

IN THE 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-APPELLEE,

v.

DOUGLAS PAUL WALBURG,

DEFENDANT-APPELLANT.

\_\_\_\_\_  
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF  
MISSOURI, EASTERN DIVISION CASE No. 4:10-CV-00478-AGF THE HONORABLE  
AUDREY G. FLEISSIG, UNITED STATES DISTRICT COURT JUDGE  
\_\_\_\_\_

AMICUS BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION  
URGING REVERSAL  
\_\_\_\_\_

AUSTIN C. SCHLICK  
GENERAL COUNSEL

PETER KARANJIA  
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS  
ASSOCIATE GENERAL COUNSEL

LAUREL R. BERGOLD  
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554  
(202) 418-1740

## TABLE OF CONTENTS

Table of Authorities.....	ii
STATEMENT OF INTEREST .....	1
STATEMENT OF ISSUE PRESENTED .....	2
STATEMENT OF THE CASE .....	2
A. Statutory and Regulatory Background.....	2
B. This Proceeding.....	7
1. Nack’s Lawsuit .....	7
2. The District Court’s Opinion .....	9
3. Appellate Proceeding.....	10
SUMMARY OF ARGUMENT .....	10
ARGUMENT .....	12
I. STANDARD OF REVIEW .....	12
II. SECTION 64.1200(a)(3)(iv) REQUIRES A FACSIMILE ADVERTISEMENT SENT WITH THE RECIPIENT’S PRIOR EXPRESS PERMISSION TO INCLUDE AN OPT- OUT NOTICE.....	13
III. SECTION 64.1200(a)(3)(iv) IS ENFORCEABLE IN THIS PRIVATE CIVIL ACTION.....	19
CONCLUSION .....	24

## TABLE OF AUTHORITIES

### CASES

<i>Auer v. Robbins</i> , 519 U.S. 452 (1997) .....	12
<i>Beeler v. Astrue</i> , 651 F.3d 954 (8th Cir. 2011) .....	12
<i>Biggerstaff v. FCC</i> , 511 F.3d 178 (D.C. Cir. 2007).....	5
<i>Black &amp; Decker Corp. v. Comm’r</i> , 986 F.2d 60 (4th Cir. 1993).....	13
<i>Boeing Co. v. United States</i> , 258 F.3d 958 (9th Cir. 2001).....	13
<i>Cablevision Systems Corp. v. FCC</i> , 649 F.3d 695 (D.C. Cir. 2011).....	18
<i>CE Design, Ltd v. Prism Business Media, Inc.</i> , 606 F.3d 443 (7th Cir. 2010).....	21
<i>Chase Bank, N.A., v. McCoy</i> , 131 S. Ct. 871 (2011) .....	12
<i>Cheney R.R. Co. v. ICC</i> , 902 F.2d 66 (D.C. Cir. 1990).....	18
<i>Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.</i> , 447 U.S. 102 (1980) .....	13
<i>Fast v. Applebee’s Int’l, Inc.</i> , 638 F.3d 872 (8th Cir. 2011).....	12
<i>FCC v. ITT World Commc’ns, Inc.</i> , 466 U.S. 463 (1984) .....	20, 21
<i>Functional Music, Inc. v. FCC</i> , 274 F.2d 543 (D.C. Cir. 1958).....	22
<i>Kennedy v. Plan Adm’r for DuPont Sav. and Inv. Plan</i> , 555 U.S. 285 (2009).....	12
<i>Landsman &amp; Funk PC v. Skinder-Strauss Assocs.</i> , 640 F.3d 72 (3d Cir. 2011).....	3, 14
<i>Mims v. Arrow Fin. Servs., LLC</i> , 132 S. Ct. 740 (2012) .....	4
<i>Missouri ex. rel. Nixon v. Am. Blast Fax, Inc.</i> , 323 F.3d 649 (8th Cir. 2003), <i>cert. denied</i> , 540 U.S. 1104 (2004) .....	3, 14

<i>Ramirez-Peyro v. Holder</i> , 574 F.3d 893 (8th Cir. 2009).....	12
<i>Talk Am., Inc. v. Mich. Bell Tel. Co.</i> , 131 S. Ct. 2254 (2011) .....	2, 12, 19
<i>United States v. Any and All Radio Station Transmission Equip.</i> , 207 F.3d 458 (8th Cir. 2000).....	2, 21, 23
<i>United States v. Big Crow</i> , 327 F.3d 685 (8th Cir. 2003).....	13
<i>United Steelworkers of Am., AFL-CIO v. NLRB</i> , 389 F.2d 295 (D.C. Cir. 1967) .....	19
<i>Vonage Holdings Corp. v. Minnesota PUC</i> , 394 F.3d 568 (8th Cir. 2004).....	21
<i>Westfeld v. Indep. Processing, LLC</i> , 621 F.3d 819 (8th Cir. 2010) .....	16

