No. 23-1226

IN THE

Supreme Court of the United States

MCLAUGHLIN CHIROPRACTIC ASSOCIATES, INC., PETITIONER

v.

MCKESSON CORPORATION, MCKESSON TECHNOLOGIES, INC.

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

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the exclusive judicial review provided by the Hobbs Administrative Orders Review Act ("Hobbs Act") bars a plaintiff in a private-party action under the Telephone Consumer Protection Act ("TCPA") from collaterally attacking an order of the Federal Communications Commission ("FCC") that limits the scope of defendants' liability when the plaintiff concedes it had a prior and adequate opportunity to seek Hobbs Act review; and, regardless, whether the TCPA's plain text, structure, and purpose show that online fax services are not "telephone facsimile machines" under the statute.

CORPORATE DISCLOSURE STATEMENT

McKesson Corporation is a publicly traded company. McKesson Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock. McKesson Technologies, Inc., which became McKesson Technologies LLC in 2017, was a wholly owned subsidiary of McKesson Corporation. In 2018, McKesson Technologies LLC was acquired by Change Healthcare. As part of the sale agreement, McKesson Corporation retained responsibility for McKesson Technologies LLC's obligations related to this suit. McKesson Corporation currently has no ownership or direct or indirect voting interest in either Change Healthcare or McKesson Technologies LLC.

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INTRODUCTION

The Hobbs Act provides finality, certainty, and uniformity by creating a single, streamlined review process for orders of specific agencies, including the FCC. 28 U.S.C. §2342. The Hobbs Act gives federal courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" covered orders. *Ibid.* It imposes a time limit and consolidates all challenges to such an order in a single court—allowing for one final determination of the order's validity, subject only to certiorari review. *Id.* §§2112, 2344, 2348, 2350. By its express terms, this "exclusive" review process means other courts may not "determine the validity" of the agency order (*id.* §2342)—that is, decide the correctness of the order. That plain meaning of "validity" is the only one that coheres with the rest of the statutory text, structure, and history.

The Administrative Procedure Act ("APA") confirms that interpretation while providing a safety valve where the Hobbs Act's exclusivity would unfairly prejudice a party. The APA bars "judicial review" of agency orders "in civil or criminal proceedings for judicial enforcement"—except when another statute has not provided "prior, adequate, and exclusive opportunity for judicial review." 5 U.S.C. §703. By subsequently using "exclusive" in the Hobbs Act, Congress established the kind of "exclusive opportunity for judicial review" contemplated by the APA. *Ibid.* That means an enforcement court asked to review an FCC order's merits may do so only when prior Hobbs Act review was not "adequate."

This Court's remand in *PDR Network v. Carlton & Harris Chiropractic*, 588 U.S. 1 (2019), reflects this framework. The Court did not decide whether the Hobbs Act precluded the TCPA defendant there from challenging the merits of an FCC order because "two preliminary issues" had been insufficiently addressed. *Id.* at 4. One such issue was whether Hobbs Act review was "adequate" for that particular defendant. *Id.* at 7-8. In remanding, this Court suggested that, "[i]f the answer is 'no,'" the APA may permit the defendant's challenge even if the Hobbs Act is otherwise exclusive. *Id.* at 8.

Petitioner's arguments misread the Hobbs Act, virtually ignore the APA, and rely on inapposite constitutional and policy concerns. Hobbs Act exclusivity extends beyond remedies against agency orders—Congress structurally distinguished those remedies from the phrase "to determine the validity" and ratified this Court's decisions extending exclusivity in predecessor statutes to evaluation of the merits of agency orders. And the APA's adequacy requirement solves petitioner's policy concerns. Where a party could not have timely challenged an order under the Hobbs Act, or where enforcing Hobbs Act exclusivity would violate a defendant's due process right to defend itself, the APA would allow review.

But petitioner cannot trigger that safety valve. It concedes it had prior, adequate opportunity to seek Hobbs Act review but chose not to. And it has no due process right to hold others liable for conduct deemed lawful by the agency expressly authorized to issue declaratory orders construing the TCPA.

The judgment should be affirmed.

STATUTORY PROVISIONS

The appendix contains relevant provisions.

STATEMENT OF CASE

A. Legal Framework

1. Hobbs Act and APA

a. The APA makes "special statutory review provisions" the only judicial review if "prior, adequate, and exclusive"

Enacted four years before the Hobbs Act, the APA provides that "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute." 5 U.S.C. §703. Only "in the absence or inadequacy" of that special proceeding does the APA permit other judicial review. *Ibid.*.

Section 703 extends this same approach to enforcement proceedings: "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." *Ibid.* Thus, judicial review is unavailable in enforcement proceedings if the law provides a "prior, adequate, and exclusive opportunity for judicial review" elsewhere. *Ibid.*

b. The Hobbs Act provides the "exclusive" special review proceeding "to determine the validity" of FCC orders

As petitioner recognizes, the Hobbs Act creates a "special statutory review proceeding," as contemplated

by the APA. Pet.Br.5. It is no ordinary provision: the Hobbs Act is a "finality-focused specific review provision[]" that "eschew[s] a 'challenger-by-challenger' approach." *Corner Post v. Bd. of Govs. of Fed. Reserve Sys.*, 603 U.S. 799, 814, 817 (2024).

The Hobbs Act grants appellate courts "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain agency orders. 28 U.S.C. §2342. It uses the same terminology—"exclusive"—as the APA, making clear the Hobbs Act is the kind of "exclusive opportunity for judicial review" generally precluding other review. 5 U.S.C. §703.

Orders covered by the Hobbs Act include "all final orders of the [FCC] made reviewable by section 402(a) of title 47." 28 U.S.C. §2342(1). With exceptions not relevant here, section 402(a) governs "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission under [chapter 5 of title 47]." 47 U.S.C. §402(a).

To seek review, "[a]ny 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." 28 U.S.C. §2344. "The action shall be against the United States" (*ibid.*), and "the agency *** may appear *** as of right" (*id.* §2348). Multiple petitions are consolidated. *Id.* §2112(a)(3). The court has "exclusive jurisdiction to make and enter *** a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency." *Id.* §2349(a).

These procedures serve the Hobbs Act's "finality-focused" purpose by ensuring timely challenges are

brought before a single court that can provide a binding, nationwide resolution. *See Corner Post*, 603 U.S. at 815. They also "ensure that the Attorney General has an opportunity to represent the interest of the Government." *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70 (1970).

2. Telephone Consumer Protection Act

The Hobbs Act's exclusive review applies to FCC orders about the TCPA. 28 U.S.C. §2342(1).

a. TCPA prohibits faxing advertisements to a "telephone facsimile machine"

The TCPA prohibits "us[ing] any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. §227(b)(1)(C). A "telephone facsimile machine" is "equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper." *Id.* §227(a)(3). The TCPA includes a private right of action. *Id.* §227(b)(3).

b. FCC issued a declaratory order adjudicating online fax services as not "telephone facsimile machine[s]"

Congress authorized the FCC to "prescribe regulations to implement the [TCPA's] requirements." *Id.* §227(b)(2). The FCC also has authority to "issue a declaratory order" in an adjudication to "remove

uncertainty" in the law. 5 U.S.C. §554(e); *see* 5 U.S.C. §551(6)-(7); 47 C.F.R. §1.2(a).

A party petitioned the FCC to adjudicate whether "online fax services" are TCPA "telephone facsimile machines." Pet.App.47a. "An online fax service is 'a cloud-based service'" that "allow[s] users to 'access "faxes" the same way they do email.'" *Ibid*. The FCC solicited "comment on the petition via public notice." 47 C.F.R. §1.2(b); 32 FCC Rcd. 5667 (2017). Petitioner could have participated but chose not to. Pet.App.58a-59a.

An FCC bureau issued a declaratory order ("*Amerifactors*") adjudicating that an online fax service is "not a 'telephone facsimile machine' and thus falls outside the scope of the statutory prohibition." Pet.App.48a. That conclusion followed from the statute's text, purposes, and the extensive record "on the nature and operations of current online fax services." Pet.App.50a. *Amerifactors* reasoned: while "Congress made clear that the proscription applies when a fax is sent *from* other devices"—"a 'computer,' or any 'other device'"—the statute's text proscribes sending a fax only "*to* a 'telephone facsimile machine.'" Pet.App.51a-52a (quoting 47 U.S.C. §227(b)(1)(C)) (emphases added). The order also explained that an online fax service, which effectively transmits faxes as emails, is not within the statutory definition of "telephone facsimile machine" because it "is plainly not 'equipment which has the capacity *** to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper." Pet.App.52a-53a (quoting 47 U.S.C. §227(a)(3)).

An application for review by the full FCC remains pending. CG Docket Nos. 05-338, 02-278, Career Counseling Services Application for Review (Jan. 8, 2020). Pending review, *Amerifactors* has the "same force and effect" as a full FCC order. 47 U.S.C. §155(c); *see* Pet.Br.14.

In a later declaratory order, the FCC bureau followed *Amerifactors* and found another online fax service not a "telephone facsimile machine." *Joseph T. Ryerson Petition for Declaratory Ruling*, 35 FCC Rcd. 9474, 9475 (2020). Again, petitioner chose not to participate. Petitioner's counsel, however, filed comments on counsel's own behalf and then petitioned the full FCC for review. *Anderson + Wanca's Comments*, CG Docket Nos. 05-338, 02-278 (Dec. 9, 2015); *Application for Review*, CG Docket Nos. 05-338, 02-278 (Oct. 5, 2020). That petition remains pending.

B. Procedural Background

1. In 2009 and 2010, respondents sent 12 faxes to petitioner's standalone fax machine. 1-ER-5. Petitioner and another plaintiff filed this putative class action, alleging respondents faxed "unsolicited advertisements." Pet.App.24a-25a; 3-ER-339.

The district court certified the class. Pet.App.28a. After *Amerifactors*, respondents moved to decertify, explaining individual inquiries would be needed to separate those receiving faxes on TCPA-covered telephone facsimile machines from those using uncovered online fax services. 2-ER-197-222; 2-ER-127-151.

The district court created a "Stand-Alone Fax Machine Class" and an "Online Fax Services Class."

Pet.App.24a-42a. Concluding it was bound by *Amerifactors* (Pet.App.36a-37a), the court entered summary judgment against the Online Fax Services Class, finding "no cause of action as a matter of law under *Amerifactors*." Pet.App.21a-23a. After plaintiffs could not identify the "Stand-Alone Fax Machine Class" members, the court decertified that class. Pet.App.12a-20a. It entered judgment on plaintiffs' individual claims, with statutory damages, but finding no willful or knowing violation. 1-ER-2.

2. The court of appeals affirmed decertification. Pet.App.3a-11a. It agreed the Hobbs Act required following *Amerifactors*' conclusion "that the TCPA does not apply to faxes received through an online fax service." Pet.App.7a. For purposes of the Hobbs Act's exclusive jurisdiction, the court held "it does not matter that *Amerifactors* was issued by the Commission's Consumer and Governmental Affairs Bureau, rather than the full Commission." Pet.App.7a.[1]

The court also held *Amerifactors* applied retroactively because the declaratory ruling was an "adjudication[]." Pet.App.9a (citing 5 U.S.C. §554(e)). It did not reach respondents' alternative argument that, independent of *Amerifactors*, the TCPA does not cover online fax services. Resp.CA.Response.Br.17-28.

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[1] Neither petitioner's certiorari nor merits briefing challenged the holding about *Amerifactors*' bureau-level nature, an issue petitioner has never asserted is certworthy. *See* BIO34; Pet.Br.19. Were the materiality of that issue in dispute, this case would not present the question this Court granted certiorari to resolve, and it should consider dismissing as improvidently granted.

SUMMARY OF ARGUMENT

I.A. The Hobbs Act grants courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" covered orders. 28 U.S.C. §2342. In common parlance, "to determine the validity" of an order means to decide whether the order is correct. And that is the only meaning that makes sense given the Hobbs Act's text and structure.

The provisions governing Hobbs Act review of FCC orders differ from each other in sentence structure and how they treat "to determine the validity" as compared to other terms. *See id.* §2349(a); 47 U.S.C. §402(a). If "to determine the validity" were merely a form of declaratory relief, as petitioner asserts, there would be no reason for Congress to differentiate it from the other terms. The differences between the provisions can be coherently explained only if "to determine the validity" refers to a court's decisional process in evaluating an order's merits, while "to enjoin, set aside, suspend" refers to relief flowing from that decision. Thus, the Hobbs Act's exclusive jurisdiction to enter certain relief "*or to* determine the validity" of an order precludes other courts from deciding the order's merits, regardless of the relief sought. 28 U.S.C. §2342 (emphasis added).

Statutory history, precedent, and purpose reinforces that interpretation. In enacting the Hobbs Act, Congress borrowed from the Urgent Deficiencies Act and the Emergency Price Control Act, which this Court had interpreted as precluding judicial review of agency orders in enforcement and private litigation, even where no relief was sought against the order.

Venner v. Mich. Cent. R.R., 271 U.S. 127, 130 (1926); *Yakus v. United States*, 321 U.S. 414, 429-430 (1944). This Court subsequently interpreted the Hobbs Act to preclude judicial review of an order's merits, regardless of the relief sought. *Port of Boston*, 400 U.S. at 69-70. Congress then ratified that interpretation. Permitting parties to circumvent the Hobbs Act's exclusive review would undermine Congress's purpose of providing finality, certainty, and uniformity.

