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

BRIEF OF THE U.S. CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

DARYL JOSEFFER
MICHAEL B. SCHON
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

MEGAN L. BROWN
Counsel of Record
BERT W. REIN
JEREMY J. BROGGI
WESLEY E. WEEKS
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
mbrown@wileyrein.com

Counsel for Amicus Curiae

January 15, 2019

286103

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

Cited Authorities

STATUTES & LEGISLATIVE MATERIALS

Page

REGULATIONS & ADMINISTRATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of business organizations and individuals. The Chamber has 300,000 direct members and indirectly represents more than three million businesses of every size, in every sector, and from every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing amicus briefs in cases involving issues of national concern to American business.

The Chamber and its members have two important interests in this case. *First*, many of the Chamber's members are regulated by the federal administrative agencies whose final orders are reviewable under the Hobbs Act. These members rely on the regulatory certainty and national uniformity promoted by the system of orderly court of appeals review established by Congress in that law.

Second, businesses that are sued for purported violations of agency regulations—by the agency itself or by a private party acting as a private attorney general—have a strong interest, rooted in due process, in being able to defend themselves. This includes making arguments about the reach and authority of agency rules.

---

1. No counsel for any party authored this brief in whole or in part, and no person or entity other than the Chamber, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief by express written consent.

This is particularly salient in vexatious litigation under the Telephone Consumer Protection Act ("TCPA"). The TCPA has turned into a breeding ground for lawsuits by serial plaintiffs and lawyers who have made lucrative businesses out of targeting legitimate activities by U.S. companies. Class actions seek to exploit the statutory damages of $500 to $1,500 per communication to seek millions and billions in damages. TCPA lawsuits are a cottage industry and a scourge on legitimate businesses—from small restaurants to the L.A. Lakers to sellers of generic drugs—who have little warning that reasonable communicative activities may generate crushing litigation. *See, e.g.*, *Bais Yaakov v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017) (Kavanaugh, J.) ("Let that soak in for a minute: Anda was potentially on the hook for $150 million for failing to include opt-out notices on faxes that the recipients had given Anda permission to send."), *cert. denied*, 138 S. Ct. 1043 (2018)). The Chamber has taken an active role in defending businesses both at the Federal Communications Commission and in court. *See, e.g.*, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). Businesses should not be barred from defending themselves when an agency order is used in litigation to purportedly subject them to enormous damages.

SUMMARY OF THE ARGUMENT

Congress exercised its authority over the jurisdiction of the federal courts to foreclose challenges to the "validity" of final orders covered by the Hobbs Act, except through direct review in a court of appeals within a 60-day timeframe. This regime generally prevents repeated challenges to agency action and promotes regulatory certainty and uniformity on which regulated entities

substantially rely in ordering their operations. When agencies develop regulations after notice and comment and those regulations are either vindicated on judicial review or not challenged at all, the regulated community relies on them. Every day, American businesses make decisions that respond to and rely on agency determinations about their legal rights and obligations. Those expectations are protected by a robust application of the Hobbs Act that channels judicial review and limits collateral attacks.

Equally important, due process requires that private defendants in litigation to enforce agency rules be able to challenge the reach and basis of those rules. When agency rules are to be enforced against a party by the government, the defendant must be able to mount a defense that includes challenging the basis for the rule being applied to it. The same logic protects defendants when rules are being enforced by private actors, such as in class actions or private attorney general suits. This is particularly the case under the TCPA, where private defendants are subjected to unpredictable liability based upon alleged violations that stray far from congressional goals and reasonable regulatory implementation. *See* U.S. Chamber, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* (Aug. 2017), *available at* https://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf.

ARGUMENT

I. THE COURT SHOULD PROTECT THE NATIONAL UNIFORMITY AND RELIANCE INTERESTS PROMOTED BY THE HOBBS ACT.

A. The Hobbs Act Channels Review Of Covered Agency Orders To A Single Court of Appeals Within A Specified Timeframe.

Direct review of final orders of seven regulatory agencies—the Federal Communications Commission, Department of Agriculture, Department of Transportation, Federal Maritime Commission, Nuclear Regulatory Commission,[2] Surface Transportation Board, and Department of Housing and Urban Development—is governed by the Administrative Orders Review Act, 64 Stat. 1129 (1950), codified at 28 U.S.C. §§ 2341–2352, commonly known as the Hobbs Act.

