No. 23-1226

IN THE
Supreme Court of the United States

MCLAUGHLIN CHIROPRACTIC ASSOCIATES, INC.,
Petitioner,
v.
MCKESSON CORPORATION, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF CTIA—THE WIRELESS ASSOCIATION, NCTA—THE INTERNET & TELEVISION ASSOCIATION, USTELECOM—THE BROADBAND ASSOCIATION, AND THE WIRELESS INFRASTRUCTURE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

THOMAS M. JOHNSON, JR.
Counsel of Record
JOSHUA S. TURNER
SARA M. BAXENBERG
MICHAEL J. SHOWALTER
MELISSA ALBA
WILEY REIN LLP
2050 M Street N.W.
Washington, D.C. 20036
tmjohnson@wiley.law
(202) 719-7000

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Regulatory Materials

Statutes

Other Authorities

INTRODUCTION AND INTEREST OF *AMICI*[1]

Amici are several major communications trade associations whose members are regulated by the Federal Communications Commission ("FCC"), which in turn is subject to the judicial review provisions of the Hobbs Act. *Amici*'s diverse members include carriers, providers, and infrastructure companies who provide consumers with services ranging from traditional telephony to broadband Internet to cable television, offered over both wired and wireless platforms. While *amici*'s members often try to differentiate themselves in an increasingly competitive and always evolving marketplace, they are united in their conviction that bringing cutting-edge communications services to Americans across the country requires regulatory certainty to support the tremendous planning, investment, and effort involved. Congress recognized this reality too, which is why it placed the communications industry under the auspices of a single, nationwide regulator (the FCC) and made that regulator's actions subject to centralized judicial review in the courts of appeals.

While the communications industry does not agree with every rule the FCC adopts, it depends on the adjudicative finality afforded to those rules by the Hobbs Act—a statute of venue and repose that governs appeals of FCC orders. Under the Hobbs Act, once a federal court of appeals upholds a challenged FCC order, or the period for bringing such a challenge

---

[1] No party's counsel authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to fund the brief's preparation or submission.

has passed, the industry can be confident that the order is legally valid. This certainty is instrumental in enabling FCC-regulated entities to plan for their operations and keep pace with rapidly changing technologies. It also ensures uniformity in communications policy—an inherently national endeavor. Indeed, it is because of this national character that Congress established the FCC as the sole federal regulator for spectrum licenses and interstate communications.

Petitioner seeks to jeopardize this certainty and uniformity by asking the Court to conclude that a district court is not bound by a legal interpretation in an FCC order in a suit that seeks to impose new liability on civil defendants in Telephone Consumer Protection Act ("TCPA") cases. A holding for Petitioner could undermine a wide range of long-settled FCC interpretations, regulations, and policies, create balkanized communications law across jurisdictions, and deprive FCC-regulated entities of critical certainty about the meaning and requirements of the Communications Act.

Amici seek to help the Court understand the way in which communications industry stakeholders rely on the Act, and the fundamental unfairness that would result from allowing collateral attacks on FCC orders even in cases where private or governmental plaintiffs seek to expand the scope of liability retroactively for regulated parties like *amici*'s members.

SUMMARY OF ARGUMENT

For certain industries like communications that have a truly national character, Congress has elected

through the Hobbs Act to foreclose challenges to the "validity" of final agency orders, except through direct review in a court of appeals within a 60-day timeframe. This regime promotes regulatory certainty and uniformity, preserves judicial resources, and engenders reliance among regulated entities who order their operations in part around existing agency rules.

Congress drew on a decades-long history of exclusive judicial review provisions when it adopted the Hobbs Act to prevent any future court from "determining the validity of" an agency order outside the prescribed 60-day window. As interpreted by this Court, that broad language extended not merely to formally vacating or enjoining the order (as might happen on direct review) but also to deciding whether the order was lawful (as might happen in private litigation). In the communications space, the Hobbs Act works hand in glove with the earlier-enacted Communications Act, which similarly directs parties to challenge most agency orders through direct review in federal courts of appeals. Despite amending the Communications Act many times over the course of its existence to account for new and evolving technologies, Congress has decided to keep the same basic judicial review framework in place that has existed since the 1930s.

The finality afforded by the Hobbs Act, or Hobbs Act preclusion, is especially important to the communications industry, which must make decisions about how best to deploy nationwide broadband Internet, cable, and telephone networks based on a complex web of federal, state, and local regulation. The Hobbs Act provides certainty, for

example, on the validity of FCC rules concerning the extent to which state and local governments, or cable franchising authorities, can permissibly charge fees or direct placement of network infrastructure. If such federal rules were never settled, then state and municipal governments could contest the validity of FCC orders during every dispute over siting approvals, aesthetics requirements, right-of-way access fees, or hosts of other issues. This would increase regulatory costs substantially while sowing uncertainty over communications providers' rights to build out networks across the country. The Hobbs Act's exclusivity provision is part of the structure that Congress designed to prevent such chaos.

While Hobbs Act preclusion is essential to ensuring regulatory certainty in the communications industry, it is not absolute. As a plurality of this Court recognized in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 588 U.S. 1 (2019), significant due process concerns would arise if defendants in civil or criminal enforcement actions were unable to challenge liability that rested in part on a prior agency order. *Amici* fully appreciate these concerns, as their members have significant experience cooperating with, and in some cases challenging, FCC enforcement proceedings, which can result in massive civil penalties for purported violations of rules. But these concerns are addressed by Section 703 of the Administrative Procedure Act, which provides for a limited exception to exclusive judicial review statutes in cases like these, involving "agency action [that] is subject to judicial review in civil or criminal proceedings for judicial enforcement." 5 U.S.C. § 703.

