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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 and 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 it would be -- implicate
3 this case or implicate this regulation or
4 order, and then you find out, you know, 10
5 years later 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: 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 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 and
20 -- 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 And I think it's made even more

1 complicated in a case like this one where the
2 FCC's ultimate order doesn't follow from a
3 specific notice to the public that what we're
4 going to do is entertain this kind of a
5 definition of -- of what an advertisement is.

6 JUSTICE GINSBURG: Did -- did P --

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

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

15 MR. PHILLIPS: I agree with that.

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

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

25 And -- and so, if you adopt the rule,

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

10 CHIEF JUSTICE ROBERTS: Why --

11 JUSTICE KAGAN: May I ask, Mister --

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

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

21 MR. PHILLIPS: Right.

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

24 MR. PHILLIPS: I -- I -- I don't think
25 it's enough. And, first of all, you would have

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

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

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

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

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

1 right, are heavily regulated and they follow
2 very carefully what happens.

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

8 JUSTICE SOTOMAYOR: But why --

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

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

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

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

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

25 MR. PHILLIPS: -- could have exercised

1 primary -- could have allowed primary
2 jurisdiction --

3 JUSTICE SOTOMAYOR: Exactly.

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

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

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

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

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

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

24 MR. PHILLIPS: There's hope. You're
25 telling me there's hope.

1 (Laughter.)

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

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

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

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

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

23 JUSTICE KAGAN: Mr. Phillips, what --
24 I guess that's the second time you've said that
25 there's a real difference between the Yakus

1 model and this. And I take it you're referring
2 to the kind of second provision which says no
3 courts shall --

4 MR. PHILLIPS: Consider.

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

10 MR. PHILLIPS: No.

11 JUSTICE KAGAN: You don't need it.

12 MR. PHILLIPS: No, I think it's --

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

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

23 And we know from the Administrative
24 Procedure Act that the strong presumption is in
25 favor of allowing you to defend against the

1 regulation or order in an enforcement action.

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

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

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

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

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

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

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

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

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

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

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

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

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

21 MR. PHILLIPS: Exclusive to do what?

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

24 MR. PHILLIPS: Right. To do what?
25 And the question is, is it -- is it to do -- to

1 provide the kind of injunctive relief or
2 declaratory relief --

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

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

7 JUSTICE KAVANAUGH: Keep going.

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

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

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

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

24 There was a need for the kind of
25 consistency and nationwide decision-making, Mr.

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

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

14 JUSTICE GORSUCH: So, Mister --

15 MR. PHILLIPS: -- of the regulations.

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

24 One is the -- the separation of powers
25 difference, that there was a wartime measure

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

4 MR. PHILLIPS: Or were.

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

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

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

17 MR. PHILLIPS: Right.

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

24 MR. PHILLIPS: I -- I tried to make
25 the separation of powers point earlier because

1 I do believe --

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

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

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

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

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

24 But, on your broader point, why is it
25 a separation of powers problem to say: Of

1 course, a court has to determine what the law
2 is, but -- but it doesn't have to be every
3 court at every time that determines what the
4 law is.

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

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

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

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

6 JUSTICE SOTOMAYOR: But the problem --

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

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

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

17 MR. PHILLIPS: Right.

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

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

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

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

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

20 JUSTICE KAVANAUGH: Well, there are --

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

23 JUSTICE KAVANAUGH: There are statutes
24 that explicitly preclude judicial review in
25 enforcement proceedings, however, like the

1 Clean Air Act.

2 MR. PHILLIPS: Right.

3 JUSTICE KAVANAUGH: Are those
4 unconstitutional?

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

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

14 Some statutes --

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

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

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

25 JUSTICE KAVANAUGH: -- you don't

1 dispute that those statutes preclude --

2 MR. PHILLIPS: Some forms --

3 JUSTICE KAVANAUGH: -- review?

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

6 JUSTICE KAVANAUGH: Right.

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

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

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

21 MR. PHILLIPS: Right.

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

24 MR. PHILLIPS: Right. But I -- and I
25 would -- and I would construe the silence here

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

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

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

17 JUSTICE KAGAN: Could you talk --

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

20 MR. PHILLIPS: I'm sorry.

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

1 read down the statute, it talks about review of
2 rules, regulations --

3 MR. PHILLIPS: Right.

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

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

18 (Laughter.)

