

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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PDR NETWORK, LLC, ET AL.,)
Petitioners,)
v.) No. 17-1705
CARLTON & HARRIS CHIROPRACTIC, INC.,)
Respondent.)
- - - - -

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 8 - - - - -

9
 10 Washington, D.C.
 11 Monday, March 25, 2019

12
 13 The above-entitled matter came on for
 14 oral argument before the Supreme Court of the
 15 United States at 10:08 a.m.

16
 17 APPEARANCES:
 18 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf
 19 of the Petitioners.
 20 GLENN L. HARA, ESQ., Rolling Meadows, Illinois; on
 21 behalf of the Respondent.
 22 RACHEL P. KOVNER, Assistant to the Solicitor General,
 23 Department of Justice, Washington, D.C.; on behalf
 24 of the United States, as amicus curiae, in support
 25 of the Respondent.

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1 P R O C E E D I N G S

2 (10:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 17-1705,
5 PDR Network versus Carlton & Harris
6 Chiropractic.

7 Mr. Phillips.

8 ORAL ARGUMENT OF CARTER G. PHILLIPS

9 ON BEHALF OF THE PETITIONERS

10 MR. PHILLIPS: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 The most startling comment in the
13 Fourth Circuit's opinion in this case is the
14 following one: "We need not harmonize the
15 FCC's rule with the underlying statute."

16 I would have thought, in any ordinary
17 instance of judicial review of administrative
18 agency decision-making, that's a statement that
19 ought to leap out off the page, and when it's
20 being applied in the context of a private right
21 of action brought as a class action by private
22 plaintiffs against a private defendant who is
23 seeking to assert that the statute is not
24 violated by the action of the defendant, the
25 idea that the court of appeals will say, no,

1 no, there's no opportunity and no reason for
2 the courts to entertain the agency's standard
3 to be applied in those circumstances is one
4 that, it would seem to me, you could only
5 justify in extraordinary circumstances that are
6 candidly not presented.

7 JUSTICE SOTOMAYOR: That -- that --
8 that's a bit what's unusual about this case.
9 It's a different question whether the court of
10 appeals can do it because the Hobbs Act gives
11 it exclusive jurisdiction, and I think the
12 exclusive jurisdiction has to mean something.

13 And that it then doesn't become a
14 matter of jurisdiction; it becomes a matter of
15 how much, if any, deference this interpretation
16 is due than the question we granted cert on,
17 which is, what does the district court -- what
18 can the district court do as opposed to the
19 court of appeals?

20 MR. PHILLIPS: Can --

21 JUSTICE SOTOMAYOR: So, here, the
22 district court, I understand, didn't think it
23 was challenging the validity of the order, or
24 that you were, of -- of the FDC interpretation.
25 It was interpreting it.

1 MR. PHILLIPS: Right.

2 JUSTICE SOTOMAYOR: So where does that
3 leave --

4 MR. PHILLIPS: But it was interpreting
5 it in -- in -- in light of the statute,
6 candidly.

7 JUSTICE SOTOMAYOR: Well, but --

8 MR. PHILLIPS: Can -- can --

9 JUSTICE SOTOMAYOR: -- yes, I agree
10 with you, it's interpreting, but that's what
11 applied challenges are about, aren't they?
12 They're here's the statute, here's the
13 interpretation, your facts are unique, and we
14 now as judges decide whether or not that
15 uniqueness falls within or without the
16 interpretive guideline or the -- the statute.

17 MR. PHILLIPS: I mean, there --

18 JUSTICE SOTOMAYOR: That's a normal
19 process, isn't it?

20 MR. PHILLIPS: Right. There -- there
21 are two things that come out of that question
22 that I'd like to address. The first one is,
23 what is the -- the work that's done by the
24 requirement of exclusive jurisdiction in the
25 Hobbs Act?

1 And we would say that the exclusive
2 jurisdiction under the Hobbs Act says the court
3 of appeals can decide whether and only -- you
4 know, whether they can enjoin, set aside,
5 suspend in whole or part --

6 JUSTICE SOTOMAYOR: Put that aside,
7 because that's -- assuming I don't accept that,
8 that the court of appeals has exclusive
9 jurisdiction, period, and we have plenty of
10 statutes that give courts of appeals exclusive
11 jurisdiction over matters.

12 So, if you're not challenging the
13 validity of the Hobbs Act, how do you -- and
14 you accept it on its face, what happens?

15 MR. PHILLIPS: Well, I accept it on
16 its face. The question --

17 JUSTICE SOTOMAYOR: Just with a
18 different interpretation?

19 MR. PHILLIPS: Right. I -- well, I
20 guess that's the problem, is it's difficult for
21 me to -- to sort of sweep away what does it
22 mean to determine the validity of.

23 JUSTICE SOTOMAYOR: Well, let -- let's
24 assume we just accept where we've always been.
25 Isn't this a Yakus case? If the court of

1 appeals is the only body -- body that can
2 determine the validity of a administrative
3 holding or an administrative final order, do
4 you lose?

5 MR. PHILLIPS: No -- well, does -- I
6 -- I think if you're relying on Yakus to get to
7 that proposition, it's hard to do that without
8 taking into account the specific circumstances
9 and the statutory language in Yakus, because
10 Yakus didn't just say that the court of appeals
11 has exclusive authority to -- to do the
12 injunctive work and the declaratory work, but
13 it went further, and this Court upheld it under
14 these circumstances, coupled with the provision
15 that "no court, federal, state, or territorial,
16 shall have jurisdiction or power to consider
17 the validity of any such regulation."

18 And it was the "coupled with" language
19 that -- that makes Yakus what it is. Yakus
20 doesn't answer the question of whether the --
21 the provision of exclusive jurisdiction goes
22 beyond the ordinary situation of seeking
23 injunctive relief or equitable relief,
24 including declaratory relief.

25 JUSTICE ALITO: Mr. Phillips, what --

1 JUSTICE KAGAN: I mean, I guess I
2 don't --

3 JUSTICE SOTOMAYOR: So then I'm --

4 JUSTICE ALITO: It seems to me the
5 most difficult part of your argument is the
6 question of reliance by parties that
7 participated in the rule-making activity.

8 So suppose here that PDR had been a
9 party and it said -- it -- it -- it took the
10 position -- it said the FCC should say that the
11 -- the statute applies only if the fax directly
12 proposes a commercial transaction, and the FCC
13 agreed on that. And then PDR gets sued, just
14 as it was here.

15 MR. PHILLIPS: Right.

16 JUSTICE ALITO: So couldn't --

17 MR. PHILLIPS: But then I -- then the
18 normal estoppel rules would apply. You had the
19 opportunity. You participated in the
20 proceedings. Estoppel, a la cases like Port of
21 Boston and other cases, say, you know, when you
22 have a full, fair opportunity to litigate and
23 you lose, then that's tough luck, when -- when
24 the issue comes back up.

25 But, if you're in the situation that

1 PDR is, where -- where it never engaged in any
2 of the behavior that would be -- implicate this
3 case or implicate this regulation or order, and
4 then you find out, you know, 10 years later
5 what's -- that it was --

6 JUSTICE ALITO: But suppose it wasn't
7 a party, so -- but it -- it was aware of what
8 was going on. Is it the same situation?

9 MR. PHILLIPS: I --

10 JUSTICE ALITO: The same result?

11 MR. PHILLIPS: I -- I think so, if
12 you're talking about aware in the sense of -- I
13 mean, the problem is even if they were aware of
14 it, they still weren't sending out faxes. They
15 weren't adversely affected by it at the time.

16 And so, therefore, they would have had
17 no basis to -- to seek judicial review under
18 the circumstances.

19 JUSTICE GORSUCH: Well --

20 JUSTICE KAGAN: Is that the --

21 JUSTICE GORSUCH: -- the government --
22 I'm sorry, go ahead.

23 JUSTICE KAGAN: Is that the test, were
24 you adversely affected at the time? Did you
25 have -- were you -- you know, did you

1 reasonably think you could be adversely
2 affected at the time?

3 What -- what do you think the test is?

4 MR. PHILLIPS: I -- I mean, the
5 Administrative Procedure Act suggests the test
6 is you have to be adversely affected by the --
7 by the action of the agency. And I would think
8 this Court's Article III cases would require
9 you to be at least somewhat adversely affected.

10 JUSTICE KAGAN: But, in other words --

11 MR. PHILLIPS: Otherwise, you have no
12 injury.

13 JUSTICE KAGAN: -- that if they were
14 carrying out that kind of activity, if they
15 were sending out faxes at that time, would that
16 be enough?

17 MR. PHILLIPS: I -- I think that's
18 difficult in that circumstance, because I -- I
19 don't think the Court has historically said --
20 and -- and Adamo Wrecking and Justice Powell's
21 opinion suggests that it doesn't put that kind
22 of a burden on the average individual to try to
23 sort out all the federal regulations and try to
24 figure out exactly what happens.

25 JUSTICE GINSBURG: Did -- did --

1 MR. PHILLIPS: And I think it's made
2 even more complicated in a case like this one,
3 where the FCC's ultimate order doesn't follow
4 from a specific notice to the public that what
5 we're going to do is entertain this kind of a
6 definition of -- of what an advertisement is.