This case, however, does not raise due process concerns. Rather than a defendant attempting to protect itself from prosecutorial overreach, this case involves a plaintiff in a purported class action under the TCPA attempting to evade Hobbs Act preclusion by undermining an FCC bureau order that would *absolve* defendants' liability and instead *expand* that liability through the courts. Permitting plaintiffs to thwart Hobbs Act finality in such cases would only exacerbate the due process concerns that the *PDR Network* plurality identified, by subjecting defendants to unfair surprise and massive monetary exposure based on legal theories that the agency charged with administering the Communications Act explicitly considered and rejected. The United States could never impose retroactive liability via enforcement action in this manner, and the plaintiffs' bar should not be allowed to either. This case thus presents a classic example of when ordinary Hobbs Act preclusion principles should apply.

ARGUMENT

I. The Hobbs Act Promotes Uniformity and Predictability in the Review of FCC Decisions.

The FCC serves as the single, national regulator for radio spectrum use and interstate communications. The Communications Act of 1934 created the FCC to bring together "disjointed regulation by several different agencies" under one roof. H.R. Rep No. 73-1850, at 3. In passing the Communications Act, the House and Senate recognized the "great need for the creation of one

central body vested with comprehensive jurisdiction over the industry." *Id.*

Since 1950, the Hobbs Act has constituted one half of the two-pronged statutory scheme that Congress designed to channel review of FCC orders to specific courts. Section 402 of the Communications Act, 47 U.S.C. § 402, establishes the limits on review of FCC decisions. Section 402(b) provides that appeals of certain enumerated types of FCC actions may only be heard in the D.C. Circuit, and must be brought within 30 days. 47 U.S.C. § 402(b). For all other FCC orders, Section 402(a) permits a slightly broader choice of venue, though its language makes clear it is intended to cover all potential actions—"[a]ny proceeding to enjoin, set aside, annul, or suspend" such an order must be brought according to the Hobbs Act, Chapter 158 of Title 28, 28 U.S.C. § 2341 et seq. *Id.* § 402(a).

A. The Communications Act and the Hobbs Act Provide "Exclusive Jurisdiction" to Courts of Appeals.

Under the Hobbs Act, federal courts of appeals—not district courts—have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" FCC orders covered by Section 402(a) of the Communications Act. 28 U.S.C. § 2342(1). "Any party aggrieved by" a final agency action covered by the statute "may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." *Id.* § 2344. This jurisdictional constraint limits the timing and venue for such petitions, and has been generally held to prevent collateral attacks on agency orders. *See, e.g.*, *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 278

(1987); *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463 (1984).

"The action shall be against the United States," 28 U.S.C. § 2344, and "the agency … may appear as [a] part[y] thereto … as of right," *id.* § 2348. When more than one petition for review is filed, they are consolidated in a single court of appeals. *Id.* § 2112(a)(3). This ensures judicial review is consolidated in a single court when multiple petitions for review are filed. *See, e.g.*, *Brodsky v. HumanaDental Ins. Co.*, 910 F.3d 285, 289 (7th Cir. 2018) (explaining interaction of the Hobbs Act with 28 U.S.C. § 2112). The resulting order affirming or vacating FCC action in whole or in part then applies nationwide.

The Hobbs Act serves as both a venue statute and a statute of repose for those FCC decisions that are not covered by the stricter provisions of Section 402(b). *See Corner Post v. Bd. of Govs. of Fed. Reserve Sys.*, 603 U.S. 799, 812 (2024) (statutes of repose "like the Hobbs Act" set "an outer limit on the right to bring a civil action"); *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 581 U.S. 258 (2017) (presupposing the validity of Congress's authority to structure and regulate venue in federal courts). Unlike statutes providing for review of certain Securities and Exchange Commission and Department of Labor orders, *see PDR Network*, 588 U.S. at 15 (Kavanaugh, J., concurring in the judgment), both the Communications Act and the Hobbs Act provide clear instructions about which court determines the validity of FCC orders.

By expressly granting "exclusive" jurisdiction to certain courts of appeals for review of FCC actions, the Hobbs Act "necessarily preclude[s]" other courts from exercising that same jurisdiction. *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958).

B. The History of the Hobbs Act Supports Reading It as an Exclusive Mechanism to Review the Legality of FCC Orders.

The Hobbs Act did not arise in a vacuum. As Respondents explain (at 22–23), the Hobbs Act followed and replaced the Urgent Deficiencies Act of 1913 and borrowed language from the Emergency Price Control Act of 1930.

1. The Urgent Deficiencies Act channeled challenges to orders of certain agencies, including the Interstate Commerce Commission ("ICC"), to a special three-judge court that could "enforce, suspend, or set aside" such orders. Act of Oct. 22, 1913, Pub. L. No. 63-32, 38 Stat. 208, 219–20.

