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

CHRISTOPHER J. WRIGHT
TIMOTHY J. SIMEONE
HWG LLP
1919 M Street NW
Eighth Floor
Washington, DC 20036

PAUL D. CLEMENT
Counsel of Record
MATTHEW D. ROWEN*
NICHOLAS M. GALLAGHER*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

*Supervised by principals of the firm who are members of the Virginia bar

Counsel for Petitioner

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The private respondents' brief in opposition is long on rhetoric and short on reasons to let the FCC's massive bait-and-switch to their benefit stand. Their question-begging starts with the first sentence of their effort to reframe the question presented by labeling petitioner "a front company," and the pejoratives only escalate from there. That effort is not just hypocritical—as respondents have successfully used these same small-business credits in the past and intervened here only because a new entrant beat them at their own game—it obscures the critical issue. Everyone, including the FCC, expects small businesses to team up with well-capitalized larger entities. There is no other way for small businesses to participate in the high-stakes auction for valuable spectrum, as Congress encouraged. Thus, talk of front companies and financing ruses is little more than a colorful way of describing a longstanding statutory scheme that respondents themselves have employed.

What has made that regime operate consistently with the Due Process Clause, despite the lack of clear ex ante guidance about what separates a viable partnership from an impermissible "front," is the existence of a robust ex post cure process—i.e., the precise thing that petitioners have been denied here. Petitioners thus suffered hundreds of millions in penalties for financial arrangements modeled on and materially indistinct from arrangements respondents employed and the FCC approved repeatedly in the past. Respondents contend that those penalties raise no due process concerns because it has always been clear beyond cavil that withdrawing a successful bid

will result in penalties. That is pure sophistry. As respondents well know, the only reason that successful bids were withdrawn is because small-business credits were denied without clear ex ante guidance or an ex post opportunity to cure. The government cannot make up for imprecision in awarding small-business credits by making the consequences of losing them both crystal clear and draconian. Any transfer of control will neither make those penalties go away nor moot this controversy. Finally, respondents' claim that there is constitutionally sufficient ex ante guidance here is belied by the FCC's own brief, which makes clear that it reserves the power to find de facto control under the totality of the circumstances *even if each of the nine-plus factors it considers is independently satisfied*.

Respondents may be content with the FCC's selective commitment to due process (for now), but this Court should not be. 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. Those principles matter most when the stakes are highest and when new entrants threaten the status quo ante of agency capture. Yet the FCC elided them here. The inevitable result was a massive penalty imposed without fair warning on entities that satisfied every ex ante test for de jure independence and that would be profitably operating the spectrum on which they bid had the agency followed its long-settled cure process, as it did for respondents and other politically connected incumbents. This Court should grant the petition and correct this agency bait and switch.

I. Respondents' Efforts To Deny The Realities Of The Regime At Issue Here Serve Only To Confirm The Need For Plenary Review.

Respondents never deny the basic and well-established principle that underlies Northstar's petition: Unless an agency provides a meaningful cure process after the fact, it cannot "impos[e] penalties for private conduct" when the alleged violations are of "unclear rules." Resp.Br.6 (citing *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012), and *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012)); *see* Pet.i, 3; Reply.3. That principle makes the case for certiorari clear. After all, not only did the FCC impose a nine-figure default penalty after refusing to meaningfully engage with Northstar to cure any de facto control deficiencies (as it did time and again for respondents), but the version of "th'ol' totality of the circumstances test" it said Northstar flunked is so indeterminate that not even the government can decide what it means. *See* Reply.3-5.

While respondents pay lip-service to the argument that the ex ante guidance the FCC provides is constitutionally sufficient, that argument is belied by the FCC's own decisions and its brief. Respondents fail to mention that the "rules" they invoke not only are *not* codified anywhere, but emanate from three FCC opinions—*Baker Creek*, *Intermountain Microwave*, and the so-called *Fifth MO&O*, *see* US.BIO.22-24—that collectively apply at least nine separate factors (some of which appear to contradict each other) and provide exactly zero guidance as to which factors matter most or how to balance them. *See* Reply.4-5. Respondents likewise have nothing to

say about the fact that, in reviewing Northstar's bidding-credits application, 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; *see* Pet.15. And the Commission doubles down on that proposition in its brief here, *see* U.S.BIO.26, effectively confirming that the more factors in the balancing test and the more circumstances in the totality, the less constrained the agency.

