No. ______

In the
Supreme Court of the United States

NORTHSTAR WIRELESS, LLC,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In this case, the FCC has imposed nine-figure penalties without supplying the most basic component of due process: "fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). The FCC has tried to reconcile competing congressional commands to raise funds by auctioning off valuable spectrum and to ensure the full participation of small businesses by offering them substantial discounts. Given the value of the spectrum at issue, the FCC expects and allows small businesses to partner with large companies, while prohibiting the latter from exercising de facto or de jure control over the former. The rules for de jure control are clear, and there is no dispute they were fully satisfied here. The rules for de facto control are anything but clear and amount to nothing more than an ad hoc agency judgment based on the totality of the circumstances. For years, the FCC managed to square that amorphous standard—and the fact that the FCC evaluates control only after an auction is closed, and requires small-business bidders to pay the full, non-discounted price if it finds them to be controlled—with fair-notice requirements by providing an opportunity to cure after identifying de facto control deficiencies. Here, however, under pressure from congressional critics and dominant providers, the FCC provided only the empty formalism of an opportunity to cure without engaging with petitioner or identifying the conduct necessary to avoid a nine-figure penalty.

The question presented is:

Whether imposing massive penalties without providing either clear ex ante guidance or a

meaningful post hoc opportunity to cure satisfies the fair notice requirements of the Due Process Clause and administrative law.

PARTIES TO THE PROCEEDING

Petitioners below were Northstar Wireless, LLC, and SNR Wireless LicenseCo, LLC.

Respondent below was the Federal Communications Commission.

DISH Network Corporation was an intervenor below in support of petitioners below.

AT&T Services, Inc., T-Mobile USA, Inc., and VTel Wireless, Inc., were intervenors below in support of respondent below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Northstar Wireless, LLC, a Delaware limited liability company, has one member: Northstar Spectrum, LLC. Northstar Manager, LLC, a Delaware limited liability company, holds more than 10 percent of all member interests in Northstar Spectrum, LLC, and is the sole manager. Doyon, Limited, an Alaska corporation, holds more than 10 percent of the member interests in Northstar Manager, LLC. Doyon, Limited; Northstar Manager, LLC; and Northstar Spectrum LLC hold controlling interest in petitioner Northstar Wireless, LLC. DISH Network Corporation indirectly holds (through privately held subsidiaries) a greater-than-10-percent ownership interest in Northstar Spectrum, LLC.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States Court of Appeals for the D.C. Circuit and before the Federal Communications Commission:

- *Northstar Wireless, LLC v. Federal Communications Commission*, 38 F.4th 190 (D.C. Cir. 2022);
- *In the Matter of Northstar Wireless, LLC, and SNR Wireless LicenseCo, LLC*, 33 F.C.C. Rcd. 7248 (F.C.C. July 24, 2018);
- *In the Matter of Northstar Wireless, LLC, and SNR Wireless LicenseCo, LLC*, 33 F.C.C. Rcd. 231 (F.C.C. Jan. 24, 2018);
- *SNR Wireless LicenseCo, LLC v. Federal Communications Commission*, 868 F.3d 1021 (D.C. Cir. 2017);
- *Wireless Telecommunications Bureau Actions on Aws-3 Licenses in the 1695-1710 Mhz, 1755-1780 Mhz & 2155-2180 Mhz Bands*, 30 F.C.C. Rcd. 11622 (F.C.C. Oct. 27, 2015);
- *In the Matter of Northstar Wireless, LLC*, 30 FCC Rcd. 8887 (F.C.C. Aug. 18, 2015)
- *Wireless Telecommunications Bureau Announces that Applications for Aws-3 Licenses in the 1695-1710 Mhz, & 1755-1780 Mhz & 2155-2180 Mhz Bands Are Accepted for Filing*, 30 F.C.C. Rcd. 3795 (F.C.C. Apr. 29, 2015);
- *Auction of Advanced Wireless Servs. (AWS-3) Licenses Closes*, 30 F.C.C. Rcd. 630 (F.C.C. Jan. 30, 2015); and

- *Auction of Advanced Wireless Servs. (AWS-3) Licenses Scheduled for Nov. 13, 2014*, 29 F.C.C. Rcd. 8386 (F.C.C. July 23, 2014).

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

The FCC encourages very small businesses to participate in spectrum auctions with very big stakes. It attempts to balance competing congressional commands to generate revenue in allocating valuable spectrum and to encourage the participation of small businesses by offering small businesses substantial discounts—up to 35% off the winning bid, depending on the auction—with the biggest discounts going to the smallest bidders. But even with the discounts, most small businesses cannot afford to go it alone in competing with established industry players who willingly bid sums far greater than any business that qualifies as "small" is likely to be able to match. To overcome that paradox, the FCC allows small businesses to rely on investments from larger, more established companies—as long as the investments do not put the larger company in de jure or de facto control of the smaller company.

The consequences for crossing those lines, however, are severe, as the facts of this case dramatically illustrate. The FCC is not content to simply deny discounts or disqualify bids from small businesses that are perceived to have allowed a large investor to hold too much sway. Instead, the agency imposes massive penalties, totaling hundreds of millions of dollars here, on small bidders deemed to be controlled by their investors. To square such draconian penalties with fair-notice principles and the Due Process Clause, the rules for control would need to be pellucidly clear. Unfortunately, that is only half true.

The agency has promulgated clear ex ante rules governing de jure control. Those rules provide regulated parties with fair notice of how to structure investments to ensure that the small business remains in control and eligible for the substantial discounts on which the regulatory system depends. As a direct result, it is conceded that petitioner fully complied with every applicable rule for de jure control.

The agency's rules for de facto control, by contrast, are anything but clear. Indeed, they do not even purport to provide any clear ex ante guidance. While one expects a de facto test to take into account more facts and circumstances than a de jure test, the FCC barely tries to identify outcome-determinative factors for de facto control. Instead, it reserves for itself the prerogative to make a judgment based on "th'ol' 'totality of the circumstances' test," i.e., the test "most feared by [regulated parties] who want to know what to expect." *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

For years, the agency managed to square this regime with fair-notice principles by providing a clear opportunity for a non-conforming small bidder to cure any deficiencies identified by the Commission. What the regime lacked in terms of ex ante notice was remedied by ex post opportunity to cure specific deficiencies identified by the Commission (and thus avoid the severe penalties imposed for a non-conforming bid). In this way, the FCC avoided what would otherwise be a serious due process problem—a regime that combined draconian penalties with no meaningful ex ante guidance—until this case.