When the Communications Act was first enacted in 1934, it was this mechanism that Congress used to provide review of certain actions of the newly created FCC, which in many ways was modeled on the ICC.[2] Thus, while Section 402(b) of the Act has always provided for the D.C. Circuit to be the sole venue for particular, enumerated FCC actions, Section 402(a) of

---

[2] *See, e.g.*, *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 6–7 (1942) (explaining how the Communications Act "centralize[d] [the] scattered [federal] regulatory authority" over interstate communications, including the ICC under the Mann-Elkins Act, in a "new agency," the FCC).

the Act originally referenced the courts established by the Urgent Deficiencies Act as the exclusive venue for challenges to all other orders.[3]

As Respondents observe (at 15), the Urgent Deficiencies Act review provision to which Section 402(a) originally referred did not expressly provide for determining the "validity" of the underlying order. Nevertheless, this Court read the Urgent Deficiencies Act broadly, and held that other courts could not "assail the validity" of an agency order by reviewing the merits in a collateral proceeding. *Venner v. Mich. Cent. R.R.*, 271 U.S. 127, 130 (1926). Congress was presumptively aware of this authoritative construction of the Urgent Deficiencies Act when it adopted its language in the Communications Act.[4] And Congress later endorsed *Venner* when it adopted the Hobbs Act in 1950 and added the phrase "determine the validity of" to the language imported from the Urgent Deficiencies Act.

2. The Emergency Price Control Act, meanwhile, created "exclusive jurisdiction" in one court to review agency orders setting commodity prices, using the "determine the validity of" phrase the Hobbs Act later copied. Emergency Price Control Act of 1942, Pub. L. No. 77-421, § 204, 56 Stat. 23, 33. That language, this

---

[3] *See* Communications Act of 1934, Pub. L. No. 73-416, § 402(a), 48 Stat. 1064, 1093.

[4] *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, at least insofar as it affects the new statute"); *see also Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 233 (2020).

Court held, deprived district courts of "power to consider the validity of the … order," *i.e.*, to rule in a manner contrary to the order's reasoning. *Yakus v. United States*, 321 U.S. 414, 429–30 (1944); *see also Woods v. Hills*, 334 U.S. 210, 213–14 (1948). And it was this language that Congress used in drafting the Hobbs Act to replace the Urgent Deficiencies Act, underlining its endorsement of this Court's interpretation of the prior mechanism for review.

C. Statutory Purposes Reinforce the Importance of Hobbs Act Finality

The Hobbs Act's "far-reaching procedural effects," *Simmons v. ICC*, 716 F.2d 40, 44 (D.C. Cir. 1983) (Scalia, J.), serve several important purposes. By limiting the time and place for suit, the Hobbs Act "promotes judicial efficiency, vests an appellate panel rather than a single district judge with the power of agency review, and allows 'uniform, nationwide interpretation of [a] federal statute by the centralized expert agency created by Congress' to enforce [it]." *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010) (citing *New York Co. v. N.Y. Dep't of Labor,* 440 U.S. 519, 528 (1979)); *see also Corner Post,* 603 U.S. at 815 (describing the Hobbs Act as a "finality-focused limitations provision[]"). The exclusive-jurisdiction provision thus "eliminates duplicative and potentially conflicting review and the delay and expense incidental thereto." *Telecomms. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 78 (D.C. Cir. 1984) (cleaned up).

1. *Promoting Reliance Through Finality*. The channeling features of the Hobbs Act ensure that regulatory changes will normally occur only after

consideration by the agency and review by a court of appeals. This orderly process helps to ensure that "serious reliance interests" are "taken into account" before agency orders are changed. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 106 (2015); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). As discussed more in Sec. II, *infra*, these reliance interests are especially important in the communications industry, where stakeholders design years-long build-out plans, investment strategies, and technology evolutions in reliance on legal interpretations and regulations adopted in FCC orders.

Respect for reliance interests also prevents the "unfair surprise" that can result when an interpretive change during district court litigation results in "potentially massive liability … for conduct that occurred well before that interpretation was announced." *Christopher v. SmithKline Beecham*, 567 U.S. 142, 155–56 (2012). When rules promulgated by Hobbs Act agencies like the FCC are subject to enforcement through private rights of action, potential defendants must be able to rely on agency orders to show that their conduct was lawful. *See, e.g.*, *CE Design*, 606 F.3d at 446 (affirming summary judgment where regulatory exemption provided "a complete defense" to enforcement); *Leyse v. Clear Channel Broad., Inc.*, 545 F.App'x 444, 445 (6th Cir. 2013) (affirming dismissal under similar circumstances). Otherwise, defendants could be found liable where an agency "did not think the industry's practice was unlawful" and its regulations reflected that position. *Christopher*, 567 U.S. at 158.

2. *National Uniformity*. The Hobbs Act also allows "uniform, nationwide interpretation of the federal statute by the centralized expert agency" followed by consolidated court of appeals review. *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014) (quotation marks omitted). This prevents divisions of authority that increase compliance costs and may take years to resolve, while constraining agency authority by guaranteeing "one review of right in an appellate court" of final agency orders, *see Providing for the Review of Orders of Certain Agencies: Hearing Before the H. Subcomm. No. 2*, 81st Cong. 65 at 112 (1949) (statement of the Hon. Orie L. Phillips, Chief Judge of the 10th Circuit Court of Appeals).

