No. 17-1058

In the Supreme Court of the United States

SNR WIRELESS LICENSECO, LLC AND NORTHSTAR WIRELESS, LLC,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF

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REPLY BRIEF FOR PETITIONERS

It is vitally important that federal agencies give fair notice to the public of the standards they intend to apply. Without such notice, regulated entities cannot conform their conduct to the law. Providing such notice also disciplines the agencies to conform *their* conduct to the law. Accordingly, the standard by which courts assess whether agencies have given fair notice is critical to ensuring principled agency decision making.

What is most telling about the Brief in Opposition, therefore, is the government's complete failure to acknowledge the need for such standards. It falls back on broad generalities that impose no meaningful notice requirement and give agencies near-boundless discretion. The government says that it's enough for lower courts to intone those same meaningless standards. But as the Petition demonstrates, in substance the standards applied by the courts of appeals differ greatly. The plurality of circuits applies a notice standard that requires an agency to provide advance guidance when there are multiple reasonable interpretations of the applicable requirement. The court below did not. It permitted the FCC to deny billions of dollars in licenses and impose hundreds of millions of dollars in fines, on the basis of standards that the agency never meaningfully articulated, that departed from prior agency practice, and that were only enshrined in the FCC's rules *after* the FCC penalized the Petitioners. Pet. App. 41a. The Court's intervention is necessary to resolve this conflict, and to ensure that the regulated public

receives appropriate notice of the standards that government regulators will apply.

The government's principal response is that the Petition is premature. Opp. 20. It observes that the court of appeals, having approved the agency's *de facto* control standard, remanded to give Petitioners a chance to "cure" the supposed defects identified by the Commission. *Id*. But "curing" would not moot the controversy or eliminate the harm caused by the decision below. On the contrary, it would mean fundamentally restructuring Petitioners' relationships with their investors under the Commission's *new* standards, the very ones of which Petitioners had no fair notice—and doing so under the looming threat of massive penalties if the FCC decides not to approve Petitioners' cure. This, therefore, is quite unlike cert. petitions in an interlocutory posture where the legal error might be washed clean by subsequent proceedings. Here, even if a "cure" were possible—and as discussed below, the Commission has refused even to meet to negotiate with Petitioners—it would calcify rather than ameliorate the court of appeals' error.

The government's remaining arguments cannot disguise the critical problem here: As even the court of appeals recognized, "there was considerable uncertainty at the time of Auction 97 about the degree of control [the Commission's] rules would tolerate." Pet. App. 44a. Under a proper standard, an agency's official statements must provide at least enough notice to enable a regulated entity to determine the agency's likely regulatory interpretation. Here, the Commission did not come close. No party could have divined the Commission's ad hoc approach to evaluating bidding credit eligibility.

Given the extraordinary importance of this question—not just because of billions of dollars and critical wireless spectrum are at issue, but because administrative fair notice is essential to the massive federal bureaucracy and those it regulates—the Petition should be granted.

I. The Courts of Appeals Apply Divergent Administrative Fair Notice Standards.

A. As the Petition explains, the circuits are divided over the appropriate standard for measuring administrative fair notice. Pet. 13–22.

The government responds that "the lower courts have applied a substantially uniform standard." Opp. 27. Its only support, however, is that other circuits "employ the same 'ascertainable certainty' formulation, often citing D.C. Circuit cases." Opp. 27–28. But without consistent parameters, "ascertainable certainty" is an empty label. "Certain" to *whom* and to *what degree*, and "ascertainable" by reference to *what*?

The answers make all the difference, and beneath the label, the circuits are deeply divided. The Ninth Circuit, for instance, will find notice to be inadequate unless "a person of ordinary intelligence should have known … that [the regulation] was susceptible *only* to the interpretation the government … champions." *United States* v. *AMC Entm't, Inc.*, 549 F.3d 760, 768 (9th Cir. 2008) (emphasis added). The First Circuit, by contrast—much like the decision below—requires much less, asking only whether "the regulation … was reasonably susceptible to the construction [the agency] adopted." *United States* v. *Lachman*, 387 F.3d 42, 57 (1st Cir. 2004). The gov-

ernment does not even try to reconcile these standards.

