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July 19, 2013

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VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Petition of Staples, Inc. and Quill Corporation for a Rulemaking to Repeal Rule 64.1200(a)(3)(iv) and for a Declaratory Ruling to Interpret Rule 64.1200(a)(3)(iv)*, RM No. ____; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278; *Junk Fax Prevention Act of 2005*, CG Docket No. 05-338

Dear Ms. Dortch:

On behalf of Staples, Inc. and Quill Corporation, enclosed please find a petition for rulemaking to repeal Rule 64.1200(a)(3)(iv) and for a declaratory ruling clarifying that Rule 64.1200(a)(3)(iv) does not require that solicited fax advertisements contain an opt-out notice. Please include this filing in the above-referenced dockets.

Should you have any questions regarding this filing, please do not hesitate to contact me.

Respectfully submitted,

/s/ Helgi C. Walker

cc: Sean Lev
Kris Monteith

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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In the Matter of:)	
)	
Petition of Staples, Inc. and Quill)	RM No. _____
Corporation for a Rulemaking to Repeal)	
Rule 64.1200(a)(3)(iv) and for a)	
Declaratory Ruling to Interpret Rule)	
64.1200(a)(3)(iv))	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of)	
1991)	
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 05-338
)	

**PETITION OF STAPLES, INC. AND QUILL CORPORATION FOR RULEMAKING
AND DECLARATORY RULING**

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July 19, 2013

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**PETITION OF STAPLES, INC. AND QUILL CORPORATION FOR RULEMAKING
AND DECLARATORY RULING**

Pursuant to Sections 1.401 and 1.2 of the rules of the Federal Communications Commission (the “Commission” or “FCC”),¹ Staples, Inc. (“Staples”) and Quill Corporation (“Quill”) respectfully petition the Commission to initiate a rulemaking proceeding to repeal Rule 64.1200(a)(3)(iv)² and issue a declaratory ruling clarifying that Rule 64.1200(a)(3)(iv) does not require that solicited fax advertisements contain an opt-out notice.

I. INTRODUCTION AND SUMMARY

Rule 64.1200(a)(3)(iv) (sometimes referred to herein simply as “the Rule”) has exposed companies and individuals to a risk of massive liability that Congress never intended to authorize. It does so by applying notice requirements, backed by a statutory damages provision,

¹ 47 C.F.R. § 1.401; 47 C.F.R. § 1.2.

² 47 C.F.R. § 64.1200(a)(3)(iv).

that Congress created only for *unsolicited* fax advertisements to fax advertisements that a recipient has expressly requested or otherwise *agreed* to receive.³ Thus, the Rule has spawned class-action lawsuits around the country that seek to impose huge liabilities on businesses and individuals based solely on consensual communications with their customers.

The Commission adopted the Rule in 2006 after Congress enacted the Junk Fax Protection Act of 2005, which amended the Telephone Consumer Protection Act (“TCPA”). The TCPA, codified in Section 227(b) of the Communications Act, prohibits sending an “unsolicited advertisement” to any fax machine unless “the unsolicited advertisement contains a notice [that includes specified opt-out language].”⁴ Further, Section 227(b) directs the FCC to “prescribe regulations to implement the requirements” for the opt-out “notice contained in an unsolicited advertisement.”⁵ The statute also authorizes a private right of action for damages “based on a violation of this subsection [Section 227(b)] or the regulations prescribed under this subsection.”⁶ Rule 64.1200(a)(3)(iv), which purports to implement Section 227, provides 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.”⁷

The Rule exceeds the Commission’s statutory authority and thus should be repealed. Congress has directly spoken to the question whether opt-out notices must be included in solicited faxes, *i.e.*, faxes *sent with the recipient’s prior express consent*, and the answer is no.

³ 47 C.F.R. § 64.1200(a)(3)(iv) (covering any fax “that is sent to a recipient that has provided prior express invitation or permission” for the communications).

⁴ 47 U.S.C. § 227(b)(1)(C) & (C)(iii).

⁵ *Id.* § 227(b)(2)(D).

⁶ *Id.* § 227(b)(3)(A).

⁷ 47 C.F.R. § 64.1200(a)(3)(iv).

The TCPA makes clear that an opt-out notice is required only for unsolicited advertisements sent via facsimile. Rule 64.1200(a)(3)(iv), which extends the statutory opt-out requirement to *solicited* fax advertisements, contravenes Congress’s unambiguous intent not to regulate solicited fax advertisements *at all*. Moreover, Rule 64.1200(a)(3)(iv) violates the First Amendment to the extent that it requires opt-out notices on solicited fax advertisements.

Repealing the Rule, however, may not provide adequately certain relief to parties such as Staples that are currently facing lawsuits for alleged violations of Rule 64.1200(a)(3)(iv), because agency rulemakings generally do not apply retroactively. Accordingly, in conjunction with a rulemaking to repeal the Rule, the Commission should issue a declaratory ruling to eliminate uncertainty and provide retrospective relief from the Rule for companies and individuals currently involved in litigation arising under the Rule. Specifically, the Commission should interpret the Rule and the 2006 *Junk Fax Order*⁸ in accordance with the TCPA’s text, so as to make clear that solicited faxes were *never* required to contain an opt-out notice.

II. BACKGROUND

A. Congress Authorized The Commission To Regulate Unsolicited Fax Advertisements, Not Solicited Fax Advertisements.

Congress enacted the TCPA in 1991 to address the growing number of telemarketing practices, including unsolicited advertisements, believed to invade consumer privacy.⁹ The statute defines “unsolicited advertisement” as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person

⁸ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, Report and Order and Third Order on Reconsideration*, 21 F.C.C.R. 3787 (2006) (the “*Junk Fax Order*”).

