No.

# In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

*v.*

NEXTWAVE PERSONAL COMMUNICATIONS INC. AND NEXTWAVE POWER PARTNERS INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI


PAUL D. CLEMENT
*Acting Solicitor General*
*Counsel of Record*

LAWRENCE G. WALLACE
*Deputy Solicitor General*

JEFFREY A. LAMKEN
*Assistant to the Solicitor General*

WILLIAM KANTER
JACOB M. LEWIS
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514–2217*

JOHN A. ROGOVIN
*Deputy General Counsel*

DANIEL M. ARMSTRONG
JOEL MARCUS
*Counsel*
*Federal Communications Commission*
*Washington, D.C. 20554*

## QUESTION PRESENTED

Whether Section 525 of the Bankruptcy Code, 11 U.S.C. 525, conflicts with and displaces the Federal Communications Commission's rules for congressionally authorized spectrum auctions, which provide that wireless telecommunications licenses obtained at auction automatically cancel upon the winning bidder's failure to make timely payments to fulfill its winning bid.

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## PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Federal Communications Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 254 F.3d 130. The Federal Communications Commission's Public Notice announcing re-auction of the radio spectrum previously licensed to respondents (Pet. App. 96a-97a) is reported at 15 FCC Rcd 693, and its order denying respondents' petition for reconsideration (Pet. App. 52a-95a) is reported at 15 FCC Rcd 17,500.

## JURISDICTION

The judgment of the court of appeals was entered on June 22, 2001. On September 13, 2001, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 19, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 309(j) of the Communications Act, 47 U.S.C. 309(j) (1994 & Supp. V 1999), and Section 525 of the Bankruptcy Code, 11 U.S.C. 525, are reprinted in an appendix to this petition. Pet. App. 417a-469a.

## STATEMENT

1. The Communications Act (the Act) seeks "to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." 47 U.S.C. 301. The Act establishes the Federal Communications Commission (FCC or Commission) and vests it with the authority to issue radio licenses upon its determination that doing so will serve the "public interest, convenience, and necessity." 47 U.S.C. 309(a).

For many years, the FCC attempted to identify the license applicant that would best serve the public interest through comparative hearings at which the FCC examined the qualifications of each competing applicant. Concerned about the "substantial delays and burdensome costs" associated with the hearing process, H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 897 (1981), Congress amended the statute in 1982 to authorize the FCC to award initial licenses to qualified applicants "through the use of a system of random selection," or lottery. See 47 U.S.C. 309(i) (1994 & Supp. V 1999); Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087. The lottery system also proved unsatisfactory. Among other things, it was criticized for "encouraging unproductive speculation for spectrum licenses" and failing "to reward persons who have spent money to research and develop a new technology or service." H.R. Rep. No. 111, 103d Cong., 1st Sess. 248 (1993).

Accordingly, in 1993 Congress authorized the FCC to award initial licenses for spectrum dedicated to certain commercial services "through a system of competitive bidding," or auction. 47 U.S.C. 309(j)(1) (1994 & Supp. V 1999). Congress recognized that such a system would eliminate speculation, because those who lack an efficient and immediate plan for using the spectrum generally will not submit the highest bid. See H.R. Rep. No. 111, *supra*, at 249. Through the auction mechanism, Congress sought to enable the FCC to further "the development and rapid deployment of new technologies, products and services" to benefit the public, 47 U.S.C. 309(j)(3)(A), assist in the "recovery for the public of a portion of the value of the public spectrum," 47 U.S.C. 309(j)(3)(C), and promote "the efficient and intensive use of the electromagnetic spectrum," 47 U.S.C. 309(j)(3)(D) (1994 & Supp. V 1999). In 1997, Congress mandated the use of auctions for most future licensing proceedings. Pub. L. No. 105-33, § 3002, 111 Stat. 258.

Congress also directed the Commission to promote "economic opportunity and competition * * * by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses." 47 U.S.C. 309(j)(3)(B). Congress expressly instructed the Commission to "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments." 47 U.S.C. 309(j)(4)(A).

The FCC chose to award licenses using simultaneous, multiple-round auctions. *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd 2348, ¶ 68 (1994). The FCC concluded that an auction design "that award[s] licenses to those parties that value them most highly" would best fulfill the statute's goals. *Id.* at ¶ 69. The agency explained: "Since a bidder's abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increase the value of a license to a bidder, an auction design that awards licenses to

those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services in each area and the efficient and intensive use of the spectrum." *Id.* at ¶ 71 (footnote omitted).

To ensure broad dissemination of licenses, see 47 U.S.C. 309(j)(3)(B), the FCC sought to encourage small businesses and other "designated entities" to participate in the auction process by providing them with bidding credits. 9 FCC Rcd 2348, ¶ 229. The FCC also restricted eligibility for certain auctions to small businesses and other designated entities. *Ibid.* For example, the spectrum dedicated to broadband personal communications services (PCS)—a new generation of mobile telecommunications services, 9 FCC Rcd 5532, ¶ 6—was divided into six auction blocks, identified by the letters "A" through "F." See *ibid.* Participation in the "C" and "F" Block auctions was limited to small businesses and other designated entities. 47 C.F.R. 24.709(a)(1) (1997). Finally, in accordance with 47 U.S.C. 309(j)(4)(A), the FCC decided to allow small businesses that obtained licenses at auction to pay in installments over the term of the license. 9 FCC Rcd 2348, ¶ 229.

To ensure the integrity of competitive bidding as a rational means of license allocation, and to ensure that spectrum is neither awarded to nor held by insincere or lower-value bidders, the FCC's auction rules specify that license awards "will be conditioned upon full and timely payment of the winning bid amount." 47 C.F.R. 24.708(a) (1997). For bidders electing to pay in installments, the rules provided that any "license granted * * * shall be conditioned upon the full and timely performance of the licensee's obligations under the installment plan," 47 C.F.R. 1.2110(e)(4) (1997), and that, in the event of failure to make timely payments, "the license will automatically cancel." 47 C.F.R. 1.2110(e)(4)(iii) (1997).

2. Respondent NextWave Personal Communications Inc. (NPCI) was formed to participate in the FCC's auction for

"C-Block" PCS licenses in the summer of 1995. NPCI was declared the high bidder for 63 C-Block licenses after it submitted winning bids totaling $4.74 billion. Pet. App. 4a-5a. Respondent NextWave Power Partners Inc. (NPPI) was formed to participate in the FCC's F-Block license auction, which concluded in January of 1997. NPPI was declared the high bidder for 27 F-Block licenses after it submitted winning bids of approximately $123 million. See Pet. App. 313a-314a; *Public Notice, D, E, and F Block Auction Closes*, DA 97-81, 1997 WL 20711 (Jan. 15, 1997).

