

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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McLAUGHLIN CHIROPRACTIC)
ASSOCIATES, INC.,)
 Petitioner,)
 v.) No. 23-1226
McKESSON CORPORATION, ET AL.,)
 Respondents.)
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Petitioner,)

v.) No. 23-1226

McKESSON CORPORATION, ET AL.,)

Respondents.)

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Washington, D.C.

Tuesday, January 21, 2025

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:17 a.m.

1 APPEARANCES:
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9 Respondents.
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P R O C E E D I N G S

(11:17 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 23-1226, McLaughlin Chiropractic Associates against McKesson Corporation.

Mr. Wessler.

ORAL ARGUMENT OF MATTHEW W.H. WESSLER
ON BEHALF OF THE PETITIONER

MR. WESSLER: Thank you, Mr. Chief Justice, and may it please the Court:

Five years ago, in PDR Network, four justices recognized that, properly construed, the Hobbs Act does not require district courts to treat agency orders that interpret federal statutes as binding precedent. Instead, it operates just like other pre-enforcement channeling statutes by providing for direct review of agency orders in the courts of appeals.

McKesson and the government reject this view. Together, they urge an interpretation that would bind courts, including this one, to agency interpretations of federal statutes no matter how wrong, and that would be

1 true even for interpretive rules that, by
2 definition, do not carry the force of law,
3 transforming even the most informal agency
4 interpretations into permanently binding ones.

5 But none of the relevant markers,
6 text, context, structure, and history support
7 such a misguided and possibly unconstitutional
8 reading of the Hobbs Act. The key phrase,
9 "determine the validity of," authorizes courts
10 of appeals to determine whether an order is
11 legally in effect, and a court does this by
12 issuing a declaratory judgment that the order is
13 valid or invalid.

14 Context cinches this. The phrase is
15 immediately surrounded by terms which all denote
16 specific forms of equitable relief directed
17 against the order itself. The phrase "determine
18 the validity of" should therefore be read the
19 same way.

20 The Act's broader structure reinforces
21 this understanding. From beginning to end, it
22 establishes procedures designed to govern direct
23 review proceedings and elsewhere uses the phrase
24 "determine the validity of" to mean a
25 declaratory judgment.

1 And, finally, there's history. The
2 Act was never intended to implicate actions
3 between private parties. Instead, it was
4 patterned on similar statutes established for
5 the review of orders from other agencies that
6 have never been thought to bind district courts.

7 Consistent with the longstanding
8 recognition that interpreting statutes is a job
9 for the judiciary, this Court should construe
10 the Hobbs Act for what it is, a commonplace
11 jurisdictional provision that allows parties to
12 obtain equitable relief directly against agency
13 orders in the courts of appeals.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: What -- what would
16 you do with the Port of Boston case?

17 MR. WESSLER: I think the Port of
18 Boston case is -- is different for a couple of
19 reasons, Justice Thomas, but, most importantly,
20 in that case, both parties that were involved in
21 the district court were also involved in the
22 regulatory proceeding seeking a petition for
23 review.

24 And I think, in that scenario, where
25 you've got two parties that are specifically

1 bound by an agency action, you've got normal
2 estoppel principles, issue preclusion
3 principles, that would apply. But we're not
4 really talking about a situation --

5 JUSTICE SOTOMAYOR: That's not what
6 the Court there said. The Court could have
7 easily said that, that res -- collateral
8 estoppel principles apply, but it didn't. It
9 said -- the Court said that the Act is explicit
10 that the district court was without authority to
11 review the merits of the Commission's decision.

12 So you have a problem that the -- that
13 the analysis that the Court used is directly
14 contrary to your position.

15 MR. WESSLER: But I think the -- the
16 difference, Your Honor, in -- in -- in that case
17 compared with what we have here is you've got a
18 situation where the parties that are -- are
19 fighting about the meaning of the agency
20 interpretation were also parties in the agency
21 proceeding itself.

22 Here, you don't have a situation
23 where, you know, the plaintiffs in this case had
24 any role to play or had any -- were --

25 JUSTICE SOTOMAYOR: But they could

1 have.

2 MR. WESSLER: -- were involved at all.

3 JUSTICE SOTOMAYOR: You haven't denied
4 they had an opportunity to -- to --

5 MR. WESSLER: Well -- well, we don't
6 deny that -- that, in theory, they had an
7 opportunity.

8 JUSTICE SOTOMAYOR: No, not in theory.
9 They -- they -- the -- this is an unusual case
10 where the proceeding was actually in effect
11 during the litigation. In my experience -- and
12 I think we've said this -- if there is something
13 like that happening, the district court -- the
14 court below should stay letting that decision
15 become final, and --

16 MR. WESSLER: I think, Your Honor,
17 that illustrates what kind of empty promise
18 the -- my friends on the other side's
19 interpretation would have for the Hobbs Act
20 because, you're right, what happened here was
21 the litigation was proceeding for six years and
22 the agency then issued this Amerifactors order.

23 If, in fact, what was supposed to
24 happen at that point was the -- the parties
25 in -- in the underlying litigation were required

1 to go and seek some sort of relief in front of
2 either the agency or a petition for review, we
3 are six years on from -- from that point in time
4 happening, and the agency hasn't actually
5 resolved what one -- what one party had actually
6 done in that case, which was to file for
7 reconsideration.

8 And so I think, as the concurrences in
9 PDR Network pointed out, that kind of circuitous
10 route to judicial review doesn't really make
11 very much sense either if you look at the terms
12 of the Hobbs Act text itself or in practical
13 sense.

14 If, in fact, it's the case that a
15 party could seek judicial review in some way,
16 why not allow district courts to -- to -- to
17 provide that review in a case which arises
18 organically from just a claim that the --

19 JUSTICE SOTOMAYOR: Thank you,
20 counsel.

21 MR. WESSLER: -- the statute had been
22 violated.

23 JUSTICE SOTOMAYOR: What do I do with
24 the dictionary definition of "validity?"
25 "Valid" means things like lawful, meritorious,

1 or correct. No dictionary suggests that you
2 only need a declaratory judgment for that. We
3 have Heck versus Humphrey, where the Court said
4 that you cannot bring a wrongful conviction
5 claim under 1983 because doing so would amount
6 to a collateral challenge to the conviction's
7 validity. 1983 only requires money damages.
8 And yet we use "validity" in a very different
9 sense because nothing in the 1983 was going to
10 vacate the conviction.

11 So we've -- there are multiple ways to
12 challenge validity without a declaration.

13 MR. WESSLER: Well, I -- I -- I agree
14 with that, Justice Sotomayor. But I think that
15 the phrase "determine the validity" helps
16 provide, I think, clarity for what that term
17 means in the context of 2342.

18 It isn't just that a court is opining
19 on the -- on the validity in a colloquial sense
20 of -- of the legitimacy or reasoning of the
21 order. It's that it's finally resolving whether
22 that order is valid or invalid.

23 JUSTICE SOTOMAYOR: It was the same
24 language in Yakus, and yet -- "determine the
25 validity" -- and in Yakus, we said it was

1 exclusive.

2 I know you rely on the Second Circuit,
3 but, if you look at the analysis, it barely
4 mentions the Second -- the Second Circuit, the
5 sentence -- the second circuit -- sentence --
6 boy, my tongue got tied.

7 MR. WESSLER: Yes.

8 JUSTICE SOTOMAYOR: What it did was
9 focus in on that language, "determine the
10 validity."

11 MR. WESSLER: Well, I -- I
12 respectfully disagree with -- with how much it
13 relied on the first sentence or the second
14 sentence. I think it said those two sentences
15 together lead to the conclusion that we reach in
16 that case.

17 And, you know, the key language there
18 as -- as --

19 JUSTICE SOTOMAYOR: But we made that
20 finding, and Congress a few years later uses
21 exactly the same language, "determine the
22 validity," in this statute, the Hobbs Act.

23 MR. WESSLER: It -- it -- it does, but
24 it doesn't use what I think is, in fact, the key
25 language of the second sentence, which is not

1 "determine the validity" but "consider the
2 validity."

3 And I think there's also another
4 distinction at least as a textual matter between
5 the -- the language of the Emergency Price
6 Control Act that was at issue in Yakus and here,
7 which is, if you look at where that language,
8 "determine the validity," is in the Emergency
9 Price Control Act, it doesn't come -- it's not
10 included in -- in -- in a series of -- of other
11 terms that denote specific forms of equitable
12 relief.

13 And so, yes, the phrase "determine the
14 validity of" is the same between the two
15 statutes, but the context is different.

16 JUSTICE SOTOMAYOR: I don't
17 understand. When you have a sentence that
18 doesn't say "and," it says "or," the equitable
19 relief is set forth at first. It says has
20 exclusive jurisdiction to "enjoin," that's
21 equitable. "Set aside," equitable. "Suspend"
22 and "hold in part."

23 And it doesn't use the word "and" --
24 "or" -- "and determine the validity of." It
25 says "or to determine the validity of." That's

1 broader. That's intended to be broader.

2 MR. WESSLER: Well, I respectfully
3 would disagree with that. I think it's -- it's
4 different and distinct but not necessarily
5 broader. What I think is notable about the way
6 that that -- that sentence is structured is you
7 have the first three terms -- "enjoin," "set
8 aside," and "suspend" -- all referring to some
9 form of injunctive or coercive relief.

10 The next phrase, "determine the
11 validity of," refers to something entirely
12 different, albeit a form of equitable relief,
13 but a declaratory judgment.

14 JUSTICE SOTOMAYOR: Well, as I
15 mentioned, "or determine the validity of" can be
16 done in a variety of different ways. It doesn't
17 require just a declaratory judgment.

18 MR. WESSLER: I think, in the
19 abstract, "validity" might lead a -- a -- a
20 reader to think that that could be true.

21 But I think, read in context, what's
22 going on in this provision, both with respect to
23 the use of the -- of the term "determine" but
24 also that it's appearing in a list of other
25 forms of equitable relief, that what the statute

1 is trying to do is it's trying to provide
2 some -- something of an instruction manual for
3 parties who are -- are planning to seek direct
4 review of an agency action.