The form of judicial review specified by the Hobbs Act has several distinctive features. *First*, the Hobbs Act vests "exclusive jurisdiction" in the federal "court of appeals . . . to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders" covered by the Act. 28 U.S.C. § 2342. This "basic congressional choice" obligates a court of appeals to determine "whether the action passes muster under the appropriate

2. Actually, the Hobbs Act specifies the Atomic Energy Commission. 28 U.S.C. § 2342(4). The relevant functions of that agency were transferred to the Nuclear Regulatory Commission, and review is now taken from the NRC. *See* 42 U.S.C. § 5841; *Reytblatt v. NRC*, 105 F.3d 715, 720 (D.C. Cir. 1997).

[Administrative Procedure Act] standard of review." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 741, 744 (1985).

Second, the Hobbs Act establishes venue "in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit." 28 U.S.C. §§ 2343, 2344. This provision, operating in conjunction with the judicial lottery and first-to-file rule established by 28 U.S.C. § 2112, ensures judicial review is consolidated in a single court of appeals when multiple petitions for review are filed. *See, e.g.*, *Brodsky v. HumanaDental Ins. Co.*, 910 F.3d 285, 289 (7th Cir. 2018) (explaining interaction of the Hobbs Act with 28 U.S.C. § 2112).

Third, the Hobbs Act requires petitions for review to be filed "within 60 days" of the order's entry. 28 U.S.C. § 2344. The lower courts "have uniformly held that the Hobbs Act's 60-day time limit . . . is jurisdictional." *Henderson v. Shinseki*, 562 U.S. 428, 437 (2011); *cf. Stone v. INS*, 514 U.S. 386, 405 (1995). This jurisdictional constraint limits the timing of petitions seeking direct review and generally prevents collateral attacks on previously promulgated orders. *See ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 278 (1987); *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463 (1984). Litigants have options, even after the Hobbs Act period, in which to bring substantive challenges to agency rules.[3]

3. After the Hobbs Act period expires, persons aggrieved by agency rules may "fil[e] a petition for amendment or rescission of the agency's regulations, and challeng[e] the denial of that petition" in the court of appeals. *See Edison Elec. Institute v. ICC*, 969 F.2d 1221, 1229 (D.C. Cir. 1992) (citation omitted). If collateral litigation is pending, the district court has discretion to hold its proceedings

B. The Hobbs Act Promotes National Uniformity And Predictability, Which Fosters Substantial Reliance By Regulated Communities.

The "far-reaching procedural effects" of the Hobbs Act serve several important purposes. *See Simmons v. ICC*, 716 F.2d 40, 44 (1983) (Scalia, J.).

First, and of great importance to the business community, the Hobbs Act protects important reliance interests that are vital to the national economy. Businesses participate in agency regulatory proceedings in hopes of influencing rules and orders. They often participate in judicial review of agency orders to protect their interests and present arguments. Once rules are final, businesses build their operations, policies, and products around federal regulatory expectations, often over many years. Companies create compliance plans, hire personnel, and form contractual relationships. Reliance interests protected by the Hobbs Act can range from the build out and operation of national telecommunications networks, to the establishment of international maritime agreements, to compliance plans for Railroad Retirement Board obligations applicable to rail carriers.

---

in abeyance pending the agency's resolution of a relevant petition. *See, e.g.*, *Raitport v. Harbour Capital Corp.*, 312 F. Supp. 3d 225, 227 (D.N.H. 2018) (holding proceeding in abeyance pending outcome of *Bais Yaakov*, 852 F.3d at 1078). District courts also can proactively facilitate agency engagement and revision of rules through primary-jurisdiction referrals. *See Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68–69 (1970).

