No. 23-1226

IN THE

Supreme Court of the United States

MCLAUGHLIN CHIROPRACTIC ASSOCIATES, INC.,
Petitioner,

v.

MCKESSON CORPORATION, ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* THE LOCAL GOVERNMENT LEGAL CENTER IN SUPPORT OF PETITIONER

Bryan Weir
Counsel of Record
Tiffany H. Bates
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423
bryan@consovoymccarthy.com

Counsel for Amici Curiae

November 25, 2024

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. Requiring district courts to defer under the Hobbs Act ignores the Act's text and purpose and raises serious constitutional concerns 5

A. Neither the text nor the purpose of the Hobbs Act precludes district courts from reviewing an agency's interpretation of a statute 5

B. Applying the Hobbs Act jurisdictional bar to interpretive rules burdens local governments, forces unnecessary regulatory challenges, and spurs regulatory gamesmanship 8

C. Blind deference to agency interpretations raises serious constitutional concerns 13

II. Allowing the decision below to stand would upset local governments' role in managing local issues 15

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Abbott Laboratories v. Gardner,
387 U.S. 136 (1967) 11

Adamo Wrecking Co. v. United States,
434 U.S. 275 (1978) 9, 10

Bennett v. Spear,
520 U.S. 154 (1997) 10

City of Eugene, Oregon v. FCC,
998 F.3d 701 (6th Cir. 2021) 18

City of Portland v. United States,
969 F.3d 1020 (9th Cir. 2020) 17

Comcast of Oregon II, Inc. v. City of Beaverton,
609 F. Supp. 3d 1136 (D. Or. 2022) 17

Common Cause v. Trump,
506 F. Supp. 3d 39 (D.D.C. 2020) 11

Consolo v. Fed. Mar. Comm'n,
383 U.S. 607 (1966) 6

Crown Castle Fiber, LLC v.
City of Pasadena, Texas,
76 F.4th 425 (5th Cir. 2023),
cert. denied, 144 S. Ct. 820 (2024) 17

Dep't of Transp. v. Ass'n of Am. R.R.s,
575 U.S. 43 (2015) 15

Encino Motorcars, LLC v. Navarro,
579 U.S. 211 (2016) 12

Fla. Power & Light Co. v. Lorion,
470 U.S. 729 (1985) 6

Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.,
561 U.S. 477 (2015) 15

Harrison v. PPG Indus., Inc.,
446 U.S. 578 (1980) 6, 7

Int'l Union v. Chao,
361 F.3d 249 (3d Cir. 2004) 21

Isbrandtsen Co. v. United States,
211 F.2d 51 (D.C. Cir. 1954) 6

Marbury v. Madison,
5 U.S. 137 (1803) 14

Minnesota Pub. Utils. Comm'n v. FCC,
483 F.3d 570 (8th Cir. 2007) 12

Montgomery Cnty., Maryland v. FCC,
863 F.3d 485 (6th Cir. 2017) 20

Nat. Res. Def. Council v.
U.S. Nuclear Regulatory Comm'n,
606 F.2d 1261 (D.C. Cir. 1979) 6

Nat'l Park Hosp. Ass'n v. Dep't of Interior,
538 U.S. 803 (2003) 11

New Jersey v. Nuclear Regulatory Comm'n,
526 F.3d 98 (3d Cir. 2008) 11

Oil, Chem. & Atomic Workers Union v. OSHA,
145 F.3d 120 (3d Cir. 1998) 20

PDR Network, LLC v.
Carlton & Harris Chiropractic, Inc.,
588 U.S. 1 (2019) 5, 6, 9, 10, 13, 14, 19-21

Perez v. Mortgage Bankers Ass'n,
575 U.S. 92 (2015) 10, 14

Pub. Citizen Health Rsch. Grp. v. Chao,
314 F.3d 143 (3d Cir. 2002) 20

Radio-Television Dirs. Ass'n v. FCC,
229 F.3d 269 (D.C. Cir. 2000) 20

Sierra Club v. Env't Prot. Agency,
955 F.3d 56 (D.C. Cir. 2020) 10

United States ex rel. Att'y Gen. v. Delaware & Hudson Co.,
213 U.S. 366 (1909) 13