National uniformity is critical in industries with nationwide reach such as the communications industry. It is not a coincidence that Congress decided to include Section 402(a) among the various agency actions designated for Hobbs Act review; the Hobbs Act also covers final orders of other agencies which regulate important national interests. It governs orders of the FCC, the Department of Transportation, the Federal Maritime Commission, the Surface Transportation Board, the Department of Agriculture, the Nuclear Regulatory Commission (then the Atomic Energy Commission), and certain orders of the Department of Housing and Urban Development ("HUD") that have national effect. Act of Dec. 29, 1950, Pub. L. No. 81-901, 64 Stat. 1129 (codified at 28 U.S.C. §§ 2341–2352). The first seven of those regulate the channels and instrumentalities of interstate commerce, as well as goods intended for nationwide distribution. *See, e.g.*, *United States v.*

Dunifer, 219 F.3d 1004, 1008 (9th Cir. 2000) (explaining need for "uniform, nationwide interpretation of the federal statute … governing the nation's airwaves") (cleaned up). And the last two similarly implement policies of national concern. This Court has long recognized the need for consistent oversight in such areas. *See Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68 (1970); *Far East Conf. v. United States*, 342 U.S. 570, 574–75 (1952).

Under this framework, stakeholders can be confident that when an FCC order is upheld by a federal court of appeals or left unchallenged, it will not then be invalidated in other circuits. This certainty is critical for the inherently national communications industry, which demands a uniform policy approach. *See, e.g.*, *Fisher's Blend Station v. Tax Comm'n of State of Washington*, 297 U.S. 650, 655 (1936).

3. *Judicial Efficiency.* Finally, the Hobbs Act promotes judicial efficiency by helping to "avoid the waste" that occurs where a district court and court of appeals each "decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). By channeling review, the Act also ensures "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; *see also* Resp. Br. 31. These mutually reinforcing interests are why Congress designed Hobbs Act review the way it did and included Section

402(a) orders among those covered by the Hobbs Act's provisions.

D. Congress Has Repeatedly and Fundamentally Revised the Communications Act Without Changing How FCC Orders Are Reviewed.

Over the years, Congress has expanded and reshaped the authority of the FCC in a variety of ways, but it has not changed the mechanism for judicial review in Section 402. Nor has it materially altered the Hobbs Act with respect to FCC review. By implication, Congress has repeatedly ratified the appropriateness of this review scheme, as elaborated through this Court's authoritative constructions in *Yakus* and *Venner*.[5]

For example, Congress added Title VI to the Communications Act in 1984 to "establish a national policy concerning cable communications" and create national standards for cable franchises, 47 U.S.C. § 521. By adding these authorities to the Act, it subjected the FCC's implementation of these new standards to the existing means of review in Section 402, declining to modify or alter this review process. And when Congress revised these provisions in 1992, it once again left Section 402's review mechanism untouched.

---

[5] *See, e.g.*, *Lorillard*, 434 U.S. at 580 ("Congress is presumed to be aware of a[] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change").

Similarly, in 1993 Congress created a new regulatory classification for commercial mobile wireless service, consolidating disparate existing regulations in a way that led to the meteoric rise of the wireless communications industry. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392. While Congress granted the FCC authority to regulate these new services, 47 U.S.C. § 332, it left the review provisions of Section 402 and the Hobbs Act unchanged.

The same happened again in 1996, when Congress passed the landmark Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. This pro-competitive, deregulatory Act represented a sea change in how the communications sector was regulated; among other things, it "fundamentally restructure[d] local telephone markets," ending state-granted monopolies and promoting competition, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999), while imposing limitations on local zoning authority when it came to the deployment of wireless and other communications facilities, *City of Arlington v. FCC*, 569 U.S. 290, 293 (2013). One thing that the transformative 1996 Act did not do, however, was change Section 402 or the Hobbs Act; the FCC's rulemaking authority "extend[ed] to the subsequently adopted portions of the Act," *id.*, but so too did the exclusive means by which the agency's orders could be reviewed. For the next three decades, leading up to present day, the FCC has worked to implement the vision of the 1996 Act, adopting, modifying, and revising countless regulations, orders, and declaratory rulings—and, in each case, the agency's actions have been reviewed pursuant to Section 402 and the Hobbs Act.

E. Courts Have Consistently Applied Hobbs Act Preclusion for Decades.

As a practical matter, there has been essentially universal agreement in the lower courts about the exclusive nature of the review that the Hobbs Act was intended to provide. Every Circuit to have addressed the issue has held that the Hobbs Act precludes collateral attacks on agency orders in district courts. *See* BIO 15–16. And in many such cases, the circuit courts have applied the Hobbs Act to preclude challenges to agency regulations in suits between private parties like this one. *See, e.g.*, *Mais*, 768 F.3d at 1119–21; *Leyse*, 545 Fed. Appx. at 459; *Nack v. Walburg*, 715 F.3d 680, 685–87 (8th Cir. 2013); *CE Design*, 606 F.3d at 447–48; *Daniels v. Union Pac. R.R. Co.*, 530 F.3d 936, 940–41 (D.C. Cir. 2008); *City of Peoria v. Gen. Elec. Cablevision Corp.*, 690 F.2d 116, 119–21 (7th Cir. 1982).

This interpretation of the law is thus well-settled. It not only has engendered significant reliance interests, but it has also helped the U.S. communications industry grow into the dominant global player that it is today.

II. Hobbs Act Finality Has Played a Pivotal Role in U.S. Leadership in Communications.

The objectives that Congress sought to serve by adopting the Hobbs Act are not merely academic. The communications industry has long relied on Hobbs Act finality in undertaking large-scale investment and innovation in communications technology and deployment. Its preclusive effect has thwarted litigants in district court from upending national

communications policies in ways that would have significantly inhibited growth and development in the industry. The cutting-edge connectivity we all enjoy today—an achievement that has secured the United States' position as a communications leader and contributes significantly to the U.S. economy—owes its success, in part, to Hobbs Act finality.