A few examples illustrate the investment built on regulatory determinations. When the FCC by rule exempted next-generation fiber facilities from its network unbundling and sharing requirements applicable to legacy telephone equipment, the telecommunications industry responded with millions of dollars in new investment supporting fiber deployments that vastly increased the number of households with broadband internet connections. *See In re Bus. Data Servs. in an Internet Protocol Env't*, 32 FCC Rcd. 3459 ¶ 5 n.15 (2017). Similarly, railroads, shippers, and other participants in the surface transportation marketplace indicate that their capital investment decisions reflect substantial reliance and investment-backed expectations with regard to rates and other regulations adopted by the Surface Transportation Board. *See, e.g.*, Comments of CSX Trans., Inc., *In re Competition in the Railroad Industry*, STB Ex Parte No. 705 (filed Apr. 12, 2011).

Manufacturers of communications equipment and other regulated devices design their products in reliance on FCC rules about certifications and conformity with disability access and other requirements. *See* FCC, *Equipment Authorization* (last visited Jan. 15, 2019), https://www.fcc.gov/engineering-technology/laboratory-division/general/equipment-authorization. Likewise, telecommunications carriers and investors base strategies, corporate structures, and long-term investment decisions on regulations applicable to non-U.S. ownership, spectrum use, and build out requirements, *see, e.g.*, 47 C.F.R. § 63.11, which are often in place for years because these substantial investments must have a long time-horizon. Disruption of agency rules by district courts in collateral litigation long after they are final would be markedly

unfair to defendants and substantially harm the reliance interests of regulated communities.

The channeling features of the Hobbs Act ensure that regulatory changes will normally occur only after consideration by the agency and review by a court of appeals. This orderly process helps to ensure that the aforementioned "serious reliance interests" are "taken into account" when an agency changes position. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Respect for reliance interests also prevents the "unfair surprise" that can result when an interpretive change during district court litigation results in "potentially massive liability . . . for conduct that occurred well before that interpretation was announced." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–56 (2012). Where rules promulgated by Hobbs Act agencies are subject to enforcement through private rights of action, for example, potential defendants must be able to rely on agency orders to show that their conduct was lawful. *See, e.g.*, *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 446 (7th Cir. 2010) (affirming summary judgment where regulatory exemption provided "a complete defense" to enforcement); *Leyse v. Clear Channel Broad., Inc.*, 545 F. App'x 444, 445 (6th Cir. 2013) (affirming dismissal under similar circumstances). Otherwise, defendants could be found liable where an agency "did not think the industry's practice was unlawful" and its regulations reflected that position. *Christopher*, 567 U.S. at 158.

Second, the Hobbs Act promotes national uniformity. It "allows 'uniform, nationwide interpretation of the

federal statute by the centralized expert agency'" followed by consolidated court of appeals review. *See Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1119 (11th Cir. 2014) (quoting *CE Design*, 606 F.3d at 450). This scheme prevents divisions of authority that increase compliance costs and may take years to resolve, *see Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980–83 (2005), while simultaneously constraining agency authority by guaranteeing "one review of right in an appellate court" of final agency orders, *see Providing for the Review of Orders of Certain Agencies: Hearing Before the H. Subcomm. No. 2*, 81st Cong. 65 at 112 (1949) (statement of the Hon. Orie L. Phillips, Chief Judge of the 10th Circuit Court of Appeals).

Concerns about national uniformity are acute in industries with nationwide reach. Congress designated for Hobbs Act review the final orders of agencies which regulate important national interests. The Federal Communications Commission, Department of Transportation, Federal Maritime Commission, Surface Transportation Board, and Department of Agriculture regulate the channels and instrumentalities of interstate commerce, as well as goods intended for nationwide distribution. *See, e.g.*, *United States v. Dunifer*, 219 F.3d 1004, 1008 (9th Cir. 2000) (explaining need for "uniform, nationwide interpretation of the federal statute . . . governing the nation's airwaves") (quotation marks and citation omitted). The Nuclear Regulatory Commission and Department of Housing and Urban Development similarly implement policies of national concern.[4] The

4. At first glance, HUD seems like something of an outlier in this list. But the covered orders of that agency are those issued

Court has long recognized the need for consistent agency oversight in such areas. *See Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68 (1970); *Far East Conference v. United States*, 342 U.S. 570, 574–75 (1952).

