

No. _____

In The
Supreme Court of the United States

—————◆—————
BLANCA TELEPHONE COMPANY,

Petitioner,

v.

THE UNITED STATES OF AMERICA;
FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

—————◆—————
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

—————◆—————
PETITION FOR A WRIT OF CERTIORARI

—————◆—————
TIMOTHY E. WELCH, ESQ.
HILL AND WELCH
1116 Heartfields Drive
Silver Spring, MD 20904
(202) 321-1448
welchlaw@earthlink.net
Counsel of Record

QUESTIONS PRESENTED

Whether federal agencies are exempted from the rule requiring strict compliance with appellate mandates.

Whether judicial deference to federal agencies includes deference to material false statements.

PARTIES TO THE PROCEEDINGS BELOW

All parties are disclosed in the case caption.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner, Blanca Telephone Company, is a non-public, closely held, Incumbent Local Exchange Carrier (ILEC), with no publicly owned subsidiaries or owners, and is organized, and located in, Colorado. The sole owner is a citizen of the United States residing in Colorado.

RELATED CASES

Blanca Tel. Co. v. FCC, et al., 991 F.3d 1097 (CA10 2021) (Nos. 20-9510 & 20-9524) (*Slip Op. App.* at 2), *rehearing and rehearing en banc den.* (May 6, 2021), *cert. den.*, *Blanca Tel. Co. v. FCC, et al.*, 142 S. Ct. 486 (2021) (No. 21-472), *rehearing den.*, 142 S. Ct. 850 (2022), *mandate recall den.* (CA10 October 17, 2022) (*App.* at 1).

Blanca Tel. Co. v. FCC, (CA10 March 12, 2019) (unpublished) (No. 18-9587) (jurisdictional defect), *rehearing and rehearing en banc den.* April 30, 2019, *cert. den.* *Blanca Tel. Co. v. FCC et al.*, 140 S. Ct. 225 (2019) (No. 19-134).

Blanca Tel. Co. v. FCC, (CA10 October 25, 2018) (unpublished) (No. 18-9502) (jurisdictional defect), *rehearing and rehearing en banc den.* December 10, 2018.

In re: Blanca Tel. Co. v. FCC, (CA10 December 29, 2017) (unpublished) (No. 17-1451) (mandamus denied).

In re: Blanca Tel. Co. v. FCC, (CADC October 21, 2016) (unpublished) (No. 16-1216) (prohibition denied), *rehearing and rehearing en banc den.* December 12, 2016.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties To The Proceedings Below	ii
Rule 29.6 Disclosure Statement	ii
Related Cases	iii
Table Of Contents	iv
Table Of Authorities	vi
Petition For A Writ Of Certiorari	1
Opinion Below.....	1
Jurisdiction	1
Constitutional Or Statutory Provisions Involved.....	2
Statement	3
A. The FCC’s USF Debt Adjudication.....	3
B. The FCC’s Post-Mandate Punitive Order ...	6
C. Blanca’s Mandate Recall Motion.....	7
Reasons For Granting The Petition.....	9
I. Courtroom Norms Apply To Agencies.....	9
II. Appellate Review Was Not Available	12
A. The Mandate Was Not Enforced.....	12
B. Deference To False Statements	15
Conclusion.....	19

TABLE OF CONTENTS – Continued

Page

APPENDIX INDEX

221017 Order Denying Motion to Recall the Mandate 10th Cir. No. 20-9510 & 20-9524.....	App. 1
210315 Order Denying Petition for Review 10th Cir. No. 20-9510 & 20-9524.....	App. 2