⁹ 47 U.S.C. § 227.

without that person’s prior express invitation or permission, in writing or otherwise.”¹⁰ In 2005, Congress amended the TCPA with the Junk Fax Protection Act to address “junk fax transmissions.”¹¹ The key provision of the Junk Fax Protection Act is its “prohibition on fax transmissions containing unsolicited advertisements,” which amended Section 227(b) of the Communications Act.¹²

As amended, Section 227(b)(1)(C) makes it “unlawful for any person . . . (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 [authorized means]; and (iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D).”¹³ Paragraph (2)(D) of Section 227(b) directs the FCC to “prescribe regulations to implement the requirements” for the opt-out “notice contained in an unsolicited advertisement.”¹⁴ In particular, Congress instructed the Commission to promulgate a rule governing the statutory opt-out notice to be contained “in an unsolicited advertisement.”¹⁵ The opt-out 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.”¹⁶ Meanwhile, *solicited* fax advertisements are not so much as mentioned in the TCPA. It is thus readily apparent from the

¹⁰ *Id.* § 227(a)(5).

¹¹ Pub. L. No. 109-21 (2005).

¹² *Id.* § 2.

¹³ 47 U.S.C. § 227(b)(1)(C).

¹⁴ *Id.* § 227(b)(2)(D).

¹⁵ *Id.*

¹⁶ *Id.* § 227(b)(2)(D)(i), (iv)(I)–(II).

text and structure of the TCPA that Congress gave the Commission specific rulemaking authority only with respect to *unsolicited* fax advertisements.

In 2006, the Commission adopted rules to implement the Junk Fax Prevention Act. In particular, the Commission adopted Rule 64.1200(a)(3)(iv), which extends the TCPA’s opt-out notice requirement for unsolicited faxes to solicited faxes. The Rule provides 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.”¹⁷

The Commission offered confusing and conflicting statements regarding the Rule in its 2006 *Junk Fax Order*. The Commission stated that the Rule is intended “to allow consumers to stop unwanted faxes in the future” even if the sender had previously “obtained permission” from the recipient.¹⁸ In a footnote, however, the FCC declared—consistent with the text of the TCPA—that “the opt-out notice requirement *only applies to communications that constitute unsolicited advertisements.*”¹⁹ No party sought judicial review of the *Junk Fax Order* within the time period established by Section 402(a) of the Communications Act and the Hobbs Act.²⁰

B. Companies And Individuals Have Been Exposed To Massive Liability For Alleged Violations Of Rule 64.1200(a)(3)(iv).

The Commission’s adoption of the opt-out notice requirement in Rule 64.1200(a)(3)(iv) has exposed both companies and individuals to massive liability for sending solicited faxes. The TCPA authorizes private parties to bring an action for damages “based on a violation of this

¹⁷ 47 C.F.R. § 64.1200(a)(3)(iv).

¹⁸ *Junk Fax Order* ¶ 48.

¹⁹ *Id.* ¶ 42 n.154 (emphasis added).

²⁰ 47 U.S.C. § 402(a); 28 U.S.C. § 2342.

subsection [Section 227(b)] or the regulations prescribed under this subsection”²¹ and authorizes up to “\$500 in damages for each such violation.”²² The Rule has spawned class-action lawsuits around the country that threaten businesses and individuals with massive liability based solely on consensual communications with their customers.²³ Indeed, the U.S. Court of Appeals for the Eighth Circuit has recently recognized the inherent unfairness of the Rule: “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.”²⁴ Staples and its subsidiary Quill are in the same position: they face class-action lawsuits in Massachusetts and Illinois, respectively, where purported classes of plaintiffs are seeking millions of dollars in damages for alleged deficiencies in opt-out notices on faxes sent with the express consent of the recipients.²⁵

Anda, Inc. is another company facing similar liability. In November 2010, Anda filed a petition for a declaratory ruling asking the Commission to clarify the statutory basis for Rule 64.1200(a)(3)(iv). Anda specifically questioned the Commission’s statutory authority to adopt a rule requiring an opt-out notice on fax advertisements sent with the recipient’s prior express

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

²² *Id.* § 227(b)(3)(B).

²³ *See, e.g., Milwaukee Occupational Medicine v Prime Health Services, Inc.*, No. 12-cv-8086 (Milwaukee, Wis., County Circuit Court); *Physicians Healthsource, Inc., v. Anda*, No. 12 CV 60798 (S.D. Fla.); *Physicians Healthsource, Inc. v. Purdue Pharma L.P.*, No. 3:12-cv-01208 (D. Conn); *Medical West Ballas Pharmacy, Ltd. v. Anda, Inc.*, No. 08 SL-CC00257 (St. Louis, Mo., County Circuit Court); *St. Louis Heart Center, Inc. v. Forest Pharmaceuticals, Inc.*, No. 12-2224 (E.D. Mo.).

²⁴ *Nack v. Walburg*, 715 F.3d 680, 682 (8th Cir. 2013).

²⁵ *See Burik v. Staples Contract & Commercial, Inc.*, No. 1:12-cv-10806-NMG (D. Mass.); *Whiteamire Clinic, P.A., Inc. v. Quill Corp.*, No. 1:12-cv-05490 (N.D. Ill.).

consent. The Consumer & Governmental Affairs Bureau dismissed Anda's petition,²⁶ concluding that there was no uncertainty regarding "the statutory basis for the Commission's rule requiring an opt-out notice for fax advertisements sent with the recipient's prior express consent,"²⁷ and that the petition was "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."²⁸ Anda's petition is now pending before the full Commission.

