No. 22-672

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

This is a classic bait and switch of enormous proportions. For decades, the FCC has respected due process while reconciling opposing statutory imperatives to auction valuable spectrum and ensure the participation of small businesses that cannot afford the opening bid without assistance. The agency achieved Congress' competing goals by encouraging big businesses to provide financial backing for small bidders, without crossing the fuzzy line of exercising de facto control. And it squared that system with the demands of fair notice and due process by affording robust opportunities for bidders to cure identified problems and avoid the massive penalties that come with a finding of de facto control. That cure process was not a matter of executive grace. It was vitally necessary to comply with the most basic demands of fair notice in a context where small businesses are affirmatively encouraged to make bids (and face potential penalties) that they cannot afford. Yet when Northstar, backed by a large new entrant feared by entrenched incumbents, won big at auction, the FCC changed all the rules. Even though Northstar concededly satisfied every test for de jure control and modeled its contracts on those the agency had previously blessed, the FCC selectively abrogated its precedent, deemed Northstar non-qualifying, and then refused to provide a meaningful cure process. The result was entirely predictable and entirely unlawful: The agency not only disqualified Northstar, but imposed one of the largest penalties in agency history.

The FCC does not deny any of this. Instead, it argues that its murky test for de facto control satisfies fair notice even without a robust cure process. That claim would be dubious even if de facto control only turned on multiple multi-part tests (with nine or more factors, depending on how they are counted). But the agency is not content even with the considerable discretion afforded by its multi-factor tests; instead, it reserves the power to find de facto control under the totality of the circumstances *even if each factor is independently satisfied*. In that context, a meaningful ex post cure process is the difference between what the Constitution allows and a trap for the unwary. This Court has reprimanded this very agency for failing to provide fair notice in imposing five-figure fines on national networks; the FCC's effort to impose a nine-figure penalty on would-be new entrants underscores the urgent need for a refresher lesson.

That may explain why the agency seeks to avoid review with supposed vehicle objections that only highlight the need for plenary review. That Northstar now must formally transfer control of its licenses to DISH *is the consequence* of the agency's bait and switch: Had Northstar received what due process demands, it would have either received the valuable small-business credits (allowing it to make enough money to keep the licenses under its control) or declined to throw its hat in the ring in the first place. As for the lack of a circuit split, that simply highlights the centrality of the D.C. Circuit in appeals from agency action and the heightened stakes from a D.C. Circuit precedent endorsing this bait and switch. This Court's intervention is imperative.

I. The Agency's Unforeseeable, Retroactive, And Selective Departure From Settled Principles Violated Due Process.

It should go without saying that administrative agencies cannot penalize regulated entities—even below the nine-figure level—unless they provide fair notice of applicable criteria ex ante or a meaningful opportunity to cure specifically identified defects ex post. After all, this Court has repeatedly admonished agencies, including the FCC, for failing to comport their actions with this most basic component of the due process guarantee even when the stakes are relatively low. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (maximum $27,500 fine); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012). Despite having suggested otherwise below, the FCC now acknowledges this constitutional minimum; it just thinks that the version of "th'ol' totality of the circumstances test," *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting), it applies in this context provides sufficient ex ante guidance even without a meaningful ex post opportunity to cure. But the government inadvertently underscores the problem when it tries to articulate the purportedly "ascertainable … standards" at play in the FCC's de facto control regime. BIO.22.

The government claims that Northstar "had fair notice of the Commission's *de facto* control finding under the *Fifth MO&O*,"[1] and, "[s]eparately and

[1] *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*").

independently, 'the Commission's *Baker Creek* and *Intermountain Microwave* decisions provided further notice[.]'" BIO.22-23. These decisions are anything but clear—or consistent. *Intermountain Microwave* dates back to the Kennedy Administration, decades before high-stakes spectrum auctions with the possibility of nine-figure penalties. It lists six highly generalized factors for assessing de facto control: "(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." Pet.App.73. Which factors matter most, or how to reconcile factors pointing in opposite directions, the agency does not say, leaving private parties to guess—or historically, to rely on the cure process.

Things only get more jumbled from there. The government describes the *Fifth MO&O* as "summarizing *Intermountain Microwave,*" BIO.3, but in reality the *Fifth MO&O* injects brand-new considerations into the mix, some of which seem to duplicate *Intermountain Microwave* but others that seem to repudiate it. In seeming contrast to *Intermountain Microwave*, the *Fifth MO&O* pronounced 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. 10 FCC Rcd. at 448 ¶81. 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.

