No. 23-1226

In the Supreme Court of the United States

MCLAUGHLIN CHIROPRACTIC ASSOCIATES, INC.,
PETITIONER

v.

MCKESSON CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The Administrative Orders Review Act (Hobbs Act), ch. 1189, 64 Stat. 1129, vests "exclusive jurisdiction" in the courts of appeals to "determine the validity" of specified agency actions, 28 U.S.C. 2342, including certain final orders of the Federal Communications Commission (FCC) implementing the Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, 105 Stat. 2394. In this case, petitioner sued respondents in federal district court, alleging that respondents had violated the TCPA by transmitting unsolicited faxes. During the litigation, the FCC's Consumer and Governmental Affairs Bureau issued an order clarifying that unsolicited faxes sent to online fax services do not violate the TCPA. The district court concluded that, in light of the Hobbs Act, the court was required to adhere to the Bureau's order and to reject petitioner's effort to impose TCPA liability on respondents for unsolicited faxes sent to an online fax service. The court of appeals affirmed. The question presented is as follows:

Whether the Hobbs Act's vesting of "exclusive jurisdiction" in the courts of appeals to "determine the validity" of a covered agency action, 28 U.S.C. 2342, bars collateral attacks on the same agency action in district-court litigation between private parties.

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INTEREST OF THE UNITED STATES

The Administrative Orders Review Act (Hobbs Act), ch. 1189, 64 Stat. 1129, vests courts of appeals with "exclusive jurisdiction * * * to determine the validity of" certain federal agency actions. 28 U.S.C. 2342. The parties in this case dispute whether that exclusivity provision bars litigants from contesting the legality of the specified agency orders in private district-court litigation. Such collateral attacks would undermine the interests of regulated parties and of the federal agencies involved in promptly and conclusively determining the validity of covered agency actions. The United States therefore has a substantial interest in the question presented.

STATUTORY PROVISIONS INVOLVED

Relevant statutes are reprinted in an appendix to this brief. App., *infra*, 1a-11a.

STATEMENT

1. The Hobbs Act gives courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain agency actions, including "all final orders" of the Federal Communications Commission (FCC) "made reviewable by section 402(a) of title 47." 28 U.S.C. 2342(1). The Act also applies to specified actions of the Secretary of Agriculture, Secretary of Housing and Urban Development, Secretary of the Interior, Secretary of Transportation, Board of Immigration Appeals, Federal Maritime Commission, Nuclear Regulatory Commission, and Surface Transportation Board. See 8 U.S.C. 1252(a)(1); 28 U.S.C. 2342(2)-(7); 50 U.S.C. 167h(b); see also 42 U.S.C. 5841(f).

"Any party aggrieved by" a final agency action covered by the statute "may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. 2344. "The action shall be against the United States," *ibid.*, and the "agency * * * may appear as [a] part[y] thereto * * * as of right," 28 U.S.C. 2348. When more than one petition for review is filed with respect to a particular final agency order, the petitions are consolidated in a single court of appeals. 28 U.S.C. 2112(a)(3).

Congress enacted the Hobbs Act in 1950, following a request by Chief Justice Stone to reform the judicial-review procedures that had previously applied under the Act of Oct. 22, 1913 (Urgent Deficiencies Act), ch. 32, 38 Stat. 208, to certain FCC orders and other agency actions. See H.R. Rep. No. 2122, 81st Cong., 2d Sess.

2 (1950). Under the prior scheme, litigants could seek review in a three-judge district court under specialized procedures, with a right of appeal to this Court. *Ibid.* The Hobbs Act replaced that scheme with a system of exclusive circuit-court review under which the Attorney General can "represent the interest of the Government whenever an order of one of the specified agencies is reviewed." *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70 (1970).

2. a. The Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, 105 Stat. 2394, generally prohibits sending an unsolicited advertisement to a "telephone facsimile machine" from another such machine or from a computer or other device. 47 U.S.C. 227(b)(1)(C). The statute defines "telephone facsimile machine" to mean "equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper." 47 U.S.C. 227(a)(3).

The FCC administers the TCPA. 47 U.S.C. 227(b)(2) (2018 & Supp. IV 2022). In certain circumstances, the agency's Consumer and Governmental Affairs Bureau is authorized to act on the Commission's behalf. 47 C.F.R. 0.141(a), 0.361. When the Bureau exercises authority delegated by the Commission, any "person aggrieved * * * may file an application for review by the Commission * * * and every such application shall be passed upon by the Commission." 47 U.S.C. 155(c)(4); see 47 C.F.R. 1.115(a). The filing of such an application for review is a "condition precedent to judicial review" of an action taken by the Bureau on delegated authority. 47 U.S.C. 155(c)(7); see 47 C.F.R. 1.115(k).

The government may enforce the TCPA. See, *e.g.*, 47 U.S.C. 501-503. The TCPA also creates private rights of action to enforce certain provisions and regulations. 47 U.S.C. 227(b)(3) and (c)(5). Federal and state courts have concurrent jurisdiction over private TCPA lawsuits. *Mims* v. *Arrow Fin. Servs., LLC*, 565 U.S. 368, 371-372 (2012).

b. In 2002, the FCC sought public comment on a variety of TCPA-related issues, including the proper treatment of "fax servers." 17 FCC Rcd 17,459, 17,482 ¶ 37. In 2003, the agency issued an order finalizing changes to its rules. 18 FCC Rcd 14,014, 14,017 ¶¶ 1-2. The FCC explained that fax servers "enable multiple desktops to send and receive faxes from the same or shared telephone lines." *Id.* at 14,133 ¶ 200. Some commenters had argued that faxes transmitted to fax servers are not covered by the TCPA because such faxes are not necessarily "reduced to paper." *Id.* at 14,133 ¶ 199. The Commission disagreed, explaining that the statutory definition of a "telephone facsimile machine" encompasses devices that have "the capacity to transcribe text or images" to paper. *Id.* at 14,133 ¶ 201.

In 2009, a regulated party petitioned the FCC for clarification of how the TCPA "applies to the transmission of efaxes," which the party described as "'a fax that is converted to email'" after being received. 30 FCC Rcd 8620, 8621 ¶ 4 (2015). The petition was referred to the Consumer and Governmental Affairs Bureau, which solicited public comment and ultimately concluded that "efaxes are subject to the TCPA." *Id.* at 8622 ¶ 7.