Finally, the Hobbs Act promotes judicial efficiency. It helps "avoid the waste" of judicial resources that occurs where a district court and court of appeals each "decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review." *Fla. Power & Light Co.*, 470 U.S. at 741, 744. By channeling review to the court of appeals, the Act also ensures "that the Attorney General has an opportunity to represent the interest of the Government whenever an order of one of the specified agencies is reviewed." *See Port of Bos.*, 400 U.S. at 70. These mutually reinforcing interests are key benefits of the Hobbs Act, which this Court should protect.

II. THE COURT SHOULD ALSO PROTECT PRIVATE DEFENDANTS' DUE PROCESS RIGHT TO CHALLENGE REGULATIONS ENFORCED AGAINST THEM, PARTICULARLY IN TCPA CASES.

While the stability, certainty, uniformity, and efficiency benefits of the Hobbs Act are vital, they cannot outweigh private defendants' due process rights. In

---

under section 812 of the Fair Housing Act, which are orders that resolve charges of discriminatory housing practices after both parties have elected to forego federal district court proceedings. *See* 28 U.S.C. § 2342(6); 42 U.S.C. § 3612. Congress may have been sensitive to costs or delays associated with requiring such individuals to relitigate a dispute in district court.

cases to enforce agency regulations, particularly TCPA class action lawsuits manufactured by the plaintiffs' bar, private defendants must be able to challenge the legality and reach of the rules.

Of course, a district court may always determine how an agency rule—accepted as valid—applies to the facts. The court below correctly recognized that even accepting a rule as valid, "the court can, and must, interpret what [the rule] says" and how it applies. App. 11a; *accord CE Design*, 606 F.3d at 450–51.

Beyond contesting how a rule applies, private defendants facing enforcement of an agency rule in litigation possess a due-process right "to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quotation marks omitted). In the context of administrative obligations, this due process right generally requires that defendants be able to make arguments about the reach and authority of agency rules enforced against them, particularly where a defendant lacked a meaningful opportunity to participate in the agency rulemaking proceeding. Otherwise, "one can conceive of a whole parade of horribles headed by a circumstance in which a party totally deprived of due process in an original agency petition could never obtain review of the merits." *Fritsch v. ICC*, 59 F.3d 248, 252 (D.C. Cir. 1995); *accord Ex parte Young*, 209 U.S. 123, 147 (1908) ("If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional."). A defendant against whom litigation is brought may not have existed at the time a regulation was promulgated, may not have been in the relevant line of business at the time, or may not

have thought that a rule would be construed in a particular way with regard to its operations.

The due process right to present every available defense is at full force when the government seeks to enforce an administrative order covered by the Hobbs Act. Where a defendant contends that application of an agency rule will violate his constitutional rights, for example, the court may address that issue. The Court's decision in *FCC v. Fox Television Inc.*, 567 U.S. 239 (2012), is illustrative. There, two broadcasters, Fox and ABC, sought review of enforcement orders issued in 2006 holding that certain of their 2003 broadcasts violated the FCC's indecency standards. The standards had been in place since 2001, but the agency had refined their meaning in 2004 and applied the new meaning retroactively. The Court set the enforcement orders aside because the underlying standards were unconstitutionally vague "as applied." *See id.* at 258. "[T]he Commission policy in place at the time of the broadcasts gave no notice to Fox or ABC that [the broadcast content] could be actionably indecent." *Id.* at 254. Principles of constitutional avoidance reinforced the conclusion.[5]

The due process right to present every available defense means that a defendant may also challenge government enforcement as ultra vires. "[W]hen an agency seeks to apply the rule, those affected may challenge that application on the grounds that it 'conflicts with the statute

5. The indecency standards in *Fox Television* implicated speech, mandating "rigorous adherence" to due process requirements "to ensure that ambiguity does not chill protected speech." 567 U.S. at 253–54. But the Court made clear that the due process rationale would apply "with respect to a regulatory change this abrupt on any subject." *See id.* at 254.

from which its authority derives.'" *Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145 (D.C. Cir. 2014) (collecting cases); *see generally Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir. 1958). When the government sues for violation of a statute, it necessarily puts its administrative interpretation of the statute at issue.

