No. 23-1226

# In the Supreme Court of the United States

MCLAUGHLIN CHIROPRACTIC ASSOCIATES, INC., individually and as representative of a class of similarly situated persons,

*Petitioner,*

v.

MCKESSON CORPORATION and MCKESSON TECHNOLOGIES, INC.,

*Respondents.*

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

## REPLY BRIEF OF PETITIONER


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January 10, 2025

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Rules**



**Other Authorities**

## INTRODUCTION

McKesson asks this Court to adopt a strikingly broad reading of the Hobbs Act—one that would strip the federal courts (including this Court) of jurisdiction in private enforcement actions to second-guess an agency's interpretation of a statute. Nobody questions that the Hobbs Act's grant of "exclusive jurisdiction" is designed to funnel facial, pre-enforcement challenges to agency actions into the courts of appeals. No matter how the Court resolves this case, those challenges will continue. But McKesson's construction would extend that exclusive jurisdiction to include garden-variety civil litigation between private parties in district court. If Congress really wanted to deprive courts of jurisdiction to question agencies' reading of statutes in such cases, it knew how to do so. *See*, *e.g.*, 33 U.S.C. § 1369(b)(1). That Congress didn't use comparable language here is strong evidence that it had no such intent.

Although McKesson barely acknowledges it, four justices have already squarely rejected its far-reaching position. *See PDR Network, LLC v. Carlton & Harris Chiropractic*, 588 U.S. 1, 9 (2019) (Thomas, J., concurring); *id.* at 12 (Kavanaugh, J., concurring). And for good reason: That reading, which relies primarily on dictionary definitions at the expense of context, fails to plausibly account for the statute's plain meaning and surrounding text (much of which it would render superfluous), ignores the statute's history, and raises serious constitutional problems. Neither McKesson nor the government—which recycles its arguments nearly

verbatim from *PDR Network*—comes up with convincing answers to these problems.[1]

Even if the Hobbs Act did foreclose a district court's review of an agency's *legislative* rules (which have the force of law), the Ninth Circuit was still wrong to apply that limit to the FCC's *interpretive* (and thus non-binding) order here. Both parties agreed below that the agency's *Amerifactors* order is interpretive because, rather than creating new rules or standards of conduct, it serves primarily to advise the public about the agency's construction of the statute it administers. Because this kind of interpretive rule lacks the force of law, it can never bind parties and courts—whether or not the Hobbs Act's exclusive jurisdiction applies.

As this Court recently reaffirmed in *Loper Bright Enterprises v. Raimondo*, the "interpretation of the meaning of statutes, as applied to justiciable controversies," is "exclusively a judicial function." 603 U.S. 369, 387 (2024). The approach pushed by McKesson and the government, however, would require courts to afford "not mere *Skidmore* deference or *Chevron* deference, but absolute deference" to agencies for all manner of informal and otherwise non-binding interpretive rules and guidance documents—"no matter how wrong the agency's interpretation might be." *PDR Network,* 588 U.S. at 27 (Kavanaugh, J., concurring). That would threaten a "proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment." *Loper Bright*, 603 U.S. at 391.

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[1] Unless otherwise noted, all internal quotation marks, citations, and alterations have been omitted from quotations.

To avoid the many serious problems caused by McKesson's rule, this Court should read the Hobbs Act as what it is: a commonplace jurisdictional statute designed to allow parties to obtain declaratory and injunctive relief against agencies in the courts of appeals; not a mandate for judicial "abdication" to federal agencies. *PDR Network*, 588 U.S. at 27 (Kavanaugh, J., concurring).

## ARGUMENT

### I. The Hobbs Act does not forbid the federal courts from disagreeing with an agency's interpretation of a statute in a private enforcement suit.