In the proceedings below, the Commission abandoned its traditional practice of providing a meaningful opportunity to cure specifically identified deficiencies in a small-business/investor arrangement, replacing it with a meaningless opportunity to shoot at an unidentified target. Rather than meet with petitioner and identify the specific aspects of its investment structure that concededly complied with every de jure requirement, but nonetheless raised concerns about de facto control, the Commission gave petitioner only a few perfunctory meetings—devoid of information from the Commission—and a similarly meaningless opportunity to attempt to cure supposed defects it refused to identify with any real specificity. This converted a critical opportunity to cure identified deficiencies (and thus avoid massive penalties) into "an empty thing." *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 330 (1945). Worse still, the agency eliminated the only step in the process that provided the fair notice required by administrative law and the Due Process Clause. As this Court has underscored in reprimanding this very agency, an agency rule fails to provide fair notice by failing to make clear what "conduct … is forbidden or required" and "what fact must be proved." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

The reason the FCC deviated from its established practice and the demands of fair notice in this case are (unlike the standard for de facto control) not hard to identify. The stakes in this particular auction were outsized. The spectrum was highly coveted by the dominant players in the industry, and when small upstarts backed by new-entrant investors prevailed in the auction, those dominant players and their allies in

Congress cried foul. But principles of fair warning and due process exist precisely to protect against political pressure and efforts to change the rules of the game mid-stream. *See* Lawrence J. Spiwak, *The FCC's Regulatory "Bonfire of the Vanities"*, The Federalist Soc'y (Feb. 1, 2021), https://bit.ly/3isJOto. If the government insists that citizens "turn square corners when they deal with the Government," the least it can do is "turn square corners in dealing with the people." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S.Ct. 1891, 1909 (2020) (quoting *Rock Island, Ark. & La. R.R. Co. v. United States*, 254 U.S. 141, 143 (1920), and *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting)). That principle is most important when the stakes are highest. The agency here honored that principle only in the breach, and the result was a nine-figure penalty imposed without fair warning on entities that satisfied every ex ante test for de jure independence. This Court should grant review and reaffirm bedrock principles of fair notice and due process.

OPINIONS BELOW

The decision below, 38 F.4th 190, is reproduced at App.1-55. The D.C. Circuit's 2017 opinion, 868 F.3d 1021, is reproduced at App.58-108. The underlying FCC orders, 30 FCC Rcd. 8887 (2015), 33 FCC 7248 (2018), and 35 FCCR 13317 (2020), are reproduced at App.109-276, App.277-306, and App.307-436, respectively.

JURISDICTION

The D.C. Circuit issued its decision on June 21, 2022, App.1-55, and denied a timely petition for rehearing on August 18, 2022, App.56-57. On

December 16, 2022, the Chief Justice extended the time to file certiorari until January 15, 2023. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in relevant part: "No person shall … be deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V. Under the Administrative Procedure Act, "reviewing court[s] shall … hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A).

Section 309(j) of the Federal Communications Act, 47 U.S.C. §309(j), is reproduced at App.437-466. The applicable FCC designated-entity regulations, codified at 47 C.F.R. §1.2110, are reproduced at App.466-506.

STATEMENT OF THE CASE

A. Legal Background

1. Spectrum is an inexhaustible resource, at least theoretically. But no frequency can be put to multiple purposes at one time without causing interference and rendering it unusable for all. To avoid that dilemma, and "prompted by the Titanic disaster, 'when 'chaos in the spectrum' was said to have confused a potential rescue ship 'so it missed the calls of help from the sinking luxury liner,'" Susan P. Crawford, *The Radio and the Internet*, 23 Berkeley Tech. L.J. 933, 944 n.39 (2008), the federal government began regulating the use of spectrum more than 100 years ago, *see* Act of Aug. 13, 1912, ch. 287, 37 Stat. 302 (1912).

Congress created the FCC in 1934 and vested it with responsibility to allocate and regulate spectrum usage. *See* 47 U.S.C. §301 (tasking the FCC with regulating "all the channels of radio transmission"). In the intervening nine decades, the Commission has issued spectrum licenses to private parties for a variety of uses, including radio broadcasting, mobile communications, satellite services, and more. Cong. Rsch. Serv., *FCC Spectrum Auction Authority* 1 (Dec. 21, 2022), https://bit.ly/3WIGAka ("CRS Report").

The method by which the Commission issues spectrum licenses has changed over time. Initially, when confronted with multiple applications for the same spectrum in the same area, the FCC would simply choose which one it preferred. But this Court soon held that all qualified applicants must receive a competitive hearing. *Ashbacker Radio Corp.*, 326 U.S. at 328-33. The resulting process was heavily time and resource intensive, and there was often "substantial disagreement about what the comparative criteria should be and how they should be weighted." Evan Kwerel & Alex D. Felker, *Using Auctions to Select FCC Licenses* 3 (FCC, Office of Plans & Policy, Working Paper Series No. 16, 1985). That was in large part due to the criteria the FCC was obligated to apply: Congress tasked the agency with awarding licenses based on an applicant's ability to further "the public interest, convenience or necessity." *See FCC v. RCA Commc'ns, Inc.*, 346 U.S. 86, 90 (1953) (describing "public interest, convenience, or necessity" standard as "[n]ot a standard that lends itself to application with exac[ti]tude," but one that "leaves wide discretion and calls for imaginative interpretation").

For all the costs this onerous regime imposed, the government reaped nothing material in return. "The great irony of this approach" was that a "very active and lucrative secondary market … arose after the original license was given away by the government and then transferred for large sums to another party with the original licensee reaping the windfall, rather than the public." Nicholas W. Allard, *The New Spectrum Auction Law*, 18 Seton Hall Legis. J. 13, 23-24 (1993). Congress tried to fix this problem in the 1980s by giving the FCC authority to choose to award licenses by lottery. Kwerel & Felker, *supra*, at 4. But that only made things worse, giving rise to "application mills" that used infomercials and "boiler room telephone sales operations" to induce average citizens to file applications in hopes of securing and then flipping a license, while making a windfall in the process. Allard, *supra*, at 26. So many applications poured in that "[a]t one point the FCC was forced to call in a structural engineer to determine whether the FCC's floor could bear the weight of the accumulated paper due to the volume of applications." *Id.* at 25-26.