III. THE COMMISSION SHOULD INITIATE A RULEMAKING PROCEEDING TO REPEAL RULE 64.1200(a)(3)(iv).

Not only does Rule 64.1200(a)(3)(iv) reflect poor policy that unfairly threatens companies and individuals with massive liability for the transmission of solicited fax advertisements, but mandating an opt-out notice in a solicited fax advertisement plainly exceeds the agency's statutory authority. The Commission, like other federal agencies, "literally has no power to act . . . unless and until Congress confers power upon it."²⁹ In Section 227, Congress never intended to expose fax advertisers to massive liability for failing to include an opt-out notice in fax advertisements expressly invited by the recipient. In fact, Congress never intended for the Commission to regulate solicited fax advertisements at all. Worse still, Rule 64.1200(a)(3)(iv) violates the First Amendment to the extent that it requires opt-out notices on solicited fax advertisements. The Commission should therefore repeal Rule 64.1200(a)(3)(iv) to provide prospective relief from this *ultra vires* rule.

²⁶ *In re 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*, 27 F.C.C.R. 4912 (2012) (the "Anda Bureau Order").

²⁷ *Id.* ¶ 5.

²⁸ *Id.* ¶ 6.

²⁹ *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

A. The Commission Lacks Statutory Authority To Require That Solicited Faxes Contain An Opt-Out Notice.

Congress has directly spoken to the question whether a solicited fax advertisement must contain an opt-out notice. The TCPA requires any “unsolicited advertisement” sent by fax to “contain[] a notice meeting the requirements under paragraph 2(D).”³⁰ Congress’s definition of “unsolicited advertisement” expressly excludes from the TCPA’s restrictions any fax advertisements sent with the recipient’s “prior express invitation or permission.”³¹ Thus, Congress unambiguously has determined that a fax advertisement sent with the recipient’s “prior express invitation or permission”—*i.e.*, a solicited fax—need not “contain[] a notice meeting the requirements under paragraph 2(D).”³² “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”³³

Nothing in the TCPA authorizes the Commission to regulate solicited fax advertisements in any manner, much less to adopt an opt-out notice requirement for solicited fax advertisements.³⁴ In Section 227(b), Congress gave the FCC the power to regulate unsolicited fax advertisements. Nothing in the plain language of Section 227(b) indicates that, by so doing, Congress gave the FCC authority to regulate solicited fax advertisements. Indeed, the grant of rulemaking authority in the TCPA, Section 227(b)(2)(D), expressly limits the FCC’s jurisdiction to “unsolicited advertisement[s].”³⁵ The mere fact that Congress delegated to the Commission

³⁰ 47 U.S.C. § 227(b)(1)(C) & (C)(iii).

³¹ *Id.* § 227(a)(5).

³² *Id.* § 227(b)(1)(C) & (C)(iii).

³³ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

³⁴ 47 U.S.C. § 227(b)(2).

³⁵ *Id.* § 227(b)(2)(D).

some authority to regulate unsolicited fax advertisements does not mean that Congress has conferred similar authority to regulate solicited fax advertisements.³⁶ Indeed, it means the opposite. Put simply, the statute reflects Congress’s intent to leave *solicited fax advertisements unregulated* and thus to confine the Commission’s jurisdiction to unsolicited fax advertisements. Because “Congress had already addressed the question [at issue,] it conferred no power upon—and left no room for—the FCC to weigh in” with respect to solicited fax advertisements.³⁷

The Commission’s interpretation also conflicts with basic canons of statutory construction.³⁸ It is elementary that a statute should “be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant.”³⁹ The Commission’s reading of Section 227(b) contravenes this basic principle because it renders the word “unsolicited” in the statute superfluous. If Congress had intended for the Commission to regulate solicited fax advertisements, as the Commission believes, it could have simply used the term “advertisement” instead of “unsolicited advertisement.” Congress’s use of the term “unsolicited” must be respected, but the Commission’s interpretation “makes the [statute] function as if the word [‘unsolicited’] had been excised from section [227(b)].”⁴⁰

Rule 64.1200(a)(3)(iv) is a classic case of the Commission improperly substituting its policy judgment for that of Congress. It is Congress’s policy judgment in the TCPA that

³⁶ See *Am. Library Ass’n v. FCC*, 406 F.3d 689, 708 (D.C. Cir. 2005) (“The [Commission’s] position in this case amounts to the bare suggestion that it possesses plenary authority to act within a given area simply because Congress has endowed it with some authority to act in that area. We categorically reject that suggestion.”).

³⁷ *Am. Civil Liberties Union v. FCC*, 823 F.2d 1554, 1571 (D.C. Cir. 1987).

³⁸ *Junk Fax Order* ¶ 48.

³⁹ *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 499 (D.C. Cir. 2004) (quoting *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461 n.13 (2004)).

⁴⁰ *New York v. EPA*, 443 F.3d 880, 887 (D.C. Cir. 2006).

solicited faxes do not need an opt-out notice. That makes sense, of course, because Congress would have no reason to be concerned that recipients who have opted-in to such fax advertising need special notices informing them how to opt-out (for the very reason that such recipients have already *consented* to communications with the sender). The Commission may believe that including opt-out notices in solicited faxes is better policy, but the TCPA leaves no room for Commission discretion. An agency cannot “avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.”⁴¹ In the TCPA, “Congress, presumably after due consideration, has indicated by plain language a preference to pursue its stated goals by what [the FCC] asserts are less than optimal means. In such case, neither [a] court nor the agency is free to ignore the plain meaning of the statute and to substitute its policy judgment for that of Congress.”⁴²

The Eighth Circuit’s decision in *Nack* casts serious doubt on the statutory authority for Rule 64.1200(a)(3)(iv). Although the court felt compelled to apply the Rule in that case, it nevertheless found the statutory basis for Rule 64.1200(a)(3)(iv) to be “questionable”⁴³ because “[t]he statute itself does not expressly impose similar limitations or requirements on the sending of solicited or consented-to fax advertisements.”⁴⁴ The Commission should repeal the Rule for lack of statutory authority.

