No. 17-1705

IN THE

Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,
Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,
Respondent.

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

PETITIONERS' REPLY

JEFFREY N. ROSENTHAL
BLANK ROME LLP
130 N. 18th Street
Philadelphia, PA 19103
(215) 569-5553

ANA TAGVORYAN
BLANK ROME LLP
2029 Century Park East
6th Floor
Los Angeles, CA 90067
(424) 239-3400

CARTER G. PHILLIPS *
KWAKU A. AKOWUAH
DANIEL J. FEITH
KURT A. JOHNSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioners

* Counsel of Record

March 11, 2019

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INTRODUCTION

As the decision below recognized, there is "nothing unique" about the Hobbs Act. Pet. App. 8a. Like many agency review provisions, it establishes a "special statutory review proceeding" that allows parties to directly challenge agency action and obtain injunctive or declaratory relief against the government. 5 U.S.C. § 703. Such statutes are common in administrative law and, as the Government concedes, "ordinarily" preserve the right of defendants in enforcement proceedings to judicial review of agency actions in that setting, where their liberty or property rights are at risk. Govt. 24. Yet Respondent and the Government argue that the Hobbs Act strips defendants of this right by requiring enforcement courts to slavishly apply legal interpretations announced in covered agency orders. Nothing in the Hobbs Act compels that disturbing and anomalous result.

First, the text of the Hobbs Act does not support it. Respondent and the Government's position depends on reading the phrase "exclusive jurisdiction ... to determine the validity" in isolation, without regard to the surrounding text, other provisions of the Hobbs Act, or background principles of administrative law. All those sources support the same conclusion: the Act does not preclude judicial review of agency legal interpretations when enforcement actions are brought in district court. Congress knows how to expressly strip enforcement courts of jurisdiction to consider legal questions, *e.g.*, 33 U.S.C. § 1369(b)(2), and did not use such language in the Hobbs Act.

Second, Section 703 of the Administrative Procedure Act ("APA") entitles PDR to judicial review in this case because the Hobbs Act provided no opportunity for re-

view that was both prior and adequate. In arguing otherwise, the Government asserts a startlingly punitive view of adequacy, under which the 60-day window to obtain direct review of a generally applicable regulation is deemed adequate for *all* parties, even those that lacked standing to sue at the time. But obviously, parties that lack standing do not have *any* opportunity to sue—let alone an "adequate" one. In junk fax class action litigation, and other settings, the Government's position would deprive countless defendants of the opportunity to obtain a judicial determination of what the statute at the heart of their case means.

Finally, Respondent and the Government ignore the unsettling implications of their estoppel-on-steroids position—including the grave constitutional concerns it would raise. One such implication is that their jurisdiction-stripping arguments apply equally to a host of other statutes that likewise create an exclusive proceeding for direct review of agency action. If the FCC gets its wish, other agencies will line up to seek the same insulation from judicial review for their own legal interpretations. But properly construed, the Hobbs Act and other like statutes permit defendants facing ruinous liability to assert the basic litigation defense that they did not violate the law.

I. THE HOBBS ACT DOES NOT PRECLUDE TCPA DEFENDANTS FROM OBTAINING JUDICIAL REVIEW OF FCC LEGAL INTERPRETATIONS.

The Government attempts to recast this case as addressing "whether a litigant in a private district-court lawsuit may collaterally attack the validity of [an order] that could have been challenged under the Hobbs Act when it was issued." Govt. 1. But the question presented is far narrower. It asks only whether the Hobbs

Act strips district courts in TCPA proceedings of jurisdiction to consider a defendant's argument that the law, properly construed, did not prohibit its conduct—let alone create exposure to massive class-action damages.

As PDR's opening brief demonstrated, the text and context of the Hobbs Act and Section 703 show that the Hobbs Act does no such thing. Respondent's and the Government's contrary arguments are unpersuasive.

A. Text and Context Require Construing the Hobbs Act More Narrowly than Respondent and the Government's Reading.

The phrase at the heart of this case—"determine the validity"—appears twice in the Hobbs Act. The Government concedes that, in § 2349(a), a judgment "determining the validity" of an order refers to a specific "type[] of relief," Govt. 21-22, but contends "determine the validity" has a different meaning in § 2342. There, it supposedly refers to authority "to settle a question or controversy about [an order's] validity," without regard to any specific form of judicial relief. Govt. 11 (internal quotation marks omitted). That is wrong.