In 2017, the Bureau received a petition for a declaratory ruling regarding the application of the TCPA to a "cloud-based" online fax service, in which faxes received by the service are made available to users digitally,

either via a website or as email attachments. 34 FCC Rcd 11,950, 11,950 ¶ 2 (2019) (*Amerifactors*) (citation omitted); see *id.* at 11,951 ¶ 6. After seeking public comment, the Bureau concluded in a 2019 order that faxes sent to such an online fax service are "outside the scope" of the TCPA. *Id.* at 11,952 ¶ 8. The Bureau explained that the cloud service "cannot itself print a fax—the user of an online fax service must connect his or her own equipment in order to do so." *Id.* at 11,953 ¶ 11.

In 2020, the Commission received an application for review of the Bureau's *Amerifactors* order. See Career Counseling Services' Application for Review, *In re Amerifactors Financial Group, LLC Petition for Expedited Declaratory Ruling*, CG Docket Nos. 02-278, 05-338 (Jan. 8, 2020). That application remains pending with the Commission.

3. The present controversy arises from a private TCPA suit in the United States District Court for the Northern District of California, which petitioner joined as a co-plaintiff in 2014. Pet. App. 25a. The gravamen of the complaint is that respondents "violated the TCPA by sending 'unsolicited advertisements' by fax." *Ibid.* (citation omitted).

The district court initially denied a motion for class certification; the plaintiffs appealed; and the court of appeals affirmed in part, reversed in part, and remanded. 896 F.3d 923, 926, cert. denied, 139 S. Ct. 2743. On remand, the district court granted a renewed motion for class certification, appointed petitioner to represent the class, and denied respondents' motion for summary judgment. 332 F.R.D. 589, 610.

In 2020, respondents moved to decertify the class on the theory that, in light of *Amerifactors*, "individualized inquiries" would be necessary "to determine whether

class members received the advertisements through online fax services or traditional analog fax machines." Pet. App. 31a. The district court understood circuit precedent to require it to treat *Amerifactors* as "authoritative." *Id.* at 36a. But rather than decertify the class, the court initially bifurcated it into two groups, depending on whether particular class members had received advertisements via a "'stand-alone' fax machine" or via an "online fax service." *Id.* at 39a-40a. Based on *Amerifactors*, the court later entered summary judgment for respondents on all TCPA claims asserted by the online-fax-service class. *Id.* at 21a-23a.

After further discovery, the district court decertified the standalone-fax-machine class. Pet. App. 12a-20a. The court concluded that no reliable method existed to show "via classwide, common proof" which faxes were sent to standalone fax machines rather than online fax services, so that individualized questions about how a given plaintiff received a given fax would predominate over any common questions. *Id.* at 15a; see *id.* at 18a.

4. The court of appeals affirmed. Pet. App. 1a-11a. As relevant here, the court held that the district court had "correctly found that it was bound by" the "*Amerifactors* declaratory ruling, which determined that the TCPA does not apply to faxes received through an online fax service." *Id.* at 7a. Petitioner had argued that the Hobbs Act's exclusivity provision does not apply because "*Amerifactors* is neither an order of the Commission, nor final." *Ibid.* The court of appeals acknowledged that an application for Commission review of *Amerifactors* remained pending, but the court concluded that *Amerifactors* nonetheless constitutes a "final order of the Commission made reviewable by Section 402(a)" of Title 47. *Id.* at 8a-9a. The court based

that conclusion on circuit precedent and on an FCC regulation stating that Bureau orders are generally effective upon release. See *id.* at 7a-8a & n.1. Accordingly, the court of appeals concluded that the district court lacked authority to "disagree[] with *Amerifactors*" by imposing TCPA liability on respondents for unsolicited faxes sent to online fax services. *Id.* at 9a.

SUMMARY OF ARGUMENT

The Hobbs Act's exclusivity provision bars district courts from entertaining collateral attacks on covered agency actions in litigation between private parties.

A. As an initial matter, this case comes to the Court based on an erroneous premise. The courts below viewed *Amerifactors* as a "final order of the [FCC] made reviewable by section 402(a) of title 47." 28 U.S.C. 2342(1). But *Amerifactors* was issued by a bureau of the FCC on delegated authority, and an application for Commission review of the order remains pending. Because the Commission's disposition of the pending application is a "condition precedent" to judicial review, 47 U.S.C. 155(c)(7), *Amerifactors* has never been susceptible to direct court-of-appeals review, and the exclusivity provision does not apply to it.

B. If the Court assumes for purposes of this case that *Amerifactors* is a final order to which the Hobbs Act applies, the judgment below should be affirmed.

The Hobbs Act vests courts of appeals with "exclusive jurisdiction" to "determine the validity" of covered agency actions. 28 U.S.C. 2342. A court "determine[s]" an action's "validity" when it resolves a dispute about whether the action is sound or lawful. *Ibid.* The plain language of the statute therefore encompasses the situation in which a party to private litigation asks the court to adopt an interpretation of a statute that a covered

agency order rejects. Consistent with the statutory text, this Court has previously construed the Hobbs Act's exclusivity provision to bar a collateral attack on an agency action in a district-court damages suit between private parties. See *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69-72 (1970).

The statutory history confirms the clear import of the text. Congress derived the relevant language from the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23, after this Court had construed that statute to bar collateral attacks on covered agency actions even in enforcement proceedings. *Yakus* v. *United States*, 321 U.S. 414, 429-430 (1944). The Hobbs Act operates the same way. That understanding is further supported by this Court's precedent interpreting the pre-Hobbs Act statutory scheme for judicial review of FCC orders.

Petitioner's interpretation of the Hobbs Act would undermine its purposes and structure. The Act is designed to achieve certainty and finality by providing a centralized forum for judicial review of covered agency actions, in which the presence of the United States as a party is ensured. Allowing litigants to collaterally attack covered agency actions in private district-court litigation would disserve those interests.

C. Any presumption of judicial review does not help petitioner because the Hobbs Act provides for review in an Article III court. Similarly, while 5 U.S.C. 703 establishes a general rule that agency action may be challenged during enforcement suits, that rule does not apply where a "prior, adequate, and exclusive opportunity for judicial review is provided by law." *Ibid.* The other statutes to which petitioner seeks to compare the Hobbs

Act contain materially different language. And the canon of constitutional avoidance does not apply here.

D. Petitioner contends in the alternative that the Hobbs Act at least does not prevent district courts from adjudicating collateral attacks on interpretive rules or guidance documents. *Amerifactors* is a declaratory order, not a rule. In any event, the Hobbs Act contains no exception for interpretive agency actions. Where an interpretive rule or order is reviewable by a court of appeals under the Hobbs Act, district courts lack authority to determine the action's validity.