For example, wireless infrastructure deployment relies on multiple enactments of Congress that preempt dilatory state and local conduct. This includes Section 332(c)(7) of the Communications Act, added by the deregulatory Telecommunications Act of 1996. Among other things, Section 332(c)(7) preempts local actions that would "prohibit or have the effect of prohibiting the provision of personal wireless services," and requires localities to act on wireless infrastructure applications "within a reasonable period of time." 47 U.S.C. § 332(c)(7)(B). In 2012, Congress adopted Section 6409 of the Spectrum Act, an even more forceful preemptive provision which provides that localities "may not deny, and shall approve" modification requests that do not substantially change the physical dimensions of a wireless facility. *Id*. § 1455(a)(1).

In the years that followed these enactments, the FCC issued several declaratory rulings and regulations interpreting the statutory language (e.g., what constitutes an "effective prohibition of service") and taking steps to make it actionable (e.g., establishing application processing shot clocks and a deemed granted framework to ensure that localities do in fact act in a "reasonable period of time" and "approve" eligible modification requests,

respectively).[6] As technology advanced, the FCC issued new orders clarifying application of these paradigms, such as the 2018 *Accelerating Wireless Broadband Deployment Order*, which, *inter alia*, explained how Section 332 applies in the context of "small cell" facilities necessary for 5G deployment.[7]

The FCC's various orders were consistently challenged by municipalities in federal appellate courts via the Hobbs Act, where they largely have been upheld.[8] The finality afforded by the decisions affirming these FCC orders has been critical to the wireless industry, particularly as it built out 4G and 5G wireless networks across the country and now, as it looks to deploy 6G. Throughout this period, district court litigation has been frequent as disputes have arisen between localities and industry (e.g., whether

---

[6] *See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, Declaratory Ruling, 24 F.C.C.R. 13994 (2009); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 F.C.C.R. 12865 (2014).

[7] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 F.C.C.R. 9088 (2018) ("*2018 Order*"); *see also, e.g., Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, Declaratory Ruling and Notice of Proposed Rulemaking, 35 F.C.C.R. 9577 (2020).

[8] *See, e.g.*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd,* 569 U.S. 290 (2013); *Montgomery Cnty. v. FCC*, 811 F.3d 121 (4th Cir. 2015); *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020), *cert. denied sub nom. City of Portland v. FCC*, 141 S. Ct. 2855 (2021); *League of California Cities v. FCC*, Case No. 20-71765 (9th Cir. 2024).

a municipal ordinance effectively prohibits the provision of service, whether a facility modification would substantially change the underlying structure such that Section 6409's streamlined treatment is unavailable, whether a municipality failed to act on an application in the required time period, and so forth). But critically, Hobbs Act preclusion has prevented municipalities in those disputes from attacking the underlying FCC orders that set the rules of the road.[9]

As a result, federal siting policy applies consistently across the country, as intended. Municipalities cannot seek district court rulings that would carve out special rules for deployment that apply only in their jurisdictions—which in the aggregate would have significant negative impacts on the nationwide communications landscape and the investment-backed expectations of the industry. *Cf. 2018 Order* ¶53 ("[E]ven fees that might seem small in isolation have material and prohibitive effects on deployment, particularly when considered in the aggregate given the nature and volume of anticipated . . . deployment."). Indeed, the wireless industry has invested an estimated $705 billion in infrastructure since 2018 (the year 5G was launched), and the resulting networks cover 330 million Americans and provide 558 million connections. *See* CTIA, *2024*

---

[9] *See, e.g., T-Mobile S., LLC v. City of Roswell*, 662 F. Supp. 3d 1269, 1285 (N.D. Ga. 2023); *Crown Castle Fiber LLC v. City of Pasadena*, 618 F. Supp. 3d 567, 583 (S.D. Tex. 2022), *aff'd sub nom. Crown Castle Fiber, LLC v. City of Pasadena*, 76 F.4th 425 (5th Cir. 2023), *cert. denied,* 144 S. Ct. 820 (2024).

Annual Survey Highlights, https://api.ctia.org/wp-content/uploads/2024/09/2024-Annual-Survey.pdf.[10]

The FCC has taken similar steps with respect to legacy wireline networks, fiber, and cable franchising, shielding those technologies from state and local barriers to deployment.[11] These segments of the communications industry likewise rely on Hobbs Act preclusion when disputes arise in district court, and have been able to build thriving, modern networks as a result. For instance, in *Comcast of Oregon II, Inc. v. City of Beaverton*, where the city attempted to impose new taxes on broadband Internet access service contrary to FCC orders, the district court rejected the city's argument that the court could "reject" such an FCC order "if the [c]ourt concludes it is not entitled to deference," 609 F. Supp. 3d 1136, 1147 (D. Or. 2022). Finding that the Hobbs Act and relevant case law applying it "directs district courts to apply FCC orders as written," the court held that the

---

[10] None of this is to deny that the Communications Act provides an important role for States and municipalities to play in managing the public rights-of-way and reviewing and approving deployments. *See, e.g.*, 47 U.S.C. §§ 253(c); 332(c)(7). But once a court of appeals determines that an FCC order constitutes a valid exercise of its authority to preempt state or local laws, the Hobbs Act contemplates that providers should be able to rely on the stability that comes from such nationwide rules.