In accordance with FCC regulations, respondents deposited sufficient funds to cover their downpayment obligations, see Pet. App. 5a, and executed promissory notes for the balance of their bids, to be paid in installments. Pet. App. 313a.[1] After considering challenges to NPCI's compliance with foreign ownership rules, the FCC granted the licenses, conditioned on NPCI's compliance with an ownership restructuring plan and respondents' compliance with all other regulatory conditions. See *In re Applications of NextWave Personal Communications, Inc. for Various C-Block Broadband PCS Licenses*, 12 FCC Rcd 2030, ¶¶ 8-9 (1997).

Consistent with FCC requirements, each license stated that it was "conditioned upon the full and timely payment of all monies due" and that failure to comply with that obligation "will result in the automatic cancellation" of the license. Pet. App. 388a. Likewise, the Installment Plan Note executed by respondents acknowledged that the licenses

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[1] Applicants eligible for the C-Block auction were required to pay only ten percent of their winning bid in cash by the time of the license grant, 47 C.F.R. 24.711(a)(2) (1997), with the remaining balance to be paid over the ten-year term of the license. 47 C.F.R. 24.711(b) (1997). For an applicant such as NPCI that qualified as a "small business," the interest rate was the rate for ten-year Treasury obligations on the day the license was granted, with interest-only payments for the first six years. 47 C.F.R. 24.711(b)(3) (1997). Favorable terms were also available to small business bidders for F-Block licenses. See 47 C.F.R. 24.716 (1997) (20 percent downpayment and interest-only payments for the first two years).

were "conditioned upon full and timely payment" of respondents' obligations to the FCC, *id.* at 393a, and the associated Security Agreements stated that the company's "continued retention of the License[s]" was "conditioned on compliance with * * * Commission orders and regulations," *id.* at 413a. The Security Agreements further noted that any rights created by those agreements were in addition to, not in contravention of, the FCC's regulatory powers. *Id.* at 403a-404a.

After the licenses were awarded, a number of C-Block and F-Block licensees, including respondents' parent company, petitioned the Commission to restructure their installment payment obligations, describing "a range of apparent difficulties in accessing the capital markets" because of the prices they had bid for the licenses. *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 12 FCC Rcd 16,436, ¶ 11 (1997). After temporarily suspending payment obligations for C-Block and F-Block licensees, the Commission adopted several options designed to aid C-Block licensees. See *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 13 FCC Rcd 8345, ¶¶ 11-15 (1998); *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 14 FCC Rcd 6571 (1999). See also *U.S. Airwaves, Inc.* v. *FCC*, 232 F.3d 227, 236 (D.C. Cir. 2000) (upholding restructuring scheme). The Commission refused, however, "to adopt proposals that result in a dramatic forgiveness of the debt owed," because such a resolution "would be very unfair to other bidders, and would gravely undermine the credibility and integrity of [the auction] rules." 12 FCC Rcd 16,436, at ¶ 19. Accordingly, none of the restructuring options adopted by the Commission allowed C-Block licensees to keep any license for less than the full amount that they

had bid. See 13 FCC Rcd 8345, ¶ 8; *U.S. Airwaves*, 232 F.3d at 235.

The Commission gave C-Block licensees until June 8, 1998, to elect a restructuring option, provided that licensees should resume payments by July 31, 1998, and set October 29, 1998, as the last date on which it would accept late installment payments (with a late fee). Public Notice, *Wireless Telecommunications Bureau Announces June 8, 1998 Election Date*, 13 FCC Rcd 7413 (1998). Respondents and others unsuccessfully sought to stay the election deadline. See *In re Petition of NextWave Telecom, Inc. for a Stay of the June 8, 1998 Personal Communications Services C Block Election Date*, 13 FCC Rcd 11,880 (1998); *NextWave Telecom Inc.* v. *FCC*, No. 98-1255, 1998 WL 389116 (D.C. Cir. June 11, 1998). Respondents did not make an election by the June 8, 1998, deadline. Instead, they filed for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. They did not meet the October 29 deadline for resuming the payments that were an express condition of their licenses. See *In re Public Notice DA 00-49 Auction of C and F Block Broadband PCS Licenses, NextWave Personal Communications, et al., Petition for Reconsideration*, 15 FCC Rcd 17,500, ¶ 5 (2000).

3. Respondent NPCI filed an adversary proceeding in bankruptcy court, seeking to avoid most of its payment obligation for the C-Block licenses as a constructively fraudulent conveyance under 11 U.S.C. 544 (1994 & Supp. V 1999). Ruling in respondents' favor, the court held that the licenses were worth less than respondents' bid amount, and that roughly $3.72 billion of NPCI's $4.74 billion payment obligation should therefore be avoided as constructively fraudulent. The bankruptcy court ordered that NPCI be permitted to keep its licenses while meeting only $1.023 billion of its $4.74 billion payment obligation. Pet. App. 357a-358a. The district court affirmed. *Id.* at 254a, 272a.

The Second Circuit reversed and remanded for further proceedings, "if any are necessary." Pet. App. 253a. Although the bankruptcy court had rested its decision to alter license conditions on the theory that they concerned "solely the debtor-creditor relationship between the FCC and [NextWave]," the Second Circuit rejected that approach as "fundamentally mistaken." *Id.* at 234a-235a. Instead, the Second Circuit viewed the payment condition of respondents' licenses as quintessentially regulatory. "The FCC had not sold NextWave something that the FCC had owned," the court explained. Instead, the FCC "had used the willingness and ability of NextWave to pay more than its competitors as the basis on which it decided to grant the [l]icenses to NextWave." *Id.* at 234a. Thus, "NextWave's inability to follow through on its financial undertakings had more than financial implications." *Ibid.* Rather, "[i]t indicated that under the predictive mechanism created by Congress to guide the FCC, NextWave was not the applicant most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted." *Ibid.* "By holding that for a price of $1.023 billion NextWave would retain licenses for which it had bid $4.74 billion," the court of appeals concluded, the "bankruptcy and district courts impaired the FCC's method for selecting licensees by effectively awarding the [l]icenses to an entity that the FCC determined was not entitled to them." *Id.* at 235a. This Court denied respondents' petition for a writ of certiorari. 531 U.S. 924 (2000).