7 JUSTICE GINSBURG: Did -- did P --

8 MR. PHILLIPS: All it said was we are
9 going to -- we're going to review -- I'm sorry,
10 Your Honor.

11 JUSTICE GINSBURG: Did -- did PDR have
12 any reason to think that even the regulation as
13 written would affect it? I mean, the -- the
14 district court -- there -- there's -- the
15 regulation was far from crystal-clear.

16 MR. PHILLIPS: I agree with that.

17 JUSTICE GINSBURG: And the -- the
18 district court thought that the statute and the
19 regulation were in harmony and that PDR didn't
20 violate either.

21 MR. PHILLIPS: Right. And that's --
22 I mean, that's part of the problem here, is --
23 is you don't know what the statute means --
24 what the regulation and what effect it has
25 until you get into litigation.

1 And -- and so, if you adopt the rule,
2 Justice Kagan, that says that if you're just
3 generally aware of the problem, what you're
4 doing is saying what we want to invite is
5 premature challenges to agency decision-making
6 when we don't have any concrete injury at all,
7 but because there's a risk, at some point,
8 we're engaged in some kind of behavior that
9 might trigger this, we're otherwise barred for
10 all time. I mean, that is --

11 CHIEF JUSTICE ROBERTS: Why --

12 JUSTICE KAGAN: May I ask, Mister --

13 MR. PHILLIPS: -- estoppel on
14 steroids. I'm sorry.

15 CHIEF JUSTICE ROBERTS: Why -- why
16 isn't it enough that you can seek
17 reconsideration of the FCC determination prior
18 to the application of the order to you? And,
19 presumably, the agency will deny it, but then
20 you'd get judicial review at that point. Isn't
21 that --

22 MR. PHILLIPS: Right.

23 CHIEF JUSTICE ROBERTS: -- isn't that
24 enough?

25 MR. PHILLIPS: I -- I -- I don't think

1 it's enough. And, first of all, you would have
2 to say that -- is that what Congress thought
3 the Hobbs Act required under these
4 circumstances? That is an extraordinarily
5 convoluted process where you are asking for
6 something to be reopened that's already been
7 decided by the -- by the Commission and where
8 the Commission has absolute discretion to grant
9 or deny it --

10 CHIEF JUSTICE ROBERTS: Well, I
11 mean --

12 MR. PHILLIPS: -- and -- and on its
13 own time frame.

14 CHIEF JUSTICE ROBERTS: Well, is that
15 what Congress intended? I mean, to the extent
16 you have the argument that you want a decision
17 that's applicable throughout the
18 heavily-regulated industry, I mean, that may be
19 exactly what they wanted, whether it was only
20 once or if they wanted to allow you to raise it
21 again at a subsequent time.

22 MR. PHILLIPS: I -- I think it makes
23 much more sense to think of the Hobbs Act as
24 saying to the world, look, if you're directly
25 affected by an agency action, and most of the

1 cases under the Hobbs Act, most of those
2 agencies, you're right, are heavily regulated
3 and they follow very carefully what happens.

4 And if they think they're being
5 adversely affected, they run to court
6 immediately and they seek some form of
7 injunctive relief or equitable relief or
8 declaratory relief in order to stop and --

9 JUSTICE SOTOMAYOR: But why --

10 MR. PHILLIPS: -- and allow them to go
11 forward.

12 JUSTICE SOTOMAYOR: -- why, if you
13 think you're not doing anything wrong, I -- I
14 know the Chief mentioned a motion for
15 reconsideration, but much easier is a motion
16 for declaratory judgment.

17 And you go to the agency and you say,
18 in fact, is what we do -- what -- we don't
19 think we're violating your order. Are we or
20 aren't we? You could have done that.

21 MR. PHILLIPS: We could have done
22 that. And the -- and the district court could
23 have --

24 JUSTICE SOTOMAYOR: You could have
25 asked that --

1 MR. PHILLIPS: -- could have exercised
2 primary -- could have allowed primary
3 jurisdiction --

4 JUSTICE SOTOMAYOR: Exactly.

5 MR. PHILLIPS: -- when the Commission
6 --

7 JUSTICE SOTOMAYOR: But you never
8 asked for it.

9 MR. PHILLIPS: Because we believed
10 that the district court --

11 JUSTICE SOTOMAYOR: I know what you
12 believed. But, if you were wrong, shouldn't
13 you have?

14 MR. PHILLIPS: Well, with the benefit
15 of hindsight, I suppose you could say that, but
16 at the -- at the time of the -- of the
17 litigation, we're faced with a question of are
18 we liable potentially for treble damages for a
19 violation of a private cause -- of a -- of a
20 statutory provision providing a private cause
21 of action.

22 JUSTICE SOTOMAYOR: So, if I think --
23 if I were to think -- I'm not there yet -- that
24 there's no due --

25 MR. PHILLIPS: There's hope. You're

1 telling me there's hope.

2 (Laughter.)

3 JUSTICE SOTOMAYOR: If there's -- if I
4 don't think there's a due process violation
5 because you have access to the agency and to
6 getting a response if you take the proper
7 steps, what happens to your argument then?

8 MR. PHILLIPS: Well, I think it's --

9 JUSTICE SOTOMAYOR: If I don't think
10 there's a due process violation.

11 MR. PHILLIPS: Well, there are two
12 issues, two parts of that. There's still a --
13 a very serious, to my mind, separation of
14 powers argument that says that you have a case
15 that's within the jurisdiction of the district
16 court, properly before it, and the district
17 court is -- is not -- is not allowed to decide
18 what the right outcome is.

19 If -- if Congress intended for that, I
20 would expect Congress to be much clearer that
21 that's its intention. It would have followed
22 the Yakus model rather than the ICC model or
23 the FTC model that is the basis for this --

24 JUSTICE KAGAN: Mr. Phillips, what --
25 I guess that's the second time you've said that

1 there's a real difference between the Yakus
2 model and this. And I take it you're referring
3 to the kind of second provision, which says no
4 courts shall --

5 MR. PHILLIPS: Consider.

6 JUSTICE KAGAN: Yeah, but that's --
7 once you have the word "exclusive" in the first
8 provision, a second provision that says no
9 other courts shall hear this kind of case is
10 redundant, isn't it?

11 MR. PHILLIPS: No.

12 JUSTICE KAGAN: You don't need it.

13 MR. PHILLIPS: No, I think it --

14 JUSTICE KAGAN: As long as you say
15 this Court has exclusive jurisdiction, why
16 would you need a separate provision saying no
17 other courts have jurisdiction?

18 MR. PHILLIPS: Because there's a big
19 difference between having jurisdiction to
20 decide in the first instance whether or not to
21 enjoin, set aside, or declare invalid a rule of
22 an agency and what happens when an enforcement
23 action is brought.

24 And we know from the Administrative
25 Procedure Act that the strong presumption is in

1 favor of allowing you to defend against the
2 regulation or order in an enforcement action.

3 And, therefore, Congress has to mean
4 explicitly that it wants something different
5 under those circumstances.

6 And what I would tell you is that if
7 we were -- if -- if Yakus had been adopted
8 here, my position would obviously be a heck of
9 a lot more difficult, and then I'd only be
10 arguing, well, that was a national emergency
11 and this isn't. But that's not the language
12 the Congress adopted.

13 And what -- what the Fourth Circuit
14 said -- and I think it's --

15 JUSTICE KAGAN: Well, I guess I'm
16 still not --

17 MR. PHILLIPS: -- it's just an
18 ordinary statute -- I'm sorry.

19 JUSTICE KAGAN: -- seeing it. It just
20 seems to me it is the language that Congress
21 adopted, with the exception of removing a
22 completely redundant provision.

23 Once you say Court X has exclusive
24 jurisdiction, you don't need another provision
25 saying Court Y doesn't have jurisdiction. It's

1 implicit in the first statement.

2 MR. PHILLIPS: If -- if Congress had
3 not already adopted the -- the -- the rule that
4 says you have -- you know, you have both, and
5 this Court hadn't said, because you have both,
6 that is the basis on which there is -- this
7 estoppel operates against this defendant in a
8 -- in a criminal action, that would be one
9 thing.

10 But that's -- that's how the statute
11 was interpreted with that second provision in
12 it.

13 Congress then comes back and adopts a
14 truncated version of that, doesn't say that it
15 wants to go to the Yakus world.

16 JUSTICE KAGAN: Well, truncated but
17 with the word "exclusive" in it.

18 MR. PHILLIPS: Right. And, again, I
19 don't -- there's no question --

20 JUSTICE KAGAN: Exclusive means
21 exclusive, Mr. Phillips, doesn't it?

22 MR. PHILLIPS: Exclusive to do what?

23 JUSTICE KAGAN: It means this Court
24 and no other.

25 MR. PHILLIPS: Right. To do what?

1 And the question is, is it -- is it to do -- to
2 provide the kind of injunctive relief or
3 declaratory relief --

4 JUSTICE KAVANAUGH: Do you -- do you
5 see any --

6 MR. PHILLIPS: -- that 24 -- I'm
7 sorry, Your Honor.

8 JUSTICE KAVANAUGH: Keep going.

9 MR. PHILLIPS: That the -- that the
10 statute subsequently in the Hobbs Act in 2349
11 specifically talks about judgments for
12 declaratory relief.

13 JUSTICE KAVANAUGH: The first sentence
14 says determine the validity. The second says
15 consider the validity.

16 Do you see any difference in those two
17 phrases?

18 MR. PHILLIPS: I think the use of
19 "consider the validity" is extraordinarily
20 broad and says to those courts: Stay out of
21 this business. And -- and -- and done for good
22 reason. I mean, we were -- this was right
23 after Pearl Harbor. There was price regulation
24 in -- in effect.