Constitutional Provisions

U.S. Const. art. I 14

U.S. Const. art. III 13

Statutes, Rules and Regulations

28 U.S.C. §§2342 *et seq.* 5

28 U.S.C. §2344 ..... 7, 10

47 U.S.C. §332(c)(7)(A) 16

Fed. R. App. P. 4(a) 7

Hobbs Act 3-8, 10-15, 17, 19, 21

Supreme Court Rule 37.6 1

Other Authorities

Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1329 (1992) 12

Maeve P. Carey, Cong. Rsch. Serv., R43056, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register* (2019)..... 18

Susan Crawford, *Cities Are Teaming Up to Offer Broadband, and the FCC Is Mad*, Wired (Sept. 27, 2018), perma.cc/3QYU-293G 15-16

Clyde Wayne Crews, Jr., *Biden's 2023 Federal Register Page Count Is The Second-Highest Ever*, Forbes (Dec. 29, 2023)..... 8, 9

Clyde Wayne Crews, Jr., *Confronting A Surge In Costly Federal Rules*, Forbes (May 13, 2024)..... 8, 18

Clyde Wayne Crews, Jr., *Obama's Legacy: 2016 Ends With A Record-Shattering Regulatory Rulebook*, Forbes (Dec. 30, 2016) 9

Antoinette DelBel, *Verizon Sues City of Rochester Over 5G Rollout, Calls Fees Discriminatory*, WHAM (Aug. 12, 2019), perma.cc/AUR9-SCRL 19

The Federalist No. 47 (J. Madison) 13

The Federalist No. 78 (A. Hamilton) 13

H.R. Rep. No. 2122 (1950)..... 6

H.R. Rep. No. 80-1619 (1948)..... 6

Chris D. Linebaugh & Eric N. Holmes, Cong. Rsch. Serv., R46736, *Stepping In: The FCC's Authority to Preempt State Laws Under the Communications Act* (Sept. 20, 2021) 16

Nat'l Ass'n of Telecomms. Officers & Advisors, *Stretched Thin and Feeling the Squeeze: The Harmful Effects of Small Cell Preemption on Local Governments* (Mar. 2021) 16, 17, 18, 19

Nat'l Ass'n of Towns & Townships, *Broadband Development* (Apr. 18, 2022), perma.cc/P22J-DMZV 15, 18

S. Rep. No. 2618 (1950) 6

Dana A Scherer, Cong. Rsch. Serv., R46077, *Potential Effect of FCC Rules on State and Local Video Franchising Authorities* (Jan. 9. 2020) 17-18

Sarah Wray, *T-Mobile Launches Lawsuit Against the City of San Francisco Over 5G Upgrade*, Cities Today, (Nov. 24, 2020), perma.cc/92E6-J2V8 19

INTEREST OF *AMICI CURIAE*[1]

The Local Government Legal Center (LGLC) is a coalition of national local government organizations formed in 2023 to educate local governments regarding the Supreme Court and its impact on local governments and local officials and to advocate for local government positions at the Supreme Court in appropriate cases. The National Association of Counties, the National League of Cities, and the International Municipal Lawyers Association are the founding members of the LGLC.

The International Municipal Lawyers Association (IMLA) is a non-profit professional organization of over 2,500 local government attorneys. Since 1935, IMLA has served as a national, and now international, resource for legal information and cooperation on municipal legal matters. Its mission is to advance the development of just and effective municipal law and to advocate for the legal interests of local governments. It does so in part through filing *amicus* briefs before the U.S. Supreme Court, the U.S. Courts of Appeals, and state supreme and appellate courts.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

---

[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans, and 49 state municipal leagues.

Amici have a strong interest in informing the Court of the significant, adverse, and unwarranted consequences that local governments suffer as a result of affording blind deference to federal agencies' interpretations of congressionally enacted statutes. According absolute deference requires the judiciary to abdicate its constitutional duty and creates serious separation of power problems. And it imposes significant strain on limited local government resources.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Congress enacted the Hobbs Act to channel certain challenges to agency orders directly to the courts of appeals within 60 days. That choice encourages simplicity and the prompt resolution of regulatory challenges subject to the Act. But the decision below improperly expands the Act also to cover enforcement suits brought by and against private parties. Under that rule, a district court must give blind deference to an agency's interpretation of a statute in a private enforcement action. That decision is wrong.

Neither the text nor the purpose of the Hobbs Act requires that result. The text of the Hobbs Act applies only to suits for injunctive or declaratory relief brought against a federal agency. And expanding the Hobbs Act to cover private enforcement actions does not make these suits more efficient. Instead, it deprives parties of their day in court.