ARGUMENT

THE HOBBS ACT BARS COLLATERAL ATTACKS ON THE VALIDITY OF A COVERED FCC ORDER IN DISTRICT-COURT LITIGATION BETWEEN PRIVATE PARTIES

The Hobbs Act vests courts of appeals with "exclusive jurisdiction" to "determine the validity of" specified categories of agency actions, including certain "final orders of the" FCC. 28 U.S.C. 2342(1). The decision below rests on the premise that, for purposes of the Hobbs Act, the *Amerifactors* order issued in 2019 by the FCC's Consumer and Governmental Affairs Bureau is a "final order[] of the" Commission that is "made reviewable by section 402(a) of title 47." *Ibid.*; see Pet. App. 7a-8a. Although petitioner does not contest that premise, it is incorrect. But accepting that premise for purposes of this case, the judgment below should be affirmed.

Under the Hobbs Act's jurisdiction-channeling provision, covered agency actions may not be collaterally attacked in district court, including in litigation between private parties. Accordingly, if *Amerifactors* is treated as a final FCC order subject to Hobbs Act review in a court of appeals, the district court correctly concluded that it lacked authority to impose liability on

respondents for conduct that does not violate the TCPA as interpreted in *Amerifactors*.

A. The Decision Below Rests On An Incorrect Premise

The court of appeals erred in treating the Bureau's *Amerifactors* order as a "final order[] of the Commission" that is "made reviewable by section 402(a) of title 47." 28 U.S.C. 2342(1); see Pet. App. 8a-9a. The FCC may delegate certain functions to "an employee board" within the agency, such as the Bureau. 47 U.S.C. 155(c)(1). An order issued "pursuant to any such delegation * * * shall have the same force and effect" as an order by the Commission "unless" it is "reviewed" by the Commission, 47 U.S.C. 155(c)(3), which may do so *sua sponte* or upon the filing of an application for review, 47 U.S.C. 155(c)(4). Filing an application for Commission review is "a condition precedent to judicial review of any order * * * made" pursuant to a delegation of authority from the Commission. 47 U.S.C. 155(c)(7).

Although the statutory text makes the "filing" of an application for review a prerequisite to judicial review, 47 U.S.C. 155(c)(7), the courts of appeals have correctly understood that provision to mean that the aggrieved person must "await the Commission's disposition" of the application *before* seeking judicial review. *International Telecard Ass'n* v. *FCC*, 166 F.3d 387, 388 (D.C. Cir.) (per curiam), cert. denied, 526 U.S. 1146 (1999); see, *e.g.*, *Alabama Power Co.* v. *FCC*, 311 F.3d 1357, 1366 (11th Cir. 2002), cert. denied, 540 U.S. 937 (2003); *Cellular Phone Taskforce* v. *FCC*, 205 F.3d 82, 88-89 (2d Cir. 2000), cert. denied, 531 U.S. 1070 (2001). Accordingly, a petition for review is "incurably premature" if the petition seeks judicial review of an order issued on delegated authority while an application for review of

that order remains pending before the Commission. *International Telecard*, 166 F.3d at 388.

Here, a statutory "condition precedent" to judicial review of *Amerifactors* under 47 U.S.C. 402(a)—the Commission's disposition of the pending application for review of the Bureau's order—remains unfulfilled. 47 U.S.C. 155(c)(7); see p. 5, *supra*. *Amerifactors* is therefore not presently a "final order[] of the [FCC] made reviewable by section 402(a) of title 47." 28 U.S.C. 2342(1); see 47 U.S.C. 402(a). The Hobbs Act does not currently authorize any court of appeals to review *Amerifactors*, nor does it preclude district courts from determining that order's validity.[1]

In *PDR Network, LLC* v. *Carlton & Harris Chiropractic, Inc.*, 588 U.S. 1 (2019), the Court stated that it would "assume without deciding" that the FCC action at issue there was "a 'final order'" under the Hobbs Act. *Id.* at 6. Finality had not been disputed in that case. See *ibid.* By contrast, petitioner argued below that *Amerifactors* is not a "final order" for purposes of the Hobbs Act, but the court of appeals rejected that argument, see pp. 6-7, *supra*, and petitioner did not seek this Court's review of that holding. Given petitioner's litigation choice and this Court's grant of certiorari, the

[1] The situation would be different if the time for filing an application for Commission review of *Amerifactors* had expired without any aggrieved person filing such an application. In those circumstances, the Hobbs Act's exclusivity provision would apply because *Amerifactors* would be properly treated as a "final order[] of the [FCC] made reviewable by section 402(a) of title 47," even though no party took the necessary steps to perfect such review. 28 U.S.C. 2342(1). Applying the exclusivity provision in those circumstances would be no different from applying it when judicial review under the Hobbs Act is available for an agency action but no party seeks review within the 60-day period prescribed by 28 U.S.C. 2344.

Court may assume for purposes of this case that the *Amerifactors* order is covered by Section 2342(1) and therefore could have been challenged directly in a court of appeals through the Hobbs Act's review mechanism.

B. The Hobbs Act Provides The Exclusive Mechanism For Obtaining Judicial Review Of Covered Agency Orders

Assuming that the *Amerifactors* order could have been challenged in a court of appeals under the Hobbs Act, the Act bars petitioner from pursuing a claim of private TCPA liability that is inconsistent with that order. The Hobbs Act's text forecloses such collateral attacks, and the statute's history and purposes confirm the clear import of the statutory language.

1. The Hobbs Act's plain language precludes district-court review of agency actions covered by 28 U.S.C. 2342

a. The Hobbs Act gives courts of appeals "exclusive jurisdiction * * * to determine the validity of" specified categories of agency action. 28 U.S.C. 2342. To "determine" an issue means "[t]o settle a question or controversy about" it or "to decide [it] by authoritative or judicial sentence." *Webster's New International Dictionary of the English Language* 711 (2d ed. 1958) (*Webster's Second*); see 4 *The Oxford English Dictionary* 550 (2d ed. 1989) (*OED*) ("To settle or decide (a dispute, question, matter in debate) as a judge or arbiter."). The term "validity" refers in this context to having "[l]egal strength, force, or authority" or to being "grounded" in "sound principles." *Webster's Second* 2814; accord 19 *OED* 410; *Black's Law Dictionary* 1870 (12th ed. 2024); 3 *Bouvier's Law Dictionary and Concise Encyclopedia* 3387 (3d rev. 8th ed. 1914). The Hobbs Act thus gives the courts of appeals exclusive au-

thority to decide any question about the lawfulness of a covered agency action.

Petitioner accepts that determining the validity of an agency order means deciding "whether the order has 'legal force' or is 'effective or binding.'" Pet. Br. 21. Petitioner maintains, however, that a court makes such a determination "only by entering a declaratory judgment that the order is valid or invalid." *Id.* at 22 (quoting *PDR Network*, 588 U.S. at 21 (Kavanaugh, J., concurring in the judgment)). Entering a judgment declaring an agency action to be invalid (or valid) is surely one means of determining the validity of that action. But petitioner identifies no dictionary, treatise, or other source that defines the words "determine" or "validity" as referring *exclusively* to the entry of a declaratory judgment.