#### A. The Hobbs Act's plain language limits the Act's coverage to actions for declaratory or injunctive relief.

Our opening brief explains why "determine the validity of," as used in the Hobbs Act, 28 U.S.C. § 2342, is best read as an authorization for the courts of appeals to issue declaratory judgments on covered agency orders—just as it authorizes them to issue other forms of equitable relief. The ordinary meaning of the word "valid" includes "having legal force; effective or binding." *American Heritage Dictionary* (4th ed. 2006). To "determine the validity of" an order under this reading thus means to determine whether the order is legally in effect. And the Hobbs Act requires the courts of appeals to make this determination in a "judgment." 28 U.S.C. § 2349(a). As Justice Kavanaugh explained in his concurrence in *PDR Network*, a court can do that "only by entering a declaratory judgment that the order is valid or invalid." 588 U.S. at 21. That's the mechanism that courts routinely use to "determine the validity of" statutes and regulations. *Ry. Mail Ass'n v. Corsi*, 326 U.S. 88, 91 (1945) (noting that

the plaintiff sought "a declaratory judgment to determine the validity of" a statute).[2]

McKesson cannot deny that this reading is consistent with the plain meaning of "declare the validity." As the government correctly notes (at 13): "Entering a judgment declaring an agency action to be invalid (or valid) is surely one means of determining the validity of that action." Instead, McKesson offers an alternative (and much broader) definition of the phrase that would extend to any "decision on whether the agency order was correct, regardless of the relief sought." McKesson Br. 12; *see also* U.S. Br. 12 (arguing that the phrase covers decisions on whether an order is "grounded" in "sound principles"). It never argues, however, that this interpretation is the *only* possible reading. *See* McKesson Br. 12 (calling its preferred definition "*a* common, ordinary meaning of 'to determine the validity'" (emphasis added)). Dictionaries equally support our reading as an alternative definition of "valid." *See* Br. 21; U.S. Br. 12. Because there are thus at least "two grammatically permissible ways" to read "determine the validity of," the Court must resolve the conflict "by reviewing [the] text in context." *Pulsifer v. United States*, 601 U.S. 124, 133 (2024).

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[2] The government makes a preliminary suggestion (at 10-12) that the Ninth Circuit "erred in treating" the FCC's *Amerifactors* order as a "final order" covered by the Hobbs Act. Although we don't disagree, this Court granted certiorari on the premise that the order was final—just as it did in *PDR Network*. *See* 588 U.S. at 6 ("assum[ing] without deciding" that the FCC action was "a 'final order'" under the Hobbs Act). As the government itself acknowledges (at 11-12), the Court therefore "may assume for purposes of this case that the *Amerifactors* order is covered."

### B. The surrounding language of section 2342 further fixes the Act's narrow scope.

**1.** It is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993). Here, the phrase "determine the validity of" appears in the context of the immediately "surrounding words"—"enjoin," "set aside," and "suspend"—each of which denotes a specific form of equitable relief directed against the government. 28 U.S.C. § 2342.

The "canon of *noscitur a sociis* teaches that a word is given more precise content by the neighboring words with which it is associated." *Fischer v. United States*, 603 U.S. 480, 481 (2024). For example, a statute that governs "automobiles, trucks, motorcycles, or any other self-propelled vehicle" would not apply to airplanes—even though they are "self-propelled vehicles"—because the context of the surrounding words limits the statute's scope to "vehicle[s] running on land." *McBoyle v. United States*, 283 U.S. 25, 26 (1931) (Holmes, J.). The same principle applies here. Because "determine the validity of" is preceded by terms describing specific forms of equitable relief directed against the government, *noscitur a sociis* holds that "determine the validity of" should be read the same way—to refer to equitable relief directed against the government in the form of a declaratory judgment.

**2.** McKesson admits (at 14) that "'to enjoin, set aside, [or] suspend' refers to possible relief … such as an injunction." Even so, the company claims (at 9) that "determine the validity of," which appears alongside the other terms and as part of the same list, means something

totally different—namely, "a court's decisional process in evaluating an order's merits." It would be odd, however, for Congress to list three forms of equitable relief (all sought against the government) followed by an entirely different—and much broader—unrelated term. That kind of broadening beyond the subject matter of a statute implicates the very purpose of *noscitur a sociis*: to "ensure[] … that none of [a statute's] specific parts are made redundant by a clause" that, taken "literally," is "broad enough to include them." *Fischer*, 603 U.S. at 488. That's exactly what's going on here.[3]

