

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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McLAUGHLIN CHIROPRACTIC)
ASSOCIATES, INC.,)
Petitioner,)
v.) No. 23-1226
McKESSON CORPORATION, ET AL.,)
Respondents.)
- - - - -

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:17 a.m.

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3 behalf of the Petitioner.
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1 P R O C E E D I N G S

2 (11:17 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 23-1226, McLaughlin
5 Chiropractic Associates against McKesson
6 Corporation.

7 Mr. Wessler.

8 ORAL ARGUMENT OF MATTHEW W.H. WESSLER

9 ON BEHALF OF THE PETITIONER

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

12 Five years ago, in PDR Network, four
13 justices recognized that, properly construed,
14 the Hobbs Act does not require district courts
15 to treat agency orders that interpret federal
16 statutes as binding precedent. Instead, it
17 operates just like other pre-enforcement
18 channeling statutes by providing for direct
19 review of agency orders in the courts of
20 appeals.

21 McKesson and the government reject
22 this view. Together, they urge an
23 interpretation that would bind courts, including
24 this one, to agency interpretations of federal
25 statutes no matter how wrong, and that would be

1 true even for interpretive rules that, by
2 definition, do not carry the force of law,
3 transforming even the most informal agency
4 interpretations into permanently binding ones.

5 But none of the relevant markers,
6 text, context, structure, and history support
7 such a misguided and possibly unconstitutional
8 reading of the Hobbs Act. The key phrase,
9 "determine the validity of," authorizes courts
10 of appeals to determine whether an order is
11 legally in effect, and a court does this by
12 issuing a declaratory judgment that the order is
13 valid or invalid.

14 Context cinches this. The phrase is
15 immediately surrounded by terms which all denote
16 specific forms of equitable relief directed
17 against the order itself. The phrase "determine
18 the validity of" should therefore be read the
19 same way.

20 The Act's broader structure reinforces
21 this understanding. From beginning to end, it
22 establishes procedures designed to govern direct
23 review proceedings and elsewhere uses the phrase
24 "determine the validity of" to mean a
25 declaratory judgment.

1 And, finally, there's history. The
2 Act was never intended to implicate actions
3 between private parties. Instead, it was
4 patterned on similar statutes established for
5 the review of orders from other agencies that
6 have never been thought to bind district courts.

7 Consistent with the longstanding
8 recognition that interpreting statutes is a job
9 for the judiciary, this Court should construe
10 the Hobbs Act for what it is, a commonplace
11 jurisdictional provision that allows parties to
12 obtain equitable relief directly against agency
13 orders in the courts of appeals.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: What -- what would
16 you do with the Port of Boston case?

17 MR. WESSLER: I think Port of Boston
18 case is -- is different for a couple of reasons,
19 Justice Thomas, but, most importantly, in that
20 case, both parties that were involved in the
21 district court were also involved in the
22 regulatory proceeding seeking a petition for
23 review.

24 And I think, in that scenario, where
25 you've got two parties that are specifically

1 bound by an agency action, you've got normal
2 estoppel principles, issue preclusion
3 principles, that would apply. But we're not
4 really talking about a situation --

5 JUSTICE SOTOMAYOR: That's not what
6 the Court there said. The Court could have
7 easily said that, that -- collateral estoppel
8 principles apply, but it didn't. It said -- the
9 Court said that the Act is explicit that the
10 district court was without authority to review
11 the merits of the Commission's decision.

12 So you have a problem that the -- that
13 the analysis that the Court used is directly
14 contrary to your position.

15 MR. WESSLER: But I think the -- the
16 difference, Your Honor, in -- in -- in that case
17 compared with what we have here is you've got a
18 situation where the parties that are -- are
19 fighting about the meaning of the agency
20 interpretation were also parties in the agency
21 proceeding itself.

22 Here, you don't have a situation
23 where, you know, the plaintiffs in this case had
24 any role to play or had any -- were --

25 JUSTICE SOTOMAYOR: But they could

1 have.

2 MR. WESSLER: -- were involved at all.

3 JUSTICE SOTOMAYOR: You haven't denied
4 they had an opportunity to -- to --

5 MR. WESSLER: Well -- well, we don't
6 deny that -- that, in theory, they had an
7 opportunity.

8 JUSTICE SOTOMAYOR: No, not in theory.
9 They -- they -- the -- this is an unusual case
10 where the proceeding was actually in effect
11 during the litigation. In my experience -- and
12 I think we've said this -- if there is something
13 like that happening, the district court -- the
14 court below should stay letting that decision
15 become final, and --

16 MR. WESSLER: I think, Your Honor,
17 that illustrates what kind of empty promise
18 the -- the -- my friends on the other side's
19 interpretation would have for the Hobbs Act
20 because, you're right, what happened here was
21 the litigation was proceeding for six years and
22 the agency then issued this Amerifactors order.

23 If, in fact, what was supposed to
24 happen at that point was the -- the parties
25 in -- in the underlying litigation were required

1 to go and seek some sort of relief in front of
2 either the agency or a petition for review, we
3 are six years on from -- from that point in time
4 happening, and the agency hasn't actually
5 resolved what one -- what one party had actually
6 done in that case, which was to file for
7 reconsideration.

8 And so I think, as the concurrences in
9 PDR Network pointed out, that kind of circuitous
10 route to judicial review doesn't really make
11 very much sense either if you look at the terms
12 of the Hobbs Act text itself or in practical
13 sense.

14 If, in fact, it's the case that a
15 party could seek judicial review in some way,
16 why not allow district courts to -- to -- to
17 provide that review in a case which arises
18 organically from just a -- a claim that the --

19 JUSTICE SOTOMAYOR: Thank you,
20 counsel.

21 MR. WESSLER: -- the statute had been
22 violated.

23 JUSTICE SOTOMAYOR: What do I do with
24 the dictionary definition of "validity?"
25 "Valid" means things like lawful, meritorious,

1 or correct. No dictionary suggests that you
2 only need a declaratory judgment for that. We
3 have Heck versus Humphrey, where the Court said
4 that you cannot bring a wrongful conviction
5 claim under 1983 because doing so would amount
6 to a collateral challenge to the conviction's
7 validity. 1983 only requires money damages.
8 And yet we use "validity" in a very different
9 sense because nothing in the 1983 was going to
10 vacate the conviction.

11 So we've -- there are multiple ways to
12 challenge validity without a declaration.

13 MR. WESSLER: Well, I -- I -- I agree
14 with that, Justice Sotomayor. But I think that
15 the phrase "determine the validity" helps
16 provide, I think, clarity for what that term
17 means in the context of 2342.

18 It isn't just that a court is opining
19 on the -- on the validity in a colloquial sense
20 of -- of the legitimacy or reasoning of the
21 order. It's that it's finally resolving whether
22 that order is valid or invalid.

23 JUSTICE SOTOMAYOR: It was the same
24 language in Yakus, and yet -- "determine the
25 validity" -- and in Yakus, we said it was

1 exclusive.

2 I know you rely on the Second Circuit,
3 but, if you look at the analysis, it barely
4 mentions the Second -- the Second Circuit, the
5 sentence -- the second circuit -- sentence --
6 boy, my tongue got tied.

7 MR. WESSLER: Yes.

8 JUSTICE SOTOMAYOR: What it did was
9 focus in on that language, "determine the
10 validity."

11 MR. WESSLER: Well, I -- I
12 respectfully disagree with -- with how much it
13 relied on the first sentence or the second
14 sentence. I think it said those two sentences
15 together lead to the conclusion that we reach in
16 that case.

17 And, you know, the -- the key language
18 there as -- as --

19 JUSTICE SOTOMAYOR: But we made that
20 finding, and Congress a few years later uses
21 exactly the same language, "determine the
22 validity," in this statute, the Hobbs Act.

23 MR. WESSLER: It -- it -- it does, but
24 it doesn't use what I think is, in fact, the key
25 language of the second sentence, which is not

1 "determine the validity" but "consider the
2 validity."

3 And I think there's also another
4 distinction at least as a textual matter between
5 the -- the language of the Emergency Price
6 Control Act that was at issue in Yakus and here,
7 which is, if you look at -- at where that
8 language, "determine the validity," is in the
9 Emergency Price Control Act, it doesn't come --
10 it's not included in the -- in -- in a series
11 of -- of other terms that denote specific forms
12 of equitable relief.

13 And so, yes, the phrase "determine the
14 validity of" is the same between the two
15 statutes, but the context is different.

16 JUSTICE SOTOMAYOR: I don't
17 understand. I -- when you have a sentence that
18 doesn't say "and," it says "or," the equitable
19 relief is set forth at first. It says has
20 exclusive jurisdiction to "enjoin," that's
21 equitable. "Set aside," equitable. "Suspend"
22 and "hold in part."

23 And it doesn't use the word "and" --
24 "or" -- "and determine the validity of." It
25 says "or to determine the validity of." That's

1 broader. That's intended to be broader.

2 MR. WESSLER: Well, I respectfully
3 would disagree with that. I think it's -- it's
4 different and distinct but not necessarily
5 broader. What I think is notable about the --
6 the way that that -- that sentence is structured
7 is you have the first three terms -- "enjoin,"
8 "set aside," and "suspend" -- all referring to
9 some form of injunctive or coercive relief.

10 The next phrase, "determine the
11 validity of," refers to something entirely
12 different, albeit a form of equitable relief,
13 but a declaratory judgment.

14 JUSTICE SOTOMAYOR: Well, as I
15 mentioned, "or determine the validity of" can be
16 done in a variety of different ways. It doesn't
17 require just a declaratory judgment.

18 MR. WESSLER: I think, in the
19 abstract, "validity" might lead a -- a -- a -- a
20 reader to think that that could be true.

21 But I think, read in context, what's
22 going on in this provision, both with respect to
23 the use of the -- of the term "determine" but
24 also that it's appearing in a list of other
25 forms of equitable relief, that what the statute

1 is trying to do is it's trying to provide
2 some -- something of an instruction manual for
3 parties who are -- are planning to seek direct
4 review of an agency action.

5 And it's saying: For that kind of
6 petition or proceeding, where you actually want
7 the agency order to be enjoined in some way or
8 declared invalid, you can do that by filing your
9 petition within 60 days in a court of appeals.