A court that finds an agency's order to be inconsistent with a statute, and therefore disregards the order in adjudicating one private party's liability to another, is naturally said to "determine" the order's "validity." 28 U.S.C. 2342. It likewise would be natural to say that in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), this Court determined the validity of the statute that purported to grant the Court original jurisdiction over mandamus petitions. The Court held that the statute was unconstitutional, declined to give it effect, and then dismissed the proceeding for want of appellate jurisdiction. See *id.* at 173-180. Entry of an injunction or declaratory judgment will sometimes be an appropriate *remedial* step *after* the court has determined whether an agency action is lawful. But whenever a court decides whether an agency action is lawful or unlawful in the course of resolving a case before it, the court is "determin[ing] the validity of" that action.

Petitioner suggests that it did not ask the district court to determine the validity of *Amerifactors* because the judgment that petitioner sought would have left the agency free to "enforce the order against others." Pet. Br. 20 (quoting *PDR Network*, 588 U.S. at 21 (Kavanaugh, J., concurring in the judgment)). But that would be equally true for a declaratory judgment issued by a district court, which would bind only the parties. See *United States* v. *Mendoza*, 464 U.S. 154, 162-163 (1984) (federal government is not subject to nonmutual collateral estoppel). Indeed, under petitioner's approach, a court of appeals that upheld a covered agency action on direct Hobbs Act review would not "determine [the action's] validity," since petitioner views such court of appeals decisions as binding only on the parties. See Pet. Br. 31 n.6.

b. Petitioner argues that, under the interpretive principle *noscitur a sociis*, the terms "'enjoin,'" "'suspend,'" and "'set aside'" all refer "to specific kinds of *equitable* relief," and that "'determine the validity' is best read to do the same." Pet. Br. 22-23 (citations omitted); see 28 U.S.C. 2342 ("to enjoin, set aside, suspend (in whole or in part), or to determine the validity of"). But *noscitur a sociis* has "no place, as this Court has many times held, except in the domain of ambiguity." *Russell Motor Car Co.* v. *United States*, 261 U.S. 514, 519 (1923); see *United States* v. *Stevens*, 559 U.S. 460, 474-475 (2010). The phrase "determine the validity of" unambiguously encompasses deciding the lawfulness of an agency order in the course of resolving a dispute between private parties.

Petitioner's understanding of the surrounding text is also incorrect. Petitioner assumes that to "[s]et aside" an agency order must mean to "annul or vacate" it. Pet.

Br. 23 (citation omitted). But as three Members of this Court recently recognized in assessing a court's authority to "set aside" agency action under 5 U.S.C. 706(2) (a provision originally enacted in the Administrative Procedure Act (APA), ch. 324, § 10(e), 60 Stat. 243, four years before Congress enacted the Hobbs Act, see p. 2, *supra*), that language permits a reviewing court to "'set aside'" agency action by "'disregard[ing]'" the action as unlawful and resolving the dispute before the court without the agency action figuring into the "decisional process." *United States* v. *Texas*, 599 U.S. 670, 696 (2023) (Gorsuch, J., concurring in the judgment).[2]

In any event, the phrase "determine the validity of" should be given its natural meaning, however the Court construes the separate phrase "set aside." Contrary to petitioner's suggestion (Br. 24), reading Section 2342 in that way would not render any of its language "superfluous." A court might be asked to "enjoin," "set aside," or "suspend" a covered agency action without conclusively determining its validity—for example, when a party seeks a preliminary injunction. Congress therefore had good reason to include the complete set of terms that appears in Section 2342.

c. The inference that "determin[ing] * * * validity" under Section 2342 does not refer exclusively to entering declaratory judgments is bolstered by a comparison to 28 U.S.C. 2349(a). Section 2349(a) states that, when

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[2] Section 703 of Title 5 contemplates that "judicial review" of agency action may occur in an enforcement proceeding (see p. 26, *infra*), and Section 706 indicates that a reviewing court may "set aside" agency action. 5 U.S.C. 703, 706(2). Taken together, those provisions reinforce the conclusion that a court can "set aside" an agency action by disregarding the action as unlawful in the course of adjudicating an enforcement suit.

a Hobbs Act suit is filed, the court of appeals "has jurisdiction to vacate stay orders or interlocutory injunctions" and "to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a *judgment* determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency." *Ibid.* (emphasis added).

Petitioner contends (Br. 25) that Section 2349(a) "confirm[s] that Congress intended the determination of an order's validity to be an equitable remedy awarded through a declaratory 'judgment.'" But the word "judgment" appears only in Section 2349(a), not Section 2342, and its omission from the latter was presumably deliberate and should be given effect. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983). Section 2349 delineates the jurisdiction and powers of the reviewing court when a party properly invokes the Hobbs Act to seek direct judicial review of a covered agency action, with the United States named as a party. By contrast, Section 2342's exclusivity provision forecloses judicial review of covered agency actions *outside* of the Hobbs Act's review scheme. And rather than stating that courts of appeals have exclusive jurisdiction to enter "a judgment determining the validity of" a covered agency order, 28 U.S.C. 2349(a), Section 2342 states more broadly that those courts have exclusive jurisdiction "to determine the validity of" covered orders, 28 U.S.C. 2342. Petitioner disregards that textual difference.

2. This Court has construed the Hobbs Act to bar parties in private district-court litigation from collaterally attacking covered agency action

In *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970) (*Transatlantic*), vessel owners refused to pay certain cargo

fees, asserting that the absence of pre-approval by the Federal Maritime Commission (FMC) rendered the fees invalid. *Id.* at 64-65. The port operator brought suit for damages and declaratory relief against a vessel-owner organization. *Ibid.* The district court stayed the proceedings to allow the parties to obtain a ruling from the FMC, which concluded that the fees were largely valid because they had not required pre-approval. *Id.* at 65-66. An affected carrier then moved to intervene in the damages action on the ground that the carrier would be liable for part of any judgment. *Id.* at 67. The court granted leave to intervene, but it refused to consider the carrier's argument—raised as a defense to potential civil liability—that the FMC had erred in deeming the tariff revisions valid. *Ibid.*

This Court unanimously agreed that the district court "was without authority" to consider the carrier's attack on the FMC's action. *Transatlantic*, 400 U.S. at 69. The Court grounded that holding in the Hobbs Act's exclusivity provision, explaining that the Act "is explicit" in vesting the courts of appeals with "'exclusive jurisdiction to . . . determine the validity of . . . such final orders of the [FMC].'" *Ibid.* (quoting 28 U.S.C. 2342). The Court explained that an exception for cases involving referrals to the FMC "would vitiate the scheme of the [Hobbs Act]—a scheme designed to ensure that the Attorney General has an opportunity to represent the interest of the Government whenever an order of one of the specified agencies is reviewed." *Id.* at 70.