⁴¹ *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996).

⁴² *Ala. Power Co. v. EPA*, 40 F.3d 450, 456 (D.C. Cir. 1994) (quoting *Ala. Power Co. v. Costle*, 636 F.2d 323, 365 (D.C. Cir. 1979)); *see also Consol. Rail Corp. v. United States*, 896 F.2d 574, 578, 579 (D.C. Cir. 1990) (“Faced with clear statutory language, uncontradicted by anything in the legislative history, we cannot so blithely infer that Congress has erred. For we must never forget that it is a statute we are expounding, and it is the intention of the drafters, as expressed in the words they used, that we must heed.”).

⁴³ *Nack*, 715 F.3d at 682.

⁴⁴ *Id.* at 683; *see also id.* (“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

B. Rule 64.1200(a)(3)(iv) Violates The First Amendment To The Extent It Requires That Solicited Faxes Contain An Opt-Out Notice.

The Commission should also repeal Rule 64.1200(a)(3)(iv) because it cannot withstand constitutional scrutiny. It is well established that companies such as Staples have a First Amendment right to speak with their customers. Indeed, “nonmisleading commercial speech regarding a lawful activity is a form of protected speech under the First Amendment.”⁴⁵ Moreover, “[t]he identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster.”⁴⁶

Rule 64.1200(a)(3)(iv) infringes upon the protected speech of senders of truthful solicited fax advertisements by compelling them to include opt-out notices in their advertisements. But for the FCC’s Rule, advertisers would not include such opt-out notices in consensual communications with their customers. The First Amendment, however, guarantees “both the right to speak freely and the right to refrain from speaking at all.”⁴⁷ As the Supreme Court has emphasized, “the First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what not to say.”⁴⁸ “Since *all* speech inherently

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.”).

⁴⁵ *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1233 (10th Cir. 1999); *see also Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

⁴⁶ *Pac. Gas & Elec. Co. v. Pub. Utilities Comm’n of Cal.*, 475 U.S. 1, 8 (1986); *see also Citizens United v. FEC*, 130 S. Ct. 876 (2010).

⁴⁷ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

⁴⁸ *Riley v. Nat’l Fed. of Blind of N. C., Inc.*, 487 U.S. 781, 796-97 (1988).

involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide ‘what not to say.’”⁴⁹ “Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech . . . [and is therefore] a content-based regulation of speech”⁵⁰ subject to strict scrutiny.

The Commission’s compelled speech requirement in Rule 64.1200(a)(3)(iv) could not survive strict scrutiny. The fact that the Rule compels speech by a commercial speaker should not change the analysis. Commercial speech should be treated as fully protected speech because there is no “philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial’ speech.”⁵¹ Indeed, “so-called commercial speech has become an essential part of the public discourse the First Amendment secures.”⁵² “Since commercial speech is not subject to any categorical exclusion from First Amendment protection, and indeed is protectible as a speaker’s chosen medium of commercial enterprise, . . . compelling cognizable speech officially is just as suspect as suppressing it, and is typically subject to the same level of scrutiny.”⁵³ Having provided no First Amendment justification for regulating solicited fax

⁴⁹ *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 573 (1995) (citations omitted) (emphasis in original).

⁵⁰ *Riley*, 487 U.S. at 795.

⁵¹ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part and concurring in judgment); see also *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 255 (2010) (Thomas, J. concurring in part and concurring in judgment) (“I have never been persuaded that there is any basis in the First Amendment for the relaxed scrutiny this Court applies to laws that suppress nonmisleading commercial speech.”).

⁵² *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 636 (1995) (Kennedy, J., dissenting).

⁵³ *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 481 (1997) (Souter, J., dissenting).

advertisements in the *Junk Fax Order*, the Commission could not possibly demonstrate that Rule 64.1200(a)(3)(iv) is “narrowly tailored to promote a compelling Government interest.”⁵⁴

Nor could Rule 64.1200(a)(3)(iv) survive First Amendment scrutiny under the *Central Hudson* standard generally applicable to commercial speech.⁵⁵ Under *Central Hudson*, the Government must demonstrate “a substantial interest to be achieved by restrictions on commercial speech,” that the restrictions “directly advance the state interest involved,” and that the Government’s asserted interest could not “be served as well by a more limited restriction on commercial speech.”⁵⁶ When regulating commercial speech, the Government cannot rely on “mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real *and* its restriction will in fact alleviate them to a material degree.”⁵⁷ And in determining whether there is a “reasonable fit” between the interest sought to be advanced and the governmental restriction on speech, the “availability of less burdensome alternatives to reach the stated goal signals that the fit ... may

⁵⁴ *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

⁵⁵ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 564 (1980); *U.S. West*, 182 F.3d at 1233-34.

⁵⁶ *Central Hudson*, 447 U.S. at 564; *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993) (explaining that there must be a “reasonable fit between” the FCC’s “legitimate interests” and “the means chosen to serve those interests” (internal quotation marks omitted)); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995) (explaining that a restriction on commercial speech must be “no more extensive than [is] necessary to serve [the stated] interest”); *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (government must have “carefully calculated the costs and benefits associated with the burden on speech imposed by its prohibition” (internal quotation marks omitted)).

