Essay

Time Is Not the Enemy

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Abstract

The conservative members of the Supreme Court desire to radically reshape the status quo of administrative law. To achieve this goal, conservative justices have focused on time preclusion statutes which provide for judicial review of agency action pre-enforcement but close off review once the time period expires. Congress included these preclusion provisions to assure finality, certainty, and efficiency for both agencies and regulated entities. But Justice Brett Kavanaugh's recent concurring opinion in PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, reflects the conservative justices' desire to limit the reach of these time limiting statutes in favor of more judicial review. Justice Kavanaugh posited statutes like the Hobbs Act, which provides pre-enforcement review but does not explicitly close review unlike other variations of time preclusion statutes, should be read to allow for both pre-enforcement and enforcement review of an agency action. This Essay advocates a different reading. Rather, statutes like the Hobbs Act should be read as closing off review once the time period has lapsed. This view both comports with Congress's intent and alleviates the burdens of ossification on the administrative process. This Essay further argues that these time preclusion statutes should be read as providing an implied exemption when a party's claim is not ripe for review during the pre-enforcement time period but becomes ripe outside of the time period. Such an exemption, if recognized by the Court, will alleviate the concerns of the conservative justices yet still respect the will of Congress.*

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Introduction

Members of the Supreme Court intend to further alter the state of administrative law. Currently, the legal community is still grappling with the Court's major administrative law decisions addressing significant issues such as the nondelegation doctrine,[1] agency deference to its regulations,[2] and agency pretext.[3] In addition to those decisions, commentators and practitioners alike will have to interpret the Court's hints that it may dramatically alter existing law regarding time limits on review of agency actions. In *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*,[4] for instance, a concurring opinion by Justice Brett Kavanaugh on behalf of three other justices[5] addressed statutory time limits that preclude judicial review of agency actions after a certain period of time.[6] Many statutes, such as the Administrative Orders Review Act,[7] also known as the Hobbs Act, allow for pre-enforcement judicial review of agency rules within a specified time period, such as 60 days.[8] Lower courts have held that once the time

1 *See* Gundy v. United States, 139 S. Ct. 2116, 2121 (2019).

2 *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019).

3 *See* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2573–76 (2019).

4 139 S. Ct. 2051 (2019).

5 Those justices are Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch. *Id.* at 2057 (Kavanaugh, J., concurring in the judgment).

6 *See id.* at 2057–67.

7 28 U.S.C. §§ 2341–2351 (2018).

8 *See, e.g.*, *id.* § 2344 (establishing a 60-day review period for final agency orders); *see*

period runs judicial review is precluded, with some exceptions.[9] If a party fails to challenge the agency's interpretation of its authorizing statute in promulgating its regulation within the statutory time period, then the party will be unable to make such a challenge during enforcement proceedings and must accept the validity of the regulation.[10] The courts have interpreted these time preclusion provisions and created what some commentators have called a "common law of preclusion."[11]

Justice Kavanaugh's concurrence, however, would radically alter this body of law governing how courts apply preclusion statutes.[12] According to the concurrence, if statutes do not *explicitly* shut off judicial review,[13] then parties would be able to challenge the validity of the agency's regulations during enforcement proceedings.[14] Justice Kavanaugh argued that congressional silence should be interpreted to permit subsequent judicial review.[15] Such a position, however, would overrule a whole body of case law developed by federal appeals courts that defines the reach and extent of time preclusion statutes, would upset the congressional intent in restricting judicial review of agency actions, and would open the door to a larger universe of parties that can attack the validity of such regulations.

In the past, the Court has declined to answer directly whether time preclusion statutes are legitimate.[16] Historically, when presented with the issue of time-limiting statutes, the Court dispensed with the case on narrow grounds and avoided confronting the issue.[17] But the concurrence in *PDR Network* indicates that the Court may be ready to dive into the time-preclusion thicket.

The Court should not make the radical decision of opening the jurisdiction of federal courts to a wide range of challenges that Congress purposefully chose to restrict. Rather than interpreting statutory

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infra notes 37–38 and accompanying text; *see also PDR Network*, 139 S. Ct. at 2055–56 (discussing the Hobbs Act's 60-day review period).

9 *See infra* Section I.A.

10 *See infra* Section I.A.

11 *E.g.*, Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203, 2205 (2011).

12 It is important to note that time preclusion statutes "remain the exception rather than the rule in" administrative law. *Id.* at 2213.

13 *See, e.g.*, 28 U.S.C. § 2344; *see also infra* note 37 (listing statutes that explicitly cut off review).

14 PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2060–61 (2019) (Kavanaugh, J., concurring in the judgment).

15 *See id.*

16 *See infra* Section I.C.

17 *See infra* Section I.C.

silence to suggest Congress intended to permit judicial review for parties that fail to exercise due diligence, congressional silence should be interpreted to allow for judicial review during enforcement proceedings *only* if, during pre-enforcement, the case would have been unripe for review. This should be the case even if Congress has not provided *explicitly* for enforcement review of a ripened claim in a particular statute. Part I discusses pre-enforcement review and the law of time preclusion. Part II discusses the *PDR Network* opinion in more detail. Finally, Part III addresses the proper interpretation of congressional silence in time preclusion statutes.

I. The Availability of Pre-enforcement Review

A. The Presumption of Exclusive, Pre-enforcement Review and Congress's Time Restrictions

The Administrative Procedure Act ("APA")[18] lets parties challenge the validity of agency actions in federal court.[19] The Court has held that sections 702[20] and 704[21] of the APA create the "basic presumption" of judicial review for all agency actions.[22] The Court has reaffirmed this presumption on a number of occasions.[23] The presumption of judicial review is "'just' a presumption, however."[24] It can be overcome "whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'"[25] The easiest

18 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (2018)).

19 5 U.S.C. § 702 (2018) (providing a general rule that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

20 *Id.*

21 *Id.* § 704 (providing judicial review for "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court").

22 Abbott Labs. v. Garner, 387 U.S. 136, 140 (1967), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977); *see* Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670–71 (1986) (noting that it is a "strong presumption"). *But see* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 Harv. L. Rev. 1285, 1288 (2014) (describing the "absence of support for the presumption of reviewability"); *id.* at 1306–07, 1336.

23 *E.g.*, Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 370 (2018); Sackett v. EPA, 566 U.S. 120, 130–31 (2012).

24 Lincoln v. Vigil, 508 U.S. 182, 190 (1993) (quoting Block v. Cmty. Nutrition Inst., 467 U.S. 340, 349 (1984)); *see Abbott Labs.*, 387 U.S. at 140 ("[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.").

25 *Block*, 467 U.S. at 351 (quoting Data Processing Serv. v. Camp, 397 U.S. 150, 157 (1970)); *see also* Mach Mining, LLC v. EEOC, 575 U.S. 480, 486 (2015) (noting that the presumption is overcome "when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct").

way for Congress to manifest its intent to close off judicial review is to expressly limit or exclude judicial review in statutory language[26] because Congress has the authority to determine "the exclusive means of obtaining judicial review."[27]

In *Abbott Laboratories v. Garner*,[28] the Court not only created the modern presumption of judicial review but also "revolutionized administrative law"[29] by opening the door to pre-enforcement review.[30] There, the Court allowed pre-enforcement review of a Food and Drug Administration ("FDA") regulation requiring drug manufacturers to print the "established name" prominently on labels.[31] The Court permitted early review because the legal and factual issues were sufficiently developed, allowing it to be ripe for consideration.[32] After *Abbott Labs*, Congress acted quickly to restrict judicial review to *only* pre-enforcement review by stripping courts of their jurisdiction to entertain challenges to a regulation's validity at the enforcement stage.[33] Congress also enacted several provisions that precluded judicial review after a certain time period as in the the Hobbs Act, the Clean Water Act ("CWA"),[34] and the Clean Air Act ("CAA").[35] These time preclusion statutes are mostly a product of the 1960s and 1970s, with Congress passing only a handful of such statutes since that time period.[36]

There are two distinct sets of statutes that prescribe time limits for pre-enforcement review: those that explicitly prohibit review of a rule in an enforcement proceeding[37] and those that are silent as to

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26 *See Abbott Labs.*, 387 U.S. at 140.

27 City of Rochester v. Bond, 603 F.2d 927, 931 (D.C. Cir. 1979).

28 387 U.S. 136 (1967).

29 PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2060 (2019) (Kavanaugh, J., concurring in the judgment) (discussing *Abbott Labs*).

30 *Abbott Labs.*, 387 U.S. at 148.

31 *See id.* at 149–50.

32 *See id.* at 138–39, 152.

