

Hobbs Act — Administrative Law — Judicial Review —
McLaughlin Chiropractic Associates, Inc. v. McKesson Corp.

If there were ever a “First Commandment” of the federal judiciary, one candidate might be an oft-quoted phrase from *Marbury v. Madison*¹: “It is emphatically the province and duty of the judicial department to say what the law is.”² Although the phrase is regularly invoked by the Supreme Court,³ its precise meaning has long been debated. Some understand it to support a system of “judicial supremacy,” whereby the federal judiciary is the government’s authoritative source of legal interpretation.⁴ Others understand the phrase to support a narrower “departmentalist” view, in which the judiciary — just like any other branch of government — must interpret the law for itself in order to perform its constitutional functions.⁵ In the realm of administrative law, this “*Marbury* duty” has gained renewed significance, as the Court repeatedly invoked it as a reason to jettison *Chevron*⁶ deference in *Loper Bright Enterprises v. Raimondo*.⁷

Last Term, in *McLaughlin Chiropractic Associates, Inc. v. McKesson Corp.*,⁸ the Supreme Court construed the Hobbs Act⁹ in a manner that supports a departmentalist view of its *Marbury* duty. At issue was whether a court “determine[s] the validity” of an agency action under the Hobbs Act when, during an enforcement proceeding, it disagrees with the statutory interpretation offered within that agency action.¹⁰ *McLaughlin* held that such disagreement does not necessarily invalidate the agency action, but instead merely reflects the court’s own interpretation of the statute to resolve the present case.¹¹ This shows an express openness to the executive and judicial departments adopting conflicting interpretations of the same statutory provision — a departure from *Chevron*’s aim to offer one unified meaning of federal law, determined primarily by executive agencies.¹² Therefore, *McLaughlin* suggests that the *Marbury* duty — as revived in *Loper* — is not a full pendulum

¹ 5 U.S. (1 Cranch) 137 (1803).

² *Id.* at 177.

³ *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 703 (1974) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177); *Moore v. Harper*, 143 S. Ct. 2065, 2079 (2023) (same).

⁴ *See, e.g.*, *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177, to support the claim that “the interpretation . . . enunciated by this Court . . . is the supreme law of the land”).

⁵ *See, e.g.*, Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2715–16 (2003).

⁶ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁷ 144 S. Ct. 2244 (2024); *id.* at 2273; *see, e.g., id.* at 2271 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

⁸ 145 S. Ct. 2006 (2025).

⁹ Administrative Orders Review Act, 28 U.S.C. §§ 2341–2351.

¹⁰ *See McLaughlin*, 145 S. Ct. at 2017 (quoting 28 U.S.C. § 2342).

¹¹ *Id.* at 2018.

¹² *See infra* notes 92–96 and accompanying text.

swing from *Chevron*'s "executive supremacy" to "judicial supremacy." Instead, *McLaughlin* entertains a moderate, departmentalist approach.

The Administrative Procedure Act¹³ (APA) provides default rules for judicial review of agency action.¹⁴ For pre-enforcement challenges, the Supreme Court has read §§ 702 and 704 to "embod[y] [a] basic presumption of judicial review" of agency action.¹⁵ For challenges raised during enforcement proceedings in federal court, § 703 separately guarantees review of an agency action unless a "prior, adequate, and exclusive opportunity for judicial review" was available.¹⁶

The Administrative Orders Review Act (also known as the Hobbs Act) displaces the APA's default rules for certain agency actions, including "final orders of the [FCC]."¹⁷ The Hobbs Act creates a special pre-enforcement review system for agency orders governed by the Act, under which aggrieved parties must file petitions for review within sixty days of the agency adjudication.¹⁸ All petitions are then channeled to a single federal court of appeals, which is vested with "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" the order.¹⁹

Separately, the FCC is responsible for administering the Telephone Consumer Protection Act²⁰ (TCPA).²¹ That statute makes it "unlawful" to send any "unsolicited advertisement" to another person's fax machine.²² The TCPA allows the FCC to "prescribe regulations to implement" this prohibition.²³ It also creates a private right of action for those who receive unsolicited advertisements.²⁴

In 2009 and 2010, a subsidiary of McKesson Corporation began sending unsolicited advertisements to potential buyers through a mix of traditional and online fax services.²⁵ In 2014, one of those recipients — *McLaughlin Chiropractic Associates* — sued McKesson in the U.S. District Court for the Northern District of California.²⁶ *McLaughlin* alleged that McKesson had violated the TCPA by sending the advertisements, and it sought class certification for all recipients of unsolicited faxes from McKesson.²⁷

¹³ 5 U.S.C. §§ 551–559, 701–706.