This Court also rejected the carrier's argument that it should be permitted to mount "a collateral attack on the Commission's order" because the carrier had not been a party to the FMC proceedings. *Transatlantic*,

400 U.S. at 71. The Court explained that the carrier was in fact "represented before the Commission and ha[d] previously made numerous claims to party status." *Ibid.* The Court also observed that, "[e]ven if [the carrier] was not a formal party" to the administrative proceeding, its "interests were clearly at stake," and its lack of party status did not justify allowing a "collateral redetermination of the same issue in a different and inappropriate forum." *Id.* at 72. The Court also noted that the carrier "had every opportunity to participate before the Commission and then to seek timely review" via the Hobbs Act but "chose not to do so." *Ibid.*

In accordance with *Transatlantic*, every court of appeals to address the issue has construed the Hobbs Act to bar courts from determining the validity of covered agency actions in *any* proceeding outside the Hobbs Act's channels. The courts of appeals have applied the Hobbs Act to preclude challenges to agency regulations in suits between private parties, *e.g.*, *Mais* v. *Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119-1121 (11th Cir. 2014); *Leyse* v. *Clear Channel Broad., Inc.*, 545 Fed. Appx. 444, 459 (6th Cir. 2013), cert. denied, 574 U.S. 815 (2014); *Nack* v. *Walburg*, 715 F.3d 680, 685-687 (8th Cir. 2013), cert. denied, 572 U.S. 1028 (2014); *CE Design, Ltd.* v. *Prism Bus. Media, Inc.*, 606 F.3d 443, 447-448 (7th Cir. 2010), cert. denied, 562 U.S. 1138 (2011); *Daniels* v. *Union Pac. R.R.*, 530 F.3d 936, 940-941 (D.C. Cir. 2008); *City of Peoria* v. *General Elec. Cablevision Corp.*, 690 F.2d 116, 119-121 (7th Cir. 1982), and to preclude the assertion of such challenges as defenses to civil enforcement actions brought by the government, *e.g.*, *United States* v. *Dunifer*, 219 F.3d 1004, 1007 (9th Cir. 2000); *United States* v. *Any & All Radio*

Station Transmission Equip., 207 F.3d 458, 463 (8th Cir. 2000), cert. denied, 531 U.S. 1071 (2001).

3. The history of the Hobbs Act and its predecessors reinforces the most natural reading of Section 2342's text

a. The Hobbs Act's language vesting the courts of appeals with "exclusive jurisdiction" to "determine the validity of" covered orders derives from the Emergency Price Control Act of 1942 (EPCA), ch. 26, 56 Stat. 23. Under the EPCA, a party that wished to challenge orders fixing maximum prices and rents was required to file a protest with a federal administrator—and, when the statute was enacted, to do so within 60 days. § 203(a), 56 Stat. 31. An aggrieved party could then appeal to a special Article III court, called the Emergency Court of Appeals. § 204, 56 Stat. 31-33. The EPCA vested the Emergency Court with "exclusive jurisdiction to determine the validity" of regulations, orders, and price schedules issued under the Act. § 204(d), 56 Stat. 33. The statute also stated that, "[e]xcept as provided in [the EPCA], no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, * * * any provision of any such regulation, order, or price schedule." *Ibid.*

This Court construed the EPCA's exclusivity provision to bar other courts from determining the validity of covered orders in all types of litigation, including enforcement suits. In *Yakus* v. *United States*, 321 U.S. 414 (1944), the Court held that the statute divested district courts of "power to consider the validity of a price regulation as a defense to a criminal prosecution for its violation." *Id.* at 429; see *id.* at 430. The Court similarly

found "no doubt" that the EPCA barred a district court "from determining the validity of [an] individual rent order" in a civil enforcement suit against a landlord to recover allegedly excessive rents, "even though the defense to the action brought there was based on the alleged invalidity of the order." *Woods* v. *Hills*, 334 U.S. 210, 213-214 (1948).

When language is "obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Stokeling* v. *United States*, 586 U.S. 73, 80 (2019) (citation omitted). By incorporating EPCA language that this Court had authoritatively construed, Congress signaled its intent that the Hobbs Act's grant of "exclusive jurisdiction" to "determine the validity" of specified agency actions should be understood in a like manner.

b. Petitioner contends (Br. 34) that the old-soil principle does not apply here because the EPCA contained two sentences regarding exclusivity, *Yakus* rested on both of them together, and the Hobbs Act incorporates language from only one of the sentences. Those contentions are unsound.

As petitioner observes, the EPCA provided in two consecutive sentences (1) that the Emergency Court established by the Act "shall have exclusive jurisdiction to determine the validity" of the covered agency actions and (2) that no other court "shall have jurisdiction or power to consider the validity of any such" action. § 204(d), 56 Stat. 33. In *Yakus*, this Court quoted the first sentence and observed that, "coupled" with the second, the provisions were "broad enough in terms to deprive the district court of power to consider the validity of" the challenged regulation. 321 U.S. at 430. But the Court's observation that the two sentences together were "broad

enough," *ibid.*, does not suggest that either standing alone would have been insufficient. Those sentences merely stated two sides of the same coin: One granted the Emergency Court "exclusive jurisdiction," and the other made explicit the necessary implication of that exclusivity for other modes of review. EPCA § 204(d), 56 Stat. 33. Petitioner observes that the first sentence referred to "determin[ing]" validity while the second referred to "consider[ing]" validity. Pet. Br. 34 (citations and emphasis omitted). But this Court in *Yakus* did not suggest any salient distinction between those terms, and petitioner does not identify one.

Petitioner is also wrong to suggest (Br. 34) that the Hobbs Act incorporates language only from the first EPCA sentence. The second EPCA sentence (but not the first) stated that no court other than the Emergency Court could "stay, restrain, enjoin, or set aside" covered agency action. EPCA § 204(d), 56 Stat. 33. Congress included similar language in the Hobbs Act's exclusivity provision. See 28 U.S.C. 2342. Section 2342 thus incorporates language from each of the two EPCA sentences that the *Yakus* Court viewed as collectively precluding district-court review.

The APA's text and history point in the same direction. As enacted in 1946, the APA stated that agency action "shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law." § 10(b), 60 Stat. 243; see 5 U.S.C. 703. That provision is widely understood to have been added to the APA "to account for the possible reappearance" of judicial-review schemes similar to the EPCA's. Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 Tulane L.