33 *See* Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733, 734 (1983). Congress's power to restrict the jurisdiction of lower federal courts is implied from its power to "ordain and establish" "inferior Courts." U.S. CONST. art. III, § 1; *see also, e.g.*, Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies.").

34 33 U.S.C. §§ 1251–1387 (2018); *see id.* § 1369(b)(1) (restricting judicial review to 120 days).

35 42 U.S.C. §§ 7401–7671q (2018); *see id.* § 7607(b)(1) (restricting judicial review to 60 days).

36 *See* Levin, *supra* note 11, at 2213 (describing time preclusion statutes as "the exception rather than the rule in our legal system").

37 *See, e.g.*, Federal Mine Safety & Health Act, 30 U.S.C. § 811(d) (2018) (providing for judicial review in the Court of Appeals for the District of Columbia Circuit within 60 days of the

what type of review is available during enforcement proceedings.[38] Both types of statutes are jurisdictional in nature, and courts have recognized that the statutes preclude review once the time limit has passed.[39]

The Hobbs Act, in particular, which governs judicial review for a host of administrative statutes, states that "[a]ny party aggrieved by [a] final order may, within 60 days after its entry, file a petition to review the order in the court of appeals."[40] A time limit, like the one in the Hobbs Act, "serves the important purpose of imparting finality into they administrative process, thereby conserving administrative resources and protecting the reliance interests of regulatees who conform their conduct to the regulations."[41] Limiting judicial review to the pre-enforcement stage "reflect[s] a deliberate congressional choice to impose statutory finality on agency orders, a choice [the courts] may not second-guess."[42] When Congress imposes a time limit on judicial review, it has "determined that the agency's interest generally lies in prompt review of agency regulations" and the courts will "accord

challenged regulation's promulgation date but stating that "[t]he validity of any mandatory health or safety standard shall not be subject to challenge on the grounds that any of the time limitations in the section have been exceeded"); Oil Pollution Act of 1990, 33 U.S.C. § 2717(a) (2018); 33 U.S.C. § 1369(b)(1); Noise Control Act § 16, 42 U.S.C. § 4915(a) (2018); 42 U.S.C. § 7607(b)(1); Comprehensive Environmental Response, Compensation, and Liability Act (CERLA), 42 U.S.C. § 9613 (2018); *see also* Frederick Davis, *Judicial Review of Rulemaking: New Patterns and New Problems*, 1981 DUKE L.J. 279, 307–08 pattern 5 (listing further statutes that explicitly cut off review after the close of the proscribed time period).

38 *See, e.g.*, 28 U.S.C. § 2344 (2018); Occupational Health and Safety Act, 29 U.S.C. § 655(f) (2018); Radiation Control for Health & Safety Act, 42 U.S.C. § 263(f) (2018); Atomic Energy Act, 42 U.S.C. § 2022(c)(2) (2018); *see also* Davis, *supra* note 37, at 300–06 patterns 4(a) & 4(b) (listing further statutes that do not explicitly cut off review after the close of the prescribed time period). Justice Kavanaugh has recognized this distinction. *See* PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2059–60 (2019) (Kavanaugh, J., concurring in the judgment).

39 *See, e.g.*, Nat. Res. Def. Council v. Nuclear Regulatory Comm'n (*NRDC*), 666 F.2d 595, 602 (D.C. Cir. 1981) (noting that the time period in the Hobbs Act "for seeking judicial review . . . is jurisdictional in nature, and may not be enlarged or altered by the courts"); Council Tree Investors, Inc. v. FCC, 739 F.3d 544, 551 (D.C. Cir. 2014); Ill. Cent. Gulf R.R. Co. v. Interstate Commerce Comm'n, 720 F.2d 958, 960 (7th Cir. 1983) (describing the time limit as jurisdictional that "may not be enlarged by the courts").

40 28 U.S.C. § 2344 (2018).

41 *NRDC*, 666 F.2d at 602; *see* Lubrizol Corp. v. Train, 547 F.2d 310, 315 (6th Cir. 1976) (stating that the purpose of the time preclusion statutes is "to avoid needless delays in the implementation of important national programs caused by incessant litigation and inconsistent decisions").

42 City of Rochester v. Bond, 603 F.2d 927, 935 (D.C. Cir. 1979).

'heavy weight' to that view."[43] Otherwise, if such review is available, the courts' focus "would automatically widen from an investigation of the defendant's actions to an investigation of [the agency]'s actions in issuing the regulation," which would undermine the enforcement of Congress's enactments.[44]

B. Narrow Exceptions for Substantive Challenges

The circuits have largely followed Paul Verkuil's distinction between procedural and substantive challenges to agency rules.[45] He reasoned that procedural challenges will be no more ripe then when the rule is initially promulgated, requiring prompt challenges so the agency can address it.[46] The Court of Appeals for the District of Columbia Circuit, for instance, has concluded that the time limit rule cuts off review of a party's "contention that a regulation suffers from some *procedural* infirmity . . . outside of the statutory limitations period."[47]

Other courts have also taken a similar approach to substantive challenges.[48] These courts have denied a party's claim upon finding that it lacks jurisdiction over untimely actions.[49] The lodestar opinion on time restrictions, *National Resources Defense Council v. Nuclear Regulatory Commission*,[50] was such a case. There, the petitioners chal-

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43 Mountain States Tel. & Tel. Co. v. FCC, 939 F.2d 1035, 1040 (D.C. Cir. 1991) (quoting Eagle-Picher Indus. v. EPA, 759 F.2d 905, 916 (D.C. Cir. 1985)).

44 Mary Parker Squiers, *Restricted Judicial Review Provisions of the Clean Air Act—Denial of Due Process or Indispensable to Efficient Administration?*, 8 B.C. ENVTL. AFF. L. REV. 119, 120 (1979).

45 *See* Levin, *supra* note 11 (assessing the impact of Verkuil's procedural versus substantive challenges distinction on judicial review); Verkuil, *supra* note 33, at 744–45, 760–61 (distinguishing between procedural and substantive challenges to agency rules). Professor Verkuil made this distinction in arguing that those statutes that "impliedly" restrict enforcement review, e.g., the Hobbs Act, should foreclose procedural challenges to a regulation but not substantive challenges. *See id.* at 760–63.

46 *Id.* at 763.

47 NLRB Union v. Fed. Labor Relations Auth., 834 F.2d 191, 196 (D.C. Cir. 1987). So have other circuits. *See, e.g.*, Florilli Corp. v. Pena, 118 F.3d 1212, 1214 (8th Cir. 1997).

48 *See* sources cited *supra* note 45; *see also* Verkuil, *supra* note 33, at 751–53, 760–62 (arguing that statutes that were explicit in cutting off review should be read as allowing for only constitutional review and ultra vires claims).

49 *See, e.g.*, Nat. Resources Def. Council v. EPA, 571 F.3d 1245, 1265 (D.C. Cir. 2009) (per curium) (dismissing a claim under the CAA because the time for the petitioner's challenge to EPA's general policy for particular emission permits have "long since" passed); Envtl. Def. v. EPA, 467 F.3d 1329, 1332–34 (D.C. Cir. 2006) (dismissing challenges to certain EPA regulations governing how states bring transportation plans as required by the CAA); Cellular Telecomms. & Internet Ass'n v. FCC, 330 F.3d 502, 508–09 (D.C. Cir. 2003) (dismissing petitioners' challenge to the FCC's regulation requiring wireless carriers to provide number portability as it was outside the time limit under the Hobbs Act).

50 666 F.2d 595 (D.C. Cir. 1981).

lenged an amendment to regulations of the Nuclear Regulatory Commission ("NRC") that defined "basic component" for nuclear power plants.[51] The D.C. Circuit, however, dismissed the challenge by the National Resources Defense Council ("NRDC") to the NRC's regulation because it had no jurisdiction due to NRDC's failure to challenge the regulation within the time period.[52] The actions of the NRC were governed by the Hobbs Act, which means parties had 60 days to object to the NRC's final regulations prior to its enforcement.[53]

Substantive review, however, may be allowed outside the time restraints in "a limited number of exceptional situations."[54] For example, if a party is seeking to challenge the substantive basis for a rule, i.e., the "agency action [is] violative of [the] statute," then the party is able to challenge the rule outside the statutory time period "by filing a petition for amendment or rescission of the agency's regulations, and challenging the denial of that petition."[55] The time limitation does not cut off review if "the agency's action did not 'reasonably put[ ] aggrieved parties on notice of the rule's content.'"[56] Finally, the reopener doctrine gives parties an opportunity to challenge a rule outside the pre-enforcement time period if "'the agency opened the issue up anew,' and then 'reexamined . . . and reaffirmed its [prior] decision.'"[57] The D.C. Circuit applies a test[58] in determining whether the agency has "undertaken a serious, substantive reconsideration of

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51 *See id.* at 601–03 (quoting 10 C.F.R. § 21.3(a) (1980)).