1. The Government construes "determine the validity" based solely on dictionary definitions of each word. Govt. 11-12. It then seeks to brush aside PDR's argument that context suggests a narrower definition, by asserting that the phrase is "unambiguous[]." Govt. 20. "Whether a statutory term is unambiguous," however, "does not turn solely on dictionary definitions of its component words." *Yates v. United States*, 135 S. Ct. 1074, 1081 (2015) (plurality opinion). "[S]tatutory language must be read in context since a phrase gathers meaning from the words around it." *Gen. Dynamics Land Sys., Inc. v. Cline,* 540 U.S. 581, 596 (2004) (alterations and internal quotation marks omitted).

Here, every contextual clue supports PDR's position. The Government concedes that § 2349 uses "determining the validity" to "specif[y] the type[] of relief that a court may enter." Govt. 22. The natural inference is that the phrase "determine the validity" has the same import in § 2342, because 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) (internal quotation marks omitted).

The Government attempts to circumvent this interpretive rule by contending that § 2349(a) describes the "judicial relief that the Hobbs Act *authorizes*," while § 2342 defines the judicial action the Act "*forecloses*." Govt. 21-22. Both provisions, however, are phrased as affirmative grants of authority; neither expressly forecloses anything. Moreover, the contention that § 2349(a) *authorizes* judicial actions while § 2342 *forecloses* them sheds no light on whether the judicial actions discussed in the two provisions are the same or different. Again, because Congress used the same phrase twice, the "normal" interpretation is that Congress meant in both places to refer to the same actions. *Gustafson*, 513 U.S. at 570.

The Government also stresses that § 2342 "does not contain the word 'judgment,'" Govt. 22, but never explains why that difference matters. If the word's absence in § 2342 affected the meaning of "determine the validity," it would also affect the meaning of the remaining verbs listed in the string. The Government, however, never explains how the presence or absence of "judgment" would, for example, affect the understanding of "enjoin," and no answer is apparent. In both provisions, "enjoin" refers to injunctive relief that may issue as part of a judgment.

The Government likewise makes no effort to connect its construction of "determine the validity" to the adjoining terms "enjoin," "set aside," and "suspend." 28 U.S.C. § 2342. In *Direct Marketing Association v. Brohl*, this Court recognized that the words "'enjoin' and 'suspend' are terms of art in equity" that "refer to different equitable remedies that restrict or stop official action to varying degrees." 135 S. Ct. 1124, 1132 (2015). The Court thus construed the adjacent term "restrain" in the Tax Injunction Act—which provides that district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law," 28 U.S.C. § 1341—to also refer to equitable relief, rejecting the broader dictionary-based construction adopted by the lower court that "restrain" means any action that might have a "negative impact" on State tax collection. 135 S. Ct. at 1132-33. The same logic applies here. Just as "enjoin," "suspend," and "set aside" denote specific remedies available in administrative litigation, "determine the validity" likewise denotes a remedy available against an agency—declaratory relief.

Finally, the Government's expansive reading of "determine the validity" conflicts with the interpretive "duty to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted). The Government reads "determine the validity" to refer to any determination of whether an agency's action is "sound," "good," or "legally sufficient or efficacious." Govt. 12. If that were correct, the terms "enjoin," "set aside," and "suspend" in § 2342 would be superfluous because a court could not "enjoin" or "suspend" an agency action without finding that it is *not* "sound" or "good."

PDR's construction avoids such surplusage. "Enjoin," "set aside," and "suspend" each refer to a different type of injunctive relief, and "determine the validity" correspondingly refers to declaratory relief.