**ADMINISTRATIVE DECISIONS**

<i>Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991</i> , Memorandum Opinion and Order, 10 FCC Rcd 12391 (1995).....	3
<i>Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991</i> , Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006), <i>petition for review dismissed</i> , <i>Biggerstaff v. FCC</i> , 511 F.3d 178 (D.C. Cir. 2007), <i>recon. granted in part</i> , 23 FCC Rcd 15059 (2008).....	5, 6, 7, 14, 17, 18, 19
<i>Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991</i> , Report and Order, 7 FCC Rcd 8752 (1992), <i>recon. granted in part</i> , 10 FCC Rcd 12391, <i>further recon. granted in part</i> , 12 FCC Rcd 4609 (1997) .....	4
<i>Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005</i> , 71 Fed. Reg. 25967 (2006) .....	7, 18

**STATUTES AND REGULATIONS**

28 U.S.C. § 2341 *et seq* .....20  
28 U.S.C. § 2342(1) .....20  
47 U.S.C. § 227 .....2  
47 U.S.C. § 227(a)(5) .....4  
47 U.S.C. § 227(b).....17  
47 U.S.C. § 227(b)(1).....8  
47 U.S.C. § 227(b)(1)(C) .....3  
47 U.S.C. § 227(b)(1)(C)(i)..... 4, 16  
47 U.S.C. § 227(b)(1)(C)(iii) .....5  
47 U.S.C. § 227(b)(3)..... 4, 20, 21  
47 U.S.C. § 227(g).....4  
47 U.S.C. § 402(a).....20  
47 U.S.C. § 405 .....22  
47 U.S.C. § 405(a).....22  
47 C.F.R. § 1.106(f) .....22  
47 C.F.R. § 1.401 .....22  
47 C.F.R. § 64.1200(a)(3) .....9  
47 C.F.R. § 64.1200(a)(3)(i)-(iii) ..... 11, 15, 16, 19  
47 C.F.R. § 64.1200(a)(3)(iii) .....5  
47 C.F.R. § 64.1200(a)(3)(iii)(A)-(E) .....5  
47 C.F.R. § 64.1200(a)(3)(iv) ..... 2, 6, 8, 10, 13, 14, 15  
47 C.F.R. § 64.1200(f)(5).....5  
Pub. L. No. 102-243, 105 Stat. 2394 (1991).....2  
Pub. L. No. 109-21, 119 Stat 359 (2005).....1

**OTHERS**

H.R. Rep. No. 317, 102d Cong., 1st Sess. 11 (1991).....3  
S. Rep. No. 178, 102d Cong., 1st Sess. 6 (1991),  
1991 U.S.C.C.A.N 1969.....17

IN THE 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-APPELLEE,

v.

DOUGLAS PAUL WALBURG,

DEFENDANT-APPELLANT.

---

APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE EASTERN DISTRICT OF  
MISSOURI, EASTERN DIVISION CASE NO. 4:10-  
CV-00478-AGF THE HONORABLE AUDREY G.  
FLEISSIG, UNITED STATES DISTRICT COURT  
JUDGE

---

AMICUS BRIEF FOR THE FEDERAL  
COMMUNICATIONS COMMISSION URGING  
REVERSAL

---

**STATEMENT OF INTEREST**

This case involves the interpretation of Section 64.1200(a)(3)(iv) of the FCC's rules, which implement the Junk Fax Prevention Act of 2005 ("JFPA"), Pub. L. No. 109-21, 119 Stat 359 (2005), by requiring that an "opt-

out” notice be provided on certain advertisements transmitted by facsimile machines. 47 C.F.R. § 64.1200(a)(3)(iv). The FCC has an interest in ensuring that the JFPA and Section 64.1200(a)(3)(iv) are interpreted correctly.

### **STATEMENT OF ISSUE PRESENTED**

This Court invited the FCC to file an *amicus* brief that addresses the “the meaning and scope of 47 CFR Section 64.1200(a)(3)(iv) and its application to the facsimile issue in this case.” Order of the Ct. (Jan. 11, 2011). Pertinent authorities are:

47 C.F.R. 64.1200(a)(3)(iv).

*Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254 (2011).

*United States v. Any and All Radio Station Transmission Equip.*, 207 F.3d 458 (8th Cir. 2000).

