

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

MICHAEL R. NACK, individually and on)	
behalf of all others similarly-situated)	
Plaintiff-Appellant)	
v.)	No. 11-1460
)	
DOUGLAS PAUL WALBURG)	
Defendant-Appellee)	

**MOTION OF THE FEDERAL COMMUNICATIONS COMMISSION
FOR LEAVE TO FILE SUPPLEMENTAL BRIEF**

The Federal Communications Commission (“FCC”) respectfully requests leave to file the attached supplemental brief in response to the brief filed by Anda, Inc. in this case.

At the Court’s invitation, the FCC filed a brief addressing the meaning and scope of 47 C.F.R. § 64.1200(a)(3)(iv) and its application to this case. *See* Order of the Ct. (Jan. 11, 2011). Because this case “does not involve judicial review of FCC action pursuant to the Hobbs Act,” the FCC explained that the Court ‘is without jurisdiction to entertain a challenge to [the] FCC regulation[.]’” FCC Brief, quoting *Any and All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000).

Appellee Douglas Walburg, in a responsive brief, told the Court that section 64.1200(a)(3)(iv) was “perfectly valid” and agreed with the FCC that

“the validity of the FCC’s regulation is not at issue here.” Walburg Response Brief at 12, 15. Appellant Michael Nack agrees that section 64.1200(a)(3)(iv) is lawful. Nack Reply Brief at 3-4.

On July 23, 2012, this Court accepted an *amicus* brief filed by Anda, an *amicus curiae* ostensibly supporting Walburg, that (1) challenges the lawfulness of section 64.1200(a)(3)(iv) and (2) contends that sections 703 and 704 of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 703, 704, create an exception to the Hobbs Act that permit the Court to entertain that challenge on review in this private civil action. *See* Order of the Ct. (July 23, 2012).

Anda acknowledges that its jurisdictional claim “has not been raised or discussed by the parties or the FCC.” Anda, Inc’s Motion for Leave to Appear and File Amicus Curiae Brief in Support of Appellee at 2. The FCC respectfully asks the Court for the opportunity to address that issue. Anda’s claim, if accepted by the Court, would transform the “exclusive jurisdiction” (47 U.S.C. § 2342(1)) that Congress gave to the courts of appeals to review final action in FCC rulemaking orders under the specific Hobbs Act procedures into a broad grant of “concurrent jurisdiction” to both district and appellate courts in a wide range of cases. That radical transformation of settled law would permit litigants to raise a collateral challenge to an FCC

rule in cases where the FCC has no opportunity to defend its rule because it is not a party and may be unaware that the lawfulness of its rule is under attack. *See Any and All Radio Station Transmission Equip.*, 207 F.3d at 463. Because Anda's jurisdictional argument has not been briefed by the parties to this case and has significant ramifications for the FCC, we respectfully request the opportunity to respond to this argument by filing the attached 15-page supplemental brief.

Respectfully submitted,

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August 21, 2012

ATTACHMENT

SUPPLEMENTAL AMICUS BRIEF

IN THE UNITED STATES COURT OF APPEALS
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MICHAEL R. NACK, INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,

PLANTIFF-APPELLANT,

v.

DOUGLAS PAUL WALBURG,

DEFENDANT-APPELLEE.

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

SUPPLEMENTAL AMICUS BRIEF FOR THE FEDERAL COMMUNICATION
COMMISSION URGING REVERSAL

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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

SUPPLEMENTAL AMICUS BRIEF

STATEMENT OF INTEREST

The Federal Communications Commission (“FCC”) administers the Telephone Consumer Protection Act of 1991 (“TCPA”), which imposes restrictions on the transmission of advertisements by facsimile machines.

The FCC rule at issue in this case, codified at 47 C.F.R. § 64.1200(a)(3)(iv),

requires the inclusion of an “opt-out” notice on facsimile advertisements transmitted with the recipient’s consent. Judicial review of the FCC’s rules, such as section 64.1200(a)(3)(iv), is governed by the Administrative Orders Review Act (commonly known as the Hobbs Act), 28 U.S.C. § 2341, *et seq.* The FCC has an interest in ensuring that the TCPA, section 64.1200(a)(3)(iv) of the agency’s rules, and the Hobbs Act are interpreted correctly.