McKesson advances just one argument in support of its claim that the canon doesn't apply. In its view (at 17), because "determine the validity of" in section 2342 "is set apart from the other terms with its own infinitive," the canon is inapplicable. The company, however, provides no authority for that proposition. Nor could it. Nothing in the nature of the canon or the cases interpreting it calls for refusing to apply it simply because Congress used an

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[3] Despite McKesson's concession that the listed terms refer to "relief," it suggests in a footnote that the meaning of "set aside" is "unsettled." McKesson Br. 17 n.2 (citing *United States v. Texas*, 599 U.S. 670, 695-702 (2023) (Gorsuch, J., concurring)); *see also* U.S. Br. 15. But the concurring opinion on which McKesson and the United States rely simply reinforces the importance of context. As Justice Gorsuch explained there, "the words 'set aside' in isolation … might suggest to some a power to 'vacate' agency action," but "just as naturally they might mean something else altogether." *Texas*, 599 U.S. at 695. In the "statutory context" of the law at issue there (section 706 of the APA), Justice Gorsuch concluded that "set aside" might reasonably be read to mean "disregard [the] offensive provisions … and proceed to decide the parties' dispute without respect to them." *Id.* at 695, 696-99. But the "statutory context" cuts the other way in this case because, unlike section 706, the Hobbs Act includes "set aside" as one element in a list of forms of relief. *See* 5 U.S.C. § 706(2).

additional infinitive. Courts have had no difficulty applying it in just those circumstances. *See ALDF v. U.S. Dep't of Ag.*, 935 F.3d 858 (9th Cir. 2019) (applying the canon to a "judicial review provision us[ing] the word 'to' twice in the same sentence").

On the contrary, this case falls within the heartland of *noscitur a sociis*. "The canon especially holds that words grouped in a list should be given related meanings." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012). And its "most common effect" is "to limit a general term" from that list "to a subset of all the things or actions that it covers." *Id.* at 196. That's all we ask from the canon here: to limit the general meaning of "determine the validity of" to conform its scope to the other terms in the list in which it appears.

Nor does McKesson offer even a common-sense explanation as to how adding the word "to" could so dramatically change the import of the statutory language. Congress could have omitted the word entirely—as in, "to enjoin, set aside, suspend (in whole or in part), *or determine* the validity of"—with no apparent effect on meaning. If anything, "the use of an infinitive to introduce" the phrase suggests that it "proscribes a distinct category" of equitable relief. *United States v. Naftalin*, 441 U.S. 768, 774 (1979). While the first three forms of relief listed are kinds of injunctions, the last instead describes a declaratory judgment.

Yet, McKesson instead relies on the word "to" as proof of Congress's intent to strip the federal district courts of power "to say what the law is" in cases before them. *PDR Network*, 588 U.S. at 9 (Thomas, J., concurring) (quoting *Marbury v. Madison*, 5 U.S. 137, 145

(1803)). That's far too much weight for a simple preposition to bear.

**3.** The weakness of McKesson's position is further apparent from the fact that the government declines to endorse it. Indeed, the government has no answer at all to the language of section 2342, except to say that *noscitur a sociis* doesn't apply to a statute that's unambiguous. U.S. Br. 14 (citing *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923)). But that can't help the government here, given that at least four members of this Court in *PDR Network* disagreed with its view on what that "unambiguous" language is supposed to mean.

Moreover, the question "[w]hether a statutory term is unambiguous … does not turn solely on dictionary definitions of its component words." *Yates v. United States*, 574 U.S. 528, 537 (2015) (plurality op.). "In law as in life, … the same words, placed in different contexts, sometimes mean different things." *Id.* The government thus can't legitimately claim that "determine the validity of" is unambiguous without first taking account of "the words around it." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596 (2004). And here, as noted, context cuts strongly against the government's reading.