5 And it's saying: For that kind of
6 petition or proceeding, where you actually want
7 the agency order to be enjoined in some way or
8 declared invalid, you can do that by filing your
9 petition within 60 days in a court of appeals.

10 But what it is not trying to do is
11 forever bind courts in any garden-variety,
12 run-of-the-mill enforcement --

13 JUSTICE SOTOMAYOR: It does seem to me
14 that the word "exclusive" has a lot of power
15 otherwise.

16 JUSTICE JACKSON: Why do you say --

17 JUSTICE SOTOMAYOR: But thank you.

18 JUSTICE JACKSON: -- that it forever
19 binds? I guess, if we have this mechanism in
20 the Hobbs Act for people to challenge the agency
21 order, I don't understand why -- why you're
22 saying it forever binds -- the agency's order
23 forever binds.

24 MR. WESSLER: Well, I mean, you can
25 take this case. The district -- the minute

1 the -- the agency issued this Amerifactors
2 order, the district court in this case said: I
3 have no license to review whether the agency's
4 interpretation of the TCPA is correct or not.

5 JUSTICE JACKSON: Right, until the
6 court of appeals hears that question per the
7 statute.

8 MR. WESSLER: Well, of course, in this
9 case, it may never hear that question.

10 JUSTICE JACKSON: It may not, but
11 there is a mechanism for it to be corrected. I
12 mean, the suggestion that the agency issues an
13 order and the courts are suddenly divested of
14 any opportunity to address its validity, I
15 think, is inconsistent with the very provision
16 we're talking about here, which allows for the
17 courts of appeals to assess the validity.

18 At a minimum, you agree that the
19 courts of appeals can do that, right?

20 MR. WESSLER: Yes, with a maybe
21 friendly amendment, which is not assess the
22 validity but to determine the validity once and
23 for all. And I do think that there is an
24 important distinction --

25 JUSTICE JACKSON: No, I understand how

1 your argument plays out.

2 I guess what I'm just saying is it
3 seems to me that we're just talking about a
4 period of time in which the district court is
5 hearing a -- a -- a -- an enforcement action or
6 whatnot, and the agency issues an order. And
7 given that the Hobbs Act -- until the court of
8 appeals determines the validity, the district
9 court has to assume for the purpose of any
10 litigation that's before it that it is a valid
11 order.

12 MR. WESSLER: I -- I -- I think we're
13 using the term "determine the validity" in
14 different ways.

15 I think what the Hobbs Act says and
16 what it requires is that if -- if you are
17 seeking a petition for review to enjoin or
18 actually declare invalid once and for all this
19 agency action, then, yes, you must bring that
20 petition within 60 days in a court of appeals.

21 But, if what you want is just a
22 district court to -- to --

23 JUSTICE JACKSON: Not apply this order
24 in the context of the litigation that's before
25 it.

1 MR. WESSLER: Correct. Correct.

2 JUSTICE JACKSON: I appreciate that
3 distinction.

4 MR. WESSLER: Yes.

5 JUSTICE JACKSON: I understand it.

6 MR. WESSLER: Yes.

7 JUSTICE JACKSON: What I'm suggesting
8 is just the -- the ultimate conclusion on your
9 part that -- or at least you said it at the
10 beginning -- that this somehow means that the
11 courts never have a chance to get out from under
12 the agency order, that the agency order will
13 bind the courts forever, perhaps permanently you
14 say. And I -- I guess I just don't understand
15 that.

16 MR. WESSLER: Well, I -- I mean, I
17 think it comes up in a number of different
18 contexts, but you could take, for instance, a
19 set of consumers who would have no reason to
20 ever think that an agency interpretation of the
21 TCPA would matter to them.

22 So the FCC could issue this
23 Amerifactors order --

24 JUSTICE JACKSON: Why wouldn't they if
25 we interpret -- if we say that when an agency

1 issues an order, unless and until the -- the
2 court of appeals determines its validity, all
3 litigation that is ongoing related to that order
4 is going to treat it as valid?

5 MR. WESSLER: Correct. My -- my --
6 maybe I didn't -- I was unclear. My -- my
7 hypothetical was just imagine there is no case,
8 the Amerifactors order is issued. A party only
9 has 60 days to file a petition for review under
10 the Hobbs Act.

11 So, in three years down the road, if
12 some consumers believe that a company has
13 violated the TCPA, they are not capable or
14 permitted to bring a petition for review under
15 the Hobbs Act.

16 JUSTICE JACKSON: There's no
17 equitable --

18 MR. WESSLER: No. This is a -- this
19 is a -- a bar -- a bar.

20 And, in that scenario, Your Honor, a
21 district court, under my friend's interpretation
22 of this provision, would have no choice but to
23 enforce the agency's interpretation of the TCPA.

24 JUSTICE KAGAN: Can I take you back,
25 Mr. Wessler, to Justice Thomas's initial

1 question about the Port case and about Venner
2 and ask you to tell me what your reply brief
3 means with respect to those cases?

4 Because what you say in your reply
5 brief is that those cases stand for a kind of
6 anti-circumvention principle, that we're not
7 going to allow people to evade the Hobbs Act,
8 and you say what those cases do is they shut
9 down collateral challenges that could have been
10 brought under the Hobbs Act.

11 So what do you mean by that? What do
12 you take the scope of those cases to be? Or,
13 said otherwise, what do you take the set of
14 collateral challenges to be that those cases
15 preclude?

16 MR. WESSLER: Sure. I think there are
17 maybe two kind of categories, the way to think
18 about it. The first would be in a -- in a case
19 in which the actual parties who are in the --
20 the -- the -- the civil proceeding were also
21 parties to an agency action. And I think, in
22 that scenario, that --

23 JUSTICE KAGAN: That's not Port of
24 Boston, right?

25 MR. WESSLER: Well, that is Port of

1 Boston. In Port of Boston, both parties that
2 were the subject of the district court
3 proceeding were also parties in the -- in the
4 agency action that was taking place kind of
5 simultaneously.

6 And so, in that scenario, I think it
7 is fair to say: Well, an order from the
8 district court would effectively enjoin the
9 agency action in a way that -- that would
10 suspend the -- the -- the -- the functioning of
11 the order and would be subject to the Hobbs Act.

12 But I don't think in any of those old
13 cases, Venner, Port of Boston --

14 JUSTICE KAGAN: You said that there
15 were two things? You said --

16 MR. WESSLER: Sorry. The other -- I
17 think the other category would be a case in
18 which you might have one party who is
19 specifically given, like, a waiver by an agency.

20 And I think, in a scenario like that,
21 if it later got sued and the only -- the only
22 agency action related to that specific party,
23 the effect of a later suit might be to suspend
24 the agency order in a way that would look like
25 the kinds of equitable relief that the Hobbs Act

1 covers.

2 But, once you're out of those two
3 pretty narrow categories -- and, certainly, that
4 isn't the case we've got here or what we had in
5 PDR Network -- it cannot be the case, I think or
6 would submit to the Court, that the Hobbs Act
7 covers any proceeding that arises in the -- in
8 the normal course of a district court's
9 jurisdiction in which the -- the district court
10 is being asked to evaluate or interpret the
11 meaning of a statute and compare the agency's
12 reasoning.

13 JUSTICE KAGAN: So I -- I understand
14 that position, but I guess I'm wondering why
15 you've argued this case quite so broadly. I
16 mean, it seems to me that you win this case so
17 long as you say: There's at least a requirement
18 that the parties bringing the suit are legally
19 bound, and that's not met here, and so we win on
20 that ground.

21 Like, why go further than that?

22 MR. WESSLER: Well, I mean, we -- I
23 will take a -- a -- a reversal win in whatever
24 way the Court thinks is best. But I do think
25 that there is something quite odd about an

1 interpretation that the other side has offered
2 for 2342 that would extend to cover a district
3 court's ability to interpret the statute.

4 And I think that really is what we're
5 talking about in this case. I think it's even
6 more extreme when you look at the nature of the
7 Amerifactors order here, which all parties
8 argued and agreed below was an interpretive
9 order, one that would --

10 JUSTICE KAGAN: Right. I mean, I
11 guess that's exactly what I'm suggesting. I
12 mean, I think that the -- in our initial opinion
13 in -- remind me of the name --

14 MR. WESSLER: PDR -- PDR Network.

15 JUSTICE KAGAN: PDR, right. That the
16 majority opinion basically says, you know -- I
17 think it's important to us the majority opinion
18 says whether this is an interpretive rule. And,
19 here, it seems to me you can just come up and
20 say: This is an interpretive rule, the majority
21 in PDR got it right that that was an important
22 question, and if it's an interpretive rule, you
23 know, it -- it falls outside the Hobbs Act.

24 MR. WESSLER: Correct.

25 JUSTICE KAGAN: End of case.

1 MR. WESSLER: Correct. And we
2 would -- we would accept a -- a decision going
3 no further than that.

4 I do think that it is hard to square
5 the -- McKesson and the government's
6 interpretation of 2342 as expansively as they
7 have argued it to mean anytime a district court
8 is -- is asked to assess the -- the -- the
9 meaning of a statute, if the agency has taken a
10 position on that already, it is -- it is barred
11 from doing that.

12 And I don't think that the -- that the
13 language of 2342 or the structure of the Hobbs
14 Act could be read to -- to -- to sustain that
15 kind of understanding about --

16 JUSTICE JACKSON: What about its
17 purposes?

18 MR. WESSLER: -- what Congress was
19 doing.

20 JUSTICE JACKSON: How -- how do you
21 square your point with its purposes?

22 MR. WESSLER: Sure. I mean, I -- I
23 don't think there's any indication if you look
24 back in the -- in the sort of transformation
25 from the Urgent Deficiency Act to the Hobbs Act

1 what Congress was trying to do to suggest that
2 they were -- that the design of and goal of this
3 statute was to do the -- to do that kind of
4 complete removal of the ability of courts to --

5 JUSTICE JACKSON: I mean, wasn't it
6 trying to --

7 MR. WESSLER: -- assess the meaning.

8 JUSTICE JACKSON: -- wasn't it trying
9 to establish finality, predictability,
10 uniformity? When -- when the court of appeals
11 rules on the validity or does the statutory
12 interpretation you're talking about, we then
13 have a sort of definitive interpretation that
14 applies at least to a particular region.