B. The APA reinforces that Hobbs Act review is exclusive, while providing a safety valve where that review would be inadequate. Where another statute provides a "prior, adequate, and exclusive opportunity for judicial review," the APA precludes "judicial review in civil or criminal proceedings for judicial enforcement." 5 U.S.C. §703. But where that exclusive review would be inadequate—*e.g.*, if a party did not exist—the APA would permit judicial review elsewhere.

Four years after enacting the APA, Congress used "exclusive" in the Hobbs Act to make clear it triggers the APA's prohibition on other judicial review. Thus, parties can collaterally challenge a Hobbs Act order only if they can show such review was inadequate for them. Because petitioner concedes it had a prior and adequate opportunity to seek Hobbs Act review, it cannot seek review in this private-party action.

C. Because the Hobbs Act and APA are clear, there is no room for resort to presumptions or canons. Regardless, the Hobbs Act neither denies judicial review nor implicates separation of powers. It simply channels judicial review to particular courts.

Nor does the Hobbs Act's exclusivity raise due process concerns. If a defendant's due process rights would be violated by precluding it from challenging an agency order in an enforcement action, Hobbs Act review would be inadequate for that defendant, and the APA's adequacy safety valve would permit review. No such due process concerns are present here.

D. Petitioner's fallback interpretive-rule exception provides no ground for reversal. *Amerifactors* was an order from an adjudication—not an interpretive or legislative rule. Adjudications carry the force of law and are thus final orders reviewable under the Hobbs Act.

II. Alternatively, this Court should affirm because the FCC's interpretation of the TCPA is correct, and nothing would be gained by remanding. *Los Rovell Dahda v. United States*, 584 U.S. 440, 440-450 (2018). The TCPA's text makes clear that an online fax service is not a "telephone facsimile machine," so the statute itself required class decertification.

ARGUMENT

I. PETITIONER CANNOT COLLATERALLY CHALLENGE *AMERIFACTORS'* MERITS

A. The Hobbs Act's Text, History, Precedent, and Purpose Establish Petitioner Cannot Assail The Order's Correctness

1. The plain text establishes "exclusive" jurisdiction "to determine the validity" of covered orders

a. A court "determine[s] the validity" of an agency order whenever it decides whether the order is correct

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" covered orders. 28 U.S.C. §2342. There is no dispute that "exclusive" precludes other courts from engaging in the same review. Pet.Br.19. The sole dispute is what "to determine the validity" means—and only one meaning makes sense when that phrase is interpreted in its textual and structural context. Given the words' plain meaning, the sentence's structure, and other Hobbs Act provisions, "to determine the validity" means a court's decision on whether the agency order was correct, regardless of the relief sought.

That is a common, ordinary meaning of "to determine the validity." Courts "determine" an issue when they "settle a question or controversy about" it. *Webster's New International Dictionary* 711 (2d ed. 1958); *Oxford English Dictionary* 550 (2d ed. 1989) ("To settle or decide (a dispute, question, matter in debate), as a judge or arbiter"); Pet.Br.21 ("decide").

And "valid" means "[f]ounded on truth or fact; capable of being justified, supported, or defended; not weak or defective; well-grounded; sound; good; as, a *valid* argument; a *valid* objection." *Webster's* at 2813. Thus, English speakers would ordinarily say a court determines an order's validity when it decides whether the order is sound and well-grounded.

This Court has used "valid" in exactly this way. It has described courts as deciding an agency order's "valid[ity]" where the court judged its merits, regardless of the case's posture or relief sought. *E.g., Whirlpool v. Marshall*, 445 U.S. 1, 8 (1980) (describing enforcement court as holding regulation "inconsistent with" statute and therefore "invalid"). This description reflects the common-sense reality that a court decides an agency order's validity not only when a party seeks to set it aside on direct review, but also when, for example, a defendant resists enforcement by arguing the order is unlawful, or a plaintiff sues on a theory arguing the order's statutory interpretation is incorrect.

Reading "to determine the validity" in this way is also compelled by the sentence structure of the Hobbs Act's exclusivity provision and related provisions. As shown below, the various provisions governing review of FCC orders each use the phrase "determine the validity" differently from "enjoin, set aside, suspend." These differences can be coherently explained only if the phrases reflect the distinction between a court's merits decision and the relief awarded based on it. That is, "to determine the validity" has its ordinary meaning referring to a court's decision whether the agency order is correct, while "to enjoin, set aside,

suspend" refers to possible relief that could be ordered based on that decision, such as an injunction.

For starters, section 2349 of the Hobbs Act describes the full scope of review in such proceedings: "to make and enter *** a judgment determining the validity of, *and* enjoining, setting aside, or suspending, in whole or in part, the order." 28 U.S.C. §2349(a) (emphasis added). The "and" connector, which sets "determining the validity" off from the remedial actions listed, recognizes that "determining" the merits is distinct from, and a necessary predicate to, the other actions. Section 2349's use of these terms in conjunction thus describes the two-step process courts undertake when directly reviewing agency action. A court must evaluate the merits *and then* order appropriate relief. As petitioner admits, courts typically cannot do the latter without the former. Pet.Br.24. So understood, "determining the validity" does not make "enjoining, setting aside, or suspending" superfluous (*contra* Pet.Br.24) because they speak to different parts of the judicial review process. *Accord* 5 U.S.C. §706 (courts "*determine* the meaning or applicability of the terms of an agency action" and then order relief, such as "hold[ing] unlawful and set[ting] aside agency action") (emphasis added).

Critically, section 2342 extends more broadly when describing the exclusionary effect of Hobbs Act review. It makes exclusive appellate courts' jurisdiction "to enjoin, set aside, suspend (in whole or in part), *or to* determine the validity of" the order. 28 U.S.C. §2342 (emphasis added). That distinct use of the words "or to" establishes that section 2342's exclusivity necessarily extends to cases where a court

might not be asked "to enjoin, set aside, suspend" an agency order but nevertheless needs "to determine the validity"—to decide the correctness—of the order to provide other relief. That describes this case, where petitioner's liability theory conflicts with the FCC's order, so granting petitioner relief would entail determining that order is incorrect.

Finally, 47 U.S.C. §402(a), the FCC provision that refers to the Hobbs Act, reinforces that "to determine the validity" is not a form of relief. In listing the relief that can be sought in Hobbs Act review, it omits "determine the validity" and states that "[a]ny proceeding to enjoin, set aside, annul, or suspend" a covered FCC order must be brought under the Hobbs Act. It was unnecessary there to mention the decisional process preceding such relief; but were "determine the validity" merely another form of relief, Congress would have included it.

b. Petitioner's attempts to restrict "to determine the validity" to declaratory judgments are unavailing

For the reasons explained, the Hobbs Act's plain text and structure refute petitioner's attempt to narrow "to determine the validity" to declaratory judgments. Had Congress intended to preclude courts from entering declaratory judgments, it could have simply borrowed language from the previously enacted Declaratory Judgment Act, which created a "remedy" authorizing courts to "declare the rights or other legal relations of any interested party seeking such declaration." 28 U.S.C. §2201. Thus, if Congress had merely meant to preclude that remedy, it could have included those words: *e.g.*, "to enjoin, set aside,

suspend (in whole or in part), declare rights relating to/issue a declaratory judgment on." *Cf.* 5 U.S.C. §703 ("actions for declaratory judgments"). But Congress instead chose broader language and set it apart in its own phrase: "or to determine the validity of."

Nor does petitioner's definition of "valid" narrow that term to declaratory judgments. Petitioner argues the definition of "'valid' *includes* 'having legal strength or force.'" Pet.Br.21 (emphasis added). But petitioner ignores the same definition also includes "well-grounded," "sound," and "good." *Webster's* at 711; *see Black's Law Dictionary* (12th ed. 2024) ("Meritorious"). "When words have several plausible definitions, context differentiates among them." *United States v. Hansen*, 599 U.S. 762, 775 (2023). As explained, the correct definition here is whether the agency order is sound or meritorious.

Regardless, in the administrative context, petitioner's definition of "valid" as "having legal strength or force" (Pet.Br.21) actually supports respondents' interpretation: an incorrect agency order and one lacking legal force are two sides of the same coin. While "[a] court's power to decide a case is independent of whether its decision is correct," "[t]hat is not so for agencies charged with administering congressional statutes." *Arlington v. FCC*, 569 U.S. 290, 297 (2013). For agencies, "[b]oth their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires." *Id.* at 297-298. This limit on agency authority is even clearer after *Loper Bright Enterprises v. Raimondo*, which clarified agencies have no power to choose

among interpretations: there is no "permissible" interpretation other than the correct one. 144 S. Ct. 2244, 2266 (2024).

This case illustrates that reality. *Amerifactors* is a declaratory ruling, after notice and comment, definitively setting forth the agency's construction of the statute. No one would describe exercise of such authority as "valid" or "legally sufficient" if it rested on an interpretation contrary to the statute. Thus, whenever a court concludes an agency's interpretation is wrong, it has determined the order is beyond the bounds of the statute and thus invalid—regardless of whether it also enters a declaratory judgment.

Noscitur a sociis does not limit "determine the validity" to a specific remedy. *Contra* Pet.Br.22-23. That canon applies only when all terms are "conjoined in such a way as to indicate that they have some quality in common." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 196 (2012)[2] Here, "determine the validity" is treated differently than "enjoin, set aside, suspend" in all three relevant sections. In 28 U.S.C. §2342, it is set apart from the other terms with its own infinitive: "*to* enjoin, set aside, suspend (in whole or in part), or *to* determine the validity" (emphases added). In 28 U.S.C. §2349(a), it is separated by "and" and thus not even part of the

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[2] Petitioner asserts the terms are all remedies (Pet.Br.22-23), but whether "set aside" always refers solely to a remedy is unsettled. *Compare United States v. Texas*, 599 U.S. 670, 695-702 (2023) (Gorsuch, J., concurring in judgment) (interpreting "set aside" in the APA as "disregard" or "refuse to apply"), *with Corner Post*, 603 U.S. at 826-843 (Kavanaugh, J., concurring) (interpreting "set aside" in the APA as "vacate").

same list as the other terms: "judgment determining the validity, *and* enjoining, setting aside, *or* suspending" the order (emphases added). In 47 U.S.C. §402(a), it is not included with the others at all.

Petitioner's reading cannot explain the differences between these sections. If "determine the validity" were a remedy like the other terms, there is no reason to omit it from section 402(a), which identifies the remedies available in the proceedings.

Petitioner's argument that a "judgment determining the validity" in section 2349 must be a declaratory judgment ignores the rest of that sentence. Pet.Br.24-25. The "judgment" there is a "judgment determining the validity of, *and* enjoining, setting aside, or suspending" the order. 28 U.S.C. §2349 (emphasis added). That refers to both the merits determination "and" the relief covered in the same judgment. The former is required for the latter, and that is why they are connected by "and." But if "determine the validity" referred just to declaratory relief, using "and" would make no sense. While courts must decide the merits before ordering relief, they need not enter a declaratory judgment before ordering injunctive relief.

c. The Hobbs Act's text distinguishes it from statutes not conveying "exclusive jurisdiction" "to determine the validity" of agency orders

The plain text refutes petitioner's characterization of the Hobbs Act as merely "one of a host" of agency-review statutes. Pet.Br.31. Unlike the Hobbs Act, neither of petitioner's cited statutes grant

"exclusive" jurisdiction "to determine the validity" of agency orders.

First, petitioner asserts certain SEC orders fall under the Hobbs Act yet have been subjected to collateral review. Pet.Br.32. But the SEC is not covered by the Hobbs Act, nor do the decisions petitioner cites mention the Act. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); *United States v. O'Hagan*, 521 U.S. 642 (1997). SEC orders are reviewable under a different statutory scheme. 15 U.S.C. §78y(a)-(b). Unlike the Hobbs Act, that statute provides exclusive jurisdiction only "to affirm or modify and enforce or to set aside" SEC orders. 15 U.S.C. §§78y(a)(3), 78y(b)(3). It nowhere makes that review the "exclusive" avenue "to determine the validity" of such orders.

Second, petitioner cites a review provision for Secretary of Labor standards. Pet.Br.32. That statute allows filing "a petition challenging the validity of such standard" with the appropriate appellate court (29 U.S.C. §655(f)), without expressly making that review "exclusive."

Far from supporting petitioner, these different statutes reinforce that the Hobbs Act's "exclusive jurisdiction *** to determine the validity" of an order should be given distinct force. 28 U.S.C. §2342.

2. The Hobbs Act adopted the broad reach of the Urgent Deficiencies Act and Emergency Price Control Act

The Hobbs Act's statutory history reinforces that "to determine the validity" means the court's decision on the merits, not a form of relief. Congress borrowed

from two statutes whose exclusive-review provisions had already been broadly interpreted by this Court to preclude collateral review in enforcement actions: the Urgent Deficiencies Act of 1913 and the Emergency Price Control Act of 1930 ("EPCA"). *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law"); Scalia & Garner at 256 ("[Q]uite separate from legislative history is *statutory* history—the statutes repealed or amended by the statute under consideration.").

a. The Hobbs Act adopted this Court's interpretation of the Urgent Deficiencies Act that a collateral lawsuit cannot "assail the validity" of an order

The Hobbs Act's most direct predecessor was the Urgent Deficiencies Act, the original judicial review provision for FCC orders and those of certain other agencies. That statute initially gave three-judge district courts authority over "any suit *** to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission" ("ICC"). Act of Oct. 22, 1913, 38 Stat. 208, 219-220.