**4.** Finally, the expansive reading of "determine the validity of" offered by McKesson and the government cannot be squared with this Court's "duty to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). McKesson concedes (at 14) that, in its view, determining the validity of an agency action is a "necessary predicate to" the "remedial actions listed." But if that's true, there would have been no need for Congress to enumerate specific forms of relief,

given that a court would have to "determine the validity of" the order before granting *any* form of relief.[4]

On our reading, in contrast, there is no surplusage. The terms "enjoin," "set aside," "suspend," and "determine the validity of" each refer to distinct kinds of equitable relief a court may enter against agency action.

### C. Broader statutory context confirms this reading.

**1.** McKesson makes no further effort to reconcile its reading with section 2342—the provision at issue here. Instead, it focuses much of its argument on section 2349(a), which grants the courts of appeals "exclusive jurisdiction" to enter "a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency." 28 U.S.C. § 2349(a). McKesson latches onto section 2349(a)'s inclusion of the word "and," which it suggests (at 14, without explanation) establishes a "two-step process" for courts to follow: first "evaluat[ing] the merits" (by determining the validity of the order), and then "order[ing] appropriate relief" (by enjoining, setting aside, or suspending it).

That reading, however, cannot be reconciled with the section's text. By granting the courts of appeals

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[4] The government (at 15) appears to disagree with McKesson's concession on this point, arguing that a "court might be asked to 'enjoin,' 'set aside,' or 'suspend' a covered agency action without conclusively determining its validity … when a party seeks a preliminary injunction." Notwithstanding the government's insertion of the word "conclusively" into section 2342's text, the statute is not so limited. Before a court can preliminarily enjoin an agency order, it would also have to at least preliminarily "determine the [order's] validity."

jurisdiction to enter a "judgment determining the validity of" an agency order, Congress did more than just authorize them to "evaluate the merits" of an order—it authorized them to issue a *remedy* against it in the form of a "judgment." And a "judgment" typically means a court's "final determination of the rights and obligations of the parties"—not the court's reasoning in support of that determination. Judgment, *Black's Law Dictionary* (12th ed. 2024); *see also* Fed. R. Civ. P. 58(a) (requiring that a judgment "be set out in a separate document" from the court's reasoning).

Even more problematic for McKesson's reading is the fact that this case is not about the meaning of section 2349(a), but section 2342. And that section replaces the word "and" with the word "or." *See* 28 U.S.C § 2342 (granting "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), *or* to determine the validity of" covered orders (emphasis added)). Thus, under McKesson's reading of "determine the validity of," section 2342 grants the courts of appeals exclusive jurisdiction *either* to "evaluate the merits" of the order *or* to "order appropriate relief." That, of course, makes no sense. As McKesson admits (at 14), courts "cannot do the latter without the former." The company's interpretation of "determine the validity of" thus fails to give any plausible meaning to the key language at issue here.

**3.** McKesson's reading of section 2349(a) also fails for the same reason as its reading of section 2342. Because section 2349(a) lists "determining the validity of" along with the same three specific forms of injunctive relief, it again implicates the common-sense principle embodied by *noscitur a sociis* that a term is "given more precise

content by the neighboring words with which it is associated." *Fischer*, 603 U.S. at 481.

The company argues (at 17-18) that the canon doesn't apply here because Congress's use of "and" in section 2349(a) "sets 'determining the validity' off from the remedial actions listed," making it "not even part of the same list." That's a strange claim to make about the word "and," given that the whole purpose of the word is to "indicate connection … especially of items within the same class or type." *See Merriam-Webster Online Dictionary*, https://perma.cc/L8HT-LG46.

Regardless, "[a]lthough most associated-words cases involve listings—usually a parallel series of nouns and noun phrases, or verbs and verb phrases—a listing is not prerequisite." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 197. More broadly, the doctrine derives from "the basic principle that words are given meaning by their context" and applies any time "several nouns or verbs … are associated in a context suggesting that the words have something in common." *Id.* at 195. "An 'association' is all that is required" for the canon to apply, *id.* at 197, and that's precisely what the word "and" provides here.