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

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

23 JUSTICE BREYER: Okay. The -- the --
24 the other one is, look, there are -- there are
25 lots of -- rule-making normally, you review in

1 the court of appeals. There are all kinds of
2 things that do that.

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

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

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

12 JUSTICE BREYER: Okay.

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

17 JUSTICE BREYER: Yeah.

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

23 JUSTICE BREYER: Right, right. So
24 there must be a holding on that. Is there no
25 case -- there's no case on that, I guess.

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

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

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

8 JUSTICE BREYER: Okay.

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

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

15 MR. PHILLIPS: Right.

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

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

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

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

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

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

5 JUSTICE BREYER: Okay.

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

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

19 JUSTICE GINSBURG: How did --

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

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

25 JUSTICE BREYER: So what about a rule

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

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

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

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

18 MR. PHILLIPS: Yeah.

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

23 MR. PHILLIPS: The -- the -- the main
24 argument is not waived because the court
25 specifically said it did not have to harmonize

1 the interpretation of the FCC with the statute
2 under these cases.

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

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

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

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

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

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

25 It was when the Fourth Circuit said we

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

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

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

18 JUSTICE SOTOMAYOR: So is your
19 point --

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

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

25 MR. PHILLIPS: Yes, Your Honor.

1 JUSTICE SOTOMAYOR: Is that your
2 point?

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

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

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

11 CHIEF JUSTICE ROBERTS: Thank --

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

14 MR. PHILLIPS: In this Court?

15 JUSTICE SOTOMAYOR: Yes.

16 MR. PHILLIPS: Absolutely.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 MR. PHILLIPS: Thank you, Your Honor.

20 CHIEF JUSTICE ROBERTS: Mr. Hara.

21 ORAL ARGUMENT OF GLENN L. HARA

22 ON BEHALF OF THE RESPONDENT

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

25 When a district court refuses to

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

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

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

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

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

24 Now it does want to challenge the
25 validity of the 2006 order. And it's -- it's

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

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

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

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

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

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

24 But, here, when the initial
25 rule-making was going on, what reason did PDR

1 have to think it would be affected by it?

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

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

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

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

20 (Laughter.)

21 JUSTICE GORSUCH: Shocking, huh?
22 Maybe a lot of people don't read the Federal
23 Register.

24 (Laughter.)

25 JUSTICE GORSUCH: Maybe they can't

1 read it. It's in eight-point font.

2 At any rate, this young man is forever
3 barred, I think, under your interpretation --
4 maybe not --

5 MR. HARA: No.

6 JUSTICE GORSUCH: -- from challenging
7 the validity of that regulation under the
8 statute?

9 MR. HARA: Our position is he is not
10 barred from challenging the validity of the
11 regulation.

12 JUSTICE GORSUCH: How?

13 MR. HARA: That person can petition
14 the agency even after the 60-day period of
15 review.

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

21 MR. HARA: A federal district court or
22 a state court?

23 JUSTICE GORSUCH: Yeah, federal
24 district court.

25 MR. HARA: Or a state court, because,

1 under PDR's reading, state courts across the
2 country could also determine the validity of
3 FCC orders.

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

8 MR. HARA: Yes. It would -- the party
9 would first need to go to the agency, and then
10 --

11 JUSTICE GORSUCH: He would have had to
12 have been born earlier.

13 MR. HARA: And then, if you lose
14 there, you petition to the court of appeals,
15 which can determine the validity of the order.

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

20 So you say to somebody, oh, go
21 petition the agency. Ask him to change it. I
22 mean, maybe you'll tell me I'm wrong about
23 this, but I always thought, if they say no,
24 that there's virtually nothing that you can do
25 about it in court, which is quite different

1 after they have a rule.