Respondents then modified their proposed reorganization plan to provide that they would pay their overdue obligation in full and pay future installments as they became due. Pet. App. 146a. In a letter to the FCC, respondents offered to pay the discounted present value of their obligations in a lump sum. *Id.* at 147a. The FCC did not accept the offer because, under FCC regulations, respondents' payment default had caused the licenses to cancel. *Id.* at 61a, 96a. The

FCC therefore issued a Public Notice scheduling the spectrum previously licensed to respondents for re-auction. *Id.* at 96a-97a.

On respondents' motion, the bankruptcy court declared that the FCC's actions were "null, void, and without force or effect." See Pet. App. 113a. The FCC's decision to re-auction the licenses, the bankruptcy court held, violated the Bankruptcy Code's automatic stay, *id.* at 155a-160a, impaired respondents' right to cure their default, *id.* at 160a-163a, and potentially contravened the Code's prohibition against license revocations premised upon the nonpayment of a dischargeable debt, *id.* at 163a-168a (citing 11 U.S.C. 525). In addition, the bankruptcy court held that automatic cancellation was barred by doctrines of equitable estoppel and waiver applicable to the "government * * * act[ing] in a commercial capacity." Pet. App. 181a-191a. The bankruptcy court acknowledged that the Second Circuit had held "that there is a 'regulatory' aspect in the FCC's 'payment in full' requirement." *Id.* at 191a. But the court found "no such aspect * * * with respect to the FCC's 'timely payment' requirement," which it viewed as a matter of "pure debtor-creditor economics." *Ibid.* See also *id.* at 165a-166a.

The Second Circuit granted a writ of mandamus directing the bankruptcy court to vacate its order. The appeals court observed that, in its prior opinion, it had "held that the FCC's decision as to 'which entities are entitled to spectrum licenses under rules and conditions it has promulgated' is a paradigmatic instance of the FCC's exclusive regulatory power over licensing," Pet. App. 116a, and thus beyond the bankruptcy court's authority to revise, *id.* at 108a-109a. The court of appeals rejected the bankruptcy court's conclusion that the timely payment condition in the FCC licenses and regulations was economic rather than regulatory. *Id.* at 118a. "The regulatory purpose for requiring payment in full —the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum

—is quite obviously served in the same way by requiring payment on time." *Id.* at 119a.

The court of appeals also rejected the bankruptcy court's reliance on the Code's automatic stay provision, 11 U.S.C. 362(a). The court emphasized that the automatic stay is by its terms inapplicable to actions to enforce a governmental unit's "police and regulatory power," and that the FCC was "[u]ndoubtedly * * * a governmental unit that is seeking 'to enforce' its 'regulatory power.'" Pet. App. 125a-126a (citing 11 U.S.C. 362(b)(4)). The court of appeals concluded that "[t]he bankruptcy court lacked jurisdiction to declare the Public Notice null and void on any ground: that the Public Notice violated the automatic stay, that the right to cure obviates any default, or that the government was estopped." Pet. App. 127a. This Court again denied certiorari. 531 U.S. 1029 (2000).

4. Respondents filed a petition with the FCC, urging it to reconsider its decision that the spectrum previously licensed to respondents would be re-auctioned. Pet. App. 63a. The FCC denied the petition, finding that license cancellation was "fully consistent" with the statute and regulations, and that the full and timely payment requirement was "paramount" in preserving "the reliability and integrity" of the auction program. *Id.* at 65a-66a. The FCC rejected respondents' contention that the Bankruptcy Code precluded cancellation; that argument, the Commission concluded, had been rejected by the Second Circuit's mandamus opinion and was therefore barred by *res judicata*. *Id.* at 83a. The Commission also ruled that neither estoppel nor waiver prohibited it from enforcing its cancellation rule. *Id.* at 83a-88a.

Respondents filed a petition for review of the FCC's decision in the Court of Appeals for the District of Columbia Circuit. While the petition was pending, the Commission completed its re-auction of the C- and F-Block spectrum associated with respondents' canceled licenses, along with other C- and F-Block spectrum. In the re-auction, the spec-

trum covered by respondents' licenses produced bids of $15.85 billion, well over three times the $4.74 billion respondents had originally bid, and 15 times the value respondents had assigned to the licenses before the bankruptcy court. See Pet. App. 302a, 357a-358a; p. 7, *supra*. The successful bidders in that re-auction have since paid substantial sums to the Commission—over $3 billion—as deposits pending issuance of the licenses.

On June 22, 2001, the D.C. Circuit reversed the FCC's cancellation decision and remanded the case to the agency. The court rejected the FCC's contention that respondents' Bankruptcy Code arguments had been resolved against them by the Second Circuit. Pet. App. 22a-36a. In the court's view, the Second Circuit merely held "that the Commission's license cancellation was a regulatory act reviewable only by a court of appeals under section 402 of the Communications Act, and thus that the bankruptcy court lacked *jurisdiction* to apply the Code to these acts." *Id.* at 24a (emphasis added). However, the court agreed that the Second Circuit's decision barred NextWave from contesting that the FCC's actions fell within the regulatory power exception to the automatic stay, 11 U.S.C. 362(b)(4), in light of the Second Circuit's unequivocal ruling on that issue. Pet. App. 34a, 125a-127a.

On the merits, the D.C. Circuit held that Section 525 of the Bankruptcy Code, 11 U.S.C. 525, precluded cancellation of respondents' licenses. Section 525 provides that a governmental unit may not revoke a license "solely because" a debtor "has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. 525(a). The court of appeals rejected the FCC's contention that "NextWave's license fee obligation was not a 'dischargeable' debt * * * because the Second Circuit * * * held * * * that so long as NextWave retained its licenses, its payment obligation was subject to neither modification nor discharge in bankruptcy." Pet. App. 41a. The D.C. Circuit read the Second Circuit's decisions as

having "merely decided that insofar as timely payment was a condition for license retention, the bankruptcy court had no authority to modify it." *Id.* at 42a. In the D.C. Circuit's view, the Second Circuit "never decided that a court of competent jurisdiction (such as this one) could not modify or discharge [the timely payment condition] under section 525." *Ibid.* The D.C. Circuit also rejected the FCC's argument that cancellation of respondents' licenses had not occurred "solely because" of respondents' failure to pay a debt within the meaning of Section 525. *Id.* at 44a-46a. The court did not dispute that the purpose of cancellation was to preserve the integrity of the auction process and select the licensee most likely to use the spectrum efficiently for the public benefit. *Id.* at 44a-45a. But it concluded that the licenses were canceled "solely because" of respondents' default because the FCC relied on non-payment as the triggering event for cancellation. *Id.* at 46a.