This also answers the government's argument that review is unwarranted because Petitioners previously invoked the "ascertainable certainty" boilerplate and the court of appeals recited it. Opp. 22. As explained, those two words denote a number of varied standards, and Petitioners asked for a searching one. They argued that "ascertainable certainty" means that a "reasonable person, exercising reasonable care, would have known that there was a violation of applicable standards." Pet. C.A. Br. 52 (quotation marks omitted). The decision below, however, applied a far lower standard, akin to the First Circuit's quoted above, which is satisfied by notice of what an agency "might" do, without regard to whether a reasonable person would have known that the agency would adopt the interpretation in question. Pet. App. 44a.

Tellingly, the government never says what it thinks "ascertainable certainty" means. And it never addresses the fault line that divides the circuits: Is it enough if a regulated party "should" have known that an agency "might" adopt a particular regulatory interpretation, as the D.C. and First Circuits hold? Pet. 18–20. Or must an agency give parties notice of which among competing reasonable interpretations will govern, as the plurality of circuits have required? Pet. 14–18. The government says little at all, seemingly content to rest on a standardless standard—"ascertainable certainty"—that would give agencies maximum flexibility and regulated entities minimal notice.

B. The government resists the "contention … that decisions of the Third, Fourth, Fifth, Seventh, and Ninth Circuits reflect a more 'rigorous fair notice standard[ ]." Opp. 29 (citing Pet. 14–18). But its characterization of those cases does not withstand scrutiny.

Take, for instance, the searching standard articulated in *United States* v. *Hoechst Celanese Corp.*, 128 F.3d 216 (4th Cir. 1997). Pet. 16–17. There, the Fourth Circuit held that an agency must provide "clear notice" of a regulatory interpretation and that this requirement is not satisfied when "nothing … forecloses [the agency's] interpretation" but "nothing mandates it" either. *Id.* at 225, 227. This standard demands more than simply notice of what an agency "might" find. The government's only response is that the decision was based on an "'[e]xamination of the particular facts of th[e] case.'" Opp. 30 (quoting *Hoechst*, 128 F.3d at 224–25). Of course it was; applying the fair notice standard always will turn on the "particular facts." The question here, however, is *what standard* the court applied. And the Fourth Circuit articulated and applied a standard far more rigorous than the one applied by the court of appeals here.

The government takes a similar approach to distinguishing *AMC Entertainment*, which announced the stringent Ninth Circuit standard quoted above. That case, it says, is different because of a "'morass of litigation'" underlying it. Opp. 30 (quoting *AMC Entm't*, 549 F.3d at 768). But that is irrelevant to what legal standard for fair notice the court used. And, in fact, the standard articulated by the Ninth

Circuit was higher than the one articulated here. As the Petition details (at 14–18), the Third, Fifth, and Seventh Circuits' standards are similarly rigorous.

C. Next, the government defends the standard used below. It acknowledges, as it must, the court of appeals' conclusion that Petitioners had fair notice because they "should reasonably have anticipated that the FCC might find them to be under DISH's *de facto* control." Opp. 25 (quoting Pet. App. 45a). Yet the government denies that the court meant what it said. It claims the court "did not hold or imply that parties are categorically on notice of anything an agency 'might' do"—the government's theory being that the court used the words "sufficiently clear" and "foreseeable" elsewhere in its decision. Opp. 25.

Why the latter statements override the former, the government doesn't say. And there is every reason to take the court of appeals at its word. Not only is the "might find" standard expressly articulated in the opinion; it is consistent with other D.C. Circuit cases articulating a similarly lax standard, which the court of appeals expressly relied upon. Pet. App. 43a (citing *Otis Elevator Co.* v. *Sec'y of Labor*, 762 F.3d 116, 125 (D.C. Cir. 2014) (discussed at Pet. 19)). True, sometimes the D.C. Circuit has applied a more rigorous notice standard. Pet. 19. But that uncertainty within the D.C. Circuit is all the more reason to grant review, given that court's outsized importance to administrative law and because, as the government recognizes (Opp. 27), courts look to the D.C. Circuit for guidance in this area.