### **STATEMENT OF THE CASE**

#### **A. Statutory and Regulatory Background**

Congress first addressed the growing problem of abusive telemarketing practices, including the transmission of unwanted advertisements via facsimile machines, in the Telephone Consumer Protection Act of 1991 (“TCPA”), Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227). As the legislative history explained, because facsimile machines “are designed to accept, process, and print all messages which arrive over their

dedicated lines,” facsimile advertising imposes burdens on unwilling recipients that are distinct from the burdens imposed by other types of advertising. H.R. Rep. No. 317, 102d Cong., 1st Sess. 11 (1991). *See Missouri ex. rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004) (“*Am. Blast Fax*”). Among other things, recipients of facsimile advertising must pay the expenses associated with receipt, including “the cost of the paper used, the cost associated with the use of the facsimile machine, and the costs associated with the time spent by the facsimile machine when receiving a facsimile advertisement during which the machine cannot be used by its owner to send or receive facsimile transmissions.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12405 (¶ 29) (1995); *see also Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72, 76 (3d Cir. 2011); *Am. Blast Fax*, 323 F.3d at 654-55.

The TCPA accordingly prohibits the “use [of] any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement.” 47 U.S.C. § 227(b)(1)(C). An “unsolicited advertisement” is defined in the TCPA as “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." 47 U.S.C. § 227(a)(5).

The TCPA provides for a private right of action in state courts for violations of the statute or the FCC's implementing regulations. 47 U.S.C. § 227(b)(3).<sup>1</sup> If a violation is established, Section 227(b)(3) entitles private litigants to recover the greater of actual monetary losses or statutory damages of up to \$500 (subject to trebling for a willful or knowing offense) for each violation of the statute. *Id.*

In 2005, Congress amended the facsimile advertising provisions of the TCPA in the JFPA. Among other provisions, the JFPA excludes from the general ban on unsolicited advertisements those facsimiles that are transmitted to persons with whom the sender has an "established business relationship" ("EBR"). 47 U.S.C. § 227(b)(1)(C)(i).<sup>2</sup> To come within the

---

<sup>1</sup> Consumers alleging a violation of the TCPA also can file a complaint with the FCC requesting enforcement action. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, 8780 (¶ 55 & n.89) (1992), *recon. granted in part*, 10 FCC Rcd 12391, *further recon. granted in part*, 12 FCC Rcd 4609 (1997). In addition, state attorneys general may bring civil enforcement actions under the TCPA to enjoin prohibited practices and recover damages on behalf of their citizens. 47 U.S.C. § 227(g). *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 746 (2012).

<sup>2</sup> An "established business relationship" is defined as "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

statutory exclusion, the sender must include, among other things, specified information on the advertisement that enables the recipient to “opt-out” of any future facsimile advertisements from that sender. 47 U.S.C. § 227(b)(1)(C)(iii).

In April 2006, pursuant to Congress’ direction, the FCC amended its TCPA regulations to implement the JFPA. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) (“2006 Rulemaking Order”), *petition for review dismissed*, *Biggerstaff v. FCC*, 511 F.3d 178 (D.C. Cir. 2007), *recon. granted in part*, 23 FCC Rcd 15059 (2008). The amended regulations provide that “No person or entity may: . . . (3) [u]se a telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine, unless . . . (iii) [t]he advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements.” 47 C.F.R. § 64.1200(a)(3)(iii). *See also id.* § 64.1200(a)(3)(iii)(A)-(E) (specifying content of opt-out notice).

---

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.” 47 C.F.R. § 64.1200(f)(5).

In the provision at issue in this case, the amended regulations further provide that “[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender” likewise must include an opt-out notice. 47 C.F.R. § 64.1200(a)(3)(iv). The opt-out notice required by Section 64.1200(a)(3)(iv) for facsimile advertisements sent with prior express invitation or permission must contain the same information as the notice required for unsolicited facsimile advertisements sent to recipients on the basis of an EBR. *See* 47 C.F.R. § 64.1200(a)(3)(iv).

In the text of the order adopting Section 64.1200(a)(3)(iv), the FCC explained that it was requiring opt-out notices on “facsimile advertisements to consumers from whom they obtained permission” so as to provide a mechanism “to allow consumers to stop unwanted faxes in the future.” *2006 Rulemaking Order*, 21 FCC Rcd at 3812 (¶ 48). Similarly, in declining to exempt nonprofit professional or trade associations from the requirement to include an opt-out notice in any unsolicited facsimiles sent to their members, the Commission emphasized that its rules provide consumers with “the necessary tools to easily opt-out of unwanted faxes.” 21 FCC Rcd at 3809-10 (¶ 42) (“we believe the benefits to consumers of having opt-out information readily available outweigh any burden in including such notices”). A footnote to this determination, however, stated (without further explanation)

that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.” *Id.* at 3810 n.154.<sup>3</sup>

After the enactment of Section 64.1200(a)(3), the FCC published a consumer guide to its facsimile advertising rules on its website: <http://www.fcc.gov/guides/fax-advertising>. In that description, the FCC specified that “[s]enders of permissible fax advertisements (those sent under an EBR or with the recipient’s prior express permission) must provide notice and contact information on the fax that allows recipients to ‘opt-out’ of future faxes.” *Id.*

## **B. This Proceeding**

1. Nack’s Lawsuit. Michael Nack filed a class action in a Missouri state court for damages alleging, *inter alia*, that Douglas Walburg, d/b/a Mariposa Publishing, violated the JFPA and the FCC’s implementing regulations by sending Nack and more than 40 other recipients facsimiles that advertised a legal reference manual and that did not contain an opt-out notice.

