No. 13-1273

In the Supreme Court of the United States

MARK LEYSE, PETITIONER

v.

CLEAR CHANNEL BROADCASTING, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a prerecorded telephone message from a local radio station to a residential phone line generally promoting the radio station violates the Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, 105 Stat. 2394, and the implementing regulations of the Federal Communications Commission (FCC).

2. Whether the district court lacked jurisdiction to consider the validity of the FCC regulations implementing the TCPA, in light of the exclusive jurisdiction of the courts of appeals "to enjoin, set aside, suspend (in whole or in part), or to determine the validity of * * * all final orders" of the FCC. 28 U.S.C. 2342 and (1).

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the Federal Communications Commission intervened in the court of appeals and is a respondent in this Court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is not published in the *Federal Reporter* but is reprinted in 545 Fed. Appx. 444. An earlier, superseded opinion of the court of appeals (Pet. App. 34a-71a) is reported at 697 F.3d 360. The opinion and order of the district court (Pet. App. 72a-79a) is not reported in the *Federal Supplement* but is available at 2010 WL 2253646.

JURISDICTION

The amended judgment of the court of appeals was entered on November 5, 2013. A petition for rehearing was denied on January 23, 2014 (Pet. App. 80a-81a). The petition for a writ of certiorari was filed on April 17, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, 105 Stat. 2394, prohibits specific types of telephone calls using automatic telephone dialing equipment or prerecorded messages—including calls to mobile phones and calls to residential lines without the recipient's consent—as well as unsolicited advertisements transmitted by fax. 47 U.S.C. 227(b)(1)(A)-(C). The TCPA authorizes the Federal Communications Commission (Commission or FCC) to prescribe implementing regulations. 47 U.S.C. 227(b)(2). In particular, the Commission may by regulation exempt from the general prohibition on calls to residential lines "such classes or categories of calls made for commercial purposes as the Commission determines (I) will not adversely affect the privacy rights that this section is intended to protect; and (II) do not include the transmission of any unsolicited advertisement." 47 U.S.C. 227(b)(2)(B)(ii).

Exercising that exemption authority, the Commission has excepted from the statutory ban on unsolicited calls using automatic dialers or prerecorded messages calls that are "made for a commercial purpose, but d[o] not include the transmission of any unsolicited advertisement." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 7 FCC Rcd. 8752, 8791 (1992) (*1992 TCPA Order*). In 2003, the Commission clarified how that general rule applies to certain prerecorded telephone messages from over-the-air television and radio broadcasters. See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14100-14101 ¶ 145 (2003) (*2003 TCPA Order*). The Commission explained that, "if the

purpose of the message is merely to invite a consumer to listen to or view a broadcast, such message is permitted under the current rules as a commercial call that 'does not include the transmission of any unsolicited advertisement,'" *id.* at 14101 ¶ 145, and thus would be exempt from the general ban. No party sought judicial review of the *2003 TCPA Order*. One party asked the Commission to reconsider its decision, but the Commission declined and reaffirmed its prior determination. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 20 FCC Rcd. 3788, 3805-3806 ¶¶ 42-44 (2005).

2. The Communications Act of 1934, 47 U.S.C. 151 *et seq.*, establishes the exclusive mechanism for challenging the validity of orders issued by the FCC. That statute specifies that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter * * * shall be brought as provided by and in the manner prescribed in chapter 158 of title 28," United States Code. 47 U.S.C. 402(a).[1] The cross-referenced chapter of the United States Code, the Administrative Orders Review Act (Hobbs Act), provides in relevant part that "[t]he court of appeals * * * has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of * * * all final orders of the Federal Communications Commission made reviewable by [47 U.S.C. 402(a)]." 28 U.S.C. 2342 and (1). The Hobbs Act specifies that "[a]ny party aggrieved

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[1] Judicial review of certain specified FCC decisions is governed by 47 U.S.C. 402(b), which vests exclusive jurisdiction in the Court of Appeals for the District of Columbia Circuit. Because the FCC orders at issue in this case are not among those specified decisions, Section 402(b) is inapplicable here.

by the [FCC's] final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. 2344.