10 But what it is not trying to do is
11 forever bind courts in -- in any garden-variety,
12 run-of-the-mill enforcement --

13 JUSTICE SOTOMAYOR: It does seem to me
14 that the word "exclusive" has a lot of power
15 otherwise.

16 JUSTICE JACKSON: Why do you say --

17 JUSTICE SOTOMAYOR: But thank you,
18 counsel.

19 JUSTICE JACKSON: -- that it forever
20 binds? I guess, if we have this mechanism in
21 the Hobbs Act for people to challenge the agency
22 order, I -- I don't understand why -- why you're
23 saying it forever binds -- the agency's order
24 forever binds.

25 MR. WESSLER: Well, I mean, you can

1 take this case. The district -- the minute
2 the -- the agency issued this Amerifactors
3 order, the district court in this case said: I
4 have no license to review whether the agency's
5 interpretation of the TCPA is correct or not.

6 JUSTICE JACKSON: Right, until the
7 court of appeals hears that question per the
8 statute.

9 MR. WESSLER: Well, of course, in this
10 case, it may never hear that question.

11 JUSTICE JACKSON: It may not, but
12 there is a mechanism for it to be corrected. I
13 mean, the suggestion that the agency issues an
14 order and the courts are suddenly divested of
15 any opportunity to address its validity, I
16 think, is inconsistent with the very provision
17 we're talking about here, which allows for the
18 courts of appeals to assess the validity.

19 At a minimum, you agree that the
20 courts of appeals can do that, right?

21 MR. WESSLER: Yes, with a maybe
22 friendly amendment, which is not assess the
23 validity but to determine the validity once and
24 for all. And I do think that there is an
25 important distinction --

1 JUSTICE JACKSON: No, I understand how
2 your argument plays out.

3 I guess what I'm just saying is it
4 seems to me that we're just talking about a
5 period of time in which the district court is
6 hearing a -- a -- a -- an enforcement action or
7 whatnot, and the agency issues an order. And
8 given that the Hobbs Act -- until the court of
9 appeals determines the validity, the district
10 court has to assume for the purpose of any
11 litigation that it's before it that it is a
12 valid order.

13 MR. WESSLER: I -- I -- I think we're
14 using the term "determine the validity" in
15 different ways.

16 I -- I think what the Hobbs Act says
17 and what it requires is that if -- if you are
18 seeking a petition for review to enjoin or
19 actually declare invalid once and for all this
20 agency action, then, yes, you must bring that
21 petition within 60 days in a court of appeals.

22 But, if what you want is just a
23 district court to -- to --

24 JUSTICE JACKSON: Not apply this order
25 in the context of the litigation that's before

1 it.

2 MR. WESSLER: Correct. Correct.

3 JUSTICE JACKSON: I appreciate that
4 distinction.

5 MR. WESSLER: Yes.

6 JUSTICE JACKSON: I understand it.

7 MR. WESSLER: Yes.

8 JUSTICE JACKSON: What I'm suggesting
9 is just the -- the ultimate conclusion on your
10 part that -- or at least you said it at the
11 beginning -- that this somehow means that the
12 courts never have a chance to get out from under
13 the agency order, that the agency order will
14 bind the courts forever, perhaps permanently you
15 say. And I -- I guess I just don't understand
16 that.

17 MR. WESSLER: Well, I -- I mean, I
18 think it comes up in -- in a number of different
19 contexts, but you could take, for instance, a
20 set of consumers who would have no reason to
21 ever think that an agency interpretation of the
22 TCPA would matter to them.

23 So the FCC could issue this
24 Amerifactors order --

25 JUSTICE JACKSON: Why wouldn't they if

1 we interpret -- if we say that when an agency
2 issues an order, unless and until the -- the
3 court of appeals determines its validity, all
4 litigation that is ongoing related to that order
5 is going to treat it as valid?

6 MR. WESSLER: Correct. My -- my --
7 my -- maybe I didn't -- I was unclear. My -- my
8 hypothetical was just imagine there is no case,
9 the Amerifactors order is issued. A -- a party
10 only has 60 days to file a petition for review
11 under the Hobbs Act.

12 So, in three years down the road, if
13 some consumers believe that a company has
14 violated the TCPA, they are not capable or
15 permitted to bring a petition for review under
16 the Hobbs Act.

17 JUSTICE JACKSON: There's no
18 equitable --

19 MR. WESSLER: No. This is a -- this
20 is a -- a bar -- a bar.

21 And, in that scenario, Your Honor, a
22 district court, under my friend's interpretation
23 of this provision, would have no choice but to
24 enforce the agency's interpretation of the TCPA.

25 JUSTICE KAGAN: Can I take you back,

1 Mr. Wessler, to Justice Thomas's initial
2 question about the Port case and about Venner
3 and ask you to tell me what your reply brief
4 means with respect to those cases?

5 Because what you say in your reply
6 brief is that those cases stand for a kind of
7 anti-circumvention principle, that we're not
8 going to allow people to evade the Hobbs Act,
9 and you say what those cases do is they shut
10 down collateral challenges that could have been
11 brought under the Hobbs Act.

12 So what do you mean by that? What do
13 you take the scope of those cases to be? Or,
14 said otherwise, what do you take the set of
15 collateral challenges to be that those cases
16 preclude?

17 MR. WESSLER: Sure. I think there are
18 maybe two kind of categories, the way to think
19 about it. The first would be in a -- in a case
20 in which the actual parties who are in the --
21 the -- the -- the civil proceeding were also
22 parties to an agency action. And I think, in
23 that scenario, that --

24 JUSTICE KAGAN: That's not Port of
25 Boston, right?

1 MR. WESSLER: Well, that is Port of
2 Boston. In Port of Boston, both parties that
3 were the subject of the district court
4 proceeding were also parties in the -- in the
5 agency action that was taking place kind of
6 simultaneously.

7 And so, in that scenario, I think it
8 is fair to say: Well, an order from the
9 district court would effectively enjoin the
10 agency action in a way that -- that would
11 suspend the -- the -- the -- the functioning of
12 the order and would be subject to the Hobbs Act.

13 But I don't think in any of those old
14 cases, Venner, Port of Boston --

15 JUSTICE KAGAN: You -- you said that
16 there were two things? You said --

17 MR. WESSLER: Sorry. The other --
18 the -- I think the other category would be a
19 case in which you might have one party who is
20 specifically given, like, a waiver by an agency.

21 And I think, in a scenario like that,
22 if it later got sued and the only -- the only
23 agency action related to that specific party,
24 the effect of a later suit might be to suspend
25 the agency order in a way that would look like

1 the kinds of equitable relief that the Hobbs Act
2 covers.

3 But, once you're out of those two
4 pretty narrow categories -- and, certainly, that
5 isn't the case we've got here or what we had in
6 PDR Network -- it cannot be the case, I think or
7 would submit to the Court, that the Hobbs Act
8 covers any proceeding that arises in the -- in
9 the normal course of a district court's
10 jurisdiction in which the -- the district court
11 is being asked to evaluate or interpret the
12 meaning of a statute and compare the agency's
13 reasoning.

14 JUSTICE KAGAN: So I -- I understand
15 that position, but I guess I'm wondering why
16 you've argued this case quite so broadly. I
17 mean, it seems to me that you win this case so
18 long as you say: There's at least a requirement
19 that the parties bringing the suit are legally
20 bound, and that's not met here, and so we win on
21 that ground.

22 Like, why go further than that?

23 MR. WESSLER: Well, I mean, we -- I
24 will take a -- a -- a reversal win in whatever
25 way the Court thinks is best. But I do think

1 that there is something quite odd about an
2 interpretation that the other side has offered
3 for 2342 that would extend to cover a district
4 court's ability to interpret the statute.

5 And I think that really is what we're
6 talking about in this case. I think it's even
7 more extreme when you look at the nature of the
8 Amerifactors order here, which all parties
9 argued and agreed below was an interpretive
10 order, one that would --

11 JUSTICE KAGAN: Right. I mean, I
12 guess that's exactly what I'm suggesting. I
13 mean, I think that the -- in our initial opinion
14 in -- remind me of the name --

15 MR. WESSLER: PDR -- PDR Network.

16 JUSTICE KAGAN: PDR, right. That the
17 majority opinion basically says, you know --
18 I -- I think it's important to us the majority
19 opinion says whether this is an interpretive
20 rule. And, here, it seems to me you can just
21 come up and say: This is an interpretive rule,
22 the majority in PDR got it right that that was
23 an important question, and if it's an
24 interpretive rule, you know, it -- it falls
25 outside the Hobbs Act.

1 MR. WESSLER: Correct.

2 JUSTICE KAGAN: End of case.

3 MR. WESSLER: Correct. And we
4 would -- we would accept a -- a decision going
5 no further than that.

6 I do think that it is hard to square
7 the -- McKesson and the government's
8 interpretation of 2342 as expansively as they
9 have argued it to mean anytime a district court
10 is -- is asked to assess the -- the -- the
11 meaning of a statute, if the agency has taken a
12 position on that already, it is -- it is barred
13 from doing that.

14 And I don't think that the -- that the
15 language of 2342 or the structure of the Hobbs
16 Act could be read to -- to -- to sustain that
17 kind of understanding about --

18 JUSTICE JACKSON: What about its
19 purposes?

20 MR. WESSLER: -- what Congress was
21 doing.

22 JUSTICE JACKSON: How -- how do you
23 square your point with its purposes?

24 MR. WESSLER: Sure. I mean, I -- I
25 don't think there's any indication if you look

1 back in the -- in the sort of transformation
2 from the Urgent Deficiency Act to the Hobbs Act
3 what Congress was trying to do to suggest that
4 they were -- that the design of and goal of this
5 statute was to do the -- to do that kind of
6 complete removal of the ability of courts to --

7 JUSTICE JACKSON: I mean, wasn't it
8 trying to --

9 MR. WESSLER: -- assess the meaning.

10 JUSTICE JACKSON: -- wasn't it trying
11 to establish finality, predictability,
12 uniformity? When -- when the court of appeals
13 rules on the validity or does the statutory
14 interpretation you're talking about, we then
15 have a sort of definitive interpretation that
16 applies at least to a particular region.

