No. 23-1226

In the Supreme Court of the United States

MCLAUGHLIN CHIROPRACTIC ASSOCIATES, INC., individually and as representative of a class of similarly situated persons,

Petitioner,

v.

MCKESSON CORPORATION and MCKESSON TECHNOLOGIES, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Hobbs Act required the district court in this case to accept the FCC's legal interpretation of the Telephone Consumer Protection Act.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner McLaughlin Chiropractic Associates, Inc. was a plaintiff in the district court and an appellee/cross-appellant in the court of appeals.

Respondents McKesson Corporation and McKesson Technologies, Inc. were the defendants in the district court and the appellants/cross-appellees in the court of appeals.

True Health Chiropractic, Inc. was a plaintiff in the district court and an appellee in the court of appeals.

RULE 29.6 STATEMENT

McLaughlin Chiropractic Associates, Inc. does not have a parent corporation. No publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

The district court held that the Telephone Consumer Protection Act's prohibition on unsolicited fax advertisements prohibits faxes sent only to "traditional analog fax machines," not to computerized fax services. But the court didn't reach that conclusion based on anything in the text of the TCPA, which it never considered. Instead, the court concluded that it was "bound by" an order from the Federal Communications Commission—issued six years into the litigation and after a class had been certified—that reversed the agency's longstanding contrary view of the statute. The court applied circuit precedent construing the Hobbs Act, 28 U.S.C. § 2342, to require federal courts to enforce the FCC's reading of a federal statute without considering whether that interpretation is, in fact, correct. The Ninth Circuit then adhered to that rule and affirmed without even citing the key statutory provision.

This Court confronted a similar scenario in *PDR Network, LLC v. Carlton & Harris Chiropractic*, 588 U.S. 1 (2019). There, the Fourth Circuit held that it was bound by the FCC's interpretation of the TCPA, just like the Ninth Circuit did below. Although a majority of this Court didn't reach the question, four Justices concluded that the Hobbs Act "does not bar" a party "from arguing that the agency's interpretation of the statute is wrong." *Id.* at 12 (Kavanaugh, J., concurring). Justice Kavanaugh explained that, under "elementary principles of administrative law," the "default rule is to allow review by the district court of whether the agency interpretation is correct." *Id.* at 15. Some statutes—like the Clean Water Act and Clean Air Act—override that strong presumption by "expressly preclud[ing] judicial review in subsequent enforcement actions." *Id.* at 14. But the Hobbs Act is

"silent" on the subject, so the default rule controls. *See id.* at 15.

Like *PDR Network*, this case involves private TCPA claims for money damages and the appeal turns on whether an FCC order bound the court. Yet the Ninth Circuit rejected the concurring Justices' reading of the Hobbs Act without so much as citing *PDR Network* or engaging with their analysis. The court instead followed circuit precedent holding that district courts—even if they "doubt … the FCC's interpretation"—"are required by the Hobbs Act to apply" it. *U.S. W. Commc'ns, Inc. v. Hamilton*, 224 F.3d 1049, 1055 (9th Cir. 2000).

Nothing in the Hobbs Act's text supports the Ninth Circuit's reading. The court relied on the provision of the Act that grants courts of appeals "exclusive jurisdiction to … determine the validity" of certain FCC orders. 28 U.S.C. § 2342. The ordinary meaning of the word "valid" includes "having legal strength or force" (as in the phrase "valid title" or "valid regulation"). To determine an order's validity, then, means to determine whether the order has legal force. As Justice Kavanaugh wrote in *PDR Network*, a court makes that determination "only by entering a declaratory judgment that the order is valid or invalid"—not by determining a defendant's liability in a civil action. 588 U.S. at 21 (Kavanaugh, J., concurring).

Additional textual evidence throughout the Hobbs Act backs this up. Most tellingly, the phrase "determine the validity of" is preceded by the terms "enjoin," "set aside," and "suspend," each of which describes a specific form of equitable relief. Based on both common sense and the *noscitur a sociis* canon, the phrase "determine the validity of" should thus also be read to denote equitable relief: in this case, a declaratory judgment.

Nor is there any other basis to conclude that Congress designed the Hobbs Act to strip district courts of their authority to interpret a federal statute. The Act is unremarkable: one of many agency-review statutes that routes cases seeking equitable relief against agencies to the courts of appeals. To that end, it grants those courts "exclusive jurisdiction" to "enjoin" and "determine the validity" of covered orders by the FCC and other agencies. 28 U.S.C. § 2342. No one doubts that district courts may not hear pre-enforcement petitions seeking those specific forms of relief. But the Act says nothing about *other* kinds of actions, like a private action for money damages, that are properly filed in federal district court under ordinary federal-question jurisdiction.

Finally, even if the Hobbs Act foreclosed review of the FCC's *legislative* rules (which at least have the force of law), the Ninth Circuit would still be wrong to apply that reading to the FCC's non-binding *interpretive* guidance. Both parties agreed below that the order at issue here is interpretive because, rather than creating new rules or standards of conduct, it serves primarily to advise the public about the agency's construction of the TCPA. And because interpretive rules lack the force of law, they can *never* bind parties and courts—whether valid or not.

If adopted by this Court, the Ninth Circuit's approach would turn the FCC's legal opinion "into the equivalent of a statute," elevating the agency's view of the law over the view of Article III judges and the text of the statute itself. *PDR Network*, 588 U.S. at 27 (Kavanaugh, J., concurring). Because the Hobbs Act does not require district courts to give the FCC such "absolute deference" in garden-variety civil cases like this one, this Court should reverse. *Id.*

OPINIONS BELOW

The Ninth Circuit's unreported decision is available at 2023 WL 7015279 and reproduced at Pet. App. 1a. The district court's decision addressing the impact of the FCC's order is unreported, available at 2020 WL 7664484, and reproduced at Pet. App. 24a. Its decision granting summary judgment to the defendant is unreported, available at 2020 WL 8515133, and reproduced at Pet. App. 21a. Its decision decertifying the class on the basis of the FCC's order is unreported, available at 2021 WL 4818945, and reproduced at Pet. App. 12a.

JURISDICTION

The court of appeals entered judgment on October 25, 2023 and denied rehearing on December 20, 2023. A petition was timely filed on May 17, 2024, and the Court granted certiorari on October 4, 2024.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Hobbs Act, 28 U.S.C. § 2342(1), provides in relevant part:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—
>
> **(1)** all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47.

The Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, 105 Stat. 2394, as amended by the Junk Fax Prevention Act of 2005, Pub. L. No. 109-

21, 119 Stat. 359, is codified at 47 U.S.C. § 227(a)(3) and provides in relevant part:

> The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

STATEMENT

I. Statutory background

A. The Hobbs Act

1. The Hobbs Act establishes what the Administrative Procedure Act calls a "special statutory review proceeding" for direct judicial review of certain orders of the FCC and about half a dozen other agencies. 5 U.S.C. § 703. There's "nothing unique" about a "jurisdiction-channeling" provision of this sort. *Blitz v. Napolitano*, 700 F.3d 733, 742 (4th Cir. 2012). The Hobbs Act is one among "a startling array of specific statutory provisions" that "establish court of appeals jurisdiction to review actions of agencies." 16 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3941 (3d ed. 2024).[1]

Section 2342 of the Hobbs Act specifies the agency actions that are subject to direct review and the relief that

[1] Unless otherwise specified, all internal quotation marks, emphases, alterations, and citations are omitted from quotations throughout. Citations to "Pet. App." are to the appendix submitted with the petition for certiorari, citations to "ER" are to the excerpts of record filed in the Ninth Circuit, and citations to "SER" are to the supplemental excerpts of record filed in the Ninth Circuit.

may be granted to a prevailing party. It covers a range of actions by the covered agencies—which include not only the FCC, but also the Department of Agriculture, the Department of Transportation, and the Atomic Energy Commission, among others. *See* 28 U.S.C. § 2342(1)–(7). But the Act does not cover *every* action taken by the agencies in its purview. For instance, it provides that the court of appeals has exclusive jurisdiction to directly review only those "rules, regulations, or final orders" of the Secretary of Transportation that are issued pursuant to certain specific statutory provisions. *See id.* § 2342(3)(A); *see also id.* § 2342(6) (applying to "all final orders under section 812 of the Fair Housing Act").