INTRODUCTION AND SUMMARY ARGUMENT

On July 23, 2012, this Court accepted an *amicus* brief filed by Anda, Inc. presenting a jurisdictional argument that Anda itself acknowledges “has not been raised or discussed by the parties or the FCC.”¹ Notwithstanding the review mechanism established in the Hobbs Act, Anda claims that sections 703 and 704 of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 703, 704, give this Court jurisdiction to consider a challenge to section 64.1200(a)(3)(iv) of the FCC’s rules, 47 C.F.R. § 64.1200(a)(3)(iv), on review of a private action initiated in a district court. That is so, Anda contends, even where the FCC is not a party to – and may not even be aware of – the litigation that challenges the validity of the agency’s rules. Anda Brief at 8-11. Anda offers this jurisdictional theory in support of its request

¹ Anda, Inc.’s Motion for Leave to Appear and File Amicus Curiae Brief in Support of Appellee at 2.

for a ruling from this Court the FCC lacked statutory authority to enact section 64.1200(a)(3)(iv) (*id.* at 16) – a ruling that, again, is sought by neither of the parties to this case.

As we explain below, Anda’s arguments are not properly before the Court and, in any event, are unfounded. As an initial matter, consistent with its practice, this Court should not reach arguments that neither of the parties to this case has advanced. Appellee Douglas Walburg told the Court that section 64.1200(a)(3)(iv) is “perfectly valid” and that “the FCC had authority to adopt the regulation.” Walburg Response Brief at 12, 15. Appellant Michael Nack likewise agrees that the FCC acted lawfully in enacting section 64.1200(a)(3)(iv). Nack Reply Brief at 3-4. Because an *amicus curiae* may not raise a challenge to the FCC’s rulemaking authority that was not raised by the parties themselves, the Court should not address either the validity of the rule or its jurisdiction to consider the validity of the rule. *United States v. Ne. Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 732 n.3 (8th Cir. 1986).

In any event, Anda’s jurisdictional argument is wrong for two reasons. First, Congress gave the courts of appeals in Hobbs Act proceedings “*exclusive jurisdiction* to . . . determine the validity of” final action in FCC rulemaking orders. 28 U.S.C. § 2342(1) (emphasis added). By making that grant of jurisdiction “exclusive,” Congress affirmatively denied to all other

courts jurisdiction to make such determinations. *See FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984).

Second, sections 703 and 704 of the APA apply only where “there is *no other* adequate remedy” for the challenge of agency action. 5 U.S.C. § 704 (emphasis added). Walburg or Anda had several avenues to challenge the validity of section 64.1200(a)(3)(iv) under the Hobbs Act. For example, they could have petitioned the court of appeals to review the FCC order adopting the rule. Alternatively, at any time after the rule became effective, they could have petitioned the FCC to rescind the rule and obtained relief from the agency or judicial review if the FCC denied that petition for rulemaking. Walburg and Anda are subject to civil liability only because they failed to timely challenge the validity of the FCC’s rule or seek relief under the Hobbs Act before they violated that rule.

ARGUMENT

I. BECAUSE THE PARTIES AGREE THAT SECTION 64.1200(A)(3)(IV) IS A VALID FCC REGULATION, NON-PARTY ANDA’S ARGUMENTS ARE NOT PROPERLY BEFORE THE COURT.

The parties to this appeal do not dispute that the FCC’s rule at issue in this case was authorized by statute. Indeed, appellee Douglas Walburg has conceded that “the validity of the FCC’s regulation is not at issue here.”

Walburg Response Brief at 15. Although Walburg now argues that section

227(b) did not authorize the FCC to adopt section 64.1200(a)(3)(iv),² he subsequently clarified that the FCC had authority to adopt the rule under different provisions of the Communications Act. Walburg Response Brief at 16-19 (citing 47 U.S.C. §§ 154(i) 303(r)).³ Appellant Michael Nack agrees that the FCC had authority to adopt section 64.1200(a)(3)(iv). *See* Nack Reply Brief at 3-4.

While the parties agree that the FCC’s rule is not *ultra vires*, Anda – a non-party *amicus curiae* that purports to support Walburg – flatly contradicts Walburg’s position on this issue. *See* Anda Brief at 16 (“the FCC acted *ultra vires* in enacting [section 64.1200(a)(3)(iv)].”). In an effort to interject this new argument into this case, Anda contends that sections 703 and 704 of the APA, 5 U.S.C. §§ 703-04, give the Court jurisdiction to entertain a collateral

² Walburg initially told this Court that section 64.1200(a)(3)(iv) was “promulgated under the grant of authority that Congress gave the FCC under . . . [s]ection 227(b)(2).” Walburg Opening Brief at 20.