Rev. 733, 741 n.34 (1983) (Verkuil) (citing U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 99 (1947) (*APA Manual*)). And in addressing the kind of preclusion that had been accomplished by the EPCA and recognized in *Yakus*, Congress referred to laws that provide an "exclusive opportunity for [judicial] review." APA § 10(b), 60 Stat. 243.

That APA language harkens back to the first of the EPCA's exclusivity sentences rather than the second, which did not use the term "exclusive." Section 703 thus indicates that a law (like the Hobbs Act, see 28 U.S.C. 2342) that designates some other mode of review as "exclusive" will preclude "judicial review in civil or criminal proceedings for judicial enforcement." 5 U.S.C. 703.[3]

c. This Court likewise construed the pre-Hobbs Act scheme for judicial review of FCC orders as precluding courts in suits between private parties from determining whether covered agency orders were lawful. The Urgent Deficiencies Act (see pp. 2-3, *supra*) conferred on specially constituted district courts "exclusive jurisdiction" over suits to "enjoin, set aside, annul, or suspend" specified agency orders. Act of June 18, 1910, ch. 309, 36 Stat. 539-540 (vesting that jurisdiction in a special commerce court); see Urgent Deficiencies Act, 38 Stat. 219-220 (abolishing the commerce court and transferring its jurisdiction to three-judge district courts); see also 28 U.S.C. 44-48 (1934); Communications Act of 1934, ch. 652, § 402(a), 48 Stat. 1093.

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[3] Petitioner is wrong in suggesting (Br. 34-35) that the *APA Manual* identified the second EPCA sentence as the key statutory language. See *APA Manual* 99 & n.13 (stating that a "statute may * * * expressly provide for an exclusive method of judicial review which precludes challenge of agency action in enforcement proceedings," and citing as an example "section 204(d) of the [EPCA]").

In applying that exclusive-jurisdiction provision, this Court focused on the practical effects of particular suits. In *Venner* v. *Michigan Central Railroad*, 271 U.S. 127 (1926), the Court explained that a suit was subject to the exclusive-jurisdiction provision, even if it did "not expressly pray that [a covered] order be annulled or set aside," if the suit "assail[ed] the validity of the order and pray[ed] that the defendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside." *Id.* at 130. Accordingly, a shareholder in a railroad could not bring a suit against the railroad outside the channels of Urgent Deficiencies Act review when the shareholder sought to enjoin the railroad from carrying out an agreement that the Interstate Commerce Commission (ICC) had approved. *Id.* at 129. In *Lambert Run Coal Co.* v. *Baltimore & Ohio Railroad*, 258 U.S. 377 (1922), the Court similarly held that a mining company's suit against a railroad to enjoin it from distributing coal cars constituted a suit to set aside an ICC order that had already mandated the relevant coal-car schedule. *Id.* at 381-382. The Hobbs Act is best understood to operate with a similar focus on the substance of the suit, not just the relief requested.

4. The purpose and structure of the Hobbs Act confirm Congress's intent to preclude collateral attacks on covered agency orders

Adherence to the Hobbs Act's jurisdictional scheme "ensure[s] that the Attorney General has an opportunity to represent the interest of the Government whenever an order of the specified agencies is reviewed." *Transatlantic*, 400 U.S. at 70; see 28 U.S.C. 2344. Here, as in *Transatlantic*, that aspect of the statutory design would be "vitiate[d]," 400 U.S. at 70, if par-

ties to private district-court litigation—or, indeed, private litigation in the state courts—could assert that covered agency orders are unlawful.

Permitting such collateral challenges would undermine the statutory scheme. Many provisions governing Hobbs Act review are designed to facilitate quick, nationwide resolution of disputes concerning the validity of covered agency actions. These provisions establish a 60-day filing deadline, mandate direct court-of-appeals review, and provide for consolidation of multiple challenges in a single court of appeals. The court of appeals can then consider the lawfulness of the agency action in light of the administrative record, and often with the participation of the full range of stakeholders who were involved in the agency proceedings. Taken together, those procedures enable private entities, in structuring their operations, to act in reliance on an agency order once a court of appeals has found it to be valid or the time for seeking review has expired.

In the TCPA context, the Hobbs Act ensures that businesses engaged in telemarketing can avoid liability in private TCPA suits by relying on safe harbors defined by the FCC. Acceptance of petitioner's position would render such safe harbors illusory. Petitioner's own suit involves a Bureau order that is not presently a final order directly reviewable under the Hobbs Act. See pp. 10-11, *supra*. But under petitioner's approach, a regulated party could be held liable for conduct that a Commission order declares to be permissible under the TCPA, even after a court of appeals has upheld the pertinent FCC order or the time for seeking Hobbs Act review has expired.

Petitioner observes that under its interpretation the Hobbs Act would still channel "facial, pre-enforcement

challenges" to the courts of appeals. Pet. Br. 25 (quoting *PDR Network*, 588 U.S. at 13 (Kavanaugh, J., concurring in the judgment)) (emphasis omitted). Reading the Act to serve *only* that purpose would be a mistake. Collateral attacks in enforcement actions, particularly private suits, can likewise undermine the finality and certainty that the Hobbs Act is designed to create—including for potential defendants who rely in good faith on covered agency orders to structure their business affairs. See Resp. Br. 33-35.

C. Petitioner's Remaining Arguments Lack Merit

Petitioner does not identify any presumptions, background rules, or substantive canons that would justify its narrow construction of the Hobbs Act's exclusivity provision.

1. The question presented here does not implicate any "'strong presumption' favoring judicial review." Pet. Br. 28 (citation omitted). The presumption that "Congress intends judicial review of administrative action," *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), comes into play only when one potential reading of a statute would insulate particular agency action from *all* judicial review. That is not the case here, since the Hobbs Act simply privileges one centralized forum for judicial review of covered agency actions. And petitioner asks the Court to decide this case on the understanding that petitioner had a prior adequate opportunity to seek Hobbs Act review of the Board's *Amerifactors* order in a court of appeals. See Pet. Cert. Reply Br. 4 (noting that petitioner "never argued that it lacked a prior or adequate opportunity for review under the Hobbs Act"). Accordingly, "this case does not implicate 'the strong presumption that Congress did not mean to prohibit all judicial re-

view.'" *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 n.8 (1994) (citations omitted).