2. History also refutes the Government's position. The Government asserts that the phrase "determine the validity" was "obviously transplanted" from the Emergency Price Control Act (EPCA), which this Court had interpreted to give "clear indication" of a congressional intent to preclude district courts from considering the validity of war-time price regulations as a defense in civil and criminal enforcement actions. *Yakus v. United States*, 321 U.S. 414, 429-31 (1944); *see also Woods v. Hills*, 334 U.S. 210, 213-14 (1948). By supposedly taking this language from the EPCA, the Government contends, Congress "br[ought] the old soil with it," imparting to the Hobbs Act the same preclusive effect. Govt. 14 (quoting *Stokeling v. United States*, 139 S. Ct. 544, 551 (2019)).

This argument, however, overlooks stark textual differences between the EPCA and the Hobbs Act.

Unlike the Hobbs Act, the EPCA *expressly* addressed whether Congress intended to preclude enforcement courts from considering the validity of agency action. Contrary to the Government's suggestion, the EPCA did not merely grant the Emergency Court of Appeals "exclusive jurisdiction to determine the validity of a covered order," and leave all else to implication. Govt. 13 (quoting EPCA, Pub. L. No. 77-421, § 204(d), 56 Stat. 23, 33 (1942)). Rather, in the sentence immediately following the passage quoted by the Government, the EPCA stated:

> Except as provided in this section, *no court, Federal, State, or Territorial, shall have jurisdiction*

> *or power to consider the validity* of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or part, any provision of this Act authorizing the issuance of such regulations or orders ... or any provision of any such regulation, order, or price schedule....

§ 204(d), 56 Stat. at 33 (emphasis added).

The Government excises this latter sentence even though it was critical to the Court's statutory holding in *Yakus*. *See* Govt. 13-14. The Court's specific holding was that the sentence highlighted by the Government, when "*coupled with* the provision that 'no court ... shall have jurisdiction or power to *consider the validity* of any such regulation,'" was "broad enough in terms to deprive the district court of power to *consider the validity* of the Administrator's regulation or order as a defense to a criminal prosecution for its violation" *Yakus*, 321 U.S. at 429-30 (quoting § 204(d), 56 Stat. at 33) (emphases added). Thus, *Yakus* did not "authoritatively construe" the language supposedly linking the Hobbs Act and EPCA. Govt. 14. It instead construed that language *in combination* with a far broader provision expressly prohibiting other courts from "consider[ing] the validity" of covered orders—a provision the Hobbs Act conspicuously lacks.

Furthermore, Congress used the phrase "determine the validity" differently in the Hobbs Act than in the EPCA. In the EPCA, the phrase stands alone; in the Hobbs Act, it is one component in a list of terms in which every other term plainly describes a type of judicial relief. And unlike the Hobbs Act, the EPCA nowhere uses the phrase "determine the validity" in a manner that can *only* refer to a grant of declaratory relief. *See* 28 U.S.C. § 2349(a). The two statutes thus employ the same phrase, but in very different ways.

The Government errs badly in ignoring those textual and contextual differences. *See supra* 3-6.

The Hobbs Act's legislative history further undermines the Government's assertion that the Act descends from the EPCA. Neither the House nor Senate report even mentions the EPCA. Instead, these reports make clear that the Act was modeled on "the pattern established for review of orders of the Federal Trade Commission in 1914 and followed by other laws since then in relation to many other agencies," including the SEC and NLRB. H.R. Rep. No. 81-2122, at 4 (1950) (citation omitted); *see* S. Rep. No. 81-2618, at 3 (1950). Context again helps explain why. The EPCA was "adopted as a temporary wartime measure" linked to the grave "circumstances attending its enactment," *i.e.*, the nation's ramp-up to total war after Pearl Harbor. *Yakus*, 321 U.S. at 419, 431-32. There was no reason for Congress to look to an exceptional wartime statute for Hobbs Act inspiration when it had available many other ordinary direct review statutes that applied to civilian agencies in peacetime.

3. The Government's sweeping view of the Hobbs Act also lacks support in this Court's decisions interpreting the Act and its predecessor, the Urgent Deficiencies Act. None of the cases cited by the Government embraces the view that the Hobbs Act precludes defendants subjected to enforcement actions from seeking review of an agency's generally applicable legal interpretation.