---

<sup>3</sup> A summary of the *2006 Rulemaking Order* was printed in the Federal Register. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 71 Fed. Reg. 25967 (2006); that summary of the *2006 Rulemaking Order* is cited in the parties’ briefs in this case. The substance of footnote 154 of the *2006 Rulemaking Order* is reprinted in the Federal Register summary as a parenthetical. 71 Fed. Reg. at 25971.

*See* J.A. 34-36, 46-48. On Walburg’s motion, the case subsequently was removed to federal district court. *See* J.A. 173.

On August 9, 2010, Walburg filed a motion for summary judgment. Walburg did not dispute that he had transmitted a facsimile advertisement to Nack that did not contain an opt-out notice. *See* J.A. 69. Instead, Walburg asserted that he was entitled to judgment as a matter of law because the facsimile advertisement had been transmitted with Nack’s prior express permission. J.A. 52-53. For purposes of the summary judgment motion, Nack stipulated that Walburg had received prior express approval to transmit the facsimile advertisement from Nack’s answering service. J.A. 138-139.

In the memorandum accompanying his summary judgment motion, Walburg acknowledged that the FCC’s rules state that “both ‘unsolicited’ faxes as well as faxes sent with ‘express invitation and permission’ shall contain an opt-out notice.” J.A. 63 (citing 47 C.F.R. § 64.1200(a)(3)(iv)). Walburg argued, however, that the rule was (1) “inconsistent” with the *2006 Rulemaking Order*, and (2) contrary to 47 U.S.C. § 227(b)(1), which applies only to “unsolicited” facsimile advertisements. J.A. 63-65.

In his response to Walburg’s summary judgment motion, Nack contended that Section 64.1200(a)(3) requires an opt-out notice on all facsimile advertisements, including those sent with the recipient’s prior

express permission, and that there was no dispute that Walburg’s facsimile advertisements lacked such notice. J.A. 146. Nack pointed out that paragraph 48 of the *2006 Rulemaking Order* (as well as the FCC’s consumer guide) expressly state that facsimile advertisements sent with the recipient’s consent must contain an opt-out notice to enable consumers to stop unwanted facsimile advertisements in the future. J.A. 147.

2. The District Court’s Opinion. The district court granted summary judgment for Walburg. J.A. 172-82. The district court agreed that Nack could bring a private action under the TCPA if Section 64.1200(a)(3)(iv) required an opt-out notice for facsimile advertisements sent with the recipient’s permission. J.A. 179. The district court concluded, however, that “the regulation, while wholly valid, does not apply to the facts of this case.” J.A. 183.

In the district court’s view, Section 64.1200(a)(3)(iv) applies only to “unsolicited” facsimile advertisements. J.A. 180. The district court reasoned that Section 64.1200(a)(3)(iv) is numbered as a subsection of Section 64.1200(a)(3), a rule prohibiting the transmission of “unsolicited” facsimile advertisements. *Id.* (quoting 47 C.F.R. § 64.1200(a)(3)). The district court also relied upon the Federal Register summary of the statement in footnote 154 of the *2006 Rulemaking Order* that the notice requirement “only applies

to communications that constitute unsolicited advertisements.” *Id.* The court recognized that the text of the FCC’s order makes clear that “the opt-out notice requirement is not expressly limited to unsolicited faxes,” but it nonetheless concluded that the regulation does not “appl[y] to a fax advertisement that is sent, as here, pursuant to the recipient’s express and specific permission.” J.A. 181.<sup>4</sup>

3. Appellate Proceeding. Nack appealed the district court’s judgment to this Court. Following briefing and oral argument, the Court invited the FCC to file a brief *amicus curiae* “regarding the meaning and scope of 47 CFR Section 64.1200(a)(3)(iv) and its application to the facsimile issue in this case.” Order of the Ct. (Jan. 11, 2012). The FCC submits this brief in response to the Court’s invitation.