TABLE OF AUTHORITIES

	Page
CASES	
<i>AT&T Corp. v. FCC</i> , 349 F.3d 692 (CA DC 2003)	6
<i>Bankers Trust Co. v. Bethlehem Steel Corp.</i> , 761 F.2d 943 (CA3 1985)	12
<i>Blanca Tel. v. FCC</i> , 991 F.3d 1097 (CA10 2021)	1, 3
<i>Burton v. Johnson</i> , 975 F.2d 690 (CA10 1992)	12
<i>Calderon v. Thompson</i> , 523 U.S. 538 (1998)	8
<i>Chambers v. NASCO, Inc.</i> , 501 U.S. 32 (1991)	10
<i>Georgia v. Brailsford</i> , 3 U.S. (3 Dall.) 1 (1794)	11
<i>Huffman v. Saul Holdings Ltd. P'ship</i> , 262 F.3d 1128 (CA10 2001)	12
<i>In re Sanford Fork & Tool</i> , 160 U.S. 247 (1895)	5, 12
<i>O'Rourke v. Dominion Voting Sys.</i> , No. 21-1442, 2022 U.S. App. LEXIS 34194 (CA10 Dec. 13, 2022) (unpublished)	9, 10
<i>Porter Tr. v. Rural Water Sewer & Solid Waste Mgmt. Dist.</i> , 607 F.3d 1251 (CA10 2010)	5
<i>Schad v. Mount Ephraim</i> , 452 U.S. 61 (1981)	10
<i>Trump v. United States</i> , 54 F.4th 689 (CA11 2022)	11
<i>United States v. Rivera-Martinez</i> , 931 F.2d 148 (CA1 1991)	12
<i>United States v. Zubaydah</i> , 142 S. Ct. 959 (2022)	17, 19

TABLE OF AUTHORITIES – Continued

	Page
<i>Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah</i> , 114 F.3d 1513 (CA10 1997)	5, 12
STATUTES AND RULES	
5 U.S.C. § 702	2, 9, 15, 18
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2342(1)	1, 15
47 U.S.C. § 402(a)	1, 15
47 U.S.C. §§ 1601 <i>et seq.</i>	14
47 C.F.R. § 1.1910(b)	6
Fed. R. App. P. 40(a)(3)	8
Tenth Cir. R. 41.2	8
U.S. Sup. Ct. R. 13.1	1
U.S. Sup. Ct. R. 13.3	1
OTHER AUTHORITIES	
<i>Federalist Paper</i> No. 51	10
<i>Order, In Re Accuracy Concerns Regarding Matters Submitted To The FISC</i> , Docket No. Misc. 19-02 (FISA Ct. December 17, 2019)	15
<i>Report and Order, Implementation of the Debt Collection Improvement Act of 1996 and Adoption of Rules Governing Applications or Requests for Benefits by Delinquent Debtors</i> , 19 FCC Rcd. 6540 (2004)	6

PETITION FOR A WRIT OF CERTIORARI

Petitioner Blanca Telephone Company respectfully petitions for a writ of certiorari to review an Order of the United States Court of Appeals for the Tenth Circuit, issued October 17, 2022, which denied Blanca’s September 6, 2022 Motion to Recall Mandate. App. at 1.



OPINION BELOW

Blanca Tel. Co. v. FCC, et al., 991 F.3d 1097 (CA10 2021), Nos. 20-9510 & 20-9524, *Slip Op.* App. at 2, *rehearing and rehearing en banc den.*, May 6, 2021, *cert. den.*, *Blanca Tel. Co. v. FCC, et al.*, 142 S. Ct. 486 (2021) (No. 21-472), *rehearing den.*, 142 S. Ct. 850 (2022), Order (CA10 October 17, 2022) (denying mandate recall). App. at 1.



JURISDICTION

The Tenth Circuit’s September 29, 2022 Order directed Respondents to respond to Blanca’s September 6, 2022 Motion to Recall Mandate. The Tenth Circuit’s October 17, 2022 Order denied Blanca’s Motion to Recall Mandate “upon consideration of the motion, opposition, and reply.” App. at 1. The instant Petition is timely filed within 90 days thereafter. U.S. Sup. Ct. R. 13.1, 13.3. The Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1). The Tenth Circuit’s jurisdiction arose under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).



CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 702 – Right of review

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. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.



STATEMENT

A. The FCC's USF Debt Adjudication

The instant case arises from the Tenth Circuit's denial of Blanca's motion to recall its May 14, 2021 mandate issued in *Blanca Tel. Co. v. FCC*, 991 F.3d 1097 (CA10 2021), *cert den.*, *Blanca Tel. Co. v. FCC.*, 142 S. Ct. 486 (2021), *rehearing den.*, 142 S. Ct. 850 (2022).