The D.C. Circuit had "no doubt that in developing its installment payment plan, the Commission made a good faith effort to implement Congress's command to encourage small businesses with limited access to capital to participate in PCS auctions." Pet. App. 48a. The appeals court was also "mindful that * * * allowing NextWave to retain its licenses may be 'grossly unfair' to losing bidders and licensees who 'complied with the administrative process and forfeited licenses or made timely payments despite their financial difficulties.'" *Ibid.* (citation omitted). Ultimately, however, it characterized the Commission as having "enter[ed] a creditor relationship with winning bidders." *Id.* at 50a. The court thus held that "section 525 prevents the Commission, whatever its motive, from canceling the licenses of winning bidders who fail to make timely installment payments while in Chapter 11." *Id.* at 49a.

## REASONS FOR GRANTING THE PETITION

Through 42 U.S.C. 309(j), Congress adopted a market-based system of spectrum allocation that awards radio licenses to the applicant best able to use the spectrum effectively and efficiently in the public interest, as demonstrated by the applicant's willingness and ability to pay more for it than others. The District of Columbia Circuit has now held that Section 525 of the Bankruptcy Code, 11 U.S.C. 525, bars the FCC from enforcing the regulatory payment obligations that are an integral part of that licensing mechanism. In so ruling, the court voided the results of a spectrum auction that generated more than $15 billion in revenue for the U.S. Treasury, and effectively confiscated licenses from applicants who stood ready to put that spectrum to its most efficient use. The court's decision, moreover, transfers the licenses to entities that value the spectrum less highly and that, under the FCC rules established at Congress's direction, have forfeited any entitlement to the spectrum.

More fundamentally, the D.C. Circuit's decision dramatically expands the reach of bankruptcy law into an area that Congress has traditionally reserved to the Commission, and needlessly transforms Section 525 into an impediment to the regulatory objectives established by Section 309(j). Congress has directed the FCC to award licenses to further the public interest under the criteria established by the Communications Act and FCC regulations. The D.C. Circuit's holding that the Bankruptcy Code supersedes those regulatory requirements and criteria, and that the spectrum licensing decisions must instead be governed by bankruptcy rules and policies designed to regulate debtor-creditor relationships, flatly conflicts with the analysis of the Second Circuit in this very case. The Second Circuit squarely held that the FCC acts in a regulatory capacity and cannot be treated as a "mere creditor" for bankruptcy purposes when it enforces payment requirements, such as those at issue here, that are

at least partially regulatory in nature. Pet. App. 234a-235a. In contrast, the D.C. Circuit barred the FCC from exercising its regulatory powers to cancel licenses because the agency also had a "creditor relationship with winning bidders." Pet. App. 50a.

1. Section 309(j) of the Communications Act establishes a market-based mechanism to guide the FCC in fulfilling its responsibility to allocate radio licenses in the public interest. The statute directs the FCC to employ a system of competitive bidding to award spectrum licenses in a manner that furthers the development and rapid deployment of telecommunications technologies and the efficient and intensive use of radio spectrum. See 47 U.S.C. 309(j)(3)(A), (C), (D). "Because new licenses would be paid for," the legislative history states, "a competitive bidding system will ensure that spectrum is used more productively and efficiently than if handed out for free." H.R. Rep. No. 111, 103d Cong., 1st Sess. 249 (1993). The competitive bidding system recognizes that the entity willing to pay the most for spectrum will also put the spectrum to its best—its highest and most efficient—use.

Echoing this "classical belief in the efficacy of market forces," Pet. App. 229a, the FCC determined that "auction designs that award licenses to the parties that value them most highly will best achieve" the statute's goals. *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd 2348, ¶ 70 (1994). The agency explained:

> Since a bidder's abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increase the value of a license to a bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services * * * and the efficient and intensive use of the spectrum.

9 FCC Rcd 2348, ¶ 71. The auction mechanism has proved effective in promoting Congress's goals of "development and rapid deployment * * * without administrative or judicial delays." 42 U.S.C. 309(j)(3)(A).[2]

As the Second Circuit explained, however, the license auction mechanism can achieve "fair and efficient allocation of spectrum licenses * * * only if the bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license at issue" and thus "only if the high bid entails the obligation to make good the amount bid." Pet. App. 246a. Consequently, the grant of any license allocated at auction is "conditioned upon full and timely payment of the winning bid amount." 47 C.F.R. 24.708(a) (1997). If licensees opt to pay in installments, the FCC's rules provide that the license "shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan," 47 C.F.R. 1.2110(e)(4) (1997), and "will automatically cancel" in the event of default, 47 C.F.R. 1.2110(e)(4)(iii) (1997). These regulatory requirements were also reflected in the licenses issued to respondents, Pet. App. 388a, as well as the Installment Payment Plan Note, *id.* at 393a, and the Security Agreement, *id.* at 409a. The D.C. Circuit nonetheless held that Section 525 of the Bankruptcy Code prevented respondents' licenses from canceling on

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[2] To date, the FCC has distributed thousands of licenses worth tens of billions of dollars through more than 30 spectrum auctions. See, *e.g.*, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Sixth Report*, FCC No. 01-192, Tables 1A, 1B (July 17, 2001). That, in turn, has spurred vigorous growth in telecommunications services. In the year ending December 2000, for example, the mobile telephone industry "generated over $52.5 billion in revenues" and "increased subscribership from 86.0 million to 109.5 million." *Id.* at 5. "To date, 259 million people, or almost 91 percent of the total U.S. population, have access to three or more different operators * * * offering mobile telephone service in the counties in which they live." *Id.* at 6.

account of their failure "to make timely installment payments while in Chapter 11." Pet. App. 49a.

That erroneous construction of Section 525 substantially thwarts the market-based license allocation mechanism Congress established in Section 309(j). As the Second Circuit explained, if the results of a spectrum auction "can be adjusted in bankruptcy proceedings so that the high bidder takes the license without paying the amount of the high bid, the auction as a mechanism for determining" which applicant values the licenses most highly "is impaired." Pet. App. 246a. For that very reason, the Second Circuit rejected respondents' attempt to use bankruptcy law to keep their licenses while reducing their payment obligation from $4.7 billion to just over $1 billion. The reality that a dollar received today is worth more than one received a year from now—commonly known as the time value of money—means that the same impairment occurs when a bidder fails to pay on time. The FCC evaluated and selected the high bidder based on assumptions about when payment would be received and the consequences of default. "Time of payment and amount of payment are alike functions of value." Pet. App. 119a. Respondent recognized as much by offering to pay a discounted amount on an accelerated schedule. *Id.* at 147a. In short, "the regulatory purpose for requiring payment in full—the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum—is quite obviously served in the same way by requiring payment on time." *Id.* at 119a. If a bidder does not make timely payments, it necessarily draws into question whether the bidder was, in fact, the entity willing and able to pay the most for the spectrum.

