No. 23-1226

IN THE

Supreme Court of the United States

MCLAUGHLIN CHIROPRACTIC ASSOCIATES, INC., INDIVIDUALLY AND AS REPRESENTATIVE OF A CLASS OF SIMILARLY SITUATED PERSONS,

Petitioner,

v.

MCKESSON CORPORATION, *ET AL.*,

Respondents.

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

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a consumer advocacy organization that appears before Congress, administrative agencies, and the courts on behalf of its nationwide members and supporters. Much of Public Citizen's research and policy work focuses on regulatory matters, and Public Citizen is often involved in litigation both challenging and defending agency action. The scope of review of agency action is therefore of critical concern to Public Citizen, and Public Citizen has often filed briefs as amicus curiae addressing the construction of the Administrative Procedure Act (APA) and other significant issues of administrative law. *See Loper Bright Ents. v. Raimondo*, 144 S. Ct. 2244 (2024); *United States v. Texas*, 599 U.S. 670 (2023); *Biden v. Texas*, 597 U.S. 785 (2022); *West Virginia v. EPA*, 597 U.S. 697 (2022); *Kisor v. Wilkie*, 588 U.S. 558 (2019). Public Citizen submits this brief because, while it strongly supports the petitioner's view that reversal is required in this case, it does so on much narrower grounds than advanced in petitioner's principal argument.

SUMMARY OF ARGUMENT

The principal submission of the petitioner in this case is that the Court should decide that the availability of an adequate opportunity to pursue Hobbs Act review of an agency action *never* bars review in a later enforcement proceeding of the correctness of a statutory interpretation underlying the agency's action. The Ninth Circuit, by contrast, has adopted the view that review is *always* barred in such circumstances,

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief.

even when the agency's interpretation was never intended to have legally binding effect.

Such all-or-nothing answers to the question presented are not necessary to resolve this case. Rather, this Court can and should decide the case in the petitioner's favor on the narrower ground that, when the agency action at issue is the issuance of a non-binding interpretive rule or its equivalent, a court may not treat the action as binding regardless of whether the interpretation was set forth in an order potentially subject to judicial review under the Hobbs Act. An agency action that is not legally binding is not transformed into a binding rule by the potential availability of judicial review under the Hobbs Act. And in subsequent proceedings, the interpretive rule is entitled only to the force such interpretations have—namely, whatever force their power to persuade gives them. Courts always remain free to exercise their own independent judgment to resolve legal issues that are subject to agency interpretations that lack the force of law.

This Court need decide no more to resolve this case because the parties agreed below that the agency action at issue was interpretive—that is, that it expresses the agency's nonbinding interpretation of a statutory provision. Under Ninth Circuit case law, the nature of the agency action made no difference. Rather, in that court's view, the availability of Hobbs Act review requires district courts to adopt an agency's nonbinding interpretations in subsequent enforcement proceedings. That paradoxical view—that the availability of judicial review under the Hobbs Act transforms an agency's non-binding action into a binding one—thus determined the outcome below. Rejection of that view by this Court would require reversal,

and that disposition would also significantly advance clarity in the law by resolving the current conflict among the circuits over whether the relevant provision of the Administrative Procedure Act (APA), 5 U.S.C. § 703, and the Hobbs Act's jurisdictional grant, 28 U.S.C. § 2342, together require district courts to adopt agency views set forth in interpretive rules for which Hobbs Act review is potentially available.

The Court should not, however, go further and hold that the availability of Hobbs Act review never bars a court in an enforcement case from determining the validity of a "legislative" rule—that is, one intended to have legally binding effect. That view, advanced by the petitioner and by the concurring opinion in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 588 U.S. 1, 10 (2019) (Kavanaugh, J., concurring in the judgment), rests on a debatable reading of the relevant statutory language. That reading is, at best, difficult to square with the plain language of section 703 of the APA, which precludes judicial review in an enforcement case when a statute provides an adequate and exclusive opportunity for prior review. The Hobbs Act provides for just such exclusive review of the actions to which it applies. The Court should not decide whether to adopt a reading of section 703 and the Hobbs Act that is in such tension with their plain meaning in a case that does not require the Court to address the application of those provisions to binding agency rules.