This Court held that the Urgent Deficiencies Act precluded other courts from questioning the merits of ICC orders, even in private-party litigation not seeking to directly set aside the order.

In *Venner*, the plaintiff sued to enjoin a railroad company from carrying out a purchase agreement. 271 U.S. at 128-129. In defense, the company relied on an ICC order approving the agreement, but the

plaintiff argued the order improperly encroached on state-agency authority. *Id.* at 129. The plaintiff sought no relief against the ICC. *Id.* at 130. This Court held the suit barred by the Urgent Deficiencies Act: "While the amended bill does not expressly pray that the order be annulled or set aside, it does *assail the validity* of the order and pray 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." *Ibid.* (emphasis added).

Likewise, in *Lambert Run Coal v. Baltimore & Ohio Railroad*, the plaintiff sued a railroad company for not distributing railcars as required by statute and instead following its own distribution rules. 258 U.S. 377, 379-380 (1922). As in *Venner*, the plaintiff sought no relief against the ICC; its complaint did not even mention that the defendant was following ICC rules. *Id.* at 380-381. This Court held plaintiff's argument barred as attempting, "in effect," to set aside the ICC's order, even though this fact "did not appear on the face of the bill." *Id.* at 381-382. The Court held that challenge could be brought only before "a court of three judges," and courts outside that process "had no occasion to *pass upon the merits* of the controversy." *Id.* at 381 (emphasis added).

In both decisions, this Court focused not on the specific relief requested, but on the lawsuit's practical effect and the merits determination that would have been required before relief could be granted. Both times, the Court recognized allowing the lawsuit would undermine a critical purpose of the exclusive-review procedure: the United States was an "indispensable party" in defending the orders but was

not joined in these types of private-party lawsuits. *Lambert*, 258 U.S. at 382; *see Venner*, 271 U.S. at 130.

After *Lambert* and *Venner*, Congress ratified the Court's interpretation by incorporating the Urgent Deficiencies Act's exclusive-review provisions into statutes for review of FCC and certain Secretary of Agriculture orders. Communications Act of 1934, §402(a), 48 Stat. 1064, 1093; Perishable Agricultural Commodities Act of 1930, §§10-11, 46 Stat. 531, 535 (codified at 7 U.S.C. §499k).

Next, Congress replaced the Urgent Deficiencies Act with the Hobbs Act. The lineage between the two statutes is apparent from the orders they cover. The Hobbs Act applies to the same FCC and Perishable Agricultural Commodities Act orders previously governed by the Urgent Deficiencies Act, and to orders under other statutes using the same language as the Urgent Deficiencies Act. *See* Hobbs Act, 64 Stat. 1129, 1129 (1950); Shipping Act of 1916, §31, 39 Stat. 728, 738; Packers and Stockyards Act of 1921, §204(a), (e), 42 Stat. 159, 162.

The Hobbs Act differed from the Urgent Deficiencies Act in two respects. It transferred the exclusive-review authority from three-judge district courts to appellate courts. And, critically here, it made exclusive not only the jurisdiction "to enjoin, set aside, suspend" agency orders, as in the Urgent Deficiencies Act's text, but also jurisdiction "to determine the validity of" them. 64 Stat. 1129. That additional language made express *Venner*'s holding that other courts are barred from hearing any case "assail[ing] the validity" of an agency order's merits, and not just from entering relief directly against the order. *Venner*,

271 U.S. at 130. While *Venner* and *Lambert* had read that rule as implicit in the Urgent Deficiencies Act, the Hobbs Act removed all doubt by making that broad reach explicit.

b. The Hobbs Act incorporated this Court's holding in Yakus *by borrowing the term "to determine the validity" from EPCA*

Congress also borrowed from EPCA, which authorized agency orders setting commodity prices during World War II. 56 Stat. 23. It created an exclusive-review procedure for such orders, permitting the filing of complaints with the newly created Emergency Court of Appeals. EPCA §§203, 204, 56 Stat. 31-33.

EPCA made this procedure "exclusive" of review by other courts, using the same language later adopted by the Hobbs Act: "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 [covered] regulation or order ***." 56 Stat. 33 (emphasis added). The second sentence of EPCA's exclusivity provision also included a bar on equitable relief against certain statutory provisions: "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 enforcement of any such provision." *Ibid.*

This Court interpreted EPCA's exclusivity provision as precluding other courts from deciding challenges to the validity of a price-fixing order, even by defendants in as-applied enforcement challenges that would have neither vacated the order nor enjoined its enforcement against others.

In *Yakus*, defendants were criminally prosecuted for violating a pricing order, which they had not challenged under EPCA's review process. 321 U.S. at 418-419. They argued the order was invalid because it "did not conform to the standards prescribed by the Act." *Id.* at 419. This Court held EPCA's exclusivity provision precluded their challenge. *Id.* at 429-430. The exclusivity provision was "broad enough in terms to deprive the district court of power to consider the validity of the Administrator's regulation or order," even when raised "as a defense to a criminal prosecution for its violation" rather than an action for equitable relief enjoining the order itself. *Ibid.*

The Court also held that restricting the defendants to EPCA's exclusive review did not violate their due process rights. *Id.* at 431-447. They had not been denied "an adequate opportunity to be heard on the question of validity" because they could have sought EPCA review but did not. *Id.* at 446.

In *Woods v. Hills*, the agency sued for damages and to enjoin a defendant from violating a price-setting order. 334 U.S. 210, 211-212 (1948). The district court ruled for the defendant, concluding the Administrator "failed to introduce proof establishing

[the order's] validity." *Id.* at 212. This Court reversed. *Id.* at 213-214. It held: "There can be no doubt that the exclusive jurisdiction conferred on the Emergency Court of Appeals by §204(d) precluded the District Court in 1946 from determining the validity of the individual rent order even though the defense to the action brought there was based on the alleged invalidity of the order." *Ibid.*

These decisions made clear that "to determine the validity" referred to deciding the order's merits, not to awarding particular relief. In neither case had the defendants sought a declaratory judgment or injunctive relief against the Administrator. They merely sought to challenge the order's validity in an as-applied defense to enforcement. Thus, to borrow language from the *PDR* concurrence: "if the district court [had] disagree[d] with the agency's interpretation in [the] enforcement action, that ruling [would] not [have] invalidate[d] the order and [would have] ha[d] no effect on the agency's ability to enforce the order against others." 588 U.S. at 21. Yet this Court nonetheless held that the enforcement court's disagreement would "determine the validity" of the order, as prohibited by EPCA. *Yakus*, 321 U.S. at 429-430; *Woods*, 334 U.S. at 214.

Congress then ratified that interpretation. In reaction to *Yakus*, Congress amended EPCA to make it easier for defendants to seek review through EPCA's exclusive mechanism, *e.g.*, by removing the time limit for filing protests with the agency and allowing for stays of enforcement to permit resolution of protests. 58 Stat. 632, 639 (1944). But Congress did not change the scope of the exclusivity provision.

A few years after *Yakus* and *Woods*, Congress enacted the Hobbs Act, borrowing EPCA's language of "exclusive jurisdiction" to "determine the validity" of covered orders. Given Congress's amendment of EPCA in response to *Yakus*, the "presumption that Congress was aware of these earlier judicial interpretations and, in effect, adopted them" is particularly strong here. *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993). And when language is "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).

c. Petitioner fails to distinguish EPCA

1. Petitioner contends the Hobbs Act does not codify the holdings of *Yakus* and *Woods* because it adopted only the sentence of EPCA's exclusivity provision granting "exclusive jurisdiction" to "determine the validity" of agency orders but not its second sentence stating other courts cannot "consider the validity" of those orders. Pet.Br.34-36. That argument fails for several reasons.

As a matter of plain language and common sense, the sentences have the same meaning as to challenged agency orders. No one disputes that "exclusive" bars others. *Black's Law Dictionary* (4th rev. ed. 1968) (defining "[e]xclusive" as "[s]hutting out; debarring from interference or participation; vested in one person alone"). Thus, stating that one court's jurisdiction "to determine the validity" is exclusive is the same as saying other courts cannot do it. Nor is there any meaningful difference between "determine" and "consider." In the context of judicial review, they

are synonyms, and *Yakus* used them interchangeably, along with other synonyms like "test" and "question." *E.g.*, 321 U.S. at 430 (using "permit consideration" and "determine the validity" together); *id.* at 444 ("testing the validity"); *see Webster's* at 568 (defining "consider" as "to regard; to judge; as, to *consider* a man unfit").

EPCA's use of both sentences reflects Congress's belt-and-suspenders approach to that statute; it does not mean Congress must state both the affirmative and negative in every statute to accomplish the same result. *See Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958) (statute establishing "exclusive" jurisdiction "necessarily precluded" other judicial review); *Merrill Lynch, Pierce, Fenner & Smith v. Manning*, 578 U.S. 374, 394 (2016) (Thomas, J., concurring) ("[B]y providing 'exclusive jurisdiction' to federal district courts over certain suits, §27 strips state courts of jurisdiction over such suits."). EPCA's second sentence also served the distinct purpose of precluding equitable relief against certain statutory provisions—a purpose absent from the Hobbs Act, which applies only to orders. *See* 56 Stat. 33 (courts cannot "stay, restrain, enjoin, or set aside, in whole or in part, any provision of *this Act* authorizing" "such regulations or orders") (emphasis added).

Consistent with this common-sense reading, nowhere in *Yakus* did the Court state that its holding turned on the second sentence or that it would have been different if EPCA contained only the first sentence. Nothing in the Court's analysis treated the two sentences separately, let alone suggested they "accomplish separate objectives." *Contra PDR*, 588 U.S. at 23 (Kavanaugh, J., concurring in judgment).

Petitioner cites only two words as a sign that the second sentence played any role in the Court's decision: "coupled with." Pet.Br.34. But the Court does not bury its holdings in oblique phrases that would require "read[ing] so much into so little." *See Brown v. Davenport*, 596 U.S. 118, 138 (2022); *id.* at 141 (stressing "the language of an opinion is not always to be parsed as though we were dealing with [the] language of a statute") (Court's alteration, citation omitted). Rather, when *Yakus* referred to the first sentence "coupled with" the second, it was simply describing the provision before it. 321 U.S. at 429-430. Nowhere did the Court state the second sentence was necessary to its conclusion. *Ibid.*

Woods also belies petitioner's distorted reading of *Yakus*. There, this Court stated that "[t]here can be no doubt that the *exclusive jurisdiction* conferred on the Emergency Court of Appeals by §204(d) precluded the District Court in 1946 from *determining the validity* of the individual rent order." *Woods*, 334 U.S. at 213-214 (emphases added). That holding focuses on the first sentence, giving preclusive effect to EPCA's "exclusive jurisdiction" language.

Regardless, even were a two-sentence belt-and-suspenders approach necessary, it is satisfied here because the Hobbs Act must be read with the APA. As explained *infra* pp.35-38, the last sentence of section 703 precludes judicial review in enforcement proceedings when another statute provides a "prior, adequate, and exclusive opportunity for judicial review." 5 U.S.C. §703. Like EPCA's second sentence, this states in the negative what the Hobbs Act's exclusivity provision states in the affirmative. Because the APA was enacted after *Yakus* but before

the Hobbs Act, Congress had no need to repeat EPCA's second sentence when seeking to achieve the same result in the Hobbs Act.

2. Other attempts to cabin *Yakus* to its facts likewise fail. Although EPCA was a wartime provision, that background played no role in the Court's statutory interpretation, and for good reason. *Yakus*, 321 U.S. at 427-431. Statutory interpretation turns on the text, and there is no basis for giving it different meaning during wartime. And Congress chose in peacetime to reenact EPCA's language into the Hobbs Act.

Instead, *Yakus* discussed the wartime context only in answering the separate question of whether the statute, as interpreted, violated due process. 321 U.S. at 431-443. As explained *infra* pp.45-46, no due process concerns are implicated here.

3. This Court's precedent, ratified by Congress, confirms that the Hobbs Act precludes collateral attacks on agency orders

This Court has already held that the Hobbs Act bars collateral challenges to the validity of covered agency orders. As when interpreting EPCA and the Urgent Deficiencies Act, the Court looked to the practical effect of the litigation rather than the form of relief sought, broadly precluding courts from reviewing the merits of agency action.

Port of Boston involved a private lawsuit between terminal operators and vessel owners. 400 U.S. at 63-64. Under an agreement approved by the Federal Maritime Commission, operators had administered a tariff governing certain fees assessed

on vessel owners. *Id.* at 64. But the operators modified a fee without Commission approval. *Ibid.* When vessel owners refused to pay the modified fee, operators sued an association representing vessel owners, seeking damages and declaratory relief against it. *Id.* at 64-65. The association argued that the modified fee was ineffective without prior Commission approval. *Id.* at 65. Under the primary-jurisdiction doctrine, the district court stayed the proceedings to allow the association to seek a Commission ruling on the fee's validity. *Ibid.*

The Commission's order found prior approval unnecessary, and the association's Hobbs Act petition was dismissed as untimely. *Id.* at 65-67. Transatlantic, a vessel owner not party to the proceeding, unsuccessfully moved the Commission for reconsideration. *Ibid.* Rather than seek Hobbs Act review of that denial, Transatlantic moved to intervene in the pending district court private-party litigation. *Id.* at 67.