15 It seems to me that to say that the
16 court -- or that the Congress was still trying
17 to preserve the district courts' ability to
18 make, you know, essentially ad hoc
19 determinations within the context of each of its
20 cases flies in the face of the idea that they
21 were channeling exclusive jurisdiction to
22 determine the validity of the agency's
23 interpretation in the court of appeals.

24 MR. WESSLER: Yes, but we -- we may
25 just disagree on what "determine the validity"

1 in that -- in this context means, because I
2 agree with everything you just said, but I -- I
3 think it is tailored to a specific kind of --
4 of -- of remedy for parties who are adversely
5 affected by agency orders.

6 JUSTICE JACKSON: But why does the
7 remedy matter? If you -- if you accept -- if
8 you agree with my premise that what Congress was
9 trying to do was get a rule out there that is
10 being consistently applied, then it really
11 doesn't relate to the remedy. It relates to the
12 merits of the party's claim that this is a valid
13 or invalid interpretation.

14 MR. WESSLER: I --

15 JUSTICE JACKSON: And it wanted the
16 court of appeals to make that decision.

17 MR. WESSLER: -- I disagree with that.
18 I think what -- what Congress wanted to do was
19 to create a streamlined process for obtaining
20 quick review of agency actions that would either
21 uphold them throughout or strike them down and
22 invalidate them.

23 But what it was not trying to do --
24 and we -- we know this, I think, for a couple of
25 reasons -- was to extend the Hobbs Act's

1 coverage further to foreclose district courts in
2 the mine-run case from even evaluating whether
3 the agency's interpretation of a statute is
4 correct.

5 And we know that, I think, for --
6 there are a couple of, I think, indicia. One,
7 you know, it had -- Congress had -- as we
8 discussed earlier, it had *Yakus* and the
9 Emergency Price Control Act out there when it
10 was enacting the Hobbs Act, and it did not
11 integrate into the Hobbs Act the key second
12 sentence of that statute which had been
13 interpreted, along with the first sentence, to
14 have this result.

15 But I think just as significantly, we
16 know -- and the concurrences in *PDR Network*
17 pointed this out -- we know that Congress knows
18 how to accomplish, I think, what -- what Your
19 Honor is suggesting, which is to eliminate the
20 ability of district courts of any type -- to
21 provide any judicial review in an enforcement
22 proceeding over an agency interpretation of a
23 statute.

24 We see that in the environmental
25 statutes. There are three or four of them.

1 And, you know, that language, which I think is
2 quite clear, provides a kind of negative
3 prescription that district courts do not have
4 the authority to provide any sort of judicial
5 review in an enforcement proceeding, just is
6 absent from the Hobbs Act here.

7 And I think that that's a quite
8 significant distinction and one, I think, that
9 we have to, again, as -- as -- as we know from
10 PDR Network, recognize that -- you know, that
11 the silence that the Hobbs Act has when it comes
12 to that kind of question, I think, ought to be
13 significant in the way we understand the
14 background rule that's operating here, which is,
15 for -- for -- for, you know, claims that don't
16 fall within one of these channeling statutes, a
17 district court is always free in that context to
18 assess the, you know, reasoning of an agency's
19 interpretation and interpret the statute itself.

20 And I think the Hobbs Act, because it
21 didn't foreclose that kind of judicial review
22 that we see from other statutes, means that
23 district courts must remain free to be able to
24 do that in a case like this one or like in what
25 we had in PDR Network.

1 JUSTICE GORSUCH: Mr. Wessler, I'm
2 struggling a little bit with the off-ramp you
3 were discussing with Justice Kagan, and as I
4 understand it, the idea goes that the Hobbs Act
5 doesn't even apply at all because the
6 Amerifactors order wasn't really an order; it
7 was an interpretive rule.

8 But it was an adjudication, and -- and
9 there was a final order issued in that
10 administrative adjudication. That would seem to
11 be, to me, every day of the week and twice on
12 Sundays an order and therefore implicate the
13 Hobbs Act and -- and raise unavoidably the
14 larger question in this case.

15 What am I missing?

16 MR. WESSLER: Yeah, I -- I don't think
17 we disagree with any of that, and -- and I don't
18 think our view is that this isn't an order.

19 I think just because -- you know, the
20 other side has said, well, it's an adjudication
21 and so somehow that doesn't implicate whether
22 there's an interpretive or legislative rule. We
23 think --

24 JUSTICE GORSUCH: I -- I -- one -- I
25 know what an interpretive --

1 MR. WESSLER: Yes.

2 JUSTICE GORSUCH: -- rule looks like,
3 and it doesn't look like an administrative
4 agency order to parties in an adjudication.

5 MR. WESSLER: Right.

6 JUSTICE GORSUCH: At least that's what
7 I had always understood, but maybe I'm missing
8 something.

9 MR. WESSLER: Right, although what --
10 what we have in this order -- it -- it is an
11 adjudicatory order. What we have in this order
12 is an agency simply advising the public of its
13 view of the meaning of a specific phrase in the
14 TCPA. And so, you know, I do think that --

15 JUSTICE KAGAN: And you don't
16 understand that as binding on you, correct?

17 MR. WESSLER: Correct.

18 JUSTICE GORSUCH: No, it's not binding
19 on you, but it's binding, isn't it?

20 MR. WESSLER: Well, we wouldn't -- we
21 wouldn't say it's -- it's binding.

22 JUSTICE GORSUCH: It's just a piece of
23 paper in the world? I mean --

24 MR. WESSLER: Yes. It would be like
25 an informal guidance offering a -- a view of --

1 of a statute. We don't think that there --
2 actually carries any binding significance. And
3 so I think -- you were asking about an off-ramp.
4 I do think that in that way, you know, what a
5 district court, in a -- in a garden-variety, you
6 know, civil case, could do is it could simply
7 ignore the order.

8 JUSTICE GORSUCH: That's not how the
9 court of appeals understood it.

10 MR. WESSLER: Certainly not.
11 Certainly not. But we think that that -- if
12 that were -- if, in fact, the court wanted to, I
13 think, move in this direction, it wouldn't be
14 determining the validity of anything because the
15 order is non-binding by nature because it's
16 interpretive.

17 Now the Ninth Circuit, you know, is
18 the only circuit that we're aware of that has
19 adopted an understanding of the Hobbs Act that
20 renders the classification between interpretive
21 and legislative rules irrelevant. In the Ninth
22 Circuit, it is -- it does not matter. Any --
23 any order that is subject to the Hobbs Act
24 immediately withdraws jurisdiction from the
25 district court to do anything.

1 And I think -- I would submit to the
2 Court that that just cannot be right because it
3 does mean that even non-binding informal
4 guidance is capable of binding district
5 courts --

6 JUSTICE SOTOMAYOR: Counsel, the
7 problem I'm having with your interpretation is I
8 don't even know why they gave jurisdiction to
9 the agency at all to do anything, meaning --
10 Justice Kavanaugh expressed a concern that if a
11 defendant could not challenge an agency's order
12 in an enforcement proceeding, that might be
13 unfair or even raise due process concerns.

14 But your interpretation means that if
15 a regular -- regulated party seeks an agency
16 order to determine whether its conduct is
17 permissible, it asks the agency for that, it
18 relies on that order to send the e-faxes, and
19 it's still liable for treble damages to any
20 plaintiff who wants to come in and say: Even
21 though I had an opportunity to challenge this
22 interpretation before the agency, I didn't have
23 to bother; I could just wait and sue anyone who
24 followed the agency's order, correct?

25 MR. WESSLER: Well, a couple of --

1 JUSTICE SOTOMAYOR: That's the
2 downside.

3 MR. WESSLER: -- a couple of responses
4 to that. I mean, first, I do not think that a
5 defendant would necessarily be on the hook in
6 that scenario for treble damages because that
7 does -- the treble damages provision of the TCPA
8 requires -- or there is built in a reasonable
9 reliance issue.

10 JUSTICE SOTOMAYOR: But it still would
11 be liable.

12 MR. WESSLER: But I do think you're --
13 you're not wrong to suggest that there might be
14 some reliance interests at stake here. I do not
15 think those can overcome what the text of this
16 statute means.

17 I also think that if we're --

18 JUSTICE SOTOMAYOR: Unless we believe
19 that the Act, by giving an out to people who
20 didn't have an -- an -- an adequate opportunity
21 for review, that's the out --

22 MR. WESSLER: Well, I don't think
23 that -- yeah.

24 JUSTICE SOTOMAYOR: -- that it was --
25 that it intended to make these orders final

1 unless overturned by the court of appeals.

2 MR. WESSLER: May I answer?

3 CHIEF JUSTICE ROBERTS: Certainly.

4 MR. WESSLER: Yeah. With respect, I
5 do not think adequacy is a sufficient safety
6 valve, and I think that's true for at least two
7 reasons.

8 The first, Your Honor, is that, you
9 know, the -- you know, the -- this Court has
10 never taken a position on what adequacy in the
11 APA means. I do not think that the point of a
12 jurisdictional statute would be to invest
13 district courts in all of these cases in -- from
14 assessing the specific circumstances of when
15 individual parties in their case may or may not
16 have known about a particular order that would
17 have given rise to a Hobbs Act claim.

18 And I also think it begs a question,
19 exclusive jurisdiction to do what, which, in
20 this case, we would submit the Hobbs Act only
21 requires for petitions that are directly
22 challenging agency actions.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas?