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

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

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

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

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

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

21 JUSTICE BREYER: Well, that's a pretty
22 big question. And -- and -- and then I go back
23 to the other, you see, that's an awfully big
24 question, and -- and the -- the -- then I read
25 the statute and it says final orders of the

1 FCC.

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

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

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

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

21 (Laughter.)

22 JUSTICE BREYER: God, that's -- here
23 -- where is it? Definitions. Well, it says
24 order somewhere. I just read it. Okay. Let
25 somebody else ask a few questions.

1 (Laughter.)

2 JUSTICE SOTOMAYOR: Counsel, can I --

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

9 Is what's before the court of appeals
10 simply the question of whether they should
11 reconsider it or the underlying merits of the
12 interpretation?

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

21 They petitioned the FCC. They were
22 denied. They -- they took a Hobbs Act appeal
23 to the D.C. Circuit court of appeals and the
24 D.C. Circuit vacated the rule. It held that
25 the FCC did not have a --

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

6 Could they say that, in other words,
7 not get to the underlying merits?

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

13 JUSTICE KAGAN: Is there any different
14 standard used at the D.C. Circuit when it comes
15 up like that?

16 MR. HARA: It's Chevron deference.

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

22 MR. HARA: There -- there was not in
23 the Bais Yaakov of Spring Valley litigation.
24 The FCC didn't argue for eliminating --

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

1 Circuit. Okay.

2 MR. HARA: Right.

3 JUSTICE BREYER: The -- the -- the
4 question -- I found order. Okay? It's 5516.
5 "Order means the whole or part of a final
6 disposition, whether affirmative, negative,
7 injunction, declaratory, of an agency in a
8 matter other than rule-making but including
9 license."

10 So, I mean, I think normally in ad law
11 you try to sort of -- but nobody's argued that
12 at all.

13 MR. HARA: No.

14 JUSTICE BREYER: So you have a major
15 question, it seems to me, of administrative law
16 that applies major. And we also have parts of
17 this involving the statute that I personally --
18 maybe everyone else does -- don't understand,
19 both statutes, the order part and the other
20 part.

21 So what should we do, if -- if -- if
22 there's a general view the same as mine?

23 MR. HARA: Well, Your Honor, as you
24 said, nobody did argue that. And PDR conceded
25 below that the 2006 order at issue here is the

1 type of final order under 2342, the Hobbs Act.

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

6 JUSTICE KAVANAUGH: It seems --

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

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

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

25 So what's wrong with that? And -- and

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

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

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

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

21 MR. HARA: You mean if the district
22 court had --

23 JUSTICE GORSUCH: No, no, the
24 regulation is still validly enforced.

25 MR. HARA: Well, no court has ever

1 invalidated it --

2 JUSTICE GORSUCH: Yeah.

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

4 JUSTICE SOTOMAYOR: I'm -- I'm -- I'm
5 a little --

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

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

23 MR. HARA: Under Yakus -- Yakus is
24 still good law. Now I -- I do have to point
25 out that Congress ameliorated the harsh effects

1 of Yakus and it concluded --

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

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

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

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

22 JUSTICE ALITO: Do you know how many
23 pages were issued in the Federal Register in
24 2018?

25 (Laughter.)

1 MR. HARA: I do not.

2 JUSTICE ALITO: I think it's something
3 like 90,000 pages.

4 MR. HARA: Right. But somebody in
5 2013 --

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

11 (Laughter.)

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

15 (Laughter.)

16 JUSTICE ALITO: -- addition to the
17 Code of Federal Regulations?

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

22 JUSTICE KAVANAUGH: Well, is --

23 MR. HARA: -- before sending their
24 faxes in 2013.

25 JUSTICE KAVANAUGH: -- isn't the

1 question here how to interpret statutory
2 silence? Because we have statutes that have
3 pre-enforcement review and then explicitly
4 allow review in the enforcement proceeding. We
5 have statutes that allow pre-enforcement review
6 and explicitly bar review in the enforcement
7 proceeding, Clean Air Act.