52 *See id.*

53 *See id.* at 601 (citing 28 U.S.C. § 2344 (1976)).

54 Raton Gas Transmission Co. v. FERC, 852 F.2d 612, 615 (D.C. Cir. 1988).

55 Pub. Citizen v. Nuclear Regulatory Comm'n, 901 F.2d 147, 152 (D.C. Cir. 1990); *see* Legal Envtl. Assistance Found. v. EPA, 118 F.3d 1467, 1472–73 (11th Cir. 1997); Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior, 88 F.3d 1191, 1213 (D.C. Cir. 1996); Functional Music, Inc. v. FCC, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959); *see also* Alon Ref. Krotz Springs, Inc. v. EPA, 936 F.3d 628, 646 (D.C. Cir. 2019) (explaining approach to be "treating denials of rulemakings based on new facts as independently reviewable decisions" that are outside and independent of the "after-arising" exception provided in many reviewability statutes).

56 *Raton Gas Transmission*, 852 F.2d at 615 (alteration in original) (quoting RCA Glob. Commc'ns, Inc. v. FCC, 758 F.2d 722, 730 (D.C. Cir. 1985)).

57 P & V Enters. v. U.S. Army Corps of Eng'rs, 516 F.3d 1021, 1023 (D.C. Cir. 2008) (alterations in original) (quoting *Pub. Citizen*, 901 F.2d at 150–51); *see* RICHARD J. PIERCE, JR. & KRISTIN E. HICKMAN, ADMINISTRATIVE LAW TREATISE § 13.3 (6th ed. 2018) (noting that reopening rulemaking is a "difficult" option).

58 *See Pub. Citizen*, 901 F.2d at 150 ("We have, for instance, inferred that an agency has reopened a previously decided issue in a case where the agency (1) proposed to make some change in its rules or policies, (2) called for comments only on new or changed provisions, but at the same time (3) explained the unchanged, republished portions, and (4) responded to at least one comment aimed at the previously decided issue.").

the [existing] rule"[59] that would allow for judicial review even if the agency in question never amended a "long-standing rule."[60] None of these exceptions can be used to challenge a procedural shortcoming—once the time period ends, a party is simply out of luck.[61]

C. The Ripeness Exception to Time Preclusion

At the same time, if review of an agency action was unripe throughout the statutory time period, then an aggrieved party can challenge the regulation during enforcement proceedings.[62] This is an outgrowth of *Abbott Labs*'s expansion of pre-enforcement review as the Court made clear that, in order to get such review, the issues presented have to be ripe.[63] The doctrine "prevent[s] the courts . . . from entangling themselves in abstract disagreements over administrative policies, and . . . protect[s] the agencies from judicial interference" in their decision-making processes.[64]

A finding of unripeness, in the time restriction context, "'gives petitioners the needed assurance' that they will not be foreclosed from judicial review when the appropriate time comes."[65] This is because if a court, during a pre-enforcement challenge, holds that an issue is unripe, then the party can bring the challenge again during an enforcement proceeding despite the time restriction.[66] Time preclusion statutes "can run only against challenges ripe for review."[67]

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59 *P & V Enters.*, 516 F.3d at 1024 (alteration in original) (quoting Nat'l Mining Ass'n v. U.S. Dep't of Interior, 70 F.3d 1345, 1352 (D.C. Cir. 1995)).

60 Gen. Motors Corp. v. EPA, 363 F.3d 442, 449–50 (D.C. Cir. 2004).

61 *See* JEM Broad. Co. v. FCC, 22 F.3d 320, 326 (D.C. Cir. 1994).

62 *See, e.g.*, Eagle-Picher Indus. v. EPA, 759 F.2d 905, 912–15 (D.C. Cir. 1985); Geller v. FCC, 610 F.2d 973, 977–78 (D.C. Cir. 1979) (per curiam).

63 *See* Abbott Labs. v. Garner, 387 U.S. 136, 148–53 (1967), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977). The Court in *Abbott Labs* requires lower courts, in determining ripeness, to examine "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149; Gardner v. Toilet Goods Ass'n, 387 U.S. 167, 170–72 (1967); Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 161–65 (1967); *see also* Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998) (identifying other considerations in ascertaining an issue's ripeness).

64 *Abbott Labs.*, 387 U.S. at 148–49.

65 Grand Canyon Air Tour Coal. v. FAA, 154 F.3d 455, 473 (D.C. Cir. 1998) (quoting Pub. Citizen, Inc. v. U.S. Nuclear Regulatory Comm'n, 940 F.2d 679, 683 (D.C. Cir. 1991)); *see Ohio Forestry Ass'n*, 523 U.S. at 735 ("The ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of—even repetitive—postimplementation litigation.").

66 *See, e.g.*, *Grand Canyon Air Tour Coal.*, 154 F.3d at 473.

67 Balt. Gas & Elec. Co. v. Interstate Commerce Comm'n, 672 F.2d 146, 149 (D.C. Cir. 1982).

Many time preclusion statutes explicitly allow for judicial review of regulations during enforcement proceedings if the challenge was unripe during the pre-enforcement review period. Typically, the statute will provide that one may seek review if the challenge "is based solely on grounds arising after" the statutory time period.[68] The D.C. Circuit has interpreted this provision to "encompass[ ] the occurrence of an event that ripens a claim."[69] Circuit courts also apply the exception when the statute does not explicitly provide for it in the time limiting provision.[70]

For example, in *Coalition for Responsible Regulation, Inc. v. EPA* ("*Responsible Regulation*"),[71] the D.C. Circuit found the parties could challenge the Prevention of Significant Deterioration of Air Quality ("PSD") program under the CAA,[72] even though it was 30 years past the close of the time restriction, because, in the interim, the Environmental Protection Agency ("EPA") promulgated the Tailpipe Rule,[73] which set a motor-vehicle emission standard for greenhouse gases.[74] This action by EPA made greenhouse gases a regulated pollutant under the CAA and, therefore, affected whether parties would have to go through the PSD permitting process, which was not required

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68 42 U.S.C. § 6976(a)(1) (2018); *accord* 30 U.S.C § 1276(a)(1) (2018); 42 U.S.C. § 7607(b)(1); *see also* Am. Rd. & Transp. Builders Ass'n v. EPA, 705 F.3d 453, 457–58 (D.C. Cir. 2013) (holding that "the denial of a petition for amendment does not constitute an after-arising ground that permits the petitioning party to seek review . . . outside the original 60-day window for challenging the promulgation of Clean Air Act regulations.").

69 Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, 129 (D.C. Cir. 2012) (per curiam), *aff'd in part, rev'd in part sub nom.* Util. Air Regulatory Grp. v. EPA, 573 U.S. 302 (2014).

70 *See, e.g.*, Hudson v. FAA, 192 F.3d 1031, 1034–35 (D.C. Cir. 1999) (allowing a petition to review a policy statement outside of the 60-day limit because the issue did not become ripe until the policy statement was applied, allowing the court to understand the meaning and effect of the statement); *Grand Canyon Air Tour Coal.*, 154 F.3d at 472–73 (finding a claim under the Overflights Act, 16 U.S.C. § 1a-1 note (2018) (Study to Determine Appropriate Minimum Altitude for Aircraft Flying Over National Park System Unites)); Consolidation Coal Co. v. Donovan, 656 F.2d 910, 914–16 (3d Cir. 1981) (determining that the petitioner's arguments had become ripe outside the time limitation period of the Federal Mine Safety and Health Act, Pub. L. No. 91-173, 83 Stat. 742 (1977) (codified as amended in scattered sections of 30 U.S.C.), despite the lack of a ripeness exemption).

71 684 F.3d 102 (D.C. Cir. 2012) (per curiam), *aff'd in part, rev'd in part sub nom.* Util. Air Regulatory Grp. v. EPA, 573 U.S. 302 (2014).

72 *See* 42 U.S.C. §§ 7475, 7479(1) (2018). This regulation requires "state-issued construction permits for certain types of stationary sources" if they could emit a certain amount of air pollutant. *Coal. for Responsible Regulation*, 684 F.3d at 115; *accord* 42 U.S.C. §§ 7475, 7479(1).

73 Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600 and 49 C.F.R. pts. 531, 533, 536, 537, 538).