To begin, *FCC v. ITT World Communications, Inc.* and *Venner v. Michigan Central Railroad* were not enforcement actions at all. Both involved obvious efforts to circumvent available direct review proceedings by seeking to enjoin not agency orders themselves, but conduct the orders blessed. In *Venner*, the Interstate Commerce Commission entered an order approving a

specific transaction between railroad companies; the next day the plaintiff sued to block that very transaction. 271 U.S. 127, 128-29 (1926). In *ITT*, the petitioner *simultaneously* sought relief under the Hobbs Act and in district court. 466 U.S. 463, 465-66 (1984). In both cases, the Court saw through the ploys, making clear that "[l]itigants may not evade" the Hobbs Act through such maneuvers. *Id.* at 468.

Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic similarly involved an attempt to evade Hobbs Act review of a party-specific order. There, a vessel owner claimed it was not liable for fees that had been approved by the Federal Maritime Commission because the fees were supposedly invalid. 400 U.S. 62, 67-68 (1970). The vessel owner argued that it had not participated in the Maritime Commission proceedings that approved the fees and therefore was not bound by the commission's order. *Id.* at 71. Tellingly, in rejecting this argument, the Court did not state that § 2342 flatly foreclosed the defendant's district court challenge. Instead, the Court emphasized that the defendant "was in fact represented before the Commission," "its interests were clearly at stake," and it "had every opportunity to participate before the Commission and then to seek timely review in the Court of Appeals," which it "chose not to do." *Id.* at 71-72. *Port of Boston* thus held that when an administrative proceeding settles specific parties' rights, those parties must seek review under the Hobbs Act and cannot circumvent it through "collateral" challenges. *Id.* at 72; *accord United States v. Ruzicka*, 329 U.S. 287 (1946).

These decisions do not support the Government's argument that the Hobbs Act precludes enforcement review of generally applicable rules. Such rules, by definition, apply to indeterminate parties, whose specific rights and interests may not have been "clearly at

stake" in the administrative proceeding that produced the rule, and who may not have had "every opportunity" to participate before the agency. *Port of Boston*, 400 U.S. at 72; *see Gage v. U.S. Atomic Energy Comm'n*, 479 F.2d 1214, 1218 (D.C. Cir. 1973) ("Unlike those subject to adjudicative orders, persons who may ultimately be affected by regulations may have legitimate grounds for deciding not to join in the formulation of the rules."). Indeed, every court of appeals to consider the issue has held that when such rules are applied in subsequent enforcement proceedings, respondents can challenge the rules' validity even if the Hobbs Act's 60-day review period has run. Br. 27; *see, e.g.*, *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958).

The Government attempts to distinguish those decisions on the ground that they still require review to occur "in the court of appeals under the Hobbs Act procedures." Govt. 30. This misses the point: If the Government's reading of § 2342 were correct, *Functional Music* would be wrong. That is, if § 2342 actually precluded enforcement review, the *only* opportunity to challenge a rule would be in the 60 days after it issued. 28 U.S.C. § 2344. By its terms, that limitations period would apply regardless whether subsequent enforcement occurred in an administrative or judicial forum. *See id.* Once that window closed, defendants could dispute only whether a rule applied to them, not whether the rule itself is lawful. *Cf.* 42 U.S.C. § 7607(b)(2) (restricting review of certain Clean Air Act regulations in this manner). Thus, the ability under *Functional Music* to challenge an "underlying rule" in an enforcement action is further proof that the "exclusive jurisdiction" over covered orders in § 2342 is "exclusive" only as to direct review. 274 F.2d at 546. It does not displace the

review traditionally available in the event of enforcement. *Functional Music* also demonstrates that the Hobbs Act does not pursue the goal of "quick, nationwide resolution of the validity of covered agency actions," Govt. 18, at the cost of enforcement review.[1]

B. The Hobbs Act Did Not Provide a Prior, Adequate, and Exclusive Opportunity for Judicial Review of the 2006 Order.

Neither Respondent nor the Government disputes that the preclusive effect of the Hobbs Act is limited by the APA, which provides, "[e]xcept 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." 5 U.S.C. § 703. Instead, they contend that the Hobbs Act gave PDR two "prior, adequate, and exclusive" opportunities for review of the 2006 Order: prior to its release, through participation in the underlying FCC proceeding; and after Respondent sued, by filing a new petition to the FCC (whether for reconsideration, a declaratory order, or rulemaking). Resp. 25-42; Govt. 24-29. They are wrong.