[11] *See, e.g., Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 F.C.C.R. 7705, ¶¶ 145-152 (2018); *2018 Order* ¶¶ 34-46 (interpreting Section 253(a)); *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, Second Report and Order, 22 F.C.C.R. 19633 (2007), Order on Reconsideration, 30 F.C.C.R. 810 (2015), and Third Report and Order, 34 F.C.C.R. 6844 (2019).

city's new broadband taxes were preempted. *Id.* at 1149, 1155–56. The ability of the cable industry to depend on FCC orders delineating the limits of local franchise authority is critical to successfully deploying broadband and other services across the country.

And these are just a few examples. The FCC crafts policy and makes decisions on a wide range of communications issues that require uniform, nationwide application. For instance, the FCC serves as the nation's radiofrequency spectrum manager, deciding how best to allocate spectrum for different uses "as public convenience, interest, or necessity requires." 47 U.S.C. § 303. Its spectrum auctions take years of planning, preparation, and implementation, and have generated more than $233 billion for the U.S. Treasury over the past 30 years. FCC, Press Release, *Chairwoman Rosenworcel Statement on the Expiration of FCC Spectrum Auction Authority* (Mar. 10, 2023). Given the tremendous capital needed to secure radiofrequency spectrum at auction, communications providers and investors base substantial long-term investment plans on the FCC's spectrum allocation decisions.

In light of these equities, Congress rightly determined that federal communications policies should be national and uniform and should not be undermined by competing district court determinations. These principles of uniformity and finality have enabled a thriving communications industry that has placed the United States at the forefront of communications technology. The Hobbs Act has not only worked the way Congress intended it, but has done so to great societal benefit.

III. The Hobbs Act Should Not Preclude Defendants From Challenging the Validity of FCC Orders on Subsequent Civil and Criminal Enforcement Proceedings.

While the Hobbs Act requires preclusion in a variety of contexts and is critical to the uniform administration of communications law, *amici* appreciate the unfairness and prejudice identified by Justice Kavanaugh in *PDR Network* that can result from preclusion in one specific context—where parties seek to challenge agency action in defending against any criminal or civil enforcement action. *See PDR Network*, 588 U.S. at 18 (Kavanaugh, J., concurring in the judgment) (calling preclusion in such cases "grossly inefficient and unfair").

This case does not involve the defense of an enforcement action, so this Court does not need to resolve here how the Hobbs Act might operate in that context. *See infra* Part IV. But *amici* recognize that a limited exception to Hobbs Act preclusion may be appropriate for defendants in enforcement proceedings. Indeed, many of *amici*'s members have been targets of aggressive enforcement investigations and forfeiture orders at the FCC, where regulators have operated outside the protections afforded by an Article III judge or jury.[12] An exception to Hobbs Act preclusion in defense against enforcement would

---

[12] *See generally* Br. of CTIA et al. as Amicus Curiae Supporting Respondents at 21–29, *SEC v. Jarkesy*, No. 22-859 (Oct. 18, 2023) (outlining enforcement overreach in the communications industry at the FCC and other agencies).

mitigate some of the unfairness associated with agency investigations and associated civil penalties.

Such an exception to Hobbs Act preclusion, moreover, is strongly supported in law and consistent with the general rule that the Hobbs Act is ordinarily the exclusive mechanism for review of covered agency rules. As Respondents explain, the Hobbs Act must be read *in pari materia* with the APA, which provides that "agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement," unless "prior, adequate, and exclusive opportunity for judicial review is provided by law." 5 U.S.C. § 703; *see also* Resp. Br. 35–36. While the Hobbs Act provides an "exclusive" mechanism for review, that mechanism must still be "prior" and "adequate" to preclude defendants in enforcement proceedings from challenging the lawfulness of agency action. That standard should provide defendants with meaningful options to vindicate their legal rights when agencies exceed their authority in the enforcement context.

A. As Justice Kavanaugh explained in *PDR Network*, Section 703 of the APA reflects a "default rule" in favor of allowing parties to raise applicable legal defenses in enforcement actions, consistent with "[t]he tradition of allowing defendants in enforcement actions to argue that the agency's interpretation is wrong," among other things. 588 U.S. at 16 (Kavanaugh, J., concurring in the judgment); *see also Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.,* 586 U.S. 9, 22 (2018) (the APA's "basic presumption of judicial review for one suffering legal wrong because of agency action") (cleaned up). This rule coheres with the United States' longstanding and consistent position that "[t]here are many situations in which

the invalidity of agency action may be set up as a defense in enforcement proceedings." Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 100 (1947); *see also* Br. for United States as Amicus Curiae Supporting Respondent at 24, *PDR Network*, No. 17-1705 (Feb. 14, 2019) (the "general rule that, when a defendant's liability depends in part on the propriety of an agency action, that action ordinarily can be challenged in a civil or criminal enforcement suit").

In this case, this Court need not decide the contours of what constitutes an "adequate" opportunity to litigate an issue "prior" to a civil or criminal enforcement action. *See infra* p. 28. But future courts could apply the default rule permitting challenges to agency orders in enforcement proceedings to avoid the "serious constitutional issue" that might otherwise result. *PDR Network*, 588 U.S. at 19 (Kavanaugh, J., concurring in the judgment). Specifically, "[b]arring defendants in as-applied enforcement actions from raising arguments about the reach and authority of agency rules enforced against them raises significant questions under the Due Process Clause." *Id.* (collecting authorities).[13]

---

[13] These due process concerns regarding private litigants, of course, do not apply when a local government or other state actor is the defendant. *See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966) ("The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court."); *Commonwealth of Pa. v. Porter*, 659 F.2d 306, 314 (3d Cir. 1981) (Pennsylvania is not a "person" for purposes of Fourteenth Amendment).