74 *Id.*

prior to the rule.[75] The court reasoned that the petitioner's challenge to the PSD program would have been unripe when the program was first promulgated because, if the parties brought their claim during the pre-enforcement time period in 1980, the claims would have been unripe and the petitioners would have lacked standing because the petitioners' claims of injury were speculative.[76] In other words, the petitioner could not have gone into court in 1980 and alleged that EPA was going to regulate greenhouses gases under the PSD program in the future.[77] In the eyes of the D.C. Circuit, the challengers' claims were no longer speculative after the promulgation of the rule because there was a "'substantial probability' of injury to them."[78] Therefore, parties need not fear the time preclusion provision if their claims were not ripe within that time period.[79] Courts have also found that the "after-arising" exemption includes Court decisions that "changed the legal landscape."[80] Once a claim does become ripe and a party is entitled to the "after-arising" exception, then the party has 60 days to file that claim.[81]

But courts "have rejected attempts to manufacture ripeness."[82] The argument that the party was not in existence at the time of the promulgation of the regulation is not sufficient to persuade a court to exempt a party from Congress's command.[83] Similarly, courts typically will not exempt a party if it claims that the basis for the supposed ripeness claim is "the mere application of a regulation."[84]

The ripeness exception protects parties whose claims were unripe at the time of the reviewing statute's limitation period. The doctrine works in conjunction with Congress's desire to conserve time and resources by protecting courts and agencies from litigating claims that cannot be resolved because the legal and factual background have not

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75 *Coal. for Responsible Regulation*, 684 F.3d at 115.

76 *See id.* at 131.

77 *See id.*

78 *See id.* (quoting Balt. Gas & Elec. Co. v. Interstate Commerce Comm'n, 672 F.2d 146, 149 (D.C. Cir. 1982)).

79 *See id.*

80 Honeywell Int'l, Inc. v. EPA, 705 F.3d 470, 473 (D.C. Cir. 2013) (noting that a decision in the D.C. Circuit created the premise of the petitioner's argument).

81 Coal River Energy, LLC v. U.S. Dep't of the Interior, 931 F. Supp. 2d 64, 74 (D.D.C. 2013) (finding that a party's claim was not ripe until it began exporting coal and, therefore, met the "after-arising" exemption but that the party nevertheless failed to file a timely claim challenging the fees it owed once it began exporting coal), *aff'd sub nom.* Coal River Energy, LLC v. Jewell, 751 F.3d 659 (D.C. Cir. 2014).

82 Sierra Club de P.R. v. EPA, 815 F.3d 22, 27 (D.C. Cir. 2016).

83 *Coal River Energy*, 751 F.3d at 662–63.

84 Am. Rd. & Transp. Builders Ass'n v. EPA, 705 F.3d 453, 458 (D.C. Cir. 2013).

been fully developed. If a party is unsure as to whether their claim would be found ripe outside the time limit, it would behoove a party to bring a challenge during the pre-enforcement time period and have a court dismiss the claim as unripe so as to preserve the right to make the challenge when it becomes ripe and, therefore, reviewable.[85]

D. The Court's Quibbling with Time Restrictions

Despite the issue of time restrictions coming before the Supreme Court a number of times, the Court always seems to find a way to avoid resolving the validity of the statutory scheme.[86] In the back of the minds of the Justices when they address time restrictions is *Yakus v. United States*,[87] which addressed the lack of judicial review under the Emergency Price Control Act of 1942.[88] The statute created the Office of Price Administration ("Office") which was tasked with regulating commodity prices in the midst of World War II to combat inflation.[89] In *Yakus*, the petitioners were found guilty of selling beef above the maximum price as prescribed by the Office.[90] In order to challenge the regulation setting the price of beef, the petitioners would have had to file a claim within 60 days of the regulation's effective date.[91] The Court upheld the petitioners' convictions based on the lower court's findings that the petitioners were able but failed to challenge the validity of the price regulations within the 60-day time limit.[92] The Court cabined the decision in two ways. First, the decision that the 60-day time restriction was reasonable was based on the "urgency and exigencies" of wartime.[93] Second, the Court declined to ad-

85 *See, e.g.*, Atl. States Legal Found. v. EPA, 325 F.3d 281, 282–86 (D.C. Cir. 2003) (dismissing a claim under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992k (2018), as unripe but noting that the time restriction statute does not begin to run until the claim ripens); Eagle-Picher Indus. v. EPA, 759 F.2d 905, 914 (D.C. Cir. 1985) ("As a general proposition, however, if there is *any* doubt about the ripeness of a claim, petitioners must bring their challenge in a timely fashion or risk being barred."); *see also* PIERCE & HICKMAN, *supra* note 57, § 13.1 ("When in doubt, a party should file the petition within the original statute of limitations on the assumption that the action is immediately reviewable. If the court dismisses the petition on the basis of . . . ripeness, . . . a party has preserved its right to challenge the action later when it becomes reviewable.").

86 *See* Levin, *supra* note 11, at 2228 (noting that the Court has found "no satisfying basis" to prevent Congress from "foreclos[ing] ultra vires challenges to a regulation in an enforcement case").

87 321 U.S. 414 (1944).

88 Pub. L. No. 77-421, 56 Stat. 23.

89 *Id.* § 201; *Yakus*, 321 U.S. at 419–23.

90 *Id.* at 418.

91 Emergency Price Control Act § 203(a).

92 *See id.* at 444–48.

93 *Id.* at 435.

dress the constitutionality of precluding a party from raising the issue if the party did not have an opportunity to challenge a regulation within the allotted time period in an enforcement proceeding.[94]

Since *Yakus*, the Court has failed to resolve the validity of time limits for regulatory challenges. In *Adamo Wrecking Co. v. United States*,[95] the Court flinched in a challenge to the indictment of a demolition company for violating an EPA "emission standard" regulation.[96] Section 307(b) of the CAA, at that time, required a party to bring a claim within 30 days of the rule's promulgation in order to obtain review of the emissions standard.[97] The Court, in an opinion by then-Justice Rehnquist, held that the company's actions did not violate EPA's emission standards because the standards that were violated were "work practice standards"[98] and, therefore, not subject to the time restriction in section 307(b).[99] The Court avoided the question of the validity of time limits by making it a case of statutory construction rather than constitutional viability.[100] As one commentator put it, *Adamo Wrecking* opened the possibility of as-applied review outside of the statutory time limit.[101]

Then again, in *Environmental Defense v. Duke Energy Corp.*,[102] the Court found that it "ha[d] no occasion at this point to consider the significance of [the CAA's time limit provision]."[103] When grappling with the meaning of "modification" in two different regulatory schemes under the CAA, the Court determined that because one scheme was "implicit[ly] invalid[ ]" and the other was not controlled by section 307(b) of the CAA the Court did not need to address the time restriction.[104]

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94 *See id.* at 446–47.

95 434 U.S. 275 (1978).

96 *See id.* at 285; Clean Air Act, 42 U.S.C. § 1857c-7(c)(1)(B) (1970) ("After the effective date of any emission standard . . . no air pollutant to which such standard applies may be emitted from any stationary source in violation of such standard.").

97 Clean Air Act § 307(b), 42 U.S.C. § 1857h-5(b)(1) (Supp. V 1970).

98 *Adamo Wrecking*, 434 U.S. at 279–88.

99 *See id.* at 281–82.

100 *See id.* at 282–84.

101 Verkuil, *supra* note 33, at 749; *see also Adamo Wrecking*, 434 U.S. at 285 ("[D]istrict courts will be importuned, under the guise of making a determination as to whether a regulation is [properly applied to the regulated party] to engage in judicial review in a manner that is precluded by § 307(b)(2) . . . . This they may not do.").

102 549 U.S. 561 (2007).

103 *Id.* at 581; *see also* Levin, *supra* note 11, at 2228 (noting the Court's disregard in *Envtl. Def.* of the CAA's time limit as "puzzling").

104 *See Envtl. Def.*, 549 U.S. at 573–81.