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[1] Nor do the reliance interests invoked by the Government justify eliminating enforcement review. The Government raises the specter of TCPA *plaintiffs* challenging FCC orders creating safe harbors on which defendants relied. Govt. 19. But even if those safe harbors were held impermissible, imposing retroactive liability on parties that relied on them would raise due process questions not presented here. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (refusing to defer to agency interpretation that would "impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced" because such deference "would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires" (internal quotation marks and alteration omitted)).

1. The Government claims that PDR had an "adequate" opportunity to challenge the 2006 Order during the 60-day window after its release. Relying on the Attorney General's Manual on the Administrative Procedure Act (1947) [hereinafter *APA Manual*], the Government contends that Section 703 is "most naturally understood to incorporate the concept of 'adequacy' that the Court articulated in *Yakus*." Govt. 25. The Government appears to view that "concept of 'adequacy'" to mean that if an agency review scheme permits parties to "present their claims to the agency and then seek judicial review within a particular time," it is categorically "adequate," except (perhaps!) as applied to parties that did not exist during the direct review period. Govt. 25-26.

That cannot be correct. Even the Government concedes that Section 703 was intended to establish a "general rule that, when a defendant's liability depends in part on the propriety of an agency action, that action ordinarily can be challenged in a civil or criminal enforcement suit." Govt. 24. Under the Government's "concept of adequacy," however, Section 703 would be meaningless. Every review scheme that offers direct review would qualify as "adequate," and so defendants could never obtain review in enforcement proceedings.

The Government misunderstands "adequacy" because it misreads *Yakus*. There, the discussion of "adequacy" was part of the Court's due process holding. In sustaining the EPCA, *Yakus* did not adopt a myopic rule that all review schemes that run through agency processes to a court are "adequate" at all times and for all purposes, as the Government suggests. Rather, it upheld the EPCA's rigid 60-day review window as adequate—even with respect to enforcement proceed-

ings—because of "the urgency and exigencies of wartime price regulation." 321 U.S. at 435. In those circumstances, the Government's regulatory interests were at their zenith, and parties could reasonably have been expected to be—and Mr. Yakus in fact was—attuned to the Government's dictates. *Id.*

The cases cited in *Yakus*'s adequacy discussion confirm that adequacy requires a real, rather than theoretical, opportunity to litigate. *Bradley v. City of Richmond*, 227 U.S. 477 (1913), for example, involved a constitutional challenge to a municipal tax scheme. The Court upheld the scheme, subject to this qualifier: "If the right to appear and be heard and to obtain a review should prove illusory, there would, under general principles of jurisprudence, remain the right to judicial review...." *Id.* at 483.

The *APA Manual* supports this same contextualized notion of "adequacy." In a passage ignored by the Government, the Manual states that in considering whether judicial review is available in enforcement proceedings under Section 703, "the extent to which the 'opportunity' for judicial review prior to the enforcement proceeding has been *waived or disregarded by the defendant in those proceedings* must also be considered." *APA Manual* 101 (emphasis added). The Manual thus anticipates decisions such as *Port of Boston*. Where an agency order specifically determines a party's particular rights and that party chooses not to pursue immediate review, it will often be fair to say that the "defendant in [the] proceedings" has "waived or disregarded" its opportunity for review.

This logic, however, does not hold for orders promulgating generally applicable rules. "[U]nlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application." *Functional Music*, 274 F.2d at 546. They apply to any party

whose conduct falls within their scope, regardless of whether the party was engaged in that activity, planning to engage in that activity, or even in existence at the time the rules were issued. The Government refuses to say whether it thinks Hobbs Act review is adequate for parties that did not exist when a rule was promulgated, *see* Govt. 28, but its argument that the 60-day window suffices for any party that did exist at that time is little better. Mere existence, after all, does not confer standing, without which a party cannot obtain direct review even if it participates in agency proceedings. *See City of Bos. Delegation v. Fed. Energy Regulatory Comm'n*, 897 F.3d 241, 248 (D.C. Cir. 2018). Unless a party can show that it was at least imminently planning to engage in the regulated activity, the path to direct review is closed. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014).[2] In such circumstances, the opportunity for direct Hobbs Act review is "illusory," *Bradley*, 227 U.S. at 483, and Section 703's "adequacy" standard is properly read to permit judicial review of agency action within an enforcement proceeding.