### SUMMARY OF ARGUMENT

1. The plain language of 47 C.F.R. § 64.1200(a)(3)(iv) requires facsimile advertisements sent with the recipient’s consent to contain an opt-

---

<sup>4</sup> While observing that it was “not called upon to determine when and how the regulation requiring opt-out language would apply,” the district court appeared to read Section 64.1200(a)(3)(iv) as applying only in situations where “at some previous point in time, perhaps pursuant to an EBR, permission was given.” J.A. 181. In the court’s view, “[a]ny such sender who thereafter sent an ‘unsolicited’ fax, in reliance on the earlier permission, would need to include an opt-out notice . . . for the later fax.” *Id.*

out notice. Moreover, reading the FCC's regulation in accordance with its terms both advances the consumer protection policies underlying the TCPA and the JFPA, and comports with the FCC's published description of its facsimile advertisement regulations. By contrast, construing the regulation to apply only to unsolicited faxes – as the court below held – would render it entirely duplicative of the separate opt-out notice requirement applicable to such faxes contained in 47 C.F.R. § 64.1200(a)(3)(i)-(iii). Because the district court's reading of the FCC's regulation is inconsistent with its text, and undermines the goals of Congress and the FCC in regulating abusive telemarketing practices, the decision below should be reversed.

2. The Administrative Orders Review Act (commonly known as the Hobbs Act) provides the exclusive jurisdictional basis for a challenge to the validity of final action taken in an FCC rulemaking order. Because this case does not involve direct judicial review of FCC action pursuant to the Hobbs Act, the Court lacks jurisdiction over Walburg's collateral challenge to Section 64.1200(a)(3)(iv) – which Walburg contends was promulgated without statutory authority – in this case.



## ARGUMENT

### I. STANDARD OF REVIEW

The courts owe substantial deference to an agency's construction of its own regulations. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2260-61 (2011); *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 879 (8th Cir. 2011). Indeed, the FCC's construction of its own regulation is controlling unless that construction is “plainly erroneous or inconsistent with the regulation[]” 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.’” *Talk Am.*, 131 S. Ct at 2261 (quoting *Chase Bank, N.A., v. McCoy*, 131 S. Ct. 871, 881 (2011)); *see also Beeler v. Astrue*, 651 F.3d 954, 961 (8th Cir. 2011). As the Supreme Court repeatedly has stated, such deference applies to the FCC's interpretation of a rule that is set forth in an *amicus curiae* brief. *Talk Am.*, 131 S.Ct. at 2261 (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)). *Accord Chase Bank*, 131 S.Ct. at 881; *Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan*, 555 U.S. 285, 296 n.7 (2009). *See also Ramirez-Peyro v. Holder*, 574 F.3d 893, 900 (8th Cir. 2009). Moreover, courts defer to an agency's reasonable construction of its own rule even if an alternative construction also is reasonable. *See, e.g., Ramirez-Peyro*, 574 F.3d at 900.

**II. SECTION 64.1200(A)(3)(IV) REQUIRES A FACSIMILE ADVERTISEMENT SENT WITH THE RECIPIENT'S PRIOR EXPRESS PERMISSION TO INCLUDE AN OPT-OUT NOTICE.**

1. The starting point in the interpretation of a statute or agency rule<sup>5</sup> is its language. “Absent a clearly expressed . . . intention to the contrary, that language must ordinarily be regarded as conclusive.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). See *United States v. Big Crow*, 327 F.3d 685, 688 (8th Cir. 2003).

Section 64.1200(a)(3)(iv), in its entirety, states:

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). There is no reason to think that Section 64.1200(a)(3)(iv) does not mean exactly what it says: a “facsimile advertisement” sent with the recipient’s “prior express invitation or permission” must “include an opt-out notice.” *Id.*

---

<sup>5</sup> It is well-established that the “tenets of statutory construction apply with equal force to the interpretation of regulations.” *Boeing Co. v. United States*, 258 F.3d 958, 967 (9th Cir. 2001) (citing *Black & Decker Corp. v. Comm’r*, 986 F.2d 60, 65 (4th Cir. 1993)).

2. This construction of Section 64.1200(a)(3)(iv) not only accords with its plain language, it also advances the legislative purposes underlying the TCPA and JFPA. As this Court has pointed out, Congress enacted that legislation in order to protect consumers from the costs and burdens associated with receiving unwanted facsimile advertisements. *E.g., Am. Blast Fax*, 323 F.3d at 654-55. *See Landsman & Funk*, 640 F.3d at 76. In adopting the opt-out notice requirement in Section 64.1200(a)(3)(iv), the FCC recognized that consumers that have provided prior express consent to the receipt of a facsimile advertisement might subsequently choose to withdraw that consent. The FCC’s construction of Section 64.1200(a)(3)(iv) provides protection against unwanted facsimile advertisements by ensuring that consumers who receive facsimile advertisements transmitted with their consent (1) are informed of their right to withdraw that consent, and (2) are provided with a cost-free mechanism by which to opt out of future facsimile advertisements if they decide to exercise that right. 47 C.F.R.