Finally, in *Decker v. Northwest Environmental Defense Center*,[105] the Court found another reason to avoid the time limitation question under the CWA. The case involved a citizen suit alleging that the defendants discharged "channeled stormwater runoff into two waterways" without obtaining National Pollutant Discharge Elimination System ("NPDES") permits in violation of the CWA.[106] Despite the statute declaring that review is only available within 120 days of the Administrator's action,[107] the Court concluded it was inapplicable because the relevant regulation was ambiguous regarding the applicability of EPA's runoff permitting process.[108] Because the plaintiffs in this case challenged the *interpretation* of the rule rather than the *validity* of it, the citizen suit was within the scope of a different provision in the statute.[109] This allowed the plaintiffs to bring the suit beyond the 120-day window.[110] The Court impressively avoided the question through major hair-splitting.[111]

II. *PDR Network*: A Sign of What's to Come?

The Court again had the opportunity to clear up the uncertainty surrounding the constitutionality of time preclusion statutes in *PDR Network*. A majority of the Court hedged the issue and allowed it to further percolate in the lower courts. But a four-justice majority was clear as to how time preclusion statutes ought to be interpreted. Justice Kavanaugh's concurrence would narrowly construe statutes like the Hobbs Act and expand judicial review of agency actions. If Justice Kavanaugh's proposition became law, it would have a major impact on administrative law as it would undermine finality and exasperate ossification. This Part discusses the majority opinion's sidestepping of the time preclusion issue and Justice Kavanaugh's response that is contrary to precedent and impractical.

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105 568 U.S. 597 (2013).

106 *Id.* at 606; *see* Clean Water Act, 33 U.S.C. § 1311(a) (2018) ("[T]he discharge of any pollutant by any person shall be unlawful."); *id.* § 1342(a)(1) ("[T]he Administrator may . . . issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a).").

107 33 U.S.C. § 1369(b)(1).

108 *Decker*, 568 U.S. at 608.

109 *Id.* at 608–09 (finding that the plaintiffs' action fell under 33 U.S.C. § 1365 (2012), not § 1369(b)).

110 *Id.* at 607–09.

111 *See* Levin, *supra* note 11, at 2226 (noting that the Court has yet to "articulate a clear concept as to how, if at all, [a time preclusion statute] prevents a court from deciding in an enforcement case" the validity of an agency's regulation).

A. The Majority's Reversal

The petitioners in *PDR Network* were business entities that compile and publish information about the uses and side effects of various prescription drugs in a publication called the *Physicians' Desk Reference*.[112] To advertise its new ebook version of the *Reference*, PDR Network sent faxes to health care providers offering them an opportunity to reserve a free copy on its website.[113] One of those faxes was sent to the respondent, Carlton & Harris Chiropractic, who then brought a class action suit against PDR Network alleging violations of the Telephone Consumer Protection Act ("Telephone Act").[114]

The Telephone Act prohibits advertisers from sending via fax "unsolicited advertisement[s],"[115] which are defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."[116] The Telephone Act gives the Federal Communications Commission ("FCC") the authority to "prescribe regulations to implement the requirements" of the statute.[117] In 2006, the FCC issued an order stating that the term "unsolicited advertisements" include faxes that "promote goods or services even at no cost, such as free magazine subscriptions[ ] [and] catalogs."[118] The Hobbs Act governs review of FCC orders and it gives the federal courts of appeals the "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . [certain] final orders of the Federal Communication Commission."[119]

The Court had to grapple with the question of "whether the Hobbs Act's vesting of 'exclusive jurisdiction' in the courts of appeals to 'enjoin, set aside, suspend,' or 'determine the validity' of FCC 'final orders' means that a district court must adopt, and consequently follow, the FCC's Order interpreting the term 'unsolicited advertisement' as including certain faxes that promote 'free' goods" under the

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112 PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2053–54 (2019).

113 *Id.* at 2054.

114 47 U.S.C. § 227 (2018); *PDR Network*, 139 S. Ct. at 2054. The statute allows victorious plaintiffs to collect statutory damages. *See* 47 U.S.C. § 227(b)(3)(B).

115 47 U.S.C. § 227(b)(1)(C).

116 *Id.* § 227(a)(5).

117 *Id.* § 227(b)(2).

118 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 and Junk Fax Prevention Act of 2005, 21 FCC Rcd. 3787, 3814 (2006).

119 28 U.S.C. § 2342(1) (2018).

Telephone Act.[120] The lower court answered no because it found the Telephone Act unambiguous, which led it to dismiss Carlton & Harris Chiropractic's claim because it found the fax was not commercial in nature in so far as it offered something for free.[121] The Fourth Circuit reversed, however, holding that the Hobbs Act required the district court to apply the FCC interpretation of "unsolicited advertisement."[122] Because the 2006 Order defined an "unsolicited advertisement" as "any offer of a free good or service,"[123] Carlton & Harris Chiropractic's complaint should have survived the motion to dismiss.[124]

The Supreme Court, in an opinion written by Justice Breyer and joined by Chief Justice Roberts and Justices Ginsburg, Sotomayor, and Kagan, reversed and vacated the holding of the Fourth Circuit and required it to address two preliminary questions before resolving the question of whether the district court had to accept the interpretation of the FCC.[125] First, the Court required the lower court to determine whether the 2006 Order is a "legislative rule" because if it is merely an "interpretive rule," the district court was not bound to follow it.[126] Second, the Court required the lower court to determine whether PDR Network received a "prior" and "adequate" opportunity to seek judicial review of the 2006 Order given the 60-day time limit for parties to challenge the validity of a regulation during preenforcement.[127] If PDR Network did not have the required opportunity, the district court would not be bound by the FCC's interpretation.[128] The Court declined to answer the above questions because the parties had not raised them below.[129]

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120 PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2053 (2019) (quoting 28 U.S.C. § 2342(1)).

121 Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC, No. 3:15-14887, 2016 WL 5799301, at *3 (S.D. W. Va. Sept. 30, 2016), *vacated and remanded*, 139 S. Ct. 2051 (2019). The lower court also found that the claim would survive even under the FCC's 2006 Order. *See id.* at *4.

122 Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC, 883 F.3d 459, 466 (4th Cir. 2018), *vacated and remanded*, 139 S. Ct. 2051 (2019).

123 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 and Junk Fax Prevention Act of 2005, 21 FCC Rcd. 3787, 3814 (2006).

124 *Carlton & Harris Chiropractic*, 883 F.3d at 467.

125 *PDR Network*, 139 S. Ct. at 2056.

126 *Id.* at 2055.

127 *Id.* (citing 5 U.S.C. § 703 (2018)).

128 *See id.* at 2056.

129 *See id.*

B. The Concurrence that Packed a Punch

But Justice Kavanaugh, in his concurrence, stated that the Court should have addressed the question presented and held "that the Hobbs Act does not bar a defendant in an enforcement action from arguing that the agency's interpretation of the statute is wrong."[130] Because the Hobbs Act is silent as to whether judicial review is available in order to determine the validity of the agency interpretation, the "general rule" should be that such review would be available during enforcement proceedings.[131]

Justice Kavanaugh first distinguished between two sets of statutes: those that explicitly cut off judicial review outside of the pre-enforcement context[132] and those, like the Hobbs Act, that are silent as to what subsequent review is available during the enforcement stage.[133] As to the second category of statutes, the concurrence reasoned that if the Court were to choose between whether Congress precluded lower courts from determining the validity of a statute during enforcement proceedings or not, the Court, based on congressional silence, should choose the latter.[134] The former conclusion would be "extraordinary"[135] because Congress knows how to take the significant step of precluding judicial review in enforcement proceedings, as it did for the CWA and CAA.[136] In addition, there is the "strong presumption" of reviewability unless there is evidence demonstrating Congress's intent to preclude judicial review.[137]

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130 *Id.* at 2058 (Kavanaugh, J., concurring in the judgment). Justice Thomas also filed a concurring opinion arguing that the Hobbs Act is, in fact, unconstitutional as the Act prevents the district court from interpreting the FCC's regulations even though it is the responsibility of the court to "identify[ ] and apply[ ] the governing law." *Id.* at 2057 (Thomas, J., concurring in the judgment). His ire towards the Hobbs Act falls in line with his general skepticism of judicial deference to agency interpretations of its own statutes. *See id.* (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

131 *See id.* at 2058 (Kavanaugh, J., concurring in the judgment).

132 *See id.* at 2059; *see also supra* note 37 (cataloging examples of statutes that explicitly cut off judicial review outside of the pre-enforcement context).

133 *See PDR Network*, 139 S. Ct. at 2059–60 (Kavanaugh, J., concurring in the judgment); *see also supra* note 38 (cataloging examples of statutes that are silent as to the subsequent review during enforcement).

134 *PDR Network*, 139 S. Ct. at 2059–62 (Kavanaugh, J., concurring in the judgment).

135 *Id.* at 2062.

136 *Id.* at 2061.

