No.

In the
Supreme Court of the United States

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

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that agencies must provide regulated parties fair warning of the conduct a regulation prohibits or requires. Courts enforce that principle through the doctrine of "administrative fair notice." The doctrine is an independent check on agency adjudication, preventing agencies from penalizing regulated parties for noncompliance with unclear agency standards.

The circuits, however, have adopted divergent standards for administrative fair notice. Two circuits have adopted a lax standard, exemplified by the decision below, that notice is sufficient as long as a regulated party "should have anticipated" that the agency "might have" adopted the regulatory interpretation it did. But five circuits apply a more stringent standard, requiring administrative agencies to clearly and ascertainably announce their regulatory interpretations before applying them to regulated parties.

The question presented is:

What is the proper administrative fair notice standard?

CORPORATE DISCLOSURE STATEMENT

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 Northstar Wireless, LLC. DISH Network Corporation indirectly holds (through privately held subsidiaries) a greater than 10 percent ownership interest in Northstar Spectrum, LLC.

SNR Wireless LicenseCo, LLC's direct parent company is SNR Wireless HoldCo, LLC. SNR Wireless HoldCo's direct parent company is SNR Wireless Management, LLC; the sole manager of SNR Management, LLC is Atelum LLC, which has a sole managing member, John Muleta. DISH Network Corporation, through wholly owned subsidiaries, has a greater than 10 percent ownership interest in SNR Wireless HoldCo.

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INTRODUCTION

Nothing bears the whiff of illegitimacy quite like a mid-game rule change. Moving targets, sloped playing fields, and seemingly random enforcement of the rules make it hard to accept a result, and can even make it seem like it's not worthwhile to play at all. The law is supposed to avoid this—which is why notice is a foundational value under the Due Process Clause. And never is the principle more vitally important than to proceedings before administrative agencies, the law's most omnipotent referees. From *Chevron* and *Auer* to the arbitrary-and-capricious standard of review, agencies have enormous discretion to define and change the terms on which regulated parties operate. Without a meaningful fair notice requirement, an agency can change the rules—or define them for the first time—once the game is well underway. That would leave regulated entities to guess at what the agency will do, and the consequences of predicting wrong can be ruinous.

They certainly were for Petitioners SNR Wireless LicenseCo, LLC and Northstar Wireless, LLC. The two small businesses made billions of dollars in bids on wireless spectrum licenses in an auction conducted by Respondent Federal Communications Commission. Before entering their bids, Petitioners reviewed the FCC's regulations and scrutinized prior administrative staff decisions that provided more specific guidance to ensure that their relationships with outside investors would not disqualify them from obtaining bidding credits available to small businesses—credits that would be worth $3.3 billion. Petitioners closely patterned their agreements on the details of two previous contractual relationships the FCC had blessed in decisions approving bidding credits—the "Denali" and "Salmon" decisions. But after SNR's and Northstar's bids succeeded and wireless incumbents cried foul, the FCC disqualified Petitioners from obtaining bidding credits. The FCC also imposed "interim" default penalties on SNR and Northstar totaling $516 million.

On appeal to the D.C. Circuit, Petitioners invoked the administrative fair notice doctrine. They protested that the FCC's past regulatory interpretations and decisions did not give fair notice of the standard the agency ultimately applied—and indeed, completely disregarded the Denali and Salmon decisions. The D.C. Circuit acknowledged "considerable uncertainty" in the FCC's standard. Pet. App. 44a. But it nevertheless dismissed Petitioners' argument on the basis that they "should reasonably have anticipated that the FCC *might* find them" ineligible for bidding credits. Pet. App. 45a (emphasis added). In other words, the D.C. Circuit considered it sufficient that Petitioners were on notice of what the FCC "might" do.

This standard cannot be right. Notice of what a decisionmaker *might* do is no notice at all when the decisionmaker is an administrative agency with the power to impose substantial penalties for noncompliance. Where a statute is ambiguous, or an agency is otherwise delegated interpretive authority, the agency generally has the power to choose any reasonable interpretation of the law. The agency also can change that interpretation, for reasons based in policy or politics as much as in law. That is why this Court has recognized that administrative deference "creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit." *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012). The administrative fair notice doctrine is supposed to mitigate that risk. *Id.* But the D.C. Circuit's "might" standard does the opposite: It permits results-oriented agencies to do just what *Christopher* warned of.

Other circuits are not so lax. Five circuits—the Third, Fourth, Fifth, Seventh, and Ninth—have all adopted more stringent standards that would not be satisfied merely by notice of what an agency "might" do. Rather, each requires clear, advance guidance as to which among reasonable interpretations an agency has selected. The First Circuit, however, has joined the D.C. Circuit in adopting a less stringent standard. Deepening the confusion still, the remaining circuits have all recognized an administrative fair notice doctrine, but, despite ample opportunity to announce a meaningful standard, have instead adopted vague and ill-defined standards.