Indeed, the only thing that is clear from the welter of factors that are relevant but not dispositive is that Northstar had no clarity as to what rules to follow when it came to the all-important de-facto-control inquiry—and that it suffered a textbook due process violation when the cure process was yanked out from under it and transformed into "an empty thing." *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 330 (1945). That conclusion became even more clear just last week, when this Court reaffirmed that it falls "far short of" constitutionally required clear-notice principles for an administrative agency to penalize private parties based on a "freewheeling inquiry [that] provides little notice … of their obligations" and "'le[aves them] 'to feel their way on a case-by-case basis.'" Slip op.25, *Sackett v. EPA*, No. 21-454 (U.S. May 25, 2023) (quoting *Sackett v. EPA*, 566 U.S. 120, 124 (2012)); *see Rapanos v. United States*, 547 U.S. 715, 757-58 (2006) (Roberts, C.J., concurring). *Sackett* squarely rejected an attempt by the EPA to enforce an interpretation of the law that gave it "discretion to grant or deny permits based on a long, nonexclusive list of factors that ends with a catchall mandate to

consider 'in general, the needs and welfare of the people.'" Slip op.4, *Sackett* (quoting 33 C.F.R. §320.4(a)(1) (2022)). As *Sackett* makes clear, "'th'ol' 'totality of the circumstances' test" that agencies embrace when they are "unwilling to be held to rules," *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting), cannot be wielded to justify arbitrary deprivations of property—and doubly so when it comes to the imposition of massive penalties.

Perhaps for that reason, respondents dispute whether the nine-figure default penalties the FCC has imposed here are really penalties for failing to qualify for small-business credits. Instead, respondents' claim that the FCC "simply denied petitioner an improperly claimed discount," Resp.Br.6, and that the FCC was crystal clear that defaulting on a bid would result in penalties. That blinks reality. The only reason that Northstar could not honor its bids was because it was denied small-business credits, and the only reason it was denied small-business credits was because it was denied a meaningful opportunity to cure. When the government imposes nine-figure consequences for failing to comply with shifting interpretations of multi-factor tests and then denies a meaningful opportunity to cure, calling those nine-figure consequences anything but penalties is pure sophistry. Perhaps for that reason, even the initial D.C. Circuit panel held that "the agency was required to give [Northstar] fair notice before applying its remedy here." Pet.App.47.n.16; *see id.* (recognizing that "the default penalties" are "a punishment").

In all events, it would make no difference if the obligations the agency imposed here were thought of

as default *payments* instead of *penalties*; under the circumstances, there is no material difference. For one thing, the $333-million obligation the agency has imposed is not the consequence of breaching an ordinary contract between equal parties; bidding on licenses for spectrum controlled by the FCC is the only way to enter this market (and the only way to further Congress' interest in having small businesses participate in these high-stakes auctions). And while everyone that bid on spectrum and submitted a small-business-credit certification at Auction 97 had "notice" of the potential to incur "default-payment obligations," Resp.Br.i, before this case, *no one* could have had any inkling that the FCC would selectively abandon all past staff-level guidance on de facto control and refuse to provide a meaningful post hoc cure process.

There is no meaningful difference between a loss of small-business credits and default in this context. That is inherent in the regime. Congress has affirmatively encouraged small-business participation in these high-stakes auctions. The only way small businesses can hope to win licenses worth nine- or ten-figures at auction is by partnering with large financial backers. And the only way new entrants can hope to make bids that can compete with well-capitalized incumbents is to make bids that only a large business could afford *and* rely on the small-business credits to make up the difference. If those credits are arbitrarily denied with no meaningful opportunity to cure, then default and the accompanying penalties follow as a matter of course. In that context, respondents' suggestion that nine-figure default-payment obligations do not trigger the strictures of the Due Process Clause "sounds absurd, because it is." *Sekhar*

v. United States, 570 U.S. 729, 738 (2013). Put another way, if due process requires the FCC to give fair notice when it imposes a $27,500 fine for one well-capitalized network and a penalty remitted to zero for another, *Fox*, 567 U.S. at 252-53, then the constitutional obligations to small businesses that Congress wants to participate in these auctions follow *a fortiori*.

II. This Is An Excellent Vehicle To Resolve A Question Of Surpassing Importance.

Unable to deny that the lack of clear ex ante guidance and the abandonment of a meaningful ex post opportunity to cure equals a due process violation, respondents throw various vehicle objections at the wall. None sticks.

Respondents claim that concerns about the lack of notice from the FCC's totality-of-the-circumstances approach is misplaced because the agency's de-facto-control inquiry here actually boiled down to "a single-factor test." Resp.Br.10 n.2; *see also* Resp.Br.8-9. That is flatly incorrect. *See* Reply.4-5. If the FCC had boiled its analysis down to a single defect, then the cure process would have been straightforward. In reality, the FCC faulted Northstar for "myopically focus[ing] on individual changes to [its] agreements with DISH" because that view—*i.e.*, the view respondents now attribute to the agency—"fails to reflect the fact that *de facto* control *must be assessed based on the totality of the circumstances*." Pet.App.353 ¶61 (emphasis added).

To the extent respondents suggest that review is unwarranted because *the D.C. Circuit* viewed the "put-option analysis" as a "single-factor" basis for

affirmance, Resp.Br.9, that is doubly wrong. First, if the D.C. Circuit and the FCC cannot agree on the basis for the agency's action, then that just underscores the lack of fair notice in the de-facto-control analysis and the need for plenary review. Second, to the extent the D.C. Circuit would affirm based on analysis the agency never embraced, that is a strike in favor, not against, this Court's review. After all, this Court just summarily reversed a Sixth Circuit decision that had affirmed agency action on grounds other than the ones the FDIC articulated in a context calling for "highly fact specific and contextual" agency "judgment." Slip op.1-7, *Calcutt v. FDIC*, No. 22-714 (U.S. May 22, 2023) (per curiam).