For example, the Communications Act (as currently construed by the courts) requires parties who are subject to FCC forfeiture orders for monetary penalties to *prepay* those penalties before they can avail themselves of the ordinary Hobbs Act procedures for obtaining appellate review of final agency orders. *See AT&T Corp. v. FCC*, 323 F.3d 1081, 1083–84 (D.C. Cir. 2003) (citing 47 U.S.C. § 504(a)). If the target of a forfeiture order refuses to prepay the penalties, its right to immediate judicial review in the court of appeals disappears, and the Department of Justice may initiate an action in federal district court to collect the penalties. *See id.* at 1084 (construing 47 U.S.C. § 504(a)).

At least some courts have held that the standard of review of agency action in any such district court collection action is "extremely limited."[14] That is doubly unfair, as the FCC often uses forfeiture proceedings to announce novel interpretations of the Communications Act for the first time, and civil penalties can reach into the tens or hundreds of millions of dollars.[15] An appellate process requiring

---

[14] *United States v. Olenick*, No. 18-CV-675-LY, 2019 WL 2565280, at *3 (W.D. Tex. Apr. 2, 2019), *adopted*, 2019 WL 3818041, at *1 (W.D. Tex. May 14, 2019); *see also United States v. Stevens*, 691 F.3d 620, 622 (5th Cir. 2012); *United States v. Any & all Radio Station Transmission Equip.,* 207 F.3d 458, 463 (8th Cir. 2000); *Dunifer*, 219 F.3d at 1008 n.8.

[15] *See, e.g.*, *In re Location Based Services Forfeiture Orders*, FCC 24-40, Dissenting Statement of Commissioner Brendan Carr (Apr. 17, 2024) (chastising FCC for imposing forfeitures based on "a newfound definition of customer proprietary network information (CPNI) that finds no support in the Communications Act

prepayment of massive fines cannot plausibly be described as an "adequate" prior opportunity to raise all possible objections to the agency's statutory authority in a subsequent enforcement action. Such a fundamentally unfair result would only be compounded now that this Court has cast into substantial doubt agencies' authority even to impose such civil penalties as an initial matter consistently with Article III and the Seventh Amendment. *See SEC v. Jarkesy*, 144 S. Ct. 2117 (2024).

B. Apart from Section 703, there are other vehicles for parties regulated by Hobbs Act agencies to challenge legal interpretations in prior agency orders where the time for a direct appeal has lapsed and the agency now seeks to enforce the rule against a regulated party.

Notably, where an agency adopts a subsequent order that builds on a prior agency rulemaking, a regulated party can sometimes challenge a prior legal interpretation through that *subsequent* order. This restarts the 60-day period for judicial review in the courts of appeals.

The D.C. Circuit, in the *Functional Music* line of cases, has developed a robust set of rules that recognizes that the time limit imposed by the Hobbs Act for facial challenges "does not foreclose subsequent examination of a rule where properly brought before this court for review of further Commission action applying it." *Functional Music,*

---

or FCC precedent," and "without providing advance notice of the new legal duties expected of carriers," "announc[ing] eye-popping forfeitures totaling nearly $200,000,000").

Inc. v. FCC, 274 F.2d 543, 546 (D.C. Cir. 1958); *see also, e.g.*, *Hikvision USA, Inc. v. FCC*, 97 F.4th 938, 944–45 (D.C. Cir. 2024).[16] The court has applied this rule to the FCC's "formal enforcement actions" as well as similar settings like licensing and tariff proceedings. *See Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145–46 (D.C. Cir. 2014) (quotation marks omitted).

In addition, after the initial Hobbs Act period expires, a person aggrieved by agency rules may "fil[e] a petition for amendment or rescission of the agency's regulations, and challeng[e] the denial of that petition" in the court of appeals. *Edison Elec. Inst. v. ICC*, 969 F.2d 1221, 1229 (D.C. Cir. 1992). If collateral litigation is pending, the district court may hold its proceedings in abeyance pending the agency's resolution of a relevant petition. *See, e.g.*, *Raitport v. Harbour Cap. Corp.*, 312 F. Supp. 3d 225, 227 (D.N.H. 2018). District courts also can proactively facilitate agency engagement and revision of rules through primary-jurisdiction referrals. *See Port of Boston*, 400 U.S. at 68–69.

In short, read holistically and in harmony, the Hobbs Act and the APA should not prevent defendants in enforcement proceedings where

---

[16] Although *Functional Music* arose in the context of an adjudicatory proceeding regarding a rulemaking order (the FCC denied Functional Music's petition to reconsider an existing rule), the case stands for the proposition that the venue-channeling strictures of the Hobbs Act "should not undercut the right to challenge the underlying rule when an agency applies it." *Commonwealth Edison Co. v. NRC*, 830 F.2d 610, 615 (7th Cir. 1987). As such, "[l]ater cases have applied this language [in *Functional Music*] to enforcement cases." *Id.*

liability is based in part on agency actions from challenging such actions as unlawful. Rather, both district courts and appellate courts have multiple tools at their disposal to protect the due process rights of defendants in the enforcement context.