This confusion, which has persisted over decades, is immensely consequential. It undermines this Court's admonitions on the importance of notice in the regulatory context, potentially touching every regulated party in the country, from well-counseled corporations to indigent immigrants. Only this Court can dispel the confusion and establish a clear, meaningful notice standard. This case—in which even the court below acknowledged "considerable uncertainty"—is the perfect vehicle for doing so.

OPINIONS AND ORDERS BELOW

The FCC's memorandum opinion and order finding that Petitioners are not entitled to bidding credits is available at 30 FCC Rcd. 8887 and is reprinted at Pet. App. 53a–217a. The D.C. Circuit's opinion denying-in-part and granting-in-part Petitioners' consolidated petitions for review is available at 868 F.3d 1021 and is reprinted at Pet. App. 1a–50a.

JURISDICTION

The D.C. Circuit entered its opinion and judgment on August 29, 2017. Pet. App. 1a, 51a. On November 21, 2017, the Chief Justice extended the time for filing this petition to and including January 26, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Small Businesses May Qualify for "Bidding Credits" Unless They Are Under the De Facto *Control of a Larger Entity*

The FCC is authorized to auction spectrum licenses "through a system of competitive bidding." 47 U.S.C. § 309(j)(1). In designing auction procedures, the FCC must seek to "disseminat[e] licenses among a wide variety of applicants, including small businesses." *Id.* § 309(j)(3)(B). Doing so "avoid[s] excessive concentration of licenses" among large incumbent service providers. *Id.* The FCC has empowered its Wireless Telecommunications Bureau (the "Wireless Bureau") to "[a]dminister[] all Commission spectrum auctions," and to "act[] for the Commission under delegated authority[] in all matters pertaining to the licensing and regulation of wireless telecommunications." 47 C.F.R. § 0.131(a), (c).

For more than twenty years, the FCC has encouraged competition by offering discounts, called "bidding credits," from the cost of spectrum licenses. The purpose is to boost the purchasing power of certain "designated entities." Pet. App. 22a–23a, 55a–56a. Among the entities that are eligible for bidding credits are "very small businesses," defined as businesses with revenues below a certain threshold. Pet. App. 55a–56a. Very small businesses receive a 25 percent bidding discount. *Id.*

Even with the aid of bidding credits, however, "wireless spectrum licenses are expensive, and small companies often need to obtain hundreds of millions of dollars in loans to enable them to participate in spectrum auctions." Pet. App. 44a. Investors that make available that magnitude of capital generally "demand[] extensive protections—including the right to supervise the small businesses closely." *Id.* Moreover, to make use of their licenses, small businesses must construct "multi-million dollar" wireless service facilities. Pet. App. 45a. "As a practical matter," that additional expense separately requires "at least the substantial involvement of a larger business." *Id.*

In recognition of those "economic realities," the FCC has repeatedly awarded bidding credits to small businesses that were subject to "extensive supervision" and "significant influence" by larger strategic investors. Pet. App. 44a–46a. For example, during a prior auction in 2006, the FCC granted a request for bidding credits by a small company named Denali Spectrum License, LLC ("Denali"). Denali had received substantial equity capital and loans from Cricket Wireless, now a subsidiary of AT&T and then the fifth largest wireless provider in the country, in exchange for significant "investor protections" from Denali. The same is true for Salmon PCS ("Salmon"), which sought and received bidding credits during an auction in 2001. The FCC granted Salmon bidding credits even though Salmon received substantial investment capital and loans from Cingular Wireless, then the second largest wireless provider in the country, which obtained significant investor protections in return. Pet. App. 27a–28a, 45a–46a.

While the FCC has "tolerated extensive supervision" of the small-business bidder by its investors, Pet. App. 44a, it has adopted a rule foreclosing bidding credits if a bidder's relationship with an investor moves past investment and extensive supervision such that the bidder is under the investor's "*de facto* control." Pet. App. 6a (quotation marks omitted); *see* 47 C.F.R. § 1.2110(b). That rule is designed to prevent larger entities from creating small businesses to act on their behalf, while taking advantage of bidding credits. Pet. App. 5a. Thus, when seeking to use bidding credits to purchase spectrum licenses, small businesses must walk a fine, not-clearly-delineated line: retain *de facto* control but cede enough supervisory authority to entice large entities to provide the capital and management assistance needed to develop a successful wireless business.

The Full FCC Has Offered Vague and Scattered Guidance on the* De Facto *Control Standard

As explained above, the FCC has delegated considerable authority to its own Wireless Bureau. In contrast, the full Commission has shed minimal light on when, precisely, a larger strategic investor's supervision crosses the line from permissible oversight to impermissible *de facto* control.

The agency's rules provide that *de facto* control must be evaluated on a "case-by-case basis." 47 C.F.R.

§ 1.2110(c). And the full FCC has rarely applied the *de facto* control standard, leaving that to the Wireless Bureau. The full FCC's leading analysis of the control standard dates back to its 1963 opinion in *Intermountain Microwave*, which articulated a broad six-factor test for *de facto* control. *See Nonbroadcast & Gen. Action Report No. 1142*, Public Notice, 12 F.C.C.2d 559, 559–560 (1963). But that 50-year-old test, developed long before the dawn of commercial wireless services and generally applied to agreements relating to broadcast stations, provides only vague guidance to modern small businesses negotiating complex credit and management agreements in order to provide wireless services.