The district court "refused, however, to review the merits of the Commission's decision and rendered judgment against the Shipping Association and Transatlantic." *Ibid.* The First Circuit reversed, declining to follow the Commission's decision because it was inconsistent with the governing statute and "did not bind non-parties." *Port of Boston Marine Terminal Assn. v. Boston Shipping Assn., Inc.*, 420 F.2d 419, 423 (1st Cir. 1970).

This Court reversed, holding that the district court "was without authority to review the merits of the Commission's decision." *Port of Boston*, 400 U.S. at 69. It stated that the Hobbs Act "is explicit: 'The

court of appeals has exclusive jurisdiction to *** determine the validity of *** such final orders of the Federal Maritime Commission ***.'" *Ibid.* (quoting 28 U.S.C. §2342 (1964 ed., Supp. V)) (Court's ellipses). This Court's use of ellipses makes clear it was relying specifically on the Hobbs Act's "determine the validity" language, not other parts of the provision. And it reasoned that allowing the review of the order's merits in collateral private-party litigation would "vitiate the scheme of the Administrative Orders Review 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.

On two independent grounds, the Court rejected Transatlantic's argument that it should not be bound by the order because it was not a party at the Commission. *Id.* at 71-72. First, Transatlantic had been represented by an agent in the proceedings. *Id.* at 71. Second, even if not, "its interests were clearly at stake," and "it had every opportunity to participate before the Commission and then to seek timely review in the Court of Appeals" under the Hobbs Act. *Id.* at 72. Because "[i]t chose not to do so," it could not "force collateral redetermination of the same issue in a different and inappropriate forum." *Ibid.*

In so holding, this Court never focused on the particular relief requested. For example, it did not refuse declaratory relief against the order yet permit review of its merits to assess the appropriateness of damages—as would be expected if "to determine the validity" were limited to declaratory judgments. Instead, the opinion's language makes clear this Court was concerned with whether the district court would

"review the merits of the Commission's decision." *Id.* at 69; *see id.* at 72 (court lacked "authority to review the merits of that decision").

Port of Boston's holding is reinforced by *FCC v. ITT World Communications*, 466 U.S. 463 (1984). There, telecommunications companies petitioned for rulemaking about certain FCC conferences. *Id.* at 465-466. The FCC denied the petition, and the companies sought review in the court of appeals. *Id.* at 466. While that review was pending, they sued in district court, making the same contentions raised in their rulemaking petition. *Ibid.*

This Court held that the Hobbs Act precluded the district court from reaching the issue: "Litigants may not evade these provisions by requesting the District Court to enjoin action that is the outcome of the agency's order," even if they are not asking to enjoin the order itself. *Id.* at 468. As in *Port of Boston*, the Court focused on the fact that the litigation "raised the same issues" as the requested rulemaking. *Ibid.* And it rejected the argument that the APA provided jurisdiction. *Id.* at 469. The Court noted that the APA provided review only "to the extent that other statutory procedures for review are inadequate," which the challengers had failed to prove. *Ibid.* (citing 5 U.S.C. §§703, 704).

Congress has ratified these holdings. Since *Port of Boston*, it has repeatedly amended section 2342—including to extend exclusive review to new agencies—without changing the broad text providing "exclusive" jurisdiction "to determine the validity" of covered orders. *See, e.g.*, Act of Sept. 13, 1988, Pub. L. 100-

430, §11, 102 Stat. 1619; Act of Sept. 3, 1992, Pub. L. 102-365, §5, 106 Stat. 972.

4. Allowing collateral attacks on agency orders in private-party lawsuits would undermine the Hobbs Act's purpose

Petitioner's interpretation would undermine the Hobbs Act's efficiency and finality purposes.

First, by establishing exclusive jurisdiction (28 U.S.C. §2342) and consolidating petitions in a single court of appeals (*id.* §2112(a)(3)), the Hobbs Act's streamlined review promotes judicial efficiency and provides uniform, nationwide resolution of an order's validity. Congress thus designated the Hobbs Act to apply to orders of agencies that regulate areas (such as telecommunications) where nationwide uniformity is important. *See id.* §§2342(3), (5) (also covering, *e.g.*, transportation-related orders). The Hobbs Act deliberately "eschew[s] a 'challenger-by-challenger' approach" in such areas. *Corner Post*, 603 U.S. at 817.

Congress's design would be undermined if an order's merits could be collaterally attacked in private litigation by parties that had a prior and adequate opportunity for Hobbs Act review. For example, over a thousand TCPA actions are filed annually. U.S. Chamber of Commerce Institute of Legal Reform, *Expanding Litigation Pathways: TCPA Lawsuit Abuse Continues in the Wake of* Duguid 2 (2024). Those actions can be brought in both state and federal courts. 47 U.S.C. §227(b)(3); *Mims v. Arrow Fin. Servs.*, 565 U.S. 368, 372 (2012). Under petitioner's interpretation, even where a federal court of appeals has upheld an order's validity under Hobbs Act review,

federal courts in other circuits and state courts nationwide could adopt and apply a contrary rule. The Hobbs Act's goal of national uniformity would be illusory.

Second, the Hobbs Act was 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." *Port of Boston*, 400 U.S. at 70. But the government is not named as a party in private actions, like this one, that nonetheless require courts to review the validity of agency action. Allowing courts to hold such orders unlawful and refuse to apply them in cases without government participation would prejudice "the vital interest of the United States." *Lambert*, 258 U.S. at 383.

Finally, petitioner's interpretation creates due process concerns by denying fair notice to defendants relying on agency orders. One purpose of agency rulemaking and adjudication is to provide "notice and predictability" to regulated entities. *See Talk America v. Mich. Bell Tel.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring). When agency orders are upheld under Hobbs Act review or not timely challenged, stakeholders rely on them. The Hobbs Act's "finality-focused" and "defendant-protective" 60-day time limit for seeking judicial review protects those reliance interests. *Corner Post*, 603 U.S. at 813-814.

Petitioner's interpretation would allow anyone at any time to collaterally challenge longstanding agency orders, whether unchallenged or upheld on Hobbs Act review. That would open the door to gamesmanship, creating serial opportunities for attacks on agency

orders by companies within an industry or plaintiffs' lawyers with a national pool of clients. Even setting aside such gamesmanship, petitioner's interpretation would make certainty impossible. And were plaintiffs allowed to bring such collateral challenges to impose liability for conduct long deemed lawful by an agency order, serious constitutional concerns would arise. Exposing defendants to "potentially massive liability" based on conduct no one, not even the agency, thought was unlawful at the time would result in "unfair surprise" and violate the fair notice required by due process. *Cf. Christopher v. SmithKline Beecham*, 567 U.S. 142, 155-156 (2012).[3]

B. The APA Confirms The Hobbs Act's Special Statutory Review Proceedings Are Exclusive When Adequate

1. *The Hobbs Act operates harmoniously with the APA, which reinforces the exclusivity of Hobbs Act jurisdiction*

a. *The APA precludes other avenues of "judicial review" where a special review process is "prior, adequate, and exclusive"*

Congress drafted the Hobbs Act to work with the previously enacted APA. Indeed, the Hobbs Act was originally codified just after the APA in title 5 (5 U.S.C. §§1031-1042 (1952)), and the Hobbs Act's legislative history is replete with APA references (*see,*

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[3] While respondents do not assert reliance on *Amerifactors*, which issued after the faxes here, petitioner's interpretation of the Hobbs Act would expose to liability those who did rely on *Amerifactors* and other orders.

e.g., Hearings on H.R. 1468, H.R. 1470, and H.R. 2271, 80th Cong., at 30, 81, 113 (Mar. 17, 1947); S. Rep. No. 81-2618, at 2, 4 (1950)). Reading the statutes together reinforces that Congress generally foreclosed judicial review of Hobbs Act-covered orders in other fora.

The APA provides that "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute"—here, the review procedure established by the Hobbs Act. 5 U.S.C. §703. Only "in the absence or inadequacy" of such proceeding does the APA provide for other "applicable form of legal action *** in a court of competent jurisdiction." *Ibid.*

The last sentence of section 703 reinforces this exclusivity and applies it specifically to enforcement proceedings: "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." *Ibid.* The "except" clause thus precludes "judicial review in civil or criminal proceedings for judicial enforcement" when the special statutory review proceeding provides a "prior, adequate, and exclusive opportunity" for review. *Ibid.*; *see* Public.Citizen.Amicus.Br.14-17.

That is how this Court reads "except" clauses. For example, the APA states its review provisions apply "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. §701(a). This Court held that such language "makes it clear that review is not to be had" in those enumerated instances.

Lincoln v. Vigil, 508 U.S. 182, 191 (1993) (quotation omitted). So too here.

Congress's mirroring uses of the word "exclusive" in the APA and the Hobbs Act—enacted just four years apart—indicate Congress intended the Hobbs Act to be the kind of prior "exclusive opportunity for judicial review" that would preclude judicial review in enforcement proceedings when adequacy is satisfied. *Compare* 28 U.S.C. §2342, *with* 5 U.S.C. §703. And this Court's precedents reinforce that connection. For example, in *ITT*, the Court rejected the lower court's attempt to circumvent the Hobbs Act via the APA, holding that APA review is permitted only when Hobbs Act review is "inadequate." 466 U.S. at 469; *see PDR*, 588 U.S. at 7-8 (deeming it "important to determine whether the Hobbs Act's exclusive-review provision *** afforded PDR a 'prior' and 'adequate' opportunity for judicial review") (citing 5 U.S.C. §703). Thus, on top of the Hobbs Act itself, the APA makes doubly clear review is unavailable when exclusive Hobbs Act review is adequate.

The APA's express reference to enforcement proceedings also refutes petitioner's argument that Hobbs Act exclusivity is limited to pre-enforcement review of agency orders. *Contra* Pet.Br.25-26. As noted, the APA prohibits "judicial review" in enforcement actions when a special statutory review proceeding is "prior, adequate, and exclusive." 5 U.S.C. §703. But if "judicial review" meant only declaratory or injunctive relief against the order, that prohibition would be unnecessary because, as Justice Kavanaugh recognized, an enforcement-action court "does not issue a declaratory judgment or an injunction against the agency." *PDR*, 588 U.S. at 21.

The APA's prohibition thus makes sense only if it generally prohibits an enforcement court from reviewing the merits of an agency's order, regardless of the relief sought.

Contrary to petitioner's suggestion (*e.g.*, Pet.Br.19), this prohibition does not preclude enforcement courts from any consideration of issues involved in agency orders. For example, enforcement courts can assess the adequacy of Hobbs Act review for the party seeking to challenge the order. *PDR*, 588 U.S. at 7-8. Such courts can also stay the litigation so the party can petition the agency for a new order and seek its Hobbs Act review. *Port of Boston*, 400 U.S. at 65. They can also interpret the agency order or rule to the extent it is ambiguous. *See Pac. Bell v. Pac. W. Telecomm*, 325 F.3d 1114, 1125 (9th Cir. 2003). And, of course, enforcement courts can determine whether and how the order applies to the particular facts before them. *E.g.*, *ibid.* What the Hobbs Act and APA preclude is deciding whether the order is correct.

b. The Hobbs Act and APA are no less clear than the Clean Air Act, Clean Water Act, and CERCLA

Consistent with this broad meaning of "judicial review" in the APA, petitioner concedes that the prohibitions on "judicial review" in the Clean Water Act, Clean Air Act, and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") bar enforcement-action courts from considering an agency order's merits regardless of the relief sought. *PDR*, 588 U.S. at 26 (Kavanaugh, J.); Pet.Br.32-33. Those statutes each state that covered agency actions "shall not be subject

to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. §1369(b); 42 U.S.C. §7607(b); 42 U.S.C. §9613.

That is exactly what the Hobbs Act and APA do. The APA's text parallels these other statutes—they all expressly preclude judicial review in civil and criminal enforcement proceedings. If "judicial review" in the environmental statutes prohibits more than just injunctive and declaratory relief, so too does the last sentence of section 703.

To the extent the statutory language differs, it is because the environmental statutes lack the Hobbs Act's "exclusive jurisdiction" language and thus do not directly trigger section 703 of the APA. And unlike these environmental statutes' bars, the APA imposes express conditions before precluding review: another statute must provide the exclusive opportunity for judicial review (as the Hobbs Act does) and that opportunity must be prior and adequate. 5 U.S.C. §703; *see* Public.Citizen.Amicus.Br.15. But on the exclusivity question that matters here, the statutes are the same.

Indeed, petitioner's recognition that the environmental statutes' review provisions exclude all other judicial review undermines its other arguments. Petitioner cannot reasonably claim that reading the Hobbs Act to do the same thing would lead to "absurd results" (Pet.Br.26) if it accepts that these statutes accomplish those results. Nor can it argue that the constitutional avoidance canon applies to the Hobbs Act (Pet.Br.35-37) without also arguing that these three statutes are unconstitutional.

2. Petitioner's policy concerns are addressed by the APA's separate "adequate" requirement

a. Adequacy is a safety valve for due process and fairness concerns

Regardless, petitioner's so-called "absurd results" are illusory. Pet.Br.26-28. Congress addressed those concerns, not by limiting the scope of the Hobbs Act's exclusivity, but by imposing an independent requirement that the exclusive-review proceeding be adequate. This separate requirement is rooted in the APA's text, which precludes judicial review only where another statute's opportunity for review was "prior, adequate, *and* exclusive." 5 U.S.C. §703 (emphasis added). Adequacy thus acts as a safety valve: even where a statute like the Hobbs Act makes its review exclusive, parties in enforcement proceedings can still seek judicial review if they can establish that the exclusive proceeding was inadequate for them. Such adequacy questions are familiar to courts. *E.g.*, Restatement (Second) of Judgments §28(5)(c) (1982) (for issue preclusion, courts assess whether party had "an adequate opportunity or incentive to obtain a full and fair adjudication").