1 Justice Alito?
2 Anything further, Justice Sotomayor?
3 No?
4 Justice Kagan?
5 Justice Kavanaugh? No?
6 Justice Barrett?
7 Justice Jackson?
8 Okay. Thank you, counsel.
9 MR. WESSLER: Thank you.
10 CHIEF JUSTICE ROBERTS: Mr. Palmore.
11 ORAL ARGUMENT OF JOSEPH R. PALMORE
12 ON BEHALF OF THE RESPONDENTS
13 MR. PALMORE: Thank you, Mr. Chief
14 Justice, and may it please the Court:
15 The Hobbs Act's text, history,
16 precedent, and purpose all support the
17 conclusion that a lower court here could not
18 impose liability on McKesson for engaging in
19 conduct that the FCC said did not violate the
20 TCPA, where plaintiff concedes it had adequate
21 opportunity for judicial review under the Hobbs
22 Act.
23 The statutory text and structure show
24 that a Hobbs Act course of exclusive
25 jurisdiction to determine the validity of an

1 order means it alone can evaluate whether the
2 order is correct. If Congress had wanted to
3 limit this exclusivity to declaratory judgments,
4 it would have done so expressly.

5 Instead, Sections 2349 and 2342
6 together show that the Hobbs Act court has
7 exclusive jurisdiction not just over remedies
8 against the order but also over evaluation of
9 its merits.

10 And that is exactly how this Court
11 interpreted predecessor statutes whose terms and
12 precedent Congress incorporated into the Hobbs
13 Act. Under both the Urgent Deficiencies Act and
14 the Emergency Price Control Act, this Court
15 construed those statutes to bar collateral
16 review in enforcement and private-party disputes
17 even when no declaratory judgment or other
18 relief was sought against the order.

19 And consistent with that precedent,
20 Justice Thomas, the Court in *Port of Boston*
21 interpreted the Hobbs Act's exclusive
22 jurisdiction to mean "review the merits," and on
23 that understanding, it barred redetermination of
24 the same issue decided by an agency in a private
25 payment dispute, again, where no declaratory

1 judgment or relief against the order was sought
2 and whether or not the party participated before
3 the agency.

4 Finally, the Hobbs Act's purpose of
5 establishing finality, certainty, and reliance
6 would be undermined by Petitioner's position
7 that an FCC order, even if affirmed under Hobbs
8 Act review, could forever be subject to
9 second-guessing in state and federal courts all
10 across the country.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: So, as I understand
13 you, if a case -- if this case were to come
14 before a district judge, an order before a
15 district judge, and a district judge says this
16 is the most ridiculous opinion I have ever seen
17 in my many years on the bench, however, I have
18 no authority to review it, that -- you don't see
19 a problem with that?

20 MR. PALMORE: Justice Thomas, this is
21 not an issue of agency versus court. This is an
22 issue of which court and when. And I think it's
23 important to emphasize how this --

24 JUSTICE THOMAS: It's still -- you
25 have the same -- you have a collateral attack.

1 You have a disagreement between two parties.
2 They're in court. And the district judge says:
3 Under the Hobbs Act, I have no authority, even
4 though I can see this is -- this order is
5 ridiculous.

6 MR. PALMORE: That's because the Hobbs
7 Act court has that authority. And if the order
8 is ridiculous, the Hobbs Act court will reverse.
9 And I think it's important to emphasize page 4
10 of the cert reply says Petitioners ask this
11 Court to decide the question presented on the
12 assumption that they had a prior and adequate
13 opportunity for judicial review under the Hobbs
14 Act.

15 So the -- the -- the issue about delay
16 and long-ago orders that were presented in PDR
17 is not presented here.

18 JUSTICE JACKSON: Do you -- do you
19 concede that if they didn't have an adequate
20 opportunity that we would have the problem that
21 Petitioner raises here?

22 MR. PALMORE: Well, we think adequacy
23 is an important safety valve. And -- and -- and
24 Justice Kavanaugh, in his concurrence in PDR
25 Network, canvassed a number of concerns with an

1 overly strict reading of exclusivity in this
2 scheme. And we -- we understand that --

3 JUSTICE JACKSON: What about the
4 timing? I mean, I -- I had a little colloquy
5 with Petitioner, and he says that, you know,
6 some of these customers, people affected, would
7 have no -- would have had no reason to bring
8 this up with the court of appeals within 60 days
9 of the original order.

10 MR. PALMORE: So two responses,
11 Justice Jackson.

12 One is that concern is not presented
13 here, but given the concession that they did
14 have a prior and adequate opportunity and they
15 just chose not to exercise it, so their view is
16 Hobbs Act exclusivity is optional, they can go
17 either way.

18 Two, in a hypothetical case where that
19 issue was presented, we view that as an adequacy
20 problem. We think Congress addressed potential
21 unfairness, potential due process concerns that
22 Justice Kavanaugh canvassed in his PDR Network
23 concurrence, not through limiting the exclusive
24 jurisdiction of the Hobbs Act court but by
25 creating an adequacy safety valve, and we think

1 that's where the consideration of -- of timing,
2 interests, standing, that's where that would go.

3 JUSTICE ALITO: Suppose I'm a -- a
4 district judge in New Jersey and someone shows
5 me a Ninth Circuit opinion on a question of law
6 that I'm considering. And if I conclude that --
7 and there's no Third Circuit precedent on point
8 and no Supreme Court precedent on point.

9 If I disagree with the Ninth Circuit's
10 interpretation, am I invalidating the Ninth
11 Circuit decision?

12 MR. PALMORE: No, Justice Alito. But
13 that's not the statutory language here. It's
14 not "invalidating." It's "determining the
15 validity," which is a capacious term, and it
16 wasn't one that was new to this statute. It had
17 just been construed by this Court in *Yakus*. And
18 it's comfortably understood to mean evaluate the
19 soundness. The -- this Court said in *Port of*
20 *Boston* it meant review the merits or
21 collaterally redetermine the same issue.

22 And if I can just make one quick point
23 on *Port of Boston*. Mr. Wessler says: Well,
24 that party participated. There were alternative
25 holdings in *Port of Boston*.

1 The first holding was we think you
2 participated through an agent. But the Court
3 was crystal-clear. It went on and said: Even
4 if not, your interests were implicated. You
5 could have participated and you chose not to.

6 Having made that choice, you can't now
7 get a collateral redetermination of that same
8 issue in the private payment dispute. And that
9 was a dispute over the meaning of Section 15 of
10 the Shipping Act. It was a statutory
11 construction question.

12 And, Justice Kagan, this kind of idea
13 of is this a non-coercive order, the
14 Amerifactors issue, came up in Port of Boston
15 also, because the party there who was objecting
16 to that order and seeking to get collateral
17 review of it said this order has no course of
18 effect. This is just the agency kind of opining
19 on the meaning of the Shipping Act.

20 And what this Court said was that's
21 still reviewable under the Hobbs Act because
22 there's this -- it's a finality consideration,
23 does it determine rights or obligations and do
24 legal consequences flow from it?

25 And the Court said: Yes, they do.

1 When an agency with statutory authority
2 construes a statute within its jurisdiction,
3 that means something. And it cited this Court's
4 decision in the Frozen Foods Express case, which
5 was construing the APA declaratory order
6 provision which is now codified in 54(e), which
7 says agencies have authority to terminate
8 controversy or remove uncertainty.

9 And that's what this order did. It
10 was an adjudication, as Justice Gorsuch pointed
11 out, with real legal effect. And they've
12 conceded again that they could have sought Hobbs
13 Act review. They asked the Court to decide the
14 question on that understanding but opted --
15 simply opted not to.

16 JUSTICE KAVANAUGH: You -- you
17 mentioned Yakus in response to Justice Alito.
18 Of course, the other side points out that Yakus
19 had the two sentences, "determine the validity"
20 and "consider the validity."

21 Can you just address that?

22 MR. PALMORE: Sure, Justice Kavanaugh.

23 What Congress did in the Hobbs Act was
24 combine the two sentences. So the first
25 sentence in Yakus said determine -- the

1 emergency court of appeals has exclusive
2 jurisdiction to determine the validity, and then
3 the second sentence said, and no other court can
4 consider the validity, enjoin, or set aside.

5 What Congress did in the Hobbs Act was
6 meld the two sentences into one, and it drew
7 both from that Emergency Price Control Act and
8 also from the Urgent Deficiencies Act. So it
9 takes "determine the validity" and "enjoin" from
10 the first and second sentence of Yakus; it takes
11 "set aside" from the second sentence of Yakus,
12 also from the Urgent Deficiencies Act. It takes
13 "suspend" only from the Urgent Deficiencies Act.

14 So it's drawing on both these sources,
15 both of which had been interpreted to bar
16 collateral redetermination of the same issue,
17 and it combined them into one.

18 To the extent that my friend is saying
19 that the second sentence is necessary, Congress
20 can provide exclusive jurisdiction to a court
21 without stating the necessary implication. It
22 can, of course, choose to do that if it wants
23 to, that exclusive jurisdiction over A means
24 other courts can't exercise jurisdiction over A,
25 but there's no rule I'm aware of that they have

1 to -- to proceed that way.

2 And I think, given the old-soil
3 principle, the way that this language was
4 construed in Port of Boston, that the -- that
5 "determine the validity" has the meaning that we
6 and the government are suggesting.

7 JUSTICE ALITO: Yakus was a very harsh
8 decision rendered in a wartime atmosphere based
9 on particular facts and a particular statute,
10 and you want us to read an awful lot into it.

11 Why should we do that?

12 MR. PALMORE: Justice Alito, you are,
13 of course, correct that Yakus was a World War II
14 statute, but I think it's important to emphasize
15 that the discussion of the wartime exigencies
16 was only in the due process part of the
17 decision. It was not in the statutory
18 construction part of the decision, which is what
19 we're relying on here. And that makes sense.
20 Statutes -- the meaning of statutes don't change
21 depending on whether the country is at war or
22 enjoying peace.

23 The due process holding in Yakus,
24 Congress responded to that by amending the
25 Emergency Price Control Act, not to change the

1 "determine the validity" language or the
2 exclusivity but to reopen a window for criminal
3 defendants, civil defendants, to seek review
4 through that exclusive path in the event they
5 were prosecuted or sued.

6 And, here, of course, the -- kind of
7 the -- what you describe as the harsh result in
8 Yakus is avoided, we believe, by Section 703.
9 703 was not on the books at the time of Yakus.
10 It was enacted two years later and before the
11 Hobbs Act. And so Congress adopts the Hobbs Act
12 knowing that 703 is there, and we believe it
13 provides a very important safety valve.