If there were any doubt about the Hobbs Act's scope, constitutional avoidance weighs against upholding the decision below. According blind deference to agency interpretations raises significant separation of powers concerns. It shifts substantial power from the judiciary to administrative agencies and disrupts the Constitution's careful allocation of power. At a minimum, then, constitutional avoidance counsels against allowing the Ninth Circuit's decision to stand.

The practical consequences of applying the Hobbs Act jurisdictional bar to interpretive rules also militate against affirming the decision below. Extending the bar to cover interpretive rules would force local governments to navigate a treacherous and expensive

path to challenge erroneous statutory interpretations adopted by an agency. Such a rule would force parties to constantly monitor for and sue over interpretive rules to avoid missing the 60-day jurisdictional window. On top of that, it is often difficult to determine whether an interpretive rule can be challenged at all, since true interpretive rules are not binding. And even when those rules are challenged, agencies may still evade judicial review by arguing that the rule is not a final action that is ripe for review. These problems are especially prevalent for local governments who have limited resources to navigate this complex administrative framework.

Finally, the Ninth Circuit's interpretation of the Hobbs Act imposes unnecessary costs on local governments. In recent years, agencies whose orders are covered by the Hobbs Act have repeatedly clashed with local governments. Many local governments have faced steep compliance costs and expensive litigation as a result. But under the Ninth Circuit's ruling, the Hobbs Act could prevent localities from even defending their conduct as compliant with the statute. That scheme is simply untenable. Local governments deserve their day in federal court.

Nor does the existence of alternative paths of judicial review assuage these concerns. Other mechanisms like petitions for review and petitions for rulemaking are inefficient and ineffective routes to receive judicial review—especially for state and local governments who have limited resources to pursue them.

The Court should reverse.

ARGUMENT

I. Requiring district courts to defer under the Hobbs Act ignores the Act's text and purpose and raises serious constitutional concerns.

The Hobbs Act does not bar a district court from reviewing an agency's interpretation of a statute in a private enforcement action. Such a rule would flout the Hobbs Act's plain meaning, undermine its purpose, and raise serious constitutional concerns. And applying the Hobbs Act jurisdictional bar to interpretive rules would burden local governments, force unnecessary regulatory challenges, and spur regulatory gamesmanship.

A. Neither the text nor the purpose of the Hobbs Act precludes district courts from reviewing an agency's interpretation of a statute.

Congress enacted the Hobbs Act to channel certain challenges to agency orders directly to the courts of appeals. The Hobbs Act gives the courts of appeals "exclusive jurisdiction" to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain actions performed by covered agencies, including the FCC. 28 U.S.C. §2342 *et seq*. The Act's text reaches only direct challenges to the agency action itself: requests to enjoin it, set it aside, suspend it, or invalidate it. Its "exclusive jurisdiction language" "afford[s] the court of appeals exclusive jurisdiction to issue an injunction or declaratory judgment regarding the agency's order." *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 588 U.S. 1, 20-21 (2019) (Kavanaugh, J., concurring in the judgment). The

House Committee Report specified that the Hobbs Act would not "relate to actions between private parties to enforce various liabilities." H.R. Rep. No. 80-1619, at 4 (1948). And most early Hobbs Act cases focused on direct challenges to agency actions—precisely what the Act aimed to address. *See, e.g., Isbrandtsen Co. v. United States*, 211 F.2d 51 (D.C. Cir. 1954); *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607 (1966); *Nat. Res. Def. Council v. U.S. Nuclear Regulatory Comm'n*, 606 F.2d 1261 (D.C. Cir. 1979).

By funneling these direct challenges to the courts of appeals, Congress sought to increase efficiency. Direct review in the courts of appeals encourages "simplicity" in a "considerable" number of cases. *See* S. Rep. No. 2618, at 4-5 (1950). As this Court has explained, "[o]ne purpose of the Hobbs Act was to avoid the duplication of effort involved in creation of a separate record before the agency and before the district court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 740 (1985); *see also* H.R. Rep. No. 2122, at 3-4 (1950) ("[S]ubmission of the cases upon the records made before the administrative agencies will avoid the making of two records, one before the agency and one before the court on review, and thus going over the same ground twice."). Direct review in the courts of appeals also promotes the "expeditio[us]" resolution of cases. *See* S. Rep. No. 2618, at 4-5 (1950). It "force[s] parties who want to challenge agency orders via facial, pre-enforcement challenges to do so *promptly*." *PDR Network*, 588 U.S. at 13 (Kavanaugh, J., concurring in the judgment) (emphasis added). And it "has the "most obvious advantage" of saving time "compared to review by a district court, followed by a second review on appeal." *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593

(1980). Thus, this method of review properly serves the efficiency goals Congress had in mind at enactment.