⁵⁷ *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (emphasis added); *U.S. West*, 182 F.3d at 1234 (“When faced with a constitutional challenge, the government bears the responsibility of building a record adequate to clearly articulate and justify the state interest.”).

be too imprecise to withstand First Amendment scrutiny.”⁵⁸ Indeed, “[t]his is particularly true when such alternatives are obvious and restrict substantially less speech.”⁵⁹

Rule 64.1200(a)(3)(iv) fails all three prongs of the *Central Hudson* test. In the *Junk Fax Order*, the Commission identified no governmental interest advanced by a rule requiring an opt-out notice for solicited fax advertisements, no ways in which the rule advanced any such interest, and no reasons why a less restrictive rule would not suffice. Courts applying *Central Hudson* to statutory requirements for *unsolicited* fax advertisements under Section 227(b) have upheld those requirements by recognizing “a substantial interest in restricting unsolicited fax advertisements in order to prevent the cost shifting and interference such unwanted advertising places on the recipient.”⁶⁰ But, as the Eighth Circuit has recognized, that interest is simply not present in the context of solicited faxes.⁶¹ The Government’s interest in preventing the cost-shifting and interference associated with *unsolicited* fax advertisements evaporates when the recipient has consented to such faxes because consent is a strong “indication that a fax advertisement would be welcome.”⁶² Importantly, these courts have concluded that the statute’s restrictions are

⁵⁸ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 529 (1996) (O’Connor, J., concurring); *see also City of Cincinnati*, 507 U.S. at 417 n.13 (the existence of “less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the ‘fit’ between ends and means is reasonable”).

⁵⁹ *U.S. West*, 182 F.3d at 1238.

⁶⁰ *Missouri v. Am. Blast Fax*, 323 F.3d 649, 655 (8th Cir. 2003); *see also Destination Ventures 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”).

⁶¹ *See Nack*, 715 F.3d at 687 (“Applying the commercial speech test of *Central Hudson Gas & Electric Corporation v. Public Service Comm’n*, 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. 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.” (citations omitted)).

⁶² *Am. Blast Fax*, 323 F.3d at 657.

sufficiently tailored with respect to unsolicited advertisements precisely because advertisers remain free to “obtain consent for their faxes” through “telephone solicitation, direct mailing, and interaction with customers in their shops.”⁶³ By applying the same speech regulations to solicited fax advertisements, then, the Commission has over-run the very limits that ensured its infringement of speech was sufficiently tailored to comport with the First Amendment.

The existence of an obvious and less restrictive alternative confirms the lack of fit between Rule 64.1200(a)(3)(iv) and any legitimate interest in preventing cost-shifting and interference that it might purport to serve. Even assuming that the Government maintains an interest in preventing cost-shifting and interference in the context of *solicited* fax advertisements, existing (and less burdensome) disclosure requirements are sufficient to provide recipients of solicited fax advertisements with a means to opt-out of receiving future fax advertisements. As the Commission surely is aware, the TCPA already requires faxes to contain, “in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.”⁶⁴ This statutory requirement is much less burdensome than the elaborate opt-out requirements of Rule 64.1200(a)(3)(iv), yet still ensures that recipients of solicited faxes have a simple way of opting out of future messages from a sender from whom they previously invited a fax advertisement. The availability of this obvious and significantly less-restrictive

⁶³ *Id.* at 659.

⁶⁴ 47 U.S.C. § 227(d)(1)(B); 47 C.F.R. § 68.318(d) (same). *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, Notice of Proposed Rulemaking and Order, 20 F.C.C.R. 19758, 19768 & n.54 (¶ 21) (2005) (“*Junk Fax NPRM*”) (“We note that the Commission’s rules currently require senders of facsimile messages to identify themselves on the message, along with the telephone number of the sending machine or the business, other entity, or individual sending the message”) (citing 47 U.S.C. § 227(d)(1)(B) and 47 C.F.R. § 68.318(d)).

alternative demonstrates that Rule 64.1200(a)(3)(iv) is “too imprecise to withstand First Amendment scrutiny.”⁶⁵

C. A Rulemaking Proceeding Is The Proper Vehicle To Provide Prospective Relief From Rule 64.1200(a)(3)(iv).

The Commission can and should grant prospective relief from Rule 64.1200(a)(3)(iv) to individuals and companies such as Staples that could be subject to future class-action lawsuits and other litigation that Congress never intended to allow. “[T]he right to petition for repeal of a rule is recognized by both the APA and the Commission’s rules.”⁶⁶ Moreover, neither Section 402(a) of the Communications Act nor the Hobbs Act bars requests for prospective relief from a rule. “[A] petitioner’s contention that a regulation should be amended or rescinded because it *conflicts with the statute* from which its authority derives is reviewable outside of a statutory limitations period.”⁶⁷ Indeed, the Office of General Counsel has recognized that “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.”⁶⁸ The Commission should, therefore, initiate a rulemaking proceeding to consider repealing Rule 64.1200(a)(3)(iv) and, for the reasons given above, ultimately repeal it.

⁶⁵ *44 Liquormart, Inc.*, 517 U.S. at 529 (O’Connor, J., concurring).

⁶⁶ *Natural Res. Def. Council v. Nuclear Regulatory Comm’n*, 666 F.2d 595, 602 (D.C. Cir. 1981); *see* 47 C.F.R. § 1.401(a) (“Any interested person may petition for the . . . repeal of a rule or regulation.”).

⁶⁷ *NLRB Union v. Fed. Labor Relations Auth.*, 834 F.2d 191, 196 (D.C. Cir. 1987) (emphasis in original).

⁶⁸ Amicus Br. for the Federal Communications Commission Urging Reversal at 22, *Nack v. Walburg*, No. 11-1460 (8th Cir. filed Feb. 24, 2012) (“FCC Amicus Br.”).

IV. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING TO ELIMINATE UNCERTAINTY AND PROVIDE RETROSPECTIVE RELIEF FROM RULE 64.1200(a)(3)(iv).