14 JUSTICE GORSUCH: I'd like to ask you
15 a question about 703 -- your view of 703. Of
16 course, it's not in the Hobbs Act, but you're
17 interpreting the Hobbs Act in light of it. I
18 understand that. It seems to me we have two
19 choices basically, one recognizing that there's
20 an order here, as, indeed, there is. You can
21 say, well, on the one hand, the Hobbs Act
22 doesn't preclude the district court from saying
23 this is the craziest decision I ever saw because
24 it's not undermining that order in any way; it's
25 just adjudicating the rights of the parties

1 presently before the court. That's one option.

2 The second option is to say, ah, yeah,
3 it's still sort of affecting that order in some
4 way, but no worries if you didn't have an
5 adequate opportunity to challenge it. And
6 that's the -- that's what you're asking us to
7 do.

8 Are we going to then have a
9 jurisprudence of adequacy? And, if so, what
10 does that look like for parties who weren't
11 alive at the time of -- of the administrative
12 proceeding, for parties who wish to present
13 different arguments than was considered by the
14 agency at the time, for parties with different
15 factual circumstances than those that the agency
16 may have had in mind at the time it adjudicated
17 the case before it? Thoughts.

18 MR. PALMORE: Sure, Justice Gorsuch.
19 I'll give you some thoughts. I mean, I think I
20 would emphasize at the outset that that issue is
21 not presented here because adequacy is -- is
22 conceded.

23 JUSTICE GORSUCH: I understand that.

24 MR. PALMORE: Right?

25 JUSTICE GORSUCH: But -- but you're

1 asking us --

2 MR. PALMORE: So --

3 JUSTICE GORSUCH: -- to open a new
4 door and -- and -- and create a jurisprudence of
5 adequacy. And I just want to understand what it
6 would look like because I think those -- those
7 are our two choices in this case, right, that --
8 that I outlined at the very beginning of my --
9 my question?

10 MR. PALMORE: Well -- right.

11 JUSTICE GORSUCH: One -- one --

12 MR. PALMORE: You can -- you can
13 enforce what we believe to be the proper reading
14 of the Hobbs Act, bracketing that adequacy
15 exists --

16 JUSTICE GORSUCH: Right.

17 MR. PALMORE: -- for -- for hard
18 cases.

19 JUSTICE GORSUCH: Or simply say
20 that --

21 MR. PALMORE: Or we could lose,
22 right --

23 JUSTICE GORSUCH: -- you could lose,
24 right.

25 MR. PALMORE: -- on the Hobbs -- on

1 the Hobbs Act. Sure.

2 JUSTICE GORSUCH: Those are the two
3 choices. But, once -- if we buy yours --

4 MR. PALMORE: Right.

5 JUSTICE GORSUCH: -- what does this
6 jurisprudence of adequacy look like?

7 MR. PALMORE: Well, I think that --
8 that there are a couple data points already in
9 the Court's cases. So PDR Network, admittedly,
10 not a definitive holding, but it remanded for
11 consideration of adequacy. And we understand
12 that to be a response to the defendant's
13 argument there that they would have had no
14 interest in participating at the FCC or seeking
15 Hobbs Act review at the time that that order
16 issued. And the Court viewed that
17 party-specific argument as a possible adequacy
18 issue.

19 We think Port of Boston, although it's
20 not citing 703, is consistent with that because
21 it looked at the specifics of that party and it
22 said you had every interest in participating and
23 you didn't.

24 JUSTICE GORSUCH: So what I think
25 it'll wind up doing is saying, for the people

1 who are really closely tied in at the moment,
2 who could have been there or were there, a kind
3 of collateral estoppel sort of idea. But I
4 don't know what it means much beyond that. Five
5 years out, 10 years out, different people,
6 different arguments, different facts.

7 Are -- are we just going to wind up in
8 the same place?

9 MR. PALMORE: Well, Justice Gorsuch,
10 we think Congress was balancing two competing
11 interests here. It was -- it was balancing
12 finality reliance, what this Court called in
13 Corner Post the kind of finality-focused
14 orientation of the Hobbs Act, with, we think,
15 fairness and due process concerns. And so
16 Congress is, of course, not required to pursue
17 all its objectives to the ends of the earth. It
18 can balance them. And we think that that's what
19 it did here.

20 But I think what I'd emphasize is,
21 even if there was some work to do in future
22 cases, that would all be work to do about the
23 meaning of "adequacy" because that's --

24 JUSTICE GORSUCH: I -- I understand
25 that --

1 MR. PALMORE: Yes.

2 JUSTICE GORSUCH: -- but, if -- if
3 finality is so important and it turns out that
4 your interpretation doesn't do much to advance
5 finality beyond a few parties presently, what --
6 what are we here about?

7 MR. PALMORE: Well, I think it would,
8 Justice Gorsuch. Of course, here, again,
9 adequacy is conceded, so the Court doesn't
10 really have to get into that. But, in -- you
11 alluded to this yourself. I mean, the FCC
12 operates in a highly regulated -- you know, this
13 is a highly regulated industry. You have an
14 amicus brief from some of the major trade
15 associations who are repeat players. They have
16 armies of people who follow what goes on at the
17 FCC. They engage in litigation. Those folks
18 are like -- unlikely to be able to make any kind
19 of adequacy argument, and they are the ones who
20 are often engaged in this litigation.

21 But we think Congress allowed a safety
22 valve.

23 JUSTICE GORSUCH: But -- but then
24 we're going to have the Corner Posts of the
25 world who are going to come in and say: I

1 wasn't alive, I wasn't there, I wasn't in
2 business. And we've said the statute of
3 limitations allows them to file their claims.
4 That's got to mean something, right?

5 MR. PALMORE: Well, perhaps so, Your
6 Honor. So, I guess, in our conception -- and
7 the government has a different view on adequacy,
8 which is probably a less capacious view.

9 JUSTICE GORSUCH: Substantially, I
10 suspect.

11 MR. PALMORE: Substantially, right.
12 We have more of a -- you know, we -- we believe
13 it can be more party-specific, but I think it's
14 important to emphasize the implications of
15 Petitioner's view, right, is that a party could
16 go to the agency, say I want to send faxes to
17 online fax services, get a declaratory order,
18 which is like a declaratory judgment, someone
19 wants guidance, they want a ruling before they
20 act at their own peril. The agency could say
21 that's right; that's not covered. That could be
22 affirmed by a court of appeals under the Hobbs
23 Act.

24 Then, years later, they could be
25 exposed to liability in a federal court, in a

1 state court, for having relied on and sent the
2 faxes that the FCC in a Hobbs Act-affirmed order
3 said was permissible. We think that --

4 JUSTICE JACKSON: Mr. Palmore?

5 MR. PALMORE: Yes.

6 JUSTICE JACKSON: Sorry. Mr. Palmore,
7 can you speak to Petitioner's argument about
8 interpretive rule? Do you agree that this is an
9 interpretive rule?

10 MR. PALMORE: Absolutely not, Justice
11 Jackson. This is an adjudication. It's not a
12 rule of any kind. It's an adjudication.

13 And through -- in 5 U.S.C. 554(e),
14 Congress gave agencies authority to issue
15 declaratory orders with like effect as to other
16 orders to terminate a controversy or remove
17 uncertainty. And that's what it did here.

18 The FCC, like many other agencies,
19 based on this Court's decision in *Chenery II*, in
20 the *NLRB versus Bell Aerospace*, often announces
21 kind of broad things that look like rules
22 through declaratory orders. It did it here with
23 notice-and-comment rulemaking.

24 JUSTICE JACKSON: And you consider
25 this to be binding then?

1 MR. PALMORE: Yes. Yes. It's binding
2 in -- it's binding because the -- the FCC was
3 not just deciding a dispute between two
4 particular parties; it was applying the statute
5 to a particular technology, which was this --
6 these online fax businesses.

7 JUSTICE KAGAN: But -- so, I mean,
8 suppose that I think that you have some good
9 arguments about why it's not just suits asking
10 for declaratory judgments that fall within the
11 Hobbs Act but that you at least have to have a
12 suit that's challenging an agency decision with
13 the force of law, that that's a necessity to
14 fall within the Hobbs Act.

15 You think that if that's the rule you
16 are covered?

17 MR. PALMORE: Absolutely. And I think
18 Port of Boston stands for that proposition.
19 Port of Boston, again, if you look at the
20 relevant part --

21 JUSTICE KAGAN: So do you think that
22 that should be the rule? Yeah, you don't have
23 to have a declaratory judgment, but -- but the
24 only thing that the Hobbs Act is talking about
25 is challenging -- challenges to agency rulings

1 with the force of law, that the Hobbs Act just
2 excludes anything that doesn't have the force of
3 law?

4 MR. PALMORE: I think that's -- that
5 that's right. So the SG cites in their brief a
6 Seventh Circuit decision called the American
7 Trucking case, which was a ICC report where the
8 ICC was just kind of opining on some things.

9 And the -- what the Seventh Circuit
10 said was that's not a Hobbs Act reviewable order
11 because it has no legal consequences, it doesn't
12 determine rights or obligations, so it's not a
13 Hobbs Act order, so then there would be no
14 preclusion at all.

15 JUSTICE KAGAN: So -- but then --

16 JUSTICE KAVANAUGH: Can you --

17 JUSTICE KAGAN: -- I take it that
18 you're actually agreeing with Mr. Wessler more
19 than I maybe thought you were but disagreeing
20 just as to what this ruling does and what it is.
21 In other words, you're saying, yeah, we too
22 agree that if you're talking in the land of
23 interpretations, you're outside the Hobbs Act.
24 But you think that if -- if we limit the Hobbs
25 Act coverage to rulings with the force of law,

1 you think you're in. Mr. Wessler thinks you're
2 out.

3 MR. PALMORE: I want to be careful in
4 how I answer this. So "interpretation" is being
5 used in multiple different ways here. Of
6 course, agencies always are interpreting
7 statutes, including when they issue legislative
8 rules. They -- they are creatures of -- of
9 statute, and they --

10 JUSTICE KAGAN: Yeah, but we know what
11 binding decisions are and what they're not.

12 MR. PALMORE: Right.

13 JUSTICE KAGAN: And I take Mr. Wessler
14 to be essentially saying there is -- that the --
15 the -- the decision that you're challenging is
16 not binding on you, and that's at least one
17 reason why you don't have a good argument under
18 the Hobbs Act.