2. Because the Hobbs Act "provide[s] by law" for a "prior, adequate, and exclusive opportunity for judicial review" of covered agency actions, 5 U.S.C. 703, Section 703 by its terms indicates that such actions are *not* subject to review in enforcement proceedings. The concept of "adequacy" in Section 703 derives from this Court's decision in *Yakus*. See pp. 19-21, *supra* (discussing *Yakus*); see also Verkuil 741 n.34 (explaining that Section 703 "incorporates the 'adequacy' standard of *Yakus*"); cf. *APA Manual* 97-98 (observing that the "adequate" limitation codified existing law). The Court had held in *Yakus* that foreclosing judicial review in enforcement proceedings does not violate due process as long as the defendants had previously received an "adequate" opportunity to challenge the relevant agency order. 321 U.S. at 434, 436-437. Congress incorporated the same safeguard, using the same term, when it enacted the APA four years later. APA § 10(b), 60 Stat. 243 ("prior, adequate, and exclusive opportunity").

As *Yakus* illustrates, an exclusive review scheme may provide an "adequate" opportunity for judicial review even where a particular litigant has failed to invoke that scheme. See *Yakus*, 321 U.S. at 433-435 & n.3. Petitioner's only proffered reason for reading Section 703 to preserve judicial review of covered FCC orders in private TCPA suits is that the Hobbs Act is "'exclusive'" of district-court review only when the plaintiff seeks "'an injunction or declaratory judgment regarding the agency's order' in a pre-enforcement facial challenge." Pet. Br. 29 n.5 (citations omitted). If the Court rejects that reading of the Hobbs Act's exclusivity provision, then Section 703 adds nothing to petitioner's arguments.

3. Petitioner observes (Br. 31-32) that certain other agency-review statutes channel pre-enforcement challenges to appellate courts while also permitting challenges to be raised in enforcement suits. But petitioner does not identify any example of such a statute that describes the appellate court's jurisdiction as "exclusive." Petitioner's discussion (Br. 32) of judicial review of rules issued by the Securities and Exchange Commission does not fill that gap. Contrary to petitioner's suggestion (*ibid.*), the Hobbs Act does not govern review of such rules, and the statute that *does* apply is worded differently. See 15 U.S.C. 78y.

Petitioner also invokes (Br. 32-33) other statutes that more specifically foreclose collateral attacks on the validity of agency orders in enforcement litigation. As petitioner points out, some provisions state that covered agency actions "shall not be subject to judicial review in any civil or criminal proceedings for enforcement." Pet. Br. 33 (quoting *PDR Network*, 588 U.S. at 14 (Kavanaugh, J., concurring in the judgment), in turn quoting 33 U.S.C. 1369(b)(2)). "But the mere possibility of clearer phrasing cannot defeat the most natural reading of a statute." *Caraco Pharm. Labs., Ltd.* v. *Novo Nordisk A/S*, 566 U.S. 399, 416 (2012). Congress enacted the Hobbs Act more than a decade before it enacted any of those provisions. Well before the Hobbs Act was enacted, moreover, the Court in *Venner* had held that the Urgent Deficiencies Act's conferral of exclusive jurisdiction foreclosed collateral challenges in litigation between private parties. 271 U.S. at 130; see p. 23, *supra*. The fact that more recent Congresses have foreclosed collateral challenges through differently worded provisions—none of which includes the term

"exclusive jurisdiction"—does not cast doubt on the proper interpretation of the Hobbs Act.

4. Petitioner's reliance (Br. 35-37) on constitutional-avoidance principles is also misplaced. The rule that constitutional difficulties should be avoided where possible "does not give a court the authority to rewrite a statute," but simply permits a court to "'choose between competing plausible interpretations of a statutory text.'" *Jennings* v. *Rodriguez*, 583 U.S. 281, 298 (2018) (brackets, citation, and emphasis omitted). Given its language, the history of its operative terms, and this Court's precedents, the Hobbs Act cannot plausibly be read to contain the limitation that petitioner advocates.

In any event, the reading of the Hobbs Act that the Ninth Circuit adopted, and that respondents and the government advocate here, raises no serious constitutional concern. Due process "requires the government to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Jones* v. *Flowers*, 547 U.S. 220, 226 (2006) (citation and internal quotation marks omitted). Due process does not, however, require that litigants be permitted to challenge an agency order at whatever time, or in whatever forum, they prefer. Moreover, litigants who wish to challenge a covered FCC order after the 60-day period for petitioning for Hobbs Act review are not without recourse. A person in those circumstances may petition the FCC for a new declaratory ruling, 47 C.F.R. 1.2, or ask the agency to initiate a new rulemaking proceeding, 47 C.F.R. 1.401. See *FCC* v. *ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 n.5 (1984); *Any and All Radio Station*, 207 F.3d at 463; *City of Peoria*, 690 F.2d at 121.

The availability of judicial review also refutes petitioner's separation-of-powers argument (Br. 36-37). The Hobbs Act does not deny the federal judiciary the power to decide the legality of covered agency actions. Rather, the Act simply specifies review procedures to promote finality, uniformity, and judicial economy, and to ensure that orders are reviewed with the participation of the government and on a developed administrative record. "There is no constitutional requirement that [a challenge] be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process." *Yakus*, 321 U.S. at 444; see *United States* v. *Ruzicka*, 329 U.S. 287, 292-294 (1946). The separation of powers is likewise not offended when an Article III court is required to give preclusive effect to an agency's prior decision. See *B&B Hardware, Inc.* v. *Hargis Indus., Inc.*, 575 U.S. 138, 151 (2015).

D. *Amerifactors*' Status As An Interpretation Of The TCPA Does Not Render The Hobbs Act's Exclusive-Review Provision Inapplicable

In *PDR Network*, this Court remanded to allow the court of appeals to address, *inter alia*, whether the FCC order in that case should have been treated as the "equivalent of an 'interpretive rule.'" 588 U.S. at 6-7. The Court viewed that inquiry as potentially bearing on the "extent to which the order binds the lower courts." *Id.* at 6. Petitioner contends (Br. 37-42) that the Hobbs Act at least does not bar collateral attacks on interpretive rules or guidance, and that *Amerifactors* qualifies for that putative "interpretive" exception. Those arguments lack merit.

The interpretive/legislative distinction derives from the APA's rulemaking requirements, which do not gov-

ern the promulgation of agency orders. The APA exempts "interpretative" rules from the notice, comment, and effective-date requirements for rulemaking under 5 U.S.C. 553. See 5 U.S.C. 553(b)(A) and (d)(2). The APA does not use the term "legislative rule," but that term has come to describe rules that are *not* interpretative and therefore are ineligible for the notice-and-comment exception. See, *e.g.*, *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015). The APA prescribes separate requirements and procedures for issuing an agency "order," which by definition is the product of adjudication rather than rulemaking. See 5 U.S.C. 551(6) and (7) (defining "order" and "adjudication").