17 It seems to me that to say that the
18 court -- or that the Congress was still trying
19 to preserve the district courts' ability to
20 make, you know, essentially ad hoc
21 determinations within the context of each of its
22 cases flies in the face of the idea that they
23 were channeling exclusive jurisdiction to
24 determine the validity of the agency's
25 interpretation in the court of appeals.

1 MR. WESSLER: Yes, but we -- we may
2 just disagree on what "determine the validity"
3 in that -- in this context means, because I
4 agree with everything you just said, but I -- I
5 think it is tailored to a specific kind of --
6 of -- of remedy for parties who are adversely
7 affected by agency orders.

8 JUSTICE JACKSON: But why does the
9 remedy matter? If you -- if you accept -- if
10 you agree with my premise that what Congress was
11 trying to do was get a rule out there that is
12 being consistently applied, then it really
13 doesn't relate to the remedy. It relates to the
14 merits of the party's claim that this is a valid
15 or invalid interpretation.

16 MR. WESSLER: I --

17 JUSTICE JACKSON: And it wanted the
18 court of appeals to make that decision.

19 MR. WESSLER: I -- I disagree with
20 that. I think what -- what Congress wanted to
21 do was to create a streamlined process for
22 obtaining quick review of agency actions that
23 would either uphold them throughout or strike
24 them down and invalidate them.

25 But what it was not trying to do --

1 and we -- we know this, I think, for a couple of
2 reasons -- was to extend the Hobbs Act's
3 coverage further to foreclose district courts in
4 the mine-run case from even evaluating whether
5 the agency's interpretation of a statute is
6 correct.

7 And we know that, I think, for --
8 there are a couple of, I think, indicia. One,
9 you know, it had -- Congress had -- as we
10 discussed earlier, it had Yakus and the
11 Emergency Price Control Act out there when it
12 was enacting the Hobbs Act, and it did not
13 integrate into the Hobbs Act the key second
14 sentence of that statute which had been
15 interpreted, along with the first sentence, to
16 have this result.

17 But I think just as significantly, we
18 know -- and the concurrences in PDR Network
19 pointed this out -- we know that Congress knows
20 how to accomplish, I think, what -- what Your
21 Honor is suggesting, which is to eliminate the
22 ability of district courts of any type -- to
23 provide any judicial review in an enforcement
24 proceeding over an agency interpretation of a
25 statute.

1 We see that in the environmental
2 statutes. There are three or four of them.
3 And, you know, that language, which I think is
4 quite clear, provides a kind of negative
5 prescription that district courts do not have
6 the authority to provide any sort of judicial
7 review in enforcement proceeding, just is absent
8 from the -- the Hobbs Act here.

9 And I think that that's a quite
10 significant distinction and one, I think, that
11 we have to, again, as -- as -- as we know from
12 PDR Network, recognize that -- you know, that
13 the -- the silence that the Hobbs Act has when
14 it comes to that kind of question, I -- I think,
15 ought to be significant in the way we understand
16 the background rule that's operating here, which
17 is, for -- for -- for, you know, claims that
18 don't fall within one of these channeling
19 statutes, a district court is always free in
20 that context to assess the, you know, reasoning
21 of an agency's interpretation and interpret the
22 statute itself.

23 And I think the Hobbs Act, because it
24 didn't foreclose that kind of judicial review
25 that we see from other statutes, means that

1 district courts must remain free to be able to
2 do that in a case like this one or like in what
3 we had in PDR Network.

4 JUSTICE GORSUCH: Mr. Wessler, I'm --
5 I'm struggling a little bit with the off-ramp
6 you were discussing with Justice Kagan, and as I
7 understand it, the idea goes that the Hobbs Act
8 doesn't even apply at all because the
9 Amerifactors order wasn't really an order; it
10 was an interpretive rule.

11 But it was an adjudication, and -- and
12 there was a final order issued in that
13 administrative adjudication. That would seem to
14 be, to me, every day of the week and twice on
15 Sundays an order and therefore implicate the
16 Hobbs Act and -- and raise unavoidably the
17 larger question in this case.

18 What am I missing?

19 MR. WESSLER: Yeah, I -- I don't think
20 we disagree with any of that, and -- and I don't
21 think our view is that this isn't an order.

22 I -- I think just because -- you know,
23 the other side has said, well, it's an
24 adjudication and so somehow that doesn't
25 implicate whether there's an interpretive or

1 legislative rule. We think --

2 JUSTICE GORSUCH: I -- I -- one -- I
3 know what an interpretive --

4 MR. WESSLER: Yes.

5 JUSTICE GORSUCH: -- rule looks like,
6 and it doesn't look like an administrative
7 agency order to parties in an adjudication.

8 MR. WESSLER: Right.

9 JUSTICE GORSUCH: At least that's what
10 I had always understood, but maybe I'm missing
11 something.

12 MR. WESSLER: Right, although what --
13 what we have in this order -- it -- it is an
14 adjudicatory order. What we have in this order
15 is an agency simply advising the public of its
16 view of the meaning of a specific phrase in the
17 TCPA. And so, you know, I do think that --

18 JUSTICE KAGAN: And you don't
19 understand that as binding on you, correct?

20 MR. WESSLER: Correct.

21 JUSTICE GORSUCH: No, it's not binding
22 on you, but it's binding, isn't it?

23 MR. WESSLER: Well, we wouldn't -- we
24 wouldn't say it's -- it's binding.

25 JUSTICE GORSUCH: It's just a piece of

1 paper in the world? I mean --

2 MR. WESSLER: Yes. It would be like
3 an informal guidance offering a -- a view of --
4 of -- of a statute. We don't think that
5 there -- actually carries any binding
6 significance. And so I think -- you were asking
7 about an off-ramp. I do think that in that way,
8 you know, what a district court, in a -- in a
9 garden-variety, you know, civil case, could do
10 is it could simply ignore the order.

11 JUSTICE GORSUCH: That's not how the
12 court of appeals understood it.

13 MR. WESSLER: Certainly not.
14 Certainly not. But we think that that -- if
15 that were -- if, in fact, the court wanted to, I
16 think, move in this direction, it wouldn't be
17 determining the validity of anything because the
18 order is non-binding by nature because it's
19 interpretive.

20 Now the Ninth Circuit, you know, is
21 the only circuit that we're aware of that has
22 adopted an understanding of the Hobbs Act that
23 renders the classification between interpretive
24 and legislative rules irrelevant. In the Ninth
25 Circuit, it is -- it does not matter. Any --

1 any order that is subject to the Hobbs Act
2 immediately withdraws jurisdiction from the
3 district court to do anything.

4 And I think -- I would submit to the
5 Court that that just cannot be right because it
6 does mean that even non-binding informal
7 guidance is capable of binding district
8 courts --

9 JUSTICE SOTOMAYOR: Counsel, the
10 problem I'm having with your interpretation is I
11 don't even know why they gave jurisdiction to
12 the agency at all to do anything, meaning --
13 Justice Kavanaugh expressed a concern that if a
14 defendant could not challenge an agency's order
15 in an enforcement proceeding, that might be
16 unfair or even raise due process concerns.

17 But your interpretation means that if
18 a regular -- regulated party seeks an agency
19 order to determine whether its conduct is
20 permissible, it asks the agency for that, it
21 relies on that order to send the e-faxes, and
22 it's still liable for treble damages to any
23 plaintiff who wants to come in and say: Even
24 though I had an opportunity to challenge this
25 interpretation before the agency, I didn't have

1 to bother; I could just wait and sue anyone who
2 followed the agency's order, correct?

3 MR. WESSLER: Well, a -- a couple
4 of --

5 JUSTICE SOTOMAYOR: That's the
6 downside.

7 MR. WESSLER: -- a couple of responses
8 to that. I mean, first, I -- I do not think
9 that a defendant would necessarily be on the
10 hook in that scenario for treble damages because
11 that does -- the -- the treble damages provision
12 of the TCPA requires -- or there is a built in a
13 reasonable reliance issue.

14 JUSTICE SOTOMAYOR: But it still would
15 be liable.

16 MR. WESSLER: But I do think you're --
17 you're -- you're not wrong to suggest that there
18 might be some reliance interests at stake here.
19 I do not think those can overcome what the text
20 of this statute means.

21 I also think that if we're --

22 JUSTICE SOTOMAYOR: Unless we believe
23 that the Act, by giving an out to people who
24 didn't have an -- an -- an adequate opportunity
25 for review, that's the out --

1 MR. WESSLER: Well, I -- I don't think
2 that -- yeah.

3 JUSTICE SOTOMAYOR: -- that it was --
4 that it intended to make these orders final
5 unless overturned by the court of appeals.

6 MR. WESSLER: May I answer?

7 CHIEF JUSTICE ROBERTS: Certainly.

8 MR. WESSLER: Yeah. With respect, I
9 do not think adequacy is a sufficient safety
10 valve, and I think that's true for at least two
11 reasons.

12 The first, Your Honor, is that, you
13 know, the -- you know, the -- this Court has
14 never taken a position on what adequacy in the
15 APA means. I -- I do not think that the point
16 of a jurisdictional statute would be to invest
17 district courts in all of these cases in -- from
18 assessing the specific circumstances of when
19 individual parties in their case may or may not
20 have known about a particular order that would
21 have given rise to a Hobbs Act claim.

22 And I also think it begs a question,
23 exclusive jurisdiction to do what, which, in
24 this case, we would submit the Hobbs Act only
25 requires for petitions that are directly

1 challenging agency actions.

2 CHIEF JUSTICE ROBERTS: Thank you,

3 counsel.

4 Justice Thomas?

5 Justice Alito?

6 Anything further, Justice Sotomayor?

7 No?

8 Justice Kagan?

9 Justice Kavanaugh? No?

10 Justice Barrett?

11 Justice Jackson?

12 Okay. Thank you, counsel.

13 MR. WESSLER: Thank you.

14 CHIEF JUSTICE ROBERTS: Mr. Palmore.

15 ORAL ARGUMENT OF JOSEPH R. PALMORE

16 ON BEHALF OF THE RESPONDENTS

17 MR. PALMORE: Thank you, Mr. Chief

18 Justice, and may it please the Court:

19 The Hobbs Act's text, history,

20 precedent, and purpose all support the

21 conclusion that a lower court here could not

22 impose liability on McKesson for engaging in

23 conduct that the FCC said did not violate the

24 TCPA, where plaintiff concedes it had adequate

25 opportunity for judicial review under the Hobbs

1 Act.

2 The statutory text and structure show
3 that a Hobbs Act course exclusive jurisdiction
4 to determine the validity of an order means it
5 alone can evaluate whether the order is correct.
6 If Congress had wanted to limit this exclusivity
7 to declaratory judgments, it would have done so
8 expressly.