137 *See id.* at 2060. Justice Kavanaugh discussed how the Court has considered interpretive challenges to statutes despite the fact that the statutes contain preclusion provisions similar to the Hobbs Act. *See id.* at 2060–61. One such statute is the Occupational Safety and Health Act ("OSHA"), 29 U.S.C. §§ 651–678 (2018), which gives parties 60 days to challenge an action of the Occupational Safety and Health Review Commission. *See id.* § 655(f). But Justice Kavanaugh failed to recognize the unique nature of § 655(f) compared to other time preclusion stat-

The concurrence justified its conclusion based on the "practical consequences" of not following the "default rule"[138] of allowing review. Precluding judicial review would be "a huge waste of resources" because it would "require every potentially affected party to bring pre-enforcement [actions] . . . against every agency order that might possibly affect them in the future."[139] In addition, it would be "unfair" to cut off enforcement review because entities that did not exist at the time of a regulation's promulgation would be subject to the agency's interpretation and it is unrealistic to think that every potential party would predict a regulation's applicability to it.[140] Because of the "unfairness" of cutting off judicial review, Congress typically does so explicitly.[141] Moreover, such a statute could "raise a 'substantial due process question.'"[142]

Justice Kavanaugh fiercely disagreed with all four of the government's arguments that would find the Hobbs Act precluded enforcement review. First, Justice Kavanaugh disagreed with the argument that the "exclusive jurisdiction" to "enjoin, set aside, suspend," or "determine the validity" language of 28 U.S.C. § 2349 prevented the district court from interpreting the FCC regulation.[143] Instead, he concluded that the Act's language does not prevent a party from arguing the FCC misinterpreted the Telephone Act.[144] Second, rather than finding the Court had already endorsed this statutory scheme in *Yakus* when it held that the Emergency Price Control Act could cut off judicial review in enforcement proceedings,[145] Justice Kavanaugh dis-

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utes like the Hobbs Act. *See PDR Network*, 139 S. Ct. at 2061 (Kavanaugh, J., concurring in the judgment). Courts of appeals have interpreted § 655(f) as not overcoming the presumption of reviewability because the Senate Report for OSHA explicitly said that pre-enforcement review "does not foreclose [a party] from challenging the validity of [an agency ruling] during an enforcement proceeding." S. REP. NO. 91-1282, at 8 (1970); *see* Deering Milliken, Inc., Unity Plant v. Occupational Safety & Health Review Comm'n, 630 F.2d 1094, 1099 (5th Cir. 1980) (finding pre-enforcement review of 29 U.S.C. § 655(f)). The Hobbs Act is distinguishable seeing as it does not have such a legislative history.

138 *PDR Network*, 139 S. Ct. at 2061 (Kavanaugh, J., concurring in the judgment).

139 *Id.* It is important to note that "the appearance of rules and regulations in the *Federal Register* gives legal notice of their contents." Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384–85 (1947).

140 *PDR Network*, 139 S. Ct. at 2061–62 (Kavanaugh, J., concurring in the judgment).

141 *Id.* at 2062.

142 *Id.* (quoting Chrysler Corp. v. EPA, 600 F.2d 904, 913 (D.C. Cir. 1979)).

143 *See id.* at 2062–64; Brief for the United States as Amicus Curiae in Support of Respondent at 21–22, *PDR Network*, 139 S. Ct. 2051 (No. 17-1705) [hereinafter Brief for the United States].

144 *See PDR Network*, 139 S. Ct. at 2063–64 (Kavanaugh, J., concurring in the judgment).

145 *See* Yakus v. United States, 321 U.S. 414, 429–30 (1944); Brief for the United States, *supra* note 143, at 13–14.

tinguished *Yakus* on the ground that the language in the Emergency Price Control Act is materially different from that in the Hobbs Act and that *Yakus* was a wartime case.[146] Third, the concurrence rejected the government's argument that the alternative to judicial review during the enforcement stage—petitioning the agency to reconsider its regulation and appealing its denial—provided an adequate pathway for PDR Network to take in order to obtain review.[147] Justice Kavanaugh deemed this alternative method of review "empty" and "illusory" because appealing a denial of a petition to reconsider is merely "deferential judicial review" of the agency's denial, "not judicial review of the agency's initial interpretation of the statute."[148] Finally, the concurrence also found the government's policy concerns unconvincing because the consequences of cutting off judicial review of parties are too great.[149]

For these reasons, the concurrence asserted that if Congress intends to cut off judicial review "Congress can[ ] [and] must . . . speak clearly."[150] The consequences of precluding judicial review in enforcement proceedings are so significant, the concurrence asserted, that the Court "cannot presume that Congress *silently*" intended to preclude judicial review.[151] When it came to the case at bar, the concurrence would have allowed the district court to review the FCC's 2006 Order interpreting the Telephone Act because the district court is not bound by the FCC's interpretation.[152]

The case has since been remanded and supplemental briefing has been ordered by the Fourth Circuit.[153] Since the opinion was handed down, it also has gained some traction in the lower courts. For instance, in the Eleventh Circuit case *Gorss Motels, Inc. v. Safemark Systems, LP*,[154] a three-judge concurrence called upon the circuit to

146 *See PDR Network*, 139 S. Ct. at 2064–65 (Kavanaugh, J., concurring in the judgment) ("That wartime need renders *Yakus* . . . 'at least arguably distinguishable' in civil enforcement proceedings." (quoting Adamo Wrecking Co. v. United States, 434 U.S. 275, 290 (1978) (Powell, J., concurring))).

147 *Id.* at 2065–66; Brief for the United States, *supra* note 143, at 26 n.5; Transcript of Oral Argument at 70, 72–73, PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051 (2019) (No. 17-1705).

148 *PDR Network*, 139 S. Ct. at 2065–66 (Kavanaugh, J., concurring in the judgment).

149 *Id.* at 2066.

150 *Id.* at 2062.

151 *Id.*

152 *Id.* at 2066–67.

153 *See* Supplemental Brief of Appellant at 1, Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC, 883 F.3d 459 (4th Cir. Dec. 13, 2019) (No. 16-2185).

154 931 F.3d 1094 (11th Cir. 2019) (Pryor, J., concurring).

overrule its past precedents interpreting the Hobbs Act as foreclosing judicial review after the close of the time period in light of Justice Kavanaugh and Justice Thomas's concurrences in *PDR Network*.[155] This may indicate the future impact the opinion will have on administrative law.

III. How to Properly Interpret the Hobbs Act's Time Preclusion Provision

There were significant flaws in Justice Kavanaugh's concurrence. The reasoning is both contrary to Congress's intent and the Court's own precedent. Additionally, it wholly ignores a legitimate pathway for litigants to obtain judicial review: arguing that, during the pre-enforcement time period, their claim would have been unripe and, therefore, could not have been brought. Availing oneself of this justiciability doctrine smooths the edges of time preclusion statutes but also respects Congress's intent.

A. Problems with the Concurrence's View

The *PDR Network* concurrence does not make sense given the evidence that Congress enacted the Hobbs Act with the intent of foreclosing review during enforcement proceedings. The structure of judicial review under the Hobbs Act created a procedure to "make for economy and expedition in the disposition of" challenges of agency actions before courts of appeals.[156] The central purpose of the Hobbs Act would be undermined if parties brought as-applied challenges during enforcement proceedings because such actions would ossify the rulemaking process and cause agencies to divert further resources to defending their regulations in court.

The Supreme Court in *Abbott Labs* recognized the important benefit of having pre-enforcement review. It reasoned that such review assists in realizing "the important public interest served by assuring prompt and unimpeded administration" of Congress's duly-enacted statutes.[157] Efficient administration is accomplished because once a court issues a judgment in a pre-enforcement suit, either relevant parties will swiftly conform their conduct to the requirement of a

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155 *See id.* at 1105–12.

156 H.R. Rep. No. 81-2122, at 4 (1950).

157 *See* Abbott Labs. v. Garner, 387 U.S. 136, 154 (1967), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977); *see also* Pierce & Hickman, *supra* note 57, § 17.14 (pre-enforcement review has the advantage of allowing for "swift, efficient, and inexpensive" subsequent enforcement).

regulation or the government will "quickly revise its regulation."[158] Undermining the Hobbs Act's ability to preclude parties from judicial review in enforcement actions, as Justice Kavanaugh suggests, thwarts the very benefits the Court in *Abbott Labs* thought were important to administrative law.