As to the FCC, section 2342 provides that "[t]he court of appeals … has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of … all final orders of the [FCC] made reviewable by section 402(a) of title 47." *Id.* § 2342, 2342(1). Consistent with the approach taken for several other agencies, *see, e.g. id.* § 2342(4)–(5), this provision thus does not subject every FCC order to the Hobbs Act's exclusive-review procedures. Instead, it applies only to those FCC orders that are "made reviewable" by 47 U.S.C. § 402(a). And section 402(a), in turn, covers (with some exceptions not relevant here) only those orders that may be made the subject of a "proceeding to enjoin, set aside, annul, or suspend any order of the Commission." *Id.*

A separate section of the Hobbs Act authorizes the court of appeals in such a proceeding to enter "a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency." 28 U.S.C. § 2349(a). The Act sets out procedures for filing a "petition to review" to obtain these judgments,

providing that such actions "shall be against the United States," *id.* § 2344, "within 60 days" of entry of the final order, *id.*, "in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit," *id.* § 2343. Multiple petitions challenging the same law are consolidated in a single court of appeals. *Id.* § 2112(a)(3).

As commentators have observed, the legislative history at the time Congress enacted the Hobbs Act "suggests that the Act's drafters did not intend the jurisdictional reforms to apply to private enforcement actions because such proceedings lacked a record made by the agency." Jason N. Sigalos, *The Other Hobbs Act: An Old Leviathan in the Modern Administrative State*, 54 Ga. L. Rev. 1095, 1122 (2020). For instance, a "detailed and specific memorandum of coverage" contained in the House Report recognized that the Hobbs Act would not "relate to actions between private parties to enforce various liabilities created by the Interstate Commerce Act." *Id.* (quoting H.R. Rep. No. 80-1619, at 4 (1948)); *see also id.* at 1122 n.179 (noting that "the logic behind H.R. 1468's limited coverage equally applies to private rights of actions created by law such as the TCPA").

2. Six years ago, in *PDR Network*, this Court granted certiorari to decide the same question presented here: whether the Hobbs Act requires a district court in a private lawsuit "to accept the FCC's legal interpretation of the Telephone Consumer Protection Act." 588 U.S. at 6. A majority of the Court, however, "found it difficult to answer this question" because of "two preliminary issues" that had been raised by the petitioner but not addressed by the court of appeals: (1) whether the FCC order at issue was an "interpretive rule" such that it might not be

subject to the Hobbs Act, and (2) whether the Act failed to afford the petitioner a "prior" and "adequate" opportunity for judicial review of the order—which would make the order subject to judicial review "in civil … proceedings for judicial enforcement" under section 703 of the APA. *Id.* at 4, 7–8; *see* 5 U.S.C. § 703. Without deciding the question presented, the Court remanded for the lower court to address these issues.

Four members of the Court, in a concurrence authored by Justice Kavanaugh, would have reached "the question that we granted certiorari to decide." *Id.* at 12 (Kavanaugh, J., concurring). Justice Kavanaugh explained that the Hobbs Act "does not bar" a party in a private enforcement action "from arguing that the agency's interpretation of the statute is wrong." *Id.* That conclusion flows from a "straightforward" analysis of the statute's plain text. *Id.* Some statutes—like the Clean Water Act and Clean Air Act—"expressly preclude judicial review in subsequent enforcement actions" and therefore bar parties in those actions from arguing that the agency misinterpreted the statute. *Id.* at 14.

But unlike those statutes, the Hobbs Act is "silent about review in subsequent enforcement actions." *Id.* at 15. So the "general rule of administrative law" kicks in and allows a party to argue, and a district court to consider, that the FCC's interpretation of a statute is wrong. *Id.* at 12. In other words, the court is "not bound by the agency's interpretation" of the statute—a reading of the Hobbs Act that is reinforced by the basic "unfairness" and "serious constitutional issue[s]" raised by a rule barring a party and a district court in an "as-applied enforcement action" from addressing "the reach and authority of agency rules." *Id.* at 15, 19. Justice Kavanaugh noted that this

analysis of the Hobbs Act's proper meaning "remains available to other courts in the future." *Id.* at 13.

Justice Thomas, joined by Justice Gorsuch, also concurred separately to note not only that "[i]nterpreting a statute does not 'determine the validity' of an agency order interpreting or implementing a statute," but also that a "contrary view would arguably render the Hobbs Act unconstitutional." *Id.* at 9 (Thomas, J., concurring). As Justice Thomas explained, to the extent the Hobbs Act "requires courts to 'give the "force of law" to agency pronouncements on matters of private conduct' without regard to the text of the governing statute, the Act would be unconstitutional" because "it would 'permit a body other than Congress' to exercise the legislative power, in violation of Article I." *Id.* at 10. As a result, Justice Thomas recognized, this Court's "constitutional-avoidance" doctrine "would militate against" such an interpretation of the Hobbs Act. *Id.*

B. The Telephone Consumer Protection Act

Congress passed the TCPA in response to the public's "outrage[] over the proliferation of intrusive, nuisance calls." 47 U.S.C. § 227 note. As amended by the Junk Fax Prevention Act, Pub. L. No. 109-21, 119 Stat. 359, the law targets "a number of problems associated with junk faxes." *Imhoff Inv., LLC v. Alfoccino, Inc.*, 792 F.3d 627, 633 (6th Cir. 2015). Junk faxes often force the recipient, frequently small businesses, to incur significant costs in the form of "paper and ink" and "tied up" fax lines, *id.*, while also "interrupt[ing] the recipient's privacy" and placing unnecessary stress on the "recipient's fax machines." ER415.

For these reasons, Congress made it unlawful "to use any telephone facsimile machine, computer, or other

device to send, to a telephone facsimile machine, an unsolicited advertisement.” 47 U.S.C. § 227(b)(1)(C). It broadly defined the term “telephone facsimile machine” to include any “equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.” *Id.* § 227(a)(3).

In the years since the TCPA was amended to prohibit using fax machines to send unsolicited advertisements, marketers have shifted much of their advertising online. But as both the FCC and courts have long explained, the TCPA’s bar on unsolicited faxes extends to faxes sent from and to “computerized” fax machines, which qualify as a “telephone facsimile machine” under the definition set forth in the statute. *See In re Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 68 FR 44144-01, ¶ 143 (FCC July 25, 2003).

That is because the TCPA “broadly applies to any equipment that has the *capacity* to send or receive text or images,” which “ensure[s] that the prohibition on unsolicited faxing” cannot be easily circumvented as technology advances. *Id.* ¶ 144 (emphasis added). Unsolicited faxes sent to a recipient’s “inbox,” the FCC has explained, still risk “shift[ing] the advertising cost of paper and toner to the recipient” and “may also tie up lines and printers so that the recipients’ requested faxes are not timely received.” *Id.* ¶ 145. “Congress could not have intended to allow easy circumvention of its prohibition when faxes are … transmitted to personal computers and fax servers, rather than traditional stand-alone facsimile machines.” *Id.* ¶ 144.