25 There was a need for the kind of

1 consistency and nationwide decision-making, Mr.
2 Chief Justice, that you talked about. Most of
3 these are fine if what you're talking about is
4 creating problems for regulated entities who
5 monitor it and bring their actions and try to
6 stop it.

7 But, when that doesn't happen and the
8 agency goes beyond that and adopts
9 interpretations, it should -- there's nothing
10 in the Hobbs Act, which is just an ordinary
11 judicial review statute, that should divest the
12 district court of the authority to decide the
13 question on the basis of the statute and its
14 interpretation --

15 JUSTICE GORSUCH: So, Mister --

16 MR. PHILLIPS: -- of the regulations.

17 JUSTICE GORSUCH: -- Mr. Phillips, on
18 -- on -- on Yakus, you've emphasized the
19 difference in the statutory language. I -- I
20 -- I wonder whether there are a couple of other
21 distinctions that you might comment on, and --
22 and maybe there's a reason why you're not
23 pursuing them, and that's the reason for my
24 question.

25 One is the -- the separation of powers

1 difference, that there was a wartime measure
2 and the executive had, arguably, some inherent
3 authority in the area that's lacking when it
4 comes to faxes, as important as they are.

5 MR. PHILLIPS: Or were.

6 JUSTICE GORSUCH: And the other -- or
7 were, right, right, right. This -- this did
8 take place a few years ago.

9 And the other would be that -- that --
10 that there, I think Professor Bamzai makes this
11 point, that you have a -- a -- a proceeding in
12 which there's a criminal -- a criminal
13 proceeding and one of the elements is violation
14 of the agency's price control regulation.

15 And there you really are challenging
16 the validity of that regulation if you're
17 challenging the government's indictment.

18 MR. PHILLIPS: Right.

19 JUSTICE GORSUCH: Whereas, here, as I
20 understand it, the regulation doesn't disappear
21 tomorrow, and it isn't declared invalid in any
22 meaningful sense. So those are distinctions I
23 had understood to exist, but I'm -- I'm not
24 hearing you argue them and I'm wondering why?

25 MR. PHILLIPS: I -- I tried to make

1 the separation of powers point earlier because
2 I do believe --

3 JUSTICE GORSUCH: Fair -- you did --
4 you did try. I -- I grant you that.

5 MR. PHILLIPS: So, I mean, and -- and
6 I do think you have to interpret the Hobbs Act
7 in light of the -- of the extraordinary
8 separation of powers problem that you create by
9 an over-expansive use of exclusive, unless
10 Congress really means it and -- and then ties
11 it up in a bow for you.

12 JUSTICE KAGAN: So what -- what
13 separation of powers problem do you create?

14 MR. PHILLIPS: You create the problem
15 that you have here, where the court of appeals
16 says to the -- to the world: We don't have to
17 harmonize the rule, the FCC's rule, with the
18 statute. We can impose liability on someone
19 under a rule that's set, and slavishly have to
20 follow the rules set by the FCC.

21 JUSTICE KAGAN: Well, I -- I think
22 even the government agrees that a court can
23 interpret a regulation. So you -- you might be
24 quite right about that.

25 But, on your broader point, why is it

1 a separation of powers problem to say: Of
2 course, a court has to determine what the law
3 is, but -- but it doesn't have to be every
4 court at every time that determines what the
5 law is.

6 It can be a particular court, the
7 court of appeals, at a particular time, 60 days
8 after an agency action. Whether it's the
9 initial agency action or, as the district -- as
10 the D.C. Circuit does, a -- a petition for a
11 new agency action.

12 But why is that a separation of powers
13 problem to limit the court and to limit the
14 timing really in order to ensure uniformity and
15 to ensure that the government is in the room
16 when the determination about the regulation
17 takes place?

18 MR. PHILLIPS: Well, because I think,
19 at bottom, the -- the -- the -- the normal rule
20 should be, in any situation in which you are
21 being sued for violating a statute, and you are
22 seeking to defend on the basis that you didn't
23 violate the statute, and they're being told,
24 no, you did violate the statute because there's
25 a regulation, and that regulation is not

1 something you're entitled to challenge, you
2 would ask is -- is that a situation -- I mean,
3 that seems like a separation of powers problem
4 to me because district courts are in the
5 business of dictating what the law is, not
6 being slavishly adherent to the --

7 JUSTICE SOTOMAYOR: But the problem --

8 MR. PHILLIPS: -- dictates of the
9 Commission --

10 JUSTICE SOTOMAYOR: -- but the problem
11 here is that what you're challenging is not the
12 question presented.

13 The district court looked at your
14 argument and bought it and said we're not
15 challenging -- you're right, this doesn't
16 violate either the statute or the interpretive
17 rule that the agency gave it.

18 MR. PHILLIPS: Right.

19 JUSTICE SOTOMAYOR: It was the court
20 of appeals who read the interpretive rule
21 differently. So it appears as if your
22 challenge is really not to the jurisdiction of
23 the court of appeals, because everybody knows
24 it has jurisdiction either as an appeal from
25 the district court or under the Hobbs Act,

1 because the Hobbs Act only gives the court of
2 appeals -- under the Hobbs Act, maybe the FCC
3 is the only one who can question it, but that's
4 not the question presented that we had.

5 MR. PHILLIPS: Right. But the way --
6 to me, the way and the reason why the question
7 that the Court rewrote came up the way it did
8 was you have an ordinary situation where a
9 district court does exactly what you would want
10 a district court to do, which is to figure out
11 what the statute means in light of the
12 interpretation of the agency.

13 And then you have this extraordinary
14 statement made by the court of appeals which
15 says, no, we're going to reverse that, and
16 we're going to reverse that because the
17 district court had no business getting into
18 that -- into that inquiry to begin with.

19 That seems to me offensive to core
20 notions of separation of powers.

21 JUSTICE KAVANAUGH: Well, there are --

22 MR. PHILLIPS: And if Congress -- I'm
23 sorry, Your Honor.

24 JUSTICE KAVANAUGH: There are statutes
25 that explicitly preclude judicial review in

1 enforcement proceedings, however, like the
2 Clean Air Act.

3 MR. PHILLIPS: Right.

4 JUSTICE KAVANAUGH: Are those
5 unconstitutional?

6 MR. PHILLIPS: Probably not under the
7 circumstances. And --

8 JUSTICE KAVANAUGH: Well, then, if
9 they're not unconstitutional, then that's --
10 you don't really have a separation of powers
11 argument; you have more an argument about what
12 we should do with a statute that's silent about
13 the -- the -- whether judicial review is
14 available in the enforcement proceedings.

15 Some statutes --

16 MR. PHILLIPS: I mean, part of -- I
17 mean, the -- the reason why it's hard for me to
18 tell you in the abstract whether the
19 environmental statutes are constitutional or
20 not constitutional is they have different
21 language than the statute here and certainly
22 different language than the Court had in --

23 JUSTICE KAVANAUGH: But you don't
24 dispute --

25 MR. PHILLIPS: -- in *Yakus* as well.

1 JUSTICE KAVANAUGH: -- you don't
2 dispute that those statutes preclude --

3 MR. PHILLIPS: Some forms --

4 JUSTICE KAVANAUGH: -- review?

5 MR. PHILLIPS: -- in some
6 circumstances.

7 JUSTICE KAVANAUGH: Right.

8 MR. PHILLIPS: But, again, it seems to
9 me they're much more useful as an understanding
10 of, you know, would Congress have intended,
11 because even assuming it's constitutional, it's
12 something that the courts -- that Congress
13 doesn't typically do.

14 JUSTICE KAVANAUGH: I agree with that.
15 And -- but I -- I was just pressing the broader
16 -- how far you were going to press the broader
17 point on separation of powers, right?

18 There's some statutes that explicitly
19 preserve judicial review, some statutes that
20 explicitly bar the judicial review in the
21 enforcement proceedings --

22 MR. PHILLIPS: Right.

23 JUSTICE KAVANAUGH: -- and then we're
24 in the gray area where it's silent, right?

25 MR. PHILLIPS: Right. But I -- and --

1 and I would -- and I would construe the silence
2 here in favor of saying we ought to have
3 judicial review, but it -- but, in some ways,
4 it goes back to Justice Gorsuch's question, and
5 it -- it's part of my problem with the -- with
6 the EPA. I can envision circumstances where it
7 would be unconstitutional as a separation of
8 powers because one of the things that Yakus
9 tells us is that the executive does have some
10 authority here.

11 We're talking about emergencies. And
12 I don't know exactly the circumstances in which
13 Congress decided to limit the authority to
14 review those issues and -- and how aggressive
15 that's interpreted in various circumstances.

16 And -- and, again, of course, there's
17 the due process issue.

18 JUSTICE KAGAN: Could you talk --

19 CHIEF JUSTICE ROBERTS: Justice --
20 Justice Breyer.

21 MR. PHILLIPS: I'm sorry.

22 JUSTICE BREYER: I have a question.
23 This may be very elementary, in which case just
24 tell me read the brief again. But the -- the
25 -- the -- the statute refers to the FCC's

1 review of FCC final orders. And then, when you
2 read down the statute, it talks about review of
3 rules, regulations --

4 MR. PHILLIPS: Right.

5 JUSTICE BREYER: -- and orders, but
6 not those of the FCC. It doesn't have it in
7 that section. Then, if you look up final
8 order, if you look it up in -- if you look up
9 "order" in the APA, it refers to a final
10 decision -- "final" comes from the review part
11 -- other than rule-making.