§ 64.1200(a)(3)(iv). As the Commission explained in the *2006 Rulemaking Order*, requiring an opt-out notice on faxes even when permission is granted serves to “allow consumers to stop unwanted faxes in the future.” 21 FCC Rcd at 3812 (¶ 48).

Consistent with the language of the rule — and the explanation in the order adopting it — the consumer guide to fax advertising on the FCC’s website similarly has stated at least since March 2007 that “[s]enders of permissible fax advertisements (those sent under an EBR or with the recipient’s prior express permission) must provide [an opt-out notice].” *See* <http://www.fcc.gov/guides/fax-advertising>.

Contrary to the district court’s understanding in this case (*see* J.A. 180), the fact that Section 64.1200(a)(3)(iv) appears in the FCC’s rules as a subsection of Section 64.1200(a)(3), which otherwise concerns “unsolicited” facsimile advertisements, does not demonstrate that Section 64.1200(a)(3)(iv)’s opt-out notice is also limited to unsolicited facsimile advertisements. In contrast with Section 64.1200(a)(3) and its first three subsections, *see* 47 C.F.R. § 64.1200(a)(3)(i)-(iii), all of which mention “unsolicited advertisements,” Section 64.1200(a)(3)(iv) by its terms applies to “[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender.” 47 C.F.R. § 64.1200(a)(3)(iv). That Section 64.1200(a)(3)(iv) embodies a stand-alone requirement is further supported by the punctuation of the rule. There is a period after subsection (3)(iii), which suggests a break in the connection between the preceding subsections and subsection (3)(iv). Thus, the language

and punctuation of Section 64.1200(a)(3) show that Section 64.1200(a)(3)(iv) was not directed at the unsolicited advertisements to which the prior portions of Section 64.1200(a)(3) apply.

That understanding of the regulation appropriately gives each of its sub-sections independent meaning. *See Westfeld v. Indep. Processing, LLC*, 621 F.3d 819, 824 (8th Cir. 2010) (applying well-established principle that a regulation should not be interpreted “in a manner that renders any section . . . superfluous or fails to give effect to all of the words.”). Section 64.1200(a)(3)(i)-(iii) already requires *unsolicited* facsimile advertisements that are transmitted to persons with whom the sender has an EBR to contain an opt-out notice. 47 C.F.R. § 64.1200(a)(3)(i)-(iii). The only unsolicited facsimile advertisements permitted under the JFPA, however, are those in which the sender has an EBR with the recipient. 47 U.S.C. § 227(b)(1)(C)(i). Thus, the portion of Section 64.1200(a)(3) preceding subsection (iv) — Section 64.1200(a)(3)(i)-(iii) — already requires all permitted unsolicited facsimile advertisements to contain an opt-out notice. Interpreting subsection (iv) as applying only to unsolicited facsimile advertisements — and requiring such advertisements to contain an opt-out notice — would render that

subsection duplicative of Section 64.1200(a)(3)(i)-(iii) and deprive it of independent meaning.<sup>6</sup>

Walburg argues that its construction of Section 64.1200(a)(3)(iv) is necessary to harmonize the rule with the language and purpose of the TCPA as amended by the JFPA. Walburg Brief at 22-24. That argument is without merit. In enacting 47 U.S.C. § 227(b), Congress concluded that a prohibition on unsolicited facsimile advertisements is “the *minimum* necessary to protect unwilling recipients from receiving fax messages that are detrimental to the owner's uses of his or her fax machine.” S. Rep. No. 178, 102d Cong., 1st Sess. 6 (1991), 1991 U.S.C.C.A.N 1969, 1975-76 (emphasis added). By mandating a ban on the transmission of unsolicited facsimile advertisements, Congress did not preclude the FCC from adopting measures not expressly mandated by statute to protect consumers from receiving unwanted facsimile advertisements. Instead, Congress was silent on the mechanism by which

---

<sup>6</sup> The district court construed Section 64.1200(a)(3)(iv) to apply to what it believed to be a specific type of “unsolicited” facsimile advertisements, *i.e.*, the second (and subsequent) advertisements sent to a recipient who had given express permission to the transmission of an earlier facsimile advertisement. *See* J.A. 181. Under the FCC’s rules, however, express permission, once obtained, applies “until the consumer revokes such permission by sending an opt-out request to the sender.” *2006 Rulemaking Order*, 21 FCC Rcd at 3812 (¶ 46). Thus, the facsimile advertisements that the district court believed to be governed by Section 64.1200(a)(3)(iv) are not “unsolicited” advertisements at all, but instead are a subgroup of advertisements transmitted with the consent of the recipient.

consumers would be notified of their right to withdraw their consent to receive facsimile advertisements. “Congress’s mandate in one context with its silence in another suggests . . . simply a decision not to mandate any solution in the second context, *i.e.*, to leave the question to agency discretion.” *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990). *See Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 705 (D.C. Cir. 2011) (concluding that grant of authority to the FCC in the Communications Act “establishes a floor rather than a ceiling.”). Because there is no conflict in this case between the statute and the FCC’s opt-out notice rule, the Court should reject Walburg’s invitation to “interpret” the agency’s rule in a manner inconsistent with its plain language.