The full FCC also issued its "Fifth Memorandum Opinion and Order" in 1994. That document made the unilluminating point that the likelihood of a *de facto* control finding is "greatly increased" where a larger entity provides "capital and management services." *Implementation of Section 309(j) of the Commc'ns Act – Competitive Bidding*, Fifth Memorandum Op. & Order, 10 FCC Rcd. 403, 456 (1994) ("Fifth MO&O"). That statement is not all that helpful to the many small businesses whose participation depends on finding a viable source of capital. After all, the 2006-07 agreements in Denali and the 2000-01 agreements in Salmon both involved situations where the major equity investor and lender also provided management services, and bidding credits were granted by the FCC in both cases. The most that can be taken from the Fifth MO&O's statement, then, is that agreements involving both capital and management services will be examined closely but are not *per se* prohibited. Companies still were left to ask where the line was between agreements that pass muster and those that do not.

With the FCC's vague "case-by-case" rule and the full Commission's guidance sharply limited, the FCC has left it to the Wireless Bureau to flesh out the contours of its *de facto* control regulation on an ad hoc basis. The Wireless Bureau has approved or denied more than a hundred bidding credit applications in major wireless auctions since 2000 across a variety of cases, while the full FCC has addressed just one, and did so on review of a decision of the Wireless Bureau. *See Applications of Alaska Native Wireless, LLC*, Order, 18 FCC Rcd. 11640 (2003). And the full FCC urges auction participants to review those past Wireless Bureau decisions for guidance; indeed it "has repeatedly cautioned auction applicants to 'review carefully the Commission's decisions regarding the designated entity provisions'"—including prior Wireless Bureau orders. Pet. App. 171a n.352; *accord* Pet. App. 7a.

In recent years, the Wireless Bureau has decided whether a range of specific arrangements between small businesses and larger investors qualify for bidding credits. In many cases, the Wireless Bureau approved or denied applications for bidding credits without significant explanation. However, extensive summaries of the agreements are available on the FCC's website for public inspection—for example, the summary of the Denali agreements is 87 pages long. Thus, those agreements provide the most concrete and useful guidance available to a prudent small business attempting to obtain the capital needed to buy spectrum licenses without ceding control of the licenses.

Petitioners Rely on the Wireless Bureau's Denali and Salmon Decisions

Petitioners are small companies that sought to enter the wireless industry by purchasing spectrum licenses, with the aid of bidding credits, at FCC Auction 97. Pet. App. 8a–9a. Like many small businesses in this situation, Petitioners contracted for capital and management assistance from a larger strategic investor—in this case, DISH Network. Under those contracts, Petitioners retained the "exclusive right and power to manage, operate and control" their businesses. Pet. App. 109a n.205. But, by necessity, and like others before them, they also granted DISH several supervisory rights.

To ensure that DISH's supervision would not reach the level of "*de facto* control," Petitioners relied on the most specific agency guidance available: the Wireless Bureau's prior approvals of the Denali and Salmon agreements. In fact, the vast majority of provisions in Petitioners' agreements were modeled on—and virtually identical to—the terms of the Denali transaction, which "the Wireless Bureau had previously accepted as not evidencing disqualifying *de facto* control." Pet. App. 28a. To name just a few, as in the Denali and Salmon agreements, DISH contributed the significant "capital that [Petitioners] needed to participate in the auction," Pet. App. 8a; *see* Final Opening Br. for Pet'rs–Appellants App. at A9 (D.C. Cir. Apr. 4, 2016), and in return obtained an 85 percent ownership interest in the companies, Pet. App. 9a. In addition, Petitioners (like Denali and Salmon) contracted for DISH to "help them navigate the challenges of building a national wireless network" by managing a range of construction and development tasks. Pet. App. 2a; *see* Final Opening Br. for Pet'rs–Appellants App. at A6–7 (D.C. Cir. Apr. 4, 2016). Petitioners agreed to develop wireless technology that would be interoperable with the technology DISH used for its own wireless services. Pet. App. 75a; *see* Pet. App. 176a n.364. And Petitioners granted DISH input on certain employment decisions. Pet. App. 17a–18a; *see* Pet. App. 46a.

By closely modeling their agreements, often verbatim, on the Wireless Bureau-approved Denali and Salmon agreements, Petitioners reasonably relied on the best available information and guidance. Petitioners also publicly submitted detailed descriptions of their agreements *prior to* Auction 97, as the Commission's rules required. But as is its common practice, the Commission did not review the agreements until after the auction.