Scholars have noted that the judiciary has been a source of ossification in the rulemaking process.[159] This derives from the "hard look" review[160] courts give to informal rules that empower courts to set aside these rules upon a finding that they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[161] Such review requires that the agency, in promulgating the rule, provide a detailed and adequate explanation of the agency's decision, offer a well-reasoned statement of basis and purpose for the rule, thoroughly consider responses to an agency's proposed rule, and explain why it did not move forward with alternative regulatory measures.[162] This process of creating a record for review for final rules has been described as a "Herculean effort"[163] and an "extraordinarily lengthy, complicated, and expensive process."[164] These efforts are done with the hope that a rule will survive judicial scrutiny when challenged.[165] Scholars have posited that this has been the result of the courts opening up pre-enforcement review.[166] Evidence suggests, however, that such rigorous review is not unique to the pre-enforcement stage but takes place during enforcement proceedings as well.[167]

If statutes, like the Hobbs Act, offer parties both pre-enforcement and enforcement review, the problems of ossification would increase. It would create a situation in which, rather than having all interested and affected parties sue during pre-enforcement, some par-

158 *See Abbott Labs.*, 387 U.S. at 154.

159 *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1401 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65–66, 88–93 (1995) (noting the consequences of not having pre-enforcement review); Mark Seidenfeld, *Playing Games with the Timing of Judicial Review: An Evaluation of Proposals to Restrict Pre-Enforcement Review of Agency Rules*, 58 OHIO ST. L.J. 85, 119–26 (1997).

160 *See, e.g.*, Sierra Club v. FERC, 867 F.3d 1357, 1367 (D.C. Cir. 2017); Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970).

161 5 U.S.C. § 706(2)(A) (2018); McGarity, *supra* note 159, at 1410–12.

162 *See* PIERCE & HICKMAN, *supra* note 57, § 5.4; Pierce, *supra* note 159, at 89.

163 McGarity, *supra* note 159, at 1401.

164 Pierce, *supra* note 159, at 65.

165 *See* McGarity, *supra* note 159, at 1401.

166 *See, e.g.*, Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 205 (1974).

167 *See* Pierce, *supra* note 159, at 89.

ties who would have sued during pre-enforcement will decline to seek review.[168] This would stretch out judicial review and increase regulatory uncertainty. There likely would be parties who still would bring pre-enforcement challenges in order to mitigate the risk of penalties for failing to comply with an agency regulation.[169] When parties bring pre-enforcement challenges, the agency must still devote significant time and resources to produce a record sufficient enough to surmount hard look review.[170] But this record requirement would be required during the enforcement stage as well, if enforcement review is allowed. Each challenge would require the agency to justify its own actions rather than focus on the actions of the defendant.[171] This would upset Congress's goal of having agency rule finality. Moreover, such a scenario would prevent regulated parties from conforming their conduct to agency rules with certainty.[172]

Not only would agencies have to defend against parties who declined to seek pre-enforcement review, but the number of enforcement challenges would be even greater if entities that were not in existence when the rule was promulgated can subsequently challenge the validity of a rule. Justice Kavanaugh was concerned for these businesses that were not in existence at the time of a rule's promulgation.[173] But if previously nonexistent companies were able to obtain judicial review, then the agency would have to continually use its time and resources to justify rules it may have made decades prior—a situation Congress sought to eliminate with statutes like the Hobbs Act.[174] As a result, a substantial amount of the agency's time and resources would be used whenever a new regulated entity seeks to challenge a enforced rule. Indeed, the lower courts have long recognized that regulatory finality supersedes the arguable unfairness of not being able to challenge a rule despite not existing during the pre-enforcement time period:

> We recognize that as a result of our holdings today, some parties—such as those not yet in existence when a rule is promulgated—never will have the opportunity to challenge

168 *See id.* at 90 (noting that a lack of pre-enforcement review would deter a regulated party from seeing review); Seidenfeld, *supra* note 159, at 120–21.

169 *See* Seidenfeld, *supra* note 159, at 119.

170 *See* McGarity, *supra* note 159, at 1401.

171 *See* Squiers, *supra* note 44, at 120.

172 *See supra* notes 157–58 and accompanying text.

173 *See* PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2062 (2019) (Kavanaugh, J., concurring in the judgment).

174 *See* United States v. Walsh, 8 F.3d 659, 664–65 (9th Cir. 1993).

> the procedural lineage of rules that are applied to their detriment. In our view, the law countenances this result because of the value of repose.[175]

With this in mind, rather than interpreting silence as suggesting that Congress intended to permit enforcement review, the Court should construe the statutory language allowing regulatory review as the sole method for challenging an agency regulation. The D.C. Circuit took this approach in *City of Rochester v. Bond*, when it reviewed a Federal Aviation Administration ("FAA") order.[176] Rather than file its claim with the court of appeals within the time requirements of the Communications Act[177]or the Federal Aviation Act,[178] the City filed its claim in the district court nine months after the FAA promulgated the order.[179] The lower court dismissed the case as untimely and the court in *City of Rochester* affirmed.[180] Like the Hobbs Act, neither the Communications Act nor the Federal Aviation Act were explicit as to what review is available after the pre-enforcement time has run.[181] The D.C. Circuit concluded that pre-enforcement review was the "exclusive" means of review:

> Congress, acting within its constitutional powers, may freely choose the court in which judicial review may occur. In the absence of a statute prescribing review in a particular court, "nonstatutory" review may be sought in district court under any applicable jurisdictional grant. If, however, there exists a special statutory review procedure, it is ordinarily supposed that *Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies*.[182]

In other words, "[i]t is hard to believe that Congress . . . would have" provided "a centralized forum to review the validity of [agency] regu-

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175 JEM Broad. Co. v. FCC, 22 F.3d 320, 326 (D.C. Cir. 1994).

176 City of Rochester v. Bond, 603 F.2d 927, 929–31 (D.C. Cir. 1979) (petitioner challenging the FAA's decision to install a radio antenna tower by the Rochester, New York airport).

177 47 U.S.C. §§ 151–622 (1976); *see id.* § 402(b)–(c) (30 days).

178 Pub. L. No. 85-726, 72 Stat. 731 (1958) (codified as amended in scattered sections of 49 U.S.C. (1976)); *see* 49 U.S.C. § 1486(a) (60 days).

179 *City of Rochester*, 603 F.2d at 930–31.

180 *Id.* at 929.

181 *Id.* at 932.

182 *Id.* at 931 (emphasis added) (footnotes omitted); *see also* Inv. Co. Inst. v. Bd. of Governors of the Fed. Reserve Sys., 551 F.2d 1270, 1279–80 (D.C. Cir. 1977) ("[W]here Congress has not expressly conferred exclusive jurisdiction, a special review statute vesting jurisdiction in a particular court cuts off other courts' original jurisdiction in all cases covered by the special statute.").

lations" but merely "made the remedy optional and contemplated that the regulation could also be challenged by defiance."[183]

Justice Kavanaugh further posited that, in justifying judicial review during enforcement proceedings, it would be unfair to expect parties to be knowledgeable of regulations that may affect them despite notice in the *Federal Register*.[184] In essence, he argues that parties are not sufficiently on notice. But publication in the *Federal Register* comports with the Court's notice requirements and understanding of due process.[185] In a similar context, the Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*[186] found that publication in a newspaper was sufficient notice for those who had claims to a common trust fund when parties were unknown.[187] For unknown parties, it was "reasonably calculated" that notice in a newspaper chosen by the trial court was sufficient, even if a particular party was unaware of its claim to the common trust.[188] Similarly, in administrative law, notice of rulemaking printed in the *Federal Register* is reasonably calculated to put affected parties on notice of agency actions that may affect them. Whether it be a large corporation or a "small contractor,"[189] regulated parties ought to make themselves aware of agency actions that may implicate them. The *Federal Register* is published for the exact purpose of keeping regulated parties on notice of their inter-

183 United States v. Szabo, 760 F.3d 997, 1006 (9th Cir. 2014) (second alteration in original) (quoting United States v. Zenón-Encarnación, 387 F.3d 60, 67 (1st Cir. 2004) (Boudin and Lynch, JJ., concurring)).

184 PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2061–62 (2019) (Kavanaugh, J., concurring in the judgment).

185 *See* Yakus v. United States, 321 U.S. 414, 435 (1944) ("[R]egulations, which are given the force of law, are published in the Federal Register, and constructive notice of their contents is thus given all persons affected by them."); *supra* note 139; *cf.* United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 563 (1971) ("The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation.").

186 339 U.S. 306 (1950).

187 *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 317–18 (1950).