Finally, the court below erred in concluding that footnote 154 of the FCC’s *2006 Rulemaking Order* demonstrates that Section 64.1200(a)(3)(iv) applies only to unsolicited advertisements. To be sure, that footnote states, without explanation, that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.” 21 FCC Rcd at 3810 n.154. *See* 71 Fed. Reg. at 25971. But the text of the *2006 Rulemaking Order* states explicitly that “entities that send facsimile advertisements to consumers from whom they obtained permission, must include on the advertisements [an] opt-out notice” to enable “consumers to stop unwanted

faxes in the future.” 21 FCC Rcd at 3812 (¶ 48). Furthermore, other parts of that order state without qualification that facsimile advertisements must include an opt-out notice. *See 2006 Rulemaking Order*, 21 FCC Rcd at 3788, 3824 (¶¶ 1, 70). Where, as here, a conflict exists between the text and a footnote in the same agency order, “the text of the [agency’s] decision controls.” *United Steelworkers of Am., AFL-CIO v. NLRB*, 389 F.2d 295, 297 (D.C. Cir. 1967). That principle applies with particular force here because the text in question — in contrast with the unexplained footnote — construes the rule in a manner compelled by the language in the regulation itself.<sup>7</sup> The FCC’s reasonable reading of its own regulation and order is entitled to deference. *See Talk Am.*, 131 S. Ct at 2261.

### **III. SECTION 64.1200(A)(3)(IV) IS ENFORCEABLE IN THIS PRIVATE CIVIL ACTION.**

The TCPA authorizes persons to bring an action for damages or injunctive relief in state court “based on a violation of [47 U.S.C. § 227(b)] *or*

---

<sup>7</sup> It is irrelevant to this case that the *2006 Rulemaking Order* stated that the Commission was amending its 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.” 21 FCC Rcd at 3800 (¶ 24). *See Walburg Brief* at 18. There is no dispute that the FCC’s rules require an opt-out notice on all unsolicited facsimile advertisements. *See* 47 C.F.R. § 64.1200(a)(3)(i)-(iii). The issue here is whether Section 64.1200(a)(3)(iv) likewise requires an opt-out notice on facsimile advertisements that are transmitted with the recipient’s consent.



the regulations prescribed under [that statute].” 47 U.S.C. § 227(b)(3) (emphasis added).

Walburg acknowledges that Section 64.1200(a)(3)(iv) was “promulgated under the grant of authority that Congress gave the FCC under . . . Section 227(b)(2).” Walburg Brief at 20. The district court agreed. *See* J.A. 179 (“if an opt-out notice is required by the regulation,” Nack would have “a right to bring a cause of action under the TCPA”). Nonetheless, Walburg argues that if Section 64.1200(a)(3)(iv) requires an opt-out notice for facsimile advertisements sent with the recipient’s consent, that regulation is not enforceable in this private civil action because the JFPA only authorizes the FCC to adopt an opt-out notice requirement for unsolicited facsimiles. Walburg Brief at 29-33. That argument is a thinly veiled challenge to the validity of Section 64.1200(a)(3)(iv) that is not properly before the Court in this case.

Section 402(a) of the Communications Act, 47 U.S.C. § 402(a), specifies that (with certain exceptions not applicable here) any challenge to final action taken in an FCC rulemaking order must be brought under the Hobbs Act, 28 U.S.C. § 2341 *et seq.* The Hobbs Act, in turn, gives the courts of appeals “*exclusive jurisdiction* to . . . determine the validity of” such action. 28 U.S.C. § 2342(1) (emphasis added). *See FCC v. ITT World*

*Commc 'ns, Inc.*, 466 U.S. 463, 467 (1984). Because this case does not involve judicial review of FCC action pursuant to the Hobbs Act, the Court “is without jurisdiction to entertain a challenge to [the] FCC regulation[.]” *United States v. Any and All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000). See *Vonage Holdings Corp. v. Minnesota PUC*, 394 F.3d 568, 569 (8th Cir. 2004) (“No collateral attacks on the FCC Order are permitted . . . [because] [t]he case before us is not a Hobbs Act petition for review.”). Indeed, one recent appellate decision has squarely held that the Hobbs Act precludes a challenge, like the one here, to the validity of FCC rules promulgated under the TCPA in a private civil action brought under 47 U.S.C. § 227(b)(3). *CE Design, Ltd v. Prism Business Media, Inc.*, 606 F.3d 443 (7th Cir. 2010).