This Court has several times modeled that case-by-case adequacy analysis. In *ITT World*, for example, the Court held that the Hobbs Act's exclusive jurisdiction precluded collateral review, while recognizing that the APA could still authorize review if the Hobbs Act's "procedures for review are inadequate." 466 U.S. at 469. It declined to permit review there because the plaintiffs failed to show inadequacy. *Ibid.* And while not citing section 703, *Port of Boston* found Hobbs Act review adequate

because Transatlantic's "interests were clearly at stake," and "it had every opportunity to participate before the Commission and then to seek timely review." 400 U.S. at 72. Most recently, in *PDR*, the Court cited section 703 in remanding, "believ[ing] it important" to determine whether Hobbs Act review had been adequate. 588 U.S. at 7-8. If not, "it may be that the Administrative Procedure Act permits PDR to challenge the validity of the Order in this enforcement proceeding." *Id.* at 8.

Adequacy, not the scope of exclusivity, thus resolves the policy concerns raised by Justice Kavanaugh's concurrence—a point that may not have been fully developed in the *PDR* record. For example, if an enforcement-action defendant did not "exist[] back when an agency order was issued" or lacked "incentive" to timely challenge the order, it could argue the Hobbs Act was inadequate and seek review under the APA. *PDR*, 588 U.S. at 18, 25 (Kavanaugh, J.); *see id.* at 7-8 (Court's opinion); *Port of Boston*, 400 U.S. at 71 (considering whether challenger's "interests were clearly at stake" in agency proceeding). And an exclusive-review proceeding would not have been adequate for "defendants in as-applied enforcement actions" if, under the circumstances, precluding review would violate the defendant's due process rights. *See PDR*, 588 U.S. at 19 (Kavanaugh, J.); *Yakus*, 321 U.S. at 436 (addressing due process challenge by determining whether procedures "provided by the statute will prove *inadequate*") (emphasis added).

b. Petitioner concedes it had an adequate opportunity for Hobbs Act review

Here, petitioner concedes it had a "prior and adequate opportunity for judicial review" under the Hobbs Act; petitioner simply chose not to use it. Pet.3 ("The petitioner did not argue that it lacked a prior or adequate opportunity to seek review of the FCC's order under the Hobbs Act."); Pet.19-20 (same); Pet.Reply.4 (same). Thus, the only question before this Court is whether the Hobbs Act's review is exclusive, and as explained, the answer is yes.

Petitioner's concession was appropriate because—like the would-be challenger in *Port of Boston* and unlike the defendant in *PDR*—petitioner "had every opportunity to participate" and simply did not do so. *Port of Boston*, 400 U.S. at 71. Petitioner does not deny that its interest in the TCPA's application to online fax services was already established when *Amerifactors* and *Ryerson* were decided. Nor does petitioner deny it was aware of those adjudications and could have participated. Indeed, petitioner's counsel participated in *Ryerson* on counsel's own behalf. *Supra* p.7.

Nor can petitioner invoke any due process concerns. In *PDR*, a TCPA *defendant* argued it had a right to resist liability under an erroneous statutory interpretation. 588 U.S. at 6. Here, by contrast, the FCC's order states that defendants are not liable for fax advertisements received via online fax services, and it is a TCPA *plaintiff* that seeks to circumvent the Hobbs Act to expand defendants' liability.

That difference is critical for adequacy purposes. None of the fairness concerns animating Justice

Kavanaugh's *PDR* concurrence is present here. To the contrary, as explained, when plaintiffs seek to collaterally challenge orders limiting defendants' liability, due process weighs *against* permitting such unexpected challenges. *Supra* pp.34-35. Unlike defendants, plaintiffs disagreeing with an agency's interpretation are not forced to "take the risk of engaging in the activity and then arguing against the agency's legal interpretation as a defendant in an enforcement action." *PDR*, 588 U.S. at 13-14 (Kavanaugh, J.).

The *PDR* concurrence invoked the "general rule of administrative law" that "a *defendant* may argue that an agency's interpretation of a statute is wrong." *Id.* at 12 (emphasis added); *see Corner Post*, 603 U.S. at 823 ("Regulated parties 'may always assail a regulation as exceeding the agency's statutory authority in enforcement proceedings *against them*.'") (citation omitted, emphasis added). But that principle is inapplicable when a plaintiff seeks to impose liability for conduct an agency has deemed legal. And the APA allows courts to account for such differently situated parties: what is adequate for one may be inadequate for another.[4]

C. Petitioner's Resort To Interpretive Tools Is Inappropriate

As explained, the Hobbs Act expressly precludes collateral review of the merits of an agency's order. The Act is neither silent nor ambiguous on that question, so there is no basis for resorting to the

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[4] That the Hobbs Act's text does not treat plaintiffs and defendants differently (Pet.Br.22n.4) is thus beside the point.

presumptions and canons petitioner invokes. *See Bouarfa v. Mayorkas*, 604 U.S. __ (2024) (slip op. 11-12). Regardless, neither the general presumption of judicial review nor the constitutional avoidance canon is appropriate here.

1. The general presumption of judicial review is satisfied because the Hobbs Act provides a process for judicial review

The general presumption of judicial review cannot help petitioner. *Contra* Pet.Br.28-29. The decisions petitioner cites presumed that "Congress did not mean to prohibit *all* judicial review of [the agency's] decision." *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 671-672 (1986) (emphasis added); *see Mach Mining v. EEOC*, 575 U.S. 480, 486 (2015); *Kucana v. Holder*, 558 U.S. 233, 238-239 (2010).

That is not the situation here. The Hobbs Act expressly subjects agency orders to review, merely channeling it into a particular forum. 28 U.S.C. §§2349, 2350. Nothing about the presumption prohibits such channeling. Indeed, this Court has recognized that the presumption is embodied in the APA, which expressly permits channeling review into exclusive special statutory review proceedings. 5 U.S.C. §703; *see Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967); *Weyerhaeuser v. U.S. Fish and Wildlife Serv.*, 586 U.S. 9, 22-23 (2018).

Moreover, even were the presumption applied to channeling rather than just complete denial of judicial review, it "is, after all, a presumption, and 'like all presumptions used in interpreting statues, may be overcome.'" *Mich. Academy*, 476 U.S. at 673 (citation

omitted). Any presumption is overcome by the Hobbs Act's clear language providing that its review is "exclusive." 28 U.S.C. §2342; *compare, e.g.*, *Abbott Labs.*, 387 U.S. at 141 (applying presumption to general APA action where there was "no explicit statutory authority" limiting review). And here, of course, petitioner has conceded that it could seek review through the Hobbs Act's procedures but has simply chosen not to.

2. This case presents no concerns requiring constitutional avoidance

a. Due process weighs against petitioner's interpretation where, as here, a plaintiff challenges an agency order prohibiting liability against defendants

As explained, the Hobbs Act's exclusivity provision poses no due process problems because the APA's adequacy requirement provides a safety valve allowing judicial review on a case-by-case basis whenever the Hobbs Act proves inadequate to protect due process rights. *Supra* pp.40-41.

But no due process concerns implicating that safety valve are present here. This Court addressed due process challenges where criminal and civil EPCA *defendants* sought to challenge an agency's order as part of their defense, and it held due process was satisfied as long as the special review procedure was adequate. *Yakus*, 321 U.S. at 431-437; *Woods*, 334 U.S. at 217-218. Here, in contrast, petitioner is a plaintiff, not a defendant, and it concedes it had a prior and adequate opportunity for Hobbs Act review. Petitioner thus has no basis for invoking due process.

If anything, constitutional avoidance militates *against* petitioner's interpretation. *Supra* pp.34-35.

b. The Hobbs Act does not implicate the separation of powers

Nor is there need for constitutional avoidance on separation-of-powers grounds. *Contra* Pet.Br.35-37. As explained, the Hobbs Act does not deny judicial review of agency actions. *Supra* pp.44-45. Rather, the courts of appeals, and ultimately this Court, retain final authority to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Congress has not transferred judicial power from courts to agencies; it has channeled that power to particular courts.

Congress unquestionably may channel certain matters into certain courts. *E.g.*, 28 U.S.C. §1295 (exclusive jurisdiction of Federal Circuit). That is "accomplished by the exercise of the constitutional power of Congress to prescribe the jurisdiction of inferior courts." *Yakus*, 321 U.S. at 429; *see Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (discussing Congress's power to establish the "limited, concurrent, or exclusive" jurisdiction of inferior courts). Where Congress "provides a mode of testing the validity of a regulation," "[t]here is no constitutional requirement that that test 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. And where parties "fail[] to make timely assertion" of their right to review before the proper tribunal, restricting other review avenues is merely a basic application of "familiar" forfeiture principles. *Ibid.*

The Hobbs Act thus in no way requires "absolute deference" to agencies. *Contra* Pet.Br.16 (citation omitted). When a court of appeals with Hobbs Act jurisdiction reviews an agency's action, the court gives no deference to the agency's interpretation except whatever persuasive value it warrants. *Loper Bright*, 144 S. Ct. at 2273. The Hobbs Act has no effect on that substantive standard; it merely prescribes *which* court applies it.

D. *Amerifactors* Is A Declaratory Order Resulting From An Adjudication

Petitioner argues that even if the Hobbs Act bars judicial review of legislative rules in enforcement proceedings, it does not do so for interpretive rules. Pet.Br.37-42. Even were that so, that would not be a basis to reverse the judgment here because the Ninth Circuit correctly held *Amerifactors* is a declaratory order resulting from an adjudication. Pet.App.9a. Such orders are neither interpretive rules nor legislative rules because they are not rules at all. Adjudications are a separate category of their own: they result in "final orders" reviewable under the Hobbs Act (28 U.S.C. §2342; 47 U.S.C. §402(a)), and they "ha[ve] the 'force and effect of law.'" (*see PDR*, 588 U.S. at 7 (citation omitted)).[5]

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[5] Respondents explained in their certiorari opposition that *Amerifactors* was an adjudicatory order and not an interpretive rule. BIO14-15. Petitioner's opening brief ignores that argument and nowhere explains why the Ninth Circuit was wrong in classifying *Amerifactors* as an adjudicatory order. If this Court's decision might turn on the proper classification of *Amerifactors*, it should consider dismissing the petition as improvidently granted.

By definition, an "order" is statutorily distinct from a "rule." An "order" is "a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency *in a matter other than rule making*." 5 U.S.C. §551(6) (emphasis added). While rules are promulgated through rulemaking, "adjudications" are the "agency process for the formulation of an order." *Id.* §§551(5), (7); *see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216-225 (1988) (Scalia, J., concurring) (discussing the rulemaking-adjudication "dichotomy upon which the most significant portions of the APA are based"). In adjudications, the FCC (like other agencies) "may issue a declaratory order to terminate a controversy or remove uncertainty" that has "like effect as in the case of other orders." 5 U.S.C. §554(e).

Amerifactors was a declaratory order issued under this adjudicatory authority. Pet.App.46a ("Declaratory Ruling"); *see Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007) (FCC declaratory orders can be adjudications). When the FCC issued public notice soliciting comments for the adjudication, it did so under 47 C.F.R. §1.2, which authorizes the agency to "issue a declaratory ruling terminating a controversy or removing uncertainty" "in accordance with" the APA's adjudicatory provisions. 47 C.F.R. §1.2(a); *see* 32 FCC Rcd. 5667.

Consistent with the FCC's notice and order, the Ninth Circuit concluded *Amerifactors* was an adjudication. Pet.App.9a. Indeed, the court of appeals decided that the order applied retroactively to the faxes here *because* it was an adjudication. *Ibid.* The court cited 5 U.S.C. §554(e), which "characterize[s] declaratory rulings as adjudications." Pet.App.9a

(citing 5 U.S.C. §554(e); 47 C.F.R. §1.2). And the court followed Ninth Circuit precedent that "when an agency's adjudicatory decisions apply preexisting rules to new factual circumstances," its "determinations apply retroactively." *Ibid.* (citation omitted).[6]

Regardless of whether the Hobbs Act applies to interpretive rules, it applies to adjudicatory "orders." 28 U.S.C. §2342. Like legislative rules, declaratory orders in adjudications are "issued by an agency pursuant to statutory authority" and have the "force and effect of law." *See PDR*, 588 U.S. at 7; 5 U.S.C. §554(e). And for agencies with rulemaking authority (which the FCC has over the TCPA's fax provisions, 47 U.S.C. §227(b)(2)), "adjudication operates as an appropriate mechanism not only for factfinding, but also for the exercise of delegated lawmaking powers, including lawmaking by interpretation." *Martin v. OSHA*, 499 U.S. 144, 154 (1991); *see NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (agencies can "announc[e] new principles in an adjudicative proceeding"); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (adjudications are "a very definite place for the

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[6] Given that the Ninth Circuit agreed with respondents that *Amerifactors* was an adjudicatory order, that is how this case comes to this Court. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Both parties' previous inconsistency on this issue is thus immaterial. *See* Resp.C.A.Response.Br.14-15; 2-ER-140 (respondents arguing that *Amerifactors* was an adjudicatory order and also mentioning, inconsistently, that it was an interpretive rule); Pet.Principal.Br.34, 41-43 (petitioner arguing that *Amerifactors* was an interpretive rule and also, inconsistently, that it was subject to the prohibition against retroactive application of *legislative* rules).

case-by-case evolution of statutory standards"); *Qwest*, 509 F.3d at 536.