D. Finally, the government contends that "any inconsistency among the courts of appeals' articula-

tions of the governing fair notice standard is not implicated in this case." Opp. 31. Its theory is that Petitioners "identify no reason to believe that any other court of appeals would have held in these circumstances that petitioners lacked adequate notice of the FCC's requirements." *Id.* On the contrary, the Petition identifies just such a reason: The court of appeals' express acknowledgment that Petitioners confronted "considerable uncertainty" and "confusion" about the relevant standard. Pet. App. 44a, 46a.

The decision below got that much right. The FCC reached its decision only by relying on the 50-year-old multi-factor test from *Intermountain Microwave* and the vague guidance announced in its 1994 "Fifth MO&O." Even the court of appeals acknowledged that the "waters are muddied" because these "rules predate cellular technology." Pet. App. 45a. And to reach its result, the Commission had to expressly disavow the very Wireless Bureau decisions upon which Petitioners based their contractual arrangements. Pet. 6–9; *accord* Opp. 11–12. This pick-and-choose decision making would never pass muster under the notice standards applied by the plurality of circuits, which demand notice of which among competing, reasonable regulatory interpretations will govern.

II. The D.C. Circuit's Standard Does Not Ensure Administrative Fair Notice.

The Petition explains that the D.C. Circuit's administrative fair notice standard is too lenient. Pet. 22–29. And amici have weighed in to emphasize how the D.C. Circuit's standard greatly expands the pow-

er of the administrative state and risks unprincipled decision making. Public Interest Organizations Amicus Br. 21–28.

A. The government does not appear to contest that in both *Christopher* v. *SmithKline Beecham Corp.* and *FCC* v. *Fox Television Stations*, *Inc.*, this Court cited bedrock notice principles in overturning agency action. Nor could it. In *Christopher*, the Court specifically declined to "require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference." 567 U.S. 142, 158–59 (2012). And *Fox*—after reviewing a range of FCC guidance, both published and unpublished—reversed an FCC penalty for lack of notice. 567 U.S. 239, 253–57 (2012).

Instead, the government seeks to distinguish *Christopher* and *Fox* on the ground that they "addressed challenges to *liability* imposed on private parties," whereas this case involves "the FCC's decision that petitioners were ineligible for bidding credits," which "deprived them of a public benefit." Opp. 24. But the government cites no authority limiting the administrative fair notice doctrine in this way, and *Christopher* and *Fox* hint at no such limitation. Nor, for that matter, did the court of appeals perceive one. And, even if one could draw the line the government suggests, the FCC imposed massive liability on Petitioners, charging penalties of over $500 million dollars in addition to requiring the Petitioners to default on $3.3 billion worth of licenses. Pet. 30. That dwarfs the $1.2 million penalty at stake in

Fox. *Christopher* and *Fox* thus apply with full force here, and both support a meaningful more stringent standard than the one applied by the court of appeals.

B. *Fox* also refutes the government's argument that, for purposes of fair notice, "regulated entities cannot reasonably assume that the agency will adhere in future cases to prior staff decisions." Opp. 26. As the Petition explains (at 25–26), *Fox* expressly relied on an unpublished, Bureau-level decision in conducting its fair notice analysis. 567 U.S. 239 at 257. Just like the Denali and Salmon decisions here, in *Fox* the FCC's unpublished decision had previously blessed materially identical conduct. *Id.* "In light of this record of agency decisions," the Court found that the FCC had not provided sufficient notice of a more stringent regulatory interpretation. *Id. Fox* proves that the court of appeals' standard—which allowed the FCC to ignore the Denali and Salmon decisions—is too lax.