Other provisions of the Hobbs Act are consistent with this view of the Act as a means to promptly and efficiently adjudicate direct challenges to agency action. The Act sets a 60-day deadline to sue the agency promulgating the rule. *See* 28 U.S.C. §2344. And that deadline is workable for direct challenges that seek to invalidate the order itself; in fact, it aligns with the deadline for a notice of appeal in cases that, like a direct challenge to an agency decision, involve the United States. *See* Fed. R. App. P. 4(a).

But that deadline is *inefficient* for questions relating to how an agency's statutory interpretation applies. If plaintiffs and defendants in private suits are bound by all potential applications of a regulation to all factual scenarios, then those parties will challenge that regulation before those factual scenarios arise. Otherwise, they will lose the right to challenge the regulation when future, now-hypothetical disputes arise. *See infra* section I.B. Yet such future disputes often *don't* ever occur, and even if they do, they may be resolved on other grounds before the regulation's merits are reached. The Ninth Circuit's rule, however, forces those merits decisions now and ensnares courts in hypothetical applications of regulations. Neither the text nor the purpose of the Hobbs Act requires that result.

B. Applying the Hobbs Act jurisdictional bar to interpretive rules burdens local governments, forces unnecessary regulatory challenges, and spurs regulatory gamesmanship.

Extending the Hobbs Act jurisdictional bar to interpretive rules exacerbates the above problems in two ways. First, it forces parties to constantly monitor for, and sue over, interpretive rules to avoid missing the 60-day jurisdictional window. Second, it produces needless, complicated litigation because it is often difficult to determine whether an interpretive rule can be challenged at all. And when those rules are challenged, agencies proffer myriad obstacles to evade judicial review. These problems are especially prevalent for local governments who have limited resources to navigate this complex administrative framework.

1. Applying the jurisdictional bar to include interpretive rules would make complying with the Hobbs Act prohibitively expensive for most parties—especially local governments. Interpretive rules are often issued with little to no advance notice. If the jurisdictional bar applies to interpretive rules, then, an entity seeking to preserve its ability to meet the 60-day window to sue must monitor the Federal Register daily for interpretive rules potentially subject to the Hobbs Act. That is no small task, given that the Federal Register posts hundreds of pages of documents each day. Indeed, "[p]age tallies of over 800 per day" are "routine." Clyde Wayne Crews, Jr., *Confronting A Surge In Costly Federal Rules*, Forbes (May 13, 2024). In 2023 alone, for example, the Federal Register published more that 90,000 pages. Clyde Wayne Crews, Jr., *Biden's 2023 Federal Register Page Count Is The*

Second-Highest Ever, Forbes (Dec. 29, 2023). And many interpretive rules like guidance documents never make it on the Federal Register at all. Scholars have explained that "[n]o one even knows where to find all the sub-regulatory agency guidance, so one can't easily tally it." Clyde Wayne Crews, Jr., *Obama's Legacy: 2016 Ends With A Record-Shattering Regulatory Rulebook*, Forbes (Dec. 30, 2016).

Worse still, even after identifying a rule, parties must *guess* whether it may ever be applied against them years or even decades down the line. Guessing wrongly means becoming "blindside[d] defendants" who inadvertently waived legal defenses to erroneous interpretations of rules because they had not "anticipated that they should have filed a facial, pre-enforcement challenge." *PDR Network,* 588 U.S. at 26 (Kavanaugh, J., concurring in the judgment). For that reason, "it is unfair to expect potentially affected parties to predict the future." *Id.* at 18. That is especially so given the countless ways that agencies like HUD, the FCC, and others regulate parties. *Id.* The sheer volume of regulatory matter subject to the Act would make it nearly impossible for any party to keep track of every potentially problematic item, let alone have "the capacity to immediately challenge" them. *Id.* At the very least, it would require potentially affected parties to maintain highly sophisticated and expensive compliance operations. Such a regime "is totally unrealistic." *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 290 (1978) (Powell, J., concurring). It is imprudent to "assume that more than a fraction of the … entities affected by a regulation—especially small [localities] scattered across the country—would have knowledge of" each rule's "promulgation or familiarity

with … the Federal Register." *Id.* Nothing in the Hobbs Act's text requires that these inefficiencies be placed on local governments. And the practical consequences counsel against it.