Respondents spare little rhetoric in trying to paint Northstar and DISH as bad actors. But Northstar simply responded to the incentives that Congress created and tried to follow a well-trod path marked by respondents themselves. Northstar certainly did not embark on some nefarious hidden scheme: It not only disclosed the relationship between itself and DISH upfront in its Short Form application, but provided the agreements setting the terms of that relationship *in its application*, which it filed *before* it lodged any bids. *See* Pub.Interest.Orgs.*Amicus*.Br.5. The fact that the FCC chose not to look at the contractual arrangements until after the auctions—for reasons wholly of administrative convenience, *see* Reply.6—hardly makes the publicly disclosed applications hidden, and underscores the due process problems inherent in this regime.

The harsh characterizations of the agreements between Northstar and DISH are particularly difficult

to credit coming from respondents given that the initial arrangements here were closely modeled on AT&T's own prior agreement with another designated entity related to an Alaska Native Corporation (as petitioner is), and the revised agreements were near-carbon-copies of agreements that the Wireless Bureau had approved as part of the same auction. *See* Pet.28. There was, in short, nothing unusual in the corporate arrangements here—except that the large company, DISH, was not an entrenched incumbent in the wireless-spectrum market with well-established relationships with the regulators. *See* Pet.3-4. Ultimately, the very fact that agreements modeled on contracts previously approved by the FCC can somehow simultaneously be "the *Fifth MO&O*'s 'paradigm example of … ensnaring conditions'" sufficient for de facto control, Resp.Br.9 (quoting Pet.App.47); *see* US.BIO.23 (similar), confirms that the FCC's regime is arbitrary in the extreme—and could only be saved by a meaningful cure process of the sort respondents long have received but which the FCC wantonly denied Northstar here.

The FCC and respondents have both stressed that there is no circuit split. US.BIO.22; Resp.Br.1. But the D.C. Circuit is the circuit to which the applicable statute directs "[a]ppeals may be taken." 47 U.S.C. §402(b). And this Court often grants review without a circuit split when the D.C. Circuit decides a recurring issue of administrative law erroneously, as it has long been acknowledged that "the decision of that court in [agency-law cases] will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another court." *Vt. Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 535

n.14 (1978) (noting that, in light of this, a decision of the D.C. Circuit may "raise[] questions of such significance in this area of the law as to warrant our granting certiorari and deciding the case" on its own); *see also, e.g.*, John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375, 389 (2006). Simply put, an erroneous D.C. Circuit decision about the need for agencies to provide fair notice and meaningful cure opportunities has outsized consequences given the number of agency actions that court reviews. That is particularly true here, where countless government programs involve opportunities for cure that are the key to reconciling amorphous guidance with the requirements of due process. *See, e.g.*, 20 C.F.R. §§655.130(a), 655.141(a)-(b), 655.143(a) (H2-A agricultural visa program: employer always given a clear chance to cure before suffering rejection); *People of Ill. v. EPA*, 621 F.2d 259, 260 (7th Cir. 1980) (EPA State Implementation Plans); *WildEarth Guardians v. Pub. Serv. Co. of Colo.*, 690 F.3d 1174 (10th Cir. 2012) (CERCLA); *United States v. Gosselin World Wide Moving, N.V.*, 411 F.3d 502, 509 (4th Cir. 2005) (Shipping Act); *United States v. Frontone*, 383 F.3d 656, 657-58 (7th Cir. 2004) (Tax Code).

Finally, respondents suggest that mootness problems loom on the horizon. That argument mistakes the consequences of a due process violation for a mooting event. In reality, the prospect that the licenses here could be transferred to DISH is just a direct consequence of a small business being denied small-business credits. And even if ownership were to transfer, that would not moot this controversy or make the draconian penalties disappear. The notion that a

case involving nine-figure penalties could be mooted is as strained as respondents' other imagined vehicle problems.

In the end, this case is a perfect vehicle for re-establishing an important principle of administrative and constitutional law. The governed are entitled to fair notice of the rules, especially when it comes to the allocation of valuable public spectrum and especially when Congress goes out of its way to encourage non-repeat players to enter the ring. Agencies can provide fair notice via clear ex ante rules or by meaningful ex post opportunities to cure identified deficiencies. But combining "th'ol totality of the circumstances test" with a single shot at an unidentified target is an abuse of government power that the Due Process Clause does not tolerate and this Court should not leave standing.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

CHRISTOPHER J. WRIGHT
TIMOTHY J. SIMEONE
HWG LLP
1919 M Street NW
Eighth Floor
Washington, DC 20036

PAUL D. CLEMENT
Counsel of Record
MATTHEW D. ROWEN*
NICHOLAS M. GALLAGHER*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

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