12 So how does -- here -- here we have --
13 how is that supposed to work? Is -- is it
14 everybody knows it? I have another final
15 absurd obvious question too, which you can tell
16 me both, and that is what happens -- a lot of
17 rules are -- these are my only two questions.
18 Can I -- shall I ask both?

19 (Laughter.)

20 JUSTICE BREYER: You want me to ask
21 both or in order?

22 MR. PHILLIPS: I won't hold -- I won't
23 hold you to that, Justice Breyer.

24 JUSTICE BREYER: Okay. The -- the --
25 the other one is, look, there are -- there are

1 lots of -- rule-making normally, you review in
2 the court of appeals. There are all kinds of
3 things that do that.

4 So what happens to a person who wasn't
5 born yet or what happens to a business that
6 wasn't formed yet? There must be law on that.
7 This can't be the first -- you know, here they
8 were, by the way, but, I mean, how do we work
9 it in the normal case?

10 So those are my two questions. You've
11 got them both?

12 MR. PHILLIPS: I've got them both.

13 JUSTICE BREYER: Okay.

14 MR. PHILLIPS: Let me take them in the
15 -- in the opposite order. I think the answer
16 to the second one is -- I mean, it's a very
17 deep and fundamental due process --

18 JUSTICE BREYER: Yeah.

19 MR. PHILLIPS: -- problem. If you've
20 never had an opportunity to obtain review of
21 the agency's decision-making, never could have,
22 the idea that you are subsequently barred under
23 these circumstances is absurd to the process.

24 JUSTICE BREYER: Right, right. So
25 there must be a holding on that. Is there no

1 case -- there's no case on that, I guess.

2 MR. PHILLIPS: Well, my guess is most
3 -- most courts wouldn't entertain the
4 suggestion that you're not allowed to --

5 JUSTICE BREYER: Therefore, there is
6 no case?

7 MR. PHILLIPS: At least I don't --
8 I've -- I've not seen one --

9 JUSTICE BREYER: Okay.

10 MR. PHILLIPS: -- where the issue was
11 being fought.

12 JUSTICE BREYER: All right. What
13 about the first one, which is just my confusion
14 about the statute. See, I -- I see the word
15 "final" order.

16 MR. PHILLIPS: Right.

17 JUSTICE BREYER: I'm trying to
18 reconcile this with the APA.

19 MR. PHILLIPS: Right. Well, what we
20 -- what we --

21 JUSTICE BREYER: Go back to the APA?
22 Order is not --

23 MR. PHILLIPS: I don't think this is a
24 final order within the meaning of -- of that
25 provision in the Hobbs Act. I mean, that's the

1 last part of our brief --

2 JUSTICE BREYER: So I should ask the
3 other side? Okay.

4 MR. PHILLIPS: -- on the interpretive
5 rule.

6 JUSTICE BREYER: Okay.

7 MR. PHILLIPS: I realize there's a lot
8 of water under that bridge in terms of things
9 that have been reviewed that way, but the
10 reality is -- and -- and I do think the -- the
11 FCC's method of decision-making here is -- is
12 one that's reasonably called into question
13 because there are very specific rules that were
14 adopted as part of this order and there was
15 very specific notice and comment as to those.

16 And none of that went to the part of
17 the order that now is being used or asserted
18 against my client as absolutely binding and
19 without any opportunity for judicial review.

20 JUSTICE GINSBURG: How did --

21 JUSTICE BREYER: Well, what -- what
22 about your -- was your client around at the
23 time?

24 MR. PHILLIPS: They were, but they
25 weren't using faxes.

1 JUSTICE BREYER: So what about a rule
2 that says, I'm sorry, people who are around
3 have to come and challenge it in the court of
4 appeals when it's first promulgated or 90 days
5 thereafter? What's wrong with that?

6 MR. PHILLIPS: The problem with that
7 is, one, if you haven't been adversely affected
8 by it, you have no injury in fact, you can't go
9 to an Article III court and complain about it
10 under those circumstances.

11 CHIEF JUSTICE ROBERTS: Justice --
12 Justice Kagan?

13 JUSTICE KAGAN: May I ask if you would
14 just talk a little bit about the argument, I
15 think it's at the end of your brief, that this
16 is really an interpretive rule and, whatever is
17 true of any other rules, interpretive rules are
18 different.

19 MR. PHILLIPS: Yeah.

20 JUSTICE KAGAN: And then to also tell
21 me why you think that's not waived. And then
22 to also tell me why you think your main
23 argument is not waived.

24 MR. PHILLIPS: The -- the -- the main
25 argument is not waived because the court

1 specifically said it did not have to harmonize
2 the interpretation of the FCC with the statute
3 under these cases.

4 JUSTICE KAGAN: And I don't want --

5 MR. PHILLIPS: And that's our --
6 that's the core of our main argument.

7 JUSTICE KAGAN: I don't want to take a
8 lot of your time, but the -- but the point, of
9 course, is -- and you -- I can read a bunch of
10 stuff and I don't want to do that. Is -- is
11 there a bunch of times where you said in the
12 district court and then in your petition that
13 you were not arguing that the -- you know, that
14 you were not arguing that the district court
15 should ignore the rule, that you accepted --

16 MR. PHILLIPS: No, I mean, what we --

17 JUSTICE KAGAN: -- that you accepted
18 Hobbs, essentially?

19 MR. PHILLIPS: Well, I don't know that
20 we accepted Hobbs so much as we were perfectly
21 comfortable with the district court's
22 determination that if you interpret the statute
23 and the regulation and -- and lay it against
24 our conduct, there was nothing wrong and,
25 therefore, no basis for liability.

1 It was when the Fourth Circuit said we
2 -- you can't look at that at all or take any in
3 -- into account, that's when we started to
4 complain. And then this Court said: Does the
5 Hobbs Act deprive the district court of the
6 authority to do that? This is precisely raised
7 by that holding of the Fourth Circuit in -- in
8 this particular case.

9 On the interpretive rule point, again,
10 the question you asked is, does the Hobbs Act
11 prevent this? We answered that question.
12 Admittedly, this issue was not raised before,
13 but that's the question you posed, and we felt
14 an obligation to give you a full answer to that
15 question.

16 If -- if you had simply granted the
17 petition, I doubt we would have made that last
18 argument. But that's why we --

19 JUSTICE SOTOMAYOR: So is your
20 point --

21 MR. PHILLIPS: -- put it in front of
22 the Court.

23 JUSTICE SOTOMAYOR: -- is that point
24 that interpretive rules are not subject to the
25 Hobbs Act at all?

1 MR. PHILLIPS: Yes, Your Honor.

2 JUSTICE SOTOMAYOR: Is that your
3 point?

4 MR. PHILLIPS: That's our last point,
5 yes, Your Honor.

6 JUSTICE SOTOMAYOR: Okay. So the
7 district court and the Fourth -- and the
8 circuit court can both look at whether the
9 interpretive rule is right under the statute?

10 MR. PHILLIPS: Yes, that's absolutely
11 correct, Your Honor.

12 CHIEF JUSTICE ROBERTS: Thank --

13 JUSTICE SOTOMAYOR: Do you think that
14 was adequately briefed here?

15 MR. PHILLIPS: In this Court?

16 JUSTICE SOTOMAYOR: Yes.

17 MR. PHILLIPS: Absolutely.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 MR. PHILLIPS: Thank you, Your Honor.

21 CHIEF JUSTICE ROBERTS: Mr. Hara.

22 ORAL ARGUMENT OF GLENN L. HARA

23 ON BEHALF OF THE RESPONDENT

24 MR. HARA: Mr. Chief Justice, and may
25 it please the Court:

1 When a district court refuses to
2 accept a final order of the FCC interpreting
3 the TCPA on the basis that it's inconsistent
4 with the statute, that court is determining the
5 validity of the order. And that --

6 JUSTICE GINSBURG: The district court
7 didn't find that the regulation was
8 inconsistent with the statute. It read the
9 regulation to be in harmony with the statute.
10 The district court did not find that the --
11 there was a clash between the statute.

12 MR. HARA: That's exactly right,
13 Justice Ginsburg. The district court in this
14 case interpreted the 2006 rule to mean what PDR
15 says it means. And then that ruling was
16 reversed by the Fourth Circuit Court of
17 Appeals.

18 The Fourth Circuit held paragraph 52
19 of the 2006 order creates a per se rule that a
20 fax offering free goods or services is an
21 advertisement, as -- as we advocated for.

22 Now, having lost on its interpretive
23 argument, PDR says it wants to do something
24 that it never said it wanted to do before.

25 Now it does want to challenge the

1 validity of the 2006 order. And it's -- it's
2 arguing to this Court, because the question
3 presented was so broad, it's -- it -- it's
4 raising arguments that it either forfeited
5 below expressly, like the argument that it
6 wants to challenge the validity of an FCC order
7 --

8 JUSTICE GINSBURG: What about the very
9 basic argument, someone who is going to be
10 subject to an enforcement proceeding has a
11 right to notice and an opportunity to be heard
12 on the issue?