IV. The Court Need Not Determine the Scope of any Exception to Hobbs Act Preclusion to Resolve This Case.

The Court can leave for another day the precise contours of the limitations on Hobbs Act preclusion established by Section 703 of the APA and *Functional Music*. Whatever the boundaries of these exceptions, this case does not fall within them, for at least two reasons.

First, Petitioner has already conceded that it had a prior and adequate opportunity for judicial review pursuant to Section 703. *See* Resp. Br. 42. Accordingly, any suggestion to the contrary has been waived and is not before this Court.

Second, any due process concerns do not apply where, as here, a plaintiff seeks to circumvent Hobbs Act finality to expand liability against a defendant. In *PDR Network*, the plurality raised a series of statutory, fairness, and due process concerns that would arise if the Hobbs Act generally prohibited *defendants* in enforcement actions from asserting that FCC orders are invalid. *PDR Network*, 588 U.S. at 16 (Kavanaugh, J., concurring in the judgment) (noting "the tradition of allowing *defendants* in enforcement actions to argue that the agency's interpretation is wrong"); *id.* at 17 (Hobbs Act language "should not be read to bar *defendants* in enforcement actions"); *id.* (noting government's concession that Section 703

allows review "when a *defendant's* liability depends in part on the propriety of an agency action"); *id.* (noting other "enforcement proceedings" where this Court has "routinely considered *defendants'* arguments"); *id.* at 19 ("[b]arring *defendants* in as-applied enforcement actions from raising arguments" would raise due process concerns) (emphases added).

This case, however, raises none of those issues. The party claiming to be aggrieved here by the application of the Hobbs Act is the *plaintiff*. And that plaintiff seeks to avoid the Hobbs Act not to vindicate its rights against a suit, but to *expand* liability for the defendants.

A ruling for Respondents, therefore, can preserve the benefits of finality and stability without jeopardizing private defendants' due-process right to challenge regulations enforced against them, as permitted by Section 703 and as recognized in *Functional Music*. *See also Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (private defendants facing enforcement of an agency rule in litigation possess a due-process right "to present every available defense").

Indeed, allowing Petitioner to expand the scope of TCPA liability in this case would exacerbate the due process concerns noted by the *PDR Network* plurality. This is a case where "[t]he statutes and regulations certainly do not provide clear notice" of the legal position advanced by Petitioner in this case (*Christopher*, 567 U.S. at 157)—that online fax machines are in fact "telephone facsimile machine[s]" under the TCPA. To the contrary, as Respondents explain, both the TCPA itself and FCC staff's

reasoned adjudication here support the conclusion that such online fax machines are *not* covered by the statute. *See* Resp. Br. 51–53. "[T]he potential for unfair surprise is acute" where, as here, agency staff "did not think the industry's practice was unlawful." *Christopher*, 567 U.S. at 158.

In *Christopher*, this Court refused to defer to the government's interpretation of its own regulations when it sought to enforce them against private parties in a novel manner, having never previously "suggested that it thought the industry was acting unlawfully." *Id.* at 157. It would be at least as offensive to due process, if not more, to allow a *private party* to impose novel and retroactive liability on a defendant in the face of a government order that *vindicates* the defendant's position. Defendants ought to be able to rely on existing regulations in discerning whether their conduct is lawful.

To be sure, plaintiffs are also entitled to protection under the Fourteenth Amendment's Due Process Clause, which "protect[s] 'persons,' not 'defendants,'" but the Clause "need not and does not afford [plaintiffs] as much protection" when the burdens of litigation disproportionately fall on defendants. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985). Here, allowing an enterprising plaintiff to expand liability on defendants could expose unknowing online fax machine operators to millions of dollars in civil penalties. And in this case, Petitioner could have sought to participate in the FCC proceeding that led to the adjudication excluding online fax machines from the TCPA—indeed, Petitioner's counsel filed comments in its own name. Resp. Br. 7. Thus, even if there are cases where

plaintiffs could show that they lacked an "adequate" opportunity to challenge an FCC rule, this is not one of them.

Finally, recent changes in administrative law mitigate any separation of powers concerns about the Hobbs Act's preclusive effect. *See PDR Network*, 588 U.S. at 9 (Thomas, J., concurring). When *PDR Network* was decided, agencies were still entitled to *Chevron* deference; in combination with the Hobbs Act, this meant that an agency's interpretation of an ambiguous statute would first be subject to deference, and then be subject to what Justice Kavanaugh called "*PDR* abdication," *id.* at 27 (Kavanaugh, J., concurring in the judgment), in that later courts would be precluded from revisiting this issue at all.

The *Loper Bright* decision, however, changes this calculus. Now, the appellate court designated by the process in the Hobbs Act is once again empowered to "say what the law is," *id.* at 10, without affording deference to FCC interpretations of ambiguous statutes. *Loper Bright* returns the Hobbs Act to its original form—not a statute designed to insulate agency decisions behind a wall of deference, transforming them into super-legislatures, but a well-established statute of venue and repose.

CONCLUSION

This Court should affirm.

Respectfully submitted,

THOMAS M. JOHNSON, JR.
Counsel of Record
JOSHUA S. TURNER
SARA M. BAXENBERG
MICHAEL J. SHOWALTER
MELISSA ALBA
WILEY REIN LLP
2050 M Street N.W.
Washington, D.C. 20036
tmjohnson@wiley.law
(202) 719-7000

Counsel for Amici Curiae

December 26, 2024