Just as McKesson's reading of section 2342 renders the listed forms of injunctive relief superfluous, its reading of section 2349(a) does the same for the phrase "determining the validity of." That's because, if "determining the validity of" an agency order is (as McKesson claims) a necessary predicate to issuing injunctive relief, a court wouldn't need separate authorization from Congress to do it. Federal courts don't need Congress's permission to give reasons for their

decisions—a task that goes to the very heart of the judicial role. *See Loper Bright*, 603 U.S. at 391.

**4.** Perhaps recognizing the flaws in McKesson's construction, the government doesn't try to deny that section 2349(a)'s reference to a "judgment determining the validity of" an agency order authorizes a remedy in the form of a declaratory judgment. Ordinarily, that would be the end of the matter. The "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995).

The government, however, relies on the fact that, unlike section 2349(a), the word "judgment" doesn't appear before "determine the validity of" in section 2342—an omission that it argues (at 16) "was presumably deliberate and should be given effect." But the government never explains the significance of that difference, which in any case is easily explainable by the different purposes of the two provisions. While section 2342 grants the courts of appeals jurisdiction to review agency actions, section 2349(a) grants them jurisdiction to "make and enter … a judgment" in those proceedings. Since only section 2349(a) discusses a court's authority to enter judgments, it should not be surprising that the word "judgment" occurs only in that section.

### D. McKesson's contrary position cannot be squared with the Hobbs Act's history or the language of comparable review provisions.

**1.** Both McKesson and the government also look for support for their position in the Hobbs Act's legislative history. In doing so, however, they entirely ignore the

most relevant piece of history, cited in our opening brief (at 7) and in the amicus brief of the Local Government Legal Center (at 5-6), which expressly recognizes that the Act was never intended to "relate to actions between private parties." H.R. Rep. No. 80-1619, at 4 (1948); *see also* Jason N. Sigalos, *The Other Hobbs Act: An Old Leviathan in the Modern Administrative State*, 54 Ga. L. Rev. 1095, 1122 (2020) (noting that the "drafters did not intend the jurisdictional reforms to apply to private enforcement actions"). To the extent legislative history is important, that language is dispositive. Yet neither McKesson nor the government even acknowledge it.

The legislative history on which McKesson relies is not to the contrary. For example, it cites (at 36) a Senate report for the proposition that Congress intended to "foreclose[] judicial review of Hobbs Act-covered orders." But the report in fact says the opposite, providing that the "pattern used" in the Hobbs Act was the same "one established for review of orders of … many other agencies," S. Rep. No. 81-2618, at 4 (1950)—none of which restrict litigation between private parties in district court.

**2.** McKesson and the government also look to this Court's decisions interpreting the Hobbs Act and its predecessor, the Urgent Deficiencies Act. But the decisions they cite do not adopt their view that parties in private litigation are precluded from seeking review of an agency's interpretation of a statute. Rather, they hold only that parties can't bypass exclusive direct-review proceedings by effectively bringing the same kinds of claims in district court.

The first, *Venner v. Michigan Central Railroad Co.*, involved an order by the Interstate Commerce Commission authorizing an agreement between railroad

companies. 271 U.S. 127, 128 (1926). The day after the ICC issued the order, the plaintiff sued in state court "to enjoin the defendant company from carrying out [the] agreement … notwithstanding its approval by the" ICC. *Id.* at 129. This Court held that the suit was subject to the ICC's exclusive jurisdiction because it was "essentially one to annul or set aside the order of the Commission." *Id.* Although the plaintiff did not "expressly pray that the order be annulled or set aside, it [did] assail the validity of the order and pray that the defendant company be enjoined from doing what the order specifically authorizes." *Id.* That, the Court concluded, "is equivalent to asking that the order be adjudged invalid and set aside." *Id.*; *see also Lambert Run Coal Co. v. Baltimore & O.R. Co.*, 258 U.S. 377, 380-81 (1922) (disapproving of a suit that "in effect" attempted to set aside an ICC order).

Likewise, the plaintiff in *FCC v. ITT World Communications, Inc.* simultaneously sought relief under the Hobbs Act in a court of appeals and in federal district court. 466 U.S. 463, 465-66 (1984). Like *Venner*, the case just stands for the proposition that "[l]itigants may not evade" the Hobbs Act so easily. *Id.* at 468; *see also Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970) (rejecting a collateral challenge to a Federal Maritime Commission order brought by a party who was "represented before the Commission" and had "made numerous claims to party status.").