19 MR. PALMORE: So a couple points,
20 Justice Kagan. We think an order is either in
21 under the Hobbs Act or it's out. It's either
22 reviewable under the Hobbs Act or it's not
23 reviewable, and then this exclusivity discussion
24 we're having is inapplicable. They've conceded
25 in, you know, Footnote 2 of their reply brief

1 that this is a final order reviewable under the
2 Hobbs Act.

3 So our point is there may be some
4 things agencies do that have absolutely no legal
5 consequences that are not reviewable under the
6 Hobbs Act at all, and then we wouldn't be having
7 this discussion.

8 There's no middle category, though --
9 and this is a point I want to emphasize -- of
10 orders that are somehow reviewable under the
11 Hobbs Act, they're final and legally
12 consequential enough to be reviewable under the
13 Hobbs Act but don't trigger this kind of
14 exclusivity.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas?

18 JUSTICE THOMAS: I'm going to try one
19 more time. You mentioned Yakus. Yakus was a
20 criminal trial. They were indicted for
21 violating one of the stabilization laws. And
22 the district court refused to admit evidence,
23 their arguments, to allow their arguments that
24 the ruling of the Board or Commission was
25 improper.

1 What if the judge, the district judge,
2 said that it's ridiculous, it's the worst thing
3 I've ever seen? You find nothing wrong with
4 that even in the criminal context?

5 MR. PALMORE: Well, I don't think the
6 court -- of course, this is not a criminal case,
7 and -- and --

8 JUSTICE THOMAS: No. Well -- but
9 you're relying on Yakus.

10 MR. PALMORE: Well, there's a due
11 process holding in Yakus that is as you
12 described.

13 We don't need to rely on the full
14 extent of that Yakus due process holding. We're
15 the defendant. We're the ones wielding an
16 agency order that says that what we did did not
17 violate the statute. And the other side is
18 trying to impose liability on us.

19 So the situation is -- is flipped.
20 The due process concerns -- and I completely
21 understand them, and Justice Rutledge wrote
22 about them at length, although he tethered his
23 discussion to the criminal context. Those --
24 none of those issues is -- is applicable here.

25 CHIEF JUSTICE ROBERTS: Justice Alito?

1 JUSTICE SOTOMAYOR: The problem with
2 the other side's argument is that unlike Corner
3 Post, where the new entity went and -- as it has
4 a right to do, to challenge the order completely
5 by -- they could do a petition for
6 reconsideration, correct, before the Commission?

7 MR. PALMORE: Yes, Your Honor.

8 JUSTICE SOTOMAYOR: They can file a
9 petition for a declaratory judgment in a circuit
10 court, correct?

11 MR. PALMORE: A declaratory ruling at
12 the agency, right.

13 JUSTICE SOTOMAYOR: Yeah.

14 MR. PALMORE: And then they could get
15 Hobbs Act review of that.

16 JUSTICE SOTOMAYOR: Exactly.

17 MR. PALMORE: Yes.

18 JUSTICE SOTOMAYOR: So now we -- if we
19 don't do something like this, people can just
20 ignore agency final orders because they can't
21 be -- if they think they got a good argument,
22 they might as well just go ahead and do it
23 and -- because the agency ruling will have no
24 effect on them.

25 MR. PALMORE: I -- I think that's

1 right. And the Hobbs Act is somewhat unique, as
2 this Court in Corner Post described it. It's
3 unique in having the marrying of "exclusive" and
4 "determine the validity." And Congress really
5 wanted finality in this situation.

6 And, again, in a case like this one,
7 where the party has conceded that it could have
8 sought judicial review and it said that was a
9 reason why this was a good cert vehicle, their
10 position would basically turn Hobbs Act
11 exclusive review into an option. A party could
12 decide to do it, or they could decide to kind of
13 hang back and wait and see if it mattered to
14 them down the road.

15 JUSTICE SOTOMAYOR: Until somebody
16 sued them, the government or --

17 MR. PALMORE: Correct.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?
19 Justice Gorsuch?

20 JUSTICE KAVANAUGH: Just one question
21 in response to Justice Kagan.

22 Force of law, do you think that -- or
23 what do you think that means?

24 MR. PALMORE: I -- the best I can do,
25 Justice Kavanaugh, is use this Court's words. I

1 mean, it -- does it -- does it determine legal
2 consequences, or do -- I'm sorry, determine
3 rights or obligations, or do legal consequences
4 flow from it?

5 So that's what this Court in Port of
6 Boston said when the same kind of argument was
7 made, well, this isn't a coercive order. And,
8 of course, that became the -- kind of the
9 formulation in Bennett versus Spear --

10 JUSTICE KAVANAUGH: There's a lot of
11 debate --

12 MR. PALMORE: -- down the road.

13 JUSTICE KAVANAUGH: -- a lot of debate
14 in application about particular things, whether
15 they have the force of law, isn't there?

16 MR. PALMORE: Well, perhaps, but I
17 think the FCC declaratory orders are quite
18 common. They're done through notice-and-comment
19 rulemaking. They have, for decades, resulted in
20 Hobbs Act review. This Court's decision --

21 JUSTICE KAVANAUGH: Yeah.

22 MR. PALMORE: -- in City of Arlington
23 was a declaratory ruling.

24 JUSTICE KAVANAUGH: That's one.

25 MR. PALMORE: So they -- agencies can

1 and do kind of broadly applicable things through
2 this font of their authority.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett?

6 Justice Jackson?

7 JUSTICE JACKSON: Was the character of
8 this order as interpretive or otherwise
9 addressed by the lower court?

10 MR. PALMORE: It was -- yes, this
11 issue was joined. And the -- the Ninth Circuit
12 held it was an adjudication. It did not hold
13 that it was an interpretive rule. It said this
14 is an adjudication. And that was actually
15 critical --

16 JUSTICE JACKSON: Well, I thought
17 the -- I thought legislative versus interpretive
18 was the fault line, that you -- you --

19 MR. PALMORE: So -- so there's
20 legislative and interpretive, is kind of over
21 here.

22 JUSTICE JACKSON: Yeah.

23 MR. PALMORE: And then there's
24 adjudication over here.

25 And what the Ninth Circuit said was

1 this is an adjudication.

2 And that was critical to one of its
3 holdings, which was that it applied
4 retroactively because that's what adjudications
5 do. And so that -- that was the holding below,
6 that this was an adjudication, not that it was
7 an interpretive rule.

8 And the -- and the Petitioners never
9 explained in the cert petition or anywhere else
10 why the Ninth Circuit was wrong in what it said,
11 other than to say: Well, this was an
12 adjudicatory order kind of interpreting the
13 statute. But that's a different use of the word
14 "interpretive" because agencies always interpret
15 statutes.

16 JUSTICE JACKSON: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Guarnieri.

20 ORAL ARGUMENT OF MATTHEW GUARNIERI,
21 FOR THE UNITED STATES, AS AMICUS CURIAE,
22 SUPPORTING THE RESPONDENTS

23 MR. GUARNIERI: Mr. Chief Justice, and
24 may it please the Court:

25 The Hobbs Act precludes collateral

1 attacks on covered agency actions in district
2 court even in suits between private parties.
3 The Act does so by conferring exclusive
4 jurisdiction on the courts of appeals to
5 determine the validity of covered agency
6 actions.

7 Now Petitioner contends, as you've
8 heard this morning, that determining the
9 validity of an order refers only to entering a
10 declaratory judgment finding that the order is
11 valid or invalid.

12 That reading of the Act is
13 inconsistent with its plain language, purpose,
14 and history, and with this Court's precedent,
15 particularly the -- the Port of Boston case,
16 which we refer to as Transatlantic, which I
17 still don't think Petitioner has provided an
18 adequate explanation for.

19 If you accept Petitioner's view, that
20 would mean that a regulated party could obtain a
21 final order from the FCC determining that some
22 particular course of conduct does not violate
23 the TCPA. That order could be upheld on direct
24 review by the court of appeals under the Hobbs
25 Act procedures, and a private plaintiff could

1 nonetheless go into district court, sue the
2 regulated party, and ask the district court to
3 disregard the agency's order and impose
4 liability.

5 That is not how the Hobbs Act has ever
6 been understood to work, and we ask this Court
7 to reject that interpretation.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Does that take you as
10 far as the Court in *Yakus*?

11 MR. GUARNIERI: I -- I think, at least
12 with respect to the statutory interpretation
13 piece of this, yes. And that's no accident.
14 Congress was clearly drawing on the language
15 that this Court interpreted in *Yakus*.

16 The Emergency Price Control Act
17 conferred on a special emergency court exclusive
18 jurisdiction to determine the validity of price
19 control regulations, and Congress took that
20 language, which -- which was, I think, unique at
21 the time in the Emergency Control Act. Congress
22 took it and brought it into the Hobbs Act in
23 order to accomplish the same purpose that this
24 Court construed the Emergency Price Control Act
25 to have in the *Yakus* decision.

1 JUSTICE GORSUCH: If you take the
2 Hobbs Act to go as far as Yakus -- I mean,
3 that's an extraordinary thing. I mean, Yakus is
4 not a case people usually want to rely on
5 outside the wartime context.

6 But, if that's as far as the Hobbs Act
7 goes, if it goes that far, aren't we going to
8 have real due process questions? I mean,
9 Justice Rutledge raised them. Justice Powell
10 raised them years later in -- what was that?

11 JUSTICE BARRETT: Do you know the
12 reference?

13 JUSTICE GORSUCH: In one of them.
14 Yeah. You know which one I'm talking about.

15 MR. GUARNIERI: I do, Your Honor.

16 JUSTICE GORSUCH: Let's see. I can
17 even find it for you.

18 MR. GUARNIERI: Adamo, right?

19 JUSTICE GORSUCH: Adamo or --
20 whatever. However you pronounce it. Adamo.
21 Yeah.

22 Do you really want us to start a -- a
23 Fourteenth Amendment jurisprudence about this?

24 MR. GUARNIERI: Well, I don't think
25 that you -- that -- that there are going to be

1 cognizable due process claims in the mine-run of
2 applications of the Hobbs Act.