2. Even if a locality were to identify an interpretation it wishes to challenge, the agency may employ other procedural machinations to prevent courts from ever deciding the merits of a challenge. Only "final orders" are "reviewable" under the Hobbs Act. *See* 28 U.S.C. §2344. And it is often unclear when an interpretive rule is a "final order." To qualify as "final," an agency order must meet two conditions: (1) "the action must mark the 'consummation' of the agency's decision making process—it must not be of a merely tentative or interlocutory nature"; and (2) "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (cleaned up). In practice, the "question of whether an agency action is final for the purposes of judicial review" is "labyrinthine." *Sierra Club v. Env't Prot. Agency*, 955 F.3d 56, 58 (D.C. Cir. 2020) (dismissing petition under direct circuit review provision because interpretive guidance was "non-final"). Courts have often found this a difficult field to navigate. And the contours of the distinction between "interpretive" and "legislative" rules "is the source of much scholarly and judicial debate." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96-97 (2015); *see also PDR Network,* 588 U.S. at 7. The finality doctrine presents a conundrum for litigants if the Hobbs Act's 60-day bar applies to interpretive rules: challenge it now and risk getting thrown out of court; or wait and hope the rule isn't given any

binding effect in future litigation because it isn't final agency action.

New Jersey v. Nuclear Regulatory Comm'n provides an example of how the finality requirement can thwart Hobbs Act review. 526 F.3d 98 (3d Cir. 2008). That case concerned NRC guidance explaining "the requirements for decommissioning" facilities. *Id.* at 100. After certain facilities struggled to meet the regulations' stringent standards, NRC issued interpretative guidance signaling an alternative, less onerous way for facilities to comply. *Id.* at 101. Concerned with NRC lowering these standards through interpretive guidance, New Jersey challenged it under the Hobbs Act. *Id.* at 101-02. But the court dismissed the petition for lack of jurisdiction because the guidance was "nonbinding" and thus "not a final order" for Hobbs Act purposes. *Id.* at 103.

Ripeness can also defeat merits review if applied to interpretive rules. To determine whether a controversy is ripe for judicial review, the court evaluates both (1) "the fitness of the issues for judicial decision," and (2) "hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). But both "aspects of the inquiry involve the exercise of judgment, rather than the application of a black-letter rule." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 814 (2003) (Stevens, J., concurring in the judgment). The doctrine is thus malleable and context dependent. *See, e.g.*, *Common Cause v. Trump*, 506 F. Supp. 3d 39, 45 n.3 (D.D.C. 2020) (Katsas, J.) (explaining all the factors and formulations the D.C. Circuit uses for ripeness analyses).

In fact, these threshold roadblocks to challenging interpretations, combined with the constraints of the Hobbs Act, could possibly render interpretive rules *completely* unreviewable. Parties often do not know the extent to which an interpretive rule is binding. Since interpretive rules do not go through notice-and-comment rulemaking, they technically do not "carry the force of law." *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 220 (2016). But "[t]here is nevertheless a practical binding effect if private parties suffer or reasonably believe they will suffer by noncompliance." Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1329 (1992). So, litigants can't challenge an interpretive rule immediately and courts may adopt the rule as authoritative in later private civil litigation.

That untenable outcome is already happening. In *Minnesota Pub. Utils. Comm'n v. FCC*, for example, a state identified agency guidance that could be used in the future to preempt the state's regulations and timely filed for review under the Hobbs Act. 483 F.3d 570, 582 (8th Cir. 2007). Yet the court of appeals held that portion of the order was not ripe for review because the preemption issue was "only a mere prediction." *Id.* at 582-83. Thus, the state could not challenge a potentially preemptive interpretative rule because "the order only suggests" that the agency "would preempt" the state in the future, but it hadn't done so yet. *Id.* If that "prediction" comes true, the state would be stuck with no recourse and the rule would effectively evade judicial review on the merits entirely. That sort of outcome counsels heavily

against applying the Hobbs Act to interpretive rules as the Ninth Circuit did below.