PDR's circumstances provide a case-in-point. Nothing in the record indicates that, in 2006, PDR was engaged or planning to engage in activity subject to the 2006 Order. Therefore, even if PDR could travel back in time to December 19, 2005, review the 384 pages of the Federal Register published that day, when the FCC "open[ed] a new docket" to "seek[] comment" on its "unsolicited facsimile advertising rules," 70 Fed. Reg. 75,070, and submit comments in that proceeding,

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[2] The FCC knows this full well. It challenged the constitutional standing of both parties that sought Hobbs Act review of the 2006 Order, and prevailed as to one. *See Biggerstaff v. FCC*, 511 F.3d 178, 184 (D.C. Cir. 2007). The Government now describes that victory as resting on "procedural grounds." Govt. 5.

it still could not have sued under the Hobbs Act. An abstract interest in administrative proceedings does not create Article III standing.

For PDR, the opportunity for direct Hobbs Act review of the 2006 Order was illusory because PDR lacked statutory standing to raise such a challenge. Br. 25-27. In 2006, PDR was a stranger to the FCC proceedings, and thus not "aggrieved" by the 2006 Order. 28 U.S.C. § 2344. Nor did it know how the FCC's interpretation would one day be construed by the Fourth Circuit or any other court (many of which disagree with the Fourth Circuit's view of what the 2006 Order means). *See Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92, 96 n.1 (2d Cir. 2017) (citing cases).[3] And once Respondent sued PDR in 2014, it was far too late for PDR to seek direct review.

The Government's primary response is "too bad." In its view, "a mode of judicial review is not inadequate simply because a particular litigant fails to satisfy the statutory prerequisites for invoking it." Govt. 26. But the cases the Government cites for this proposition involved parties whose interests were clearly and concretely at stake at a time when direct review was available. *See Port of Boston*, 400 U.S. at 71-72; *United States v. Szabo*, 760 F.3d 997, 1006-07 (9th Cir. 2014) (finding direct review adequate because the defendant

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[3] Contrary to the Government's suggestion (at 27), this Court need not blind itself to the lower courts' divergent views. That is particularly true because the Fourth Circuit's conclusion about the meaning of the FCC rule rested on its aberrant view that it was *improper* to consider the TCPA in construing the FCC's interpretation of that statute. *See* Pet. App. 14a. The Government properly declines to defend that aspect of the Fourth Circuit's analysis, Govt. Br. 27 n.6, and this Court should make clear that it is wrong.

had standing to seek pre-enforcement review of the regulation at issue *and* had specific grounds, based on his own prior conduct, to do so). Neither case supports the underpinnings of the Government's position—namely, that parties must exercise perfect foresight about how their conduct and the law might evolve, *and* must file lawsuits based on those prophecies regardless of standing.

Finally, standing considerations also rebut the suggestion (Govt. 29) that Federal Register publication creates an "adequate" opportunity for review. Mere constructive notice of agency action does not create standing to challenge it. That is, no doubt, among the reasons this Court has expressed qualms about the "severity" of a rule requiring parties to "protect themselves against arbitrary administrative action only by daily perusal of ... the Federal Register and by immediate initiation of litigation." *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 283 n.2 (1978). The Government provides no reason to cast these concerns aside, especially when all that hangs in the balance is an unwanted fax.

2. The Government and Respondent also suggest that it is fine to deny review in enforcement settings, even where direct review was only hypothetically available, because the defendant may seek a kind of back-door agency review by initiating a petition for rulemaking, reconsideration, or a declaratory order.

This argument is meritless. Section 703 preserves judicial review in enforcement settings unless the defendant had a "*prior*" opportunity for review. In context, "prior" must mean "before the enforcement proceeding began"—neither Respondent nor the Government argues otherwise, and neither seeks to explain how a proceeding that begins "*after* a defendant has

been sued," Resp. 27 (emphasis added), qualifies as a "*prior*" opportunity.