The APA's adjudication provisions authorize agencies to issue "declaratory order[s] to terminate a controversy or remove uncertainty." 5 U.S.C. 554(e). Declaratory orders have "like effect as in the case of other orders." *Ibid.* They function similarly to declaratory judgments, allowing agencies to issue "binding rulings capable of providing clear and certain guidance to regulated parties without requiring those parties to first act on peril of sanction." Emily S. Bremer, *Declaratory Orders: Final Report to the Administrative Conference of the United States* 5 (Oct. 30, 2015). The FCC's regulations specifically authorize the agency and its subordinate bureaus to issue such orders, which are known as "declaratory rulings." 47 C.F.R. 1.2.

Here, the Bureau issued *Amerifactors* in response to a petition for a declaratory ruling, and the order states that it is a "declaratory ruling." 34 FCC Rcd at 11,950 ¶ 3. Petitioner identifies no reason to disregard that characterization. Indeed, treating *Amerifactors* as an order rather than a rule was essential to an aspect of the decision below that petitioner does not challenge: It

was on that basis that the court of appeals treated *Amerifactors* as applying "retroactively" to faxes that predated the order. Pet. App. 9a.

In any event, petitioner is wrong to suggest (Br. 39) that the exclusivity of the Hobbs Act review mechanism turns on whether a particular agency action is better characterized as "interpretive" or "legislative." As the government acknowledged in *PDR Network*, that characterization may sometimes bear on whether a particular agency action is reviewable in a court of appeals under the Hobbs Act scheme. Oral Arg. Tr. 59, 64, *PDR Network*, *supra* (No. 17-1705); see, *e.g.*, *American Trucking Ass'n* v. *United States*, 755 F.2d 1292, 1296 (7th Cir. 1985) (agency report issued as an "educational undertaking" was not subject to Hobbs Act review); cf. Pet. Br. 41. But the Hobbs Act does not otherwise provide any "exception for 'interpretive' rules, and case law does not create one." *US West Commc'ns, Inc.* v. *Hamilton*, 224 F.3d 1049, 1055 (9th Cir. 2000); see, *e.g.*, *Sorenson Commc'ns, Inc.* v. *FCC*, 567 F.3d 1215, 1223 (10th Cir. 2009) (Hobbs Act review of interpretive rule). Here, petitioner specifically urged the Court to grant certiorari and decide this case on the understanding that *Amerifactors* could have been challenged in a court of appeals under the Hobbs Act review scheme. See Pet. Cert. Reply Br. 4. When a particular agency action is reviewable by a court of appeals under the Hobbs Act, the Act divests district courts of authority to "determine [the action's] validity," 28 U.S.C. 2342, regardless of whether the action is interpretive in character.

Petitioner identifies no sound reason to except interpretive rules from that exclusivity principle. Even apart from the absence of textual support for such an exception, the distinction between interpretive and leg-

islative rules is not always easy to draw. Cf. *Mortgage Bankers Ass'n*, 575 U.S. at 96 (observing that the "precise meaning" of the APA's reference to "interpretative rule[s]" has been "the source of much scholarly and judicial debate"). Petitioner suggests (Br. 40) that distinguishing between the two types of rules is necessary to avoid improperly giving interpretive rules the "force of law" in district courts. But to the extent the Hobbs Act precludes a district court from finding an agency's interpretive rule to be unlawful, that bar is no different from requiring a district court to give preclusive effect to an agency adjudication, see, *e.g.*, *B&B Hardware*, 575 U.S. at 148-149, or to reject an untimely challenge to an agency action. Congress may limit the time and forum for challenging an agency's interpretation of a statute, and the Hobbs Act imposes such limitations for agency actions covered by the Act's exclusivity provision.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

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APPENDIX

1. 5 U.S.C. 703 provides:

Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

2. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

3. 28 U.S.C. 2342 provides:

Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of—

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101-56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

4. 28 U.S.C. 2344 provides:

Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

5. 28 U.S.C. 2348 provides:

Representation in proceeding; intervention

The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency

is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.

6. 28 U.S.C. 2349(a) provides:

Jurisdiction of the proceeding

(a) The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

7. 47 U.S.C. 155 provides in pertinent part:

Commission

* * * * *

(c) Delegation of functions; exceptions to initial orders; force, effect and enforcement of orders; administrative and judicial review; qualifications and compensation of delegates; assignment of cases; separation of review and investigative or prosecuting functions; secretary; seal

(1) When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions (except functions granted to the Commission by this paragraph and by paragraphs (4), (5), and (6) of this subsection and except any action referred to in sections 204(a)(2), 208(b), and 405(b) of this title) to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter; except that in delegating review functions to employees in cases of adjudication (as defined in section 551 of title 5), the delegation in any such case may be made only to an employee board consisting of two or more employees referred to in paragraph (8) of this subsection. Any such rule or order may be adopted, amended, or rescinded only by a vote of a majority of the members of the Commission then holding office. Except for cases involving the authorization of service in the instructional television fixed service, or as otherwise provided in this chapter, nothing in this paragraph shall authorize the Com-

mission to provide for the conduct, by any person or persons other than persons referred to in paragraph (2) or (3) of section 556(b) of title 5, of any hearing to which such section applies.

* * * * *

(3) Any order, decision, report, or action made or taken pursuant to any such delegation, unless reviewed as provided in paragraph (4) of this subsection, shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.

(4) Any person aggrieved by any such order, decision, report or action may file an application for review by the Commission within such time and in such manner as the Commission shall prescribe, and every such application shall be passed upon by the Commission. The Commission, on its own initiative, may review in whole or in part, at such time and in such manner as it shall determine, any order, decision, report, or action made or taken pursuant to any delegation under paragraph (1) of this subsection.

(5) In passing upon applications for review, the Commission may grant, in whole or in part, or deny such applications without specifying any reasons therefor. No such application for review shall rely on questions of fact or law upon which the panel of commissioners, individual commissioner, employee board, or individual employee has been afforded no opportunity to pass.

(6) If the Commission grants the application for review, it may affirm, modify, or set aside the order, decision, report, or action, or it may order a rehearing upon

such order, decision, report, or action in accordance with section 405 of this title.

(7) The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1) of this subsection. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title, shall be computed from the date upon which public notice is given of orders disposing of all applications for review filed in any case.

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8. 47 U.S.C. 227 provides in pertinent part:

Restrictions on use of telephone equipment

(a) Definitions

As used in this section—

* * * * *

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

* * * * *

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

* * * * *

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through—

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the

facsimile machine number of the recipient before July 9, 2005; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

* * * * *

9. 47 U.S.C. 402(a) provides:

Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28.

10. Emergency Price Control Act of 1942, ch. 26, § 204(d), 56 Stat. 31, provides:

REVIEW

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SEC. 204. (d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.