The fact that Walburg’s challenge to Section 64.1200(a)(3)(iv) is presented as part of its defense in a civil action does not override the Hobbs Act’s jurisdictional limitation. As this Court has pointed out, a “defensive attack on the FCC regulation[] is as much an evasion of the exclusive jurisdiction of the Court of Appeals [that is prescribed in the Hobbs Act] as is a preemptive strike.” *Any and All Radio Station Transmission Equip.*, 207 F.3d at 463.

A litigant like Walburg has several avenues to raise a challenge to the lawfulness of an FCC rule consistent with the jurisdictional limitations set forth in the Hobbs Act. First, an aggrieved person can contest the validity of the rule in a timely petition for administrative reconsideration, *see* 47 U.S.C. § 405; if the agency denies the litigant's request, the litigant can seek judicial review of that decision under the Hobbs Act. Second, an aggrieved person at any time can petition the FCC to amend or repeal the rule on the basis that the rule is unauthorized by statute, *see* 47 C.F.R. § 1.401, and obtain judicial review in the court of appeals under the Hobbs Act if the agency denies the petition. Third, if the FCC issues an order applying the rule to a party, that party can seek judicial review of that order under the Hobbs Act and challenge the validity of the rule in that appellate proceeding, provided that the party previously presented the same argument to the FCC in the administrative enforcement proceeding. *See Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir. 1958); 47 U.S.C. § 405(a).

None of those avenues is available to Walburg in this case, however. The 30-day time limit for seeking reconsideration of the FCC's 2006 adoption of Section 64.1200(a)(iv) has long since expired. *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(f). No party has filed a petition to rescind the rule. Finally, this case does not arise from any action by the Commission

applying the rule against Walburg. This Court has no power to permit an “end run” around the “statutory channels” for review of FCC orders. *See Any and All Radio Station Transmission Equip.*, 207 F.3d at 463. Because Congress did not give the court of appeals jurisdiction to entertain a collateral challenge to the lawfulness of an FCC rule on review of a private action under Section 227(b)(3), Walburg’s contention that the FCC lacked authority under the JPFA to enact Section 64.1200(a)(3)(iv) is not properly before this Court.

**CONCLUSION**

The judgment below should be reversed.

Respectfully submitted,

AUSTIN C. SCHLICK  
GENERAL COUNSEL

PETER KARANJIA  
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS  
ASSOCIATE GENERAL COUNSEL

/s/ Laurel R. Bergold

LAUREL R. BERGOLD  
COUNSEL

FEDERAL COMMUNICATIONS  
COMMISSION  
WASHINGTON, D.C. 20554  
(202) 418-1740

February 24, 2012

IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

MICHAEL R. NACK, INDIVIDUALLY AND ON  
BEHALF OF ALL OTHERS SIMILARLY SITUATED

PLAINTIFF-APPELLEE,

v.

DOUGLAS PAUL WALBURG,

DEFENDANT-APPELLANT.

No. 11-1460

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby  
certify that the accompanying Amicus Brief for the Federal Communications  
Commission Urging Reversal in the captioned case contains 4,744 words.

/s/ Laurel R. Bergold  
Laurel R. Bergold  
Counsel  
Federal Communications Commission  
Washington, D.C. 20554  
(202) 418-1740 (Telephone)  
(202) 418-2819 (Fax)

February 24, 2012

**11-1460**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

**Michael R. Nack, Plaintiff-Appellant**

**v.**

**Douglas Paul Walburg, Defendant-Appellee.**

**CERTIFICATE OF SERVICE**

I, Laurel R. Bergold, Jr., hereby certify that on February 24, 2012, I electronically filed the foregoing Amicus Brief for the Federal Communications Commission Urging Reversal with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Phillip A. Bock  
Bock & Hatch  
134 N. LaSalle Street  
Suite 1000  
Chicago, IL 60602  
*Counsel for: Michael R. Nack*

Max G. Margulis  
Margulis Law Group  
28 Old Belle Monte Road  
Chesterfield, MO 63017  
*Counsel for: Michael R. Nack*

Brian J. Wanca  
Anderson & Wanca  
3701 Algonquin Road  
Suite 760  
Rolling Meadows, IL 60008  
*Counsel for: Michael R. Nack*

Patrick A. Bousquet  
Robert L Carter  
Russell F. Watters  
Timothy J. Wolf  
Brown & James  
1010 Market Street  
20<sup>th</sup> Floor  
St. Louis, MO 63101  
*Counsel for: Douglas Paul Walburg*

/s/ Laurel R. Bergold