9 Instead, Sections 2349 and 2342
10 together show that the Hobbs Act court has
11 exclusive jurisdiction not just over remedies
12 against the order but also over evaluation of
13 its merits.

14 And that is exactly how this Court
15 interpreted predecessor statutes whose terms and
16 precedent Congress incorporated into the Hobbs
17 Act. Under both the Urgent Deficiencies Act and
18 the Emergency Price Control Act, this Court
19 construed those statutes to bar collateral
20 review in enforcement and private-party disputes
21 even when no declaratory judgment or other
22 relief was sought against the order.

23 And consistent with that precedent,
24 Justice Thomas, the Court in Port of Boston
25 interpreted the Hobbs Act's exclusive

1 jurisdiction to mean "review the merits," and on
2 that understanding, it barred redetermination of
3 the same issue decided by an agency in a private
4 payment dispute, again, where no declaratory
5 judgment or relief against the order was sought
6 and whether or not the party participated before
7 the agency.

8 Finally, the Hobbs Act's purpose of
9 establishing finality, certainty, and reliance
10 would be undermined by Petitioner's position
11 that an FCC order, even if affirmed under Hobbs
12 Act review, could forever be subject to
13 second-guessing in state and federal courts all
14 across the country.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: So, as I understand
17 you, if a case -- if this case were to come
18 before a district judge, an order before a
19 district judge, and a district judge says this
20 is the most ridiculous opinion I have ever seen
21 in my many years on the bench, however, I have
22 no authority to review it, that -- you don't see
23 a problem with that?

24 MR. PALMORE: Justice Thomas, this is
25 not an issue of agency versus court. This is an

1 issue of which court and when. And I think it's
2 important to emphasize how this --

3 JUSTICE THOMAS: It's still -- you
4 have the same -- you have a collateral attack.
5 You have a disagreement between two parties.
6 They're in court. And the district judge says:
7 Under the Hobbs Act, I have no authority, even
8 though I can see this is -- this order is
9 ridiculous.

10 MR. PALMORE: That's because the Hobbs
11 Act court has that authority. And if the order
12 is ridiculous, the Hobbs Act court will reverse.
13 And I think it's important to emphasize page 4
14 of the cert reply says Petitioners ask this
15 Court to decide the question presented on the
16 assumption that they had a prior and adequate
17 opportunity for judicial review under the Hobbs
18 Act.

19 So the -- the -- the issue about delay
20 and long-ago orders that were presented in PDR
21 is not presented here.

22 JUSTICE JACKSON: Do you -- do you
23 concede that if they didn't have an adequate
24 opportunity that we would have the problem that
25 Petitioner raises here?

1 MR. PALMORE: Well, we think adequacy
2 is an important safety valve. And -- and -- and
3 Justice Kavanaugh, in his concurrence in PDR
4 Network, canvassed a number of concerns with an
5 overly strict reading of exclusivity in this
6 scheme. And we -- we understand that --

7 JUSTICE JACKSON: What about the
8 timing? I mean, I -- I had a little colloquy
9 with Petitioner, and he says that, you know,
10 some of these customers, people affected, would
11 have no -- would have had no reason to bring
12 this up with the court of appeals within 60 days
13 of the original order.

14 MR. PALMORE: So two responses,
15 Justice Jackson.

16 One is that concern is not presented
17 here, but given the concession that they did
18 have a prior and adequate opportunity and they
19 just chose not to exercise it, so their view is
20 Hobbs Act exclusivity is optional, they can go
21 either way.

22 Two, in a hypothetical case where that
23 issue was presented, we view that as an adequacy
24 problem. We think Congress addressed potential
25 unfairness, potential due process concerns that

1 Justice Kavanaugh canvassed in his PDR Network
2 concurrence, not through limiting the exclusive
3 jurisdiction of the Hobbs Act court but by
4 creating an adequacy safety valve, and we think
5 that's where the consideration of -- of timing,
6 interests, standing, that's where that would go.

7 JUSTICE ALITO: Suppose I'm a -- a
8 district judge in New Jersey and someone shows
9 me a Ninth Circuit opinion on a question of law
10 that I'm considering. And if I conclude that --
11 and -- and there's no Third Circuit precedent on
12 point and no Supreme Court precedent on point.

13 If I disagree with the Ninth Circuit's
14 interpretation, am I invalidating the Ninth
15 Circuit decision?

16 MR. PALMORE: No, Justice Alito. But
17 that's not the statutory language here. It's
18 not "invalidating." It's "determining the
19 validity," which is a capacious term, and it
20 wasn't one that was new to this statute. It had
21 just been construed by this Court in Yakus. And
22 it's comfortably understood to mean evaluate the
23 soundness. The -- this Court said in Port of
24 Boston it meant review the merits or
25 collaterally redetermine the same issue.

1 And if I can just make one quick point
2 on Port of Boston. Mr. Wessler says: Well,
3 that party participated. There were alternative
4 holdings in Port of Boston.

5 The first holding was we think you
6 participated through an agent. But the Court
7 was crystal-clear. It went on and said: Even
8 if not, your interests were implicated. You
9 could have participated and you chose not to.

10 Having made that choice, you can't now
11 get a collateral redetermination of that same
12 issue in the private payment dispute. And that
13 was a -- a dispute over the meaning of Section
14 15 of the Shipping Act. It was a statutory
15 construction question.

16 And, Justice Kagan, this kind of idea
17 of -- of is this a non-coercive order, the
18 Amerifactors issue, came up in Port of Boston
19 also, because the party there who was objecting
20 to that order and seeking to get collateral
21 review of it said this order has no course of
22 effect. This is just the agency kind of opining
23 on the meaning of the Shipping Act.

24 And what this Court said was that's
25 still reviewable under the Hobbs Act because

1 there's this -- it's a finality consideration,
2 does it determine rights or obligations and do
3 legal consequences flow from it?

4 And the Court said: Yes, they do.
5 When an agency with statutory authority
6 construes a statute within its jurisdiction,
7 that means something. And it cited this Court's
8 decision in the Frozen Foods Express case, which
9 was construing the APA declaratory order
10 provision which is now codified in 54(e), which
11 says agencies have authority to "terminate
12 controversy or remove uncertainty."

13 And that's what this order did. It
14 was an adjudication, as Justice Gorsuch pointed
15 out, with real legal effect. And they've
16 conceded again that they could have sought Hobbs
17 Act review. That -- they -- they asked the
18 Court to decide the question on that
19 understanding but opted -- simply opted not to.

20 JUSTICE KAVANAUGH: You -- you
21 mentioned Yakus in response to Justice Alito.
22 Of course, the other side points out that Yakus
23 had the two sentences, "determine the validity"
24 and "consider the validity."

25 Can you just address that?

1 MR. PALMORE: Sure, Justice Kavanaugh.

2 What Congress did in the Hobbs Act was
3 combine the two sentences. So the first
4 sentence in Yakus said determine -- the
5 emergency court of appeals has exclusive
6 jurisdiction to determine the validity, and then
7 the second sentence said, and no other court can
8 consider the validity, enjoin, or set aside.

9 What Congress did in the Hobbs Act was
10 meld the two sentences into one, and it drew
11 both from that Emergency Price Control Act and
12 also from the Urgent Deficiencies Act. So it
13 takes "determine the validity" and "enjoin" from
14 the first and second sentence of Yakus; it takes
15 "set aside" from the second sentence of Yakus,
16 also from the Urgent Deficiencies Act. It takes
17 "suspend" only from the Urgent Deficiencies Act.

18 So it's drawing on both these sources,
19 both of which had been interpreted to bar
20 collateral redetermination of the same issue,
21 and it combined them into one.

22 To the extent that my friend is saying
23 that the second sentence is necessary, Congress
24 can provide exclusive jurisdiction to a court
25 without stating the necessary implication. It

1 can, of course, choose to do that if it wants
2 to, that exclusive jurisdiction over A means
3 other courts can't exercise jurisdiction over A,
4 but there's no rule I'm aware of that they have
5 to -- to proceed that way.

6 And I think, given the old-soil
7 principle, the way that this language was
8 construed in Port of Boston, that the -- that
9 "determine the validity" has the meaning that we
10 and the government are suggesting.

11 JUSTICE ALITO: Yakus was a very harsh
12 decision rendered in a wartime atmosphere based
13 on particular facts and a particular statute,
14 and you want us to read an awful lot into it.

15 Why should we do that?

16 MR. PALMORE: Justice Alito, you are,
17 of course, correct that the -- Yakus was a World
18 War II statute, but I think it's important to
19 emphasize that the discussion of the wartime
20 exigencies was only in the due process part of
21 the decision. It was not in the statutory
22 construction part of the decision, which is what
23 we're relying on here. And that makes sense.
24 Statutes -- the meaning of statutes don't change
25 depending on whether the country is at war or

1 enjoying peace.

2 The due process holding in Yakus,
3 Congress responded to that by amending the
4 Emergency Price Control Act, not to change the
5 "determine the validity" language or the
6 exclusivity but to reopen a window for criminal
7 defendants, civil defendants, to seek review
8 through that exclusive path in the event they
9 were prosecuted or sued.

10 And, here, of course, the -- kind of
11 the -- what you describe as the harsh result in
12 Yakus is avoided, we believe, by Section 703.
13 703 was not on the books at the time of Yakus.
14 It was enacted two years later and before the
15 Hobbs Act. And so Congress adopts the Hobbs Act
16 knowing that 703 is there, and we believe it
17 provides in a very important safety valve.