The system cried out for reform. In 1993, Congress amended the Communications Act to require the FCC to award radio spectrum licenses (in most instances) "through … a system of competitive bidding." Pub. L. No. 103-66, §6002(a), 107 Stat. 312, 388-92 (1993) (codified at 47 U.S.C. §309(j)(1)). For the first time, the public fisc would benefit from the allocation of the public good that is the spectrum.

2. At the same time Congress wanted to ensure that spectrum auctions generated revenue for the government, it did not simply want to maximize

revenue or award every license to the highest bidder. Instead, the new spectrum auctions were built atop a system that asked the FCC to take account of the public interest, including considerations of "social[] worth[]," in deciding who should receive a license. Kwerel & Felker, *supra*, at 3. Consistent with that tradition, Congress "directed the Commission, in designing its auction rules, to 'promot[e] economic opportunity and competition … by disseminating licenses among a wide variety of applicants.'" App.3-4 (alterations in original) (quoting 47 U.S.C. §309(j)(3)(B)). To that end, Congress specifically instructed the FCC to "ensure that small businesses" can meaningfully "participate in the provision of spectrum-based services." 47 U.S.C. §309(j)(4)(D).[1]

Congress' aim of ensuring small businesses a seat at the table, while quite explicit, was not easy to reconcile with its market-based reforms. The 1990s saw the maturation of cellphone technology, which sent the market value of spectrum through the roof, to eight, nine, and even ten figures per license. Yet, without assistance and investment by larger players,

[1] Small businesses were not the only preferred group. Congress instructed the FCC to preference "businesses owned by members of minority groups and women" as well. 47 U.S.C. §309(j)(4)(D). The FCC complied, and then some: It allowed minority- and women-owned businesses to receive 25% off the final price, and further provided that "a woman- or minority-owned applicant could have a single passive non-voting investor with an interest as large as 49.9%" and still retain eligibility for the discount. *Omnipoint Corp. v. FCC*, 78 F.3d 620, 626 (D.C. Cir. 1996). The FCC ultimately extended these benefits to all small businesses, not just those owned by minorities and women, *id.* at 627, following *Adarand Constructors v. Pena*, 515 U.S. 200 (1995).

small businesses, by definition, lack the funds required to bid on such high-value properties. They needed financial backing from bigger businesses to raise the capital necessary just to get into the game.

To try to ameliorate this tension, the FCC initially set aside two "blocks" of spectrum for auction to businesses with "gross revenues of less than $125 million in each of the last two years and total assets of less than $500 million," and further provided that small businesses would receive a 10% (later 25%) "bidding credit" or discount off the final price. *Omnipoint Corp. v. FCC*, 78 F.3d 620, 626 (D.C. Cir. 1996). Yet the agency later scrapped the set-aside blocks and substantially restricted how small a business needed to be to qualify for bidding credits. Under the rules in place at the time of the relevant auction here, a small business could receive "bidding credits" of 25% if its average gross revenues for the preceding three years were $15 million or less, or 15% if its average gross revenues were $40 million or less. *Notice & Filing Requirements for Nov. 13, 2014 Auction*, 29 FCC Rcd. 8386, 8412 ¶¶81-82 (2014).

At the same time, however, because a business with no more than eight figures of annual gross revenue cannot raise the capital necessary to compete for nine- and ten-figure licenses, the FCC issued regulations under which small businesses could obtain financing from larger enterprises without losing their small-business status. The key question under these regulations is: Who controls the enterprise—the small business or its large financial backer(s)?

The regulations provide clear ex ante answers when it comes to legal, or "de jure," control. If a financial backer holds "greater than 50 percent of the voting stock" or "general partnership interests," the applicant will be deemed subject to the "[d]e jure control" of the financial backer, the financial backer's "gross revenues" will be "attributed" to the applicant, and the applicant accordingly will be unable to qualify as a small business. 47 C.F.R. §1.2110(b)(1)(*i*), (c)(2)(*i*). Thus, a large entity cannot circumvent the rules and obtain benefits designed for small businesses by the simple expedient of setting up a new entity or taking over an existing entity over which it exercises legal control by pointing to the separate entity's minimal revenues.

The regulations provide far less ex ante guidance when it comes to the issue of "de facto" control. Indeed, the regulations affirmatively eschew any clear guidance. "De facto control," regulated parties are told, "is determined on a case-by-case basis." *Id.* §1.2110(c)(2)(*i*). And despite the lack of clear guidance, the regulations appear to put the burden on a de jure small business to show the absence of de facto control. Under the regulations, an applicant must "demonstrate *at least* the following indicia" to be deemed free of de facto control: The small business (A) "constitutes or appoints more than 50 percent of the board of directors or management committee"; (B) "has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee"; and (C) "plays an integral role in management decisions." *Id.* (emphasis added).

The regulations make clear these three factors are necessary, but not sufficient. And beyond those three somewhat objective necessary criteria, the FCC instructs parties to look to its own decisional law.

But FCC adjudications have done little to clear things up. The relevant auction notice here, for instance, referred to two FCC orders, *Intermountain Microwave*, 12 F.C.C.2d 559, 560 (1963), and *In re Baker Creek Communications, L.P.*, DA 98-1921, 13 FCC Rcd. 18709 (1998). App.64. Those two FCC orders broadly "articulate a six-factor test for *de facto* control" (although asserting that the six factors amount to a "test" is quite a stretch):

> (1) who controls the daily operations of the small business;
>
> (2) who employs, supervises, and dismisses the small business's employees;
>
> (3) whether the small business has "unfettered" use of all its facilities and equipment;
>
> (4) who covers the small business's expenses, including its operating costs;
>
> (5) who receives the small business's revenues and profits; and
>
> (6) who makes and carries out the policy decisions of the small business.

App.64, 73.