13 The way this thing came up, PDR had no
14 reason to think that it was a party aggrieved.

15 MR. HARA: Justice Ginsburg, do you
16 mean in 2006 when the order was issued, or do
17 you mean in 2013 before PDR sent the faxes?

18 JUSTICE GINSBURG: No, I mean when the
19 administrative proceeding was going on, during
20 the rule-making.

21 At that time, PDR had no reason to
22 think, unlike Yakus, where there's a price set
23 and you know it, you're selling meat or
24 whatever, you -- you are subject to that price.

25 But, here, when the initial

1 rule-making was going on, what reason did PDR
2 have to think it would be affected by it?

3 MR. HARA: The notice of rule-making
4 was published in the Federal Register, and that
5 constitutes constructive notice to the whole
6 world.

7 You know, we're also assuming that PDR
8 was not sending faxes offering free copies of
9 its hard copy PDR book in 2006. I'm -- I'm not
10 sure that that's true.

11 JUSTICE GORSUCH: Well, let's --
12 that's -- those are the facts we have. And I
13 -- I guess I want to return to Justice Ginsburg
14 and Justice Breyer's point.

15 What if -- what if the government
16 passes a regulation under this statute saying
17 all persons named Bob must pay the government
18 \$100 every year. All right? And a young man
19 is born after the regulation is adopted, and he
20 didn't -- he didn't read the Federal Register.

21 (Laughter.)

22 JUSTICE GORSUCH: Shocking, huh?

23 MR. HARA: Yes.

24 JUSTICE GORSUCH: Maybe a lot of
25 people don't read the Federal Register.

1 (Laughter.)

2 JUSTICE GORSUCH: Maybe they can't
3 read it. It's in eight-point font.

4 (Laughter.)

5 JUSTICE GORSUCH: At any rate, this
6 young man is forever barred, I think, under
7 your interpretation -- maybe not --

8 MR. HARA: No.

9 JUSTICE GORSUCH: -- from challenging
10 the validity of that regulation under the
11 statute?

12 MR. HARA: Our position is he is not
13 barred from challenging the validity of the
14 regulation.

15 JUSTICE GORSUCH: How?

16 MR. HARA: That person can petition
17 the agency even after the 60-day period of
18 review.

19 JUSTICE GORSUCH: Oh, I understand he
20 can petition the agency. But he can't come to
21 court. And a court is forbidden from
22 determining the validity of that -- of that
23 regulation.

24 MR. HARA: A federal district court or
25 a state court?

1 JUSTICE GORSUCH: Yeah, federal
2 district court.

3 MR. HARA: Or a state court, because,
4 under PDR's reading, state courts across the
5 country could also determine the validity of
6 FCC orders.

7 JUSTICE GORSUCH: But -- but I'm
8 talking about a federal district court, just as
9 here, would be barred from determining the
10 validity of that order, right?

11 MR. HARA: Yes. It would -- the party
12 would first need to go to the agency, and then
13 --

14 JUSTICE GORSUCH: He would have had to
15 have been born earlier.

16 MR. HARA: And then, if you lose
17 there, you petition to the court of appeals,
18 which can determine the validity of the order.

19 JUSTICE BREYER: Yeah, but the -- the
20 amount of deference you give to an agency in
21 deciding whether they should begin a proceeding
22 is enormous, I mean, compared to anything else.

23 So you say to somebody, oh, go
24 petition the agency, ask him to change it. I
25 mean, maybe you'll tell me I'm wrong about

1 this, but I always thought, if they say no,
2 that there's virtually nothing that you can do
3 about it in court, which is quite different
4 after they have a rule.

5 And after they have a rule, well, you
6 can say it's outside the statute. So it's the
7 same question that's been asked.

8 What about people -- and it's not just
9 being born later. As -- as was pointed out by
10 your colleague over here, it could be, but he
11 wasn't in that business, the business wasn't
12 formed, the business was formed, but it was in
13 certain aspects that he isn't a person
14 aggrieved. Okay?

15 So there are a lot of -- now I can't
16 believe there's no law on this. Is there no
17 law? This has been going on for years and
18 years and years. It's never come up?

19 MR. HARA: I'm -- I'm not aware of a
20 case --

21 JUSTICE BREYER: Not under just this
22 act, but, I mean, there are a lot of acts.

23 MR. HARA: I'm not aware of a case --

24 JUSTICE BREYER: Well, that's a pretty
25 big question. And -- and -- and then I go back

1 to the other, you see, that's an awfully big
2 question, and -- and the -- the -- then I read
3 the statute and it says final orders of the
4 FCC.

5 And orders have a meaning in the APA
6 other than rule-making. And then there's
7 another part of the statute that deals with
8 rule-making. But it isn't listed there, the
9 FCC.

10 So, at that point, I felt I was
11 totally confused. And -- and I would like you
12 to help me out of this confusion because I have
13 a few others too. I mean, interpretive rules,
14 for example, and so forth.

15 MR. HARA: Your Honor, on the APA's
16 definition of order as something other than
17 rule-making, I have to admit I'm not familiar
18 with it.

19 JUSTICE BREYER: Well, I'll read it to
20 you if you'd like. It says: Rule at the
21 beginning of the APA means the whole or part of
22 an agency statement of general or -- oh, that's
23 rule. Wrong place.

24 (Laughter.)

25 JUSTICE BREYER: God, that's -- here

1 -- where is it? Definitions. Well, it says
2 order somewhere. I just read it. Okay. Let
3 somebody else ask a few questions.

4 (Laughter.)

5 JUSTICE SOTOMAYOR: Counsel, can I --

6 CHIEF JUSTICE ROBERTS: It's -- it's
7 -- when you have this business about, well,
8 when the district court is applying, that you
9 can go petition the agency for reconsideration
10 and then, if the agency says no, then you can
11 go to the court of appeals.

12 Is what's before the court of appeals
13 simply the question of whether they should
14 reconsider it or the underlying merits of the
15 interpretation?

16 MR. HARA: It's the underlying merits
17 of the interpretation. I provided an example
18 in our brief because I just went through this
19 as counsel in a Hobbs Act appeal like that
20 brought by a group of TC -- TCPA defendants who
21 thought they were being subjected to an unfair
22 rule. It was issued in the same 2006 order as
23 the rule in this case.

24 They petitioned the FCC. They were
25 denied. They -- they took a Hobbs Act appeal

1 to the D.C. Circuit court of appeals and the
2 D.C. Circuit vacated the rule. It held that
3 the FCC did not have a --

4 CHIEF JUSTICE ROBERTS: Well, could
5 the D.C. Circuit have said, look, you know, the
6 -- the FCC looked at this just a couple years
7 ago. We think there's no reason for them to
8 look at it again.

9 Could they say that, in other words,
10 not get to the underlying merits?

11 MR. HARA: I think it would have to
12 consider -- if you had an argument that had not
13 been decided before, I think it would have to
14 consider the challenge to the statutory
15 authority for the agency's rule.

16 JUSTICE KAGAN: Is there any different
17 standard used at the D.C. Circuit when it comes
18 up like that?

19 MR. HARA: It's Chevron deference.

20 JUSTICE KAGAN: But is there -- is
21 there any difference between it getting to the
22 D.C. Circuit on that kind of petition and it
23 getting to the D.C. Circuit if you had
24 challenged the rule initially?

25 MR. HARA: There -- there was not in

1 the Bais Yaakov of Spring Valley litigation.

2 The FCC didn't argue for eliminating --

3 JUSTICE BREYER: That's the D.C.

4 Circuit. Okay.

5 MR. HARA: Right.

6 JUSTICE BREYER: The -- the question

7 -- I found order. Okay? It's 5516. "Order

8 means the whole or part of a final disposition,

9 whether affirmative, negative, injunction,

10 declaratory, of an agency in a matter other

11 than rule-making but including license."

12 So, I mean, I think normally in ad law

13 you try to sort of -- but nobody's argued that

14 at all.

15 MR. HARA: No.

16 JUSTICE BREYER: So you have a major

17 question, it seems to me, of administrative law

18 that applies major. And we also have parts of

19 this involving the statute that I personally --

20 maybe everyone else does -- don't understand,

21 both statutes, the order part and the other

22 part.

23 So what should we do, if -- if -- if

24 there's a general view the same as mine?

25 MR. HARA: Well, Your Honor, as you

1 said, nobody did argue that. And PDR conceded
2 below that the 2006 order at issue here is the
3 type of final order under 2342, the Hobbs Act.

4 The Fourth Circuit held that. It
5 relied on that concession and decided the case
6 on that concession. And -- and PDR didn't
7 challenge that in its petition to this Court.

8 JUSTICE KAVANAUGH: It seems --

9 JUSTICE GORSUCH: Even accepting that,
10 though, why is this determining the validity of
11 that order? Because the order stands today as
12 well as it did yesterday. The court's simply
13 interpreting the statute in a manner that may
14 be different than the agency, but that's what
15 courts do.

16 And agencies are in their
17 prosecutorial efforts allowed to interpret
18 statutes normally as well. And sometimes they
19 interpret them differently than courts. That's
20 the separation of powers.

21 So that interpretation still stands.
22 It's still the government's opinion letter on
23 the subject. It isn't been determined invalid
24 in the sense under the APA, as we normally
25 think, for lack of notice and comment the order

1 is vacated, or something like that.

2 So what's wrong with that? And -- and
3 -- and just to add on to that, the Yakus
4 problem, why doesn't that also distinguish it
5 from Yakus? Because, there, of course, to
6 challenge the criminal indictment, you had to
7 argue that the -- that the regulation was
8 invalid and that is ineffectual.