ARGUMENT

I. Non-binding agency interpretive actions are not binding on courts in enforcement actions.

The APA provides that agency action is generally "subject to judicial review in civil or criminal proceedings for judicial enforcement"—"[e]xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law." 5 U.S.C. § 703. When the APA provides for judicial review "except to the extent" that stated conditions are present, the APA's plain meaning is that judicial review is not available under those conditions.

For example, this Court has recognized that the APA's statement that its judicial review chapter "applies … except to the extent that … agency action is committed to agency discretion by law," 5 U.S.C. § 701(a), "makes it clear that 'review is not to be had' in those rare circumstances." *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993). In other words, the statute "preclude[s] judicial review" in cases that fall within stated exceptions to the availability of review. *Id.* Thus, pursuant to section 703, judicial review of an agency action is not available in a judicial enforcement proceeding to the extent that there was a "prior, adequate, and exclusive opportunity for judicial review."

Nothing in section 703, however, suggests that a court that is precluded from engaging in "judicial review" of an agency action is somehow required to give that agency action greater effect than the action ever purported to have. For example, if the FCC issued a regulation implementing the Telephone Consumer Protection Act's robocall provisions, 47 U.S.C.

§ 227(b)(1)(A), by requiring that callers using automated dialing systems honor consumers' revocation of consent to receive such calls, no one would suggest that a defendant in a subsequent enforcement proceeding could not point out that the regulation did not apply to it because it did not make a call using an automated dialing system. Arguing that an agency rule does not contain any binding directive applicable to a particular case is not in any sense seeking "judicial review" of that rule. Put another way, the *scope or effect* of an agency rule is not altered by limitations on *judicial review* of the rule.

This principle applies to an agency's non-binding statements of its views that, in APA parlance, are set forth in "interpretative rules" or "general statements of policy." 5 U.S.C. § 553(b)(A). Under the APA, the issuance of "interpretative rules" and other statements with equivalent effect (such as "guidances," "advisories," and the like) does not require the use of rulemaking or other procedures. *See Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 100–02 (2015). And unlike "legislative" or "substantive" rules that have the "force and effect of law," *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979), interpretive rules do not purport to create binding legal obligations. Rather, when an agency states its views of existing law without claiming to exercise authority to issue a binding rule or other directive implementing a statute (pursuant to a statutory delegation of such authority), it does no more than "advise the public of the agency's construction of the statute and rules which it administers," and its action "do[es] not have the force and effect of law." *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995) (citation omitted), *quoted in part in Perez*, 575 U.S. at 97.

When an agency issues such an interpretive statement, courts are never bound to treat its action as legally binding. As Justice Scalia explained, "An agency may use interpretive rules to *advise* the public by explaining its interpretation of the law. But an agency may not use interpretive rules to *bind* the public by making law." *Perez*, 575 U.S. at 109 (Scalia, J., concurring in the judgment). Consistent with that view, this Court long ago recognized that an agency's interpretive statements are "not, of course, conclusive" and do not "bind[ ] a district court's processes." *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944). Rather, a nonbinding agency interpretation is information "to which courts and litigants may properly resort for guidance," and it may be considered for what it is worth in light of "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id*. at 140. Even at the height of the sway of deference to agency regulatory actions under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), this Court always recognized that agency interpretive materials that "lack the force of law" are entitled only to "respect," "to the extent that those interpretations have the 'power to persuade.'" *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (citing *Skidmore* and other cases); *see United States v. Mead Corp.*, 533 U.S. 218, 229–31 (2001).