A proceeding to repeal Rule 64.1200(a)(3)(iv) may not provide full relief to parties currently burdened by the Rule. Because rulemakings are generally prospective only,⁶⁹ a repeal of the Rule might not afford sufficiently certain relief to parties currently defending against lawsuits alleging violations of the Rule and to other parties that might be sued for violating the Rule during the pendency of a rulemaking proceeding to repeal the Rule. To ensure that such parties are not unfairly injured by an *ultra vires* rule, the Commission should, in conjunction with its rulemaking, issue a declaratory ruling clarifying that Rule 64.1200(a)(3)(iv) *never* required the inclusion of an opt-out notice in a solicited fax.⁷⁰

A declaratory ruling is appropriate because there is uncertainty whether Rule 64.1200(a)(3)(iv) actually—and properly—requires the use of an opt-out notice for solicited faxes.⁷¹ As the Eighth Circuit recognized, the *Junk Fax Order* is inherently contradictory. On the one hand, the Commission declared that the Rule should be interpreted “to allow consumers to stop unwanted faxes in the future” even if the sender had previously “obtained permission” from the recipient.⁷² On the other hand, the Commission declared that “the opt-out notice

⁶⁹ See, e.g., *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”).

⁷⁰ *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536, 539 (D.C. Cir. 2007) (“The Commission is authorized to issue a declaratory ruling ‘to terminate a controversy or remove uncertainty,’ 5 U.S.C. § 554(e); see also 47 C.F.R. § 1.2, and there is no question that a declaratory ruling can be a form of adjudication[.] . . . Retroactivity is the norm in agency adjudications no less than in judicial adjudications.”).

⁷¹ See *Nack*, 715 F.3d at 683; *Bais Yaakov of Spring Valley*, No. 12-cv-581, 2013 WL 1285408, at *12 (S.D.N.Y. Mar. 28, 2013).

⁷² *Junk Fax Order* ¶ 48.

requirement only applies to communications that constitute unsolicited advertisements.”⁷³ Given the plain language of the TCPA and the ambiguity in the *Junk Fax Order*, this is the precise type of scenario for which Congress vested the Commission with the authority to issue a declaratory ruling.⁷⁴ And, as explained above, if the Rule were understood to require opt-out notices for solicited faxes, the Rule would plainly exceed the Commission’s statutory authority and violate the First Amendment.⁷⁵

Accordingly, in a declaratory ruling, the Commission should interpret Rule 64.1200(a)(3)(iv) as never having required that solicited faxes contain an opt-out notice. Indeed, the Commission already expressed this view in the *Junk Fax Order* (although other parts of the order are arguably inconsistent with that statement).⁷⁶ This interpretation of the Rule would comport with Congress’s intent in adopting the TCPA and provide meaningful relief to individuals and companies such as Staples that face TCPA lawsuits for alleged violations of Rule 64.1200(a)(3)(iv). The Commission should, therefore, issue a declaratory ruling clarifying its interpretation of Rule 64.1200(a)(3)(iv) at the same time that it initiates a rulemaking proceeding to repeal the Rule.

⁷³ *Id.* ¶ 42 n.154.

⁷⁴ 5 U.S.C. § 554(e) (“The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.”); 47 C.F.R. § 1.2(a) (“The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.”); *see also In the Matter of Sw. Bell Mobile Sys., Inc.*, 14 F.C.C.R. 19898, ¶ 5 (1999) (“We recognize that in recent years numerous class action lawsuits have been filed in state and federal courts contending that the billing, advertising and other practices of cellular carriers and other CMRS providers violate state contractual and consumer fraud laws, and that there is substantial uncertainty whether and to what extent such court actions are precluded by Section 332(c)(3) of the Act. . . . Thus, we are in a position to help clarify some of the current uncertainty.”).

⁷⁵ *See supra* Section III.

⁷⁶ *Junk Fax Order* ¶ 42 n.154.

The Consumer & Governmental Affairs Bureau recently dismissed Anda's petition for declaratory ruling that raised a related question of the statutory basis for Rule 64.1200(a)(3)(iv), *i.e.*, whether it was adopted pursuant to Section 227(b) (such that a lawsuit for statutory damages is potentially available for a violation of the Rule) or some other provision of the Communications Act. The Bureau dismissed that petition because it determined there was no uncertainty regarding "the statutory basis for the Commission's rule requiring an opt-out notice for fax advertisements sent with the recipient's prior express consent,"⁷⁷ and the Bureau viewed the petition as "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."⁷⁸ Unlike the question at issue in the *Anda Bureau Order*, however, there is uncertainty about whether Rule 64.1200(a)(3)(iv) actually and properly requires the use of an opt-out notice for solicited faxes.

Moreover, Staples' request is not an impermissible collateral attack on the Rule. Whereas Anda sought only a declaratory ruling, Staples also seeks prospective relief through a repeal of the Rule, and it is well established that a party may seek repeal of a rule outside the statutory limitations period for filing a petition for review of the rule. Staples' petition for a rulemaking also responds, in the interest of prudence and an abundance of caution, to those courts that have suggested that filing "a petition for rulemaking to repeal the rule" may be a precondition to challenging the substantive validity of an agency rule as a defense in a TCPA lawsuit.⁷⁹ Staples seeks retrospective relief in the form of a declaratory ruling only as an adjunct to its petition for rulemaking in order to ensure full relief from liability in pending or future

⁷⁷ *Anda Bureau Order* ¶ 5.

⁷⁸ *Id.* ¶ 6.

⁷⁹ *Nack*, 715 F.3d at 686 n.2.

litigation; the petition does not seek reconsideration of the *Junk Fax Order* and is therefore properly before the Commission. Accordingly, this petition is not time-barred by the Commission's rule (or the Communications Act's provisions) on petitions for reconsideration.⁸⁰

V. LITIGANTS MAY CHALLENGE THE SUBSTANTIVE VALIDITY OF RULE 64.1200(a)(3)(iv) AS A DEFENSE TO A PRIVATE ACTION UNDER THE TCPA.