3 The Due Process Clause of the
4 Fourteenth Amendment does not create any kind of
5 freestanding entitlement to get judicial review
6 of agency action in any court at any time that
7 the plaintiff chooses.

8 JUSTICE GORSUCH: Well, I -- I think
9 it does generally --

10 MR. GUARNIERI: Congress --

11 JUSTICE GORSUCH: -- I think it does
12 generally say: When Congress chooses to invest
13 courts with jurisdiction, as a rule, judges
14 interpret the law and they have a duty to do so
15 independently and -- and not to automatically
16 and reflexively have to adopt interpretations
17 that the executive branch chooses and prescribes
18 for them. Right?

19 MR. GUARNIERI: I -- I think, Justice
20 Gorsuch, that might be a little bit different
21 than the due process concern that my friend has
22 articulated. That's more --

23 JUSTICE GORSUCH: It's -- it's one I
24 have --

25 MR. GUARNIERI: -- in the nature or

1 line of an Article III --

2 JUSTICE GORSUCH: -- so why don't you
3 address it.

4 MR. GUARNIERI: Sure. So I think, if
5 you're thinking about the way the Hobbs Act
6 generally -- the way Congress envisioned this
7 would work, you would get judicial review in the
8 court of appeals under the Hobbs Act, and it
9 would be that application of Article III
10 authority that would then be binding in the
11 sense --

12 JUSTICE GORSUCH: I understand that,
13 but --

14 MR. GUARNIERI: -- that a district
15 court would be --

16 JUSTICE GORSUCH: -- but somebody --
17 some -- the fact that one person gets judicial
18 review under the Hobbs Act and makes whatever
19 arguments in our adversarial system that they
20 choose, and then another party, years later
21 potentially, with very different arguments and
22 different facts, it wasn't around, and you're
23 telling me due process has nothing to say about
24 whether that individual gets to have a judge
25 decide his case?

1 MR. GUARNIERI: Well, again, I think
2 Congress was talking here about which court gets
3 to do that. It's the Hobbs Act court that gets
4 to exercise Article III authority to determine
5 the validity of the agency's covered action.

6 JUSTICE GORSUCH: I understand that.
7 And I'm asking you on the due process question.
8 You don't think that raises any due process
9 questions?

10 MR. GUARNIERI: No, I don't think that
11 you would have a viable due process argument if
12 your contention is that you are -- are not
13 entitled to challenge the validity of the
14 agency's order in an enforcement action.

15 I think you can also get there -- I
16 mean, Section 703, I think, confirms that.
17 Section 703 of the APA is the provision that
18 recognizes that Congress can provide for an
19 exclusive review scheme. And there are
20 circumstances in which, when Congress does that,
21 parties are not entitled to judicial review of
22 the agency's action in the enforcement
23 proceeding.

24 JUSTICE GORSUCH: So Justice Rutledge
25 was wrong --

1 MR. GUARNIERI: I think that would
2 be --

3 JUSTICE GORSUCH: -- and Justice
4 Powell were wrong to be worried about those
5 concerns?

6 MR. GUARNIERI: No, of course not, but
7 I -- you know, I think they were focused on
8 aspects of the Emergency Price Control Act that
9 aren't necessarily replicated in the Hobbs Act.

10 The other thing that I would -- I
11 would point out for the -- I mean, this is a --
12 it is the plaintiff here, the plaintiff in the
13 private TCPA action, who is seeking to avoid the
14 application of an FCC order or an order by a
15 component bureau of the FCC. And I think the
16 due process concerns are particularly weak --
17 weak in that context.

18 JUSTICE GORSUCH: Yes, but you're
19 asking --

20 MR. GUARNIERI: I mean, at least in
21 the Yakus --

22 JUSTICE GORSUCH: -- us to draw a much
23 broader rule based on Yakus, and so we have to
24 consider where that leads and -- anyway, I --
25 I've taken up enough of your time.

1 JUSTICE KAGAN: Mr. Guarnieri, in your
2 brief, you say the term "validity" refers in
3 this context to having legal strength, force, or
4 authority -- that's one -- or to being grounded
5 in sound principles.

6 So suppose I agree with the first half
7 of that, that "validity" does refer in this
8 context to having legal force, but that I don't
9 agree with the second half, that it just refers
10 to is the ruling grounded in sound principles,
11 that what we're talking about here under the
12 Hobbs Act is a challenge to the -- the legal
13 effect of an agency order, not the sort of hazy
14 challenge to, like, do I have sound -- did the
15 agency have sound principles?

16 So what would it mean if I took your
17 definition and chopped it in half and said I
18 only agree with the first part, that the Hobbs
19 Act covers that?

20 MR. GUARNIERI: Sure. Justice Kagan,
21 if I'm understanding your question, I think this
22 goes back to some of the issues you -- you may
23 have been discussing with -- with my friends
24 earlier about, you know, what do we do with this
25 declaratory order and what do you do if you

1 think, you know, some particular agency action
2 is not meant to have legal force or effect at
3 all?

4 I agree with the way that Mr. Palmore
5 put it. The Hobbs Act in Section 2342 both
6 specifies the things that are reviewable under
7 the Hobbs Act and provides that that
8 jurisdiction is exclusive and no district court
9 here may determine the validity of the covered
10 agency actions.

11 Now, if you do that analysis and you
12 determine that some particular agency action
13 actually has no legal force or effect and is not
14 the kind of thing specified in the Hobbs Act as
15 an agency action for which you could get direct
16 review in the court of appeals, then you're just
17 out. There is -- the -- the -- you -- the
18 exclusivity provision does not come into play
19 because that agency action --

20 JUSTICE KAGAN: So what do you think
21 is just out? What category of rulings is just
22 out?

23 MR. GUARNIERI: I think there are some
24 things agencies do that are -- would constitute
25 interpretive rules as that -- in the technical

1 meaning of that sense under the APA that have no
2 legal force or effect. We cite a case involving
3 a report issued by the ICC. The FCC commonly
4 issues reports both to the public and to
5 Congress. Those things don't have legal force
6 or effect. They wouldn't satisfy the test for
7 finality.

8 JUSTICE KAGAN: So what I understand
9 Mr. Wessler --

10 MR. GUARNIERI: Yeah.

11 JUSTICE KAGAN: -- to be saying -- and
12 he'll correct me if I'm wrong -- is, in this
13 case, notwithstanding that there's an
14 adjudication, it was not an adjudication binding
15 on the parties here.

16 MR. GUARNIERI: I -- I'm not actually
17 sure what Mr. Wessler would say about that. I
18 think he has tried to characterize this as an
19 interpretive rule, which is simply incorrect.
20 The FCC understands declaratory orders to
21 have -- they are legally binding orders issued
22 by the agency after adjudication.

23 Here, the agency put this out for
24 public -- it -- it gave notice. It solicited
25 public comment on this. Declaratory orders

1 under the APA, under 5 U.S.C. 554(e), have like
2 effect as other agency orders. These are not
3 the same thing as an informal guidance document
4 that the agency might issue to advise the public
5 of its understanding of some preexisting
6 statutory obligation. I mean --

7 JUSTICE KAGAN: Thank you.

8 MR. GUARNIERI: -- these are -- this
9 is a real agency order.

10 JUSTICE JACKSON: Can I understand a
11 little bit more, though? I mean, you said,
12 if -- if the agency act has no legal force or
13 effect, then you're just outside the Hobbs Act.
14 So that, in your view, would allow the district
15 court to consider it in the context of an
16 enforcement action, is that right?

17 MR. GUARNIERI: Yes, Justice Jackson.

18 JUSTICE JACKSON: But doesn't that
19 seem odd when the language in the exclusive
20 jurisdiction provision says that the court of
21 appeals determines the validity? It seems
22 counterintuitive that you would have the
23 district court determining whether or not this
24 has a legal force and effect and, therefore, the
25 Hobbs Act applies at all when that goes to

1 validity, even your brief suggested it, and yet
2 we have the language in the statute that says
3 the validity is supposed to be interpreted -- or
4 determined by the court of appeals.

5 MR. GUARNIERI: Well, Justice Jackson,
6 the statute says that the court of appeals shall
7 have exclusive jurisdiction to determine the
8 validity of, and it's followed by an enumerated
9 list, and the enumerated list specifies various
10 statute -- statutory authorities exercised by
11 agencies like the FCC.

12 And I -- I don't think it would
13 violate the exclusivity provision for a district
14 court to determine that something the FCC has
15 done in a particular case is not, for example, a
16 final order made reviewable under Section 402(a)
17 of the Communications Act. If the district
18 court decides that, then the district court has
19 effectively decided that this is not the kind of
20 thing the Hobbs Act covers at all.

21 The other point that I would make on
22 this if -- if I may --

23 CHIEF JUSTICE ROBERTS: Sure.

24 MR. GUARNIERI: -- is simply that it
25 is open to regulated parties to argue that the

1 FCC has done something by declaratory order that
2 it could only have permissibly done by
3 notice-and-comment rulemaking.

4 But that is the kind of challenge that
5 must be brought within the Hobbs Act framework
6 itself. You could present that argument to the
7 court of appeals. And we've seen cases like
8 that.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas?

12 Justice Alito?

13 JUSTICE ALITO: Let me just ask you
14 another question about Port of Boston.

15 Why can't Port of Boston be read to
16 mean that when a litigant is an actual party to
17 an adjudicatory proceeding and that proceeding
18 produces an order regarding the rights of that
19 specific party, the party must seek review
20 through the Hobbs Act and not by waiting for an
21 enforcement action? Why can't Port of Boston be
22 interpreted that way?