Thus, when a court addresses a case involving an issue on which an agency has spoken in an interpretive rule or similar nonbinding expression of opinion, it does not engage in "judicial review" of the agency's action in issuing the opinion, as that term is used in the APA. That is, it does not adjudicate whether the

agency acted arbitrarily and capriciously or unlawfully in issuing the opinion, and it does not determine that the opinion is void. After all, there is nothing unlawful in an agency's expressing a view on the meaning of a statute or regulation, even if that view fails to persuade a court. Both before and after the court decides the case, the agency's interpretation is what it is—an expression of the agency's view. And the court gives that view the only effect that the agency intended it to have, by considering it for what it is worth—just as it considers the briefs and arguments of the parties and amici curiae, the authorities they cite, relevant legal scholarship, and other materials that bear on the proper answer to the question before the court. No one would suggest that in considering a position taken by an agency in an amicus brief, the court has engaged in "judicial review" of the agency's brief. The court's consideration of an agency interpretive rule is no different.

Thus, for example, when this Court in *Skidmore* considered an agency's interpretive bulletin and other informal rulings in deciding an issue arising under the Fair Labor Standards Act, it did not suggest that it was engaging in judicial review of those interpretive materials (or any other agency action) and did not consider whether there was some basis for subjecting them to judicial review. *See* 323 U.S. at 137–40.

Similarly, when declining to follow a non-binding agency opinion letter in *Christensen*, the Court did not say that it was engaging in judicial review of the letter under the APA, and its ultimate assessment of the letter was not that it was "invalid," "unlawful," or "void"—words that might suggest some form of judicial review—just that it was "unpersuasive." 529 U.S. at 587.

Taking a contrary view, the Ninth Circuit has held that an agency's non-binding legal interpretations become, by virtue of section 703 of the APA, binding and unchallengeable in subsequent enforcement actions whenever they are expressed in an order listed in the Hobbs Act or some other law providing for exclusive jurisdiction to review agency action. Accepting that view would effect a fundamental transformation of the nature of non-binding agency interpretations, making them legally *binding* on everyone nationwide unless they were challenged and set aside when issued. A sentence in a statute that does no more than create an exception to the availability of judicial review of agency action is an extremely unlikely source of such transformative effects.

Moreover, making non-binding agency interpretations binding on the general public and the courts unless they are immediately and successfully challenged would have significant, negative consequences. Non-binding agency interpretations often are not challenged immediately precisely because they are non-binding, and the law concerning when they have sufficient legal consequences to qualify them as final agency action that is ripe for review is, to say the least, complicated. *See*, *e.g.*, *Cal. Cmties. Against Toxics v. EPA*, 934 F.3d 627 (D.C. Cir. 2019). The Ninth Circuit's rule, under which an interpretive agency action becomes legally binding if a party had an "adequate" opportunity to challenge it under the Hobbs Act, effectively requires a retroactive inquiry into whether that specific party had such an opportunity, which in turn necessitates determining whether the interpretive rule had the kinds of real-world consequences that would qualify it as final agency action and create a ripe controversy that the party would have standing

to raise. If the court concluded that the circumstances did give the party an opportunity to seek review of the agency's interpretation, the interpretive action would be treated as if it were a binding legislative rule even though it was never intended to be one, and, at the same time, it might not be binding on another party who did not have that opportunity.

This Court can avoid that perverse result and lend important clarity to the law by holding that the correctness of an opinion set forth in an interpretive rule or other non-binding agency action can always be contested in a subsequent enforcement action. The reason is that a party that argues that the agency's views are unpersuasive is not seeking judicial review of an agency action that falls within the exception in section 703 of the APA. Accordingly, it does not matter whether the agency's non-binding opinion was set forth in an order of the type listed in the Hobbs Act or in some other statute providing for exclusive review of specified agency actions.