The essential facts of this case are undisputed. In December 2007 the FCC noticed Blanca Telephone Company that it had been randomly selected for Universal Service Fund (USF) audit. Blanca promptly disclosed its USF accounting practices. The FCC audited Blanca's USF accounting for the next five years, but sat on its hands enforcement-wise, all the while approving Blanca's monthly USF reimbursement payments.

In early 2014 the FCC referred Blanca to the DOJ for prosecution of a treble damage False Claims Act case. This punitive referral, issued more than six years after commencement of the USF audit, served as the FCC's first notice that the FCC saw issues with Blanca's USF accounting practices. Recently, the government has twice failed to address its going forward intention regarding its False Claims Act prosecution despite Blanca's requests for that position.

In June 2016 a mid-level FCC staffer inferred a civil forfeiture authority under the Debt Collection Improvement Act of 1996 (DCIA); made findings of fact;

explained that Blanca had violated the staffer's "synthesis" of three accounting rule parts without citing any specific USF accounting rule violation, *Slip Op.* App. at 37, 38 n.17; converted that synthesis into a debt owed to the government; and ordered recovery of about \$7 million in 2005-2010 USF disbursements, plus penalties. The forfeiture order issued on an *ex parte* basis without prior notice to Blanca. The June 2016 forfeiture order is the first document in the Record of this case as compiled by the FCC.

The FCC made no finding that Blanca had committed any type of fraud, had made any type of false statement, or had otherwise obstructed the FCC's years long investigation. The FCC did not bar or suspend Blanca's USF program participation or otherwise punish Blanca. The FCC redirected Blanca's monthly USF reimbursement payments back to the USF as credits "against the company's unpaid balance" and the government represented to the Tenth Circuit that "the Commission is not imposing a penalty for Blanca's erroneous accounting practices, but 'merely seeking to recover sums improperly paid.'" Government's Brief, Nos. 20-9510 & 20-9524, filed July 1, 2020, at 22, 24 (quoting the FCC orders under review, Record at 407 ¶ 35).

The government avoided the statute of limitations because the Tenth Circuit determined that, standing alone, administrative offset of Blanca's USF reimbursement payments against Blanca's USF debt is nonpunitive. The Tenth Circuit was convinced that administrative offset was not barred by the statute of

limitations because the FCC “insist[ed]” and “stressed” that administrative offset was nonpunitive and intended “solely to recover USF support improperly disbursed, not to punish for waste, fraud, or abuse.” *Slip Op.* App. at 4, 18, 20-29.

The Tenth Circuit’s mandate limited the FCC’s debt recovery to nonpunitive administrative offset without authorizing any punitive action. *Slip Op.* App. at 48 (“we AFFIRM the FCC’s decision to collect USF overpayments to Blanca through administrative offsets”). Federal appellate courts universally require strict mandate compliance. *See, e.g., In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) (on remand the lower court cannot vary the mandate “or give any other or further relief”); *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 114 F.3d 1513, 1522 (CA10 1997) (“an appellate court has power to set aside at any time a mandate that was procured by fraud or act to prevent an injustice, or to preserve the integrity of the judicial process”). Blanca’s Motion to Recall Mandate, Nos. 20-9510 & 20-9524, filed Sept. 6, 2022, at 1, 6, 17, 19.

Agencies are treated as courts when they render judicial decisions. *Porter Tr. v. Rural Water Sewer & Solid Waste Mgmt. Dist. No. 1*, 607 F.3d 1251, 1253 (CA10 2010) (whether an agency acts as a court turns upon the “plain language” of the statute). Instantly, the FCC acted as a court by adjudicating the government’s USF debt claim and determining that Blanca owed a USF debt. Blanca’s Motion to Recall Mandate, Nos. 20-9510 & 20-9524, filed Sept. 6, 2022, at 13.

B. The FCC’s Post-Mandate Punitive Order

On August 9, 2022, notwithstanding Blanca’s continuing compliance with the Tenth Circuit’s mandate, the FCC unilaterally determined that Blanca’s USF debt was delinquent, deleted Blanca’s financial Green Light, activated Blanca’s financial Red Light under 47 C.F.R. § 1.1910(b), warned that Blanca’s applications were subject to dismissal and that Blanca was ineligible for federal benefits, suspended Blanca from the USF program, and demanded immediate repayment of the USF debt “in full”. These are punitive actions under the FCC’s rules. *See Report and Order, In the Matter of Amendment of Parts 0 and 1 of the Commission’s Rules; Implementation of the Debt Collection Improvement Act of 1996 and Adoption of Rules Governing Applications or Requests for Benefits by Delinquent Debtors*, 19 FCC Rcd. 6540, 6541 ¶ 3 (2004) (“anyone delinquent in any non-tax debts . . . will be ineligible for or barred from receiving a license or other benefit until the delinquency has been resolved by payment in full”).¹ These prods are not non-punitive merely because they help collect a debt anymore than a prison term toward that end could be considered nonpunitive.