¹⁴ *See id.* §§ 701–706.

¹⁵ *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. §§ 702, 704) (citing 5 U.S.C. § 701(a)).

¹⁶ 5 U.S.C. § 703.

¹⁷ 28 U.S.C. § 2342(1).

¹⁸ *See id.* § 2344.

¹⁹ *Id.* § 2342.

²⁰ 47 U.S.C. § 227.

²¹ *Id.* § 227(b)(2).

²² *Id.* § 227(b)(1).

²³ *Id.* § 227(b)(2).

²⁴ *See id.* § 227(b)(3).

²⁵ *McLaughlin*, 145 S. Ct. at 2012.

²⁶ *Id.*

²⁷ *Id.*

After years of litigation and an appeal,²⁸ the district court eventually granted McLaughlin's motion for class certification.²⁹ Critically, the certified class did not distinguish between those who received McLaughlin's advertisements via traditional fax machines and those who received them via an online service.³⁰

While class certification was pending, an unrelated party petitioned the FCC for a declaratory ruling.³¹ The party asked the FCC to clarify whether it interprets the TCPA to create liability for sending unsolicited advertisements to online fax services.³² The FCC responded with *Amerifactors Financial Group, LLC*,³³ which interpreted the TCPA to only apply to traditional fax machines — not online fax services.³⁴ Neither McLaughlin nor any other potentially aggrieved party sought Hobbs Act pre-enforcement review of *Amerifactors* during the sixty-day petition period.³⁵

In light of *Amerifactors*, McKesson moved to decertify the combined class of online and traditional fax recipients.³⁶ The district court separated the online fax recipients into a new class,³⁷ and later decertified their class altogether.³⁸ In separating the online fax recipients, the court reasoned that it could not “diverge from *Amerifactors*' fundamental holding” as to the TCPA's meaning.³⁹ That was because any challenge to *Amerifactors* would be governed by the Hobbs Act,⁴⁰ which vests “exclusive jurisdiction . . . to determine the validity of” FCC orders in the petitioned court of appeals.⁴¹ Without such jurisdiction, the court could not “raise the same issues” addressed in *Amerifactors* by

²⁸ See *True Health Chiropractic Inc. v. McKesson Corp.*, 332 F.R.D. 589, 594–95 (N.D. Cal. 2019) (detailing procedural history).

²⁹ *Id.* at 610.

³⁰ See *id.*

³¹ The Supreme Court has not settled whether FCC “declaratory rulings” are “rules” or “orders” under the APA, or to what extent they bind regulated persons. See *infra* notes 99–04 and accompanying text. The FCC's regulations treat them as declaratory orders under 5 U.S.C. § 554(e) of the APA. See 47 C.F.R. § 1.2(a) (2024); see also *City of Arlington v. FCC*, 668 F.3d 229, 241 (5th Cir. 2012) (classifying them as such), *aff'd on other grounds*, 569 U.S. 290 (2013). That provision allows agencies to issue legally binding advice through adjudication procedures rather than rule-making. See Emily S. Bremer, *The Agency Declaratory Judgment*, 78 OHIO ST. L.J. 1169, 1181 (2017).

³² *McLaughlin*, 145 S. Ct. at 2012.

³³ 34 FCC Rcd. 11950 (2019).

³⁴ See *id.* at 11952.

³⁵ *McLaughlin*, 145 S. Ct. at 2015 n.3.

³⁶ *True Health Chiropractic Inc. v. McKesson Corp.*, No. 13-cv-02219, 2020 WL 7664484, at *3–4 (N.D. Cal. Dec. 24, 2020).