3. This case involves a private TCPA suit brought against a radio broadcaster. The TCPA creates private rights of action to enforce certain portions of the Act. See 47 U.S.C. 227(b)(3) and (c)(5). Federal and state courts have concurrent jurisdiction over private lawsuits arising under the TCPA. See *Mims* v. *Arrow Fin. Servs.*, 132 S. Ct. 740 (2012).[2]

Petitioner, a New York resident, alleges that in 2005 he received a prerecorded telephone message on his residential telephone line from a local radio station. The message promoted the station's programming and announced that recipients could call in at a specified time for a chance to win a prize. See Pet. App. 3a.

a. In 2005, petitioner filed a complaint in the United States District Court for the Southern District of New York. That court dismissed the complaint for failure to state a claim on which relief could be granted. See *Leyse* v. *Clear Channel Broad., Inc.*, No. 05 CV 6031 HB, 2006 WL 23480 (S.D.N.Y. 2006), aff'd, 301 Fed. Appx. 20 (2d Cir. 2008). The court found that, in the *2003 TCPA Order*, the Commission had "exempted from [Section] 227 the type of prerecorded call at issue here as neither an unsolicited advertisement nor a telephone solicitation." *Id.* at *2. The court deferred to that Commission determination and dismissed the complaint on the merits. *Id.* at *3-*4.

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[2] The FCC also has authority to enforce the TCPA, 47 U.S.C. 227(g)(7), as do state attorneys general. See 47 U.S.C. 227(g) and (e)(6).

On appeal, the Second Circuit asked for the FCC's views on several questions presented by the case. See Pet. App. 82a. The Commission's response explained that a telephone message of this type, which "contains both an invitation to tune into a free radio broadcast at a particular time in order to win a prize and a general promotion for the radio station * * * is permitted under the Commission's rules * * * [and] is not actionable under the TCPA." *Id.* at 92a. The Commission noted its prior determinations in the 2003 and 2005 rulemaking proceedings that, because over-the-air broadcasting is free to listeners, "neither telephone messages containing general promotional announcements for broadcast stations nor messages inviting the recipient to listen to specific broadcasts are 'unsolicited advertisements.'" *Id.* at 94a; see *id.* at 87a-88a. The FCC also argued that its "orders are consistent with the TCPA and are otherwise reasonable." *Id.* at 93a. The Commission further explained, however, that "established legal doctrine prohibit[ed] [the Second Circuit] from reviewing the Commission's TCPA Orders by way of collateral attack in a suit between private parties." *Ibid.*

The Second Circuit affirmed dismissal of the complaint on "alternate grounds—namely, there is no subject matter jurisdiction." *Leyse*, 301 Fed. Appx. at 21-22. The court held that the only basis for jurisdiction asserted by petitioner, 28 U.S.C. 1332(d)(2)(A) (creating federal jurisdiction over certain class actions), was unavailable because New York law did not permit a class action for statutory damages under the TCPA. See *Leyse*, 301 Fed. Appx. at 21-22.

b. Four months later, petitioner filed a putative class action under the TCPA in the United States

District Court for the Southern District of Ohio against the same defendants based on the same prerecorded telephone message. Pet. App. 4a, 74a.

The district court granted defendants' motion to dismiss. See Pet. App. 72a-79a.[3] The court explained that the FCC regulations exempted from the TCPA calls that both announce a contest and contain a general promotion for a radio station. See *id.* at 77a. The court held that the FCC's interpretation of the TCPA (as embodied in its regulations) was entitled to deference, and the court found that interpretation to be reasonable. *Id.* at 77a-79a.

c. The court of appeals affirmed. Pet. App. 34a-71a. The court held that the call at issue fell within the FCC's regulatory exemption from the TCPA's prerecorded call prohibitions, *id.* at 47a, and that the regulatory exemption was a reasonable exercise of the Commission's delegated authority to implement the TCPA, *id.* at 58a. In reaching the latter conclusion, the court rejected the argument that the Hobbs Act precluded it from considering the validity of the FCC's implementing regulations in this case, which did not arise under that special review statute. *Id.* at 58a-70a.