Respondent and the Government also sidestep the practical inadequacies of this option. Neither acknowledges the FCC's past practice of refusing to initiate declaratory ruling proceedings in such circumstances. *See* Br. 36. Neither acknowledges that such a petition would *not* permit review of the original order; rather, the "agency action" reviewed would be the new order resolving the petition. Br. 36. And neither disputes that even if a district court agrees to stay a TCPA suit while the defendant seeks FCC review—which Respondent concedes district courts are not required to do, Resp. 36—that administrative odyssey is so lengthy and expensive that most defendants, facing ruinous class action liability, will be forced into settlement. Br. 37-39.

To be sure, there are instances where all of these hurdles were cleared and back-door review obtained. But even Respondent's primary exemplar involves a *five-year* lag from the time the defendant petitioned the FCC to the time the D.C. Circuit decided the case. *See* Resp. 28-31 (citing *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017)); Br. 36. That is neither a "prior" nor "adequate" substitute for being able to raise a legal defense before the court where the enforcement action is pending.

C. Respondent and the Government's Position Cannot Be Squared with Other Agency Review Statutes.

PDR's opening brief also explained that agency review provisions akin to the Hobbs Act have never been construed to preclude enforcement review. *See* Br. 31-33. Respondent and the Government seek to distinguish those statutes because they do not expressly vest

the courts of appeals with "exclusive jurisdiction" to "determine the validity" of agency orders. Resp. 41; Govt. 30.

This argument fails, however, because the language of those statutes is just as broad as the Hobbs Act's. The SEC's review statute covers all "review" of SEC orders, without qualification. 15 U.S.C. § 78y(b)(1). OSHA's review statute encompasses all suits "challenging the validity" and seeking "judicial review" of OSHA standards. 29 U.S.C. § 655(f). The statutes do not use the word "exclusive," but that is irrelevant. Even when "Congress has not expressly provided that the statutory procedure is to be exclusive," "specific statutory scheme[s] for obtaining review" are deemed "to be exclusive" with respect to direct review. *Whitney Nat'l Bank v. Bank of New Orleans & Tr. Co.*, 379 U.S. 411, 420-422 (1965).

These statutes thus possess the very features that Respondent and the Government describe as distinguishing features of the Hobbs Act: They confer "exclusive" jurisdiction over "review" of agency action. Yet courts have never interpreted them to preclude judicial review of agency action in enforcement proceedings brought in district court. *See, e.g., United States v. O'Hagan*, 521 U.S. 642, 666-76 (1997).

Respondent and the Government also cannot square their interpretation 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. Br. 34-35. The Government claims these statutes shed no light on the Hobbs Act because they were enacted later in time. Govt. 23. But the Government ignores that the EPCA, enacted *before* the Hobbs Act, also contained an express preclusion provision, *see supra* 6-7. And these later enacted statutes reinforce that Congress speaks

clearly when it intends to eliminate judicial review of agency action in enforcement proceedings. The Hobbs Act contains no such clear statement—moreover, Section 703 manifests Congress's general intent to *preserve* judicial review in those settings.

D. Constitutional Avoidance Principles Favor PDR's Interpretation.

Respondent and the Government also attempt to sidestep the grave constitutional problems their reading of the Hobbs Act creates. *See* Br. 39-45. They claim PDR forfeited its avoidance arguments and that those arguments lack merit. Resp. 42-44; Govt. 31-33. Both contentions are wrong.

"Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Accordingly, PDR may advance the constitutional-avoidance canon in support of its construction of the Hobbs Act. The canon is but another "means of giving effect to congressional intent." *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005).[4]

With respect to the canon's application, Respondent and the Government barely respond. They simply ignore repeated statements by this Court and others that *Yakus*-like constraints on judicial review in enforcement proceedings would raise grave constitutional concerns in peacetime settings. *See* PDR Br. 41 n.6. The purpose of the avoidance canon is to resolve disputes between competing plausible constructions of a statute in a manner that avoids confronting such concerns. PDR has demonstrated that its proposed

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[4] Respondent's other forfeiture arguments (at 8, 22, 25-26) fail for the same reason.

construction of the Hobbs Act is more than plausible. Avoidance principles thus strongly favor that construction.