As one might expect given the high level of generality of these factors, the FCC has not been a model of consistency in applying them. "[T]he Commission has said that an entity may still be

considered independent even if a passive investor retains certain veto powers over the business's decisionmaking." App.6; *see Baker Creek*, 13 FCC Rcd. at 18714-15 ¶9. In fact, the FCC has made clear that a large investor "'generally' [can] play a role in a small business's major corporate decisions, such as the assumption of 'significant corporate debt' and the sale of 'major corporate assets,'" without causing the investor to be deemed "in *de facto* control." App.6 (quoting *In re Implementation of Section 309(j) of the Commc'ns Act—Competitive Bidding*, 10 FCC Rcd. 403, 447-48 ¶¶80-81 (1994) ("*Fifth MO&O*")). On the flip side, and to underscore the lack of clear guidance, "the Commission has been explicit that 'the aggregate effect of multiple' investor protections could be sufficient to find a small business under the *de facto* control of the investor." App.6-7 (quoting *Fifth MO&O*, 10 FCC Rcd. at 449 ¶82).

To complicate matters further, control—and thus eligibility for designated-entity bidding credits and liability for potentially massive penalties—is assessed only after the fact. "Auction participants apply for bidding credits in a two-step process." App.5. Before the auction, a small business seeking bidding credits files a short-form application self-certifying that it satisfies the criteria. 47 C.F.R. §1.2105(a); *id.* §1.2110(b). The FCC does not at that time confirm that the business qualifies, so the bidder "assumes a binding obligation to pay its full bid amount upon acceptance of the winning bid at the close of an auction." *Id.* §1.2104(g)(2). Then, when the auction is over, a winning bidder must submit "a more detailed, long-form application that the agency uses to assess whether the applicant is eligible for bidding credits."

App.5; *see* 47 C.F.R. §1.2110(j). If the agency determines at that point that the winning bidder does not qualify for bidding credits (because, *e.g.*, its financial backer has crossed the un-demarcated line and exercises too much de facto control), the "winner" cannot simply walk away. Instead, the winning bidder "must pay the full winning price on its licenses," without discounts, "or face default penalties." App.5; *see* 47 C.F.R. §§1.2104(g)(2), 1.2109(c).

The absence of clear ex ante guidance plainly fails to provide the regulated community with fair warning. But, for years, the FCC has ameliorated that concern and avoided constitutional difficulties by providing a robust ex post opportunity to cure identified deficiencies. The process was not just a second chance to shoot in the dark; the agency identified specific issues and worked with putative small businesses and their investors to reach a resolution consistent with Congress' instruction to give small businesses a real opportunity to participate in auctions for spectrum that they, by definition, cannot afford on their own. Unfortunately, in the proceedings below, the agency eliminated any meaningful opportunity to cure and brought the latent fair-warning problems to the fore.

B. Factual and Procedural Background

1. Petitioner wins billions of dollars' worth of spectrum licenses; the FCC accedes to incumbents' pressure

Petitioner Northstar Wireless LLC ("Northstar") is a minority-controlled small business based in

Alaska.[2] To have any chance of winning a spectrum auction (and, a fortiori, to be able to commercially develop any spectrum it won), Northstar borrowed money and secured equity investments from DISH and certain DISH subsidiaries. To comply with the control regulations, the parties obtained expert advice and modeled their agreements on contracts that the FCC's Wireless Telecommunications Bureau ("Wireless Bureau") had previously approved.

In May 2014, the FCC announced that it would conduct an auction (Auction 97) to award more than 1600 licenses in a spectrum band allocated to certain advanced wireless services. Northstar filed an application for Auction 97 certifying that it was a "very small business" eligible for 25% bidding credits because its "'average annual gross revenues' [was] $15 million or less over the prior three years." App.7-8; *see* 47 C.F.R. §27.1106(a).

Northstar won 345 licenses at Auction 97 with bids totaling $7.85 billion. App.278. It was able to prevail in large part because it anticipated that the bidding credits would reduce its costs by 25%, giving Northstar the precise leg up that the FCC small-business regulations anticipate. App.278-79. When it won, Northstar was able to put up more than $5.8 billion, representing the amount of its gross winning bids minus the expected bidding credits, and filed the required long-form application, including copies of all relevant agreements with DISH. App.117-22.

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[2] SNR Wireless LicenseCo, LLC ("SNR"), was a co-petitioner below. It exercised its put right option in November 2021.

But AT&T, Verizon, and other large incumbents that lost out protested Northstar's eligibility for the designated-entity credits. In response to the complaints of these repeat-players before the agency, who had dominated spectrum auctions before Auction 97, the Commissioners took the extraordinary step of deciding to rule on Northstar's application themselves, without waiting for a staff-level decision from the Wireless Bureau, as was the agency's long-settled practice. In doing so, the FCC Chairman testified to Congress that, in reviewing Northstar's application for bidding credits, the Commission would be applying an admittedly novel "totality of circumstances test that had never been applied before." *Continued Oversight of the Federal Communications Commission: Hearing before the Subcomm. On Commc'n of the H. Comm. On Energy & Commerce and Tech.*, 114th Cong., prelim. Transcript 55 (July 28, 2015), https://bit.ly/3GqDBYi (testimony of Tom Wheeler, Chairman, FCC).

Given the deviation from the normal procedural order and the notorious discretion conferred on the agency by ""th'ol' 'totality of the circumstances' test," *Mead*, 533 U.S. at 241 (Scalia, J., dissenting), it came as little surprise when the Commission ultimately ruled against Northstar, concluding that DISH exercised disqualifying de facto control under the Northstar-DISH agreements. App.231-36; *see also* App.73-78. Perhaps more surprising was the Commission's disavowal of prior precedent. In a footnote, the Commission "expressly disavow[ed]" any and all "prior actions of Commission staff [that] could be read to be inconsistent with" how it applied "the Commission's rules in this order." App.230 n.354.

Most surprising was the Commission's refusal to afford Northstar an opportunity to cure the control issues it had identified. Unlike in every prior case in which the agency had identified de facto control issues in a winning bidder's application for designated-entity bidding credits, the Commission gave Northstar an ultimatum: Pay the $1.96-billion difference between the discounted price and full price within 30 days, or else default—and owe hundreds of millions of dollars in penalties. App.259-64. Unable to conjure billions of dollars in less than a month, Northstar was left with no choice but to selectively default, forfeit licenses worth billions of dollars, *and* be slapped with interim default penalties totaling more than $333 million (plus potentially even more if the defaulted licenses bring in less than the Auction 97 bid amounts at a future reauction).