C. Blind deference to agency interpretations raises serious constitutional concerns.

If there were any doubt about applying the Hobbs Act's bar in later civil litigation between private parties, constitutional avoidance weighs against it. When a statute is "susceptible of two constructions"—one which presents "grave and doubtful constitutional questions" and one which avoids "such questions"—it is this Court's "duty to adopt the latter." *United States ex rel. Att'y Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). By interpreting the Hobbs Act to allow for review of agency interpretations in in private litigation, this Court can avoid serious separation-of-powers concerns.

Article III vests "[t]he judicial Power of the United States" in the federal courts alone. That division of power was intentional. The Framers believed that "the general liberty of the people can never be endangered … so long as the judiciary remains truly distinct from both the legislature and Executive." The Federalist No. 78 (A. Hamilton). The separation of powers is the "essential precaution in favor of liberty." The Federalist No. 47 (J. Madison). But the decision below—which requires judges to defer to an agency's judgment on questions of law—reallocates considerable judicial power to federal agencies.

Such a rule "trench[es] upon Article III's vesting of the 'judicial Power' in the courts." *PDR Network*, 588 U.S. at 9 (Thomas, J., concurring in the judgment). The judicial power, "as originally understood," demands that courts exercise "independent judgment in

interpreting and expounding upon the laws." *Perez*, 575 U.S. at 119 (Thomas, J., concurring in the judgment). That power "necessarily entails identifying and applying the governing law." *PDR Network*, 588 U.S. at 9 (Thomas, J., concurring in the judgment). The judiciary has the duty to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). And to the extent the Hobbs Act "purports to prevent courts from applying the governing statute to a case or controversy within its jurisdiction," the Act conflicts with that duty. *PDR Network*, 588 U.S. at 10 (Thomas, J., concurring in the judgment).

The Ninth Circuit's interpretation of the Hobbs Act—if allowed to stand—would raise constitutional concerns for another reason. Requiring courts to "give the 'force of law' to agency pronouncements on matters of private conduct without regard to the text of the governing statute," intrudes on Article I's vesting of the legislative power in Congress alone. *Id.* (cleaned up). "[T]o the extent the Hobbs Act" does so, the Act would "permit a body other than Congress" to "exercise the legislative power, in violation of Article I." *Id.* Such a rule would remove any real check on the FCC and the other agencies covered by the Act.

At bottom, the decision below shifts substantial power from the judiciary to administrative agencies, disrupting the Constitution's careful allocation of power. Under the Ninth Circuit's interpretation of the Hobbs Act, the FCC can interpret the TCPA however it wants, and that interpretation binds the courts. Interpreting the Hobbs Act to require such "absolute deference" undermines the balance between the branches of government. *Id.* at 27 (Kavanaugh, J.,

concurring in the judgment). And it effectively renders the judiciary a rubber stamp for agencies that "wield[] vast power and touch[] almost every aspect of daily life." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2015). The Constitution simply does not contemplate such "undifferentiated governmental power." *Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, at 67 (2015) (Thomas, J., concurring in judgment) (cleaned up). At a minimum, then, constitutional avoidance counsels against allowing the Ninth Circuit's decision to stand.

II. Allowing the decision below to stand would upset local governments' role in managing local issues.

1. The Ninth Circuit's interpretation of the Hobbs Act creates unnecessary risks for local governments. In recent years, agencies whose orders are protected by the Hobbs Act have repeatedly clashed with local governments. For example, local governments wish to "retain local control over siting decisions, fees," and other actions involved in deploying broadband and telecommunications services. *Broadband Development*, Nat'l Ass'n of Towns & Townships (Apr. 18, 2022), perma.cc/P22J-DMZV. But recent FCC orders decline to defer to local preferences and preempt local regulations. *Id.* To that end, the FCC has been "on a march to smother local authority" over broadband expansion "by blocking states from regulating any aspect of broadband service, supporting states that have raised barriers to municipal networks, deregulating pricing for lines running between cities, and removing local control over rights-of-way that could be used to bring cheaper access into town." Susan Crawford, *Cities Are*

Teaming Up to Offer Broadband, and the FCC Is Mad, Wired (Sept. 27, 2018), perma.cc/3QYU-293G.