II. THE FCC'S INTERPRETATION OF "UNSOLICITED ADVERTISEMENT" IS A NONBINDING INTERPRETIVE RULE.

Alternatively, the district court was not bound to follow the FCC's interpretation of "unsolicited advertisement" because that statement constitutes an interpretive rule, binding neither parties nor courts. Br. 45-50. Respondent and the Government offer no meritorious response.

First, both argue that PDR forfeited this argument by not "'disput[ing] that the 2006 FCC Rule is the sort of "final order" contemplated by the Hobbs Act.'" Govt. 33 (quoting Pet. App. 7a n.1.). PDR does not dispute that the 2006 Order is a final order—in part, it promulgated binding regulations that indisputably carry the "force of law." *Columbia Broad. Sys., Inc. v. United States* ("*CBS*"), 316 U.S. 407, 418 (1942); Br. 48-49. But the question here is whether the Hobbs Act required the district court to follow the specific portion of the 2006 Order interpreting "unsolicited advertisement" in the TCPA. PDR argued below that the Hobbs Act did not impose this requirement. *See* Brief of Appellees at 20, *Carlton & Harris Chiropractic, Inc. v. PDR Network LLC*, 883 F.3d 459 (4th Cir. 2018) (No. 16-2185). Its argument here is "in support of that claim," *Yee*, 503 U.S. at 534, and fairly encompassed by the question presented. Therefore, this argument is properly before the Court.

Second, without disputing that the relevant portion of the 2006 Order *is* an interpretive rule, the Government argues that the Hobbs Act makes no distinction between legislative and interpretive rules. Govt. 34.

That is wrong. Only FCC "final orders" reviewable under 47 U.S.C. § 402 are reviewable under the Hobbs Act, 28 U.S.C. § 2342(1), and FCC "final orders" are limited to orders carrying the "force of law," *CBS*, 316 U.S. at 418. Even the Government's principal case recognizes that general principles of finality, which include whether an action is "'one by which rights or obligations have been determined, or from which legal consequences will flow,'" govern the "understanding of 'final order' for the purposes of the Hobbs Act." *US W. Commc'ns, Inc. v. Hamilton*, 224 F.3d 1049, 1054-55 (9th Cir. 2000) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). Interpretive rules do not qualify. They "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (internal quotation marks omitted).

Indeed, the Government recently acknowledged this basic principle in its brief in *Kisor v. Wilkie*, No. 18-15. There, the Government urged the Court to rework *Auer* deference so as to end the "seeming incongruity of giving controlling weight to an interpretive rule that is not meant to carry the force of law." Brief for the Respondent at 26. But here, the Government seeks an interpretation of the Hobbs Act that would create much the same "incongruity"—but through the more extreme mechanism of making agency interpretive rules *unreviewable* outside of a narrow period in which (as shown, *supra* at 11-16) judicial review will be unavailable to most parties against whom the rule could someday be enforced.

Whatever else may be said about the Hobbs Act, there is no reasonable argument that it was intended to give binding effect to interpretive rules that the APA classifies as non-binding. And that suggests a narrow alternative answer to whether the Hobbs Act

"*required* the district court in this case to accept the FCC's legal interpretation." Br. (i) (emphasis added). Because the FCC's interpretation of "unsolicited advertisement" is a mere interpretive rule, it binds no one. Br. 45-46.

CONCLUSION

For the foregoing reasons, the Fourth Circuit's judgment should be reversed.

Respectfully submitted,

JEFFREY N. ROSENTHAL
BLANK ROME LLP
130 N. 18th Street
Philadelphia, PA 19103
(215) 569-5553

ANA TAGVORYAN
BLANK ROME LLP
2029 Century Park East
6th Floor
Los Angeles, CA 90067
(424) 239-3400

CARTER G. PHILLIPS *
KWAKU A. AKOWUAH
DANIEL J. FEITH
KURT A. JOHNSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioners

March 11, 2019

* Counsel of Record