These cases do no more than shut down collateral challenges that could have been brought under the Hobbs Act in the courts of appeals. They have nothing to say about ordinary civil litigation like this case, which doesn't

directly challenge any agency order and in which plaintiffs have no choice but to file in district court.

**3.** Next, McKesson and the government rehash arguments from *PDR Network* about the Emergency Price Control Act, which this Court in *Yakus v. United States* read to give "clear indication" of Congress's intent to preclude district courts from considering the validity of wartime price regulations in enforcement proceedings. 321 U.S. 414, 429-31 (1944). The government contends that Congress "transplanted" the EPCA's language to the Hobbs Act, "bring[ing] the old soil with it." U.S. Br. 20 (quoting *Stokeling v. United States*, 586 U.S. 73, 80 (2019)). But as our opening brief explained (at 34-35), the EPCA's review provision contained an additional sentence (missing from the Hobbs Act) that expressly deprived district courts of jurisdiction even "to *consider*" covered agency orders in enforcement actions. *PDR Network*, 588 U.S. at 23 (Kavanaugh, J., concurring) (emphasis added). As Justice Kavanaugh explained in *PDR Network*, it was this language from the EPCA—"coupled with" its exclusive-jurisdiction provision—that "together" foreclosed review in the district courts. *Id.*

There is no comparable language here. In contrast to the EPCA, the Hobbs Act lacks a separate provision expressly depriving the district courts of jurisdiction. *See id.* And its grant of exclusive jurisdiction to the courts of appeals also uses narrower language than that EPCA provision, which deprived district courts of jurisdiction even "to *consider*" covered agency orders. *Id.* Furthermore, *Yakus* found it "appropriate to take into account," 321 U.S. at 431, the fact that the law was "a temporary wartime measure," *id.* at 419, enacted when "the need for quick and definitive judicial rulings on the

legality of agency orders was at its apex," *PDR Network*, 588 U.S. at 24-25 (Kavanaugh, J., concurring). This Court has never applied *Yakus*'s holding to the peacetime context, and the decision likely retains little relevance today. *See United States v. Mendoza-Lopez*, 481 U.S. 828, 838 n.15 (1987) (noting that *Yakus* was "motivated by the exigencies of wartime").

**4.** Lastly, McKesson points (at 36) to section 703 of the APA, which provides: "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." Because the Hobbs Act provides for "exclusive" review of the FCC's *Amerifactors* order, it argues, section 703 precludes such "judicial review" here.

But that argument only works for McKesson if this Court accepts its interpretation of the Hobbs Act's scope. Although it is true that the Hobbs Act gives the courts of appeals "exclusive jurisdiction" over certain cases, that fact does not answer the question: "exclusive jurisdiction to do what?" *PDR Network*, 588 U.S. at 20 (Kavanaugh, J., concurring). As Justice Kavanaugh explained, the Hobbs Act grants courts of appeals exclusive jurisdiction *only* "to issue an injunction or declaratory judgment regarding the agency's order" in a pre-enforcement facial challenge. *Id.* at 21. It thus does not foreclose judicial review in cases, like this one, between private parties in district court. *Id.*

If it were otherwise, numerous other review provisions—such as the statute providing for "exclusive" review of SEC orders in the courts of appeal, 15 U.S.C. § 78y(b)(3)—would likewise preclude litigation in the district courts. *See* Opening Br. 32. These statutes possess

the very features that McKesson claims to be distinguishing features of the Hobbs Act: They confer "exclusive" jurisdiction over "review" of agency action. Yet courts have never extended them to preclude judicial review of agency action in private litigation in district court. *See, e.g.*, *United States v. O'Hagan*, 521 U.S. 642, 666-76 (1997); *see also PDR Network*, 588 U.S. at 21-22 (Kavanaugh, J., concurring).