Courts have thus been "unpersuaded" by attempts to "limit a 'telephone facsimile machine' only to traditional fax machines." *Lyngaas v. Curaden AG*, 992 F.3d 412, 425 (6th Cir. 2021). As the Sixth Circuit explained, "such a narrow definition does not comport with the plain language of the TCPA." *Id.* at 425–26. The statute's definition of "telephone facsimile machine," the court held, "makes clear" that it "encompasses more than traditional fax machines that automatically print a fax received over a telephone line." *Id.* at 426. Rather, it includes any "equipment that has the *capacity* to transcribe text or images from or onto paper—as long as the electronic signal is transmitted or received over a telephone line." *Id.* Given "the high probability that … a computer is connected to a printer and to a modem capable of receiving faxes," it "is fully capable of receiving electronic signals over a telephone line and printing out a fax." *Id.* at 426–27. "The statutory text alone, therefore, rebuts the [] argument." *Id*. at 426; *see also Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012) (similar for "automatic telephone dialing system").

II. Factual and procedural background

A. McKesson Corporation is a publicly traded company with hundreds of subsidiaries and affiliated companies and businesses that range from the sale of pharmaceuticals to behavioral coaching and information technology. ER4. One of its business units, Physician Practice Solutions, regularly engages in promotional fax campaigns designed to "market its products and services" to physician practices throughout the country. ER8. To carry out this marketing, McKesson "employed a fax broadcasting company" to transmit faxes. ER6.

McLaughlin Chiropractic Associates is one of the physician practices targeted by McKesson. ER4. In 2009 and 2010, it, along with many other small medical practices, received multiple unsolicited advertisements via fax from McKesson. ER417. These advertisements—some of which were received on stand-alone fax machines and some of which were received through online fax services—marketed McKesson's software products. ER5.

McKesson was aware that engaging in this type of advertising campaign risked violating the TCPA. A year earlier, in 2008, the FCC warned McKesson that it had "sent one or more unsolicited advertisements" via fax "in violation of the TCPA." ER4–5. The FCC issued McKesson a citation and notified the company that, in the event of any future complaint, it would bear the burden of showing that it complied with the TCPA. ER5.

B. Having received the unlawful faxes, McLaughlin Chiropractic and another practice (True Health Chiropractic, Inc.) brought a putative class action against McKesson for sending unsolicited fax advertisements in violation of the TCPA, 47 U.S.C. § 227(b)(1)(C). ER450.

After several years of litigation and an appeal to the Ninth Circuit from the denial of class certification, *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923 (9th Cir. 2018), the district court eventually certified a single class of all persons or entities whose fax numbers had been previously identified and "who received faxes from McKesson" during the class period without being notified of their right to opt out of future faxes. ER71. It appointed McLaughlin Chiropractic—the petitioner here—to represent the class. *Id.*

C. Six years into litigation, however, the FCC abruptly changed its position. Shortly after the class was certified,

the FCC issued an order (known as the *Amerifactors* order) interpreting the text of the TCPA provision at issue here. *See* Pet. App. 46a. In this order, the FCC construed the TCPA to exclude an "online fax service" from the definition of "telephone facsimile machine." Pet. App. 48a. In the FCC's view, an "online fax service that effectively receives faxes sent as email over the Internet" is "not itself equipment which has the capacity to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper" and so "falls outside the scope of the statutory prohibition." Pet. App. 48a. The FCC further reasoned that, because an online fax service "cannot itself print a fax," it did not implicate the specific harms Congress addressed in the TCPA, namely "advertiser cost-shifting." Pet. App. 52a–53a.

This order changed the trajectory of the case. Although the district court "agree[d] with the reasoning of Justice Kavanaugh's concurrence in *PDR*," it concluded that "Ninth Circuit precedent" required it to "treat *Amerifactors* as authoritative." Pet. App. 36a. In reaching that conclusion, the court held that it "does not matter" under the Hobbs Act whether the *Amerifactors* order was a non-binding "interpretive rule." Pet. App. 37a–38a. Under controlling Ninth Circuit case law, so long as the relevant FCC order is "final," the Hobbs Act applies regardless of whether the order is characterized as "legislative" or "interpretive." Pet. App. 37a–38a; *see Hamilton*, 224 F.3d at 1055 (holding that the Hobbs Act "contains no exception for 'interpretive' rules, and case law does not create one"). As a result, according to the district court, the *Amerifactors* order was "a final, binding order for purposes of the Hobbs Act." *Id.*

The district court also held that it did not matter that an application for review of the *Amerifactors* order was pending before the FCC. According to both FCC regulations and case law, reconsideration petitions do "not affect the order's finality as it applies to [a defendant's] potential liability under the TCPA." *Id.* (citing 47 C.F.R. § 1.102 (b)(1); *Comm. To Save WEAM v. FCC*, 808 F.2d 113, 119 (D.C. Cir. 1986)).

Because the FCC's order was "determinative of the viability of this case," the court held that it was required to decertify the class. Pet. App. 20a. It then *sua sponte* entered summary judgment for McKesson on the claims involving the receipt of faxes via an "online fax service." ER20–21.

D. The Ninth Circuit affirmed. Without citing or discussing either the majority's opinion or Justice Kavanaugh's concurrence in *PDR Network*, the court held that the district court "correctly found that that it was bound by the [FCC's] *Amerifactors* declaratory ruling, which determined that the TCPA does not apply to faxes received through an online fax service." Pet. App. 7a. That was so, in the Ninth Circuit's view, because the Hobbs Act's exclusive-jurisdiction provision—which "encompasses 'any proceeding to enjoin, set aside, annul, or suspend any order'" of the FCC—forecloses a district court in private litigation alleging a violation of the TCPA from even *considering* whether the agency's interpretation of the statute is wrong. Pet. App. 7a. The Ninth Circuit also confirmed that the FCC's *Amerifactors* decision was both an "order" of the FCC and "final." Pet. App. 7a–9a. And although the FCC issued its *Amerifactors* order while this case was pending, the court

concluded that it "applies retroactively to the faxes at issue here." Pet. App. 9a.

Because the *Amerifactors* order itself "makes clear that the TCPA does not apply to such faxes," the Ninth Circuit concluded, the "district court was bound" to decertify the class and "grant summary judgment to McKesson on any class claims for faxes received through an online fax service." *Id.* The court then denied en banc review without comment. Pet. App. 2a.[2]

SUMMARY OF ARGUMENT

I.A. The Hobbs Act grants the federal courts of appeals "exclusive jurisdiction to … determine the validity of" certain FCC orders. 28 U.S.C. § 2342. The Ninth Circuit has broadly construed the phrase "determine the validity of" to bar district courts in private litigation from even considering an interpretation of the TCPA found in an FCC order, let alone disagreeing with it—even if the court is convinced that the agency's interpretation of the statute is wrong. But that expansive reading of the Hobbs Act is "incorrect," as four Justices recognized in *PDR Network*, 588 U.S. at 27 (Kavanaugh, J., concurring). A district court's agreement or disagreement with an agency interpretation of a statute in a particular case doesn't bear on the order's "validity" because it neither declares the order invalid nor enjoins its enforcement.

The term "valid," especially when used in a legal context, typically refers to something that is legally "effective" or "binding," as in the common phrases "valid

[2] The Ninth Circuit also affirmed the district court's orders denying treble damages on the plaintiffs' individual claims and granting summary judgment to the plaintiffs on respondent's consent defense. Those rulings are not at issue here.

title" and "valid regulation." To "determine the validity of" an order is thus to decide whether it is legally effective. As Justice Kavanaugh pointed out in *PDR Network*, a court can make that assessment "only by entering a declaratory judgment that the order is valid or invalid." *Id.* at 21.

Context confirms this straightforward interpretation. The phrase "determine the validity of" is preceded by the terms "enjoin," "set aside," and "suspend," each of which describes a specific form of equitable relief. Based on both common sense and the *noscitur a sociis* canon, the phrase "determine the validity of" should therefore also be read to denote a form equitable relief: a declaratory judgment. Otherwise, the three preceding terms would be rendered meaningless. Additional textual clues throughout the Hobbs Act further confirm that "determine the validity of" refers only to an equitable *remedy* like a declaratory judgment. That reading is also the most consistent with statute's purpose of consolidating facial, pre-enforcement challenges to agency orders in the courts of appeals.