9 MR. HARA: I have two main responses.
10 The text of the Hobbs Act, the plain meaning of
11 those words, exclusive jurisdiction to
12 determine the validity of, to determine is to
13 decide, and to the validity of something is to
14 determine if it's legally sound or not.

15 And a district court is being asked to
16 do that when it's being asked to decide this
17 agency interpretation is inconsistent -- you
18 shouldn't apply it because it's inconsistent
19 with the statute.

20 JUSTICE GORSUCH: But you'd agree that
21 the regulation is still validly in force today,
22 right?

23 MR. HARA: You mean if the district
24 court had --

25 JUSTICE GORSUCH: No, no, the

1 regulation is still validly enforced.

2 MR. HARA: Well, no court has ever
3 invalidated it --

4 JUSTICE GORSUCH: Yeah.

5 MR. HARA: -- in this case. But --

6 JUSTICE SOTOMAYOR: I'm -- I'm -- I'm
7 a little --

8 JUSTICE ALITO: Do you think that
9 Yakus would be decided the same way today and
10 not in wartime? Let's say that Congress once
11 again sets up an agency to set all sorts of
12 prices on goods that it believes fall -- that
13 -- that -- goods affecting commerce, and the
14 agency sets prices for home-grown tomatoes,
15 maximum prices for home-grown tomatoes, and
16 somebody raises heirloom tomatoes in the
17 backyard and charges more than the specified
18 price, and there's a criminal penalty, so that
19 person is charged with the crime of selling
20 tomatoes at a price that was over the -- the
21 limit.

22 Do you think that person would be
23 prohibited from challenging the regulation? In
24 the criminal prosecution?

25 MR. HARA: Under Yakus -- Yakus is

1 still good law. Now I -- I do have to point
2 out that Congress ameliorated the harsh effects
3 of Yakus and it concluded --

4 JUSTICE ALITO: But you think that
5 would be consistent with due process? You
6 would say to the -- to the person who was
7 growing these tomatoes in the backyard, well,
8 you know, you should have kept up with the
9 Federal Register.

10 MR. HARA: Well, to the person growing
11 the tomatoes in the backyard, that would
12 present a more difficult case than the meat
13 wholesaler who presumably followed those
14 regulations.

15 JUSTICE ALITO: Okay. So where do you
16 draw the line? You say it's a more difficult
17 case, but you're not willing to say that that
18 would be a violation of due process?

19 MR. HARA: That's correct. And we
20 don't have to go as far as Yakus in this case
21 because, as we pointed out, PDR had other
22 options available to it, other than taking a
23 Hobbs Act petition in 2006.

24 JUSTICE ALITO: Do you know how many
25 pages were issued in the Federal Register in

1 2018?

2 (Laughter.)

3 MR. HARA: I do not.

4 JUSTICE ALITO: I think it's something
5 like 90,000 pages.

6 MR. HARA: Right. But somebody in
7 2013 --

8 JUSTICE ALITO: I once -- I once saw
9 somebody riding home on the Metro at midnight
10 in Washington, D.C., reading the Code of
11 Federal Regulations, and I thought: Only in
12 Washington, D.C., could you see this sight.

13 (Laughter.)

14 JUSTICE ALITO: But you think people
15 out in other parts of the country are --
16 they're waiting for the latest addition --

17 (Laughter.)

18 JUSTICE ALITO: -- addition to the
19 Code of Federal Regulations?

20 MR. HARA: Yeah, I -- I didn't suggest
21 that PDR should be combing through every issue
22 of the Federal Register, but I do think they
23 should have consulted a lawyer --

24 JUSTICE KAVANAUGH: Well, is --

25 MR. HARA: -- before sending their

1 faxes in 2013.

2 JUSTICE KAVANAUGH: -- isn't the
3 question here how to interpret statutory
4 silence? Because we have statutes that have
5 pre-enforcement review and then explicitly
6 allow review in the enforcement proceeding. We
7 have statutes that allow pre-enforcement review
8 and explicitly bar review in the enforcement
9 proceeding, Clean Air Act.

10 And, here, the statute's silent. And
11 the question is what the default rule should
12 be.

13 And to Justice Alito's point, given
14 the due process considerations, to Justice
15 Breyer's point, why the absence of -- of law on
16 this, the absence of law, I think, is because
17 judicial review has always been assumed in
18 enforcement proceedings, unless it's explicitly
19 barred. That's why there's an absence of law,
20 I -- I believe, in this instance.

21 And to your point about, well, they
22 can go through this other convoluted method of
23 motion for reconsideration: If you're going to
24 allow that, why not just allow the review in
25 the enforcement proceeding and -- and have a

1 more efficient process?

2 So that's the considerations that I
3 wanted to raise for how we should fill the
4 statutory silence.

5 MR. HARA: First of all, I don't think
6 the Hobbs Act is silent on it. I think that
7 the grant of exclusive jurisdiction to make
8 those determinations in the circuit court of
9 appeals is --

10 JUSTICE KAVANAUGH: It doesn't say
11 anything close to what the Clean Air Act says
12 for barring review in enforcement proceedings,
13 though.

14 MR. HARA: It doesn't have the second
15 clause, but I don't think it's necessary.
16 Those two accomplish the same thing using
17 different language.

18 As to the -- the last point Your Honor
19 raised, Justice Kavanaugh, one of the reasons
20 why it has to go through the Hobbs Act process,
21 and it's a reason that this Court recognized in
22 the Port of Boston case, is that, under those
23 circumstances, the attorney general is present
24 there to represent the interests of the
25 government. And it has to go through a

1 centralized appeal process.

2 JUSTICE KAVANAUGH: But --

3 MR. HARA: We don't have state courts
4 and district courts across the country deciding
5 telecommunications policy. It goes to one
6 court of appeals where the government is
7 present and knows about it.

8 JUSTICE KAVANAUGH: And that's why --
9 never mind.

10 MR. HARA: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Ms. Kovner.

14 ORAL ARGUMENT OF RACHEL P. KOVNER
15 ON BEHALF OF THE UNITED STATES, AS AMICUS
16 CURIAE, IN SUPPORT OF THE RESPONDENT

17 MS. KOVNER: Mr. Chief Justice, and
18 may it please the Court:

19 There are just four areas I want to
20 cover. The first, since this is really a
21 statutory interpretation case, is the text of
22 the statute. The second is kind of hard cases
23 like Justice Breyer raised, like a party that's
24 not in existence and how they work on our view.
25 The third is this issue of final orders that

1 Justice Breyer and some other folks have also
2 raised. And the fourth is Justice Ginsburg's
3 question about maybe whether -- whether this
4 was an ambiguous regulation and what happens
5 then.

6 So turning to the text of the statute,
7 there are two key kind of words or phrases.
8 The first is "exclusive." And the next is
9 "determine the validity." And I just want to
10 focus on "exclusive," and I think it goes to
11 Justice Kavanaugh's, you know, recent question
12 and some others.

13 We think the plain meaning of
14 "exclusive," as Justice Kagan alluded to, is
15 that's the only route. That's what the word
16 means. And I think, ultimately, Petitioner
17 conceded that one in his colloquy when he said,
18 yeah, it's exclusive to do what? That's really
19 the issue in this case.

20 And, Justice Kavanaugh, I -- I would
21 direct you to APA Section 703 on dealing with
22 that question, which is sort of, I think, the
23 overarching text on what that word means. And
24 "exclusive" is the word that APA Section 03
25 uses for the kind of statute that's going to

1 cut off review in civil and criminal
2 enforcement proceedings.

3 JUSTICE KAVANAUGH: Prior and adequate
4 it also says.

5 MS. KOVNER: Yes. So those are two
6 prerequisites. It also has to be prior and it
7 has to be adequate, but then, so long as it's
8 exclusive, the APA says it's going to cut off
9 from even enforcement proceedings. So we think
10 those are the three prerequisite --

11 JUSTICE GINSBURG: Well, how is it --
12 how is it prior and adequate in this case?
13 When the -- this -- the issue that is involved
14 here didn't even come up in the original rule
15 for notice and comment. It was -- it came up
16 because somebody asked a question, right?

17 MS. KOVNER: So -- that's right,
18 Justice Ginsburg. So somebody asked the agency
19 to clarify the issue or ruling on whether this
20 was going to apply to essentially publications
21 of the sort that are at issue here. So
22 publications that offer -- I'm sorry, faxes
23 that offer free goods or services or faxes that
24 promote medicine.

25 So they -- parties asked and it was

1 published in the Federal Register, you know, we
2 the agency want your comments on what rule we
3 should adopt with respect to that. And then
4 the agency adopted a rule governing that.

5 And maybe -- maybe I should turn now
6 to, you know, the question that you asked
7 about, well, what if the rule is not clear?
8 And we absolutely agree, Justice Ginsburg, that
9 if there's ambiguity in the rule, parties are
10 absolutely free to argue about what the rule
11 means, to argue that, you know, their
12 interpretation of the rule should be adopted,
13 and to reference the statutory text.

14 I think it's really important, though,
15 that this case comes to the Court with the
16 Court having expressly declined to take up the
17 second question presented, which was, was the
18 Fourth Circuit right that this rule is plain?
19 So --

20 JUSTICE KAGAN: Do you have a view on
21 whether the rule is interpretive or
22 legislative?

23 MS. KOVNER: We -- we don't think
24 that's the right question. You know, I think
25 if the -- if the issue is does this rule have

1 force and effect of law, we think the answer is
2 yes.