³ In his Responsive Brief, Walburg also appears to have asserted that section 64.1200(a)(3)(iv) violates the First Amendment if the rule was promulgated under the TCPA and subjects Walburg to monetary damages. Because Walburg did not raise that issue in the district court or in his opening brief, that argument is not properly before the Court. *See, e.g., Ritchie Capital Mgmt., L.L.C. v. Jeffries*, 653 F.3d 755, 763 n.4 (8th Cir. 2011) (court declines to consider issue not properly raised in district court); *Waldner v. Carr*, 618 F.3d 838, 847 (8th Cir. 2010) (failure to raise issue in opening brief results in waiver); *K.D. v. Cnty. of Crow Wing*, 434 F.3d 1051, 1055 n.4 (8th Cir. 2006) (same).

attack on the validity of section 64.1200(a)(3)(iv) in a private civil action (such as the present case), but only “to the extent this Court concludes . . . that Walburg is challenging the substantive validity of the FCC’s [r]egulation.” Anda Brief at 4, 8, 11.

It is well-established under this Court’s precedent that, “[an] amicus[] cannot raise issues not raised by the parties.” *Ne. Pharm. & Chem. Co.*, 810 F.2d at 732. *Accord United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 61 (1981); *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 826 n.6 (8th Cir. 2009). Because Walburg is not challenging “the validity of the FCC’s regulation,” Walburg Response Brief at 15, and appellant Nack agrees that the FCC’s rule is valid, Anda’s new arguments are not properly before the Court.⁴

⁴ Anda emphasizes that the FCC in its amicus brief stated that Walburg had raised a “thinly veiled challenge to the validity” of section 64.1200(a)(3). Anda Brief at 2, 8 n.4 (quoting FCC Brief at 20). The FCC made that statement before Walburg clarified that he is not challenging the validity of the rule. Anda inexplicably ignores Walburg’s own disavowal of any intent to challenge the lawfulness of section 64.1200(a)(3).

II. THE COURT LACKS JURISDICTION TO RULE ON THE SUBSTANTIVE VALIDITY OF SECTION 64.1200(A)(3)(IV).

A. The Hobbs Act Precludes A Collateral Challenge To The FCC Rule In A Private Civil Action.

Even if an *amicus* could raise these issues in the context of this case, the issues are not properly presented in this forum. With the exception of certain narrowly defined categories of cases not involved here,⁵ section 402(a) of the Communications Act requires “[a]ny proceeding” challenging final action in an FCC order to be brought under the Hobbs Act, 28 U.S.C. § 2341 *et seq.* 47 U.S.C. § 402(a) (emphasis added). In such proceedings, the courts of appeals have “*exclusive jurisdiction* to enjoin, set aside, suspend (in whole or in part), or to determine the validity of” such action. 28 U.S.C. § 2342(1) (emphasis added). To invoke that jurisdiction, a litigant must file a petition for review with the court of appeals within 60 days after entry of the FCC’s order. 28 U.S.C. § 2344. As this Court has explained, the Hobbs Act “prescribes the *sole conditions* under which the courts of appeals have jurisdiction to review the merits of FCC orders.” *Vonage Holdings Corp. v.*

⁵Section 402(b) gives the District of Columbia Circuit exclusive jurisdiction to review specific categories of cases that primarily involve FCC licensing decisions. 47 U.S.C. § 402(b). Neither *Anda*, nor either of the parties to this case, suggests that provision applies here.

Minnesota Pub. Serv. Comm'n, 394 F.3d 568, 569 (8th Cir. 2004) (emphasis added).

The framework established by the Hobbs Act “ensure[s] [that] review [is] based on an administrative record made before the agency charged with implementation of the statute,” *United States v. Any and All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000). It gives the court of appeals, before adjudicating the validity of an FCC regulation, the benefit of the views of the expert agency that promulgated the rule. And it gives the FCC the opportunity to defend its own rule as a party to the case. *See* 28 U.S.C. § 2344.