18 JUSTICE GORSUCH: I'd like to ask you
19 a question about 703 -- your view of 703. Of
20 course, it's not in the Hobbs Act, but you're
21 interpreting the Hobbs Act in light of it. I
22 understand that. It seems to me we have two
23 choices basically, one recognizing that there's
24 an order here, as, indeed, there is. You can
25 say, well, on the one hand, the Hobbs Act

1 doesn't preclude the district court from saying
2 this is the craziest decision I ever saw because
3 it's not undermining that order in any way; it's
4 just adjudicating the rights of the parties
5 presently before the court. That's one option.

6 The second option is to say, ah, yeah,
7 it's still sort of affecting that order in some
8 way, but no worries if -- if you didn't have an
9 adequate opportunity to challenge it. And
10 that's the -- that's what you're asking us to
11 do.

12 Are we going to then have a
13 jurisprudence of adequacy? And, if so, what
14 does that look like for parties who weren't
15 alive at the time of -- of the administrative
16 proceeding, for parties who wish to present
17 different arguments than was considered by the
18 agency at the time, for parties with different
19 factual circumstances than those that the agency
20 may have had in mind at the time it adjudicated
21 the case before it? Thoughts.

22 MR. PALMORE: Sure, Justice Gorsuch.
23 I'll give you some thoughts. I mean, I think I
24 would emphasize at the outset that that issue is
25 not presented here because adequacy is -- is

1 conceded.

2 JUSTICE GORSUCH: I understand that.

3 MR. PALMORE: Right?

4 JUSTICE GORSUCH: But -- but you're

5 asking us --

6 MR. PALMORE: So --

7 JUSTICE GORSUCH: -- to open a new

8 door and -- and -- and create a jurisprudence of

9 adequacy. And I just want to understand what it

10 would look like because I think those -- those

11 are our two choices in this case, right, that --

12 that I outlined at the very beginning of my --

13 my question?

14 MR. PALMORE: Well -- right.

15 JUSTICE GORSUCH: One -- one --

16 MR. PALMORE: You can -- you can

17 enforce what we believe to be the proper reading

18 of the Hobbs Act, bracketing that adequacy

19 exists --

20 JUSTICE GORSUCH: Right.

21 MR. PALMORE: -- for -- for hard

22 cases.

23 JUSTICE GORSUCH: Or simply say

24 that --

25 MR. PALMORE: Or we could lose,

1 right --

2 JUSTICE GORSUCH: -- you could lose,
3 right.

4 MR. PALMORE: -- on the Hobbs -- on
5 the Hobbs Act. Sure.

6 JUSTICE GORSUCH: Those are the two
7 choices. But, once -- if we buy yours --

8 MR. PALMORE: Right.

9 JUSTICE GORSUCH: -- what does this
10 jurisprudence of adequacy look like?

11 MR. PALMORE: Well, I think that --
12 that -- that there are a couple data points
13 already in the Court's cases. So PDR Network,
14 admittedly, not a definitive holding, but it
15 remanded for consideration of adequacy. And we
16 understand that to be a response to the
17 defendant's argument there that they would have
18 had no interest in participating at the FCC or
19 seeking Hobbs Act review at the time that that
20 order issued. And the Court viewed that
21 party-specific argument as a possible adequacy
22 issue.

23 We think Port of Boston, although it's
24 not citing 703, is consistent with that because
25 it looked at the specifics of that party and it

1 said you had every interest in participating and
2 you didn't.

3 JUSTICE GORSUCH: So what I think
4 it'll wind up doing is saying, for the people
5 who are really closely tied in -- in at the
6 moment, who could have been there or were there,
7 a kind of collateral estoppel sort of idea. But
8 I don't know what it means much beyond that.
9 Five years out, 10 years out, different people,
10 different arguments, different facts.

11 Are -- are we just going to wind up in
12 the same place?

13 MR. PALMORE: Well, Justice Gorsuch,
14 we think Congress was balancing two competing
15 interests here. It was -- it was balancing
16 finality reliance, what this Court called in
17 Corner Post the kind of finality-focused
18 orientation of the Hobbs Act, with, we think,
19 fairness and due process concerns. And so
20 Congress is, of course, not required to pursue
21 all its objectives to the ends of the earth. It
22 can balance them. And we think that that's what
23 it did here.

24 But I think what I'd emphasize is,
25 even if there was some work to do in future

1 cases, that would all be work to do about the
2 meaning of "adequacy" because that's --

3 JUSTICE GORSUCH: I -- I understand
4 that --

5 MR. PALMORE: Yes.

6 JUSTICE GORSUCH: -- but, if -- if
7 finality is so important and it turns out that
8 your interpretation doesn't do much to advance
9 finality beyond a few parties presently, what --
10 what are we here about?

11 MR. PALMORE: Well, I think it would,
12 Justice Gorsuch. Of course, here, again,
13 adequacy is conceded, so the Court doesn't
14 really have to get into that. But, in -- you
15 alluded to this yourself. I mean, the FCC
16 operates in a highly regulated -- you know, this
17 is a highly regulated industry. You have an
18 amicus brief from some of the major trade
19 associations who are repeat players. They have
20 armies of people who follow what goes on at the
21 FCC. They engage in litigation. Those folks
22 are like -- unlikely to be able to make any kind
23 of adequacy argument, and they are the ones who
24 are often engaged in this litigation.

25 But we think Congress allowed a --

1 a -- a safety valve.

2 JUSTICE GORSUCH: But -- but then
3 we're going to have the Corner Posts of the
4 world who are going to come in and say: I
5 wasn't alive, I wasn't there, I wasn't in
6 business. And we've said the statute of
7 limitations allows them to file their claims.
8 That's got to mean something, right?

9 MR. PALMORE: Well, perhaps so, Your
10 Honor. So, I guess, the -- in our conception --
11 and the government has a different view on
12 adequacy, which is probably a less capacious
13 view.

14 JUSTICE GORSUCH: Substantially, I
15 suspect.

16 MR. PALMORE: Substantially, right.
17 We have more of a -- you know, we -- we believe
18 it can be more party-specific, but I think it's
19 important to emphasize the implications of -- of
20 Petitioner's view, right, is that a party could
21 go to the agency, say I want to send faxes to
22 online fax services, get a declaratory order,
23 which is like a declaratory judgment, someone
24 wants guidance, they want a ruling before they
25 act at their own peril. The agency could say

1 that's right; that's not covered. That could be
2 affirmed by a court of appeals under the Hobbs
3 Act.

4 Then, years later, they could be
5 exposed to liability in a federal court, in a
6 state court, for having relied on and sent the
7 faxes that the FCC in a Hobbs Act-affirmed order
8 said was permissible. We think that --

9 JUSTICE JACKSON: Mr. Palmore?

10 MR. PALMORE: Yes.

11 JUSTICE JACKSON: Sorry. Mr. Palmore,
12 can you speak to Petitioner's argument about
13 interpretive rule? Do you agree that this is an
14 interpretive rule?

15 MR. PALMORE: Absolutely not, Justice
16 Jackson. This is an adjudication. It's not a
17 rule of any kind. It's an adjudication.

18 And through -- in 5 U.S.C. 554(e),
19 Congress gave agencies authority to issue
20 declaratory orders with like effect as to other
21 orders to terminate a controversy or remove
22 uncertainty. And that's what it did here.

23 The FCC, like many other agencies,
24 based on this Court's decision in *Chenery II*, in
25 the *NLRB versus Bell Aerospace*, often announces

1 kind of broad things that look like rules
2 through declaratory orders. It did it here with
3 notice-and-comment rulemaking.

4 JUSTICE JACKSON: And you consider
5 this to be binding then?

6 MR. PALMORE: Yes. Yes. It's binding
7 in -- it's binding because the -- the FCC was
8 not just deciding a dispute between two
9 particular parties; it was applying the statute
10 to a particular technology, which was this --
11 these online fax services.

12 JUSTICE KAGAN: But -- so, I mean,
13 suppose that I think that you have some good
14 arguments about why it's not just suits asking
15 for declaratory judgments that fall within the
16 Hobbs Act but that you at least have to have a
17 suit that's challenging an agency decision with
18 the force of law, that that's a necessity to
19 fall within the Hobbs Act.

20 You think that if that's the rule you
21 are covered?

22 MR. PALMORE: Absolutely. And I think
23 Port of Boston stands for that proposition.
24 Port of Boston, again, if you look at the
25 relevant part --

1 JUSTICE KAGAN: So do you think that
2 that should be the rule? Yeah, you don't have
3 to have a declaratory judgment, but -- but the
4 only thing that the Hobbs Act is talking about
5 is challenging -- challenges to agency rulings
6 with the force of law, that the Hobbs Act just
7 excludes anything that doesn't have the force of
8 law?

9 MR. PALMORE: I think that's -- that
10 that's right. So the SG cites in their brief a
11 Seventh Circuit decision called the American
12 Trucking case, which was a ICC report where the
13 ICC was just kind of opining on some things.

14 And the -- what the Seventh Circuit
15 said was that's not a Hobbs Act reviewable order
16 because it has no legal consequences, it doesn't
17 determine rights or obligations, so it's not a
18 Hobbs Act order, so then there would be no
19 preclusion at all.

20 JUSTICE KAGAN: So -- but then --

21 JUSTICE KAVANAUGH: Can you --

22 JUSTICE KAGAN: -- I take it that
23 you're actually agreeing with Mr. Wessler more
24 than I maybe thought you were but disagreeing
25 just as to what this ruling does and what it is.

1 In other words, you're saying, yeah, we too
2 agree that if you're talking in the land of
3 interpretations, you're outside the Hobbs Act.
4 But you think that if -- if we limit the Hobbs
5 Act coverage to rulings with the force of law,
6 you think you're in. Mr. Wessler thinks you're
7 out.

8 MR. PALMORE: I want to be careful in
9 how I answer this. So "interpretation" is being
10 used in multiple different ways here. Of
11 course, agencies always are interpreting
12 statutes, including when they issue legislative
13 rules. They -- they are creatures of -- of
14 statute, and they --

15 JUSTICE KAGAN: Yeah, but we know what
16 binding decisions are and what they're not.

17 MR. PALMORE: Right.

18 JUSTICE KAGAN: And I take Mr. Wessler
19 to be essentially saying there is -- that the --
20 the -- the decision that you're challenging is
21 not binding on you, and that's at least one
22 reason why you don't have a good argument under
23 the Hobbs Act.