McKesson correctly points out (at 19) that the SEC's exclusive review provision comes from a statutory scheme separate from the Hobbs Act that does not expressly vest the courts of appeals with jurisdiction to "determine the validity of" agency orders. Nevertheless, the statute's language is, if anything, even broader than the Hobbs Act's, covering without qualification *all* "review" of SEC orders. 15 U.S.C. § 78y(b)(1). Similarly, OSHA's review statute covers any suit seeking "judicial review" of OSHA standards. 29 U.S.C. § 655(f). Although that statute doesn't expressly say "exclusive," this Court deems any such "specific statutory scheme[s] for obtaining review" to be "exclusive" whether or not it says so expressly. *Whitney Nat'l Bank v. Bank of New Orleans & Tr. Co.*, 379 U.S. 411, 420-422 (1965).

McKesson likewise cannot square its interpretation of the Hobbs Act with statutes like the Clean Air Act and CERCLA, which contain direct review provisions comparable to the Hobbs Act's, but *also* expressly preclude review in enforcement proceedings. Its claim (at 39) that these statutes are "exactly" like the Hobbs Act is simply wrong. Indeed, although McKesson never acknowledges it, four justices in *PDR Network* reached exactly the opposite conclusion, noting that the statutes go much further than the Hobbs Act by including language

"expressly preclud[ing] judicial review in subsequent enforcement actions." 588 U.S. at 16-17 (Kavanaugh, J., concurring). That clear language serves as strong evidence "that Congress's silence in the Hobbs Act should not be read to preclude judicial review." *Id.* at 16-17.

### E. Constitutional avoidance principles favor reversal.

At a minimum, even if the Ninth Circuit's interpretation of the Hobbs Act were plausible, the constitutional-doubt canon would compel an alternative reading. Br. 35-37. If a district court "could never second-guess agency interpretations in orders subject to the Hobbs Act," *Gorss Motels, Inc. v. Safemark Sys., LP*, 931 F.3d 1094, 1110-11 (11th Cir. 2019), then the Hobbs Act likely intrudes "upon Article III's vesting of the 'judicial Power' in the courts," *PDR Network*, 588 U.S. at 9 (Thomas, J., concurring). And the Ninth Circuit's reading likewise "raises significant questions under the Due Process Clause." *Id.* at 19 (Kavanaugh, J., concurring).

McKesson responds (at 40) that the APA provides a "safety valve" when there is no "adequate" opportunity for review. 5 U.S.C. § 703. Because *PDR Network* left the adequacy question unresolved, *id.* at 7, it's impossible to know the degree to which McKesson is right that section 703 answers the "substantial due process question" that Justice Kavanaugh raised there, *id.* at 19 (Kavanaugh, J., concurring). But as the government told this Court, its view on "'adequacy' in Section 703" was that "judicial review is not inadequate simply because a particular litigant fails to satisfy the statutory prerequisites for invoking it." U.S. Br. in *PDR Network* 26. On that view, the government argued that PDR Network had an "adequate" opportunity to challenge the order at issue

despite the company's claim that, at the time the order was issued, it was not affected by it and had no interest in challenging it. *See* Reply Br. in *PDR Network* 15. Regardless of the correctness of the government's harsh reading of section 703, McKesson's position would, at a minimum, force courts to resolve due process issues on a case-by-case basis to determine whether they have jurisdiction—contradicting "the rule that jurisdictional rules should be clear." *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 14 (2015).

## II. The Act cannot bind courts to interpretive rules that were never designed to be binding in the first place.

**A.** Alternatively, the district court was not bound to follow the FCC's *Amerifactors* order because the order is interpretive, rather than legislative, and thus incapable of binding either parties or courts. *See* Br. 37-42. Although the parties agreed below that the order is an interpretive rule, ER 140, McKesson now argues that it is not a rule at all, but "a declaratory order resulting from an adjudication." McKesson Br. 47.