Due process rights are similarly at play where Congress authorizes private enforcement of agency regulations in district court. In this circumstance, persons asserting a private right of action step into the shoes of the government. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999). The due process considerations that permit a defendant in a government enforcement action to challenge the constitutional implications and statutory authorization for a rule are equally strong when a private party brings the enforcement action.

Such due process principles apply with special force in litigation under the TCPA because the statute's draconian damages provisions and private right of action can be used to impose extreme and unpredictable penalties that bear little if any relationship to any actual harm caused to the plaintiff. TCPA plaintiffs increasingly have been availing themselves of regulatory uncertainty and confusion in the courts about this decades-old statute. Originally enacted by Congress to bar certain types of invasive telemarketing, plaintiffs have used it to foist upon unsuspecting U.S. businesses "staggering, and potentially annihilating, amounts of statutory damages tied to new technologies." U.S. Chamber, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* 1 (Aug. 2017), *available at* https://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf (detailing filed cases, expansive theories, and course of unfair

litigation). Plaintiffs in these class action lawsuits use the FCC's rules and gaps in interpretations to sue legitimate businesses for the use of new technology or for innocent missteps in marketing campaigns.[6]

Defendants may face limited options in defending themselves. TCPA litigation often involves questions of what Congress meant to proscribe, and how the FCC has implemented the statute. Defendant businesses and their associations have sought clarifications and relief from the FCC, to little avail so far, and regularly seek judicial review of agency action when available and needed. *See ACA Int'l*, 885 F.3d at 687. TCPA defendants should be able to contest the validity of imprecise or outdated obligations that plaintiffs seek to apply to them.

Beyond the unpredictability and unfairness of weaponizing the TCPA against unwitting businesses, that statute raises serious constitutional questions. TCPA liability is imposed on communicative activities, so it implicates core First Amendment interests. Indeed, several courts have found the TCPA to be a regulation of speech subject to strict scrutiny. *See, e.g.*, *Holt v. Facebook*, No. 16-cv-02266, 2017 WL 1100564 (N.D. Cal.

6. Examples of meritless TCPA suits abound. A group of fans sued the Los Angeles Lakers for sending text messages confirming receipt of fan-originated texts. *See Emanuel v. Los Angeles Lakers, Inc.*, No. 12-cv-9936, 2013 WL 1719035 (C.D. Cal. Apr. 18, 2013). A ride-sharing service was sued for texts confirming receipt of ride requests. *See Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189, 1193 (W.D. Wash. 2014). A seller of generic drugs was sued for failing to include opt-out notices on faxes that the recipients had given the company permission to send. *See Bais Yaakov*, 852 F.3d at 1078.

Mar. 19, 2017). Due process concerns are pronounced when such First Amendment interests are at stake, making it especially important to permit defendants to challenge the rules sought to be enforced against them. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 486 (1984). Plaintiffs lack a similar interest because they are not the subject of an enforcement action predicated on a regulation.

CONCLUSION

The Court should ensure that its disposition of this case does not undermine the regulatory certainty and national uniformity promoted by the Hobbs Act, while also protecting private businesses' due process rights to defend against unwarranted liability inflicted by the FCC's prior interpretations of the TCPA.

Respectfully submitted,

DARYL JOSEFFER
MICHAEL B. SCHON
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

MEGAN L. BROWN
Counsel of Record
BERT W. REIN
JEREMY J. BROGGI
WESLEY E. WEEKS
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
mbrown@wileyrein.com

Counsel for Amicus Curiae

January 15, 2019