Yet Congress sought to preserve state and local authority over siting decisions. Apart from a "few specific limitations," the Communications Act "preserves state and local authority over decisions regarding the 'placement, construction, and modification of personal wireless service facilities.'" Chris D. Linebaugh & Eric N. Holmes, Cong. Rsch. Serv., R46736, *Stepping In: The FCC's Authority to Preempt State Laws Under the Communications Act* at 24 (Sept. 20, 2021); 47 U.S.C. §332(c)(7)(A). The Act reserves to state and local governments "'the authority … to manage public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis' for use of such rights of way." *Id.* at 23. And it provides that "[n]othing" in the Act "shall affect the ability of a State to impose, on a competitively neutral basis … requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." *Id.*

But the FCC regularly dictates to cities and counties where, when, and how telecommunications equipment can be installed. As 5G wireless technology has been deployed nationwide under the FCC's 2018 Small Cell Order, wireless companies are installing small wireless facilities or "small cells" in communities around the country. *See Stretched Thin and Feeling the Squeeze: The Harmful Effects of Small Cell Preemption on Local Governments*, Nat'l Ass'n of Telecomms. Officers & Advisors (Mar. 2021). The FCC's

policy has allowed 5G providers to install this equipment without permits, damage public property and local infrastructure, reduce local property values, and interfere with municipalities' control of their own rights of way. *Id.*; *see, e.g., City of Portland v. United States*, 969 F.3d 1020, 1053 (9th Cir. 2020) (upholding FCC's decision to prohibit localities from charge wireless or telecommunications providers fees for hosting communications equipment); *Crown Castle Fiber, LLC v. City of Pasadena, Texas*, 76 F.4th 425, 437 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 820 (2024) (holding the Telecommunications Act preempted spacing and undergrounding requirements in Pasadena's small cell regulations, and noting that under the Hobbs Act, "the district court was correct to follow the FCC's order controlling the result"); *Comcast of Oregon II, Inc. v. City of Beaverton*, 609 F. Supp. 3d 1136, 1140-41 (D. Or. 2022) (relying on Hobbs Act in upholding the FCC's decision to preempt the local government licensing fees to use the city's rights-of-way to expand broadband services). These projects have generated confusion and chaos as local governments struggle to manage local concerns and resources in the face of federal micromanagement.

State and local governments also have "traditionally played an important role in regulating cable television operators." Dana A Scherer, Cong. Rsch. Serv., R46077, *Potential Effect of FCC Rules on State and Local Video Franchising Authorities* (Jan. 9. 2020). In recent years, however, the FCC has "limited the ability of local governments … to regulate and collect fees from cable television companies and traditional telephone companies" that offer video services. *Id.* And in

August 2019, the FCC set "new limits on local governments' ability to collect fees from operators to support [public, educational, and government] channels." *Id.*; *see City of Eugene, Oregon v. FCC*, 998 F.3d 701 (6th Cir. 2021) (largely upholding the order). Two months later, the FCC preempted "municipalities' ability to regulate local rates for basic cable service." *Id.* These regulatory changes deprive local governments of revenue and "make it harder for them to ensure that video providers meet local needs." *Id.*

These cases are just the beginning. There is now a historic "lack of deference to local governments" over these matters. *Broadband Development, supra.* The FCC regularly saddles state and local governments with large and small regulatory burdens. And "[l]ocalities are feeling the financial squeeze." *Stretched Thin, supra.* More than half of all localities reported that the FCC's order preempting local authority to regulate 5G equipment alone has exponentially "increased staffing expenses," requiring them to hire new staff or pay overtime to existing staff. *Id.*

Those increased costs are the result of a *single* FCC rule. Yet federal agencies publish between 3,000 and 4,500 final rules each year. Maeve P. Carey, Cong. Rsch. Serv., R43056, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register* at 2 (2019). And they issue countless pages of interpretive rules. *See* Crews, *supra*. With limited time and resources, it is impossible for any state or local government to keep up with every new regulation and every new guidance document. And again, it would be "wholly impractical—and a huge waste of resources—to expect and re-

quire every potentially affected party to bring pre-enforcement challenges against every agency order that might possibly affect them in the future." *PDR Network*, 588 U.S. at 18 (Kavanaugh, J., concurring in the judgment).

On top of that, local governments "are facing new legal attacks, which burden already strained budgets." *Stretched Thin, supra.* FCC regulations regularly "force[] localities to bear increased legal costs, whether to deal with expensive litigation or to spend the resources necessary to mitigate legal risk." *Id.* For example, "[m]ultiple localities have faced litigation" over the FCC's Small Cell Order. *Id.; see, e.g.,* Sarah Wray, *T-Mobile Launches Lawsuit Against the City of San Francisco Over 5G Upgrade*, Cities Today, (Nov. 24, 2020), perma.cc/92E6-J2V8; Antoinette DelBel, *Verizon Sues City of Rochester Over 5G Rollout, Calls Fees Discriminatory*, WHAM (Aug. 12, 2019), perma.cc/AUR9-SCRL.