Together, Petitioners won spectrum licenses worth $13.3 billion at Auction 97. Pet. App. 2a. They then submitted the applications for those licenses and sought very-small-business bidding credits, which would have discounted the total purchase price to $10 billion. *Id.*

The FCC "Disavows" The Denali and Salmon Decisions to Find DISH Had **De Facto** ***Control***

After the auction, several disgruntled bidders objected to Petitioners receiving bidding credits and urged the FCC to adopt new rules for future auctions. In response, the FCC, after a formal rulemaking, established a "reformed approach" to bidding practices in *future* auctions. *Updating Part 1 Competitive Bidding Rules*, Report & Order, FCC 15-80, WT Docket No. 14-170, ¶ 31 (rel. July 21, 2015). In subsequent remarks to Congress about Petitioners' pending applications, the FCC's chairman suggested that the Commission had decided to apply a test that "had never been applied before." Pet. App. 42a.

Then, in a break from its past practice, the *full* Commission evaluated Petitioners' applications for bidding credits in the first instance, without waiting for the Wireless Bureau's initial decisions. Pet. App. 59a–61a. The FCC denied the bidding credits. It relied principally on two prior FCC orders. The first was the 1994 Fifth Memorandum Opinion and Order, which suggests that *de facto* control is more likely where a larger entity provides "capital and management services." Pet. App. 58a, 107a. The second was *Intermountain Microwave*, the 1963 decision establishing a broad six-factor test for *de facto* control. Pet. App. 108a. Based on those sources, the FCC concluded that the terms of Petitioners' agreements veered from granting DISH permissible supervisory rights into the terrain of *de facto* control. Pet. App. 75a–76a, 113a–118a, 136a–137a, 145a–147a.

The FCC made little effort to square its conclusion with the Wireless Bureau decisions approving analogous contractual terms in the Denali and Salmon agreements. Instead, the FCC purported to "disavow" those decisions. A short footnote to its order explained that "[t]o the extent any prior actions of Commission staff could be read to be inconsistent with our interpretation of the Commission's rules in this order, those actions are not binding on the Commission—

and we hereby expressly disavow them." Pet. App. 172a n.354.

In yet another break from past practices, the FCC deprived Petitioners of any opportunity to "cure" the problems the Commission identified—that is, to negotiate with the Commission to remedy any objectionable features in the agreements. Pet. App. 60a–61a, 45a–46a. Thus, Petitioners were obligated to either pay the full bid price for their spectrum licenses or relinquish some of them. Pet. App. 198a–204a. Petitioners opted to purchase some of the licenses and relinquish the rest—and thus lost licenses worth $3.3 billion. The FCC also imposed a $516 million "interim default penalty"—a penalty that will increase if, after a re-auction, the licenses are sold for less than the $3.3 billion Petitioners bid for them. Pet. App. 11a, 198a–204a.

The D.C. Circuit Holds That Petitioners Had Fair Notice of the FCC's Control Standard

Petitioners appealed the FCC's order to the D.C. Circuit. They argued that the FCC had failed to provide fair notice that Petitioners' agreements would transfer *de facto* control to DISH or that there would be no opportunity to cure purported control issues.

The D.C. Circuit first concluded that Petitioners had received fair notice that their agreements would transfer *de facto* control to DISH. The court did *not* find, however, that the agency's control standard was clear before Auction 97—or that Petitioners' reliance on the Denali and Salmon agreements was unreasonable. To the contrary, the D.C. Circuit recognized that, in light of competing sources of guidance, Petitioners confronted "considerable uncertainty" and "confusion" about the meaning of the FCC's control standard. Pet. App. 44a, 46a. That confusion was particularly acute because older agency decisions, like *Intermountain Microwave*, "predate[d] cellular technology" and did not address the unique economic realities of the modern wireless market. Pet. App. 45a. Nonetheless, the court concluded that Petitioners had received adequate notice on the control issue because they "should reasonably have anticipated that the FCC *might* find them to be under DISH's *de facto* control." Pet. App. *Id.* (emphasis added).

Even so, the D.C. Circuit seemed to perceive the unfairness of this result. Emphasizing the same "confusion" regarding the FCC's control standard, the court held that the FCC failed to give Petitioners notice that *if* the agency found DISH to be in *de facto* control, Petitioners would have no opportunity to cure this defect. Pet. App. 45a–49a. The court thus remanded to the FCC to "give [P]etitioners an opportunity to seek to negotiate a cure for the de facto control the FCC found." Pet. App. 4a.

REASONS FOR GRANTING THE WRIT

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

This Court has recognized "the principle that agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires." *Christopher*, 567 U.S. at 156 & n.15 (quotation marks and brackets omitted). The administrative fair-notice principle is universally recognized, but the courts of appeals have developed divergent standards for applying it. Many courts in fair-notice cases adopt the phrase that an agency must provide "ascertainable certainty"; indeed, the D.C. Circuit invoked that phrase below. *See* Pet. App. 43a. But saying that "fair notice" requires "ascertainable certainty" does not illuminate the fair-notice standard; it just uses different words to describe it. And the circuits' analyses of administrative fair notice in fact reveal markedly different approaches to the standard.