By preventing the Commission from enforcing its full and timely payment rules, the D.C. Circuit's decision frustrates achievement of the central goal of spectrum auctions, and prevents the FCC from correcting a demonstrated distortion of the bidding process. Indeed, the Commission itself de-

clined to provide regulatory relief from the full and timely payment requirements precisely because doing so would "gravely undermine the credibility and integrity of [its] rules." Second Report and Order and Further Notice of Proposed Rule Making, *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 12 FCC Rcd 16,436, ¶ 19 (1997). Only by requiring winning bidders to make good on their bid obligations can the Commission prevent speculative or insincere bidding. The D.C. Circuit's rule allows bidders that value the spectrum less than others —because they propose putting it to less valuable and intensive use—to outbid those that value the spectrum more highly, in the hope that licenses will increase in value over time or, if they do not, that the bidder will be able to adjust the bid price downward or extend payment terms in bankruptcy. Moreover, a bidder's inability to raise capital to meet its bid demonstrates that, in the market's view, the bidder cannot generate the public value through the license that its bid otherwise indicated.

For that very reason, the Second Circuit declined to construe the Bankruptcy Code as intruding on the FCC's spectrum allocation function. A bidder's failure to make full and timely payment, the Second Circuit explained, "ha[s] more than financial implications." Pet. App. 234a. Instead, it "indicate[s] that under the predictive mechanism created by Congress to guide the FCC," the defaulting bidder is "not the applicant most likely to use the [l]icenses efficiently for the * * * public in whose interest they were granted"; *i.e.*, "in regulatory terms," it indicates that the bidder is "not entitled to the [l]icenses." *Ibid.* By granting licensees immunity from the consequences of their nonpayment, the D.C. Circuit establishes a system that awards licenses to entities that, under the system of license allocation established by Section 309(j), have no entitlement to them; it awards licenses to entities that will not use them to their greatest public

benefit; and it causes that spectrum to be tied up in protracted litigation rather than being placed into immediate service. Pet. App. 235a.

The D.C. Circuit dismissed the conflict between its ruling and the achievement of Congress's goals on the ground that "nothing in the Act required the Commission to choose" to permit winning bidders to pay their bids in installments. Pet. App. 49a-50a. But Congress specifically directed the FCC to "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments" to promote small business participation. 47 U.S.C. 309(j)(4)(A).[3] The D.C. Circuit's decision effectively renders those congressionally sanctioned means inconsistent with achievement of the statute's ends.[4]

More fundamentally, the court of appeals' decision strikes not merely at installment payments but at the core of the auction regime. Section 525 states that a governmental

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[3] Congress was "concerned that, unless the Commission [was] sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries." H.R. Rep. No. 111, *supra*, at 254. Methods such as installment payment schedules were designed to head off the possibility that spectrum auctions "could inadvertently have the effect of favoring only those with 'deep pockets,'" or "incumbents, with established revenue streams, over new companies or start-ups." *Id.* at 255. In light of those considerations, the FCC determined that "installment payments [would] be an effective way to efficiently promote the participation of small businesses * * * and an effective tool for efficiently distributing licenses and services among geographic areas." 9 FCC Rcd 2348, ¶ 233.

[4] The D.C. Circuit suggested that its ruling might leave open alternative means for promoting small business participation in FCC spectrum auctions. The court stated, for example, that "the Commission could have required winning bidders to obtain third party guarantees for their license fee obligations, or required full upfront payment from C Block licensees and helped them obtain loans from third parties." Pet. App. 50a. But the FCC considered and rejected precisely those alternatives because they present the very obstructions to capital access that the installment payment rules were intended to alleviate. See 9 FCC Rcd 2348, ¶¶ 230, 233. The court of appeals' contrary ruminations improperly substitute the court's view of the public interest for that of the FCC.

agency may not "revoke" or "suspend" a license solely for nonpayment of a debt dischargeable in bankruptcy. But it also states that an agency may not "deny" a license, or "refuse to renew" one, solely for nonpayment of such a debt. 11 U.S.C. 525(a).[5] Section 525 draws no distinction between cancellation for noncompliance with an installment payment plan and denial of a license for failure to satisfy a pre-licensing payment requirement, *i.e.*, failure to come up with the bid price in the first instance.[6]

A more destructive threat to the Commission's auction process—or any other market-based license allocation regime—is difficult to imagine.[7] It does not merely embroil

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[5] Thus, the FCC's suspension of its installment payment program, *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 13 FCC Rcd 15,743, ¶ 50 (1998), neither eliminates the adverse consequences of the court of appeals' decision nor undermines the necessity of this Court's review. Further, the decision to suspend the installment payment program reflected the delays and difficulties that have been created by use of the bankruptcy process. As the Commission explained, the statutory objective "to speed service to the public cannot be achieved when licenses are held in abeyance in bankruptcy court." *Ibid.* Finally, there are several hundred licenses (in addition to those held by respondents) with installment payment conditions outstanding, and those licenses contain regulatory payment obligations of over $2.4 billion.

[6] In practice, there can be substantial delays between the submission of a high bid and the date that full payment is due. FCC rules provide that the qualifications of the winning bidder are not definitively resolved until examination of the "long-form" application for licenses filed by the winning bidder at the close of the auction. See Pet. App. 217a. At that time, interested parties are permitted to file petitions to deny on the ground that granting the license would be inconsistent with the public interest. See 47 C.F.R. 24.830(a), 1.2108. Because of the long-form application requirement, and the filing of petitions to deny, respondent NPCI was not conditionally granted the C-Block licenses for which it had been the high bidder in May and July 1996 until January 3, 1997. See *In re Applications of NextWave Personal Communications, Inc. for Various C-Block Broadband PCS Licenses*, 12 FCC Rcd 2030, ¶¶ 3-9 (1997).

[7] For example, the D.C. Circuit's ruling potentially threatens the Federal Aviation Administration's proposal, sugggested by the Port Authority of New York and New Jersey, to allocate landing slots at

licenses in protracted bankruptcy-related litigation, severely undermining Congress's goal of rapid deployment "without administrative or judicial delays." 42 U.S.C. 309(j)(3)(A). It also renders suspect the regulatory condition that is most central in identifying the applicant that will best use a license in the public interest. Under the auction mechanism, it is the winning bidder's willingness *and ability* to pay the most for the license that identifies it as the party that will best use the spectrum in the public interest. If later events belie the bidder's expressed willingness and ability to pay, the bidder no longer satisfies the key regulatory condition that its use of the spectrum be the one that best promotes the public interest. See pp. 8, 9-10, 14-16, *supra*. Yet, under the reasoning of the D.C. Circuit's decision, the licensee's demonstrated inability to meet its payment obligation—*i.e.*, proof that the most central consideration in selecting it over other applicants no longer holds true—cannot be invoked as the reason for reallocating the spectrum.[8]

2. Such interference with the proper functioning of Congress's and the FCC's market-based spectrum allocation mechanism is not a necessary consequence of the Bankruptcy Code. To the contrary, it results solely from the D.C.