The FCC's interpretations shape how these suits unfold. That is true even when the meaning of a statute is the *only* legal question at issue. Under the Ninth Circuit's decision, where the FCC has opined on any loosely related issue, the Hobbs Act would potentially prevent a locality from defending its conduct as compliant with the statute, because the complicated web of FCC regulations and orders may be read narrowly enough to preclude the court's straightforward application of the statute. That scheme is untenable. And local governments deserve their day in federal court.

2. Despite the government's prior contentions otherwise, the existence of "alternative path[s] of judicial

review" do not assuage these concerns. *See PDR Network*, 588 U.S. at 25 (Kavanaugh, J., concurring in the judgment). The last time this Court considered the question presented, the government argued that an affected party that missed the initial Hobbs Act period could always "petition the agency for reconsideration, reopening, a new rulemaking, a declaratory order, or the like," and then "obtain judicial review of the agency's denial." *Id.* Those mechanisms are inefficient and ineffective routes to receive judicial review—especially for local governments who have limited resources to pursue them. And there is no reason to channel judicial review into those "convoluted route[s] rather than just supporting judicial review in an enforcement action." *Id.*

On top of that, these "alternative path[s] of judicial review" are often "empty." *Id.* Agencies can—and often do—game the availability of review by sitting on petitions for review or petitions for rulemaking. For example, in a recent case, local cable providers filed petitions asking the FCC to reconsider several rules. The Sixth Circuit observed that "[t]he FCC neglected to respond to those petitions for nearly seven years." *Montgomery Cnty., Maryland v. FCC*, 863 F.3d 485, 488 (6th Cir. 2017). Other examples of long delays abound. *See, e.g.*, *Radio-Television Dirs. Ass'n v. FCC*, 229 F.3d 269, 270 (D.C. Cir. 2000) (20-year delay); *Pub. Citizen Health Rsch. Grp. v. Chao*, 314 F.3d 143, 151 (3d Cir. 2002) (9-year delay). And even when an agency does grant a petition, the agency can still stall. *See, e.g.*, *Oil, Chem. & Atomic Workers Union v. OSHA*, 145 F.3d 120, 124 (3d Cir. 1998) (holding four-year delay after agency agreed to commence proposed rulemaking not unreasonable).

Even when judicial review is available on a petition for review, "it may only be deferential judicial review of the agency's discretionary decision to decline to take new action, not judicial review of" the underlying rule. *PDR Network,* 588 U.S. at 25 (Kavanaugh, J., concurring in the judgment). The denial of petitions for review and petitions for rulemaking are subject only to arbitrary and capricious review. *See Int'l Union v. Chao*, 361 F.3d 249, 254-55 (3d Cir. 2004). And "where agency action is challenged as unreasonably delayed or unlawfully withheld, agencies are scrutinized at the most deferential end of the arbitrary and capricious spectrum." *Id.* Because agencies control the petition process and receive broad deference for those decisions, they can often skirt judicial review completely. *See id.* at 256 (OSHA sat on a petition for review for a decade before issuing a denial, and still evaded judicial review because their decision was not arbitrary). Thus, the supposed "alternative path of judicial review" via petitions for review or rulemaking "is illusory and does not supply a basis for denying judicial review in district court enforcement actions." *PDR Network,* 588 U.S. at 25 (Kavanaugh, J., concurring in the judgment).

For these additional reasons, if the Court holds the jurisdictional bar applies to interpretive rules and agencies systematically adopt these tactics, the Hobbs Act will cut off any further review of agency orders—no matter how erroneous—once the initial 60-day window closes. Local governments would have no option but to monitor and promptly appeal every interpretive rule that may eventually be applied against them in a harmful way, no matter how likely that harm is to occur. Most parties—but especially local

governments—simply lack the time and resources to support that excessive administrative and litigation burden.

CONCLUSION

For these reasons, the Court should reverse the decision below.

Respectfully submitted,

Bryan Weir
Counsel of Record
Tiffany H. Bates
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
Consovoy McCarthy PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423
bryan@consovoymccarthy.com

November 25, 2024 *Counsel for Amici Curiae*