Amerifactors is a perfect example. After notice and comment, the FCC exercised its expressly delegated power under the TCPA to announce the agency's formal position on the statute's application to online fax services. *Compare Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96-97 (2015) (interpretive rules are issued without notice-and-comment procedures and "do not have the force and effect of law") (citation omitted).[7]

Given that *Amerifactors* was an adjudicatory order, this case does not present the question whether the Hobbs Act bars enforcement courts from considering the validity of interpretive rules. Regardless of that question, the Act applies to *Amerifactors*.

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[7] Amicus suggests *Amerifactors* was an interpretive rule issued via adjudication. Public.Citizen.Br.10.n.2. It cites no previous example of such a hybrid, which would "destroy the entire dichotomy" between rules and adjudicatory orders. *Georgetown Univ. Hosp.*, 488 U.S. at 216 (Scalia, J., concurring). Nor is amicus correct that the order did not "purport to be anything more than the FCC's non-binding opinion." Public.Citizen.Br.10n.2. The FCC acted pursuant to its express statutory authority to issue an order, "with like effect as in the case of other orders," to "terminate a controversy" and "remove uncertainty" over the scope of the TCPA. 5 U.S.C. §554(e). A non-binding interpretation would not do so. And the FCC noted that a declaratory order was appropriate in part *because* the "issue" it was deciding "extends beyond the parties involved in the current litigation." Pet.App.51a. That shows its intent to make its interpretation "binding on the public at large through a declaratory order." Public.Citizen.Br.10n.2.

For all these reasons, the Hobbs Act's exclusive jurisdiction precludes petitioner's collateral challenge to the correctness of *Amerifactors* in this private-party litigation.

II. ALTERNATIVELY, THE JUDGMENT SHOULD BE AFFIRMED BECAUSE THE TCPA DOES NOT APPLY TO FAXES RECEIVED BY ONLINE FAX SERVICES

Regardless of whether *Amerifactors* is binding, it is correct. That is reason to affirm, and there would be "little to be gained by remanding this litigation for further consideration." *Dahda*, 584 U.S. at 440-450; *see Thigpen v. Roberts*, 468 U.S. 27, 30 (1984).

An online fax service is not a TCPA "telephone facsimile machine." *Career Counseling, Inc. v. AmeriFactors Financial Grp.*, 91 F.4th 202, 210-211 (4th Cir. 2024), *petition for cert. filed*, No. 24-86 (July 19, 2024); Pet.App.51a-55a. An online fax service "hold[s] inbound faxes in digital form on a cloud-based server, where the user accesses the document via the online portal or via an email attachment and has the option to view, delete, or print them as desired." Pet.App.54a. By contrast, as explained below, the TCPA's text and purpose make clear that a "telephone facsimile machine" is "equipment" that scans and transmits outgoing documents and receives and prints incoming ones—all via traditional telephone lines.

To start, the fax liability provision carefully distinguishes between a "telephone facsimile machine" on one hand, and a "computer" or "other device" on the other. 47 U.S.C. §227(b)(1)(C). Liability can be triggered when an advertisement is sent *from*

any of the enumerated devices. *Ibid.* But Congress proscribed faxed advertisements sent only *to* a "telephone facsimile machine"—not to a "computer" or "other device." *Ibid.*

The TCPA thus does not apply where an online fax service user receives and accesses an advertisement on their "computer" or "other device." A contrary conclusion would violate the presumption that "Congress acts intentionally and purposely in the disparate inclusion or exclusion" of "particular language." *Nken v. Holder*, 556 U.S. 418, 430 (2009) (citation omitted).

Section 227(a)(3)'s express definition of a "telephone facsimile machine" also confirms its inapplicability to online fax services. A "telephone facsimile machine" is "equipment" with the "capacity" to "transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line" or "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). That exactly describes a traditional desktop fax machine—a machine using a telephone line to (A) scan and send, or (B) receive and print, paper documents. But an online fax service cannot print without separate equipment, and it receives digital images "over the Internet," not just traditional phone lines. Pet.App.52a.

That the TCPA's definition of a "telephone facsimile machine" excludes online fax services is confirmed by its use of the word "equipment," which is a physical device. *Webster's Ninth New Collegiate Dictionary* 421 (1991) ("the set of articles or *physical*

resources serving to equip a person or thing") (emphasis added). And another TCPA provision directs the FCC to impose requirements on all "telephone facsimile machines" that were "*manufactured*" after a specified time. 47 U.S.C. §227(d)(2) (emphasis added). A traditional stand-alone fax machine is "manufactured"; an "online fax *service*" holding "inbound faxes in digital form" is not. Pet.App.54a (emphasis added).

The plain text of the statute reflects its purpose. Congress intended the TCPA to address annoyances of early 1990s fax advertising: "the recipient assumes both the cost associated with use of the facsimile machine and, the cost of the expensive paper used to print out facsimile messages." H.R. Rep. No. 102-317, at 25 (1991). Such fax advertising also "occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax." *Id.* at 10. Online fax services essentially transmitting faxes as email do not present those problems. *Career Counseling*, 91 F.4th at 209-211.

The statute's meaning is plain without any reference to the FCC's views. But the Court may also look to *Amerifactors* "for guidance" and afford it "due respect." *Loper Bright*, 144 S. Ct. at 2257, 2259 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944)).

For these reasons, the TCPA does not cover online fax services, and the judgment can be affirmed on this basis.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

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Hobbs Administrative Orders Review Act, 28 U.S.C. §§ 2341-2351

§ 2341. Definitions

As used in this chapter—

(1) "clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed;

(2) "petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed; and

(3) "agency" means—

(A) the Commission, when the order sought to be reviewed was entered by the Federal Communications Commission, the Federal Maritime Commission, or the Atomic Energy Commission, as the case may be;

(B) the Secretary, when the order was entered by the Secretary of Agriculture or the Secretary of Transportation;

(C) the Administration, when the order was entered by the Maritime Administration;

(D) the Secretary, when the order is under section 812 of the Fair Housing Act; and

(E) the Board, when the order was entered by the Surface Transportation Board.

§ 2342. 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,[1] 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

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[1] See References in Text note below.

(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.

§ 2343. Venue

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

§ 2344. 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.

§ 2345. Prehearing conference

The court of appeals may hold a prehearing conference or direct a judge of the court to hold a prehearing conference.

§ 2346. Certification of record on review

Unless the proceeding has been terminated on a motion to dismiss the petition, the agency shall file in the office of the clerk the record on review as provided by section 2112 of this title.

§ 2347. Petitions to review; proceedings

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced, and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—

(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;

(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or

(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—

(1) the additional evidence is material; and

(2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

§ 2348. 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.

§ 2349. 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.

(b) The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and

identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application.

§ 2350. Review in Supreme Court on certiorari or certification

(a) An order granting or denying an interlocutory injunction under section 2349(b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by section 1254(1) of this title. Application for the writ shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

(b) The provisions of section 1254(2) of this title, regarding certification, and of section 2101(f) of this title, regarding stays, also apply to proceedings under this chapter.

§ 2351. Enforcement of orders by district courts

The several district courts have jurisdiction specifically to enforce, and to enjoin and restrain any person from violating any order issued under section 193 of title 7.

47 U.S.C. § 402

§ 402. 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.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

(10) By any person who is aggrieved or whose interests are adversely affected by a determination made by the Commission under section 618(a)(3) of this title.

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the

questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties; filing of record

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28.

(e) Intervention

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be

adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) Records and briefs

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of title 5.

(h) Remand

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) Judgment for costs

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

Administrative Procedure Act, 5 U.S.C. §§ 551, 553-554, 701-706

§ 551. Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;[1]

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[1] See References in Text note below.

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed;

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved; and

(4) the Internet address of a summary of not more than 100 words in length of the proposed rule, in plain language, that shall be posted on the Internet website under section 206(d) of the E-Government Act of 2002 (44 U.S.C. 3501 note) (commonly known as regulations.gov).

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a[1] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other

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[1] So in original.

instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended

decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and

former section 1641(b)(2), of title 50, appendix;[1] and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

[1] See References in Text note below.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 703. 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.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 706. 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.

Telephone Consumer Protection Act, 47 U.S.C. § 227

§ 227. Restrictions on use of telephone equipment

(a) Definitions

As used in this section—

(1) The term "automatic telephone dialing system" means equipment which has the capacity—

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i), shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that—

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)).[1]

(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe

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[1] So in original. Second closing parenthesis probably should not appear.

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.

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(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—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes, is made solely pursuant to the collection of a debt owed to or guaranteed by the United States, or is exempted by rule or order by the Commission under paragraph (2)(B);

(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

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes—

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d);

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt

purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only—

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements;

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified

period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005;

(H) may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States; and

(I) shall ensure that any exemption under subparagraph (B) or (C) contains requirements for calls made in reliance on the exemption with respect to—

(i) the classes of parties that may make such calls;

(ii) the classes of parties that may be called; and

(iii) the number of such calls that a calling party may make to a particular called party.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(4) Civil forfeiture

(A) In general

Any person that is determined by the Commission, in accordance with paragraph (3) or (4) of section 503(b) of this title, to have violated this subsection shall be liable to the United States for a forfeiture penalty pursuant to section 503(b)(1) of this title. Paragraph (5) of section 503(b) of this title shall not apply in the case of a violation of this subsection. A forfeiture penalty under this subparagraph shall be in addition to any other penalty provided for by this chapter. The amount of the forfeiture penalty determined under this subparagraph shall be determined in accordance with subparagraphs (A) through (F) of section 503(b)(2) of this title.

(B) Violation with intent

Any person that is determined by the Commission, in accordance with paragraph (3) or (4) of section 503(b) of this title, to have violated this subsection with the intent to cause such violation shall be liable to the United States for a forfeiture penalty pursuant to section 503(b)(1) of this title. Paragraph (5) of section 503(b) of this title shall not apply in the case of a violation of this subsection. A forfeiture penalty under this subparagraph shall be in addition to any other penalty provided for by this chapter. The amount of the forfeiture penalty determined under this subparagraph shall be equal to an amount determined in accordance with subparagraphs (A) through (F) of section 503(b)(2) of this title plus an additional penalty not to exceed $10,000.

(C) Recovery

Any forfeiture penalty determined under subparagraph (A) or (B) shall be recoverable under section 504(a) of this title.

(D) Procedure

No forfeiture liability shall be determined under subparagraph (A) or (B) against any person unless such person receives the notice required by section 503(b)(3) of this title or section 503(b)(4) of this title.

(E) Statute of limitations

Notwithstanding paragraph (6) of section 503(b) of this title, no forfeiture penalty shall be determined or imposed against any person—

(i) under subparagraph (A) if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or

(ii) under subparagraph (B) if the violation charged occurred more than 4 years prior to the date of issuance of the required notice or notice of apparent liability.

(F) Rule of construction

Notwithstanding any law to the contrary, the Commission may not determine or impose a forfeiture penalty on a person under both subparagraphs (A) and (B) based on the same conduct.

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall—

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to

receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall—

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall—

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and—

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise

permitted by the laws or rules of court of a State bring in an appropriate court of that State—

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b).

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States—

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that—

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Prohibition on provision of misleading or inaccurate caller identification information

(1) In general

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, in connection with any voice service or text messaging service, to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value, unless such transmission is exempted pursuant to paragraph (3)(B).

(2) Protection for blocking caller identification information

Nothing in this subsection may be construed to prevent or restrict any person from blocking the capability of any caller identification service to transmit caller identification information.

(3) Regulations

(A) In general

The Commission shall prescribe regulations to implement this subsection.

(B) Content of regulations

(i) In general

The regulations required under subparagraph (A) shall include such exemptions from the prohibition under paragraph (1) as the Commission determines is appropriate.

(ii) Specific exemption for law enforcement agencies or court orders

The regulations required under subparagraph (A) shall exempt from the prohibition under paragraph (1) transmissions in connection with—

(I) any authorized activity of a law enforcement agency; or

(II) a court order that specifically authorizes the use of caller identification manipulation.

(4) Repealed. Pub. L. 115–141, div. P, title IV, §402(i)(3), Mar. 23, 2018, 132 Stat. 1089

(5) Penalties

(A) Civil forfeiture

(i) In general

Any person that is determined by the Commission, in accordance with paragraphs (3) and (4) of section 503(b) of this title, to have violated this subsection shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this paragraph shall be in addition to any other penalty provided for by this chapter. The amount of the forfeiture penalty determined under this paragraph shall not exceed $10,000 for each violation, or 3 times that amount for each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act.

(ii) Recovery

Any forfeiture penalty determined under clause (i) shall be recoverable pursuant to section 504(a) of this title. Paragraph (5) of section 503(b) of this title shall not apply in the case of a violation of this subsection.

(iii) Procedure

No forfeiture liability shall be determined under clause (i) against any person unless such person receives the notice required by section 503(b)(3) of this title or section 503(b)(4) of this title.

(iv) 4-year statute of limitations

No forfeiture penalty shall be determined or imposed against any person under clause (i) if the violation charged occurred more than 4 years prior to the date of issuance of the required notice or notice or apparent liability.

(B) Criminal fine

Any person who willfully and knowingly violates this subsection shall upon conviction thereof be fined not more than $10,000 for each violation, or 3 times that amount for each day of a continuing violation, in lieu of the fine provided by section 501 of this title for such a violation. This subparagraph does not supersede the provisions of section 501 of this title relating to imprisonment or the imposition of a penalty of both fine and imprisonment.