How the government could read that decision as a mere "summar[y]" of *Intermountain Microwave* and its multi-factor test, BIO.3, is anyone's guess. Indeed, even the agency cannot help but contradict itself on that point. *See* BIO.27-28 (claiming that the FCC ruled against Northstar under the *Fifth MO&O*, which it says is "not … a multifactor test"). In all events, even this inscrutability—and the imprecision of layering a quasi-multi-factor test on top of an actual multi-factor test—is not the real problem. The FCC itself was not content with the "guidance" provided by the combined effect of *Intermountain Microwave* and the *Fifth MO&O*, so it announced a reserve power that can trump the other rules: "[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." 10 FCC Rcd. at 449 ¶82. This is "th'ol' 'totality of the circumstances' test" with a vengeance. *See Mead*, 533 U.S. at 241 (Scalia, J., dissenting) (noting that totality tests typically are embraced by an authority when it is "unwilling to be held to rules," which is why such standardless standards are "most feared by litigants who want to know what to expect").

Even still, if a would-be bidder could learn *in advance of an auction* how the FCC tallied up the totality of the circumstances, it could withdraw its bid and avoid the prospect of nine-figure penalties for guessing wrong. But the FCC refuses to give that upfront indication because of the administrative inconvenience of evaluating all the bids ex ante, as opposed to just the winning bid ex post. The government is forthright about its reasons for declining to give ex ante guidance and screen out non-conforming bids before they skew the auction results. "'[D]eferring grantability determinations until after an auction' allows the agency to 'forego consideration of the unsuccessful applicants.'" BIO.4 (quoting *Alvin Lou Media, Inc. v. FCC*, 571 F.3d 1, 10 (D.C. Cir. 2009)). While that candid appeal to administrative convenience might suffice for rational-basis review, it is not a valid reason for denying due process.

In implicit recognition that its own preference for ex post review deprived bidders of sufficient ex ante guidance, the agency traditionally worked with applicants for small-business bidding credits deemed subject to de facto control to cure specific dependency issues it identified. *See* Pet.27 (citing cases). But now the FCC claims it has *no* obligation, once it has reached the point where it will deign to assess the winner's compliance with the de facto control rules, to grant the regulated party any insight into what the FCC wants in terms of a cure. *See* BIO.26-28. That is a sharp break with past practice and what fair-notice principles demand. The FCC's unbroken, decades-long practice was to work iteratively with the successful winner to clarify what "conduct … is forbidden or required." *Fox*, 567 U.S. at 253. Now its

position is that it owes regulated parties no more than the chance to take a shot at an unidentified moving target. That is a recipe for arbitrarily penalizing companies that have challenged well-connected incumbents, and is not remotely consistent with what this Court's due process precedents demand of government action.

It should therefore come as no surprise that the FCC has no answer for this Court's precedents. The FCC tries to dismiss *Christopher* as a case about *Auer* deference. BIO.25. In reality, the Court *declined* "[t]o defer to the agency's interpretation" in *Christopher* precisely because deference "in this circumstance would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" 567 U.S. at 156. To say that *Christopher* did not even apply "a general administrative fair-notice standard," BIO.25, is to ignore the Court's reasoning and holding, not to mention the broader principle that deference to agencies "provides no shield when an agency engages in a sustained pattern of hostility towards an entity it regulates and ignores basic principles of fairness and due process." Pub.Interest.Orgs.*Amicus*.Br.24.

As for *Fox*, it is the precedent that bears most directly upon the present case, holding that this very agency failed to provide fair notice by failing to make clear what "conduct … is forbidden or required" in the context of far smaller fines against far larger companies who were repeat players before the agency. 567 U.S. at 253. Against this, the FCC can only feebly claim that the principle was applied there in a void-for-vagueness context, and the present case is not

that. BIO.25. But *Fox* went out if its way to not decide the First Amendment issues that were briefed and argued, and instead to rely on broader principles of fair notice that apply in every context. In all events, the fact that the government spends a grand total of two sentences on *Fox* even though it involves the same agency, lower stakes, and repeat players speaks volumes. To encourage new entrants to bid for spectrum licenses and then deprive them of both fair notice and an opportunity to cure makes the problems in *Fox* pale by comparison, and makes the need for a refresher course for the agency clear.

The government's final effort to waive away this Court's precedents is the least defensible. According to the government, "*Christopher* and *Fox* … involved the imposition of liability on regulated parties," whereas here "the FCC's decision merely deprived petitioner of a public benefit, *i.e.*, a discount in bidding on spectrum license." BIO.25. That simply ignores the reality that the agency imposed a massive penalty on petitioner—the largest in agency history—on top of the loss of its bidding discount. While *Fox* involved a $27,500 fine for one network and a penalty remitted to zero for another, the agency here *imposed a $333 million penalty on Northstar* for its failure to hit a moving target in the dark. And while the FCC brazenly suggests that Northstar is to blame for that penalty because it "had an opportunity to avoid those obligations by renegotiating its agreements with DISH," BIO.25, it neglects to mention that Northstar *did* renegotiate and *did* fix each and every aspect of its agreements that the FCC had cited in its 2015 order—and yet the agency still ruled against it on the basis of

never-before-cited problems that Northstar could have fixed had the FCC ever timely raised those concerns.