The Ninth Circuit's reading, by contrast, would force district courts to grant what is tantamount to "absolute deference" to agency interpretations of a federal statute, "no matter how wrong." *PDR Network*, 588 U.S. at 26–27. This would deny plaintiffs with valid claims of statutory violations and defendants facing enforcement actions the ability to argue against flawed agency decisions. It would also bind future parties, including those unaware of the rule's existence and even people not yet born (or corporations not yet formed) at the time of the agency decision. Requiring all these potentially affected parties to preemptively file challenges within 60 days would be impractical, inefficient, and contrary to Congress's intent.

I.B. Even if the Ninth Circuit's expansive reading of "determine the validity" were a plausible one, the statute would be at most ambiguous. But that is not enough to deprive parties of judicial review in private litigation alleging violation of a statute. The APA codifies a strong presumption in favor of judicial review unless Congress expressly states otherwise. When Congress intends to preclude judicial review, it thus includes language saying so clearly—language that the Hobbs Act lacks.

Nobody disputes that the Hobbs Act's grant of "exclusive jurisdiction" requires facial, pre-enforcement challenges to be brought in the courts of appeals. But the Act says nothing about litigation between private parties alleging a statutory violation—litigation that is not brought against the United States and does not seek injunctive or declaratory relief. That statutory silence leaves in place the default rule that district courts are free to interpret statutes in private disputes brought under their ordinary jurisdiction. And this result aligns with other regulatory contexts (such as cases involving the SEC or OSHA), where courts routinely review the correctness of agency interpretations of a statute.

Congress knows how to preclude judicial review when it wants to and has done so in statutes like the Clean Air Act, where regulated parties typically have the knowledge and resources to challenge agency action. But, unlike the Hobbs Act, those statutes *expressly* preclude judicial review in litigation between private litigants. For example, the Emergency Price Control Act—after granting "exclusive jurisdiction" to the courts of appeals to consider wartime price regulations—also included a second sentence that expressly deprived district courts of jurisdiction to even "*consider*" those regulations.

Congress's decision, just six years later, not to include such language in the Hobbs Act is strong evidence that it intended a different meaning.

This conclusion is also required by constitutional-avoidance principles. Barring parties from challenging agency interpretations in private litigation would raise serious due process and separation-of-powers concerns by undermining the duty and authority of Article III courts' duty to independently interpret and apply the law. Because the Ninth Circuit's reading would raise such substantial constitutional questions and is not compelled by the statutory text, that is reason enough to avoid it.

II. The Hobbs Act also did not require the district court below to accept the FCC's interpretation of the TCPA because the FCC's order in this case is interpretive guidance, not a legislative rule. Unlike legislative rules, which have the force of law and bind courts and private parties, interpretive rules merely clarify an agency's understanding of a statute and bind nobody. The Ninth Circuit's treatment of legislative and interpretive rules as equally binding under the Hobbs Act is inconsistent with basic administrative-law principles and cannot be correct.

The *Amerifactors* order is a prototypical interpretive rule: It clarifies the TCPA's definition of "telephone facsimile service" without imposing new obligations or recognizing new rights. The district court was thus free to evaluate and reject it. Numerous courts have recognized that interpretive rules like this one fall outside the Hobbs Act's scope, and that district courts retain their authority to interpret the statutes independently. To hold otherwise would transform informal agency guidance into "the equivalent of a statute." *PDR Network*, 588 U.S. at 27. It would be anomalous to hold that informal guidance, whose

only authority is the "power to persuade," has the power to bind district courts. Nothing in the Hobbs Act suggests that Congress could have intended that bizarre result.

ARGUMENT

I. The Hobbs Act does not prohibit district courts from interpreting the TCPA in litigation between private parties.

A. The Act's language, structure, and purpose refute the Ninth Circuit's position.

1. The Hobbs Act grants the federal courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain FCC "final orders." 28 U.S.C. § 2342. This case turns on the meaning of the phrase "determine the validity of."

Although the Ninth Circuit has not precisely defined this phrase, the court construes it broadly to bar district courts in litigation between private parties from "disagree[ing]" with (or even just "rais[ing] the same issues" as) a covered FCC order. *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 399–400 (9th Cir. 1996). And that is true even if the court "doubt[s] the soundness of the FCC's [legal] interpretation." *Hamilton*, 224 F.3d at 1055.

On this reading, the courts of appeals' exclusive jurisdiction "to determine the validity of" an agency order "divest[s] the district court of jurisdiction" not only to collaterally attack an FCC decision, but even to "*consider* the issues" that were the subject of that order. *Wilson*, 87 F.3d at 399–400 (emphasis added). Indeed, even if the district court "*agreed*" with the order, that would still constitute "a determination of the [order's] validity" that, in the Ninth Circuit's eyes, "would violate § 2342." *Id.* at 400 (emphasis added); *see also Air Transp. Ass'n v. Pub.*

Util. Comm'n, 833 F.2d 200 (9th Cir. 1987) (holding that an FCC order rejecting a preemption argument deprived the district court of jurisdiction to consider that argument).[3]

The Ninth Circuit's reading of "determine the validity of" attempts to "pack a lot of congressional punch into a few oblique words in the Hobbs Act." *PDR Network*, 588 U.S. at 26 (Kavanaugh, J., concurring). But, as Justice Kavanaugh explained, that reading of the statute "is incorrect." *Id.* at 20–21. A district court doesn't "determine the validity of" an agency order just because it "agrees or disagrees with the agency interpretation" of a statute. *Id.* at 21; *see also id.* at 9 (Thomas, J., concurring) ("Interpreting a statute does not 'determine the validity' of an agency order … ."). Such a decision, which merely applies the district court's interpretation of the statute to the case before it, does not affect the "validity" of the order at all: It "does not invalidate the order" and does not prevent the agency from seeking to "enforce the order against others." *Id.* at 21. That's because, even if the court "disagrees with the agency interpretation," it "does not issue a declaratory judgment or an injunction" against the agency's order, but "simply determines" liability in a particular case "under the correct interpretation of the statute." *Id.*

[3] Two other circuits have adopted similar rules. *See, e.g.*, *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459, 467 (4th Cir. 2018), *vacated and remanded,* 588 U.S. 1 (2019) (holding that courts "need not 'harmonize' the FCC's rule with the underlying statute"); *Mais v. Gulf Coast Collection Bureau*, 768 F.3d 1110, 1119–20 (11th Cir. 2014) (holding that a district court "exceed[s] its jurisdiction" if it decides that an FCC order is "inconsistent with the TCPA" even "in a dispute between private parties").

Because the order remains in effect, other courts may reach a different interpretation of the statute, but any resulting disagreements can be resolved by the courts of appeals and on certiorari in this Court. *See id.* at 26.

2. The Ninth Circuit's reading of the Hobbs Act fails to consider the plain meaning of "determine the validity of." The ordinary meaning of the word "valid" includes "[h]aving legal strength or force." *Webster's New Collegiate Dictionary* (1949); *see also American Heritage Dictionary of the English Language* (4th ed. 2006) ("having legal force; effective or binding"). In legal writing, that's the *primary* definition of the word. *See Black's Law Dictionary* (12th ed. 2024) ("valid" means "[l]egally sufficient; binding"); *see also Vietnam Veterans of Am. v. Sec'y of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988) (explaining that, because "valid" means "binding," it is a "mere tautology" to say that "only [] 'valid' legislative rules bind the courts"). For example, most people understand that the term "valid title" refers to a title that is legally operative. *See id.* Likewise, courts commonly use phrases like "valid rule" or "valid regulation" to denote legally operative agency actions. *See, e.g.*, *United States v. Haggar Apparel Co.*, 526 U.S. 380, 391 (1999) ("Valid regulations establish legal norms" and are "controlling law."). The other key word in the phrase—"determine"—means "[t]o come to a decision concerning." *Webster's New Collegiate Dictionary* (1949); *see American Heritage Dictionary of the English Language* (4th ed. 2006) ("decide or settle … conclusively and authoritatively").