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

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

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

25 So that's the considerations that I

1 wanted to raise for how we should fill the
2 statutory silence.

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

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

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

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

25 JUSTICE KAVANAUGH: But --

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

6 JUSTICE KAVANAUGH: And that's why --
7 never mind.

8 MR. HARA: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Ms. Kovner.

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

15 MS. KOVNER: Mr. Chief Justice, and
16 may it please the Court:

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

1 question about maybe whether -- whether this
2 was an ambiguous regulation and what happens
3 then.

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

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

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

1 JUSTICE KAVANAUGH: Prior and adequate
2 it also says.

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

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

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

23 So they -- parties asked and it was
24 published in the Federal Register, you know, we
25 the agency want your comments on what rule we

1 should adopt with respect to that. And then
2 the agency adopted a rule governing that.

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

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

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

21 MS. KOVNER: We -- we don't think
22 that's the right question. You know, I think
23 if the -- if the issue is does this rule have
24 force and effect of law, we think the answer is
25 yes.

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

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

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

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

1 So -- so, look, the part you read,
2 703, as Justice Kavanaugh just pointed out, it
3 says that judicial review does lie in agency
4 action, which is very broad, is subject to
5 judicial review in civil or criminal
6 proceedings unless prior, adequate, and
7 exclusive, three, and --

8 MS. KOVNER: Yes.

9 JUSTICE BREYER: Prior, adequate, and
10 exclusive.

11 MS. KOVNER: Yes.

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

17 MS. KOVNER: That's right, Your Honor,
18 so I think --

19 JUSTICE BREYER: But does it say that
20 in your brief?

21 MS. KOVNER: Yes. So we agree in our
22 brief that Section 03 and this statute have to
23 be read in pari materia. So we agree if
24 there's no prior, adequate, exclusive
25 opportunity --

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

6 MS. KOVNER: Petitioner never argued
7 below that they were not --

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

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

20 MS. KOVNER: Your Honor, I take the
21 point that if the Court is of the view that the
22 disposition of this case turns on issues that
23 weren't really developed below or weren't
24 pressed below, that it has the option of
25 declining to decide the case and dismissing it

1 as improvidently granted.

2 JUSTICE GORSUCH: Well, why would --

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

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

14 JUSTICE ALITO: Well, a case that
15 would come out differently, not that it would
16 -- of course, it would be a different case.
17 Would it come out differently?

18 MS. KOVNER: So that would present a
19 difficult question under 703 on which we
20 haven't taken a position.

21 And the reason is, of course, this is
22 implicated in a lot of, you know, the Clean Air
23 Act, Clean Water Act. A lot of these
24 provisions cut off review.

25 And I think, you know, so we would

1 have to address the question of when Section
2 703 says does an adequate opportunity exist, is
3 it talking about an adequate opportunity for
4 you, that particular individual party, or an
5 adequate opportunity for others in your shoes?

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

13 JUSTICE KAGAN: And you're saying that
14 this was never raised by any party, by any
15 court below, that -- the exploration of that
16 question?

17 MS. KOVNER: Petitioner certainly
18 never argued we didn't have an opportunity.
19 They just argued below this isn't determining
20 the validity of --

21 JUSTICE GORSUCH: So, counsel --

22 JUSTICE KAGAN: Similarly on this
23 question of interpretive, because I -- I would
24 say that if it's an interpretive rule, by which
25 I mean something without -- without the force

1 of law, essentially guidance to the agency,
2 guidance to various parties who are interested
3 in the world, but you can't -- you can't, you
4 know, say that somebody violated it and
5 sanctioned them, something like that doesn't
6 fall within the Hobbs Act at all.