2. The D.C. Circuit vacates and remands for a genuine cure process

Northstar sought review of the FCC's decision in the D.C. Circuit. *See* 47 U.S.C. §402; 28 U.S.C. §1254(1). Applying a deferential standard of review, the court upheld the Commission's determination that, under the terms of the parties' agreements, DISH had significant de facto control over Northstar's business. App.75. The court further held that, even though those agreements tracked agreements in "applications for designated-entity bidding credits" that the Wireless Bureau had previously approved, the Commission was under no obligation "to follow the same approach *or explain why it did not do so* for … Northstar." App.87 (emphasis added).

At the same time, the court vacated and remanded for a genuine cure process. The agency's decision in *In re Application of ClearComm, L.P.*, 16 FCC Rcd. 18627 (2001), "communicate[d] a Commission-level position regarding the opportunity to seek a negotiated cure" regarding de facto control issues. App.106. Yet the Commission jettisoned that long-held position, without warning, for Northstar (and them alone; all small-business bidding-credit applications from Auction 97 other than those connected to DISH were routed through the usual agency channels *and ultimately approved*). Because the FCC "failed to provide fair notice" that a de facto control determination would be the end of the process and would not be followed by a meaningful "opportunity to cure," and because the result of that bait-and-switch was that Northstar was forced to default and pay massive default penalties, the court remanded for further proceedings consistent with the demands of due process. App.104-05.

3. Rather than provide a genuine opportunity to cure the de facto control issues, the FCC offers only stonewalling and a shot at an undisclosed target

On remand, Northstar repeatedly sought to meet with FCC staff at the Wireless Bureau to discuss how it could resolve the control issues the Commission had identified in its 2015 order. To no avail. The agency simply ignored Northstar's overtures for months. And when it finally responded, the FCC refused to provide any guidance. Instead, contrary to its past practice and the spirit of the D.C. Circuit's decision, the FCC

told Northstar to go "renegotiate its business arrangements with DISH and the other parties to its agreements in order to cure its ineligibility for the bidding credits" and then submit "any revisions it makes by supplementing the record with respect to its Auction 97 long-form application." *In re Northstar Wireless, LLC*, 33 FCC Rcd. 231, 232 ¶4 (2018).

That decision left Northstar with no meaningful guidance as to the specific defects the Commission believed were in need of redressing, so Northstar sought full Commission review, but to no avail. The full Commission ruled that no "back-and-forth discussions" were required. App.285-86. In the eyes of the FCC, Northstar was entitled only to a chance to "negotiate[a] cure" with DISH, not with anyone from the agency responsible for identifying specific deficiencies or assessing the effectiveness of any proposed cure. App.286-87.[3]

Left without any specific guidance, Northstar did its best to eliminate the concerns the Commission had raised in 2015. In response to concerns about Northstar's "financial dependency" on DISH, App.113-14, Northstar and DISH agreed to convert billions of dollars of debt to preferred equity and to extend the put-option window in the parties' agreements. App.16. In response to concerns about DISH's role in day-to-day operations, App.181-82, DISH agreed *to terminate* its Management Services Agreements with Northstar altogether, leaving Northstar to assume the

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[3] Northstar timely sought review of this decision. The court held the petition in abeyance pending completion of the FCC proceedings on remand. *See* Status Report, *Northstar Wireless, LLC v. FCC*, No. 18-1209 (D.C. Cir. June 2, 2020).

managerial responsibilities previously assigned to DISH. App.16. And in response to concerns that DISH's investor protections "extend[ed] significantly beyond the more usual and customary types of passive financial investor protections," App.176, Northstar and DISH agreed to limit DISH's investor-protection rights to those the FCC expressly approved in *Baker Creek*. App.16. Altogether, these changes, which Northstar submitted in a formal reapplication in 2018, responded to every aspect of the 2015 Order.

More than two years after the cure package was submitted—an interregnum much longer than any other similar case—the agency finally gave Northstar an audience. But all it offered were a few perfunctory videoconferences (which no Wireless Bureau experts were allowed to attend) to "present arguments" that Northstar had resolved the perceived control issues. Northstar made clear in advance that it would be willing to address any remaining control issues the Commission identified, but the agency simply sat in silence, and it never followed up with anything other than a denial. App.335.

The FCC issued that denial in November 2020, concluding that DISH still retained de facto control—but this time for new reasons. App.353-426. Even though Northstar and DISH had eliminated or significantly modified every provision previously deemed disqualifying, the FCC now saw problems with a different provision of the agreements, which the Commission concluded gave DISH a "unilateral veto over any 'lease' … of any major asset, where assets include spectrum licenses." App.396-97. Northstar's 2015 agreement had granted DISH a similar right to

control spectrum leases, yet those provisions were not cited in the 2015 Order's supposedly comprehensive explanation of the defects in Northstar's initial application. Indeed, the amended provision was expressly modeled on another agreement the Wireless Bureau had approved *in the same auction* after the 2015 Order.

The FCC also dismissed several changes to Northstar's agreements with DISH as "outweigh[ed]" by conduct Northstar could not possibly have cured on remand, because it occurred years beforehand. For instance, the FCC concluded that Northstar's revisions to DISH's passive investor rights did "not fully resolve [its] concerns" because even though Northstar "now can manage their own operations and set their own plans going forward, [its] choices continue to be circumscribed by previously adopted business plans developed at a time when DISH was in de facto control." App.312, 353-54, 367.

4. The D.C. Circuit affirms

Northstar petitioned for court of appeals review once again. This time, however, a new panel affirmed, holding that the FCC was under "no … obligation" to "negotiate" with Northstar over how to satisfy the de facto control requirement. App.19.[4]

According to the court of appeals, allowing Northstar to renegotiate its deal with DISH in light of already existing precedent and the prior rulings in the case was all the FCC was required to do. App.20-22.

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[4] The D.C. Circuit consolidated that challenge with Northstar's challenge to the 2018 Order establishing the procedures on remand. *See* n.3, *supra*.

So long as the agency provided any sort of opportunity to cure—even if it came with zero direction from the agency, let alone guidance on "the precise details of an arrangement … that would pass muster," as the Wireless Bureau had long and consistently provided—the process of submitting a cure package in the dark was acceptable. App.23-24. The court further held "on the merits" that the Commission's determination that DISH continued to control Northstar "fell within the realm of reason." App.24; *see* App.23-46.