We note that, although some courts have suggested otherwise,⁸¹ asking the Commission to repeal the Rule is not a precondition to challenging the substantive validity of Rule 64.1200(a)(3)(iv) as an affirmative defense in court. Litigants engaged in civil litigation are permitted to challenge the substantive validity of an FCC rule as a defense to a TCPA lawsuit because the “central object” of the suit is not “to either enforce or undercut an FCC order.”⁸² This result flows directly from the text of Section 402(a) of the Communications Act and the Hobbs Act.

Section 402(a) of the Communications Act provides that “[a]ny 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.”⁸³ Chapter 158 of Title 28, the Administrative Orders Review Act, is commonly referred to as the Hobbs Act.⁸⁴ The Hobbs Act provides that “[t]he court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part),

⁸⁰ 47 C.F.R. § 1.429(d) (requiring that petitions for reconsideration in rulemaking proceedings be filed within 30 days of public notice of the challenged action); *see also* 47 U.S.C. § 405(a).

⁸¹ *See supra* note 78.

⁸² *Leyse v. Clear Channel Broad. Inc.*, 697 F.3d 360, 373 (6th Cir. 2012).

⁸³ 47 U.S.C. § 402(a).

⁸⁴ *ICC v. Bhd. of Locomotive Engineers*, 482 U.S. 270, 287 (1987).

or to determine the validity of . . . all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47.”⁸⁵

The Sixth Circuit has interpreted these provisions in a manner that properly effectuates Congress’s intent. The key phrase in the Hobbs Act—made reviewable by section 402(a) of title 47—“limits the grant of exclusive jurisdiction to FCC orders that are reviewable under § 402(a).”⁸⁶ Section 402(a) makes reviewable “[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission.”⁸⁷ Thus, any “case that is not a proceeding to enjoin or annul an FCC order lies outside the ambit of [the Hobbs Act].”⁸⁸ The Sixth Circuit has interpreted Section 402(a)’s language to cover any action the “central object” of which “is to either enforce or undercut an FCC order.”⁸⁹ In *Leyse*, the Sixth Circuit held that the Hobbs Act did not bar a litigant’s substantive attack on one of the FCC’s TCPA regulations in his suit against Clear Channel because the “central object of Leyse’s action is not to enforce or undercut an FCC order; it is to seek damages and an injunction against Clear Channel, a private party, for allegedly violating the TCPA.”⁹⁰ If Leyse was barred from raising his substantive attack on the FCC’s regulation, he “would be left with ‘no other forum in which to present his . . . defenses.’”⁹¹

⁸⁵ 28 U.S.C. § 2342(1).

⁸⁶ *Leyse*, 697 F.3d at 373.

⁸⁷ 47 U.S.C. § 402(a).

⁸⁸ *Leyse*, 697 F.3d at 373.

⁸⁹ *Id.*; see also *United States v. Any & All Radio Station Transmission Equip.*, 204 F.3d 658 (6th Cir. 2000).

⁹⁰ *Leyse*, 697 F.3d at 376.

⁹¹ *Id.*

The central object of a private action under the TCPA is not to enforce or undercut an FCC order. The Hobbs Act “provides a specific requirement that the action must be reviewable under § 402(a), which limits review to ‘[a]ny proceeding to enjoin, set aside, annul, or suspend any order’ of the FCC.”⁹² A lawsuit under the TCPA “does not fit the mold of a proceeding to enjoin or annul an order of the FCC. Rather, it is a lawsuit for damages . . . in which an order of the FCC [may be] raised *as a defense*.”⁹³ Thus, private parties are permitted to challenge the substantive validity of Rule 64.1200(a)(3)(iv) as a defense to a TCPA lawsuit.

Interpreting the Hobbs Act in this manner parallels the established rule that private parties may challenge the substantive validity of an agency rule as applied against them in an enforcement proceeding. For more than a half-century, it has been clear that the substantive validity of an FCC rule may be challenged by a defendant in an enforcement proceeding before the Commission.⁹⁴ Indeed, the Commission is well aware of and concedes that such a challenge

⁹² *Id.* at 376-77.

⁹³ *Id.* at 377. (emphasis added).

⁹⁴ *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958) (“As applied to rules and regulations, the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule. . . . [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.”); *Natural Res. Def. Council v. Nuclear Regulatory Comm’n*, 666 F.2d 595, 602 (D.C. Cir. 1981) (Courts “have permitted such indirect challenges when an agency is alleged to have issued regulations which are not authorized by their parent legislation, or when changed circumstances have allegedly deprived regulations of their factual foundation and have thereby brought them into conflict with such legislation.”); *NLRB Union*, 834 F.2d at 195 (“[A] party who possesses standing may challenge regulations directly on the ground that the issuing agency acted in excess of its statutory authority in promulgating them. A challenge of this sort might be raised, for example, by way of defense in an enforcement proceeding. . . . Under such circumstances, the [litigant] could clearly challenge the validity of the regulation on which [he and the agency] were relying, even if that regulation went uncontested throughout the applicable statutory limitations period.”).

is appropriate.⁹⁵ The same rule must apply in a private enforcement action brought in court under Section 227(b). In either context, a party must be permitted to raise the substantive validity of an FCC rule as a defense because the party claiming a violation of the TCPA can seek relief in court or from the Commission.⁹⁶ There is no sound reason why an individual or company may raise such a defense in an enforcement proceeding before the Commission, but the same individual or company facing a comparable action—indeed, a potentially *more* damaging class-action—initiated by a private litigant should be altogether barred from defending itself in like manner.