7 Do -- do you -- would you agree with
8 that?

9 MS. KOVNER: I think I would, Justice
10 Kagan. We -- we think it has to be an action
11 about which rights or obligations have been
12 determined in --

13 JUSTICE KAVANAUGH: But -- but --

14 MS. KOVNER: -- describing --

15 JUSTICE KAGAN: And we don't know
16 really, because nobody argued below, whether
17 that's true. Is that correct?

18 MS. KOVNER: Nobody contested below
19 that this was an order that's subject to the
20 Hobbs Act.

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

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

24 JUSTICE KAVANAUGH: Yeah.

25 MS. KOVNER: -- I mean, this is

1 adopted through --

2 JUSTICE KAVANAUGH: So in your brief
3 you also say that the general rule is that when
4 a defendant's liability depends in part on the
5 propriety of an agency action, that action
6 ordinarily can be challenged in a civil or
7 criminal enforcement suit. That's the general
8 rule.

9 And the question here is whether to
10 read that exclusive to determine the validity
11 to deviate from the general rule.

12 Given the due process concerns and
13 given that Congress can be more explicit, as --
14 as it has in the Clean Air Act, why shouldn't
15 we stick with what you call the general rule
16 and read "exclusive to determine the validity"
17 to mean declaratory judgment actions?

18 MS. KOVNER: Well, I would really take
19 issue with the idea that those other statutes
20 are more explicit. And they use different
21 words. But "exclusive jurisdiction" is, I
22 think, quite clear language.

23 And it's the language that 703 --

24 JUSTICE KAVANAUGH: Well, but even --
25 I'm sorry to interrupt -- but even the statute

1 at issue in Yakus had a second sentence. And
2 The Court did not rely on the first sentence
3 alone, but specifically said the first sentence
4 coupled with the second sentence is what --

5 MS. KOVNER: I think -- I take that
6 point about Yakus, but I think if you wanted to
7 look for a -- to a statutory framework that
8 just uses the word "exclusive" and was around
9 before Yakus, you would look to the Urgent
10 Deficiencies Act framework.

11 JUSTICE GORSUCH: But, counsel,
12 though, you know, you -- you -- you point us to
13 the word "exclusive" but there are more words
14 after that.

15 MS. KOVNER: Yes.

16 JUSTICE GORSUCH: Exclusive to do
17 what?

18 MS. KOVNER: Yes. So in --

19 JUSTICE GORSUCH: And determine the
20 validity of --

21 MS. KOVNER: Yes.

22 JUSTICE GORSUCH: -- is the language
23 that we have here, and we don't have more than
24 that. We don't have the second sentence of
25 Yakus which you pointed out is different.

1 And why shouldn't we, given the
2 presumption of judicial review, and the
3 statutory canon that we normally look at
4 statutory terms in light of their neighbors,
5 and here all of the neighbors indicate a -- a
6 decision by a court that would actually hold
7 the regulation to be null and void.

8 And that didn't happen here. Your
9 regulation still exists today and -- and the
10 executive agencies can follow it for guidance.
11 Why wouldn't we redetermine the validity of --
12 mean -- mean kind of what it says?

13 MS. KOVNER: Well, let me -- let me
14 talk about the language and then about the
15 court's precedent. And I think that they both
16 are -- are -- sort of contradict that
17 understanding.

18 And I think every court of appeals has
19 been right to say that you determine the
20 validity of a regulation when you decline to
21 apply it on the ground that it's substantively
22 invalid. And if you look at the statute here
23 --

24 JUSTICE GORSUCH: You're not saying
25 it's substantively invalid. You're saying the

1 statute is clear.

2 MS. KOVNER: Well --

3 JUSTICE GORSUCH: The statute -- I'm
4 -- I'm being asked to interpret the statute.
5 That is what the case is about. And the
6 statute is clear.

7 I do not need the regulation. It is
8 nice. It is a lovely opinion letter by the
9 federal government and the -- the agencies may
10 choose to -- to follow it, but it's not
11 determining the validity of in a normal sense,
12 any more than we normally read the Federal
13 Register for -- for breakfast.