Putting this all together, to "determine the validity of" an order means to "decide" whether the order has "legal force" or is "effective or binding." On that more restrained interpretation of the Hobbs Act, to "determine the

validity" of an agency order would ask whether the order is legally in effect. As Justice Kavanaugh explained in *PDR Network*, a court can make that determination "only by entering a declaratory judgment that the order is valid or invalid." 588 U.S. at 21 (Kavanaugh, J., concurring).[4]

3. This understanding of the phrase "determine the validity of" is cinched by the surrounding statutory text. The "canon of *noscitur a sociis* … counsels that a word is given more precise content by the neighboring words with which it is associated." *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 634–35 (2012). It "track[s] the common sense intuition that Congress would not ordinarily introduce a general term that renders meaningless the specific text that accompanies it." *Fischer v. United States*, 603 U.S. 480, 487 (2024). The canon thus "ensures—regardless of how complicated a sentence might appear—that none of its specific parts are made redundant by a clause literally broad enough to include them." *Id.* at 488.

This principle applies with full force here. Each of the words that precede the phrase "determine the validity of" in section 2342—"enjoin," "set aside," and "suspend"—refers to specific kinds of *equitable* relief:

- "Enjoin" means to "legally prohibit or restrain by injunction." *Black's Law Dictionary* (12th ed.

[4] It makes no difference that the party trying to challenge the FCC rule in *PDR Network* was a defendant, whereas here it's a plaintiff. *See* BIO at 18–20. The Hobbs Act does not distinguish between defendants and plaintiffs, and no circuit (including the Ninth Circuit) has drawn that distinction. Either the statute requires a district court to adhere to the FCC's interpretation of the TCPA in litigation between private parties, or it does not. But the answer will not be different depending on who happens to benefit from the FCC's interpretation.

2024); *see Webster's New Collegiate Dictionary* (1949) ("To command; to admonish or direct with authority. To forbid; prohibit.").

- "Set aside" is a form of equitable relief meaning "to annul or vacate" an order. *Black's Law Dictionary* (12th ed. 2024); *see also Webster's New Collegiate Dictionary* (1949) ("To discard; dismiss. To reserve for a purpose. To annul.").
- "Suspend" is also an equitable "term[] of art" meaning to "restrict or stop official action." *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 2 (2015).

Because each of these terms denotes a specific kind of equitable relief, the canon of *noscitur a sociis* confirms that "determine the validity" is best read to do the same. *See Beecham v. United States*, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."). It denotes a specific kind of equitable relief of its own. *See, e.g.*, *Brohl*, 575 U.S. at 12 (applying the canon to narrowly read the word "restrain," in "enjoin, suspend or restrain," to mean another form of equitable relief). And the only form of equitable relief that "determines the validity" of a regulation or statute is a declaratory judgment. *See PDR Network,* 588 U.S. at 21 (Kavanaugh, J., concurring) (noting that court can make this determination "only by entering a declaratory judgment"); *see, e.g.*, *Calderon v. Ashmus*, 523 U.S. 740, 746 (1998) (noting that the Declaratory Judgment Act permits a court to "determine the validity" of a legal instrument); *Ry. Mail Ass'n v. Corsi*, 326 U.S. 88, 91 (1945) (noting that the plaintiff sought "a declaratory judgment to determine the validity" of a statute).

If the phrase were given a broader sweep, as the Ninth Circuit has given it, the other terms specifically listed in section 2342 would become superfluous. A court typically cannot "enjoin," "set aside," or "suspend" an agency order without at least "considering" its reasoning, which the Ninth Circuit has held that district courts may not do. The Ninth Circuit's expansive reading of "determine the validity" thus cannot be reconciled with the Court's "duty to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Were this Court to adopt that reading here, it would ascribe to the phrase "a meaning so broad that it is inconsistent with the company it keeps," violating "the basic logic that Congress would not go to the trouble of spelling out the list in [section 2342] if a neighboring term swallowed it up." *Fischer*, 603 U.S at 487, 490. That "unintended breadth" is precisely the evil that *noscitur a sociis* is designed to prevent. *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). So even if the Ninth Circuit's expansive definition were a plausible interpretation of the phrase taken in isolation, reading it in context would require rejecting that definition. *See United States v. Hansen*, 599 U.S. 762, 775 (2023) ("When words have several plausible definitions, context differentiates among them.").

Further textual support, if it were needed, appears in the only other place in the Hobbs Act where Congress used a variation of the phrase "determine the validity." *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (noting that the "normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning."). In section 2349(a), Congress authorized the courts of appeals to

enter "a *judgment determining the validity of*, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency." 28 U.S.C. § 2349(a) (emphasis added). That language provides additional confirmation that Congress intended the determination of an order's validity to be an equitable remedy awarded through a declaratory "judgment" in a facial challenge that establishes the order's validity as to everyone.

Other provisions back up this understanding by setting forth procedures for obtaining those judgments, requiring, for example, that a "petition for review" be filed "within 60 days" of entry of the challenged order, 28 U.S.C. § 2344, that the action must be brought "against the United States," *id.*, and that it be filed "in the judicial circuit in which the petitioner resides or has its principal office" or in the D.C. Circuit, *id.* § 2343.

4. This understanding of the phrase "determine the validity" is also the most consistent with "the law's object and design." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 462 (1993). "The point of the Hobbs Act is to force parties who want to challenge agency orders via *facial, pre-enforcement challenges* to do so promptly and to do so in a court of appeals," thus avoiding "the delays and uncertainty that otherwise would result from multiple *pre-enforcement* proceedings … in multiple district courts and courts of appeals." *PDR Network*, 588 U.S. at 13 (Kavanaugh, J., concurring) (emphasis added). The Act achieves this by channeling pre-enforcement challenges to agency orders directly to the courts of appeals and by consolidating multiple petitions challenging the same law into a single court. *See id.*; 28 U.S.C. 2112(a)(3). But that goal is not advanced by barring district courts from interpreting statutes in

litigation between private parties alleging that a defendant violated a statute. Such a rule would only create inefficiencies and conflicts in routine litigation, while doing nothing to further Congress's intent to streamline challenges to agency action.

5. The opposite conclusion—that the Hobbs Act can operate to preclude a district court from interpreting a statute in a private, as-applied litigation—would lead to absurd results. For one thing, it would prevent the court from interpreting and applying statutory language as written when doing so would conflict with an agency's interpretation. *See Miller v. FCC*, 66 F.3d 1140, 1144 (11th Cir. 1995) ("Congress has not delegated, and could not delegate, the power to any agency to oust state courts and federal district courts of subject matter jurisdiction."). Once the Hobbs Act's 60-day window closes, district courts "would have to afford the agency not mere *Skidmore* deference or *Chevron* deference, but absolute deference." *PDR Network*, 588 U.S. at 27 (Kavanaugh, J., concurring). At that point, "no one is able to argue in court that the regulation is inconsistent with the statute—no matter how wrong the agency's interpretation might be." *Id.* at 26–27. That is not deference; it's "abdication." *Id.* at 27.

The "stark implication[]" of that rule would be that "a plaintiff with a viable claim under the law Congress enacted may be unable to pursue it simply because an agency has misinterpreted the law in an order to which he was not a party." *Gorss Motels, Inc. v. Safemark Sys., LP*, 931 F.3d 1094, 1109 (11th Cir. 2019) (Pryor, J., concurring). And defendants haled into court to defend against claims that they violated the TCPA would likewise be disabled from challenging the FCC order being

enforced against them, making their claims or defenses unilaterally subject to whatever position the FCC has taken—no matter how wrong.