The Court need do no more to resolve this case because the parties agreed below that the FCC's declaratory order concerning the statutory definition of a facsimile machine was the equivalent of an interpretive rule. *See* ER 140. Accordingly, respondents did not assert that the agency's interpretation would be binding on the court if not for the argument that the Hobbs Act's grant of exclusive jurisdiction over actions seeking review of certain FCC orders precluded judicial review of that interpretation in a later enforcement action. *Cf. Perez*, 575 U.S. at 107 (holding that a party waived the argument that an agency action was more than an interpretive rule). If the Ninth Circuit's position that interpretive rules become binding in enforcement actions if set forth in orders listed in the

Hobbs Act is rejected, petitioner will be free to contest the persuasiveness of the FCC's views on remand.[2]

II. This Court should not hold in this case that courts in enforcement actions may review the validity of substantive agency rules that are subject to review under the Hobbs Act.

This Court need not and should not go further than to hold that a party can contest the reasoning of non-binding, interpretive rule in enforcement proceedings. Although four Justices of this Court would have held in *PDR*, 588 U.S. at 10 (Kavanaugh, J., concurring in the judgment), that the availability of Hobbs Act review does not bar challenges even to agency actions that claim the force of law in subsequent enforcement proceedings, their opinion understates the difficulty of the issue. The Court should not adopt it in a case

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[2] In their brief in opposition in this Court, respondents argued that the FCC's ruling does not set forth an "interpretive rule" because it was issued in an adjudication rather than a rulemaking proceeding. *See* Opp. Br. 13–15. That argument wrongly confused the question whether an agency action is an interpretive rule with the question whether it was issued using rulemaking procedures. The APA makes clear that interpretive rules do not have to be issued through notice-and-comment rulemaking procedures. 5 U.S.C. § 553(b)(A). Rather, an agency can use any procedures it wants to issue interpretive rules. *See Perez*, 575 U.S. at 100–02. Here, the agency used procedures that have some resemblance to adjudication as well as to notice-and-comment rulemaking to issue what amounted to an advisory opinion stating its views on the scope of the statutory definition of a facsimile machine. The resulting order neither purports to be anything more than the FCC's non-binding opinion on the statute's meaning, nor cites any source of statutory authority empowering the FCC to issue a construction of the statutory term at issue that is legally binding on the public at large through a declaratory order. The order is thus best understood, as respondents agreed below, as equivalent to a non-binding interpretive rule.

where reaching that question is not necessary to the result.

The *PDR* concurrence appears to recognize that section 703 of the APA precludes judicial review of an agency action in an enforcement proceeding if another statute provides an adequate and exclusive prior opportunity for such review. *See* 588 U.S. at 17. Nonetheless, the opinion concludes that the Hobbs Act's grant of "exclusive" jurisdiction to the courts of appeals to issue judgments that "determine the validity" of specified orders, 28 U.S.C. § 2342, never precludes judicial review in an enforcement action of the correctness of the statutory interpretation underlying an agency action. *See* 588 U.S. at 20–22. That result, the opinion concludes, follows because when a district court reviews the correctness of an agency action in an enforcement proceeding involving private parties, it does "not issue a declaratory judgment or an injunction against the agency" and therefore does not "determine the validity" of the agency's action. *Id*. at 21.

The view that judicial review of an agency's action in an enforcement case does not "determine the validity" of the agency action is problematic, at least as to legislative rules that fall within the scope of the Hobbs Act. The key feature of such rules is that they claim the "force of law" and, thus, *if valid*, must be applied as the rule of decision by a court adjudicating a case in which they are controlling. *Chrysler*, 441 U.S. at 301–04. Under the APA, such a regulation may be held "unlawful" if it is arbitrary and capricious, if it was prescribed without compliance with statutory rulemaking procedures, or if it is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" or "otherwise not in accordance with law," 5 U.S.C. § 706(b)(2)—that is, if it is inconsistent

with the statutes that the agency thought authorized its promulgation. But if the regulation is not unlawful and governs a case in court, the court must follow it. A court that concludes that it need not follow an agency regulation that claims the force and effect of law because the regulation is inconsistent with the governing statute has, therefore, in the Hobbs Act's terms, "determined the validity" of the regulation and, under the APA, "h[e]ld unlawful" the agency's action.