The Office of General Counsel has, unfortunately, adopted a different position. In the General Counsel’s view, “the Hobbs Act precludes a challenge . . . to the validity of FCC rules promulgated under the TCPA in a private civil action brought under 47 U.S.C. § 227(b)(3).”⁹⁷ “The fact that” a litigant’s challenge to an FCC rule “is presented as part of its defense in a civil action does not override the Hobbs Act’s jurisdictional limitation [because] . . . 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.’”⁹⁸

For the reasons given above, the Office of General Counsel’s view conflicts with the text of Section 402(a) and the Hobbs Act. It also conflicts with the APA’s “‘basic presumption of

⁹⁵ See FCC Amicus Br. 22.

⁹⁶ *Id.* at 4 & n.1 (“The TCPA provides for a private right of action in state courts for violations of the statute or the FCC’s implementing regulations. . . . Consumers alleging a violation of the TCPA also can file a complaint with the FCC requesting enforcement action.”).

⁹⁷ *Id.* at 21 (quoting *CE Design, Ltd v. Prism Business Media, Inc.*, 606 F.3d 443 (7th Cir. 2010)).

⁹⁸ *Id.* (quotation omitted).

judicial review.”⁹⁹ More fundamentally, the General Counsel’s position is deeply unfair to litigants such as Staples that would be rendered unable to fully defend themselves in a TCPA lawsuit. Staples and many other entities (and individuals) presently face class-action lawsuits alleging violations of Rule 64.1200(a)(3)(iv). Because the Commission never even mentioned, much less solicited comment on, extending the opt-out notice requirement to fax advertisements sent with the recipient’s express permission,¹⁰⁰ regulated entities could not have known in 2006 that they might potentially be subject to class-action lawsuits for failure to include opt-out notices in purely consensual fax communications and thus should not now be penalized for failing to appeal the order adopting Rule 64.1200(a)(3)(iv) at that time. Indeed, many of these entities may not even have existed at the time the FCC promulgated the Rule. Staples and these other entities are permitted to raise the substantive validity of the FCC’s Rule as a defense to a class-action seeking damages because the proceeding is not one seeking to enjoin or annul an FCC order.

Even if a lawsuit for damages under the TCPA is a proceeding to “enjoin, set aside, annul, or suspend” an FCC order, which it is not, private parties are permitted under the APA to assert the substantive invalidity of an agency rule as a defense to a civil action. Consistent with Congress’s desire “to provide broadly for judicial review of [agency] actions, affecting as they do the lives and liberties of the American people,”¹⁰¹ the APA contains a safety valve to ensure that “the exercise of governmental power, as a general matter, should not go unchecked.”¹⁰² Section 704 of the APA provides that “[a]gency action made reviewable by statute and final

⁹⁹ *Lincoln v. Vigil*, 508 U.S. 182, 190 (1993) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)).

¹⁰⁰ *See generally Junk Fax NPRM*, 20 F.C.C.R. 19758.

¹⁰¹ *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 318 (D.C. Cir. 1988).

¹⁰² *Id.*

agency action for which there is no other adequate remedy in a court are subject to judicial review.”¹⁰³ Section 703, in turn, provides that “the form of proceeding of judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action.”¹⁰⁴ Thus, the APA “authorizes an action for review of final agency action in the District Court to the extent that other statutory procedures for review are inadequate.”¹⁰⁵

If the Hobbs Act were to preclude private entities and individuals from challenging the substantive validity of Rule 64.1200(a)(3)(iv) in a TCPA lawsuit, then the APA’s safety valve would permit such a challenge because there would be “no other adequate remedy in a court” to challenge the FCC’s Rule.¹⁰⁶ Private defendants to a TCPA action cannot obtain judicial review of the FCC’s Rule in the court of appeals when the time periods for direct review of the FCC’s Rule have expired. In such an instance, the *only* vehicle for obtaining judicial review of an FCC rule is a substantive challenge to the validity of the rule enforced against them. Indeed, TCPA defendants such as Staples are in the same position as the litigants in *Sackett v. EPA*, in which the Supreme Court held that the litigants could challenge an EPA compliance order under the APA because they had “no other adequate remedy in a court” to challenge the EPA order.¹⁰⁷ Not only is such relief statutorily authorized, but basic principles of due process require it: if the Hobbs Act were interpreted to preclude the assertion of the substantive invalidity of a regulation as a defense to a lawsuit, liability for an alleged violation of the regulation could not be imposed

¹⁰³ 5 U.S.C. § 704.

¹⁰⁴ *Id.* § 703.

¹⁰⁵ *FCC v. ITT World Commc’ns, Inc.*, 466 U.S. 463, 469 (1984).

¹⁰⁶ 5 U.S.C. § 704.

¹⁰⁷ *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012).

on the defendant without *some* adjudication of the lawfulness of that action—especially if the agency has demonstrated an unwillingness to provide any administrative relief from the rule.¹⁰⁸

VI. CONCLUSION

For the foregoing reasons, the Commission should grant Staples and Quill’s Petition and initiate a proceeding to repeal Rule 64.1200(a)(3)(iv). The Commission also should issue a declaratory ruling clarifying that Rule 64.1200(a)(3)(iv) does not require that solicited faxes contain an opt-out notice.

Respectfully submitted,

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¹⁰⁸ See *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466, 468 (2000) (explaining that due process requires a party to have an “opportunity to defend against the imposition of liability” and holding that due process was violated where a party “was never afforded a proper opportunity to respond to the claim against him”); *In re Oliver*, 333 U.S. 257, 273 (1948) (“[F]ailure to afford the petitioner a reasonable opportunity to defend himself . . . was a denial of due process of law. A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence[.]”); *cf. Nack*, 715 F.3d at 686 (suggesting that “a refusal of the agency to consider a substantive challenge to the regulation would allow this court to exercise jurisdiction over such a challenge”).