An agency order that deprives district courts of the ability to even consider whether an agency's statutory interpretation is wrongly decided would also "estop[] vast numbers" of parties who "might wish to advance a view of the law different from that of the agency." *Id.* at 1110. Because the Hobbs Act's 60-day window typically closes long before enforcement actions arise, the Ninth Circuit's rule "would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958). Even worse, the rule would bind people who were not yet born and companies that were not yet created before the time to challenge the order expired. *PDR Network*, 588 U.S. at 18 (Kavanaugh, J., concurring).

"It would be wholly impractical—and a huge waste of resources—to expect and require every potentially affected party to bring pre-enforcement Hobbs Act challenges against every agency order that might possibly affect them in the future." *PDR Network*, 588 U.S. at 18 (Kavanaugh, J., concurring). For most of these potential parties, "the ultimate impact, or even the likelihood of enforcement, of proposed rules may be far from clear." *Gage v. U.S. Atomic Energy Comm'n*, 479 F.2d 1214, 1218 (D.C. Cir. 1973). It "is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation … would have knowledge of its promulgation or familiarity with or access to the Federal Register." *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 290 (1978) (Powell, J., concurring). Much less can ordinary consumers be expected to scrutinize the FCC's

docket to protect themselves in the event they someday have a claim under the TCPA. "Requiring all those potentially affected parties to bring a facial, pre-enforcement challenge within 60 days or otherwise forfeit their right to challenge an agency's interpretation of a statute borders on the absurd." *Gorss*, 931 F.3d at 1110 (Pryor, J., concurring). That is no doubt why Congress almost never imposes such a harsh requirement.

B. If any ambiguity remains, the strong presumption of reviewability still requires reversal.

1. Even if the Ninth Circuit's extraordinarily broad reading of "determine the validity" were a plausible reading of that phrase in context, it still would not be the only plausible reading. At a minimum, the phrase is also susceptible to the alternative reading adopted by four Justices of this Court in *PDR Network*, 588 U.S. at 21 (Kavanaugh, J., concurring). And an ambiguous statute, as Justice Kavanaugh explained, cannot "deprive a party of judicial review of the agency's interpretation in an enforcement action." *Id.* at 22; *see also Kucana v. Holder*, 558 U.S. 233, 251 (2010) (Where a statute is "reasonably susceptible to divergent interpretation," the Court "adopt[s] the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review.").

Recognizing that "Congress rarely intends to prevent courts from enforcing its directives to federal agencies," this Court "applies a 'strong presumption' favoring judicial review" of an agency's interpretation of a statute. *Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480, 486 (2015). That review will be allowed unless "there is persuasive reason to believe" that Congress intended to preclude it.

Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 670 (1986). Moreover, Congress codified that "traditional[]" rule in the APA, which provides that "agency action" is generally "subject to judicial review in civil or criminal proceedings for judicial enforcement." 5 U.S.C. § 703. This provision "creates a basic presumption of judicial review for one suffering legal wrong because of agency action." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 586 U.S. 9, 22 (2018). The "strong presumption that Congress intends judicial review of administrative action," *Bowen*, 476 U.S. at 670, counsels against construing the Hobbs Act to preclude review of the FCC's interpretation.[5]

To overcome that presumption, courts "cannot presume that Congress *silently* intended to preclude judicial review." *PDR Network*, 588 U.S. at 19 (Kavanaugh, J., concurring). "When Congress intends to eliminate as-applied judicial review of agency interpretations of statutes in enforcement actions, Congress can, must, and does speak clearly." *Id.* And in the absence of any such language, the well-established

[5] Judicial review under the APA is available whenever no "prior, adequate, and *exclusive* opportunity for judicial review is provided by law." 5 U.S.C. § 703 (emphasis added). That provision for review is triggered here because the Hobbs Act does not provide an "exclusive" opportunity for review in cases like this one. Although the Act gives the courts of appeals "exclusive jurisdiction" over certain cases, the relevant question—as Justice Kavanaugh explained in *PDR Network*—is "exclusive jurisdiction to do what?" 588 U.S. at 20 (Kavanaugh, J., concurring). The answer is that the Act grants courts of appeals exclusive jurisdiction "to issue an injunction or declaratory judgment regarding the agency's order" in a pre-enforcement facial challenge—not to resolve disputes in cases between private parties over an alleged statutory violation. *Id.* at 21.

"default rule" is to allow parties in private litigation "to argue that the agency's interpretation of the statute is wrong." *Id.*

2. Because the Hobbs Act is "silent about review in subsequent enforcement actions," the "default rule … applies absent statutory language to the contrary." *Id.* at 15. As explained above, petitions to review under the Hobbs Act are brought against the government and are limited to injunctive and declaratory remedies. So it makes sense that the court of appeals would have exclusive jurisdiction to "entertain facial, pre-enforcement challenges" to agency orders. *Id.* at 24. Thus, nobody disputes that this exclusive jurisdiction "means, at a minimum, that an aggrieved party may not bring a facial, pre-enforcement action … in a district court." *Id.* at 20.

But that's the *only* kind of proceeding that the Hobbs Act restricts. The Act does not mention any other kinds of cases—like suits between private parties based on alleged violations of the TCPA —and thus does not vest the courts of appeals with "exclusive jurisdiction" over such run-of-the-mill disputes. The Act has nothing to say about the authority of district courts to adjudicate ordinary civil cases, where the United States is not a party and no injunctive or declaratory relief against it is sought. The Hobbs Act gives the courts of appeals *no* jurisdiction to adjudicate private litigation alleging violations of a statute. There is "no basis to interpret a *silent* statute as achieving that extraordinary close-the-courthouse-door outcome." *Id.* at 26. Nor is there any other "reason to think that Congress wanted to short-circuit that ordinary system of judicial review for the many agencies and

multiplicity of agency orders encompassed by the Hobbs Act." *Id.*[6]

And in these "as-applied enforcement action[s]," which the Hobbs Act leaves in place, the district courts are operating outside the courts of appeals' exclusive jurisdiction over pre-enforcement challenges and are "not bound by the FCC's interpretation of the TCPA." *Id.* at 12. Instead, they are free to "interpret the statute as courts traditionally do under the usual principles of statutory interpretation." *Id.* at 27. They are, in fact, *obligated* to do so; the federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (Marshall, J.).

In this way, the Hobbs Act is one of a host of agency review statutes creating jurisdiction in the courts of appeals over a particular kind of proceeding: facial, pre-enforcement suits against the United States seeking injunctive or declaratory relief from particular kinds of agency action. *See, e.g.*, 15 U.S.C. § 78y(b)(3) (providing for "exclusive" review of SEC orders in the courts of appeal); 29 U.S.C. § 655(f) (providing for review of OSHA

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[6] That is not to say that a party who loses a pre-enforcement facial challenge under the Hobbs Act can necessarily obtain a second bite of the apple. "If a party challenges an agency action in a facial, pre-enforcement suit, that specific party may be barred by ordinary preclusion principles from relitigating the same question against the agency in a future enforcement action." *PDR Network*, 588 U.S. at 16 n.2 (Kavanaugh, J., concurring); *see Abbott Lab'ys v. Gardner*, 387 U.S. 136, 154 (1967). But, as in *PDR Network*, "[t]hat scenario is not present here because [McLaughlin] did not bring a facial, pre-enforcement suit." *PDR Network,* 588 U.S. at 16 n.2 (Kavanaugh, J., concurring).

orders). The Act's grant of exclusive jurisdiction means that a district court may not entertain a petition to review an FCC order subject to the Act. But the Act says nothing about other actions, like this one, that are properly filed in a federal district court under the court's ordinary federal-question jurisdiction.