d. The FCC, which had not been a party to this private action, became aware of the court of appeals' decision. The Commission sought to intervene for the purpose of seeking rehearing in order to argue that the district court lacked jurisdiction to consider the validity of the FCC regulations. See Mot. for Leave to

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[3] The district court held that this Court's decision in *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393 (2010), had removed the impediment to subject matter jurisdiction previously identified by the Second Circuit. See Pet. App. 76a n.1.

Intervene of the Fed. Commc'ns Comm'n 2 (Sept. 19, 2012). The court of appeals granted the motion to intervene, 10-3739 Docket entry No. (Docket entry) 56 (Sept. 27, 2012), and allowed the FCC to file a petition for rehearing. In that petition, the Commission argued that, although the district court had jurisdiction to consider the legality of the defendants' telephone call under the TCPA and the FCC's implementing regulations, it lacked jurisdiction to consider the argument that the FCC regulations were invalid.

The court of appeals panel subsequently issued an amended opinion. Pet. App. 1a-33a. As before, the court held that the prerecorded telephone message about which petitioner complained came within the category of calls that the FCC had exempted from the TCPA's prohibition. *Id.* at 7a-16a. Contrary to its previous determination, however, the court also held that "the district court did not have subject matter jurisdiction to consider [petitioner's] arguments about the procedural invalidity of the FCC regulations" because exclusive jurisdiction to consider such challenges has been committed by the Hobbs Act to the courts of appeals. *Id.* at 2a, 16a-33a.

After the court issued the amended opinion, the FCC withdrew its petition for rehearing, Docket entry No. 111 (Nov. 15, 2013), and the court denied petitioner's petition for rehearing, Pet. App. 80a.[4]

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[4] The court of appeals directed that the amended opinion not be published. See Pet. App. 1a n.*; see also Docket Entry 119 (Jan. 2, 2014) (denying the FCC's subsequent motion that opinion be published).

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Earlier this year, the Court denied a petition for a writ of certiorari raising the same jurisdictional question that is presented here, and there is no reason for a different result in this case. Further review is not warranted.

1. Petitioner contends (Pet. 11-12) that the part of the prerecorded call that he received from a New York radio station promoting that station was outside the scope of the regulatory exemption promulgated by the FCC under its authority delegated by the TCPA. The fact-specific question whether the court of appeals correctly applied the FCC's regulatory exemption is not an issue of sufficient importance to warrant further review.

In any event, the court of appeals correctly held that the "call fits within the TCPA exemption created by the FCC." Pet. App. 16a. The FCC explained in 2003 that a telephone call from a television or radio station whose purpose is "merely [to] invite a consumer to listen to or view a broadcast" is not a "telephone solicitation" within the TCPA restrictions. *2003 TCPA Order*, 18 FCC Rcd. at 14101 ¶ 145. As the court noted, the FCC again considered this question in 2005 and "reaffirm[ed] its position exempting prerecorded calls that invited a 'consumer to listen to or view a broadcast' from §227(b)'s prohibition." Pet. App. 14a. In addition, the court of appeals noted that the "FCC has even opined in its letter to the Second Circuit that the exact call at issue in this case * * * is exempt and therefore permissible under the TCPA." *Ibid.*; see *id.* at 82a, 97a-98a. The FCC's

analysis of the applicability of its own regulations to the circumstances presented here is, at the least, reasonable. See *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871, 880 (2011).