3 JUSTICE KAGAN: Well, I'm assuming
4 that an interpretive rule does not have force
5 and effect of law. That's what makes it an
6 interpretive rule. Or maybe it goes the other
7 way. But that's -- that's one of the
8 characteristics.

9 MS. KOVNER: Fair enough. So we -- we
10 think in order to be a final order, it has to
11 satisfy -- and I think you can look to Port of
12 Boston for this -- it has to satisfy basically
13 the final agency action standard, and that
14 requires that it be an order from which -- an
15 action by which rights or obligations have been
16 determined or from which legal consequences
17 flow.

18 So we think it would have been open,
19 and they didn't make the arguments in this
20 case, you know, for them to say this is just a
21 kind of informal guidance, it's not subject to
22 the Hobbs Act at all, but instead they
23 petitioned -- you know, they -- they conceded
24 throughout that this is the kind of order
25 that the Hobbs Act --

1 JUSTICE BREYER: Yeah, but this is a
2 major question, and it's bothering me.

3 So -- so, look, the part you read,
4 703, as Justice Kavanaugh just pointed out, it
5 says that judicial review does lie in agency
6 action, which is very broad, is subject to
7 judicial review in civil or criminal
8 proceedings unless prior, adequate, and
9 exclusive, three, and --

10 MS. KOVNER: Yes.

11 JUSTICE BREYER: Prior, adequate, and
12 exclusive.

13 MS. KOVNER: Yes.

14 JUSTICE BREYER: So I would have
15 thought that the answer to Justice Gorsuch's
16 question and my question is clearly there
17 wasn't an adequate opportunity. And you would
18 say here there is.

19 MS. KOVNER: That's right, Your Honor,
20 so I think --

21 JUSTICE BREYER: But does it say that
22 in your brief?

23 MS. KOVNER: Yes. So we agree in our
24 brief that Section 03 and this statute have to
25 be read in pari materia. So we agree if

1 there's no prior, adequate, exclusive
2 opportunity --

3 JUSTICE BREYER: And did the court
4 there go into whether they were around at the
5 time and they did this very thing, they did
6 have -- they were persons aggrieved during that
7 time?

8 MS. KOVNER: Petitioner never argued
9 below that they were not --

10 JUSTICE BREYER: No, this is sort of
11 non-jurisdictional but close. I mean, so we
12 have a case, we don't know whether they had an
13 adequate opportunity to raise it in the -- in
14 the Hobbs Act -- in the -- in the initial
15 rule-making proceeding. We don't know if it's
16 a rule-making legislative or a rule-making
17 interpretive.

18 And there are various other things
19 brought up that we don't know. So what is your
20 advice about whether we should decide a major
21 question in the face of those uncertainties?

22 MS. KOVNER: Your Honor, I take the
23 point that if the Court is of the view that the
24 disposition of this case turns on issues that
25 weren't really developed below or weren't

1 pressed below, that it has the option of
2 declining to decide the case and dismissing it
3 as improvidently granted.

4 JUSTICE GORSUCH: Well, why would --

5 JUSTICE ALITO: But your -- in your
6 view, those things don't matter, do they? You
7 weren't even -- would you now concede that if
8 PDR wasn't even in existence at the time, the
9 -- the situation would be different or if they
10 are -- they were in existence, but they had --
11 they weren't involved in sending out faxes,
12 would it be a different case?

13 MS. KOVNER: So we think it would --
14 it would certainly be a different case, and
15 then the question would be -- and, you know --

16 JUSTICE SOTOMAYOR: What would be --

17 JUSTICE ALITO: Well, a case that
18 would come out differently, not that it would
19 -- of course, it would be a different case.
20 Would it come out differently?

21 MS. KOVNER: So that would present a
22 difficult question under 703 on which we
23 haven't taken a position.

24 And the reason is, of course, this is
25 implicated in a lot of, you know, the Clean --

1 Clean Air Act, Clean Water Act. A lot of these
2 provisions cut off review.

3 And I think, you know, so we would
4 have to address the question of when Section
5 703 says does an adequate opportunity exist, is
6 it talking about an adequate opportunity for
7 you, that particular individual party, or an
8 adequate opportunity for others in your shoes?

9 I think we might well argue in a case
10 that really presented that question where
11 somebody could say I didn't exist, we might
12 well say it was, nonetheless, adequate, but it
13 would be a much harder question than here,
14 where I don't think there's any serious
15 question that Petitioner --

16 JUSTICE KAGAN: And -- and --

17 JUSTICE GORSUCH: But you --

18 JUSTICE KAGAN: -- you're saying that
19 this was never raised by any party, by any
20 court below, that -- the exploration of that
21 question?

22 MS. KOVNER: Petitioner certainly
23 never argued we didn't have an opportunity.
24 They just argued below this isn't determining
25 the validity of --

1 JUSTICE GORSUCH: So, counsel, as I --

2 JUSTICE KAGAN: And similarly, on this
3 question of interpretive, because I -- I would
4 say that if it's an interpretive rule, by which
5 I mean something without -- without the force
6 of law, essentially guidance to the agency,
7 guidance to various parties who are interested
8 in the world, but you can't -- you can't, you
9 know, say that somebody violated it and
10 sanctioned them, something like that doesn't
11 fall within the Hobbs Act at all.

12 Do -- do you -- would you agree with
13 that?

14 MS. KOVNER: I think I would, Justice
15 Kagan. We -- we think it has to be an action
16 about which rights or obligations have been
17 determined in --

18 JUSTICE KAVANAUGH: But -- but --

19 MS. KOVNER: -- the describing of the
20 --

21 JUSTICE KAGAN: And we don't know
22 really, because nobody argued below, whether
23 that's true, is that correct?

24 MS. KOVNER: Nobody contested below
25 that this was an order that's subject to the

1 Hobbs Act.

2 JUSTICE KAVANAUGH: But you think it
3 does have the force and effect of law?

4 MS. KOVNER: We -- we think it does.

5 JUSTICE KAVANAUGH: Yeah.

6 MS. KOVNER: I mean, this is adopted
7 through notice and comment.

8 JUSTICE KAVANAUGH: So, in your brief,
9 you also say that the general rule is that when
10 a defendant's liability depends in part on the
11 propriety of an agency action, that action
12 ordinarily can be challenged in a civil or
13 criminal enforcement suit. That's the general
14 rule.

15 And the question here is whether to
16 read that exclusive to determine the validity
17 to deviate from the general rule.

18 Given the due process concerns and
19 given that Congress can be more explicit, as --
20 as it has in the Clean Air Act, why shouldn't
21 we stick with what you call the general rule
22 and read "exclusive to determine the validity"
23 to mean declaratory judgment actions?

24 MS. KOVNER: Well, I would really take
25 issue with the idea that those other statutes

1 are more explicit. And they use different
2 words. But "exclusive jurisdiction" is, I
3 think, quite clear language.

4 And it's the language that 703 --

5 JUSTICE KAVANAUGH: Well, but even --
6 I'm sorry to interrupt -- but even the statute
7 at issue in Yakus had a second sentence. And
8 the Court did not rely on the first sentence
9 alone but specifically said the first sentence
10 coupled with the second sentence is what --

11 MS. KOVNER: I think -- I take that
12 point about Yakus, but I think if you wanted to
13 look for a -- to a statutory framework that
14 just uses the word "exclusive" and was around
15 before Yakus, you'd look to the Urgent
16 Deficiencies Act framework.

17 JUSTICE GORSUCH: But, counsel,
18 though, you know, you -- you -- you point us to
19 the word "exclusive," but there are more words
20 after that.

21 MS. KOVNER: Yes.

22 JUSTICE GORSUCH: Exclusive to do
23 what?

24 MS. KOVNER: Yes. So in --

25 JUSTICE GORSUCH: And determine the

1 validity of --

2 MS. KOVNER: Yes.

3 JUSTICE GORSUCH: -- is the language
4 that we have here, and we don't have more than
5 that. We don't have the second sentence of
6 Yakus, which you pointed out is different.

7 And why -- why shouldn't we, given the
8 presumption of judicial review, and the
9 statutory canon that we normally look at
10 statutory terms in light of their neighbors,
11 and here all of the neighbors indicate a -- a
12 decision by a court that would actually hold
13 the regulation to be null and void.

14 And that didn't happen here. Your
15 regulation still exists today and -- and the
16 executive agencies can follow it for guidance.
17 Why wouldn't we redetermine the validity of --
18 mean -- mean kind of what it says?

19 MS. KOVNER: Well, let me -- let me
20 talk about the language and then about the
21 court's precedent, and I think that they both
22 are -- are -- sort of contradict that
23 understanding.

24 I think every court of appeals has
25 been right to say that you determine the

1 validity of a regulation when you decline to
2 apply it on the ground that it's substantively
3 invalid. And if you look at the statute here
4 --

5 JUSTICE GORSUCH: You're not saying
6 it's substantively invalid. You're saying the
7 statute is clear.

8 MS. KOVNER: Well --

9 JUSTICE GORSUCH: The statute -- I'm
10 -- I'm being asked to interpret the statute.
11 That is what the case is about. And the
12 statute is clear.