(6) Enforcement by States

(A) In general

The chief legal officer of a State, or any other State officer authorized by law to bring actions on behalf of the residents of a State, may bring a civil action, as parens patriae, on behalf of the residents of that State in an appropriate district court of the United States to enforce this subsection or to impose the civil penalties for violation of this subsection, whenever the chief legal officer or other State officer has reason to believe that the interests of the residents of the State have been or are being threatened or adversely affected by a violation of this subsection or a regulation under this subsection.

(B) Notice

The chief legal officer or other State officer shall serve written notice on the Commission of any civil action under subparagraph (A) prior to initiating such civil action. The notice shall include a copy of the complaint to be filed to initiate such civil action, except that if it is not feasible for the State to provide such prior notice, the State shall provide such notice immediately upon instituting such civil action.

(C) Authority to intervene

Upon receiving the notice required by subparagraph (B), the Commission shall have the right—

(i) to intervene in the action;

(ii) upon so intervening, to be heard on all matters arising therein; and

(iii) to file petitions for appeal.

(D) Construction

For purposes of bringing any civil action under subparagraph (A), nothing in this paragraph shall prevent the chief legal officer or other State officer from exercising the powers conferred on that officer by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(E) Venue; service or process

(i) Venue

An action brought under subparagraph (A) shall be brought in a district court of the United

States that meets applicable requirements relating to venue under section 1391 of title 28.

(ii) Service of process

In an action brought under subparagraph (A)—

(I) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and

(II) a person who participated in an alleged violation that is being litigated in the civil action may be joined in the civil action without regard to the residence of the person.

(7) Effect on other laws

This subsection does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

(8) Definitions

For purposes of this subsection:

(A) Caller identification information

The term "caller identification information" means information provided by a caller identification service regarding the telephone number of, or other information regarding the origination of, a call made using a voice service or a text message sent using a text messaging service.

(B) Caller identification service

The term "caller identification service" means any service or device designed to provide the user of the service or device with the telephone number

of, or other information regarding the origination of, a call made using a voice service or a text message sent using a text messaging service. Such term includes automatic number identification services.

(C) Text message

The term "text message"—

(i) means a message consisting of text, images, sounds, or other information that is transmitted to or from a device that is identified as the receiving or transmitting device by means of a 10-digit telephone number or N11 service code;

(ii) includes a short message service (commonly referred to as "SMS") message and a multimedia message service (commonly referred to as "MMS") message; and

(iii) does not include—

(I) a real-time, two-way voice or video communication; or

(II) a message sent over an IP-enabled messaging service to another user of the same messaging service, except a message described in clause (ii).

(D) Text messaging service

The term "text messaging service" means a service that enables the transmission or receipt of a text message, including a service provided as part of or in connection with a voice service.

(E) Voice service

The term "voice service"—

(i) means any service that is interconnected with the public switched telephone network and that furnishes voice communications to an end user using resources from the North American Numbering Plan or any successor to the North American Numbering Plan adopted by the Commission under section 251(e)(1) of this title; and

(ii) includes transmissions from a telephone facsimile machine, computer, or other device to a telephone facsimile machine.

(9) Limitation

Notwithstanding any other provision of this section, subsection (f) shall not apply to this subsection or to the regulations under this subsection.

(f) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3), the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(g) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia

shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) "Attorney general" defined

As used in this subsection, the term "attorney general" means the chief legal officer of a State.

(h) Annual report to Congress on robocalls and transmission of misleading or inaccurate caller identification information

(1) Report required

Not later than 1 year after December 30, 2019, and annually thereafter, the Commission, after consultation with the Federal Trade Commission, shall submit to Congress a report regarding enforcement by the Commission of subsections (b), (c), (d), and (e) during the preceding calendar year.

(2) Matters for inclusion

Each report required by paragraph (1) shall include the following:

(A) The number of complaints received by the Commission during each of the preceding 5 calendar years, for each of the following categories:

(i) Complaints alleging that a consumer received a call in violation of subsection (b) or (c).

(ii) Complaints alleging that a consumer received a call in violation of the standards prescribed under subsection (d).

(iii) Complaints alleging that a consumer received a call in connection with which misleading or inaccurate caller identification information was transmitted in violation of subsection (e).

(B) The number of citations issued by the Commission pursuant to section 503(b) of this title during the preceding calendar year to enforce subsection (d), and details of each such citation.

(C) The number of notices of apparent liability issued by the Commission pursuant to section 503(b) of this title during the preceding calendar year to enforce subsections (b), (c), (d), and (e), and details of each such notice including any proposed forfeiture amount.

(D) The number of final orders imposing forfeiture penalties issued pursuant to section 503(b) of this title during the preceding calendar year to enforce such subsections, and details of each such order including the forfeiture imposed.

(E) The amount of forfeiture penalties or criminal fines collected, during the preceding calendar year, by the Commission or the Attorney General for violations of such subsections, and details of each case in which such a forfeiture penalty or criminal fine was collected.

(F) Proposals for reducing the number of calls made in violation of such subsections.

(G) An analysis of the contribution by providers of interconnected VoIP service and non-interconnected VoIP service that discount high-volume, unlawful, short-duration calls to the total number of calls made in violation of such subsections, and recommendations on how to address such contribution in order to decrease the total number of calls made in violation of such subsections.

(3) No additional reporting required

The Commission shall prepare the report required by paragraph (1) without requiring the provision of additional information from providers of

telecommunications service or voice service (as defined in section 227b(a) of this title).

(i) Information sharing

(1) In general

Not later than 18 months after December 30, 2019, the Commission shall prescribe regulations to establish a process that streamlines the ways in which a private entity may voluntarily share with the Commission information relating to—

(A) a call made or a text message sent in violation of subsection (b); or

(B) a call or text message for which misleading or inaccurate caller identification information was caused to be transmitted in violation of subsection (e).

(2) Text message defined

In this subsection, the term "text message" has the meaning given such term in subsection (e)(8).

(j) Robocall blocking service

(1) In general

Not later than 1 year after December 30, 2019, the Commission shall take a final agency action to ensure the robocall blocking services provided on an opt-out or opt-in basis pursuant to the Declaratory Ruling of the Commission in the matter of Advanced Methods to Target and Eliminate Unlawful Robocalls (CG Docket No. 17–59; FCC 19–51; adopted on June 6, 2019)—

(A) are provided with transparency and effective redress options for both—

(i) consumers; and

(ii) callers; and[2]

(B) are provided with no additional line item charge to consumers and no additional charge to callers for resolving complaints related to erroneously blocked calls; and

(C) make all reasonable efforts to avoid blocking emergency public safety calls.

(2) Text message defined

In this subsection, the term "text message" has the meaning given such term in subsection (e)(8).

[2] So in original. The word "and" probably should not appear.

Urgent Deficiencies Act, Act of Oct. 22, 1913, Pub. L. No. 63-32, 38 Stat. 208, 219-21

JUDICIAL

The disbursing clerk of the Department of Justice is authorized to pay, from the regular appropriations provided for such items, after audit in the Division of Accounts, the salaries of the following officers for the period during which duties were actually performed, notwithstanding the fact that the appointments were not confirmed by the Senate:

Richard E. Sloan as United States district judge for the district of Arizona.

Clinton W. Howard as United States district judge for the western district of Washington.

James B. Sloan as United States district attorney for the southern district of Alabama.

Lester G. Fant as United States district attorney for the northern district of Mississippi.

Beverly W. Coiner as United States district attorney for the western district of Washington.

COMMERCE COURT: For expenses of the Commerce Court during the first half of the fiscal year nineteen hundred and fourteen, namely: clerk, at the rate of $4,000 per annum; deputy clerk, at the rate of $2,500 per annum; marshal, at the rate of $3,000 per annum; deputy marshal, at the rate of $2,500 per annum; for rent of necessary quarters in Washington, District of Columbia, and elsewhere, and furnishing same for the Commerce Court; for books, periodicals, stationary, printing, and binding; for pay of bailiffs and all other necessary employees at the seat of government and

elsewhere, not otherwise specifically provided for, and for such other miscellaneous expenses as may be approved by the presiding judge, $17,500; in all $23,500, or so much thereof as may be necessary.

The Commerce Court, created and established by the Act entitled "An Act to create a Commerce Court and to amend the Act entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes," approved June eighteenth, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment under the terms of said Act, but such judges shall continue to act under assignment, as in the said Act provided, as judges of the district courts and circuit courts of appeals; and in the event of and on the death, resignation, or removal from office of any of such judges, his office is hereby abolished and no successor to him shall be appointed.

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the

commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.

The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as a district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined

before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided*, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as

to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the attorney general of the State. All cases pending in the Commerce Court at the date of the passage of this Act shall be deemed pending in and be transferred forthwith to said district courts except cases which may previously have been submitted to that court for final decree and the latter to be transferred to the district courts if not decided by the Commerce Court before December first, nineteen hundred and thirteen, and all cases wherein injunctions or other orders or decrees, mandatory or otherwise, have been directed or entered prior to the abolition of the said court shall be transferred forthwith to said district courts, which shall have jurisdiction to proceed therewith and to enforce said injunctions, orders, or decrees. Each of said cases and all the records, papers, and proceedings shall be transferred to the district court wherein it might have been filed at the time it was filed in the Commerce Court if this Act had then been in effect; and if it might have been filed in any one of two or more district courts it shall be transferred to that one of said district courts which may be designated by the petitioner or petitioners in said case, or, upon failure of said petitions to act in the premises within thirty days after the passage of this Act, to such one of said district courts as may be designated by the judges of the

Commerce Court. The judges of the Commerce Court shall have authority, and are hereby directed, to make any and all orders and to take any other action necessary to transfer as aforesaid the cases and all the records, papers, and proceedings then pending in the Commerce Court to said district courts. All administrative books, dockets, files, and all papers of the Commerce Court not transferred as part of the record of any particular case shall be lodged in the Department of Justice. All furniture, carpets, and other property of the Commerce Court is turned over to the Department of Justice and the Attorney General is authorized to supply such portion thereof as in his judgment may be proper and necessary to the United States Board of Mediation and Conciliation.

Any case hereafter remanded from the Supreme Court which, but for the passage of this Act, would have been remanded to the Commerce Court, shall be remanded to a district court, designated by the Supreme Court, wherein it might have been instituted at the time it was instituted in the Commerce Court if this Act had then been in effect, and thereafter such district court shall take all necessary and proper proceedings in such case in accordance with law and such mandate, order, or decree therein as may be made by said Supreme Court.

All laws or parts of laws inconsistent with the foregoing provisions relating to the Commerce Court, are repealed.

Emergency Price Control Act of 1942, Pub L. No. 77-421, 56 Stat. 23, §§ 203-04

PROCEDURE

SEC. 203. (a) Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the

protestant of the grounds upon which such decision is based, and of any economic data or other facts of which the Administrator has taken official notice.

(b) In the administration of this Act the Administrator may take official notice of economic data and other facts, including facts found by him as a result of action taken under section 202.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs.

REVIEW

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such

regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence, which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in official proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary and capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the

Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as the chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as a judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have the power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at

such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(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 cases 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 validatory 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.

Clean Water Act, 33 U.S.C. § 1369

§ 1369. Administrative procedure and judicial review

(a) Subpenas

(1) For purposes of obtaining information under section 1315 of this title, or carrying out section 1367(e) of this title, the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for effluent data, upon a showing satisfactory to the Administrator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subsection, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give

testimony before the Administrator, to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(2) The district courts of the United States are authorized, upon application by the Administrator, to issue subpenas for attendance and testimony of witnesses and the production of relevant papers, books, and documents, for purposes of obtaining information under sections 1314(b) and (c) of this title. Any papers, books, documents, or other information or part thereof, obtained by reason of such a subpena shall be subject to the same requirements as are provided in paragraph (1) of this subsection.

(b) Review of Administrator's actions; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(l) of this title, may be had by any

interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

(3) AWARD OF FEES.—In any judicial proceeding under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party whenever it determines that such award is appropriate.

(4) DISCHARGES INCIDENTAL TO NORMAL OPERATION OF VESSELS.—

(A) IN GENERAL.—Except as provided in subparagraph (B), any interested person may file a petition for review of a final agency action under section 1322(p) of this title of the Administrator or the Secretary of the department in which the Coast Guard is operating in accordance with the requirements of this subsection.

(B) VENUE EXCEPTION.—Subject to section 1322(p)(7)(C)(v) of this title, a petition for review of a final agency action under section 1322(p) of

this title of the Administrator or the Secretary of the department in which the Coast Guard is operating may be filed only in the United States Court of Appeals for the District of Columbia Circuit.

(c) Additional evidence

In any judicial proceeding brought under subsection (b) of this section in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

Clean Air Act, 42 U.S.C. § 7607

§ 7607. Administrative proceedings and judicial review

(a) Administrative subpenas; confidentiality; witnesses

In connection with any determination under section 7410(f) of this title, or for purposes of obtaining information under section 7521(b)(4)[1] or 7545(c)(3) of this title, any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the[2] chapter (including but not limited to section 7413, section 7414, section 7420, section 7429, section 7477, section 7524, section 7525, section 7542, section 7603, or section 7606 of this title),,[3] the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such paper, book, document, or information may be disclosed to other officers,

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[1] See References in Text note below.

[2] So in original. Probably should be "this".