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LaGuardia Airport through the use of an auction mechanism. *Notice of Alternative Policy Options for Managing Capacity at LaGuardia Airport and Proposed Extension of the Lottery Allocation*, 66 Fed. Reg. 31,731, 31,737 (2001).

[8] The court also suggested that the Commission "could have made license grants conditional on periodic checks of financial health, a more extensive credit check, or some other evidence that winning bidders were capable of using their licenses in the public interest." Pet. App. 50a. But the auction process was established to identify the *best* user of scarce spectrum, not merely one that meets marginal qualifications. If the bidder cannot meet its bid obligation, the market-based conclusion that it is the best user of the spectrum is fatally undermined. In any event, it was precisely to avoid the need for subjective inquiries into whether the bidder is more or less qualified than others—with attendant uncertainty and delays—that Congress replaced comparative hearings with the auction mechanism. See H.R. Rep. No. 111, *supra*, at 248.

Circuit's misconstruction of Section 525. It is a fundamental canon of statutory construction that statutes, where possible, should be construed so as to prevent them from obstructing one another. See *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). Cf. *Nathanson* v. *Labor Board*, 344 U.S. 25, 30 (1952) ("wise administration * * * demands that the bankruptcy court accommodate itself to the administrative process"). See also *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (specific statute not to be controlled or nullified by general one). As this Court has explained, federal courts should adopt the "permissible meaning" of an ambiguous statute "which fits most logically and comfortably into the body of both previously and subsequently enacted law," not because that precise "accomodative meaning" was necessarily "what the lawmakers must have had in mind," but because it is the role of the federal courts "to make sense rather than nonsense out of the *corpus juris*." *West Virginia Univ. Hosp., Inc.* v. *Casey*, 499 U.S. 83, 100-101 (1991). In this case, the D.C. Circuit needlessly made the law self-contradictory, rejecting a persuasive construction of Section 525 that accommodates bankruptcy law to the specific requirements of the license allocation regime Congress established in Section 309(j).

a. Section 525 of the Bankruptcy Code provides that, with certain exceptions, "a governmental unit may not deny, revoke, suspend, or refuse to renew a license" to "a person that is or has been a debtor under this title * * * solely because such bankrupt or debtor * * * has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. 525(a). The statutory language is clear—a governmental agency may not revoke (or refuse to issue) a license because a debtor in bankruptcy proceedings "has not paid a debt that is dischargeable" under the Bankruptcy Code; thus, if the debt is *non*dischargeable, Section 525's limitations do not apply. See, *e.g.*, *Johnson* v. *Edinboro State College*, 728 F.2d 163, 165 (3d Cir. 1984); 4 L. King, *Collier on Bankruptcy*

¶ 525.02, at 525-5 (15th ed. 2001). Moreover, the revocation of (or refusal to issue) the license must be "solely because" of the failure to pay a dischargeable debt; if the revocation has a regulatory purpose distinct from the mere fact that a debt remained unpaid, it is not proscribed. Neither of those two conditions to Section 525's applicability was met in this case.

First, because respondents' payment obligations were express regulatory conditions on respondents' right to hold the spectrum licenses, they were not dischargeable in bankruptcy within the meaning of Section 525. Pet. App. 388a; 47 C.F.R. 1.2110(e)(4) (1997). As the Second Circuit explained, the "willingness and ability" of respondents "to pay more than [their] competitors" in the spectrum auction was "the basis on which [the FCC] decided to grant the [l]icenses" to them. Pet. App. 234a. Their "inability to follow through on [their] financial undertakings" thus "indicated that under the predictive mechanism created by Congress to guide the FCC," respondents were "not the applicant[s] most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted." *Ibid.* "It meant, in regulatory terms, that [respondents were] not entitled to the [l]icenses." *Ibid.* Accordingly, in keeping with the Bankruptcy Code's general preservation of regulatory obligations, see pp. 25-26, *infra*, the Second Circuit held that the bankruptcy and district courts "were utterly without the power to order that [respondents] be allowed to retain" their licenses without fulfilling their regulatory payment obligations. Pet. App. 236a. So long as respondents held the licenses, their obligation to pay their winning bids in full and on time could not be modified in bankruptcy and thus were not "dischargeable" in bankruptcy within the meaning of Section 525.[9]

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[9] In that respect, the Second Circuit properly distinguished between the FCC's *regulatory* powers (upon which bankruptcy law does not intrude) and its *financial* interests (which may be adjusted in bankruptcy). As that court explained, the fact that bankruptcy courts cannot adjust

The D.C. Circuit's contrary conclusion does not withstand scrutiny. According to that court, the Second Circuit held that "insofar as timely payment was a condition for license retention, the *bankruptcy court* had no authority to modify it," Pet. App. 42a, but "never decided that a court of competent jurisdiction (such as [the D.C. Circuit]) could not modify or *discharge it under section 525*." *Ibid.* (emphasis added). Contrary to the D.C. Circuit's assumption, however, Section 525 does not itself authorize *any* court to *discharge* debts; it is a prohibition on government conduct, not an authorization for judicial discharge of obligations.

Moreover, the D.C. Circuit possesses no authority to "discharge" debts under any provision of the Bankruptcy Code. Section 525, by its terms, applies only if the debts are "dischargeable *in the case under this title*," *i.e.*, in bankruptcy proceedings under the Code. 11 U.S.C. 525(a) (emphasis added). For cases like this one under Chapter 11, there is but one discharge provision, Section 1141(d)(1), which provides that confirmation of the plan of reorganization "discharges the debtor from any debt that arose before the date of confirmation." 11 U.S.C. 1141(d)(1). The D.C. Circuit is not a court empowered to confirm a plan of reorganization under Chapter 11 of the Bankruptcy Code, and thus cannot "discharge" the debtor from a debt under Chapter 11. To the contrary, "original and exclusive" jurisdiction over "all cases under title 11" is vested in the district courts, 28 U.S.C. 1334(a), which may, pursuant to 28 U.S.C.