Finally, the D.C. Circuit rejected arguments that Northstar lacked fair notice of the criteria by which de facto control would be evaluated, and so should not be subject to the denial of the bidding credits and to default penalties. App.46. Noting that "a party has fair notice when, 'by reviewing the regulations and other public statements issued by the agency,' it can 'identify, with ascertainable certainty, the standards with which the agency expects parties to conform,'" the court held that the combined guidance *Intermountain Microwave*, *Baker Creek*, other FCC orders, and the D.C. Circuit's prior opinion in this case provided sufficient guidance. App.46 (quoting *General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995)).

REASONS FOR GRANTING THE PETITION

Before an agency can impose massive penalties on regulated parties, it must provide either fair notice of applicable criteria ex ante or an opportunity to cure specifically identified defects ex post. This is not optional; it is a fundamental requirement of due process applicable to agency proceedings. It is why, for example, this Court refused to countenance relatively minor penalties on regulated parties for

violating the FCC's fleeting expletive policy. This Court did not even need to reach the First Amendment issues in that case, because punishing networks for violating a moving target violated their right to "fair notice of [the] conduct that is forbidden or required." *Fox Television Stations*, 567 U.S. at 253.

What was true of large businesses facing $27,500 penalties (or penalties that were waived altogether) is true a fortiori for small businesses facing hundred-million-dollar penalties. That presumably explains why, for decades, the FCC has ameliorated its lack of upfront guidance as to what constitutes de facto control for small businesses seeking bidding credits for spectrum auctions with a robust ex post opportunity to cure identified problems and avoid massive penalties. That cure process is not an exercise of administrative grace. It is the only thing keeping this regime on the right side of constitutional and non-arbitrariness lines.

But the FCC abruptly abandoned that long-settled practice in this case. The agency deviated from settled practice by yanking the case to the full Commission before staff could apply agency precedent. The full Commission then proceeded to expressly abrogate that precedent in favor of an agency-empowering totality-of-the-circumstances test, before imposing massive penalties on Northstar. Then, even after the D.C. Circuit ordered it to allow Northstar to cure any deficiency, the agency deviated from established practice once again and refused to identify the deficiencies that needed curing. While Northstar did its best to hit an unidentified target, the agency denied relief by identifying new deficiencies. Given all

the procedural machinations the agency engaged in here, the end result was entirely predictable. It was also entirely unconstitutional and arbitrary, because the agency did not even try to give ex ante fair notice, and then eviscerated the ex post cure process on which the constitutionality of the agency process depends.

The importance of this case goes far beyond the FCC or its idiosyncratic spectrum auction rules. The reason the Commission deviated from the established order here is not difficult to discern. The pressure brought to bear on the Commission when small upstarts outbid established incumbents by those incumbents and their congressional allies was intense. Resisting such pressure is the essence of the rule of law and the reason that agencies must establish clear rules and follow them when the going gets tough. Even in the best of circumstances, the totality-of-the-circumstances test is a recipe for empowering agencies and making arbitrary distinctions. In the context of this case, the lack of ex ante guidance and a meaningful ex post opportunity to cure identified defects adds up to a complete denial of due process to the tune of more than $333 million dollars in penalties. This Court should grant certiorari.

I. By Denying Both Clear Ex Ante Guidance And A Meaningful Ex Post Opportunity To Cure Identified Deficiencies, The FCC Deprives Regulated Parties Of Fair Notice.

The FCC's methods for determining de facto control fall far short of the kind of fair warning agency need to provide before saddling regulated parties with massive penalties. The most general guidance the rules provide is also the most descriptive: "De facto

control is determined on a case-by-case basis." 47 C.F.R. §1.2110(c)(2)(*i*). While that accurately describes the agency's process, it would also accurately describe a situation in which de facto control was determined by the spin of a wheel or the whim of any three Commissioners. It is a far cry from fair notice—and things do not get better from there.

Regulated entities must navigate a thicket of complex and often-conflicting directives from multiple multifactor balancing tests. The codified regulations begin with the promise of some objective criteria by putting the burden on a small business that satisfies the regulatory requirements for de jure independence to "demonstrate *at least* the following" to be deemed free of its investor's de facto control: The small business (A) "constitutes or appoints more than 50 percent of the board of directors"; (B) "has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee"; and (C) "plays an integral role in management decisions." *Id.* (emphasis added). As that "at least" makes clear, however, those three codified factors are necessary to show the absence of de facto control, but hardly sufficient.

From there, regulated entities must contend with six more factors the FCC announced in *Intermountain Microwave*, a case decided during the Kennedy Administration, decades before spectrum auctions came into being and became billion-dollar affairs with the possibility of nine-figure penalties. Those six factors are: "(1) who controls the daily operations of the small business; (2) who employs, supervises, and dismisses the small business's employees; (3) whether

the small business has 'unfettered' use of all its facilities and equipment; (4) who covers the small business's expenses, including its operating costs; (5) who receives the small business's revenues and profits; and (6) who makes and carries out the policy decisions of the small business." App.73; *see Intermountain Microwave,* 12 F.C.C.2d at 560.

Still more "guidance" awaits, and it helpfully comes from the "live-ball" era of the modern spectrum auction. Yet it affirmatively suggests that disqualifications and penalties *will not be forthcoming* in circumstances like these. In implementing the 1993 amendments to the Communications Act (which gave rise to modern spectrum auctions), the FCC issued an order known as the *Fifth MO&O*. The FCC "clarif[ied]" there that a financial backer "may be given a decision-making role (through supermajority provisions or similar mechanisms) in major corporate decisions that fundamentally affect their interests as shareholders without being deemed to be in de facto control." 10 FCC Rcd. at 448 ¶81. Specifically, and despite *Intermountain Microwave*'s apparent contrary direction, the *Fifth MO&O* explained that a large investor not only "may hold rights of first refusal," but "generally" may play a role in "setting compensation for senior management" of the small business, making "expenditures that significantly affect [the small business's] market capitalization," "s[e]l[ling] major corporate assets," and even making "fundamental changes in corporate structure, including merger or dissolution," without being deemed in control. *Id.* It also allowed a small business the right to put its equity interest in the venture to its larger financial

backer after a license holding period (in this case five years). *Id.* at 455-56 ¶95.