14 MS. KOVNER: Well, I think it is, Your
15 Honor, and if you look to the entirety of the
16 TCPA, it says, you know, first, here's the
17 substantive, you know, prohibition.

18 And, second, the agency may make rules
19 to implement that provision.

20 And so here a party came before the
21 court and said here is the rule that the agency
22 has made about what unsolicited advertisement
23 means. If the Court declines to follow it, it
24 has to do it for a reason.

25 And the reason here is it's saying the

1 rule is substantively invalid.

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

15 JUSTICE SOTOMAYOR: Well, but --

16 MS. KOVNER: -- do it with regard to
17 jurisdiction.

18 JUSTICE SOTOMAYOR: -- who could,
19 meaning let's assume -- and we can argue
20 whether this is a clear rule or not, whether
21 it's a legislative rule or an interpretive
22 rule. Let's put all of that aside.

23 The U.S. comes in, starts an
24 enforcement action in the district court. Can
25 -- you're saying to me the district court can't

1 decide the validity, but when they go to the
2 D.C. Circuit, can the D.C. Circuit look at the
3 validity of the rule under the statute?

4 MS. KOVNER: Not if it's an appeal
5 from an enforcement action. I think the way
6 that you would get into the court of appeals
7 would be that you file a Hobbs Act petition to
8 challenge some subsequent agency action or to
9 challenge the denial of your rule.

10 JUSTICE SOTOMAYOR: So that, too,
11 explains Weaver and Functional Music. But what
12 happens here, because you're saying even the
13 court of appeals here can't decide the validity
14 of the rule, correct?

15 MS. KOVNER: That's right. And the
16 reason we think that is the surrounding
17 statutory provision, so they say here is how
18 the court of appeals exercised its
19 jurisdiction, it's on the filing of a Hobbs Act
20 petition.

21 So we think those -- those --

22 JUSTICE SOTOMAYOR: So you disagree
23 with Respondents on that point? Because
24 Respondents seem to suggest that once it got to
25 the court of appeals, that court had the power

1 to decide whether --

2 MS. KOVNER: I -- I -- yes, I don't
3 think that's right. And I don't think any
4 court of appeals has understood it that way.

5 I think you have to comply with the
6 Hobbs Act procedures to get review in the court
7 of appeals.

8 And if I could just turn to one of
9 Justice Breyer's other questions about the
10 nature of, you know, this particular order and
11 it being a rule, I think the relevant case
12 would be CBS Broadcasting, which -- which --
13 which sort of addresses this kind of order,
14 which is an order that sets out a rule.

15 When the FCC acts, it's through
16 orders, even when it's making a rule. And the
17 Court in CBS Broadcasting said that's
18 reviewable under the Hobbs Act. So I think
19 that's what tells you this is a Hobbs Act case
20 even though it sets out a rule.

21 JUSTICE KAVANAUGH: Can I ask a
22 practical, rather than strictly legal question,
23 which is, since you are saying they can get
24 judicial review, they just have to go through
25 the motion for reconsideration or petition for

1 rule-making, and the other side is arguing,
2 well, just give us the judicial review and the
3 enforcement action.

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

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

8 JUSTICE KAVANAUGH: Or is there --

9 MS. KOVNER: Yes.

10 JUSTICE KAVANAUGH: -- something
11 different about the judicial review in the
12 former, which I think may be lurking?

13 MS. KOVNER: Yes. So I think two
14 things. First let me address why we think it's
15 better and, second, let me address the nature
16 of their review.

17 So we think judicial review that's
18 accomplished through the Hobbs Act is far
19 preferable and it's because the United States
20 gets to be a party. If it's from a
21 rule-making, you're going to have the
22 opportunity for other affected parties to
23 participate, to come in, to explain why they
24 think the rule should or shouldn't be changed.

25 You're going to have a single

1 nationwide proceeding that is going to set the
2 rule for the entire nation. And I would think
3 these kinds of rules that are subject to the
4 Hobbs Act are areas where Congress thought that
5 was really important.