³⁷ *Id.* at *7, *9.

³⁸ See *True Health Chiropractic Inc. v. McKesson Corp.*, No. 13-cv-02219, 2021 WL 4818945, at *3 (N.D. Cal. Oct. 15, 2021).

³⁹ *True Health Chiropractic*, 2020 WL 77664474, at *7 (citing *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 399 (9th Cir. 1996)).

⁴⁰ *Id.* at *6–7.

⁴¹ 28 U.S.C. § 2342.

interpreting the same TCPA provision for itself.⁴² After the remaining class of traditional fax recipients received partial summary judgment,⁴³ McKesson appealed to the Ninth Circuit.⁴⁴ McLaughlin cross-appealed the district court’s class decertification.⁴⁵

The Ninth Circuit affirmed.⁴⁶ In a memorandum opinion, the panel agreed that, under controlling Ninth Circuit precedent,⁴⁷ the Hobbs Act’s “exclusive jurisdiction” provision rendered the district court effectively “bound by . . . *Amerifactors*.”⁴⁸ McLaughlin filed a petition for a writ of certiorari, which the Supreme Court granted.⁴⁹

The Supreme Court reversed.⁵⁰ Writing for the Court,⁵¹ Justice Kavanaugh concluded that “[t]he Hobbs Act does not preclude district courts in enforcement proceedings from independently assessing whether an agency’s interpretation of the relevant statute is correct.”⁵² Accordingly, the Court remanded to the district court to interpret the TCPA for itself and “afford[] appropriate respect” to the FCC’s interpretation.⁵³

To begin its analysis, the Court divided the world of statutes authorizing pre-enforcement review of agency action into three categories. First, there are statutes that “authorize pre-enforcement judicial review,” but “expressly *preclude* judicial review in subsequent enforcement proceedings.”⁵⁴ Second, there are statutes that “expressly *authorize* (or at least expressly contemplate)” enforcement-proceeding review.⁵⁵ Third, there are statutes that are “silent” on whether enforcement-proceeding review remains available.⁵⁶

⁴² *True Health Chiropractic*, 2020 WL 7664484, at *7 (quoting *Wilson*, 87 F.3d at 399).

⁴³ See *True Health Chiropractic Inc. v. McKesson Corp.*, No. 13-cv-02219, 2021 WL 1056812, at *5 (N.D. Cal. Mar. 19, 2021).

⁴⁴ *True Health Chiropractic, Inc. v. McKesson Corp.*, No. 22-15710, 2023 WL 7015279, at *1 (9th Cir. Oct. 25, 2023).

⁴⁵ See *id.* at *1–2.

⁴⁶ *Id.* at *1.

⁴⁷ See *id.* at *2 (citing *Wilson*, 87 F.3d at 400).

⁴⁸ *Id.*

⁴⁹ *McLaughlin Chiropractic Assocs., Inc. v. McKesson Corp.*, 145 S. Ct. 116 (2024).

⁵⁰ *McLaughlin*, 145 S. Ct. at 2023.

⁵¹ Justice Kavanaugh was joined by Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Barrett.

⁵² *McLaughlin*, 145 S. Ct. at 2013.

⁵³ *Id.* at 2013, 2023.

⁵⁴ *Id.* at 2014. As examples, the Court cited the Clean Water Act, 33 U.S.C. § 1369(b)(1)–(2), the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9613(a), and the Clean Air Act, *id.* § 7607(b)(1)–(2).

⁵⁵ *McLaughlin*, 145 S. Ct. at 2014. As examples, the Court cited the Toxic Substances Control Act, 15 U.S.C. § 2618(a)(1)(A)–(B), and the review scheme for certain FTC rules, *id.* § 57a(e)(5)(B).

⁵⁶ *McLaughlin*, 145 S. Ct. at 2014. As examples, the Court cited statutes that govern review of various rules and orders of the SEC, 15 U.S.C. §§ 77i(a), 80a-42(a), 80b-13(a), and the Department of Labor, 29 U.S.C. § 655(f).