Despite all that reassuring language, the *Fifth MO&O* contained a crucial agency-empowering caveat: "[T]he aggregate effect of multiple provisions could be sufficient to deprive the control group of de facto control, particularly if the terms of such provisions vary from recognized standards." *Id.* at 449 ¶82. In other words, de facto control is ultimately "determined on a case-by-case basis," 47 C.F.R. §1.2110(c)(2)(*i*), based on the totality of the circumstances. *See* App.115 ("Any one … factor[] or even combinations of them might not amount to *de facto* control.").

The net effect is that the agency does not even try to provide the regulated community with the kind of clear ex ante guidance that could justify it imposing hundreds of millions of dollars in penalties. It is difficult enough just to keep track of the numerous factors and considerations the agency has mentioned, let alone to ensure that the agency is applying them in a reasonably evenhanded manner. *See McDonald v. City of Chicago*, 561 U.S. 742, 795 (2010) (Scalia, J., concurring) ("The ability of omnidirectional guideposts to constrain is inversely proportional to their number."); Antonin Scalia, *Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989) (arguing that to adopt a totality test "is effectively to conclude that uniformity is not a particularly important objective"). Making matters worse, a corporation unsure of where the line is cannot check in advance with the FCC to see if it meets its "case-by-case," impressionistic test for de facto control. The only way

to find out is to self-certify, enter an auction with billions on the line, and *then* submit to a make-or-break post-hoc evaluation—with the consequence of a determination that the applicant for small-business bidding credits fell on the wrong side of the de facto control line being a multibillion-dollar bill, plus the prospect of massive default penalties.

In implicit recognition that this black-box regime could not be squared with the fair notice required by due process, the APA, and this Court's precedents, for decades the FCC has worked with applicants for small-business bidding credits deemed subject to de facto control to cure specific dependency issues the agency has identified. *See, e.g.*, *ClearComm*, 16 FCC Rcd. at 18631 ¶7 & n.29; *In re Applications of AirGate Wireless, L.L.C., Assignor, and Cricket Holdings, Inc., Assignee, Memorandum Opinion & Order*, 14 FCC Rcd. 11827, 11843 ¶31 (1999). But not here.

To be sure, the agency gave Northstar something it called an opportunity to cure. But unlike in the past, when the agency would "undertake discussions with … designated entity applicants" in which it identified specific deficiencies and potential fixes "in order to obtain revisions to agreements" to satisfy any de facto control concerns, *In re Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, 21 FCC Rcd. 4753, 4769 ¶43, 4800 n.206 (2006), the only "chance" the FCC gave Northstar "to cure" here were pro forma videoconferences at which Northstar was allowed to present in hopes of hitting an unidentified target. And even that empty formalism was offered only *after* the

D.C. Circuit had vacated the agency's earlier abject refusal to provide any cure opportunity whatsoever.

Northstar was thus left to take a shot in the dark. It aimed as best it could. Without real guidance on how to restructure its agreements to conform to the Commission's shifting preferences, Northstar turned to FCC precedent. It restructured its contracts with DISH so that they tracked those in a designated-entity application that the Wireless Bureau had approved in 2016 as part of the same auction—agreements that themselves were the product of extensive negotiations with Wireless Bureau staff. *See* Agreement Establishing Advantage Spectrum, L.P. §5.3(f), *Application of Advantage Spectrum*, L.P., ULS File No. 0006668843 (Aug. 29, 2014) (application granted July 5, 2016), https://bit.ly/3j0NYq7.

Yet none of that was enough for an agency that had long since made up its mind based on the kind of ipse dixit from the full Commission that "th'ol totality-of-the-circumstances test" not only permits, but encourages. Although Northstar fixed every aspect of its agreements that the Commission had cited in its 2015 order, the agency now found new problems and used those new problems to justify the imposition of massive financial penalties totaling hundreds of millions of dollars (on top of the lost defaulted licenses). The agency thus utterly abandoned the only thing that has allowed it to square its lack of meaningful ex ante guidance with well-established requirements of fair notice. The resulting process cannot be squared with due process, the APA, or this Court's cases.

At the outset, "there was considerable uncertainty at the time of Auction 97 about the degree of control th[e] rules would tolerate." App.102. That is a considerable problem, as the most basic component of due process is "fair notice of conduct that is forbidden or required," *Fox Television Stations*, 567 U.S. at 253, which is why this Court has consistently held that "agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (alteration in original) (quoting *Gates & Fox Co. v. OSHA Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.)). To be sure, an agency's decision to consider multiple factors is not surprising when the inquiry goes beyond de jure arrangements to an inquiry into de facto control. But that is no excuse for failing to provide fair notice. Indeed, precisely because multipart balancing tests can so easily be manipulated to produce results "favored by the personal (and necessarily shifting) philosophical dispositions of" the decisionmaker, *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 96 (1990) (Scalia, J., dissenting), our most basic commitments demand that the decisionmaker tasked with applying a totality test at least explain which factors or combination of factors are outcome-determinative.

The agency can provide that adequate guidance through either rulemaking or agency precedent developed through adjudication. But here the rules expressly eschewed ex ante guidance in favor of a declaration that the de facto control determination is made "on a case-by-case basis." 47 C.F.R. §1.2110(c)(2)(*i*). And whatever guidance prior

precedents could provide was expressly abandoned when it came to Northstar. The bait-and-switch here was as unmistakable as it was brazen. In its notice announcing the rules for Auction 97, the agency instructed firms seeking designated-entity bidding credits to "review carefully" precedent on the matter. But when it came to evaluating protests against Northstar lodged by well-connected incumbents, the agency yanked matters up to the Commission level and then jettisoned all of that prior precedent explicitly. That disavowal of the only precedents that gave any guidance to the regulated community violated numerous well-settled agency procedures and precedents on which Northstar relied, was inconsistent with basic notions of due process, and is a textbook example of arbitrary and capricious agency action in violation of the APA. *See Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("Unexplained inconsistency is" a "reason for holding an interpretation to be an arbitrary and capricious change from agency practice."); *N.Y. State Energy Rsch. & Dev. Auth. v. FERC*, 746 F.2d 64, 68 (D.C. Cir. 1984) (agency acted arbitrarily and capriciously in applying new rules to an applicant that relied on extant agency manuals and the representations of agency officials). "To say to [Northstar], 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970).