24 MR. PALMORE: So a couple points,
25 Justice Kagan. We think an order is either in

1 under the Hobbs Act or it's out. It's either
2 reviewable under the Hobbs Act or it's not
3 reviewable, and then this exclusivity discussion
4 we're having is inapplicable. They've conceded
5 in, you know, Footnote 2 of their reply brief
6 that this is a final order reviewable under the
7 Hobbs Act.

8 So our point is there may be some
9 things agencies do that have absolutely no legal
10 consequences that are not reviewable under the
11 Hobbs Act at all, and then we wouldn't be having
12 this discussion.

13 There's no middle category, though --
14 and this is a -- a point I want to emphasize --
15 of orders that are somehow reviewable under the
16 Hobbs Act, they're final and legally
17 consequential enough to be reviewable under the
18 Hobbs Act but don't trigger this kind of
19 exclusivity.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Justice Thomas?

23 JUSTICE THOMAS: I'm going to try one
24 more time. You mentioned Yakus. Yakus was a
25 criminal trial. They were indicted for

1 violating one of the stabilization laws. And
2 the district court refused to admit evidence,
3 their arguments, to allow their arguments that
4 the ruling of the Board or Commission was
5 improper.

6 What if the judge, the district judge,
7 said that it's ridiculous, it's the worst thing
8 I've ever seen? You find nothing wrong with
9 that even in the criminal context?

10 MR. PALMORE: Well, I don't think the
11 court -- of course, this is not a criminal case,
12 and -- and --

13 JUSTICE THOMAS: No. Well -- but
14 you're relying on Yakus.

15 MR. PALMORE: Well, there's a due
16 process holding in Yakus that is as you
17 described.

18 We don't need to rely on the full
19 extent of that Yakus due process holding. We're
20 the defendant. We're the ones wielding an
21 agency order that says that what we did did not
22 violate the statute. And the other side is
23 trying to impose liability on us.

24 So the situation is -- is flipped.
25 The due process concerns -- and I completely

1 understand them, and Justice Rutledge wrote
2 about them at length, although he tethered his
3 discussion to the criminal context. Those --
4 none of those issues is -- is applicable here.

5 CHIEF JUSTICE ROBERTS: Justice Alito?

6 JUSTICE SOTOMAYOR: The problem with
7 the other side's argument is that unlike Corner
8 Post, where the new entity went and -- as it has
9 a right to do, to challenge the order completely
10 by -- they could do a petition for
11 reconsideration, correct, before the Commission?

12 MR. PALMORE: Yes, Your Honor.

13 JUSTICE SOTOMAYOR: They can file a
14 petition for a declaratory judgment in a circuit
15 court, correct?

16 MR. PALMORE: A -- a declaratory
17 ruling at the agency, right.

18 JUSTICE SOTOMAYOR: Yeah.

19 MR. PALMORE: And then they could get
20 Hobbs Act review of that.

21 JUSTICE SOTOMAYOR: Exactly.

22 MR. PALMORE: Yes.

23 JUSTICE SOTOMAYOR: So now we -- if we
24 don't do something like this, people can just
25 ignore agency final orders because they can't

1 be -- if they think they got a good argument,
2 they might as well just go ahead and do it
3 and -- because the agency ruling will have no
4 effect on them.

5 MR. PALMORE: I -- I -- I think that's
6 right. And the Hobbs Act is somewhat unique, as
7 this Court in Corner Post described it. It's
8 unique in having the marrying of "exclusive" and
9 "determine the validity." And Congress really
10 wanted finality in this situation.

11 And, again, in a case like this one,
12 where the party has conceded that it could have
13 sought judicial review and it -- it said that
14 was a reason why this was a good cert vehicle,
15 their position would basically turn Hobbs Act
16 exclusive review into an option. A party could
17 decide to do it, or they could decide to kind of
18 hang back and wait and see if it mattered to
19 them down the road.

20 JUSTICE SOTOMAYOR: Until somebody
21 sued them, the government or --

22 MR. PALMORE: Correct.

23 CHIEF JUSTICE ROBERTS: Justice Kagan?
24 Justice Gorsuch?

25 JUSTICE KAVANAUGH: Just one question

1 in response to Justice Kagan.

2 Force of law, do you think that -- or
3 what do you think that means?

4 MR. PALMORE: I -- the best I can do,
5 Justice Kavanaugh, is use this Court's words. I
6 mean, it -- does it -- does it determine legal
7 consequences --

8 JUSTICE KAVANAUGH: Mm-hmm.

9 MR. PALMORE: -- or do -- I'm sorry,
10 determine rights or obligations, or do legal
11 consequences flow from it?

12 So that's what this Court in Port of
13 Boston said when the same kind of argument was
14 made, well, this isn't a coercive order. And,
15 of course, that became the -- kind of the
16 formulation in Bennett versus Spear --

17 JUSTICE KAVANAUGH: There's a lot of
18 debate --

19 MR. PALMORE: -- down the road.

20 JUSTICE KAVANAUGH: -- a lot of debate
21 in application about particular things, whether
22 they have the force of law, isn't there?

23 MR. PALMORE: Well, perhaps, but I
24 think the FCC declaratory orders are quite
25 common. They're done through notice-and-comment

1 rulemaking. They have, for decades, resulted in
2 Hobbs Act review. This Court's decision --

3 JUSTICE KAVANAUGH: Yeah.

4 MR. PALMORE: -- in City of Arlington
5 was a declaratory ruling.

6 JUSTICE KAVANAUGH: That's one.

7 MR. PALMORE: So they -- they --
8 agencies can and do kind of broadly applicable
9 things through this font of their authority.

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett?

13 Justice Jackson?

14 JUSTICE JACKSON: Was the character of
15 this order as interpretive or otherwise
16 addressed by the lower court?

17 MR. PALMORE: It was -- yes, this
18 issue was joined. And the -- the Ninth Circuit
19 held it was an adjudication. It did not hold
20 that it was an interpretive rule. It said this
21 is an adjudication. And that was actually
22 critical --

23 JUSTICE JACKSON: Well, I thought
24 the -- I thought legislative versus interpretive
25 was the fault line, that you -- you --

1 MR. PALMORE: So -- so there's
2 legislative and interpretive, is kind of over
3 here.

4 JUSTICE JACKSON: Yeah.

5 MR. PALMORE: And then there's
6 adjudication over here.

7 And what the Ninth Circuit said was
8 this is an adjudication.

9 And that was critical to one of its
10 holdings, which was that it applied
11 retroactively because that's what adjudications
12 do. And so that -- that was the holding below,
13 that this was an adjudication, not that it was
14 an interpretive rule.

15 And the -- and the Petitioners never
16 explained in the cert petition or anywhere else
17 why the Ninth Circuit was wrong in what it said,
18 other than to say: Well, this was an
19 adjudicatory order kind of interpreting the
20 statute. But that's a different use of the word
21 "interpretive" because agencies always interpret
22 statutes.

23 JUSTICE JACKSON: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Guarnieri.

2 ORAL ARGUMENT OF MATTHEW GUARNIERI,
3 FOR THE UNITED STATES, AS AMICUS CURIAE,
4 SUPPORTING THE RESPONDENTS

5 MR. GUARNIERI: Mr. Chief Justice, and
6 may it please the Court:

7 The Hobbs Act precludes collateral
8 attacks on covered agency actions in district
9 court even in suits between private parties.
10 The Act does so by conferring exclusive
11 jurisdiction on the courts of appeals to
12 determine the validity of covered agency
13 actions.

14 Now Petitioner contends, as you've
15 heard this morning, that determining the
16 validity of an order refers only to entering a
17 declaratory judgment finding that the order is
18 valid or invalid.

19 That reading of the Act is
20 inconsistent with its plain language, purpose,
21 and history, and with this Court's precedent,
22 particularly the -- the Port of Boston case,
23 which we refer to as Transatlantic, which I
24 still don't think Petitioner has provided an
25 adequate explanation for.

1 If you accept Petitioner's view, that
2 would mean that a regulated party could obtain a
3 final order from the FCC determining that some
4 particular course of conduct does not violate
5 the TCPA. That order could be upheld on direct
6 review by the court of appeals under the Hobbs
7 Act procedures, and a private plaintiff could
8 nonetheless go into district court, sue the
9 regulated party, and ask the district court to
10 disregard the agency's order and impose
11 liability.

12 That is not how the Hobbs Act has ever
13 been understood to work, and we ask this Court
14 to reject that interpretation.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: Does that take you as
17 far as the Court in Yakus?

18 MR. GUARNIERI: I -- I think, at least
19 with respect to the statutory interpretation
20 piece of this, yes. And that's no accident.
21 Congress was clearly drawing on the language
22 that this Court interpreted in Yakus.

23 The Emergency Price Control Act
24 conferred on a special emergency court exclusive
25 jurisdiction to determine the validity of price

1 control regulations, and Congress took that
2 language, which -- which was, I think, unique at
3 the time in the Emergency Control Act. Congress
4 took it and brought it into the Hobbs Act in
5 order to accomplish the same purpose that this
6 Court construed the Emergency Price Control Act
7 to have in the Yakus decision.

8 JUSTICE GORSUCH: If you take the
9 Hobbs Act to go as far as Yakus -- that's an
10 extraordinary thing. I mean, Yakus is not a
11 case people usually want to rely on outside the
12 wartime context.

13 But, if that's as far as the Hobbs Act
14 goes, if it goes that far, aren't we going to
15 have real due process questions? I mean,
16 Justice Rutledge raised them. Justice Powell
17 raised them years later in --

18 JUSTICE BARRETT: -- know the
19 reference --

20 JUSTICE GORSUCH: -- what was that?

21 JUSTICE BARRETT: Do you know the
22 reference?

23 JUSTICE GORSUCH: In one of them.
24 Yeah. You know which one I'm talking about.

25 MR. GUARNIERI: I do, Your Honor.

1 JUSTICE GORSUCH: Let's see. I can
2 even find it for you.

3 MR. GUARNIERI: It's the -- the
4 Adamo --

5 JUSTICE GORSUCH: Adamo or --
6 whatever. However you pronounce it. Adamo.

7 MR. GUARNIERI: Yeah.

8 JUSTICE GORSUCH: You really want us
9 to start a -- a Fourteenth Amendment
10 jurisprudence about this?

11 MR. GUARNIERI: Well, I don't think
12 that you -- that -- that there are going to be
13 cognizable due process claims in the mine-run of
14 applications of the Hobbs Act.