¹ The FCC admitted error and reinstated Blanca into the USF program, but the FCC maintained the debt delinquency finding, the Red Light status, the application processing halt, the immediate debt repayment requirement, and the debarment from receiving federal benefits. Nothing prevents the FCC from again suspending Blanca from the USF program. *See AT&T Corp. v. FCC*, 349 F.3d 692, 699 (CA DC 2003) (agency order exposing carrier to future liability creates a cognizable injury).

The government never sought modification of the Tenth Circuit’s mandate which limited FCC debt collection to nonpunitive administrative offset. The government never informed the court that it would prod Blanca to faster compliance by punishing Blanca sometime in the future. Instead, the government repeatedly represented to the Tenth Circuit that it was not punishing Blanca, but collecting a debt to make the USF whole. The nonpunitive collection argument was the central premise of the government’s case. *Slip Op.* App. at 4, 18, 20-29 (the FCC “insist[ed]” and “stressed” that its debt collection via administrative offset was nonpunitive); Government’s Brief, 10th Cir. Nos. 20-9510 & 20-9524, filed July 1, 2020, at 3, 9-11, 13, 21-24, 27, 34-39, 40-42, 45-48.

The FCC’s August 2022 order punished Blanca for accounting errors which occurred during 2005-2010. When the FCC issued its August 2022 penalty order, Blanca had already repaid more than 70% of the outstanding USF debt, not counting the interest money Blanca has paid every month since January 2018.²

C. Blanca’s Mandate Recall Motion

On September 6, 2022, promptly after the FCC imposed its time barred August 9, 2022 penalty, Blanca motioned the Tenth Circuit to recall its mandate because the FCC had violated that mandate and the law of the case, violated the statute of limitations, and

² Since January 2018 Blanca’s USF debt balance has been reduced from about \$6.9 million to about \$1.6 million.

misrepresented material information regarding the statute of limitations by “insisting” and “stressing” that the FCC was not taking punitive action against Blanca.³ The Tenth Circuit’s mandate recall practice mirrors its petition for rehearing procedure, the government was not required to respond unless the court found that Blanca had raised a substantial issue and ordered a response. On September 29, 2022 the Tenth Circuit ordered the government to respond to Blanca’s mandate recall motion.⁴

The government responded to Blanca’s charge that the government had misrepresented material information regarding the statute of limitations by asserting that Blanca should have “predicted” future punishment based upon FCC rule operation statements the FCC had made years earlier in non-merits cases. Government’s Opposition, Nos. 20-9510 & 20-9524, filed October 11, 2022, at 10. However, the issue isn’t whether the FCC previously recounted its punitive power regarding USF accounting errors. The issue is whether, in this case, the FCC can ignore its own representations and the mandate and exercise its

³ “The courts of appeals are recognized to have an inherent power to recall their mandates.” *Calderon v. Thompson*, 523 U.S. 538, 549 (1998).

⁴ Rehearing and mandate recall are extraordinary post-review proceedings and they are not construed in the light most favorable to the moving party. Fed. R. App. P. 40(a)(3) prohibits responses to rehearing petitions “unless the court requests” one. Tenth Cir. R. 41.2 required the court to find that Blanca had established “good cause” to file the subject mandate recall motion before ordering the government to respond.

punitive powers on remand. The FCC avoided the statute of limitations and obtained a court order in its favor by “insist[ing]” and “stress[ing]” that its approach was nonpunitive, but the government’s “prediction” argument admits to punitive purpose notwithstanding those representations.