In defense of the indefensible, the government miscasts a line from *SEC v. Chenery Corp.*, which stands for the basic proposition that agencies can make law on a case-by-case basis as well as through rules, as standing for the far more radical proposition that an agency may be constrained by nothing more than its *ad hoc* assessment of each case as it does so. BIO.27. As the government puts it, "regulated entities cannot reasonably assume that the agency will adhere in future cases to prior staff decisions." BIO.26. If the executive thinks that is true even when the stakes are this high, then the need for this Court's intervention could hardly be more acute. A staff decision obviously does not bind the full Commission when it comes to changing regulations or agency policies prospectively; after all, the full Commission is the only part of the agency with even a hint of political accountability. But if the full Commission can impose a nine-figure penalty in the face of staff decisions to the contrary, then no regulated party is safe.

The government makes much of the fact that the Northstar-DISH contracts supposedly parallel an example from the *Fifth MO&O*. *See, e.g.*, BIO.22-23. To the extent that is true, it makes the due process violation worse, not better, given that Northstar's revised contract was designed to imitate those that the Wireless Bureau approved as part of the same auction. *See* Pet.28. "One aspect of fundamental fairness, guaranteed by the Due Process Clause of the Fifth Amendment, is that individuals similarly situated must receive the same treatment by the Government."

U.S. Dep't of Agric. v. Murry, 413 U.S. 508, 517 (1973) (Marshall, J., concurring). Finally, the FCC's attempt to hide its unconstrained power behind the availability of judicial review is undercut by the extreme standards of deference it demanded, and received, below. *Compare* BIO.27 *with* Pet.App.19, 70.

"The Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules. Otherwise the practice of administrative law would come to resemble 'Russian Roulette.'" *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3-4 (D.C. Cir. 1987) (Silberman, J.). Unfortunately, that is precisely what transpired here. "The Commission disavowed its prior decisions, treated [Northstar] inconsistently from entities that previously qualified for Designated Entity benefits, and even treated [Northstar] differently from other applicants for such benefits in the same auction." Pub.Interest.Orgs.*Amicus*.Br.23. Due process demands far more.

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

The abuses of due process in this case led to nine-figure penalties and ten-figure losses. Those figures highlight the stakes of an auction program that generates the kind of government revenues and private value that maximizes the temptation for arbitrary action and the need for clear rules and administrative rectitude. The FCC auction program has raised over $250 billion to date. *See* Sean Michael Newhouse, *FCC's Spectrum Auction Authority Nears March Expiration*, Roll Call (Feb. 28, 2023), https://bit.ly/40AVN98. And this regime does not

stand alone; the government operates countless other programs that rely on an ex post cure process to make up for ex ante defects in clarity. *See* Pet.32; Pub.Interest.Orgs.*Amicus*.Br.16; *see also, e.g.*, 26 U.S.C. §6213(a) (tax-deficiency penalties); 53 Fed. Reg. 5298, 5300 (Feb. 23, 1988) (CERCLA).

The FCC points out that there is no circuit split. BIO.22. But given that the applicable statute provides that "[a]ppeals may be taken from decisions and orders of the [FCC] to the United States Court of Appeals for the District of Columbia," 47 U.S.C. §402(b); *see* Pet.App.18, this is of little surprise. Nor should this Court wait until the next party so abused by an agency decides that it is better off petitioning in its home jurisdiction pursuant to 47 U.S.C. §402(a). This case cleanly presents the central issues that should be resolved here and now.

Finally, the FCC contends that "[o]ngoing FCC proceedings may eliminate the practical significance of the legal issues that petitioner raises." BIO.21. This argument is as weak as the agency's caveats suggest. For one thing, hundreds of millions of dollars in penalties have been assessed in this case, in a manner that is wholly inconsistent with due process and which the court can and should remedy. Relief from these penalties was requested and denied below. *See, e.g.*, Pet'r's.Br.56, *Northstar Wireless, LLC v. FCC*, No. 18-1209 (D.C. Cir. July 15, 2021). Yet, absent this Court's intervention, there will be nowhere left to turn.[2] Finally, the fact that Northstar has been

[2] It is a bit rich for the FCC to argue that Northstar should have been able to come up with the full auction price (an additional

forced to formally transfer control of its licenses to DISH *is the consequence* of the agency's bait and switch, not a reason to let it stand. Had Northstar received what due process demands, it never would have found itself in this predicament.

CONCLUSION

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

Respectfully submitted,

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$1.9 billion) in the FCC's 30-day window, but that two 90-day windows after five and six years, respectively, were too short to allow any alternative to exercising the put option.