15 The Due Process Clause of the
16 Fourteenth Amendment does not create any kind of
17 freestanding entitlement to get judicial review
18 of agency action in any court at any time that
19 the plaintiff chooses.

20 JUSTICE GORSUCH: Well, I -- I think
21 it does generally --

22 MR. GUARNIERI: Congress --

23 JUSTICE GORSUCH: -- I think it does
24 generally say: When Congress chooses to invest
25 courts with jurisdiction, as a rule, judges

1 interpret the law and they have a duty to do so
2 independently and -- and not to automatically
3 and reflexively have to adopt interpretations
4 that the executive branch chooses and prescribes
5 for them. Right?

6 MR. GUARNIERI: I -- I think, Justice
7 Gorsuch, that might be a little bit different
8 than the due process concern that my friend has
9 articulated. That's more --

10 JUSTICE GORSUCH: It's -- it's one I
11 have --

12 MR. GUARNIERI: -- in the nature or
13 line of an Article III --

14 JUSTICE GORSUCH: -- so why don't you
15 address it.

16 MR. GUARNIERI: Sure. So I think, if
17 you're thinking about the way the Hobbs Act
18 generally -- the -- the way Congress envisioned
19 this would work, you would get judicial review
20 in the court of appeals under the Hobbs Act, and
21 it would be that application of Article III
22 authority that would then be binding in the
23 sense --

24 JUSTICE GORSUCH: I understand that,
25 but --

1 MR. GUARNIERI: -- that a district
2 court would be --

3 JUSTICE GORSUCH: -- but somebody --
4 some -- the fact that one person gets judicial
5 review under the Hobbs Act and makes whatever
6 arguments in our adversarial system that they
7 choose, and then another party, years later
8 potentially, with very different arguments and
9 different facts, it wasn't around, and you're
10 telling me due process has nothing to say about
11 whether that individual gets to have a judge
12 decide his case?

13 MR. GUARNIERI: Well, again, I think
14 Congress was talking here about which court gets
15 to do that. It's the Hobbs Act court that gets
16 to exercise Article III authority to determine
17 the validity of the agency's covered action.

18 JUSTICE GORSUCH: I understand that.
19 And I'm asking you on the due process question.
20 You don't think that raises any due process
21 questions?

22 MR. GUARNIERI: No, I don't think that
23 you would have a viable due process argument if
24 your contention is that you are -- are not
25 entitled to challenge the validity of the

1 agency's order in an enforcement action.

2 I think you can also get there -- I
3 mean, Section 703, I think, confirms that.
4 Section 703 of the APA is the provision that
5 recognizes that Congress can provide for an
6 exclusive review scheme. And there are
7 circumstances in which, when Congress does that,
8 parties are not entitled to judicial review of
9 the agency's action in the enforcement
10 proceeding.

11 JUSTICE GORSUCH: So Justice Rutledge
12 was wrong --

13 MR. GUARNIERI: I think that would
14 be --

15 JUSTICE GORSUCH: -- and Justice
16 Powell were wrong to be worried about those
17 concerns?

18 MR. GUARNIERI: No, of course not, but
19 I -- you know, I think they were focused on
20 aspects of the Emergency Price Control Act that
21 aren't necessarily replicated in the Hobbs Act.

22 The other thing that I would -- I
23 would point out for the -- I mean, this is a --
24 it is the plaintiff here, the plaintiff in the
25 private TCPA action, who is seeking to avoid the

1 application of an FCC order or an order by a
2 component bureau of the FCC. And I think the
3 due process concerns are particularly weak --
4 weak in that context.

5 JUSTICE GORSUCH: Yes, but you're
6 asking --

7 MR. GUARNIERI: I mean, at least in
8 the Yakus --

9 JUSTICE GORSUCH: -- us to draw a much
10 broader rule based on Yakus, and so we have to
11 consider where that leads and -- anyway, I --
12 I've taken up enough of your time.

13 JUSTICE KAGAN: Mr. Guarnieri, in your
14 brief, you say the term "validity" refers in
15 this context to having legal strength, force, or
16 authority -- that's one -- or to being grounded
17 in sound principles.

18 So suppose I agree with the first half
19 of that, that "validity" does refer in this
20 context to having legal force, but that I don't
21 agree with the second half, that it just refers
22 to is the ruling grounded in sound principles,
23 that what we're talking about here under the
24 Hobbs Act is a challenge to the -- the legal
25 effect of an agency order, not the sort of hazy

1 challenge to, like, do I have sound does -- did
2 the agency have sound principles?

3 So what would it mean if I took your
4 definition and chopped it in half and said I
5 only agree with the first part, that the Hobbs
6 Act covers that?

7 MR. GUARNIERI: Sure. Justice Kagan,
8 if I'm understanding your question, I think this
9 goes back to some of the issues you -- you may
10 have been discussing with -- with my friends
11 earlier about, you know, what do we do with this
12 declaratory order and what do you do if you
13 think, you know, some particular agency action
14 is not meant to have legal force or effect at
15 all?

16 I -- I agree with the way that
17 Mr. Palmore put it. The Hobbs Act in Section
18 2342 both specifies the things that are
19 reviewable under the Hobbs Act and provides that
20 that jurisdiction is exclusive and no district
21 court here may determine the validity of the
22 covered agency actions.

23 Now, if you do that analysis and you
24 determine that some particular agency action
25 actually has no legal force or effect and is not

1 the kind of thing specified in the Hobbs Act as
2 an agency action for which you could get direct
3 review in the court of appeals, then you're just
4 out. There is -- the -- the -- you -- the
5 exclusivity provision does not come into play
6 because that agency action --

7 JUSTICE KAGAN: So what do you think
8 is just out? What category of rulings is just
9 out?

10 MR. GUARNIERI: I -- I think there are
11 some things agencies do that are -- would
12 constitute interpretive rules as that -- in the
13 technical meaning of that sense under the APA
14 that have no legal force or effect. We cite a
15 case involving a report issued by the ICC. The
16 FCC commonly issues reports both to the public
17 and to Congress. Those things don't have legal
18 force or effect. They wouldn't satisfy the test
19 for finality.

20 JUSTICE KAGAN: So what I understand
21 Mr. Wessler --

22 MR. GUARNIERI: Yeah.

23 JUSTICE KAGAN: -- to be saying -- and
24 he'll correct me if I'm wrong -- is, in this
25 case, notwithstanding that there's an

1 adjudication, it was not an adjudication binding
2 on the parties here.

3 MR. GUARNIERI: I -- I -- I'm not
4 actually sure what Mr. Wessler would say about
5 that. I think he has tried to characterize this
6 as an interpretive rule, which is simply
7 incorrect. The FCC understands declaratory
8 orders to have -- they are legally binding
9 orders issued by the agency after adjudication.

10 Here, the agency put this out for
11 public -- it -- it gave notice. It -- it
12 solicited public comment on this. Declaratory
13 orders under the APA, under 5 U.S.C. 554(e),
14 have like effect as other agency orders. These
15 are not the same thing as an informal guidance
16 document that the agency might issue to advise
17 the public of its understanding of some
18 preexisting statutory obligation. I mean --

19 JUSTICE KAGAN: Thank you.

20 MR. GUARNIERI: -- these are -- this
21 is a real agency order.

22 JUSTICE JACKSON: Can I understand a
23 little bit more, though? I mean, you said,
24 if -- if the agency act has no legal force or
25 effect, then you're just outside the Hobbs Act.

1 So that, in your view, would allow the district
2 court to consider it in the context of an
3 enforcement action, is that right?

4 MR. GUARNIERI: Yes, Justice Jackson.

5 JUSTICE JACKSON: But doesn't that
6 seem odd when the language in the exclusive
7 jurisdiction provision says that the court of
8 appeals determines the validity? It seems
9 counterintuitive that you would have the
10 district court determining whether or not this
11 has a legal force and effect and, therefore, the
12 Hobbs Act applies at all when that goes to
13 validity, even your brief suggested it, and yet
14 we have the language in the statute that says
15 the validity is supposed to be interpreted -- or
16 determined by the court of appeals.

17 MR. GUARNIERI: Well, Justice Jackson,
18 the statute says that the court of appeals shall
19 have exclusive jurisdiction to determine the
20 validity of, and it's followed by an enumerated
21 list, and the enumerated list specifies various
22 statute -- statutory authorities exercised by
23 agencies like the FCC.

24 And I -- I don't think it would
25 violate the exclusivity provision for a district

1 court to determine that something the FCC has
2 done in a particular case is not, for example, a
3 final order made reviewable under Section 402 --
4 of -- (a) of the Communications Act. If the
5 district court decides that, then the district
6 court has effectively decided that this is not
7 the kind of thing the Hobbs Act covers at all.

8 The other point that I would make on
9 this if -- if I may --

10 CHIEF JUSTICE ROBERTS: Sure.

11 MR. GUARNIERI: -- is simply that it
12 is open to regulated parties to argue that the
13 FCC has done something by declaratory order that
14 it could only have permissibly done by
15 notice-and-comment rulemaking.

16 But that is the kind of challenge that
17 must be brought within the Hobbs Act framework
18 itself. You could present that argument to the
19 court of appeals. And we've seen -- seen cases
20 like that.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas?

24 Justice Alito?

25 JUSTICE ALITO: Let me just ask you

1 another question about Port of Boston.

2 Why can't Port of Boston be read to
3 mean that when a litigant is an actual party to
4 an adjudicatory proceeding and that proceeding
5 produces an order regarding the rights of that
6 specific party, the party must seek review
7 through the Hobbs Act and not by waiting for an
8 enforcement action? Why can't Port of Boston be
9 interpreted that way?