Despite finding that Blanca’s mandate recall motion had raised substantial issues worthy of a response from the government, the Tenth Circuit denied Blanca’s mandate recall motion without any substantive discussion. App. at 1. The Tenth Circuit did not address the government’s mandate compliance failure, its statute of limitations compliance failure, or the government’s admission that it had made multiple, intentionally false representations to avoid the statute of limitations. Accordingly, Blanca was effectively denied its right to judicial review of the FCC’s punitive action. 5 U.S.C. § 702.



REASONS FOR GRANTING THE PETITION

I. Courtroom Norms Apply To Agencies

During this unique period in American history the bulwarks of our democratic stability have been the nation’s various court systems. Often working against intense political pressure our various court systems have protected and preserved our constitutional order. *E.g.*, *O’Rourke v. Dominion Voting Sys.*, No. 21-1442 (unpublished), 2022 U.S. App. LEXIS 34194 (CA10 Dec. 13, 2022), *Slip Op.* at 6-7, 10, 14 (discipline is appropriate

“when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons” citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991)). The many recent *O’Rourke*-like proceedings conducted around the country highlight the indispensable role played by the various court systems to protecting democracy through their adherence to rational, rules-based decision making.

Key to the court systems’ authority is citizen acceptance of judicial decisions and critical to that continued citizen acceptance is that courts operate in an objectively impartial manner. To that end the courts must require that the government itself abide by the same judicial rules rightfully imposed upon the non-government lawyers and parties who appear before them, including the requirements of strict mandate compliance and truthful judicial interaction.

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

Schad v. Mount Ephraim, 452 U.S. 61, 87-88 (1981), Burger, C.J., *dissenting*, quoting *Federalist Paper* No. 51.

It is absolutely essential that reviewing courts enforce their orders evenhandedly. Our reliable, predictable legal system cannot endure if the doctrine of agency deference merely fosters a surface appearance of, but not the reality of, legal stability. When the

government itself is shown to have behaved badly before the court, the court must step in else ordered liberty suffers.

Government agencies are not a special class of litigants entitled to uncritical deference in situations where citizen litigants would be rightfully sanctioned. “To create a special exception here would defy our Nation’s foundational principle that our law applies ‘to all, without regard to numbers, wealth, or rank.’” *Trump v. United States*, 54 F.4th 689 (CA11 2022) (*Slip Op.* at 20) citing *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794).

The FCC’s recent activation of Blanca’s Red Light abused the court’s trust by using the court as an unwilling partner in the FCC’s punitive litigation strategy. The judicial system is, at its core, a system based upon trust and in this case the court’s trust was misplaced.

Blanca’s Motion to Recall Mandate, Nos. 20-9510 & 20-9524, filed Sept. 6, 2022, at 16.

The Tenth Circuit’s mandate recall denial order, App. at 1, does not discuss the mandate rule or the government’s material misrepresentations. Nor does the order discuss any deficiency in Blanca’s mandate recall motion, a motion which the court determined had some level of merit when it ordered the government to respond.

II. Appellate Review Was Not Available

A. The Mandate Was Not Enforced

Appellate mandates are strictly construed and “the lower court cannot vary the mandate ‘or give any other or further relief.’” *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895); *United States v. Rivera-Martinez*, 931 F.2d 148, 150 (CA1 1991) (“When a case is appealed and remanded, the decision of the appellate court establishes the law of the case and it *must* be followed by the trial court on remand.” (Emphasis in original)); *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 949 (CA3 1985) (“a trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court’s opinion and the circumstances it embraces”); *see also Huffman v. Saul Holdings Ltd. P’ship*, 262 F.3d 1128, 1132 (CA10 2001) (mandates limit lower court discretion upon remand); *Ute Indian Tribe of the Uintah & Ouray Reservation*, 114 F.3d at 1520-21 (lower court “must comply strictly with mandate”); *Burton v. Johnson*, 975 F.2d 690, 693 (CA10 1992) (the lower court cannot supersede a mandate by creating another remedy). Blanca’s Motion to Recall Mandate, Nos. 20-9510 & 20-9524, filed Sept. 6, 2022, at 12.

In opposition the government cited no case which exempts federal agencies from strict compliance with appellate court mandates and the Tenth Circuit’s mandate recall denial order does not discuss any agency exemption. Blanca is entitled to strict enforcement of the court’s mandate.