6 I do want to address the question of
7 what the scope of the review is. So I think
8 what typically happens in this case, and
9 Respondent cites a number of examples, is
10 somebody goes before the agency and asks for a
11 declaratory judgment about, you know, what the
12 scope of the rule is or asks to change the
13 rule.

14 The agency says something about the
15 merits and then that gets appealed to the court
16 of appeals.

17 Then obviously you do get full review
18 of the merits of the underlying rule. I do
19 think it's a different case if the agency were
20 to say, you know, we decline to reconsider at
21 all. And then I do --

22 JUSTICE KAVANAUGH: And -- and --

23 MS. KOVNER: -- think you would agree
24 --

25 JUSTICE KAVANAUGH: And that happens

1 quite a bit, as you well know.

2 MS. KOVNER: That --

3 JUSTICE KAVANAUGH: And in that case
4 you would be -- you would be out.

5 MS. KOVNER: In that case all you get
6 --

7 JUSTICE KAVANAUGH: In that case you
8 could be subject to millions in liability
9 without ever having an opportunity to say that
10 the rule is illegal. Even if the rule everyone
11 thinks is illegal, you still get no
12 opportunity.

13 MS. KOVNER: And in that case I think
14 you would have an argument under Section 703
15 that the Petitioner here really doesn't have,
16 that I didn't have a meaningful opportunity to
17 get review --

18 JUSTICE KAVANAUGH: So let me stop you
19 there. So if you go for the petition for
20 reconsideration and the agency says actually
21 just as an exercise of discretion we're not
22 going to do that, that would mean that it
23 wasn't adequate?

24 MS. KOVNER: No, I think -- so I think
25 Petitioner, a person in Petitioner's shoe -- if

1 I may just briefly answer -- a person in
2 Petitioner's shoes should have brought their
3 challenge in a timely fashion.

4 If you had a party that really
5 couldn't have done that for some reason, then I
6 think you have a hard 703 question.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Two minutes, Mr. Phillips.

11 REBUTTAL ARGUMENT OF CARTER G.

12 PHILLIPS ON BEHALF OF THE PETITIONERS

13 MR. PHILLIPS: Thank you Mr. Chief
14 Justice.

15 I -- I think it's important to focus
16 in the first instance on a question Justice
17 Kagan and Justice Kavanaugh, you focused on,
18 which is what is the standard of review if you
19 go through the petition for reconsideration
20 process?

21 And this Court held in Board of
22 Locomotive Engineers that -- that under those
23 circumstances the courts reviewed the distinct
24 agency action resulting from the new position.

25 And it's only in very odd

1 circumstances where the Court actually has --
2 has any kind of an opportunity to take up the
3 underlying question of the validity or -- or of
4 the relationship between the underlying statute
5 and the old rule.

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

8 JUSTICE SOTOMAYOR: It has done it in
9 Functional Music and in Weaver. It's basically
10 taken a contrary position to yours. In both of
11 those cases, they looked to the validity of the
12 rule underlying the --

13 MR. PHILLIPS: No, no --

14 JUSTICE SOTOMAYOR: -- enforcement
15 actions.

16 MR. PHILLIPS: Well --

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

19 MR. PHILLIPS: I mean, Functional
20 Music is -- is clearly in our favor in terms of
21 its approach to these kinds of issues because
22 Functional Music even said we're not even sure
23 whether or not this could have been raised in
24 the first instance by these parties. But we're
25 not going to worry about it. We're going to

1 take it up as an enforcement matter and we're
2 going to evaluate it under those circumstances.

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

13 That issue warrants this Court's
14 review. Is there a circumstance where that
15 happens?

16 Where we know, as Justice Kavanaugh
17 said several times, when there is absolute
18 silence, the presumption always should be that
19 there is post-enforcement review of the
20 validity of what the FCC says.

21 For that reason, the judgment of the
22 court of appeals should be reversed and
23 judgment of the district court should be
24 affirmed.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 11:08 a.m., the case
3 was submitted.)

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