For example, the Hobbs Act subjects certain SEC orders to the courts of appeals' "exclusive" jurisdiction over pre-enforcement actions. *See PDR Network*, 588 U.S. at 21 (Kavanaugh, J., concurring). But "that provision has never been read to bar subsequent district court review of the SEC's interpretation of a statute in an enforcement proceeding." *Id.* at 21–22. On the contrary, this Court and others often consider—and sometimes credit—arguments that the agency got it wrong on the law. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212–14 (1976) (holding that the SEC's interpretation of Rule 10b-5 was inconsistent with statutory text); *see also, e.g.*, *United States v. O'Hagan*, 521 U.S. 642, 666–76 (1997) (upholding SEC rule); *SEC v. Alpine Sec. Corp.*, 308 F. Supp. 3d 775, 795–96 (S.D.N.Y. 2018). Likewise, occupational safety and health standards are directly reviewable in the courts of appeals, *see* 29 U.S.C. § 655(f), but that has not stopped courts in the enforcement context from considering their correctness. *See, e.g., Whirlpool Corp. v. Marshall*, 445 U.S. 1, 4, 7–9 (1980) (examining "whether this regulation is consistent with the Act").

3. To say all this is not to deny that "Congress can expressly preclude as-applied review in enforcement actions (subject to constitutional constraints)." *PDR Network*, 588 U.S. at 26 (Kavanaugh, J., concurring). It can do so—and in other statutes, it has done so. When it wants to, Congress "knows how to explicitly preclude

judicial review," "as it has done with the Clean Water Act, CERCLA, and the Clean Air Act." *Id.* at 16, 26.

But "Congress traditionally takes the extraordinary step of barring as-applied review" only for "statutory schemes where the regulated parties are likely to be well aware of any agency rules and to have both the incentive and the capacity to challenge" them. *Id.* at 18. Like the Hobbs Act, these statutes "authorize facial, pre-enforcement judicial review" in the courts of appeals. *Id.* at 14. They also, however, go further than the Hobbs Act by including language that "expressly preclude[s] judicial review in subsequent enforcement actions." *Id.* at 16–17.

For example, the Clean Water Act (like the Hobbs Act) "provides for facial, pre-enforcement review of certain agency actions in a court of appeals." *Id.* at 14; *see* 33 U.S.C. § 1369(b)(1). But unlike the Hobbs Act, the statute "expressly states that those agency orders 'shall not be subject to judicial review in any civil or criminal proceeding for enforcement.'" *PDR Network*, 588 U.S. at 14 (Kavanaugh, J., concurring) (quoting 33 U.S.C. § 1369(b)(2)); *see also* 42 U.S.C. § 9613(a) (CERCLA) (stating that agency orders "shall not be subject to judicial review in any civil or criminal proceeding for enforcement"); *id.* § 7607(b)(2) (Clean Air Act) (stating that agency orders "shall not be subject to judicial review in civil or criminal proceedings for enforcement").

Other statutes, by contrast, "authorize facial, pre-enforcement judicial review, but are silent on the question whether a party may argue against the agency's legal interpretation in subsequent enforcement proceedings." *PDR Network*, 588 U.S. at 14–15 (Kavanaugh, J., concurring). The Hobbs Act, which says nothing about review in the district courts, is one of these. "Unlike the

Clean Water Act, CERCLA, and the Clean Air Act, the Hobbs Act does not expressly preclude review in enforcement actions." *Id.* at 19–20. The "fact that Congress has expressly precluded judicial review" in similar statutes "suggests that Congress's silence in the Hobbs Act should not be read to preclude judicial review." *Id.* at 16–17.

This Court's decision in *Yakus v. United States*, 321 U.S. 414 (1944), reinforces the point. There, the Court held that specific language in the Emergency Price Control Act precluded district courts from considering the validity of wartime price regulations in as-applied enforcement actions. Like the Hobbs Act, that statute granted "exclusive jurisdiction" to a court of appeals "to determine the validity of any regulation or order" by the agency charged with administering the statute. *Id.* at 429. As Justice Kavanaugh explained, this "exclusive jurisdiction" provision, which "is roughly akin to the language in the Hobbs Act," gave the "court exclusive jurisdiction to decide a facial, pre-enforcement challenge" but "did not on its own bar any subsequent review in as-applied enforcement actions." *PDR Network*, 588 U.S. at 23–24 (Kavanaugh, J., concurring).

Instead, it was the law's second sentence—"coupled with" its exclusive-jurisdiction provision—that "together" accomplished that result. *Id.* at 23. In the ECPA, after granting the court of appeals "exclusive jurisdiction" to decide facial challenges, Congress explicitly provided that no other court had jurisdiction even "to *consider*" those same agency orders in an as-applied enforcement

proceeding. *Id.* at 23;[7] *see also* U.S. Dep't of Just., Just. Manual § 10 (1947) (citing this provision as a provision that "expressly … preclude[d] challenge of agency action in enforcement proceedings"). But that language, which is "roughly akin to the preclusion of review provisions in the modern Clean Water Act, CERCLA, and Clean Air Act," is "not replicated in the Hobbs Act." *PDR Network*, 588 U.S. at 23 (Kavanaugh, J., concurring).

That Congress chose six years later when it enacted the Hobbs Act "*not* [to] include the language from the Emergency Price Control Act"—which, "as interpreted in *Yakus*, would have expressly communicated Congress's intent to preclude district courts from considering" challenges to certain regulations—is additional strong evidence that Congress did not intend the Hobbs Act to carry such a meaning. *Id.* at 24.

4. Even if the Ninth Circuit's interpretation of the Hobbs Act were left standing as a plausible contender, the constitutional-doubt canon would come into play and compel an alternative reading to avoid the "serious constitutional issue[s]" that would be raised by this interpretation. *Id.* at 19; *see Gorss*, 931 F.3d at 1106 (Pryor, J., concurring). Justice Thomas, writing separately in *PDR Network*, noted that "constitutional-

[7] In full, the second sentence read: "Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision." *Yakus*, 321 U.S. at 429.

avoidance precedents would militate against" interpreting the statute in the way that the Ninth Circuit has done. *PDR Network*, 588 U.S. at 9–10 (Thomas, J., concurring).

For one thing, "[b]arring defendants in as-applied enforcement actions from raising arguments about the reach and authority of agency rules enforced against them raises significant questions under the Due Process Clause." *PDR Network*, 588 U.S. at 19 (Kavanaugh, J., concurring); *see also Chrysler Corp. v. EPA*, 600 F.2d 904, 913 (1979) (noting that doing so raises a "substantial due process question"); *Adamo Wrecking*, 434 U.S. at 289 (Powell, J. concurring) (noting that the constitutional issues "merit[] serious consideration"). This Court "can avoid some of those due process concerns by adhering to a default rule of permitting judicial review of agency legal interpretations in enforcement actions." *PDR Network*, 588 U.S. at 19 (Kavanaugh, J., concurring).[8]

Requiring district courts to resolve statutory-violation cases without considering the statute also raises troubling separation-of-powers concerns. If a district court "could never second-guess agency interpretations in orders

[8] This Court in *Yakus* upheld the constitutionality of the Emergency Price Control Act, which precluded district courts from considering the validity of wartime price regulations as a defense to enforcement actions. 321 U.S. at 414. But *Yakus* was decided at the height of the United States' involvement in World War II, when "the need for quick and definitive judicial rulings on the legality of agency orders was at its apex." *PDR Network*, 588 U.S. at 24–25 (Kavanaugh, J., concurring). The Court in *Yakus* found it "appropriate to take into account" these exigent circumstances and the fact that the law was "a temporary wartime measure." 321 U.S. at 419, 431-32. But it has never suggested that the same rule is appropriate in peacetime. *See United States v. Mendoza-Lopez*, 481 U.S. 828, 838 n.15 (1987) (noting that *Yakus* was "motivated by the exigencies of wartime").

subject to the Hobbs Act," *Gorss*, 931 F.3d at 1110–11, the Act could intrude "upon Article III's vesting of the 'judicial Power' in the courts," *PDR Network*, 588 U.S. at 9 (Thomas, J., concurring). As Justice Thomas opined in his concurrence in *PDR Network*, "the judicial power, as originally understood," requires a court to "exercise its independent judgment in interpreting and expounding upon the laws," which "necessarily entails identifying and applying [] governing law." *Id.* at 9–10. Thus, if "the Hobbs Act purports to prevent courts from applying the governing statute to a case or controversy within its jurisdiction, the Act conflicts with the 'province and duty of the judicial department to say what the law is.'" *Id.* at 10 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

At any rate, even if the statute were not actually unconstitutional under the Ninth's Circuit's view, that is not the test for applying the constitutional-doubt canon. The test is whether the Ninth Circuit's view would "raise[] a substantial constitutional question." *Peretz v. United States*, 501 U.S. 923, 930 (1991); *see* Antonin Scalia & Bryan Garner, *Reading Law* 247–48 (2012) ("[The constitutional-doubt canon] militates against not only those interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality."). It would here.