The agency also eliminated the final step in the process that gave its lack of ex ante guidance a fighting chance to comply with fair-notice requirements—a meaningful to opportunity to cure identified deficiencies. But to take a process that

lacked clear ex ante guidance from the outset, then vitiate the agency precedents that provided minimal guidance, and then follow up by refusing to identify deficiencies in the cure process, adds up to a complete denial of fair notice.

Finally, there is something even more problematic afoot, which makes the agency's actions particularly antithetical to the regime Congress established. As noted, the FCC is required by statute to "ensure that small businesses … are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. §309(j)(4)(D). Congress has specifically instructed the FCC to "disseminat[e] licenses among a wide variety of applicants, *including small businesses*," in service of "promoting economic opportunity and competition." *Id.* §309(j)(3)(B) (emphasis added). But spectrum-based services have become big business. Auction 97 raised more than $41 billion for the U.S. Treasury, with individual licenses going for hundreds of millions of dollars. More recent auctions have raised even more. Simple arithmetic dictates that Congress' goal of allowing small businesses to have meaningful participation requires that they be able to receive substantial financial backing from an established business.

That explains why the FCC has always explicitly permitted companies "participating in an auction as a designated entity" to have substantial amounts of their total equity "provided by large businesses." Cong. Budget Office, *Where Do We Go From Here? The FCC Auctions and the Future of Radio Spectrum Management* 26 (Apr. 1997). It also explains why the agency has always previously provided successful

bidders a meaningful opportunity to cure. In practice, the agency has reconciled the inherent tension in a system to designed to encourage small businesses to make large bids by giving companies with de jure independence a meaningful opportunity to remedy any perceived deficiencies that could result in a lack of independence in fact. By abandoning that established procedure in the face of pressure from well-connected and undeniably large businesses, the Commission not only deprived Northstar, but betrayed the entire regime, which was designed to give small businesses a leg up in submitting large bids for valuable spectrum.

II. The Question Presented Is Important, And This Is A Clean Vehicle To Resolve It.

The question presented is critically important given the "vast and varied federal bureaucracy" that "wields vast power and touches almost every aspect of daily life." *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting). A number of federal agencies operate similar programs that allocate scarce resources through competitive bidding. *See, e.g.*, 30 U.S.C. §§201, 226; 43 C.F.R. §3508.11 (BLM awards coal, oil and gas, and other mineral leases); 25 C.F.R. §§211.20; 212.20 (BIA awards mineral leases on tribal lands); 36 C.F.R. §223.100 (USFS awards timber sales contracts). Many of these regimes include detailed environmental conditions that accompany approval, and, like the regime at issue here, often bake in ex post cure processes given the intricacies involved. If this Court allows the decision below to stand, each of these agencies will have a green light to follow the FCC's

lead and bow to pressure from disgruntled repeat-players and refuse to engage with disfavored parties.[5]

Nor is the problem limited to regimes that mirror the spectrum auction system. Countless federal agencies operate important programs backed by substantial penalties. The fair-notice principles here are fundamental to all of them. If the established rules can be waived whenever disappointed bidders and repeat-players before the agency complain, then there is no meaningful protection for regulated parties, especially those that appear before the agency only occasionally. Put differently, the harm from the lack of fair notice and the impermanence of minimal agency guidance hits hardest on the would-be new entrants that Congress sought to encourage here and in numerous other government programs.

The concern is particularly acute, moreover, in light of the FCC's structure. As even the most ardent supporter of independent agencies has recognized, the FCC's "comparative freedom from ballot-box control makes it all the more important that courts review its decisionmaking to assure compliance with applicable provisions of the law." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 547 (2009) (Breyer, J., dissenting). And the lack of accountability to the voters or a politically accountable President only heightens concerns for agency capture. After all, the premise of much of our system of separation of powers is that

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[5] That is, in part, why it makes no difference that the FCC tweaked its de facto control rules after Auction 97. Those tweaks also do not obviate the core problem: the Commission's capricious decision not to engage with Northstar when it always had before (and has since).

government officials will be responsive to those with the power to remove them. If agency officials are insulated from presidential removal and control, it creates a vacuum and every incentive for agency officials wielding enormous executive power to be unduly responsive to repeat-players before the agency and their congressional allies. *See e.g.*, Susan P. Crawford, *The Ambulance, the Squad Car, and the Internet*, 21 Berkeley Tech. L.J. 873, 925-31 (2006) (arguing that the FCC is inherently likely to use broad authority to favor incumbents); John F. Duffy, *The FCC and the Patent System: Progressive Ideals, Jacksonian Realism, and the Technology of Regulation*, 71 U. Colo. L. Rev. 1071, 1120-21 (2000) (describing the FCC's history as a prototypical example of agency capture).

This case proves the point. First, there can be no serious doubt that the agency here was wielding enormous executive power in allocating spectrum licenses worth tens of billions of dollars. Indeed, the amount raised in Auction 97 alone outstrips the entire budget of the Justice Department (not to mention dwarfing the budget of the entire federal judiciary). And no one cared more about the results of that auction than the well-established incumbent wireless companies who just happen to be the most frequent repeat-players before the agency. When their bids lost out to upstart new entrants, the complaints were heard loud and clear in Congress and by the Commission. Clear ex ante rules are designed to withstand those kinds of complaints. Here, the inherently malleable totality-of-circumstances was no match for that pressure. The need for this Court to restore the promise of fair notice is thus acute.

Finally, the financial impact of the decision here militates in favor of certiorari. The need for fair notice rises with the stakes of potential fines—and the stakes here are enormous. Northstar faces hundreds of millions of dollars in penalties for violating unwritten rules and then failing to hit an unidentified target in the "cure" process. Those stakes alone amplify the need for this Court's intervention. *See, e.g.*, *United States v. Mitchell*, 463 U.S. 206, 211 n.7 (1983) (noting size of $100-million judgment against the government as reason for granting review); *cf. Fid. Fed. Bank & Tr. v. Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in the denial of certiorari).

In *Fox*, this Court vindicated fair notice and due process in the context of this very agency when large networks and their affiliates were facing penalties that topped out at $27,500 and in some cases were waived entirely. Here, Northstar faces hundreds of millions of dollar in fines based on guidance that makes the FCC's fleeting expletive policy look like a model of clarity and fair warning. This Court's intervention is justified here, a fortiori.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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