Five circuits have adopted administrative fair notice standards requiring that an agency provide clear notice that it has selected one regulatory interpretation from among other reasonable interpretations before imposing penalties on regulated entities. These standards recognize that the extraordinary deference accorded administrative agencies calls for a more searching inquiry than the Due Process Clause typically calls for when reviewing straightforward judicial interpretation of the law. Two other circuits have adopted a less rigorous standard, one that is satisfied as long as regulated parties *should* have known the agency *might* adopt the interpretation it ultimately did. The remaining circuits have acknowledged the administrative fair notice doctrine but have only vaguely defined its contours. Only this Court can resolve the confusion in the law.

A. Five Circuits Require Clear and Ascertainable Notice of the Agency's Interpretation.

The Third, Fourth, Fifth, Seventh, and Ninth Circuits apply rigorous fair notice standards in the administrative context. None would permit an agency to impose substantial penalties merely by notice that an agency *might* adopt the interpretation in question.

The Third Circuit's decision in *FTC* v. *Wyndham Worldwide Corp*. is particularly lucid in its discussion of the need for a meaningful administrative fair notice standard. 799 F.3d 236, 249 (3d Cir. 2015). The court began by observing that "[t]he level of required notice for a person to be subject to liability varies by circumstance." *Id.* For *judicial* construction of statutes, the court explained that fair notice requirements are satisfied unless "the defendant could not reasonably foresee that a court might adopt the new interpretation of the statute," *id.*—the exact standard the D.C. Circuit applied in this case. But the court explained that "[a] different set of considerations is implicated when agencies are involved in statutory or regulatory interpretation," *id.* at 250; there, "[a] higher standard of fair notice applies." *Id.* at 251. The difference is that in judicial interpretation of statutes, courts "adopt the *best* or *most reasonable* interpretation," but administrative agencies are "often free to adopt *any reasonable construction*, … impos[ing] higher legal obligations than required by the best interpretation." *Id.* at 252. Because agencies are given great deference in construing statutes and even greater deference in construing their own regulations, it is important that regulated parties not be subject to penalties unless they "know with ascertainable certainty an agency's interpretation." *Id.* at 251 (quotation marks omitted).

The Ninth Circuit applies a similar standard. At issue in *United States* v. *AMC Entertainment, Inc.* was a regulation that the Attorney General promulgated under the Americans with Disabilities Act. The regulation required venues like stadiums and movie theaters to provide wheelchair access with "lines of sight comparable to those for members of the general public." 549 F.3d 760, 763–64 (9th Cir. 2008) (quoting 28 C.F.R., pt. 36, app. A, § 4.33.3). The courts struggled to interpret this line-of-sight requirement. Some interpreted it to mean that wheelchair seating must provide an "unobstructed view" over standing patrons. *Id.* at 764–65. Others found that it required only "dispersal of seating for disabled viewers." *Id.* at 765. The government then advanced a third interpretation, in an amicus filing: wheelchair seating must provide "comparable viewing angles" to those provided to the general public. *Id.* at 764–65. When that interpretation first came before the Ninth Circuit, the court found it to be at least reasonable, accepting it as a matter "of proper deference to an agency interpretation of its own regulation." *Id.* at 766.

When the government tried to apply the "comparable viewing angles" interpretation to movie theaters constructed *before* the interpretation was advanced, however, the theaters argued that they lacked fair notice of the standard. The Ninth Circuit agreed. In applying the administrative fair notice doctrine, the court asked whether "a person of ordinary intelligence should have known … that [the regulation] was susceptible *only* to the interpretation the government now champions." *Id.* at 768 (emphasis added). That standard was obviously not satisfied, since all the proposed interpretations were reasonable. *Id.*

The Fourth, Fifth, and Seventh Circuits follow similar standards. The Fourth Circuit has held that an agency must provide "clear notice" of a regulatory interpretation—a standard that is not satisfied where "nothing … forecloses [the agency's] interpretation" of its regulation, but "at the same time nothing mandates it." *United States* v. *Hoechst Celanese Corp.*, 128 F.3d 216, 225 (4th Cir. 1997); *see Consol Buchanan Mining Co.* v. *Sec'y of Labor*, 841 F.3d 642, 648–49 (4th Cir. 2016) ("[P]arties subject to … administrative sanctions are entitled to … clear notice of what conduct is proscribed by a regulation before being subject to monetary penalties for a particular violation." (quotation marks omitted)).

The Fifth Circuit holds agency notice inadequate where the agency applies an interpretation that "does not flow clearly from any authority in existence prior to th[e] action." *Employer Sols. Staffing Grp. II, L.L.C.* v. *Office of Chief Admin. Hearing Officer*, 833 F.3d 480, 489–90 (5th Cir. 2016); *accord Diamond Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976) (an agency must "state with ascertainable certainty what is meant by the standards [it] has promulgated").

And the Seventh Circuit has also invoked the "ascertainable certainty" standard, *Wisconsin Res. Prot. Council* v. *Flambeau Mining Co.*, 727 F.3d 700, 708 (7th Cir. 2013), explaining that "regulations must be written in clear and concise language" in order to satisfy fair notice requirements, *Kropp Forge Co.* v. *Sec'y of Labor*, 657 F.2d 119, 122 (7th Cir. 1981) (quotation marks omitted). By demanding affirmative clarity, these standards require agencies to dispel ambiguity *before* applying one of several competing interpretations to regulated parties.