A recent decision of this Court offers a case in point. In *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016), an action brought between private parties to enforce the Fair Labor Standards Act, the Court considered whether certain employees were "salesmen" exempt from the Act's requirements. A Department of Labor regulation, issued after notice and opportunity for comment and purporting to be a valid legislative rule with the force of law, would have resolved that issue in the employees' favor. This Court, however, held that the regulation was not controlling because it was "procedurally defective" under the APA: The Court found that the agency had failed to "give adequate reasons for its decisions" in promulgating the regulation and thus that its action was "arbitrary and capricious and so cannot carry the force of law." *Id.* at 220, 221. "An arbitrary and capricious regulation of this sort," the Court stated, "is itself unlawful." *Id*. at 222. Because the agency's explanatory failures were so great that they rendered its issuance of the rule arbitrary and capricious, the Court held that the rule "cannot carry the force of law." *Id*. at 224.

The Court's decision undoubtedly determined the validity of the agency's action in promulgating the regulation. The decision left no room for argument in any subsequent proceeding that the regulation was valid.

In every meaningful sense of the word, the Court engaged in judicial review of the validity of the regulation—which it was free to do because there was no statute that provided a prior, exclusive opportunity for judicial review of the validity of the regulation. Had such a statute existed, however, it would distort the English language beyond recognition to suggest that the decision complied with the statute by not "determining the validity" of the regulation.

To be sure, the Court did not issue an injunction or declaratory judgment against the *agency* in that case, to which the agency was not a party.[3] But the *PDR* concurrence's view that a court can "determine the validity" of an agency action only if it issues an order against the agency setting aside the action, enjoining it, or declaring it invalid does not be jibe with the ordinary meaning of "determine the validity," which applies whenever a court makes a *determination* that rests on whether the agency action is *valid*. A court's decision that it cannot apply a legislative rule intended to have legally binding effect because the rule is invalid is plainly such a determination.

Moreover, in addition to authorizing a reviewing court of appeals to "determine the validity" of a rule within its scope, the Hobbs Act authorizes the court to "to enjoin, set aside, [or] suspend (in whole or in part)" the rule. 28 U.S.C. § 2342; *see id.* § 2349(a). The view set forth in the *PDR* concurrence appears to disregard

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[3] Agency enforcement matters constitute a substantial part, if not the majority, of the cases subject to the section 703 exception. And in an enforcement case brought by an agency, a court's determination that a legislative rule promulgated by the agency could not be applied because it was invalid would be identical to that of an injunction or declaratory judgment naming the agency.

that the phrase "determine the validity of" in the Hobbs Act would be superfluous if only orders "enjoining" or "setting aside" the agency action fell within the exclusive jurisdiction to engage in judicial review granted by 28 U.S.C. § 2342.[4] The concurrence's view also gives short shrift to the Hobbs Act's express inclusion of orders "suspending, in whole *or in part*, the order of the agency" in the category of orders that the Hobbs Act court has exclusive jurisdiction to issue. 28 U.S.C. § 2349(a) (emphasis added). A court's determination in an enforcement proceeding that it cannot follow an applicable legislative rule because it is invalid certainly has the effect of "suspending" the rule "in part" by rendering it inapplicable to that specific proceeding.