Anda’s contention that a litigant in a private civil action brought in district court has “a right to challenge the substantive validity” of section 64.1200(a)(3)(iv), Anda Brief at 3-4, disregards the jurisdictional limitations of the Hobbs Act. By making Hobbs Act jurisdiction “exclusive,” Congress “cut[] off original jurisdiction in other courts in all cases covered by that statute.” *Telecomm. Res. & Action Ctr. v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984). *See United States v. Neset*, 235 F.3d 415, 421 (8th Cir. 2000). The Hobbs Act thus removes from the district courts (and, as in this case, courts of appeals in reviewing district court rulings) any jurisdiction they otherwise would have to entertain “collateral attacks on . . . FCC order[s].” *Vonage*,

394 F.3d at 569. *See ITT Worldcom*, 466 U.S. at 468-69 (“[l]itigants may not evade” exclusivity provision of Hobbs Act “by requesting the [d]istrict [c]ourt to enjoin action that is the outcome of the agency’s order.”). As this Court has held, that statutory denial of jurisdiction applies to challenges to an FCC rule (such as the one here) that are presented as a defense in a civil action. *Any and All Radio Station Transmission Equip.*, 207 F.3d at 463 (A “defensive attack on the FCC regulation[] is as much an evasion of the exclusive jurisdiction . . . [prescribed in the Hobbs Act] as is a preemptive strike.”).

B. Sections 703 and 704 Of The APA Do Not Permit The Court To Entertain Collateral Challenges To The Substantive Validity Of FCC Rules.

Contrary to Anda’s contention, sections 703 and 704 of the APA do not create an “exception to the Hobbs Act limits on judicial review” that would permit the Court to entertain a collateral challenge to the validity of section 64.1200(a)(3)(iv). *See* Anda Brief at 4. As the Supreme Court has explained, Congress “did not intend th[e] general grant of jurisdiction [in the APA] to duplicate the previously established special statutory procedures relating to specific agencies.” *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). Thus, the existence of “another statutory scheme of judicial review,” such as

the Hobbs Act, “preclude[s] review under the more general provisions of the APA.” *Bangura v. Hanson*, 434 F.3d 487, 501 (6th Cir. 2006).⁶

Anda’s jurisdictional argument would require the Court to disregard the statutory limits on its subject-matter jurisdiction. That argument, if accepted by the Court, would transform the “exclusive jurisdiction” (28 U.S.C. § 2342(1)) that Congress conferred on the courts of appeals to review final action taken in FCC rulemaking orders under the specific Hobbs Act procedures into a broad grant of jurisdiction to both federal appellate and district courts to review Commission orders in a wide array of cases.⁷

Particularly troubling, it would enable litigants to bypass the Hobbs Act

⁶ See also *Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965) (“where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive”).

⁷ Anda asserts that this Court in *Any and All Radio Station Transmission Equip.*, 207 F.3d 458, “recognized an exception to the Hobbs Act jurisdictional limits.” Anda Brief at 9. Anda misreads that decision. The Court, in affirming the district court’s determination that it lacked jurisdiction to entertain a collateral challenge to an FCC rule, squarely held that the Hobbs Act procedures are the sole means by which a litigant can contest the validity of an FCC regulation. The Court pointed out that its holding was supported by “authoritative[]” Supreme Court precedent. 207 F.3d at 463 (citing *ITT Worldcom*, 466 U.S. at 468). Although the Court opined that the case “might” (not would) be different if the litigant “had no way of obtaining judicial review of the regulations,” the Court explained that the Hobbs Act in fact provided the litigant with an adequate remedy. *Id.*

procedures in which a court of appeals adjudicates the validity of an FCC rule based upon its review of an FCC record in a case in which the FCC is a respondent. It would permit a litigant to raise a collateral challenge to an FCC rule in a private civil action where the FCC has no opportunity to defend its rule because it is not a party and may not even be aware that the validity of its rule is under attack.

C. The Hobbs Act Enables Litigants To Challenge The Substantive Validity Of FCC Rules And Provides Litigants The Opportunity To Obtain Full Relief.

As Anda acknowledges, the APA’s general review provisions apply only if “there is *no other* adequate remedy in a court.” 5 U.S.C. § 704 (emphasis added). Anda claims that those general review provisions apply here because “parties like Walburg have no way to challenge the substantive validity of [section 64.1200(a)(3)(iv)].” Anda Brief at 4. Anda is wrong.

The Hobbs Act broadly authorizes the courts of appeals “to enjoin, set aside, suspend (in whole or in part), or to determine the validity of” final actions taken in FCC rulemaking orders, 28 U.S.C. § 2342. Had Walburg or Anda wished to challenge the validity of section 64.1200(a)(3)(iv), they could have invoked that jurisdiction in several different ways. Within 30 days after the FCC adopted section 64.1200(a)(3)(iv), they could have challenged the rule’s validity in a timely petition for agency reconsideration, *see* 47 U.S.C.