The Tenth Circuit’s mandate in this case could not have been written more clearly or concisely. The Tenth Circuit ordered that:

we AFFIRM the FCC’s decision to collect USF overpayments to Blanca through administrative offsets. We remand to the FCC for any further proceedings.

Slip Op. App. at 48.

In 2016 the FCC enforced its USF funding rules against Blanca for USF accounting errors made in 2005-2010, many years after the lapse of the statute of limitations. The Tenth Circuit reasoned that because the FCC “insisted” and “stressed” that administrative offset was nonpunitive, the FCC’s enforcement of USF funding rules against Blanca was not time barred and ordered a nonpunitive remedy “to collect USF overpayments to Blanca through administrative offsets.” *Slip Op.* App. at 4, 18, 20-29. For example, the government certified to the Tenth Circuit that “the Commission is not imposing a penalty for Blanca’s erroneous accounting practices, but ‘merely seeking to recover sums improperly paid.’” Government’s Brief, Nos. 20-9510 & 20-9524, filed July 1, 2020, at 24 (quoting the FCC orders under review, Record at 407 ¶ 35).

The FCC obtained the exact relief it requested from the court. The Tenth Circuit’s mandate does not authorize, and the FCC did not seek, another form of USF debt recovery in lieu of the administrative offset remedy the Tenth Circuit granted. The mandate does not authorize any prods to coerce faster compliance nor

does it authorize punishment in violation of the statute of limitations.

The Tenth Circuit’s mandate limited the FCC’s sphere of action to nonpunitive administrative offset. Nevertheless, on August 9, 2022 the FCC acted punitively by declaring Blanca’s USF debt repayment obligation delinquent, by activating Blanca’s Red Light and barring Blanca from obtaining federal benefits, by suspending Blanca from the USF funding program, and by demanding immediate USF debt repayment. Blanca’s Motion to Recall Mandate, Nos. 20-9510 & 20-9524, filed Sept. 6, 2022, Attachment 2 at 64.

The government cannot unilaterally decide, months after mandate issuance, to collect the USF debt in a manner which differs from the one mandated by the court. The government cannot impose penalties the mandate plainly prohibits on statute of limitations grounds.

Appellate mandates must be strictly enforced against federal agencies otherwise the judicial review process becomes effectively unavailable rather than serving as a guardrail of ordered liberty. Blanca was in full, continuing compliance with the Tenth Circuit’s mandate when the FCC acted punitively in August 2022 in continuation of its nearly 15-year quest to punish Blanca for the unremarkable act of using USF funds in 2005-2010 to provide a rural telecommunications service.⁵ Nothing authorizes any FCC exemption

⁵ Blanca’s telecom network is critical national security infrastructure. *See, e.g.*, 47 U.S.C. §§ 1601 *et seq.*; 134 Stat. 158 (2020),

from strict mandate compliance and the Tenth Circuit's failure to discuss the issue deprived Blanca of its right to judicial review. 5 U.S.C. § 702.

B. Deference To False Statements

Generally speaking, in FCC rule violation proceedings the FCC is judge, jury, and executioner. In the forfeiture proceeding at issue here the FCC issued its forfeiture determination in June 2016 on an *ex parte* basis without first providing Blanca with notice or any type of hearing. The June 2016 forfeiture order is the first document in the Record on appeal as compiled by the FCC. Blanca's Opening Brief, Nos. 20-9510 & 20-9524, filed June 1, 2020, at 22-24. Blanca was denied the opportunity to inform the FCC's pre-decision thinking and Blanca was required to appeal a decision which the FCC had already made.

Adherence to courtroom norms is more, not less, important in agency review proceedings compared to civil litigation between private parties because appellate review is Blanca's only available form of relief from adverse *ex parte* FCC orders.⁶ Moreover, the government owes a heightened duty of candor when it acts on an *ex parte* basis. *See Order, In Re Accuracy Concerns Regarding Matters Submitted To The FISIC*, at 2,

Pub. L. No. 116-124 (Secure and Trusted Communications Networks Act of 2019).

⁶ 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1) vest exclusive jurisdiction over FCC orders in "court of appeals (other than the * * * Federal Circuit)."