2. Petitioner contends (Pet. 13-25) that the Hobbs Act did not prevent the district court from questioning the validity of the FCC regulation at issue. The court of appeals' interpretation of the Hobbs Act is correct and consistent with that of every other court of appeals that has addressed the issue.

a. Section 402(a) of the Communications Act, 47 U.S.C. 402(a), specifies that (with certain exceptions not applicable here) any challenge to a final order of the FCC must be brought under the Hobbs Act, 28 U.S.C. 2341 *et seq.* The Hobbs Act, in turn, gives the courts of appeals "*exclusive jurisdiction* to enjoin, set aside, suspend (in whole or in part), or to *determine the validity* of" such orders. 28 U.S.C. 2342(1) (emphases added). Contrary to petitioner's contention (Pet. 22-24), FCC orders adopting rules, even those embodying interpretive rulings, are "orders" subject to review under the Hobbs Act. *United States West Commc'ns, Inc.* v. *Hamilton*, 224 F.3d 1049, 1055 (9th Cir. 2000).

Under this review scheme, a party wishing to challenge action by the Commission must file a petition for review in the appropriate court of appeals within 60 days of the action's publication in the Federal Register. See 28 U.S.C. 2342(1); 47 U.S.C. 402(a). "[A] statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute." *Telecommunications Research and Action Ctr.* v. *FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) (discussing the same Communications Act

scheme), cert. denied, 410 U.S. 1039 (1989); see *FCC* v. *ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984) (explaining that the "appropriate procedure for obtaining judicial review of the agency's disposition of [regulatory] issues [is] appeal to the Court of Appeals as provided by statute"); Pet. App. 32a.

Petitioner contends that his complaint was not subject to the Hobbs Act because it was brought "to obtain statutory relief from respondents, not to 'enjoin, set aside, annul or suspend' an agency's order." Pet. 13 (capitalization altered). But neither the Communications Act nor the Hobbs Act suggests that jurisdiction should turn on the identity of the defendant, or on whether a suit *directly* challenges the validity of a Commission regulation. The Hobbs Act's jurisdictional limitations are "equally applicable whether [a party] wants to challenge the rule directly . . . or indirectly, by suing someone who can be expected to set up the rule as a defense in the suit." *CE Designs Ltd.* v. *Prism Bus. Media, Inc.*, 606 F.3d 443, 448 (7th Cir. 2010) (quoting *City of Peoria* v. *General Elec. Cablevision Corp.*, 690 F.2d 116, 120 (7th Cir. 1982)) (alterations in original), cert. denied, 131 S. Ct. 933 (2011).

It is clear from petitioner's filings in the court of appeals that the alleged invalidity of the FCC's regulations was critical to the success of his lawsuit. See, *e.g.*, Pet. C.A. Br. 15-40. In that circumstance, the Hobbs Act scheme precludes collateral attack on the FCC's order. If the *effect* of the suit is to invite the reviewing court to "determine the validity of [a] final order[]" of the FCC, 28 U.S.C. 2342(1), a district court does not have jurisdiction to consider that claim.

The fact that "the FCC was not a party" to petitioner's lawsuit (Pet. 16) is likewise irrelevant. That a challenge to an FCC order "arises in a dispute between private parties makes no difference." *CE Designs*, 606 F.3d at 448. "To hold otherwise merely because the [TCPA] issue has arisen in private litigation would permit an end-run around the administrative review mandated by the Hobbs Act." *Nack* v. *Walberg*, 715 F.3d 680, 686 (8th Cir. 2013), cert. denied, 134 S. Ct. 1539 (2014).

Contrary to petitioner's view, the (initial) absence of the FCC as a party in this case underscores the practical wisdom of the Hobbs Act's scheme of exclusive jurisdiction. The FCC was not even aware of this case until after the panel issued its first decision, even though the legality of its regulations was a central issue. The jurisdictional scheme enacted by Congress ensures that the FCC, and not just private parties named as defendants in litigation, will be in a position to defend the validity of FCC actions.[5]

b. The court of appeals' resolution of the jurisdictional question presented here is consistent with the decisions of all other courts of appeals to have addressed the issue. See, *e.g., Self* v. *BellSouth Mobility, Inc.*, 700 F.3d 453, 461-464 (11th Cir. 2012); *Qwest*

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[5] Those dissatisfied with existing Commission orders are not without recourse. As the court of appeals recognized, if a party wishes to challenge the lawfulness of an FCC regulation after the 60-day period for direct Hobbs Act review has expired, it may either petition the FCC for a declaratory ruling, 47 C.F.R. 1.2, or ask the agency to initiate a new rulemaking proceeding, 47 C.F.R. 1.401. Pet. App. 32a; see *ITT World Commc'ns*, 466 U.S. at 468 n.5; *City of Peoria*, 690 F.2d at 121; *United States* v. *Any and All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000) (en banc), cert. denied, 531 U.S. 1071 (2001).