For this third category of silent statutes, the Court fashioned a “default rule” that enforcement-proceeding review remains available.⁵⁷ The Court considered several “[f]undamental principles of administrative law” that made this default rule “proper.”⁵⁸ First, the Court has long required “persuasive reason to believe” a statute was intended to override the “‘basic presumption of judicial review’ of agency action.”⁵⁹ Second, the Court read § 703 to “codif[y]” this presumption with respect to enforcement-proceeding review.⁶⁰ Third, the Court characterized *Abbott Laboratories v. Gardner*,⁶¹ the seminal case greenlighting pre-enforcement APA review, as intended “to *expand* the opportunities for judicial review” rather than *replace* enforcement-proceeding review.⁶² Finally, the Court described this default rule as being fair to regulated “entities” who “may not have existed” during the sixty-day petition period or who may not have been engaged in regulated activity at the time.⁶³

Having established this “default rule,” the Court then held that the Hobbs Act falls within this category of silent statutes.⁶⁴ Although the Hobbs Act vests “exclusive jurisdiction . . . to determine the validity” of agency action in the petitioned court of appeals,⁶⁵ that provision “does not expressly preclude [judicial] review in enforcement proceedings.”⁶⁶

To reach this conclusion, the majority reasoned that courts do not “determine the validity” of agency actions whenever they disagree with the statutory interpretations offered therein.⁶⁷ The Court read the phrase “determine the validity” to refer instead to “a court of appeals . . . entering a declaratory judgment that declares the [agency’s] order valid or invalid.”⁶⁸ This reading comported best with the rest of the provision, which also vests the petitioned court of appeals with “exclusive jurisdiction” to “‘enjoin,’ ‘set aside,’ and ‘suspend’” the agency action.⁶⁹ Because each of these is a “form[] of relief,” the Court invoked the *noscitur a sociis* canon to conclude that “determine the validity” refers to another “form[] of relief” available in pre-enforcement challenges — a declaratory judgment.⁷⁰

⁵⁷ *McLaughlin*, 145 S. Ct. at 2014–15.

⁵⁸ *Id.* at 2015.

⁵⁹ *Id.* (quoting *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986); *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018)).

⁶⁰ *See id.*

⁶¹ 387 U.S. 136 (1967).

⁶² *McLaughlin*, 145 S. Ct. at 2016.

⁶³ *See id.* at 2016–17.

⁶⁴ *Id.* at 2017.

⁶⁵ *Id.* (alteration in original) (quoting 28 U.S.C. § 2342).

⁶⁶ *Id.*

⁶⁷ *See id.* at 2019.

⁶⁸ *Id.* at 2017–18.

⁶⁹ *Id.* at 2018; 28 U.S.C. § 2342.

⁷⁰ *McLaughlin*, 145 S. Ct. at 2018.

The Court also distinguished other statutes and cases that involved similar language to that of the Hobbs Act. Of particular note was *Yakus v. United States*.⁷¹ That case held that the Emergency Price Control Act of 1942⁷² (EPCA) — a statute with a near-identical “exclusive jurisdiction” provision to the Hobbs Act⁷³ — *did* preclude enforcement-proceeding review.⁷⁴ To distinguish *Yakus*, the Court read its holding to be predicated, in part, on a *second* provision in the EPCA that expressly forbade all other courts from “consider[ing] the validity” of regulations governed by the statute.⁷⁵ Because no analogue to this second provision appears in the Hobbs Act, the Court distinguished the EPCA as a statute that expressly precluded enforcement-proceeding review.⁷⁶

Justice Kagan dissented.⁷⁷ In her view, the majority’s “default rule” was based on faulty premises. First, the Court’s long-recognized “presumption of judicial review” was only a presumption against preclusion of “*all* judicial review” of an agency action.⁷⁸ Because the Hobbs Act provides for *some* review via pre-enforcement petitions, that presumption was inapposite here.⁷⁹ Second, the majority’s reliance on § 703 was improper,⁸⁰ as *McLaughlin* “never argued that it lacked a ‘prior’ or ‘adequate’ opportunity for review,”⁸¹ such that § 703 would independently guarantee enforcement-proceeding review.⁸² Separately, Justice Kagan disputed the majority’s reading of “determine the validity.”⁸³ On her read, the district court would plainly “determine the validity” of *Amerifactors* if it disagreed with the FCC’s statutory interpretation, as the court “would need to decide (or ‘determine’) [whether] *Amerifactors* is legally wrong (or ‘invalid’).”⁸⁴ Justice Kagan pointed to several prior cases that supported this reading.⁸⁵

McLaughlin sheds light on how the Court conceives of its *Marbury* duty to “say what the law is,” as recently revived in administrative

⁷¹ 321 U.S. 414 (1944).