No. Misc. 19-02 (FISA Ct. December 17, 2019) (“the government . . . has a heightened duty of candor to the FISC in *ex parte* proceedings”).⁷

The FCC’s June 2016 adjudication of 2005-2010 USF accounting errors escaped invalidation under the Communications Act’s one year statute of limitations because the FCC “insist[ed]” and “stressed” that USF debt collection via administrative offset was nonpunitive. *Slip Op.* App. at 4, 18, 20-29. For example, the government certified to the Tenth Circuit that “the Commission is not imposing a penalty for Blanca’s erroneous accounting practices, but ‘merely seeking to recover sums improperly paid.’” Government’s Brief, Nos. 20-9510 & 20-9524, filed July 1, 2020, at 24 (quoting the FCC orders under review, Record at 407 ¶ 35). Nevertheless, in August 2022 the FCC took punitive action against Blanca based upon those same 2005-2010 USF accounting errors. Blanca promptly sought relief in the Tenth Circuit via mandate recall motion.

The government’s Opposition to Blanca’s mandate recall motion attempted to pin a waiver argument to Blanca by asserting that the FCC had laid a sufficient trail of bread crumbs in earlier cases from which Blanca could “predict” future punitive action by the FCC, a clear indication that the FCC had always intended to punish Blanca. Government’s Opposition To Motion To Recall The Mandate, Nos. 20-9510 & 20-9524, filed October 11, 2022, at 10. The government’s

⁷ <https://www.fisc.uscourts.gov/sites/default/files/MIsc%2019%2002%20191217.pdf>.

waiver argument is a jaw-dropping admission that the government intentionally lied to the Tenth Circuit in the original proceeding when, for the purpose of avoiding the statute of limitations, the government “insisted” and “stressed” that it was not acting punitively.

The government never informed the Tenth Circuit in this case that it would punish Blanca after the court decided the case. The government never sought any enforcement authority beyond that which is provided in the Tenth Circuit’s mandate. Instead, the government “insisted” and “stressed” that the FCC’s 2016 debt collection of USF funds, mostly dispersed during President George W. Bush’s administration, was being collected to make the USF whole and not to punish Blanca. The government’s repeated assertion of nonpunitive purpose was the central theme of its case. Government’s Brief, Nos. 20-9510 & 20-9524, filed July 1, 2020, at 3, 9-11, 13, 21-24, 27, 34-39, 40-42, 45-48. This served as basis of the Tenth Circuit’s finding that the FCC had “insist[ed]” and “stressed” that USF debt collection via administrative offset was nonpunitive, thereby rendering the statute of limitations inapplicable. *Slip Op. App.* at 4, 18, 20-29.

The instant case excepted, undersigned counsel is unaware of any case in which deference has knowingly been accorded to deliberate governmental misrepresentation on a central case issue. *See United States v. Zubaydah*, 142 S. Ct. 959, 967 (2022) (the Court is reluctant to examine false statement claims when the government asserts national security and the need for

the information is “dubious”). The instant case does not concern misrepresentation hidden in classified military documents, it is an *ex parte* rule and debt adjudication with material governmental misrepresentation plainly included in a court filing. With all due respect, it was plain error for the Tenth Circuit, without discussion, to continue to credit the government’s multiple false statements of nonpunitive purpose to discount the central statute of limitations issue.

The government has now acted punitively and the government’s statements in the mandate recall proceeding confirmed that the FCC’s punitive purpose existed from the outset of this *ex parte* rule adjudication. Blanca’s Opening Brief, Nos. 20-9510 & 20-9524, filed June 1, 2020, at 1, 4, 11, 32-34, 38-44, 49, 53 (FCC referred False Claims Act case to DOJ in early 2014 before providing notice, before entering any findings, and before issuing its 2016 forfeiture order). The government’s false statements asserting nonpunitive purpose, and the Tenth Circuit’s failure to discuss the issue, deprived Blanca of its right to judicial review concerning the central statute of limitations issue. 5 U.S.C. § 702; *United States v. Zubaydah*, 142 S. Ct. 959, 992-94 (2022) (Gorsuch and Sotomayor, J.J., dissenting) (judicial deference to executive misrepresentation results in “loss of liberty and due process”).



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
TIMOTHY E. WELCH, ESQ.
HILL AND WELCH
1116 Heartfields Drive
Silver Spring, MD 20904
(202) 321-1448
welchlaw@earthlink.net
Counsel of Record