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regulatory payment obligations does not preclude them from adjusting any payment obligations that are purely financial in nature, Pet. App. 236a & n.11, such as those that would persist *after* surrender of the licenses. See *id.* at 237a ("If the [l]icenses are returned to the FCC, the bankruptcy court may resolve resulting financial claims that the FCC has against NextWave as it would the claims of any government agency seeking to recover a regulatory penalty or an obligation on a debt."). The D.C. Circuit's decision, in contrast, fails to distinguish between the two sets of interests, and thus erroneously treats regulatory obligations as subject to modification in bankruptcy.

157(a), refer such cases to "the bankruptcy judges for the district." See also 28 U.S.C. 157(b)(1), (b)(2)(L) ("confirmations of plans" is among the "core proceedings" that "[b]ankruptcy judges" may "hear and determine").

Second, the D.C. Circuit erred in concluding that license cancellation under the Commission's rules occurs "solely because" of the debtor's failure to pay "a debt" dischargeable in bankruptcy. Pet. App. 45a. Respondents' licenses canceled because respondents breached a fundamental regulatory condition of their licenses. The fact that the cancellation would not have occurred but for the failure to pay does not in itself satisfy the terms of Section 525 where, as here, payment serves a regulatory as well as financial function. A "but for" cause is not necessarily a "sole" cause. See *United States* v. *Dyer*, 216 F.3d 568, 570 (7th Cir. 2000) (Posner, J.) ("'But for' causation is a very weak sense of causation," that is "poles apart from 'sole cause,' as innumerable cases * * * make clear.") (citing cases).

The purpose of the auctions at issue in this case was to select a single applicant, to the exclusion of all others, to use particular spectrum to serve the public. The bids were required and collected not for their own sake but rather because they are the means by which the Commission ensures that the prospective licensee will best use the license in the public interest. Because the bid is the central regulatory mechanism used to identify the "best" licensee from among competing applicants, the bidder's failure to make full and timely payment is fatal to its implicit representation that it is the "best" of the potential licensees. The failure to pay signifies that the bidder's original representation that it was willing and able to pay more than the other bidders no longer holds true, and thus that the basis on which the FCC decided to issue the license no longer holds true either. As a result, cancellation does not occur "solely because" of respondents' failure to pay a "debt." It occurs

because of the breach of a regulatory condition central to the FCC's identification of the applicant as the proper licensee.

The obvious purpose of Section 525 is to enable one who otherwise satisfies all regulatory requirements for a business or professional license to continue, in competition with others, to conduct that business notwithstanding failure to pay a debt. For that reason, Section 525 is entitled "Protection against *discriminatory* treatment." (Emphasis added.) But Section 525 does not purport to force an agency to give an exclusive license to a business that fails to meet the key regulatory requirement for maintaining the license. By permitting respondent to keep its licenses and exclude all others from using that spectrum despite failure to meet a central condition of its license, the D.C. Circuit converted Section 525 from a bar on discrimination against debtors into a rule requiring discrimination in their favor.

b. The D.C. Circuit's construction of Section 525 also places that provision at odds with the structure of the Bankruptcy Code as a whole. The Bankruptcy Code generally exempts regulatory action from the Code's provisions. See, *e.g.*, 11 U.S.C. 362(b)(4) (1999 & Supp. V 1999) (regulatory and police actions exempted from automatic stay). This Court thus has repeatedly recognized that the Bankruptcy Code should not be construed to prevent the government from pursuing its non-creditor, regulatory interests. See, *e.g.*, *Board of Governors* v. *MCorp Fin.*, 502 U.S. 32, 40 (1991); *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envt'l Prot.*, 474 U.S. 494, 507 (1986). It is accordingly sensible to read Section 525 as permitting agency enforcement of license conditions designed to achieve regulatory goals by holding such conditions to be not "dischargeable in" bankruptcy within the meaning of Section 525.

The D.C. Circuit's contrary construction of Section 525, under which bankruptcy law governs the essentially regulatory question of who will hold a radio spectrum license, creates an unprecedented expansion of bankruptcy law into

the domain of agency authority. Under the D.C. Circuit's decision, the effect of a failure to meet a fundamental regulatory condition in a radio spectrum license is *not* determined under rules established by the FCC in pursuit of the public interest. Instead, that failure becomes a matter of bankruptcy law designed to regulate debtor-creditor relations, divorced from the specific and unique public interest concerns of the Communications Act and the FCC's expertise. Nothing in either the Communications Act or the Bankruptcy Code supports, much less compels, that dramatic displacement of FCC authority in this area.

In fact, Section 309(j) proscribes it. When Congress established auctions as a mechanism for issuing spectrum licenses, it provided that "*[n]othing* * * * in the use of competitive bidding, *shall diminish* the authority of the [FCC] under other provisions of this chapter to regulate or *reclaim* spectrum licenses." 47 U.S.C. 309(j)(6)(C) (emphases added). It further provided that the FCC's use of auctions under Section 309(j) may not "be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to [competitive bidding]." 47 U.S.C. 309(j)(6)(D). See also 47 U.S.C. 301 ("[N]o [FCC spectrum] license shall be construed to create any right, beyond the terms, conditions, and periods of the license."). Congress thus made clear that competitive bidding "alters only the licensing process, and has no effect on the requirements, obligations or privileges of the license holders." H.R. Rep. No. 111, *supra*, at 258. Yet, under the D.C. Circuit's construction, the use of competitive bidding *eliminates* the FCC's right to reclaim licenses for failure to meet fundamental license conditions specifically because the auction mechanism was used, *i.e.*, because the regulatory decision to issue the licenses had a financial component.

In light of Congress's decision to use a market-based system for allocating spectrum, that represents a significant

intrusion on the FCC's ability "to reclaim licenses," in derogation of 47 U.S.C. 309(j)(6)(C). Moreover, under the D.C. Circuit's decision, the use of competitive bidding effectively conveys additional rights to defaulting bidders—a right to retain licenses in bankruptcy despite failure to meet license conditions—that, but for the use of competitive bidding, would not exist. That result conflicts not only with the express command of Section 309(j)(6)(D), but with basic principles of bankruptcy law. See *In re Gull Air, Inc.*, 890 F.2d 1255, 1260 (1st Cir. 1989) ("The Bankruptcy Code does not create or enhance property rights of a debtor.").

Ultimately, the D.C. Circuit refused to construe Section 525 in a manner that would accommodate the FCC's regulatory regime—and Congress's goals under Section 309(j)—because Section 525 lacks a specific "regulatory purpose exception." Pet. App. 43a. That reasoning misreads Section 525. Section 525 prohibits only license revocations that occur "solely because of" the debtor's failure to pay a "debt that is dischargeable" in bankruptcy. As explained above, where the unfulfilled obligation is regulatory in nature, it is (as the Second Circuit concluded in this case) not dischargeable in bankruptcy, and revocation of the license in the event of breach is not "solely because" of the failure to pay a debt. In view of the express limits built into Section 525, Congress's failure to include a further "regulatory exception" reflects a congressional interest in avoiding redundancy.