None of the standards described above would be satisfied merely because a regulated party knew the agency *might* select from among several reasonable interpretations of an ambiguous statute or regulation. And certainly those standards would not permit massive penalties where, as here, "there was considerable uncertainty at the time … about [what] th[e] rules would tolerate." Pet. App. 44a.

B. The D.C. and First Circuits Apply a More Relaxed Standard Satisfied by Notice that an Agency Might Adopt a Particular Interpretation.

The D.C. and First Circuits apply a very lenient standard. The D.C. Circuit's failure to adopt a meaningful administrative fair notice standard is especially ominous for the development of the law, because other courts so often look to the D.C. Circuit for guidance on matters of administrative law. In fact, the First Circuit has followed the D.C. Circuit's lead in adopting a low bar.

This case is Exhibit A. The D.C. Circuit panel began by invoking boilerplate "ascertainable certainty" language. But there is nothing ascertainable or certain about a standard that finds fair notice merely because a regulated party "should have reasonably anticipated" that the agency "might" adopt the interpretation it did. Pet. App. 45a. The court of appeals acknowledged as much in observing that previous FCC decisions had engendered "considerable *uncertainty* at the time of Auction 97 about the degree of control th[e] rules would tolerate." Pet. App. 44a (emphasis added).

In other cases, too, the D.C. Circuit has relaxed or abridged the fair notice inquiry. In one case, for example, the court similarly invoked the phrase "ascertainable certainty," only to reject a fair notice challenge because the agency's interpretation was "a reasonable reading of the regulation's text and purpose," and did not mark "an abrupt change to a longstanding interpretation." *Otis Elevator Co.* v. *Sec'y of Labor*, 762 F.3d 116, 125 (D.C. Cir. 2014).

To be sure, the D.C. Circuit has at times applied that same "ascertainable certainty" label to impose a higher bar. For example, in one case, the court found notice insufficient where an agency, if asked at the time of a violation, "*might* have … given [its] current interpretation," but "*might* have given [ ] the opposite advice." *Rollins Envtl. Servs. (NJ) Inc.* v. *EPA*, 937 F.2d 649, 654 (D.C. Cir. 1991). That standard accords with those applied by the circuits discussed above. *Supra* at IA. *NetworkIP, LLC* v. *FCC*, 548 F.3d 116, 123 (D.C. Cir. 2008) (finding fair notice requirement satisfied where the agency's interpretation was the "*most* reasonable"). But that internal inconsistency is more reason, not less, to review the question presented. Given the D.C. Circuit's centrality where administrative law is concerned, uncertainty about the notice standard applicable to regulated entities is intolerable.

The First Circuit, relying heavily on the D.C. Circuit's muddled applications, has adopted a similarly confused standard. The defendant in *United States* v. *Lachman* argued that a Department of Commerce list of commodities subject to export controls failed to provide fair notice that a certain product was covered. 387 F.3d 42, 44–45 (1st Cir. 2004). The court rejected that argument on the ground that "the regulation here was reasonably susceptible to the construction … adopted." *Id.* at 57. That is effectively the same as the D.C. Circuit ruling here: The defendant should have known that the regulation was "susceptible" to the agency's interpretation, and since that interpretation therefore might be adopted, the defendant had fair notice.

The *Lachman* court then embarked on an extended discussion of the D.C. Circuit's "line of cases," and described them as requiring "ascertainable certainty." *Id.* (quotation marks omitted). But it interpreted those cases as limited "to situations in which: (1) the agency had given conflicting public interpretations of the regulation, or, (2) the regulation is so vague that the ambiguity can only be resolved by deferring to the agency's own interpretation of the regulation … and the agency has failed to provide a sufficient, publicly accessible statement of that interpretation before the conduct in question." *Id.* Ultimately, it found these narrow categories unsatisfied. Although the defendants pointed to conflicting statements from the agency as to the proper interpretation of the statute, the court deemed these statements insufficiently authoritative to bear on the notice question—again, much as the D.C. Circuit did here. *Compare id. with* Pet. App. 45a.

C. The Remaining Circuits Have Acknowledged the Administrative Fair Notice Doctrine but Have Adopted Indeterminate Standards.

The remaining circuits all have acknowledged an administrative fair notice doctrine, and all have had the opportunity to adopt a meaningful standard. Instead, however, they have articulated only vague or incomplete standards—often citing to the D.C. Circuit in the process—further deepening the confusion.

Two circuits, the Sixth and Eleventh, have taken a narrow view of the administrative fair notice doctrine by looking to D.C. Circuit case law. *See Glob. Green, Inc.* v. *SEC*, 631 F. App'x 868, 870–71 (11th Cir. 2015) (acknowledging the fair notice doctrine but citing a D.C. Circuit case to find that that the doctrine applies "only in a very limited set of cases") (quotation marks omitted)); *ECM BioFilms, Inc.* v. *FTC*, 851 F.3d 599, 618–19 (6th Cir. 2017) (citing D.C. Circuit cases for proposition that administrative fair notice doctrine "only applies when agencies seek to impose sufficiently grave or drastic sanctions" (quotation marks omitted)).