The *PDR* concurrence and petitioner's brief in this case stress that the Hobbs Act, unlike some other statutes, does not itself contain language explicitly precluding judicial review in enforcement cases. *See* 588 U.S. at 14–17; Pet. Br. 33. That point, however, overlooks that section 703 of the APA, not the Hobbs Act, provides the explicit statement that review is unavailable in an enforcement proceeding. And section 703's exception to the availability of review, by its plain terms, is *not* triggered by an express statement in another statute that review in an enforcement matter is precluded, but by the grant of a "prior, adequate, and

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[4] By contrast, giving "determine the validity" its ordinary meaning does not render superfluous the Hobbs Act's inclusion of specific types of affirmative relief (injunctions, set-aside orders, and suspension orders) that a court of appeals may grant on a petition for review: Power to issue an injunction, to vacate an action in its entirety, or to suspend it in whole or in part would not necessarily be conveyed by authorization only to determine the validity of an agency action.

exclusive opportunity for review." The Hobbs Act's provision for "exclusive" court of appeals jurisdiction to "determine the validity" of specified orders, 28 U.S.C. § 2342, is thus by itself sufficient to bring a case within the section 703 exception. Congress need not explicitly preclude review in enforcement matters *twice* to make the section 703 preclusion applicable.[5]

Importantly, section 703 does not render meaningless the express preclusion of review in statutes such as the Clean Air Act, 42 U.S.C. § 7607(b)(2), the Clean Water Act, 33 U.S.C. § 1369(b)(2), and CERCLA, 42 U.S.C. § 9613(a). First, those specific, stand-alone review preclusion provisions would remain operative even if the exception to review in section 703 were removed by Congress. Second, those provisions, unlike the section 703 exception, appear to bar review in enforcement matters regardless of whether the party seeking review had an "adequate … opportunity" to seek it under the exclusive statutory review mechanism. Thus, where applicable, they preclude review more broadly than section 703.

Finally, reading section 703 and the Hobbs Act together to bar courts in enforcement proceedings from

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[5] For the same reason, it does not matter that the Hobbs Act, unlike the statute at issue in *Yakus v. United States*, 321 U.S. 414 (1944), does not also provide that no other court can "consider the validity" of agency actions to which it applies. *See PDR*, 588 U.S. at 22–23 (Kavanaugh, J., concurring). That ground is now covered by the section 703 exception, which displaces enforcement courts from deciding matters that are subject to exclusive prior review under the Hobbs Act or another statute. That neither section 703 nor the Hobbs Act uses the term "considering" is of little significance. The crucial point is that what they together bar is not *thinking about* a rule's validity, but *determining*—i.e., deciding—its validity.

determining the validity of legislative rules neither gives "absolute deference" to legal interpretations made by agencies in issuing rules nor results in "abdication" of judicial responsibility. *See PDR*, 588 U.S. at 26 (Kavanaugh, J., concurring). That reading determines only *which courts* are empowered to engage in the *non-deferential* review of statutory issues called for by this Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), and *when* they may do so. *Loper Bright* holds that courts empowered to review agency action by the APA "abdicat[e]" their authority if they defer to an agency on statutory questions that Congress has not delegated to it, *id*. at 2266, but nowhere suggests that abiding by the limits that Congress has imposed on the availability of judicial review is a form of "abdication." On the contrary, this Court has long insisted that courts respect the APA's limits on their authority, "leav[ing] to Congress, and not to the courts," the power to determine in the first instance what actions are judicially reviewable. *Heckler v. Chaney*, 470 U.S. 821, 838 (1985).

That four Justices in *PDR* offered a view on the application of section 703 and the Hobbs Act in cases involving legislative rules that is contrary to the one suggested in this brief, while the majority chose not to resolve the issue, demonstrates that the question is not an easy one. And lurking in the background are issues concerning respect for Congress's authority to provide that an agency's substantive rulemaking authority is subject to review only by a limited set of courts acting within narrow time-limits and, when Congress has done so, how to determine when a party had an "adequate" opportunity to avail itself of such review. These questions are best left for a case in which deciding them is necessary. In this case, the

Court will provide clarity on an important issue if it decides only the issue directly presented: whether a *non-binding* agency interpretation can somehow bind courts if it is issued in an order subject to the Hobbs Act. The correct answer to that question requires reversal of the decision below.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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