[3] So in original.

employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph, [4] the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,,[3] any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5)[1] of this title, any control or prohibition under section 7545 of this title, any standard under

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[4] So in original. Probably should be "subsection,".

section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c–10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on

grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner

and upon such terms and conditions as to[5] the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F)[6] of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

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[5] So in original. The word "to" probably should not appear.

[6] So in original. There are no subpars. (D) and (F) of section 7412(g)(1) of this title.

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV–A (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV–A (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance

referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific

Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be

placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a

proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek

review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b)). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b)) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action 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; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is

arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

(f) Costs

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

In any action respecting the promulgation of regulations under section 7420 of this title or the

administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public participation

It is the intent of Congress that, consistent with the policy of subchapter II of chapter 5 of title 5, the Administrator in promulgating any regulation under this chapter, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section[7] 7407(d), 7502(a), 7511(a) and (b), and 7512(a) and (b) of this title.

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[7] So in original. Probably should be "sections".

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9613

§ 9613. Civil proceedings

(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) Controversies or other matters resulting from tax collection or tax regulation review

The provisions of subsections (a) and (b) of this section shall not apply to any controversy or other matter resulting from the assessment of collection of any tax, as provided by subchapter II[1] of this chapter, or to the review of any regulation promulgated under title 26.

(d) Litigation commenced prior to December 11, 1980

No provision of this chapter shall be deemed or held to moot any litigation concerning any release of any hazardous substance, or any damages associated therewith, commenced prior to December 11, 1980.

(e) Nationwide service of process

In any action by the United States under this chapter, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process.

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among

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[1] See References in Text note below.

liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) Period in which action may be brought

(1) Actions for natural resource damages

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a

notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may

be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after—

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation

No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this subchapter more than 3 years after the date of payment of such claim.

(5) Actions to recover indemnification payments

Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 9619 of this title, an action under section 9607 of this title for recovery of

such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) Minors and incompetents

The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

(h) Timing of review

No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2) of this title.

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

(i) Intervention

In any action commenced under this chapter or under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by existing parties.

(j) Judicial review

(1) Limitation

In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any

response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) Standard

In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

(3) Remedy

If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national contingency plan, and (B) such other relief as is consistent with the National Contingency Plan.

(4) Procedural errors

In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made.

(k) Administrative record and participation procedures

(1) Administrative record

The President shall establish an administrative record upon which the President shall base the selection of a response action. The administrative record shall be available to the public at or near the facility at issue. The President also may place duplicates of the administrative record at any other location.

(2) Participation procedures

(A) Removal action

The President shall promulgate regulations in accordance with chapter 5 of title 5 establishing procedures for the appropriate participation of interested persons in the development of the administrative record on which the President will base the selection of removal actions and on which judicial review of removal actions will be based.

(B) Remedial action

The President shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the President will base the selection of remedial actions and on which judicial review of remedial actions will be based. The procedures developed under this subparagraph shall include, at a minimum, each of the following:

(i) Notice to potentially affected persons and the public, which shall be accompanied by a brief

analysis of the plan and alternative plans that were considered.

(ii) A reasonable opportunity to comment and provide information regarding the plan.

(iii) An opportunity for a public meeting in the affected area, in accordance with section 9617(a)(2) of this title (relating to public participation).

(iv) A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations.

(v) A statement of the basis and purpose of the selected action.

For purposes of this subparagraph, the administrative record shall include all items developed and received under this subparagraph and all items described in the second sentence of section 9617(d) of this title. The President shall promulgate regulations in accordance with chapter 5 of title 5 to carry out the requirements of this subparagraph.

(C) Interim record

Until such regulations under subparagraphs (A) and (B) are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public. The development of an administrative record and the selection of response action under this chapter shall not include an adjudicatory hearing.

(D) Potentially responsible parties

The President shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action. Nothing in this paragraph shall be construed to be a defense to liability.

(l) Notice of actions

Whenever any action is brought under this chapter in a court of the United States by a plaintiff other than the United States, the plaintiff shall provide a copy of the complaint to the Attorney General of the United States and to the Administrator of the Environmental Protection Agency.

15 U.S.C. § 78y

§ 78y. Court review of orders and rules

(a) Final Commission orders; persons aggrieved; petition; record; findings; affirmance, modification, enforcement, or setting aside of orders; remand to adduce additional evidence

(1) A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated by the Commission for that purpose. Thereupon the Commission shall file in the court the record on which the order complained of is entered, as provided in section 2112 of title 28 and the Federal Rules of Appellate Procedure.

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.

(4) The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.

(5) If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence

is material and that there was reasonable ground for failure to adduce it before the Commission, the court may remand the case to the Commission for further proceedings, in whatever manner and on whatever conditions the court considers appropriate. If the case is remanded to the Commission, it shall file in the court a supplemental record containing any new evidence, any further or modified findings, and any new order.

(b) Commission rules; persons adversely affected; petition; record; affirmance, enforcement, or setting aside of rules; findings; transfer of proceedings

(1) A person adversely affected by a rule of the Commission promulgated pursuant to section 78f, 78i(h)(2), 78k, 78k–1, 78o(c)(5) or (6), 78o–3, 78q, 78q–1, or 78s of this title may obtain review of this rule in the United States Court of Appeals for the circuit in which he resides or has his principal place of business or for the District of Columbia Circuit, by filing in such court, within sixty days after the promulgation of the rule, a written petition requesting that the rule be set aside.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated for that purpose. Thereupon, the Commission shall file in the court the rule under review and any documents referred to therein, the Commission's notice of proposed rulemaking and any documents referred to therein, all written submissions and the transcript of any oral presentations in the rulemaking, factual information not included in the foregoing that was

considered by the Commission in the promulgation of the rule or proffered by the Commission as pertinent to the rule, the report of any advisory committee received or considered by the Commission in the rulemaking, and any other materials prescribed by the court.

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the materials set forth in paragraph (2) of this subsection, to affirm and enforce or to set aside the rule.

(4) The findings of the Commission as to the facts identified by the Commission as the basis, in whole or in part, of the rule, if supported by substantial evidence, are conclusive. The court shall affirm and enforce the rule unless the Commission's action in promulgating the rule is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law.

(5) If proceedings have been instituted under this subsection in two or more courts of appeals with respect to the same rule, the Commission shall file the materials set forth in paragraph (2) of this subsection in that court in which a proceeding was first instituted. The other courts shall thereupon transfer all such proceedings to the court in which the materials have been filed. For the convenience of the parties in the interest of justice that court may

thereafter transfer all the proceedings to any other court of appeals.

(c) Objections not urged before Commission; stay of orders and rules; transfer of enforcement or review proceedings

(1) No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.

(2) The filing of a petition under this section does not operate as a stay of the Commission's order or rule. Until the court's jurisdiction becomes exclusive, the Commission may stay its order or rule pending judicial review if it finds that justice so requires. After the filing of a petition under this section, the court, on whatever conditions may be required and to the extent necessary to prevent irreparable injury, may issue all necessary and appropriate process to stay the order or rule or to preserve status or rights pending its review; but (notwithstanding section 705 of title 5) no such process may be issued by the court before the filing of the record or the materials set forth in subsection (b)(2) of this section unless: (A) the Commission has denied a stay or failed to grant requested relief, (B) a reasonable period has expired since the filing of an application for a stay without a decision by the Commission, or (C) there was reasonable ground for failure to apply to the Commission.

(3) When the same order or rule is the subject of one or more petitions for review filed under this section and an action for enforcement filed in a district court

of the United States under section 78u(d) or (e) of this title, that court in which the petition or the action is first filed has jurisdiction with respect to the order or rule to the exclusion of any other court, and thereupon all such proceedings shall be transferred to that court; but, for the convenience of the parties in the interest of justice, that court may thereafter transfer all the proceedings to any other court of appeals or district court of the United States, whether or not a petition for review or an action for enforcement was originally filed in the transferee court. The scope of review by a district court under section 78u(d) or (e) of this title is in all cases the same as by a court of appeals under this section.

(d) Other appropriate regulatory agencies

(1) For purposes of the preceding subsections of this section, the term "Commission" includes the agencies enumerated in section 78c(a)(34) of this title insofar as such agencies are acting pursuant to this chapter and the Secretary of the Treasury insofar as he is acting pursuant to section 78o–5 of this title.

(2) For purposes of subsection (a)(4) of this section and section 706 of title 5, an order of the Commission pursuant to section 78s(a) of this title denying registration to a clearing agency for which the Commission is not the appropriate regulatory agency or pursuant to section 78s(b) of this title disapproving a proposed rule change by such a clearing agency shall be deemed to be an order of the appropriate regulatory agency for such clearing agency insofar as such order was entered by reason of a determination by such appropriate regulatory

agency pursuant to section 78s(a)(2)(C) or 78s(b)(4)(C) of this title that such registration or proposed rule change would be inconsistent with the safeguarding of securities or funds.

29 U.S.C. § 655

§ 655. Standards

(a) Promulgation by Secretary of national consensus standards and established Federal standards; time for promulgation; conflicting standards

Without regard to chapter 5 of title 5 or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

(b) Procedure for promulgation, modification, or revocation of standards

The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health and Human Services, the National Institute for Occupational Safety and Health, or a State or

political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this chapter, the Secretary may request the recommendations of an advisory committee appointed under section 656 of this title. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health and Human Services, together with all pertinent factual information developed by the Secretary or the Secretary of Health and Human Services, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred and seventy days.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

(3) On or before the last day of the period provided for the submission of written data or comments

under paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing.

(4) Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the standard.

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee

has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

(6)(A) Any employer may apply to the Secretary for a temporary order granting a variance from a standard or any provision thereof promulgated under this section. Such temporary order shall be granted only if the employer files an application which meets the requirements of clause (B) and establishes that (i) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date, (ii) he is taking all available steps to safeguard his employees against the hazards covered by the standard, and (iii) he has an effective program for coming into compliance with the standard as quickly as practicable. Any temporary order issued under this paragraph shall prescribe the practices, means, methods, operations, and processes which the employer must adopt and

use while the order is in effect and state in detail his program for coming into compliance with the standard. Such a temporary order may be granted only after notice to employees and an opportunity for a hearing: *Provided*, That the Secretary may issue one interim order to be effective until a decision is made on the basis of the hearing. No temporary order may be in effect for longer than the period needed by the employer to achieve compliance with the standard or one year, whichever is shorter, except that such an order may be renewed not more than twice (I) so long as the requirements of this paragraph are met and (II) if an application for renewal is filed at least 90 days prior to the expiration date of the order. No interim renewal of an order may remain in effect for longer than 180 days.

(B) An application for a temporary order under this paragraph (6) shall contain:

(i) a specification of the standard or portion thereof from which the employer seeks a variance,

(ii) a representation by the employer, supported by representations from qualified persons having firsthand knowledge of the facts represented, that he is unable to comply with the standard or portion thereof and a detailed statement of the reasons therefor,

(iii) a statement of the steps he has taken and will take (with specific dates) to protect employees against the hazard covered by the standard,

(iv) a statement of when he expects to be able to comply with the standard and what steps he has taken and what steps he will take (with dates specified) to come into compliance with the standard, and

(v) a certification that he has informed his employees of the application by giving a copy thereof to their authorized representative, posting a statement giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted, and by other appropriate means.

A description of how employees have been informed shall be contained in the certification. The information to employees shall also inform them of their right to petition the Secretary for a hearing.

(C) The Secretary is authorized to grant a variance from any standard or portion thereof whenever he determines, or the Secretary of Health and Human Services certifies, that such variance is necessary to permit an employer to participate in an experiment approved by him or the Secretary of Health and Human Services designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers.

(7) Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate

emergency treatment, and proper conditions and precautions of safe use or exposure. Where appropriate, such standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health and Human Services, such examinations may be furnished at the expense of the Secretary of Health and Human Services. The results of such examinations or tests shall be furnished only to the Secretary or the Secretary of Health and Human Services, and, at the request of the employee, to his physician. The Secretary, in consultation with the Secretary of Health and Human Services, may by rule promulgated pursuant to section 553 of title 5, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical examinations, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

(8) Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this chapter than the national consensus standard.

(c) Emergency temporary standards

(1) The Secretary shall provide, without regard to the requirements of chapter 5 of title 5, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

(2) Such standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.

(3) Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding in accordance with subsection (b), and the standard as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard as provided in paragraph (2) of this subsection.

(d) Variances from standards; procedure

Any affected employer may apply to the Secretary for a rule or order for a variance from a standard

promulgated under this section. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing. The Secretary shall issue such rule or order if he determines on the record, after opportunity for an inspection where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard. The rule or order so issued shall prescribe the conditions the employer must maintain, and the practices, means, methods, operations, and processes which he must adopt and utilize to the extent they differ from the standard in question. Such a rule or order may be modified or revoked upon application by an employer, employees, or by the Secretary on his own motion, in the manner prescribed for its issuance under this subsection at any time after six months from its issuance.

(e) Statement of reasons for Secretary's determinations; publication in Federal Register

Whenever the Secretary promulgates any standard, makes any rule, order, or decision, grants any exemption or extension of time, or compromises, mitigates, or settles any penalty assessed under this chapter, he shall include a statement of the reasons for such action, which shall be published in the Federal Register.

(f) Judicial review

Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

(g) Priority for establishment of standards

In determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments. The Secretary shall also give due regard to the recommendations of the Secretary of Health and Human Services regarding the need for mandatory standards in determining the priority for establishing such standards.