The Second Circuit has held that "regulations satisfy due process as long as a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, has fair warning of what the regulations require." *Rock of Ages Corp.* v. *Sec'y of Labor*, 170 F.3d 148, 156 (2d Cir. 1999). The Tenth Circuit, quoting the First Circuit in *Lachman*, has acknowledged that "an agency 'may fail to give sufficient fair notice to justify a penalty if the regulation [at issue] is so ambiguous that a regulated party cannot be expected to arrive at the correct interpretation using standard tools of legal interpretation, must therefore look to the agency for guidance, and the agency failed to articulate its interpretation before imposing a penalty.'" *Excel Corp.* v. *U.S. Dep't of Agric.*, 397 F.3d 1285, 1297 (10th Cir. 2005) (quoting *Lachman*, 387 F.3d at 57). And both the Eighth and Federal Circuits have recognized the administrative fair notice standard without endorsing a particular

standard, leaving litigants to wonder about its content. *See Qwest Corp.* v. *Minn. Pub. Util. Comm'n*, 427 F.3d 1061, 1068–69 (8th Cir. 2005); *Fuji Photo Film Co.* v. *Int'l Trade Comm'n*, 474 F.3d 1281, 1292–93 (Fed. Cir. 2007).

*   *   *

This intractable muddle of standards has developed and persisted over decades. It is inconceivable that the courts of appeals will iron out their differences and coalesce around a uniform standard. Without one, regulated parties will be entitled to meaningful notice in some circuits but not in others—and the circuits in which meaningful notice is not required includes the D.C. Circuit, which hears the largest percentage of administrative appeals. This Court's intervention is sorely needed.

II. The D.C. Circuit's Administrative Fair Notice Standard is Too Lax.

The standard that the court of appeals applied is wrong. This Court's recent decisions illustrate that notice is an essential condition for legitimate administrative adjudication. A more stringent notice standard is vital to constrain administrative agencies from accreting too much power to issue decisions that are unprincipled, unmoored, or discriminatory. And most importantly, a meaningful notice standard is critical for regulated parties seeking to order their conduct in conformance with the law.

A. While this Court has frequently split on questions of administrative deference, the need for agencies to provide fair notice appears to be common ground. Twice in recent years this Court has emphasized the fundamental importance of notice in the administrative context. And it has not hesitated to conduct a searching analysis of agency regulations, decisions, and statements to determine whether an agency has satisfied notice requirements.

At issue in *Christopher* v. *SmithKline Beecham Corp.* were Department of Labor (DOL) regulations interpreting the minimum wage and maximum hours requirements of the Fair Labor Standards Act (FLSA). 567 U.S. at 147. In particular, the regulations concerned an exemption to those requirements for workers employed as "outside salesm[e]n." *Id.* (quotation marks omitted). The meaning of this exemption was important to SmithKline Beecham, a prescription drug manufacturer that employed sales representatives to visit physicians' offices and convince them to prescribe its drugs. *Id.* SmithKline read the DOL's regulations to exempt the sales representatives. The sales reps disagreed and, in 2008, sued SmithKline under FLSA. They pointed to the DOL's own interpretation of its regulations, which would not exempt outside salesmen. Joined by the government as amicus curiae, the sales representatives argued that this interpretation deserved deference.

This Court rejected the argument on fair-notice grounds. The problem with deferring to the DOL's interpretation was not that the interpretation was unreasonable, but that it was not advanced until 2009, after the conduct at issue. Petitioners thus "invoke[d] the DOL's interpretation of ambiguous regulations to impose potentially massive liability … for conduct that occurred well before that interpretation was announced." *Id.* at 155–56. The Court explained that deferring to this interpretation "would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires," *id.* and would "frustrat[e] the notice and predictability purposes of rulemaking." *Id.* at 158 (quotation marks and brackets omitted). The Court declined to "require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference." *Id.* at 158–59. Notably, although four justices dissented on the best interpretation of the DOL's regulations, all agreed it was inappropriate to defer to the DOL's post hoc interpretation.

That same Term, this Court decided *FCC* v. *Fox Television Stations, Inc.*, and it once again rebuked an agency for failing to provide advance notice of its interpretation. 567 U.S. 239, 254–55 (2012). *Fox* concerned the constitutionality of the FCC's regulations concerning indecency—specifically, the FCC's targeting of fleeting expletives or brief nudity. *Id.* at 243. One instance, for example, concerned ABC's airing, in 2003, of a seven-second nude scene. *Id.* at 247–48. Prior FCC rulings—including an unpublished decision addressing a 30-second nude scene—had found fleeting nudity not actionably indecent. *Id.* But later in 2003, the FCC rejected its own prior rulings and ruled in another proceeding that a fleeting expletive was actionable. The FCC then applied its new policy to ABC, fining it over $1.2 million, even though the incident at issue had taken place before the FCC changed its interpretation. *Id.* at 249, 256.