Indeed, the legislative history of Section 525 confirms that point. See S. Rep. No. 989, 95th Cong., 2d Sess. 81 (1978) (Section 525 "does not prohibit consideration of other factors, such as future financial responsibility or ability, and does not prohibit imposition of requirements such as net capital rules, if applied nondiscriminatorily."); H.R. Rep. No. 595, 95th Cong., 1st Sess. 165 (1977) ("where the causes of a bankruptcy are intimately connected with the license * * * an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate

regulatory policies and take appropriate action without running afoul of bankruptcy policy"); 4 *Collier*, *supra*, ¶ 525.02, at 525-5 (where agency merely enforces nondiscriminatory financial requirement—one that is applicable whether or not a party has filed for bankruptcy—such as requiring "financial responsibility in a particular licensing process," Section 525(a) "is not applicable."). The D.C. Circuit dismissed the legislative history as inconsistent with statutory text, Pet. App. 46a, but it is only inconsistent with the text as misinterpreted by that court. If regulatory obligations are properly understood as nondischargable even when they have a financial component, the legislative history of Section 525 is fully consistent with Section 525's text— and with the more general principle that bankruptcy law does not intrude on the FCC's substantive regulatory authority.[10]

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[10] In holding that "the Commission violated Section 525 of the Bankruptcy Code in canceling NextWave's licenses," the D.C. Circuit stated that it "need not consider [respondents'] remaining Bankruptcy Code arguments." Pet. App. 51a. The court of appeals at one point, however, did state that "section 362's automatic stay" may have applied because the FCC's license cancellation constituted an effort to "enforce liens against property of the estate" in violation of 11 U.S.C. 362(a)(4) and (5). See Pet. App. 40a-41a. That statement, however, is merely part of the court of appeals' analysis of the Section 525 issue, and is not an independent ground. It is, in any event, incorrect. The Bankruptcy Code provides that the automatic stay of proceedings upon the filing of a bankruptcy petition does not apply to "the commencement or continuation of an action or proceeding by a governmental unit * * * to enforce such governmental unit's or organization's police and regulatory power." 11 U.S.C. 362(b)(4) (1994 & Supp. V 1999). It is true, of course, that Section 362(b)(4) does not apply where the action at issue is an effort to "create, perfect, or enforce any lien" against property of the estate or against property of the debtor to the extent that the lien secures a pre-petition claim. See 11 U.S.C. 362(b)(4) (1994 & Supp. V 1999) (specifying that regulatory exception applies only to stays under "paragraph (1), (2), (3), or (6) of subsection (a)"). But the FCC's cancellation of the licenses was not an effort to enforce a lien against property of the estate, because cancellation enforces a regulatory requirement, and the spectrum licenses are not property, much less "property of the estate." See *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) (under the Communication Act "no person is to

3. Finally, the D.C. Circuit's decision cannot be reconciled with the Second Circuit's decision in this very case. The Second Circuit ruled that the FCC's timely payment condition fulfilled the objectives underlying the statutory auction process, "the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum," in precisely the same way as the agency's requirement that winning bids be paid in full. Pet. App. 119a. Because the "timing of NextWave's payment obligation—like the amount of it—was a subject of FCC regulation," the Second Circuit held, "[t]he bankruptcy court lacked jurisdiction to declare the Public Notice null and void on any ground: that the Public Notice violated the automatic stay, that the right to cure obviates any default, or that the government was estopped." *Id.* at 126a-127a.

The D.C. Circuit assumed that the agency's enforcement of its timely payment condition fell "within the regulatory power exception" to the automatic stay. Pet. App. 35a. Yet that court declined to distinguish between the FCC's regulatory role and its financial interests. Instead, the court ruled that, because the Commission had "chosen to create standard debt obligations as part of its licensing scheme" (*id.* at

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have anything in the nature of a property right as a result of the granting of a license."). To treat a license as conferring a *property* right to exclude others from use of the allocated spectrum is tantamount to granting a property right in the spectrum itself, which Congress has expressly precluded. See p. 2, *supra;* see also pp. 26-27, *supra* (competitive bidding does not convey additional rights to licensees). More fundamentally, the D.C. Circuit erred in attaching significance to the fact that the FCC, in addition to exercising its regulatory powers, had executed agreements giving it liens on the licenses. Pet. App. 39a-40a. Respondents' licenses canceled as a result of the Commission's exercise of its regulatory authority to implement the auction process, separate and apart from the Commission's creditor interests. Nor could the additional existence of a lien diminish the scope of the Commission's regulatory authority. In this case, the notes and security agreements by their own terms make clear that they do not substitute for, but instead supplement, the regulatory power embodied in the administrative rules and license conditions. *Id.* at 403a-404a.

2a), and had "enter[ed] a creditor relationship with winning bidders" (*id.* at 50a), Section 525 of the Bankruptcy Code precluded the Commission from canceling respondents' licenses, even in its regulatory role.

The Second Circuit, in contrast, squarely rejected that approach, which "turn[s] the FCC into a mere creditor," as "fundamentally mistaken." Pet. App. 235a. Instead, the court held, "[i]n granting licenses by auction, the FCC acts as creditor and regulator both." *Id.* at 244a. The agency's "regulatory function is not ended by the bankruptcy of a licensee or license claimant," the court concluded, "and as the function persists it must perforce be carried out." *Ibid.* See also note 9, *supra.* Indeed, the D.C. Circuit's analysis and its dismissive attitude toward the impact of its decision on the FCC's regulatory goals under Section 309(j) is difficult to distinguish from the bankruptcy court reasoning the Second Circuit twice rejected. See pp. 7-10, *supra.* That unseemly conflict between the approach taken by the Second and D.C. Circuits in this very case—as well as the consequent divergence in results—weigh strongly in favor of this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
*Acting Solicitor General*[*]

LAWRENCE G. WALLACE
*Deputy Solicitor General*

JEFFREY A. LAMKEN
*Assistant to the Solicitor General*

WILLIAM KANTER
JACOB M. LEWIS
*Attorneys*

JOHN A. ROGOVIN
*Deputy General Counsel*

DANIEL M. ARMSTRONG
JOEL MARCUS
*Counsel*
*Federal Communications Commission*

OCTOBER 2001

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[*] The Solicitor General is disqualified in this case.