II. At a minimum, the district court was not required to accept the FCC's interpretation because the agency's order is non-binding interpretive guidance.

The Hobbs Act did not require the district court in this case to accept the FCC's legal interpretation of the TCPA for an additional reason. Even if the Ninth Circuit

were correct that the Hobbs Act's "exclusive jurisdiction" language precludes as-applied judicial review of an agency's *legislative* rules, which may bind courts and private parties, it cannot be the case that the same is true for an agency's *interpretive* guidance and policy statements, which do not. Here, the FCC's *Amerifactors* order is quintessential interpretive guidance. Under basic principles of administrative law, the district court was therefore not bound by it but was free to exercise its Article III authority to construe the TCPA for itself.[9]

A. Although it did not "definitively resolve the issue," this Court in *PDR Network* noted that if an FCC order is "the equivalent of an interpretive rule," it "may not be binding on a district court, and [the] district court therefore may not be required to adhere to it." 588 U.S. at 7. Unlike every other court of appeals that has considered the question, the Ninth Circuit treats "legislative" and "interpretive" rules in exactly the same way under the Hobbs Act; both are binding on district courts in as-applied enforcement proceedings. *See Hamilton*, 224 F.3d at 1055 (holding that the Hobbs Act "contains no exception for 'interpretive' rules"). Following that binding circuit precedent, the district court in this case recognized that any "potential distinction between 'legislative' and 'interpretive' rules [did] not matter." Pet. App. 37a–38a & n.5. And the Ninth Circuit agreed, holding that the district court had "correctly found" that it was bound by the FCC's order regardless of whether it was legislative or

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[9] Unlike in *PDR Network*, 588 U.S. at 7, this issue was argued below, decided by the court of appeals, and raised in the petition for certiorari. Pet App. 7a, 37a–38a & n.5. So there is no basis to remand for consideration of the issue here.

interpretive. Pet. App. 7a. That understanding of the Hobbs Act cannot be right.

The distinguishing characteristic of legislative rules is that they are "issued by an agency pursuant to statutory authority" and have the "force and effect of law." *PDR Network*, 588 U.S. at 7. They are therefore binding on courts, private parties, and the issuing agency itself. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96–97 (2015). Legislative rules, unlike interpretive ones, must go through the notice-and-comment procedures prescribed by the APA. *See Perez*, 575 U.S. at 97. By contrast, interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Id.* They do not create new rights or obligations and are not subject to the APA's notice-and-comment requirements. *See id.* Rather, their "critical feature" is that they are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Id.* Interpretive rules, therefore, cannot "bind private parties." *Kisor v. Wilkie*, 588 U.S. 558, 583 (2019) (plurality opinion).

As all parties to this case agreed below, the FCC's *Amerifactors* order is interpretive, not legislative. SER 082. By its terms, the order is a "clarification" that "interpret[s]" the TCPA's definition of "telephone facsimile machine." Pet. App. 51a. The FCC did not purport to impose new obligations or recognize new rights. Instead, it concluded that an "online fax service" "falls outside the scope of the statutory prohibition." Pet. App. 48a. The order thus simply "advise[s] the public of the agency's construction of the statutes and rules which it administers"—a "prototypical interpretive rule."

Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995); *see also Kisor*, 588 U.S. at 583 (noting that interpretive rules reflect "how the agency understands, and is likely to apply, its binding statutes") (plurality opinion); *White v. Shalala*, 7 F.3d 296, 303 (2d Cir. 1993) (noting that an interpretive rule reflects an agency's "tentative view of the meaning of a particular statutory term").

B. Because interpretive rules lack the force of law, they can *never* bind parties and courts—the Hobbs Act notwithstanding. The Act gives the courts of appeals exclusive jurisdiction to "determine the validity" of covered agency orders. 28 U.S.C. § 2342. But whether an interpretive rule is "valid" or not makes no difference to its advisory nature. Although legislative rules are binding only if valid, interpretive rules and policy statements are non-binding on courts and parties "*regardless* of their validity." *Viet. Veterans of Am.*, 843 F.2d at 537. Unlike legislative rules, interpretive rules can be both "valid" and "non-binding" with no "contradiction in terms." *Id.*

There was thus no need for the district court to "determine the validity" of the *Amerifactors* order. Whether valid or not, "a court is not required to give effect to an interpretive regulation." *Batterton v. Francis*, 432 U.S. 416, 424–26 & n.9 (1977); *see Carlton & Harris Chiropractic*, 982 F.3d at 263 (holding that an FCC order's "interpretive nature means that the district court was not bound to follow it"). Although "courts often defer to an agency's interpretative rule," "they are always free to choose otherwise." *Joseph v. U.S. Civil Serv. Comm'n*, 554 F.2d 1140, 1154 n.26 (D.C. Cir. 1977); *see also Carlton & Harris Chiropractic*, 982 F.3d at 264. And it would make no sense to say that a district court can't question the correctness of a rule's statutory interpretation that's not

binding in the first place. As the government acknowledged at oral argument in *PDR Network*, interpretive rules are "without the force of law" and thus don't "fall within the Hobbs Act at all." Oral Arg. Tr. 64.

Courts outside the Ninth Circuit have consistently recognized this limitation. The Fourth Circuit, on remand in *PDR Network*, held that the FCC order at issue was "interpretive," rather than "legislative," and thus outside the Hobbs Act. *Carlton & Harris Chiropractic*, 982 F.3d at 262–63. Because interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process," the court concluded, they cannot bind district courts in private enforcement actions. *Id.* at 264 (holding that, because the "FCC Rule is interpretive," the "district court wasn't bound by it").

Several other circuits have followed suit. For example, after recognizing that this Court in *PDR Network* "suggested that the FCC's interpretive rulings may not bind courts when they construe the TCPA," the Third Circuit refused to treat such rulings as binding authority. *Panzarella v. Navient Sols., Inc.*, 37 F.4th 867, 873 n.7 (3d Cir. 2022). The Second and Eighth Circuits have done the same. *See Gorss Motels, Inc. v. Lands' End, Inc.*, 997 F.3d 470, 477 n.4 (2d Cir. 2021) (finding the FCC's interpretation "persuasive" only after independently interpreting the statutory text); *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 960 n.8 (8th Cir. 2019) ("We agree with the FCC not because we believe we are bound to do so but because we find this portion of their interpretation of the statute to be persuasive.").

To hold otherwise would bring about the bizarre result that an agency's informal, non-binding guidance would, after 60 days, become permanently unchallenge-

able, in effect "transform[ing] … into the equivalent of a statute." *PDR Network*, 588 U.S. at 27 (Kavanaugh, J., concurring). It would be anomalous to hold that an agency legal opinion whose authority is limited to its "power to persuade," *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006), would nevertheless become binding on district courts—even when the agency's analysis is obviously wrong. It would also undermine the agency's *own* decision to issue, for example, a non-binding policy statement—only to find it entitled to "[n]ot *Skidmore* deference or Chevron deference," but the equivalent of judicial "abdication." *PDR Network*, 588 U.S. at 27 (Kavanaugh, J., concurring). That cannot be the law. There is nothing in the text, structure, or history of the Hobbs Act that even hints at the possibility that Congress would have intended to bring about such a bizarre result.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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