impose similar restrictions on the ability of litigants to raise—and the ability of courts to consider—issues regarding a law's validity. In *Legal Services Corp. v. Velazquez*, the Court struck down a statutory provision that effectively precluded attorneys funded by the Legal Services Corporation from "advis[ing] the courts of serious questions of statutory validity." 531 U.S. 533, 545 (2001). The Court explained that "[b]y seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." *Id.* A similar infirmity afflicts the Eighth Circuit's interpretation of the Hobbs Act, which effectively withdraws the question of the validity of an FCC rule—even when the question arises in an as-applied challenge—from the consideration of courts.

These due process and Article III considerations compel a narrow construction of the Hobbs Act. As noted above and in Walburg's petition, it is perfectly

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[3] Under *Chevron*, when a court is "called upon to resolve pure questions of law by statutory interpretation," it must "decide the issue de novo without deferring to an administrative agency that may be involved." *Patel v. Ashcroft*, 294 F.3d 465, 467 (3d Cir. 2002) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)). But under the Eighth Circuit's ruling, a court must *begin* the analysis by deferring to the agency, even when Congress's intent is clear on the face of the statute. Such an approach—which elevates agency determinations on pure questions of law over judicial interpretations—violates these bedrock principles.

reasonable to interpret the Hobbs Act as barring only certain kinds of *facial* challenges to FCC rules, and leaving open the ability to challenge rules as applied in private damages actions. *See supra* at 10-11; Pet. 8-11. But a construction that forecloses litigants from *any* meaningful opportunity to test the validity of laws as a matter of due process, or deprives courts from considering the validity of laws when imposing sanctions pursuant to such laws, conflicts with the Constitution and thus cannot be sustained. *See Gomez v. United States*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.").

The constitutional implications of the Eighth Circuit's decision do not end with the rule at issue in this case. For instance, the FCC could adopt a new rule requiring that all consensual fax communications must include a statement identifying which presidential candidate the sender voted for in the last election, and assert in its order that the rule was adopted pursuant to 47 U.S.C. § 227(b). Businesses engaging in fax communications may be unaware of the new rule, or may not be in existence at the time the rule is adopted, and so would not be in a position to challenge the rule within the 60-day window following adoption. Meanwhile, class action lawyers would seize upon the new rule, argue that the rule gives rise to a private right of action under Section 227(b)(3), and file complaints seeking massive damages for alleged violations of the rule. If the Eighth Circuit's ruling stands, defendants would be unable to raise challenges to such an absurd (and almost certainly

unconstitutional) rule. Moreover, courts would be required to defer to the FCC's assertion that this new rule was "prescribed under" Section 227(b) and thus can give rise to a private right of action, in light of the Eighth Circuit's ruling that such issues involve "the same need for deference to the agency and nationally uniform determinations as a direct, Hobbs Act challenge." Pet. App. 13a.

C. The FCC's Institutional Interest in "Finality" Cannot Overcome These Constitutional Concerns

The FCC cannot sidestep these serious concerns by pointing to an asserted need for administrative "finality." Any interest in protecting the "finality" of the administrative process cannot trump the substantial constitutional interests discussed above. Indeed, it is a foundational principle of administrative law that where an *agency* itself takes enforcement action against a party, the party is free to challenge the substantive validity of the rule being enforced in its defense. *See, e.g.*, *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546-57 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959). The FCC thus concedes, as it must, that if it were to initiate an action enforcing its rule against a party, the party would be able to raise statutory and constitutional defenses. *See* Amicus Br. for the Fed. Commc'ns Comm'n Urging Reversal at 22, No. 11-1460 (8th Cir. Feb. 24, 2012). The FCC nonetheless maintains that a defendant should not be able to assert those same defenses when faced with a class action brought by a private plaintiff under this same rule. But it should make no difference whether the party seeking to enforce a rule is the agency or a private

party; in either instance, due process and fundamental fairness require the defendant to be afforded an opportunity to defend itself on any legitimate ground before being deprived of its property. If anything, the due process interest is even greater in the private litigation context, given the staggering size of damages awards available in class action lawsuits in comparison with fines levied by administrative agencies.

Moreover, defendants have always been free to challenge the validity and constitutionality of *statutes* in defending against private suits for damages, notwithstanding the fact that such challenges in some sense upset the "finality" of legislative lawmaking. *See Marbury*, 5 U.S. at 177. Indeed, that is the essence of the judicial function, and such judicial review is at least as important when it comes to agency rules as with statutes. By the same token, the FCC cannot be heard to complain that a court might err in evaluating an invalidity defense, as courts must be presumed competent to make such judgments, and the appeals process is a more than adequate mechanism for error correction.

Finally, a successful *as-applied* challenge to an FCC rule would not result in an across-the-board invalidation of the rule or any injunction prohibited by the Hobbs Act, much as successful as-applied challenges to statutes do not eliminate those statutes. To the contrary, such an as-applied ruling would merely prevent a private plaintiff from invoking the federal judicial power to coerce money damages from a private defendant when the law (fully understood) does not support or permit that result. And to the extent the FCC still has concerns over its ability to defend rules challenged in private lawsuits, the FCC can

always participate in the suit as amicus, as it did in this case.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment below should be reversed.

Respectfully submitted,

J. SCOTT BALLENGER
Counsel of Record
MATTHEW A. BRILL
MATTHEW T. MURCHISON
LATHAM & WATKINS LLP
555 11TH STREET, NW
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200
Scott.Ballenger@lw.com

November 18, 2013

Counsel for Anda, Inc.