23 MR. GUARNIERI: That is not the
24 rationale that this Court gave for its decision
25 in Port of Boston. The Court squarely rested on

1 the exclusivity language in the Hobbs Act.
2 There was a factual dispute there about whether
3 the shipper, Transatlantic, had been represented
4 in the agency proceedings through its agent,
5 which was a -- the agent was a member of the
6 shipping association which was a party to the
7 agency proceeding. This Court said, even if you
8 were not a formal party to the proceeding, your
9 interests were at stake and you had an
10 opportunity to participate and you did not.

11 So I don't think the reasoning of the
12 decision can be squared with my friend's
13 suggestion that you could write that off as a
14 case about -- you know, an instance in which a
15 party is actually bound by the agency
16 adjudication in the sense of sort of preclusion
17 principles.

18 JUSTICE ALITO: Did the Court in Port
19 of Boston grapple with all the considerations
20 that were laid out in Justice Kavanaugh's
21 concurring opinion in PDR?

22 MR. GUARNIERI: No, Justice Alito. I
23 mean, I will grant you that the -- the analysis
24 in Transatlantic or Port of Boston doesn't seem
25 as troubled by some of the -- the analysis set

1 forth in -- in Justice Kavanaugh's concurring
2 opinion in PDR Network.

3 But the issue was squarely presented
4 there, and the Court had no difficulty
5 determining that the suit at issue in that case
6 was in -- in effect an effort to get a
7 collateral redetermination of something that had
8 already been settled by the Federal Maritime
9 Commission and for which review under the Hobbs
10 Act was the exclusive mechanism for -- for
11 determining the validity of that agency action.

12 I don't think you have to rest -- I
13 think Port of Boston is a -- a -- a strong card
14 for us, but I don't think you have to rest
15 exclusively on that decision either. I mean,
16 this goes back to cases like Venner and Lambert
17 Run Coal Company. There are numerous decisions
18 of this Court decided under the predecessor
19 scheme, the Urgent Deficiencies Act, that
20 likewise rejected efforts to get a kind of
21 collateral attack on the agency's order and in
22 suits in which no party was requesting
23 declaratory relief against that order.

24 So I don't think -- in addition to --
25 to Transatlantic, there are -- there are other

1 pre-Hobbs Act precedents that just can't be
2 squared with my friend's understanding of how
3 this statute should -- works.

4 JUSTICE ALITO: Well, let me take
5 you -- ask one final question about Yakus. And
6 I don't know how big the defendants in Yakus
7 were, but let's suppose they were -- you know,
8 this was some mom-and-pop operation that was
9 subject to the price controls that were in
10 effect during World War II, and it was really
11 quite unlikely that an entity in that position
12 was going to be following all the details of
13 what was being -- of what was being done in
14 wartime regulations. So they just were unaware
15 of what was happening, and then they find
16 themselves in court being criminally prosecuted
17 for violating the price controls.

18 Would you say there's not a due
19 process concern there?

20 MR. GUARNIERI: I think the holding of
21 Yakus is that there was no due process violation
22 in that application of the statute, even in the
23 context of a criminal prosecution. Obviously,
24 we are one step removed from that here. This is
25 a civil enforcement action, not a criminal

1 prosecution.

2 Now I will say my -- the Respondent in
3 this case has suggested that today, if a similar
4 issue arose, you have Section 703 as a safety
5 valve. Now, in PDR Network, we took the
6 position that in Section 703, when the statute
7 refers to an adequate prior opportunity for
8 review under one of these exclusive schemes,
9 adequacy was supposed to be judged at a level of
10 generality. The question is whether the
11 statutory scheme provided an adequate
12 opportunity to reg -- the regulated community in
13 general, not the specific party in that case.

14 We haven't had occasion to revisit
15 that position here because Petitioner has asked
16 the Court to decide this case on the premise
17 that Petitioner already had a prior and adequate
18 opportunity to seek review under the Hobbs Act.

19 But what I want to stress is, if you
20 disagree with us about how to read the adequacy
21 language in Section 703, I mean, that could be
22 something the Court could address in an
23 appropriate future case. It is not a reason to
24 adopt Petitioner's understanding of the Hobbs
25 Act.

1 JUSTICE ALITO: All right. Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor?

4 Justice Kagan?

5 Justice Gorsuch?

6 JUSTICE GORSUCH: Just one quick
7 question about Port of Boston. You -- you
8 emphasized that -- that Transatlantic there
9 wasn't a party to the administrative
10 proceedings, right?

11 MR. GUARNIERI: Yes, although I think
12 there was a factual dispute in that case about
13 the extent to which it should be --

14 JUSTICE GORSUCH: Right. Didn't the
15 Court expressly rely on the fact that
16 Transatlantic had been represented before the
17 Commission?

18 MR. GUARNIERI: No, Your Honor. I
19 think, if you look at the final paragraph of --

20 JUSTICE GORSUCH: "It was, in fact,
21 represented before the Commission and has
22 previously made numerous claims to party status.
23 In the petition for reconsideration filed with
24 the Commission, it asserted that it had been
25 represented in the administrative evidentiary

1 proceeding through its agent."

2 MR. GUARNIERI: Yes, Justice Gorsuch,
3 but I think --

4 JUSTICE GORSUCH: That's part of the
5 holding of the Court, right?

6 MR. GUARNIERI: -- if you -- I -- I
7 entirely agree. The -- the Court was engaging
8 in two alternative analyses, alternative
9 holdings. I think I heard Mr. Palmore use that
10 phrase earlier.

11 I -- I entirely agree with you that
12 the Court was saying that Transatlantic was
13 trying to have it both ways. They had claimed
14 party status before.

15 JUSTICE GORSUCH: Right.

16 MR. GUARNIERI: Now they were
17 disclaiming it.

18 If you look at the next paragraph --

19 JUSTICE GORSUCH: I'm looking at it.

20 MR. GUARNIERI: -- where it is
21 continued --

22 JUSTICE GORSUCH: Yeah.

23 MR. GUARNIERI: -- there is a clause
24 that says: "Even if Transatlantic was not a
25 formal party" --

1 JUSTICE GORSUCH: Yeah. It does say
2 that.

3 MR. GUARNIERI: -- "the exclusivity
4 analysis applies the same way."

5 JUSTICE GORSUCH: It -- it says that
6 because it had every opportunity to participate
7 before the Commission and not in the abstract,
8 in the sense that it did, and just discussed in
9 the prior paragraph.

10 It's not that somebody could have come
11 in. It's that these people did come in. It
12 was -- that was bound up in the Court's
13 analysis, wasn't it?

14 MR. GUARNIERI: Yeah, I think we would
15 say the same thing about a party in McLaughlin's
16 shoes. McLaughlin had every opportunity to
17 participate in the agency proceedings and chose
18 not to. And I think the analysis would look the
19 same way.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh?

22 Justice Barrett?

23 Justice Jackson? No?

24 Thank you, counsel.

25 Rebuttal, Mr. Wessler.

1 REBUTTAL ARGUMENT OF MATTHEW W.H. WESSLER
2 ON BEHALF OF THE PETITIONER

3 MR. WESSLER: Thank you. Just a -- a
4 few brief points in rebuttal.

5 The Hobbs Act's grant of exclusive
6 jurisdiction simply means that a district court
7 may not entertain a petition for review of an
8 agency action subject to the Act.

9 Nobody questions that the Hobbs Act's
10 grant of that kind of jurisdiction is designed
11 to create a streamlined process for funneling
12 pre-enforcement facial challenges to agency
13 actions into the courts of appeals.

14 And, of course, no matter how the
15 Court resolves this case, those challenges will
16 continue. But I think what's at issue here is
17 really whether the Hobbs Act -- the text of that
18 statute, this Court ought to read it in a way
19 that expands and extends the sweep of the Hobbs
20 Act to cover any opportunity a district court
21 might have in a garden-variety civil litigation
22 case to even consider or evaluate the reasoning
23 of an agency interpretation.

24 I think that can't be right, as we've
25 explained, based on both text, structure, and

1 history of the statute.

2 I think, to your point, Justice Alito,
3 yes, Port of Boston, I think distinctly
4 different from what we've got going on here
5 because it involved parties who, Justice
6 Gorsuch, as you noted, were themselves directly
7 involved in the agency proceeding.

8 That isn't the kind of proceeding that
9 we have here, in which the FCC has issued a
10 declaratory order that only one party sought.
11 So, in -- so, in this case, you have
12 Amerifactors, a company seeking a declaratory
13 order. There are no other parties, nor could
14 there be for purposes of this agency action.

15 I think that's significant because the
16 only opportunity that a party in the plaintiff's
17 shoes in this case would have should they -- had
18 they wanted to try to challenge that
19 interpretation, would be to do what another
20 party did, which is to file a petition for
21 reconsideration in front of the agency.

22 That is an empty promise of judicial
23 review, as, Justice Gorsuch -- as, Justice
24 Kavanaugh, you pointed out in your concurrence
25 in PDR Network, because that petition for

1 reconsideration of the FCC's Amerifactors order
2 has been pending for more than five years.

3 I think what you heard from my friends
4 on the other side was perhaps a backing away of
5 a view that the Hobbs Act covers interpretive
6 orders along with legislative orders.

7 If that's correct, it would require
8 reversal here because the Ninth Circuit's rule
9 from which we have taken an appeal is that the
10 Hobbs Act covers both interpretive and
11 legislative orders.

12 I note that the government on page 31
13 of its brief defends that proposition. Despite
14 what you heard today, it has taken the position
15 that there is no exception under the Hobbs Act
16 for interpretive rules. It covers both kinds of
17 rules.

18 And adjudication can still be an
19 interpretive rule, as courts have routinely
20 held. Adjudications are simply an alternative
21 path to a regulation or a rule-making that an
22 agency can take, but it does not affect a
23 distinction between agency action that carries
24 the force of law versus agency action that does
25 not.

1 And I will just point out that in PDR
2 Network, there, the FCC issued a rule through
3 notice and comment, but on -- on remand, the
4 Fourth Circuit held that it was interpretive and
5 therefore not subject to the FCC.

6 This Court should make clear once and
7 for all that the Hobbs Act does not require a
8 district court to follow an agency's interpret
9 of a -- interpretation of a statute, no matter
10 how wrong.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 The case is submitted.

15 (Whereupon, at 12:32 p.m., the case
16 was submitted.)

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