C. Next, the government suggests that the fair notice standard advanced in the Petition—and applied by a plurality of circuits—would "'stultify the administrative process.'" Opp. 24 (quoting *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947) (*Chenery II*)). The government's alarmism is misplaced. A meaningful notice standard would not remotely prevent agencies from proceeding by adjudication. They could continue to do so; they simply would need to provide advance notice of the regulatory interpretations they intend to apply. But that constraint on "ad hoc" decision making is essential for all of the reasons set forth previously and detailed by the amici. And the notion that a meaningful notice requirement

would "stultify" agencies is flatly implausible. Modern administrative agencies enjoy deference to their interpretations of statutes (under *Chevron*), and of their own regulations (under *Auer*) far beyond anything *Chenery II* could have imagined. If the government thinks that providing fair notice to regulated entities is a problem, that is all the more evidence that intervention by this Court and a course correction is sorely needed.

III. This is a Worthy Vehicle for Resolving an Important Question Regarding Fair Notice.

As the Petition explains (at 29–30), review is also warranted because the question of what administrative notice standard should apply is recurring and important to the "vast and varied federal bureaucracy" that "wields vast power and touches almost every aspect of daily life." *City of Arlington, Tex.* v. *FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (quotation marks omitted). Critically, the government never denies the importance of the question, and this case presents a clean vehicle to resolve it. Pet. 30. The appropriate administrative fair notice standard is squarely at issue, a point the government does not dispute. Further, as explained above (at 3–7) and in the Petition (at 14–18), the choice between competing fair notice standards will make all the difference in light of the court of appeals' acknowledgement of "considerable uncertainty" and "confusion," Pet. App. 44a, 46a.

The government nonetheless suggests that this Court's review would be "premature" because "the court of appeals remanded the matter to the Commission to permit Petitioners to attempt to cure the

de facto control problem." Opp. 20. According to the government, if Petitioners "successfully amend their agreements with DISH" to satisfy the Commission's standards, "this case will have no continuing practical importance." Opp. 21. That is incorrect.

First, the "cure" procedure will cement rather than alleviate the consequences of the decision below. If Petitioners are correct that the FCC did not give fair notice of its control standard, then their entitlement to bidding credits should be reviewed pursuant to the standards fairly noticed *at the time of the auction*—including the Denali and Salmon decisions upon which they patterned their investor agreements. The "cure" procedure, however, will require just the opposite: It will force Petitioners to restructure their investor agreements based on the standards that the Commission applied without giving proper notice. And they will have to do so on pain of losing valuable bidding credits and facing over $500 million in penalties. The government asserts that a successful cure will permit Petitioners to avoid the default-payment penalties, Opp. 24, but the government misses the point. Under the D.C. Circuit's erroneous ruling, Petitioners' agreements will be assessed under the FCC's new requirements, not the standards that were in place at the time. That unlawfully tilts the negotiations in the FCC's favor, irredeemably tainting any result. In short, the remand proceedings aren't a do-over; they're a "do now, on our terms, or else."

Second, even if a "cure" could erase the legal and practical consequences of the court of appeals' decision, the government's own subsequent actions stand in the way. In remanding the case, the court of ap-

peals directed that Petitioners would have an opportunity to "*negotiate* a cure" with the FCC. Pet. App. 4a (emphasis added). Yet, to this very day, no such negotiation has occurred. For while the government makes the coy suggestion that "renegotiation *appears* to have begun," Opp. 21 (emphasis added), the Commission knows full well that it has flatly refused to negotiate with Petitioners at all. *See* Letter from Mark F. Dever and Ari Q. Fitzgerald to Marlene H. Dortch, Sec'y, FCC, at 2 (May 4, 2018), http://wireless2.fcc.gov/UlsApp/ApplicationSearch/applAdminPleadings.jsp?applID=9239728.

In short, staying the Court's hand is unlikely to obviate the controversy, given the Commission's behavior to date. Rather, it would needlessly delay resolution of a critically important legal issue—a resolution that would resolve this case and safeguard the regulated public's entitlement to predictable and transparent decision making.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, the Petition should be granted.

Respectfully submitted,

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