10 MR. GUARNIERI: That is not the
11 rationale that this Court gave for its decision
12 in Port of Boston. The Court squarely rested on
13 the exclusivity language in the Hobbs Act.
14 There was a factual dispute there about whether
15 the shipper, Transatlantic, had been represented
16 in the agency proceedings through its agent,
17 which was a -- the agent was a member of the
18 shipping association which was a party to the
19 agency proceeding. This Court said, even if you
20 were not a formal party to the proceeding, your
21 interests were at stake and you had an
22 opportunity to participate and you did not.

23 So I don't think the reasoning of the
24 decision can be squared with my friend's
25 suggestion that you could write that off as a

1 case about -- you know, a -- an instance in
2 which a party is actually bound by the agency
3 adjudication in the sense of sort of preclusion
4 principles.

5 JUSTICE ALITO: Did the Court in Port
6 of Boston grapple with all the considerations
7 that were laid out in Justice Kavanaugh's
8 concurring opinion in PDR?

9 MR. GUARNIERI: No, Justice Alito. I
10 mean, I will grant you that the -- the analysis
11 in Transatlantic or Port of Boston doesn't seem
12 as troubled by some of the -- the analysis set
13 forth in -- in Justice Kavanaugh's concurring
14 opinion in PDR Network.

15 But the issue was squarely presented
16 there, and the Court had no difficulty
17 determining that the suit at issue in that case
18 was in -- in effect an effort to get a
19 collateral redetermination of something that had
20 already been settled by the Federal Maritime
21 Commission and for which review under the Hobbs
22 Act was the exclusive mechanism for -- for
23 determining the validity of that agency action.

24 I don't think you have to rest -- I
25 think Port of Boston is a -- a -- a strong card

1 for us, but I don't think you have to rest
2 exclusively on that decision either. I mean,
3 this goes back to cases like Venner and Lambert
4 Run Coal Company. There are numerous decisions
5 of this Court decided under the predecessor
6 scheme, the Urgent Deficiencies Act, that
7 likewise rejected efforts to get a kind of
8 collateral attack on the agency's order and in
9 suits in which no party was requesting
10 declaratory relief against that order.

11 So I don't think -- in addition to --
12 to Transatlantic, there are -- there are other
13 pre-Hobbs Act precedents that just can't be
14 squared with my friend's understanding of how
15 this statute should -- works.

16 JUSTICE ALITO: Well, let me take
17 you -- ask one final question about Yakus. And
18 I don't know how big the defendants in Yakus
19 were, but let's suppose they were -- you know,
20 this was some mom-and-pop operation that was
21 subject to the price controls that were in
22 effect during World War II, and it was really
23 quite unlikely that an entity in that position
24 was going to be following all the details of
25 what was being -- of what was being done in

1 wartime regulations. So they just were unaware
2 of what was happening, and then they find
3 themselves in court being criminally prosecuted
4 for violating the price controls.

5 Would you say there's not a due
6 process concern there?

7 MR. GUARNIERI: I -- I think the
8 holding of Yakus is that there was no due
9 process violation in that application of the
10 statute, even in the context of a criminal
11 prosecution. Obviously, we are one step removed
12 from that here. This is a civil enforcement
13 action, not a criminal prosecution.

14 Now I -- I will say my -- the
15 Respondent in this case has suggested that
16 today, if a similar issue arose, you have
17 Section 703 as a safety valve. Now, in PDR
18 Network, we took the position that in Section
19 703, when the statute refers to an adequate
20 prior opportunity for review under one of these
21 exclusive schemes, adequacy was supposed to be
22 judged at a level of generality. The question
23 is whether the statutory scheme provided an
24 adequate opportunity to -- the regulated
25 community in general, not the specific party in

1 that case.

2 We haven't had occasion to revisit
3 that position here because Petitioner has asked
4 the Court to decide this case on the premise
5 that Petitioner already had a prior and adequate
6 opportunity to seek review under the Hobbs Act.

7 But what I want to stress is, if you
8 disagree with us about how to read the adequacy
9 language in Section 703, I mean, that could be
10 something the Court could address in an
11 appropriate future case. It is not a reason to
12 adopt Petitioner's understanding of the Hobbs
13 Act.

14 JUSTICE ALITO: All right. Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor?

17 Justice Kagan?

18 Justice Gorsuch?

19 JUSTICE GORSUCH: Just one quick
20 question about Port of Boston. You -- you
21 emphasized that -- that Transatlantic there
22 wasn't a party to the administrative
23 proceedings, right?

24 MR. GUARNIERI: Yes, although I think
25 there was a factual dispute in that case about

1 the extent to which it should be --

2 JUSTICE GORSUCH: Right. Didn't the
3 Court expressly rely on the fact that
4 Transatlantic had been represented before the
5 Commission?

6 MR. GUARNIERI: No, Your Honor. I
7 think, if you look at the final paragraph of --

8 JUSTICE GORSUCH: "It was, in fact,
9 represented before the Commission and has
10 previously made numerous claims to party status.
11 In the petition for reconsideration filed with
12 the Commission, it asserted that it had been
13 represented in the administrative evidentiary
14 proceeding through its agent."

15 MR. GUARNIERI: Yes, Justice Gorsuch,
16 but I think --

17 JUSTICE GORSUCH: That's part of the
18 holding of the Court, right?

19 MR. GUARNIERI: -- if you -- I -- I
20 entirely agree. The -- the Court was engaging
21 in two alternative analyses, alternative
22 holdings. I think I heard Mr. Palmore use that
23 phrase earlier.

24 I -- I entirely agree with you that
25 the Court was saying that Transatlantic was

1 trying to have it both ways. They had claimed
2 party status before.

3 JUSTICE GORSUCH: Right.

4 MR. GUARNIERI: Now they were
5 disclaiming it.

6 If you look at the next paragraph --

7 JUSTICE GORSUCH: I -- I'm looking at
8 it.

9 MR. GUARNIERI: -- where it is
10 continued --

11 JUSTICE GORSUCH: Yeah.

12 MR. GUARNIERI: -- there is a clause
13 that says: "Even if Transatlantic was not a
14 formal party" --

15 JUSTICE GORSUCH: Yeah. It does say
16 that.

17 MR. GUARNIERI: -- "the exclusivity
18 analysis applies the same way."

19 JUSTICE GORSUCH: It -- it says that
20 because it had every opportunity to participate
21 before the Commission and not in the abstract,
22 in the sense that it did, and just discussed in
23 the prior paragraph.

24 It's not that somebody could have come
25 in. It's that these people did come in. It

1 was -- that was bound up in the Court's
2 analysis, wasn't it?

3 MR. GUARNIERI: Yeah, I think we would
4 say the same thing about a party in McLaughlin's
5 shoes. McLaughlin had every opportunity to
6 participate in the agency proceedings and chose
7 not to. And I think the analysis would look the
8 same way.

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh?

11 Justice Barrett?

12 Justice Jackson? No?

13 Thank you, counsel.

14 Rebuttal, Mr. Wessler.

15 REBUTTAL ARGUMENT OF MATTHEW W.H. WESSLER

16 ON BEHALF OF THE PETITIONER

17 MR. WESSLER: Thank you. Just a -- a
18 few brief points in rebuttal.

19 The Hobbs Act's grant of exclusive
20 jurisdiction simply means that a district court
21 may not entertain a petition for review of an
22 agency action subject to the Act.

23 Nobody questions that the Hobbs Act's
24 grant of that kind of jurisdiction is designed
25 to create a streamlined process for funneling

1 pre-enforcement facial challenges to agency
2 actions into the courts of appeals.

3 And, of course, no matter how the
4 Court resolves this case, those challenges will
5 continue. But I think what's at issue here is
6 really whether the Hobbs Act -- the text of that
7 statute, this Court ought to read it in a way
8 that expands and extends the sweep of the Hobbs
9 Act to cover any opportunity a district court
10 might have in a garden-variety civil litigation
11 case to even consider or evaluate the reasoning
12 of an agency interpretation.

13 I think that can't be right, as we've
14 explained, based on both text, structure, and
15 history of the statute.

16 I think, to your point, Justice Alito,
17 yes, Port of Boston, I think distinctly
18 different from what we've got going on here
19 because it involved parties who, Justice
20 Gorsuch, as you noted, were themselves directly
21 involved in the agency proceeding.

22 That isn't the kind of proceeding that
23 we have here, in which the FCC has issued a
24 declaratory order that only one party sought.
25 So, in -- so, in this case, you have

1 Amerifactors, a company seeking a declaratory
2 order. There are no other parties, nor could
3 there be for purposes of this agency action.

4 I think that's significant because the
5 only opportunity that a party in the plaintiff's
6 shoes in this case would have should they -- had
7 they wanted to try to challenge that
8 interpretation, would be to do what another
9 party did, which is to file a petition for
10 reconsideration in front of the agency.

11 That is an empty promise of judicial
12 review, as, Justice Gorsuch -- as, Justice
13 Kavanaugh, you pointed out in your concurrence
14 in PDR Network, because that petition for
15 reconsideration of the FCC's Amerifactors order
16 has been pending for more than five years.

17 I think what you heard from my friends
18 on the other side was perhaps a backing away of
19 a view that the Hobbs Act covers interpretive
20 orders along with legislative orders.

21 If that's correct, it would require
22 reversal here because the Ninth Circuit's rule
23 from which we have taken an appeal is that the
24 Hobbs Act covers both interpretive and
25 legislative orders.

1 I note that the government on page 31
2 of its brief defends that proposition. Despite
3 what you heard today, it has taken the position
4 that there is no exception under the Hobbs Act
5 for interpretive rules. It covers both kinds of
6 rules.

7 And adjudication can still be an
8 interpretive rule, as courts have routinely
9 held. Adjudications are simply an alternative
10 path to a regulation or a rule-making that an
11 agency can take, but it does not affect a -- a
12 distinction between agency action that carries
13 the force of law versus agency action that does
14 not.

15 And I will just point out that in PDR
16 Network, there, the FCC issued a rule through
17 notice and comment, but on -- on remand, the
18 Fourth Circuit held that it was interpretive and
19 therefore not subject to the FCC.

20 This Court should make clear once and
21 for all that the Hobbs Act does not require a
22 district court to follow an agency's interpret
23 of a -- interpretation of a statute, no matter
24 how wrong.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 The case is submitted.

4 (Whereupon, at 12:32 p.m., the case
5 was submitted.)

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