§ 405; if the FCC denied reconsideration, they could have timely filed a petition for review of the order adopting the rule under the Hobbs Act. *See ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270 (1987). They also could have challenged the validity of section 64.1200(a)(3)(iv) at any time by filing with the FCC a petition to repeal the rule (5 U.S.C. § 553(e); 47 C.F.R. § 1.401); if the FCC denied that rulemaking petition, they could have sought judicial review of that denial under the Hobbs Act. Thus, there is simply no basis for Anda's assertion that it or Walburg lacked any opportunity to challenge the validity of section 64.1200(a)(3)(iv). Anda Brief at 3.⁸

Anda argues in effect that the Hobbs Act remedies are inadequate because a challenge to the validity of section 64.1200(a)(3)(iv) if successful would invalidate the rule only prospectively and thus not relieve Walburg or

⁸ Anda is wrong in claiming that the "FCC's" dismissal of its petition for declaratory ruling shows that the Hobbs Act remedies are inadequate. *See* Anda Brief at 6. To begin with, the FCC's staff in the Consumer & Governmental Affairs Bureau, not the five-member Commission itself, dismissed Anda's petition. Anda has filed a application for review of the FCC staff's order with the full Commission, which has not yet issued a ruling on that application. Anda may file for (Hobbs Act) review if it is aggrieved after the FCC issues its decision. In any event, Anda's request for a declaratory ruling is irrelevant to its arguments before this Court. Anda asked the FCC to declare that it had enacted section 64.1200(a)(3)(iv) under statutory authority other than 47 U.S.C. § 227(b). Anda Petition for Declaratory Ruling, CG Docket No. 05-338 (Nov. 30, 2010) at 1. The FCC's ultimate disposition of that request (whatever that may be) has no bearing on whether Congress in the Hobbs Act provided an adequate remedy to a litigant seeking to challenge the substantive validity of section 64.1200(a)(3)(iv).

Anda from civil liability for their past violations of the rule. The prohibition on retroactive agency rulemaking – a basic requirement of due process – does not, however, render inadequate the Hobbs Act remedies. Walburg and Anda are subject to civil liability only if they chose to violate a binding FCC rule in effect at the time without first challenging its lawfulness. Had they contested the validity of section 64.1200(a)(3)(iv) under the Hobbs Act, and prevailed in that challenge *before* engaging in conduct that may have violated the rule, they would not be subject to liability in a private civil action. ““A legal remedy is not inadequate for purposes of the APA because . . . [a litigant] deprived [himself] of an opportunity to pursue that remedy.”” *Turner v. United States*, 449 F.3d 536, 541 (3d Cir. 2006) (quoting *Town of Sanford v. United States*, 140 F.3d 20, 23 (1st Cir. 1998)).⁹

Finally, Anda’s APA argument is similar to the one advanced in *Sable Commc’ns of Calif. v. FCC*, 827 F.2d 640 (9th Cir. 1987). In that case, Sable had argued that the district court had jurisdiction to entertain a challenge to the lawfulness of an FCC rule under section 704 of the APA because the Hobbs Act procedures were inadequate. The court of appeals, in rejecting

⁹ See also *Mitchell v. United States*, 930 F.2d 893, 897 (Fed. Cir. 1991) (“[T]he question posed by APA [s]ection 704 is whether [there are] adequate remedies, not whether [a particular litigant] will be entitled to receive those remedies.”)

that claim, held that the Hobbs Act review procedures were adequate, but that Sable had failed to avail itself of those procedures by timely filing a petition for review of the FCC order adopting the rule. The Court explained that “Sable was responsible for its own failure to challenge the regulation in a timely manner.” *Id.* at 643. The Court also pointed out that Sable’s APA argument, if accepted by the Court, “would effectively obliterate the exclusive jurisdiction provision of [the Hobbs Act].” *Id.*

As in *Sable*, the Hobbs Act provides a fully adequate remedy for a challenge of section 64.1200(a)(3)(iv), but Walburg and Anda chose not to pursue that remedy. In such circumstances, sections 703 and 704 do not authorize a collateral challenge to the rule.

CONCLUSION

Because the Court lacks jurisdiction over non-party Anda's challenge to the validity of section 64.1200(a)(3)(iv), it should not consider that challenge.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby
certify that the accompanying Supplemental Amicus Brief in the captioned
case contains 3,190 words.

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August 21, 2012

11-1460

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Douglas Paul Walburg, Defendant-Appellee.

CERTIFICATE OF SERVICE

I, Laurel R. Bergold, hereby certify that on August 21, 2012, I electronically filed the foregoing Motion for Leave to File Supplemental Amicus Brief of the Federal Communications Commission 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.

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