⁷² Pub. L. No. 77-421, 56 Stat. 23 (1942).

⁷³ See § 204(d) (vesting “exclusive jurisdiction to determine the validity of any regulation or order” in one federal appeals court).

⁷⁴ *Yakus*, 321 U.S. at 430–31.

⁷⁵ *McLaughlin*, 145 S. Ct. at 2019 (emphasis omitted) (quoting § 204(d), 56 Stat. at 33).

⁷⁶ *Id.* at 2020.

⁷⁷ Justice Kagan was joined by Justices Sotomayor and Jackson.

⁷⁸ *McLaughlin*, 145 S. Ct. at 2028 (Kagan, J., dissenting) (quoting *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 672 (1986)).

⁷⁹ See *id.* at 2028–29.

⁸⁰ See *id.* at 2024 n.1, 2029.

⁸¹ Petition for a Writ of Certiorari at 20, *McLaughlin*, 145 S. Ct. 2006 (No. 23-1226).

⁸² See *McLaughlin*, 145 S. Ct. at 2024 n.1 (Kagan, J., dissenting) (noting that *McLaughlin* “had, but passed up, an ‘adequate opportunity’” for judicial review).

⁸³ See *id.* at 2024.

⁸⁴ *Id.*

⁸⁵ See *id.* at 2025–26 (discussing *Venner v. Mich. Cent. R.R. Co.*, 271 U.S. 127 (1926), and *Yakus v. United States*, 321 U.S. 414 (1944)); *id.* at 2027 (discussing *Port of Bos. Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970)).

law with *Loper*.⁸⁶ To conclude that the Hobbs Act is silent on enforcement-proceeding review, the majority reasoned that, when a district court “determine[s] the meaning of the law,” it does not “determine the validity” of an agency action that adopted a contrary interpretation.⁸⁷ This analysis suggests a departmentalist view of the *Marbury* duty in the administrative law sphere, as it expressly contemplates the coexistence of conflicting interpretations by the executive and judicial departments. As Justice Gorsuch explained during oral argument on this issue, even if a court “interpret[s] the statute in a manner that may be different than the agency,” “the [agency’s] order stands today as well as it did yesterday.”⁸⁸

A departmentalist approach to statutory interpretation would mark a departure from the *Chevron* regime. *Chevron* was nondepartmentalist, at least insofar as it promoted a single unified interpretation of federal law.⁸⁹ But, although nondepartmentalist, *Chevron* was anything but a doctrine of judicial supremacy. Under *Chevron*, courts uniformly deferred to reasonable interpretations of ambiguous statutes offered by administrative agencies.⁹⁰ So, rather than granting the *judicial* department the definitive role of law declaration, *Chevron* instead granted it to the *executive* department where applicable.⁹¹

With a nondepartmentalist model such as *Chevron*’s, it would have been hard to deny that courts necessarily “determine[d] the validity” of agency action by disagreeing with the agency’s statutory interpretation.⁹² Under *Chevron*, agency interpretations had binding effect,⁹³ and courts were compelled to consider them even where the agency was not

⁸⁶ See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2257 (2024) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

⁸⁷ *McLaughlin*, 145 S. Ct. at 2015, 2019.

⁸⁸ Transcript of Oral Argument at 48, *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051 (2019) (No. 17-1705), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-1705_d18f.pdf [<https://perma.cc/4Y7K-4BEE>].

⁸⁹ See, e.g., Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1126 (1987); Laurence H. Silberman, *Chevron — The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 824 (1990).