188 *See id.*

189 Adamo Wrecking Co. v. United States, 434 U.S. 275, 290 (1978) (Powell, J., concurring). Justice Powell's concurrence misguidedly argues that it is unrealistic for small contractors to apprise themselves of the *Federal Register*. *Id.*

ests.[190] This was deemed sufficient by the Court in *Adamo Wrecking*.[191]

The standard of notice under *Mullane* for unknown claimants was sufficient because there was "a desire to avoid the necessity for multiple litigation with its accompanying waste and possibility of inconsistent results."[192] This problemt similarly plagues the administrative system. If parties do not bring all of their claims during the pre-enforcement process, the implicit concerns of *Mullane* are realized. When there are a range of parties that could be affected by a particular regulation and substantial concerns when it comes to efficiency, the *Federal Register* sufficiently puts parties on notice of instituted regulations.[193]

In light of the ossification concerns, it is evident that Justice Kavanaugh's interpretation of preclusion statutes, like the Hobbs Act, is seriously flawed. There is, however, a different avenue the Court can take. The Court can explicitly recognize the ripeness exception as a way by which a narrow group of parties can obtain review if they did not receive "prior" and "adequate" review during the pre-enforcement stage due to their unripe claims.

B. Ripeness: The Possible Path to Review

What is unclear is what kind of review is available if a claim is unripe for review during the statutory period. As already noted, there are many review statutes that explicitly provide for review based on circumstances that "aris[e] after" the close of the time period.[194] This language is a vestige of the Emergency Price Control Act of which the Court in *Yakus* approved.[195] The Hobbs Act, does not contain such language.

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190 If a party is unable to keep abreast of the *Federal Register* in its individual capacity, there are certainly lobbying and interest groups that can. *See Regulatory Alerts*, U.S. SMALL BUS. ADMIN., https://advocacy.sba.gov/category/regulation/regulatory-alerts/ [https://perma.cc/7MXK-GA5N] (providing alerts to small businesses of relevant publications from the *Federal Register*); *see also* OFFICE OF ADVOCACY OF THE U.S. SMALL BUS. ADMIN., BACKGROUND PAPER ON THE OFFICE OF ADVOCACY (2016) (explaining the Small Business Administration's mission to advocate for and assist small businesses).

191 *See Adamo Wrecking*, 434 U.S. at 283 n.2.

192 Hanson v. Denckla, 357 U.S. 235, 261 (1958) (Black, J., dissenting) (construing *Mullane*).

193 Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384–85 (1947); *cf.* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("[R]esolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected.").

194 42 U.S.C. § 6976(a)(1) (2018); *see supra* notes 68–69 and accompanying text.

195 *See supra* notes 87–94 and accompanying text.

Notwithstanding this omission, there remains an exemption within the statutory scheme. Section 703 of the APA provides, in relevant part, "[e]xcept to the extent that *prior*, *adequate*, and *exclusive* opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."[196] This line, as discussed in *Abbott Labs*, created the presumption of judicial review of agency actions during enforcement proceedings.[197] The statutory language, however, provides that if there was a "prior" and "adequate" opportunity for a party to challenge an agency action that was "exclusive," then judicial review during enforcement proceedings will be unavailable.[198] This "adequacy" language derived from the Court's holding in *Yakus* in which the Court sanctioned the use of exclusive review procedures that foreclose judicial review during enforcement proceedings by holding that the procedures did not inhibit due process because the parties received an "adequate" opportunity to challenge the agency action.[199] Commentators have concluded that section 703 of the APA incorporated the "adequacy" language of *Yakus*'s holding.[200] This conclusion is supported by the assertion made in the *Attorney General's Manual on the Administrative Procedure Act* which concludes that the "prior, adequate, and exclusive . . . review"[201] language of section 703 simply "restates existing law."[202]

In order to have an "adequate" opportunity for review, the party must have been able to bring the claim during the pre-enforcement period, which depends upon whether the claim was ripe for review. Otherwise, if a party's claim is speculative, as was the case in *Respon-*

196 5 U.S.C. § 703 (2018) (emphasis added).

197 Abbott Labs. v. Garner, 387 U.S. 136, 140 (1967), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

198 *See* 5 U.S.C. § 703. The Fourth Circuit in *PDR Network* is required on remand to determine, in part, whether the petitioner had a "prior" and "adequate" opportunity to challenge the FCC's 2006 Order. *See* PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2055–56 (2019).

199 Yakus v. United States, 321 U.S. 414, 434–37 (1944). The Court's holding in *Yakus* was handed down two years before the passage of the APA. *See* Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237.

200 *See, e.g.*, Verkuil, *supra* note 33, at 741 n.34.

201 5 U.S.C. § 703 (2018) (emphasis added).

202 TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 99 (1947) (internal citations and footnotes omitted); *see id.* at 100; *see also id.* at 98 ("[T]he [APA] does not provide any new definition of 'adequate', but rather assumes that the courts will determine the adequacy of statutory review procedures by the legal standards which the courts themselves have already developed.").

sible Regulation,[203] then there would be *no* adequate avenue by which a party can bring its claim.[204] A party would be hamstrung and have no recourse to bring a challenge if their claim is unripe for review during the pre-enforcement period. In order to balance both Congress's desire to promote finality and conserve administrative resources by prescribing time limitations and a party's interest in having "adequate" judicial review, the Court should allow claims that were not ripe for pre-enforcement review to be challenged during enforcement proceedings, without regard to whether the time preclusion statute explicitly allows for review of claims based on an occasion that "aris[es] after"[205] the close of the time period. If a claim was unripe during pre-enforcement, but then became ripe afterwards, closing off review would not provide a party with an adequate opportunity for review. A party, therefore, should be presumed to obtain review for a ripened claim during enforcement proceedings.

Justice Kavanaugh's *PDR Network* concurrence failed to touch upon a party's ability to bring a claim when it becomes ripe during enforcement proceedings.[206] The D.C. Circuit has long recognized that parties can bring ripened claims outside the pre-enforcement context even when the statute does not explicitly provide for that exception.[207] If the Supreme Court recognized this exception, it would alleviate Justice Kavanaugh's concerns. Justice Kavanaugh complained about the "unfairness" of requiring parties to challenge every regulation that might affect them.[208] A party who did not bring a challenge within the time period, however, is free to argue that their challenge was unripe during the pre-enforcement period. This would not be an "illusory" option[209] because a court would be empowered to allow for review upon a finding of ripeness.[210]

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203 *See supra* notes 71–79 and accompanying text.

204 *See* Eagle-Picher Indus. v. EPA, 759 F.2d 905, 911–12 (D.C. Cir. 1985) (explaining that an untimely petition may be heard "where the petitioner lacked a meaningful opportunity to challenge the agency action during the review period due to . . . lack of ripeness").

205 42 U.S.C. § 6976(a)(1) (2018).

206 At the same time, the government in its amicus brief also failed to bring up the ripening doctrine. *See* Brief for the United States, *supra* note 143.

207 *See supra* notes 67–70, 85 and accompanying text. Other circuits have also followed suit. *See, e.g.*, City of Fall River v. FERC, 507 F.3d 1, 7 (1st Cir. 2007) (noting that the time preclusion statute will not run until the party's claim becomes ripe).

208 PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2061–62 (2019) (Kavanaugh, J., concurring in the judgment).

209 *See id.* at 2065–66.

210 *See* Nat'l Park Hosp. Ass'n v. Dep't of the Interior, 538 U.S. 803, 807–08 (2003).

A party could bring a later challenge if it provided evidence that legal or factual developments had made the claim freshly ripe for review.[211] The parties, however, would have to provide "compelling justification[s]" that new information or events had allowed the party's claim to become ripe.[212] This evidence would be "events [that] occur[red] or information [that] bec[ame] available after the statutory review period expire[d] that essentially create[d] a challenge that did not previously exist, or where a petitioner's claim [was] . . . *indisputably* not ripe until the agency takes further action."[213] If parties do bring such compelling justifications, the courts should respect Congress's desires in proscribing time preclusion procedures, refrain from engaging in abstract analysis, and provide parties their presumptive right to judicial review.

Conclusion

The petitioners in *PDR Network* may provide the Fourth Circuit with evidence to suggest that, if they had brought a legal claim within 60 days of the FCC's promulgation of the 2006 Order, the claim would have been unripe and, therefore, they did not have a "prior" and "adequate" opportunity for judicial review. If the Fourth Circuit agrees with them, then the court will have jurisdiction to address the validity of the 2006 Order. If the Fourth Circuit finds otherwise, it means that the petitioners failed to exercise due diligence in keeping abreast of proposed agency regulations and make a timely challenge against the 2006 Rule—precluding them from challenging the regulations now. To hold otherwise would undermine Congress's intent and vitiate the purpose of the Hobbs Act.

211 The ripeness doctrine, however, cannot save a party that did not exist at the time of a rule's promulgation. *See supra* notes 173–75 and accompanying text.

212 Eagle-Picher Indus. v. EPA, 759 F.2d 905, 914 (D.C. Cir. 1985).

213 *Id.*