But the interpretive/legislative distinction applies regardless of whether the procedural path the agency takes is rulemaking or adjudication; what matters is the substance of the agency's action. *See Chrysler Corp. v. Env't Prot. Agency*, 600 F.2d 904, 916 (D.C. Cir. 1979) (noting that an adjudicative order can be "interpretive rather than legislative"). As this Court wrote in *Martin v. OSHA Review Commission*, "adjudication operates as an appropriate mechanism" for "lawmaking by interpretation." 499 U.S. 144, 154 (1991); *see also Beneli v. Nat'l Lab. Rels. Bd.*, 873 F.3d 1094, 1103 (9th Cir. 2017)

(holding that the APA "allows an agency to declare interpretive rules in adjudication").

McKesson resists this conclusion, arguing (at 49) that orders resulting from agency adjudications, like legislative rules, "have the force and effect of law." The only authority that McKesson cites for this proposition is the majority opinion in *PDR Network*. But the Court there held the opposite: that the FCC order there could be *either* "the equivalent of a 'legislative rule'" or "*instead* the equivalent of an 'interpretive rule.'" *PDR Network*, 588 U.S. at 7 (emphasis added); *see also id.* at 9 n.* (Thomas, J., concurring) (noting that the order was "clearly interpretive" because it was "issued by an agency to advise the public of the agency's construction of" the TCPA).

Many other courts have likewise considered whether FCC declaratory orders are legislative or interpretive, notwithstanding that the agency issued them through adjudications. The D.C. Circuit in *Central Texas Telephone Co-op.*, for example, held that an FCC "Declaratory Ruling," though deemed an "order" and reached through "adjudication," was still subject to the distinction between legislative and interpretive rules. 402 F.3d at 210; *see, e.g.*, *Viacom Int'l Inc. v. FCC*, 672 F.2d 1034, 1042 (2d Cir. 1982) (holding that the "interpretation of regulations by declaratory ruling" in an adjudication falls "well within the scope of the familiar power of an agency"); *Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1223 (10th Cir. 2009).

**B.** The government argues (at 31) that the Hobbs Act lacks an "exception for 'interpretive' rules." But no exception is needed because, as our opening brief noted (at 40-42), interpretive rules by their very nature lack "the

force and effect of law." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015). Such rules just "advise the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995). In part for this reason, every court of appeals to have considered the question (other than the Ninth Circuit) has declined to read the Hobbs Act as binding courts to interpretive rules. *See* Br. 41 (citing cases). Indeed, the government itself acknowledged at oral argument in *PDR Network* that, because interpretive rules are "without the force of law," they don't "fall within the Hobbs Act at all." Oral Arg. Tr. 64.

To hold otherwise would transform non-binding agency interpretations into permanently binding ones, requiring courts to enforce them against parties who, outside of court, would not themselves be bound. But the availability of Hobbs Act review can no more transform a non-binding order into a binding one than it can turn an agency's informal guidance memo or policy statement into a formal rule. If Congress intended the mere availability of Hobbs Act review to imbue an agency's interpretative decision with more binding force than the agency itself chose to give it, one would expect it to have said so clearly. The mere *absence* of an express exception cannot, as the government argues, establish that intent.

## III. McKesson's alternative merits argument is not presented here.

In its final argument, McKesson contends (at 51) that, "[r]egardless of whether *Amerifactors* is binding," this Court should affirm on the ground that the FCC's order "is correct" on the merits. But if the Ninth Circuit's reading of the Hobbs Act is correct, the Act's grant of exclusive jurisdiction "to determine the validity of" an

agency order "divested the district court of jurisdiction to consider the issue[]," *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 399-400 (9th Cir. 1996)—and, by extension, also divested "this Court's jurisdiction" on review, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88 (1998). On the Ninth Circuit's view, this Court would thus lack subject-matter jurisdiction either to "agree[]" or "disagree[]" with the FCC's interpretation. *Wilson*, 87 F.3d at 399-400. In any event, as McKesson itself acknowledges (at 42), "the only question before the Court is whether the Hobbs Act's review is exclusive." Its argument that the order is correct—like the government's preliminary argument that it's not final—was neither presented as a question in the petition for certiorari nor fairly included therein. *See supra* at 4 n.2.

Respectfully submitted,

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January 10, 2025 *Counsel for Petitioner*