⁹⁰ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

⁹¹ See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1818 n.257 (2010) (“In the administrative law context, it is true, there exists a national body — the agency — that can give federal law uniform meaning.”); see also Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 618 (1995) (describing *Chevron* as embodying a “sort of ‘executive supremacy’”).

⁹² See Brief of Professor Aditya Bamzai as Amicus Curiae in Support of Petitioners at 32, *PDR Network*, 139 S. Ct. 2051 (No. 17-1705) (arguing that judicial deference to agency interpretations is “a necessary premise” to the claim that “a court addresses the ‘validity’ of an agency regulation any time that it interprets the relevant statute”).

⁹³ See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2265 (2024).

a party to the litigation.⁹⁴ To break free from *Chevron* deference, courts would necessarily have to engage with the agency’s interpretation and determine that it was unreasonable or otherwise foreclosed by the statute’s text.⁹⁵ Under this framework, Justice Kagan’s dissent in *McLaughlin* would be eminently compelling — a court “would need to decide (or ‘determine’) that [an agency’s interpretation] is legally wrong (or ‘invalid’)”⁹⁶ in order to escape the *Chevron* straightjacket and adopt an alternative interpretation.

The collapse of *Chevron*’s “executive supremacy,”⁹⁷ however, took the wind out of this argument’s sails and allowed *McLaughlin* to adopt its departmentalist premise. To illustrate, one need only compare *McLaughlin*’s outcome to that of a nearly identical case from six years prior, *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*⁹⁸ In *PDR Network*, the Court faced the identical Hobbs Act question presented in *McLaughlin*.⁹⁹ But there, the Court found the question “difficult to answer”¹⁰⁰ and remanded for the lower court to resolve “two preliminary issues.”¹⁰¹ Although neither of these two issues was resolved in *McLaughlin*,¹⁰² the Court answered the “difficult” question anyway.¹⁰³ That might be because, in the time between *PDR Network* and *McLaughlin*, *Chevron*’s demise opened the door to a departmentalist approach, under which a court could exercise its *Marbury* duty to “say what the law is” without being compelled to consider the agency’s interpretation at all.¹⁰⁴ On this view of *Loper*, an agency interpretation

⁹⁴ See, e.g., *Metrophones Telecomms., Inc. v. Glob. Crossing Telecomms., Inc.* 423 F.3d 1056, 1065 (9th Cir. 2005) (applying *Chevron* deference even where agency was not a party).

⁹⁵ See *Chevron*, 467 U.S. at 842–43.

⁹⁶ *McLaughlin*, 145 S. Ct. at 2024 (Kagan, J., dissenting) (emphasis added).

⁹⁷ Schacter, *supra* note 91, at 618.

⁹⁸ 139 S. Ct. 2051 (2019).

⁹⁹ At issue in *PDR Network* was whether a district court must abide by the FCC’s interpretation of “unsolicited advertisement” in the TCPA to include advertisements of “goods or services [offered] at no cost.” *Id.* at 2053 (quoting Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 21 FCC Rcd. 3787, 3814 (2006)). As in *McLaughlin*, no regulated persons filed Hobbs Act pre-enforcement petitions against the relevant FCC order. See *id.* at 2054; *McLaughlin*, 145 S. Ct. at 2013 (citing *PDR Network*, 139 S. Ct. 2051).

¹⁰⁰ *PDR Network*, 139 S. Ct. at 2053.

¹⁰¹ *Id.* These issues concerned the “legal nature” of FCC declaratory rulings and the potential applicability of § 703. See *id.* at 2055–56.

¹⁰² The first issue was briefed by both parties, see Brief for Petitioner at 37–42, *McLaughlin*, 145 S. Ct. 2006 (2025) (No. 23-1226); Brief for Respondents at 47–51, *McLaughlin*, 145 S. Ct. 2006 (2025) (No. 23-1226), but then entirely ignored by both the majority and dissenting opinions. The second was only mentioned in passing by the dissent. See *McLaughlin*, 145 S. Ct. at 2024 n.1 (Kagan, J., dissenting).

¹⁰³ See *McLaughlin*, 145 S. Ct. at 2011.