Corp. v. *Public Utils. Comm'n*, 479 F.3d 1184, 1192 n.6 (10th Cir. 2007); *Vonage Holdings Corp.* v. *Minnesota PUC*, 394 F.3d 568, 569 (8th Cir. 2004) ("No collateral attacks on the FCC order are permitted" in private-party litigation.); *United States* v. *Dunifer*, 219 F.3d 1004, 1007 (9th Cir. 2000) ("By its terms, [the statute's] jurisdictional limitations apply as much * * * to affirmative defenses as to offensive claims."); *In re NextWave Personal Commc'ns*, 200 F.3d 43, 54 (2d Cir. 1999) (Because "jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals," a district court "lack[s] jurisdiction to decide" cases arising out of FCC orders.), cert. denied, 531 U.S. 924 (2000); *Bywater Neighborhood Ass'n* v. *Tricarico*, 879 F.2d 165, 167 (5th Cir. 1989); *Telecommunications Research & Action Ctr.*, 750 F.2d at 75; *City of Peoria*, 690 F.2d at 119 (describing challenge to FCC rule in private-party district court litigation as having been "brought in the wrong court at the wrong time against the wrong party").[6]

This Court recently denied a petition for a writ of certiorari presenting the same jurisdictional question under the Hobbs Act. See *Walberg* v. *Nack*, 134 S. Ct. 1539 (2014). The same result is warranted here.

c. Finally, this case is an unsuitable vehicle for the Court's consideration of the jurisdictional question

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[6] Case law involving other agencies covered by the Hobbs Act, 28 U.S.C. 2342, similarly holds that collateral review of agency orders is barred. See, *e.g.*, *Daniels* v. *Union Pac. R. Co.*, 530 F.3d 936, 940-941 (D.C. Cir. 2008) (Federal Railroad Administration); *United States* v. *Interlink Sys., Inc.*, 984 F.2d 79, 82-83 (2d Cir. 1993) (Federal Maritime Commission).

because reversal of the Sixth Circuit's jurisdictional holding would not affect the outcome of the suit. In the court of appeals' first decision in this case, the court determined (consistent with the position of petitioner here) that it had jurisdiction to consider the validity of the FCC's rules. See Pet. App. 58a-70a. The court held, however, that the rules were valid, see *id.* at 57a-58a, and it therefore ruled against petitioner on the merits. Petitioner thus could not prevail in this case even if the Court reversed the court of appeals' subsequent determination that the district court lacked jurisdiction to consider petitioner's collateral challenge to the FCC regulations.

3. Petitioner argues at length (Pet. 25-32) that the FCC rules he challenges are not entitled to deference on judicial review. Because the court of appeals correctly held that it lacked jurisdiction to review those rules, Pet. App. 23a-33a, the question of the proper level of deference attendant to such review is not presented here. In any event, the court of appeals correctly determined that the FCC's use and explication of its TCPA exemption authority is entitled to deference. *Id.* at 18a-19a.

Petitioner also contends that the FCC rules he challenges are "arbitrary and capricious, and constituted an abuse of discretion." Pet. 33 (capitalization altered); see Pet. 33-41. Because the court of appeals correctly held that it lacked jurisdiction to consider the validity of the rules, see Pet. App. 23a-33a, the question whether the rules are valid is not properly presented here. In any event, the court of appeals in its earlier decision correctly rejected petitioner's challenge. See *id.* at 57a-58a. Even if the Hobbs Act's jurisdictional bar were inapplicable here, the

court's application of the well-settled arbitrary-and-capricious standard to the FCC rules would not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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