13 I do not need the regulation. It is
14 nice. It is a lovely opinion letter by the
15 federal government, and the -- the agencies may
16 choose to -- to follow it, but it's not
17 determining the validity of in a normal sense,
18 any more than we normally read the Federal
19 Register for -- for breakfast.

20 MS. KOVNER: Well, I think it is, Your
21 Honor, and if you look to the entirety of the
22 TCPA, it says, you know, first, here's the
23 substantive, you know, prohibition.

24 And, second, the agency may make rules
25 to implement that provision.

1 And so, here, a party came before the
2 court and said here is the rule that the agency
3 has made about what unsolicited advertisement
4 means. If the Court declines to follow it, it
5 has to do it for a reason.

6 And the reason here is it's saying the
7 rule is substantively invalid.

8 And even if you don't agree with me, I
9 think, you know, in the first instance about
10 the reading of the statutory language, just
11 direct the Court to the cases that apply that
12 language. And this Court has repeatedly
13 applied the statutory language both here and in
14 predecessor statutes where somebody was coming
15 into court and saying: Please decide the
16 underlying merits of this legal question; and
17 the Court said: What you're asking us to do
18 would amount to determining the validity of --
19 of -- of -- of the underlying rule and so we
20 can't --

21 JUSTICE SOTOMAYOR: Well, but --

22 MS. KOVNER: -- do it with regard to
23 jurisdiction.

24 JUSTICE SOTOMAYOR: -- who could,
25 meaning let's assume -- and we can argue

1 whether this is a clear rule or not, whether
2 it's a legislative rule or an interpretive
3 rule. Let's put all of that aside.

4 The U.S. comes in, starts an
5 enforcement action in the district court. Can
6 -- you're saying to me the district court can't
7 decide the validity, but when they go to the
8 D.C. Circuit, can the D.C. Circuit look at the
9 validity of the rule under the statute?

10 MS. KOVNER: Not if it's an appeal
11 from an enforcement action. I think the way
12 that you would get into the court of appeals
13 would be that you file a Hobbs Act petition to
14 challenge some subsequent agency action or to
15 challenge the denial of your rule.

16 JUSTICE SOTOMAYOR: So that, too,
17 explains Weaver and Functional Music. But what
18 happens here? Because you're saying even the
19 court of appeals here can't decide the validity
20 of the rule, correct?

21 MS. KOVNER: That's right. And the
22 reason we think that is the surrounding
23 statutory provision, so they say here is how
24 the court of appeals exercised its
25 jurisdiction, it's on the filing of a Hobbs Act

1 petition.

2 So we think those -- those --

3 JUSTICE SOTOMAYOR: So you disagree
4 with Respondents on that point? Because
5 Respondents seem to suggest that once it got to
6 the court of appeals, that court had the power
7 to decide whether --

8 MS. KOVNER: I -- I don't -- yes, I
9 don't think that's right. And I don't think
10 any court of appeals has understood it that
11 way.

12 I think you have to comply with the
13 Hobbs Act procedures to get review in the court
14 of appeals.

15 And if I could just turn to one of
16 Justice Breyer's other questions about the
17 nature of, you know, this particular order and
18 it being a rule, I think the relevant case
19 would be CBS Broadcasting, which -- which --
20 which sort of addresses this kind of order,
21 which is an order that sets out a rule.

22 When the FCC acts, it's through
23 orders, even when it's making a rule. And the
24 Court in CBS Broadcasting said that that's
25 reviewable under the Hobbs Act. So I think

1 that's what tells you this is a Hobbs Act case
2 even though it sets out a rule.

3 JUSTICE KAVANAUGH: Can I ask a
4 practical rather than strictly legal question,
5 which is, since you're saying they can get
6 judicial review, they just have to go through
7 the motion for reconsideration or petition for
8 rule-making, and the other side is arguing,
9 well, just give us the judicial review and the
10 enforcement action.

11 Why go through all the hurdles of the
12 former if it's just going to be judicial review
13 in the end one way or the other?

14 MS. KOVNER: Sure. And -- and --

15 JUSTICE KAVANAUGH: Or is there --

16 MS. KOVNER: Yes.

17 JUSTICE KAVANAUGH: -- something
18 different about the judicial review in the
19 former, which I think may be lurking?

20 MS. KOVNER: Right. Yes. So I think
21 two things. I mean, first, let me address why
22 we think it's better and, second, let me
23 address the nature of their -- their review.

24 So we think judicial review that's
25 accomplished through the Hobbs Act is far

1 preferable and it's because the United States
2 gets to be a party. If it's from a
3 rule-making, you're going to have the
4 opportunity for other affected parties to
5 participate, to come in, to explain why they
6 think the rule should or shouldn't be changed.

7 You're going to have a single
8 nationwide proceeding that's going to set the
9 rule for the entire nation. And I would think
10 these kinds of rules that are subject to the
11 Hobbs Act are areas where Congress thought that
12 was really important.

13 I do want to address the question of
14 what the scope of the review is. So I think
15 what typically happens in these cases, and
16 Respondent cites a number of examples, is
17 somebody goes before the agency and asks for a
18 declaratory judgment about, you know, what the
19 scope of the rule is or asks to change the
20 rule. The agency says something about the
21 merits and then that gets appealed to the court
22 of appeals.

23 Then, obviously, you do get full
24 review of the merits of the underlying rule. I
25 do think it's a different case if the agency

1 were to say, you know, we decline to reconsider
2 at all. And then I do --

3 JUSTICE KAVANAUGH: And -- and --

4 MS. KOVNER: -- think you would agree
5 --

6 JUSTICE KAVANAUGH: -- and that
7 happens quite a bit, as you well know.

8 MS. KOVNER: That --

9 JUSTICE KAVANAUGH: And in that case,
10 you'd be -- you'd be out.

11 MS. KOVNER: In that case, all you get
12 --

13 JUSTICE KAVANAUGH: In that case, you
14 could be subject to millions in liability
15 without ever having an opportunity to say that
16 the rule is illegal. Even if the rule everyone
17 thinks is illegal, you still get no
18 opportunity.

19 MS. KOVNER: And in that case, I think
20 you would have an argument under Section 703
21 that the Petitioner here really doesn't have,
22 that I didn't have a meaningful opportunity to
23 get review of the --

24 JUSTICE KAVANAUGH: So let me stop you
25 there. So, if you go for the petition for

1 reconsideration and the agency says actually
2 just as an exercise of discretion we're not
3 going to do that, that would mean that it
4 wasn't adequate?

5 MS. KOVNER: No, I think -- so I think
6 Petitioner, a person in Petitioner's shoe -- if
7 I may just briefly answer -- a person in
8 Petitioner's shoes should have brought their
9 challenge in a timely fashion.

10 If you had a party that really
11 couldn't have done that for some reason, then I
12 think you have a hard 703 question.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Two minutes, Mr. Phillips.

17 REBUTTAL ARGUMENT OF CARTER G.

18 PHILLIPS ON BEHALF OF THE PETITIONERS

19 MR. PHILLIPS: Thank you, Mr. Chief
20 Justice.

21 I -- I think it's important to focus
22 in the first instance on a question Justice
23 Kagan and Justice Kavanaugh, you focused on,
24 which is what is the standard of review if you
25 go through the petition for reconsideration

1 process?

2 And this Court held in Board of
3 Locomotive Engineers that -- that, under those
4 circumstances, the courts reviewed the distinct
5 agency action resulting from the new position.

6 And it's only in very odd
7 circumstances where the Court actually has --
8 has any kind of an opportunity to take up the
9 underlying question of the validity or -- or of
10 the relationship between the underlying statute
11 and the old rule.

12 And, therefore, it's not a prior and
13 adequate remedy that gives you the basis for --

14 JUSTICE SOTOMAYOR: It has done it in
15 Functional Music and in Weaver. It's basically
16 taken a contrary position to yours. In both of
17 those cases, they looked to the validity of the
18 rule underlying the --

19 MR. PHILLIPS: No, no, no --

20 JUSTICE SOTOMAYOR: -- enforcement
21 actions.

22 MR. PHILLIPS: Well --

23 JUSTICE SOTOMAYOR: Well, one was an
24 enforcement action, the other wasn't.

25 MR. PHILLIPS: Right. Well, I mean,

1 Functional Music is -- is clearly in our favor
2 in terms of its approach to these kinds of
3 issues because Functional Music even said we're
4 not even sure whether or not this could have
5 been raised in the first instance by these
6 parties. But we're not going to worry about
7 it. We're going to take it up as an
8 enforcement matter and we're going to evaluate
9 it under those circumstances.

10 What -- what it goes to, Justice
11 Breyer, and it's the reason why, even though
12 there may be larger and broader questions that
13 are embedded in this case, but, at the end of
14 the day, what the Fourth Circuit said is that
15 the district court was not permitted, had no
16 need to, and could not harmonize the
17 interpretation put forth by the FCC with the
18 underlying liability provision of the Telephone
19 Communication Protection Act.

20 That issue warrants this Court's
21 review. Is there a circumstance where that
22 happens?

23 Where we know, as Justice Kavanaugh
24 said several times, when there is absolute
25 silence, the presumption always should be that

1 there is post-enforcement review of the
2 validity of what the FCC says.

3 For that reason, the judgment of the
4 court of appeals should be reversed and
5 judgment of the district court should be
6 affirmed.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel. The case is submitted.

9 (Whereupon, at 11:08 a.m., the case
10 was submitted.)

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Official - Subject to Final Review

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