¹⁰⁴ Cf. *PDR Network*, 139 S. Ct. at 2056 (Thomas, J., concurring in the judgment) (arguing that, but for agency interpretations serving as “authoritative gloss on . . . statutory text,” “the Hobbs Act would have no role to play in . . . a dispute between private parties”). Of course, *Loper* provides that courts may “seek aid” from agency interpretations. *Loper Bright Enters. v. Raimondo*, 144 S.

resembles persuasive precedent rather than a subject of collateral attack — by analogy, when one court of appeals rejects the persuasive precedent of another circuit, it does not thereby invalidate the other circuit’s case law.

To be sure, *McLaughlin* could have read *Loper* to swing the pendulum all the way from “executive supremacy” to “judicial supremacy,” rather than to departmentalism. Some scholars have read *Loper* that way.¹⁰⁵ And others have long argued that the judiciary should assume the mantle of uniform law declaration,¹⁰⁶ in part because “courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess.”¹⁰⁷ Nevertheless, *McLaughlin* charted a different path.

This departmentalist approach, if fully embraced, could have practical consequences in other areas of administrative law. Take, for instance, the applicable standard of review when an agency denies a petition for new rulemaking.¹⁰⁸ Under current Supreme Court precedent, such judicial review is “‘extremely limited’ and ‘highly deferential’” to the agency’s choice not to undertake new rulemaking.¹⁰⁹ But, when the Court adopted this deferential standard in *Massachusetts v. EPA*,¹¹⁰ it did so by expressly invoking *Chevron*,¹¹¹ leading some lower courts to apply a “*Chevron*-esque analysis” when an agency denies a petition based on its own statutory interpretation.¹¹² With *Chevron*’s demise, some scholars have suggested that *Massachusetts v. EPA*’s “highly deferential” review may be in jeopardy.¹¹³ But, if *McLaughlin*’s departmentalism rings true, then that need not be the case. Courts could

Ct. 2244, 2262 (2024) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). But whether this “*Skidmore* respect” mandates special engagement with agency interpretations is an open question. See, e.g., Transcript of Oral Argument at 32, *Loper*, 144 S. Ct. 2244 (No. 22-451) (statement of Kagan, J.), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-451_114p.pdf [<https://perma.cc/M5YH-C4RY>] (“*Skidmore* has always meant nothing.”).

¹⁰⁵ See, e.g., Joshua Sarnoff, *Supreme Court Confirms Judicial Supremacy Over Democracy and Expertise*, YALE J. ON REGUL.: NOTICE & COMMENT (June 30, 2024), <https://www.yalejreg.com/nc/supreme-court-confirms-judicial-supremacy-over-democracy-and-expertise-by-joshua-sarnoff> [<https://perma.cc/5JV3-4TRH>]; Daniel E. Walters, *Rulemaking Petitions in a World Without Deference to Agencies: A New Lease on Life?*, NAT. RES. & ENV’T, Spring 2025, at 9, 11.

¹⁰⁶ See, e.g., Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 476 (2000); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1368 (1973); Paul G. Kauper, *The Supreme Court: Hybrid Organ of State*, 21 SW. L.J. 573, 577 (1967).

¹⁰⁷ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 25 (1962).

¹⁰⁸ Regulated persons have the right to petition agencies for new rulemaking under 5 U.S.C. § 553(e).

¹⁰⁹ *Massachusetts v. EPA*, 549 U.S. 497, 527–28 (2007) (quoting *Nat’l Customs Brokers & Forwarders Ass’n of Am., Inc. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989)).

¹¹⁰ 549 U.S. 497 (2007).

¹¹¹ *Id.* at 527 (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984)).

¹¹² E.g., *Ctr. for Food Safety v. Perdue*, 527 F. Supp. 3d 1130, 1139 (N.D. Cal. 2021).

¹¹³ See, e.g., Walters, *supra* note 105, at 12.

instead respect the Executive’s own capacity to interpret the law and, as a general rule, not compel the Executive to promulgate rules against its interpretive will.

Any such benefits of *McLaughlin*’s departmentalism would, however, come as a one-way ratchet, only facilitating *underregulation* rather than overregulation. Once an agency takes affirmative regulatory steps that culminate in an enforcement proceeding, *McLaughlin*’s “default rule” preserving judicial review will apply.¹¹⁴ Absent express preclusion of judicial review, “parties may always assail a regulation as *exceeding* the agency’s statutory authority” in such a proceeding,¹¹⁵ and the agency’s interpretation will receive only “due respect” under *Loper*.¹¹⁶

McLaughlin’s departmentalist benefits to agencies could be further diminished if the Supreme Court itself adopts a contrary interpretation of a statute. On *McLaughlin*’s formal logic, the Court would no more “determine the validity” of an agency action when it interprets a statute than a district court does. But an interpretation from the Court could perhaps invalidate an agency action *de facto*, since lower courts would be universally bound by that interpretation.¹¹⁷ When coupled with *Loper*’s insistence that statutes “have a single, best meaning,”¹¹⁸ a vertically binding interpretation from the Court seems to leave little legally relevant space for a competing executive interpretation.

Beyond these practical effects, *McLaughlin*’s departmentalism leads to something of an ironic result. Although *McLaughlin* appears to tolerate agency disagreements with courts as to “what the law is,” it uses this premise to *expand* the opportunity for judicial review of agency action during enforcement proceedings.¹¹⁹ Because of *McLaughlin*, enforcement-proceeding review is now guaranteed for agency actions governed by the Hobbs Act or any other statute lacking express review preclusion.

But that irony is quite *Marbury*-esque, as *McLaughlin*, like *Marbury*, arguably denied the judiciary one power in order to assume a greater one.¹²⁰ Without *McLaughlin*’s implicit denial of judicial supremacy,

¹¹⁴ See 145 S. Ct. at 2015.

¹¹⁵ *Id.* at 2015–16 (emphasis added) (quoting *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsv. Sys.*, 144 S. Ct. 2440, 2458 (2024)); see also 5 U.S.C. § 706(2)(C) (reviewing courts shall “set aside agency action . . . in excess of statutory jurisdiction”).

¹¹⁶ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2267 (2024).

¹¹⁷ *E.g.*, *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994) (“[O]nce the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.”).

¹¹⁸ 144 S. Ct. at 2266.

¹¹⁹ See *McLaughlin*, 145 S. Ct. at 2022; *id.* at 2030 (Kagan, J., dissenting).

¹²⁰ The power given up in *Marbury* was, of course, the Court’s original jurisdiction over petitions for writs of mandamus. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 180 (1803). Professor Jack Goldsmith has drawn a similar parallel between *Trump v. CASA, Inc.*, 145 S. Ct. 2540 (2025), and *Marbury*. By constraining the power of lower courts to issue universal injunctions, the Court expanded its own capacity for judicial review through a “concession” from the executive branch

district court judges operating outside of the Hobbs Act context may have felt empowered to “determine the validity” of agency actions simply by disagreeing with the statutory interpretation therein — perhaps by assuming broad authority to vacate regulations, even in collateral proceedings. By disclaiming such ambitions, *McLaughlin* simultaneously expands the opportunities for judicial review of agency action, potentially calling into question “even the most solid-seeming regulatory regimes” governed by the Hobbs Act.¹²¹ *McLaughlin*, in a microcosm, shows how a Supreme Court may increase justiciability in the administrative law sphere¹²² while firmly rejecting “an imperial Judiciary.”¹²³

that it would “respect” the Court’s “opinions” (not just “judgments”) as universally binding. See Jack Goldsmith, *The Solicitor General Embraces Judicial Supremacy*, EXEC. FUNCTIONS (May 16, 2025), <https://executivefunctions.substack.com/p/the-solicitor-general-embraces-judicial> [<https://perma.cc/8YYZ-JV99>].

¹²¹ *McLaughlin*, 145 S. Ct. at 2030 (Kagan, J., dissenting).

¹²² Cf. Richard M. Re, *Does the Discourse on 303 Creative Portend a Standing Realignment?*, 99 NOTRE DAME L. REV. REFLECTION 67, 87–89 (2023) (discussing evolving trends in standing doctrine in administrative law cases).

¹²³ *CASA*, 145 S. Ct. at 2561.