This Court unanimously agreed that the FCC erred in imposing the penalty. No party raised the administrative fair notice doctrine, so this Court had no occasion to apply it. Instead, it relied on the less stringent fair notice baseline that inheres in the Due Process Clause. *Id.* at 253–54. In applying that standard, the Court considered all of the FCC's prior guidance—including unpublished Bureau-level guidance—on fleeting expletives and nudity, including prior published guidelines and FCC decisions, published and unpublished, in place at the time of the incidents. *Id.* at 256–57. In light of all of this guidance, the Court held that ABC lacked notice at the time of the incidents of the interpretation on which the FCC would ultimately rely. *Id.* at 254–55.[1]

The D.C. Circuit here failed to properly take this Court's decision in *Fox* into account. There the Court looked at unpublished FCC Bureau-level guidance—comparable to the Denali and Salmon decisions the Commission disavowed in this case—in deciding that Fox had not been given fair notice. The court of appeals said that *Fox* "does not support treating FCC Bureau decisions as themselves a body of precedent from which the Commission may not deviate without explanation." Pet. App. 35a. But the fair notice issue

[1] It bears noting that *Fox* involved a $1.2 million penalty on a broadcaster. This case involves *$516 million* in default penalties (and perhaps additional default penalties to be assessed after if the licenses are re-auctioned) and a further penalty in the form of the forfeiture of licenses worth $3.3 *billion*. Such a draconian penalty cannot be warranted where there existed "considerable uncertainty at the time of Auction 97 about the degree of control th[e] rules would tolerate." Pet. App. 44a.

is whether the Wireless Bureau-level guidance is relevant in determining whether regulated parties could reasonably ascertain how the rules would be applied and, as in *Fox*, Bureau-level decisions are plainly relevant to that inquiry.

Though neither *Christopher* nor *Fox* presented the opportunity to announce an administrative fair notice standard, the holdings and reasoning in both cast serious doubt on the fair notice standard the court of appeals applied here. In neither of those cases did it suffice that, at the time of the relevant conduct, a party could have anticipated that the agency "*might*" have adopted the interpretation it ultimately did. And both suggest that where prior agency regulations, statements, decisions, and even inaction result in what the court of appeals here called "considerable uncertainty," Pet. App. 44a, regulated parties lack fair notice of an agency's post-hoc interpretation.

B. The court of appeals' standard also undermines the functioning of administrative agencies and the legitimacy of the administrative state more generally—in several ways.

First, the court of appeals' standard gives agencies an irresistible incentive to adopt vague, ambiguous, or open-ended regulations. "[T]he very purpose behind the delegation of lawmaking power to administrative agencies … is to 'resol[ve] … ambiguity in a statutory text.'" *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) (quoting *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991)). But because agencies also enjoy the power to interpret their own regulations, they can "replace[ ] statutory ambiguity with regulatory ambiguity," accreting to themselves "greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process." *Id.*; *see Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 564 U.S. 50, 68–69 (2011) (Scalia, J., concurring); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 655 (1996).

Requiring agencies to provide meaningful notice of legal requirements before they apply them in agency adjudication will discourage this sort of administrative self-delegation. Instead of incentivizing indeterminate regulation, a stricter notice requirement would encourage an agency to work during notice-and-comment rulemaking to appreciate public concerns, foresee issues that might arise, and define regulations with clarity and predictability. *See* 5 U.S.C. § 553(b)–(c) (prescribing notice-and-comment procedures). Or, faced with latent ambiguity of the sort illustrated by *Fox*, an agency could use interpretive rulemaking or policy statements to provide *prospective* guidance reconciling past decisions, clarifying points of confusion, and adopting new interpretations. *See Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203–04 (2015) (permitting agencies to adopt new interpretations through interpretive rulemaking). The law should encourage this sort of reasoned, transparent decisionmaking, and avoid the unfair surprise of agency interpretation at the adjudicatory stage.

Second, and relatedly, the court of appeals' lax notice requirement provides no check on selective or discriminatory decisionmaking. Outside the administrative setting, this Court long ago observed that the requirement of notice restricts "arbitrary and discriminatory enforcement" of the law, because "[a] vague law impermissibly delegates basic policy matters … for resolution on an ad hoc and subjective basis." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108–09 (1972). That risk is all the more acute in the administrative setting because agencies are uniquely empowered when it comes to interpreting and defining legal commands. When an agency interprets the law, it is not so much guided by the relatively reliable interpretive instruments employed by courts as steered by the ever-changing tools of policy wonks, often depending largely on political currents. *See Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) (noting that an agency may "reverse its current view 180 degrees anytime based merely on the shift of political winds").

This case illustrates the point. Before this case, the full Commission had uniformly for the last 23 years delegated case-by-case decisionmaking to the Wireless Bureau. *Supra* at 8. Without specific guidance from the FCC, it was only natural for Petitioners to study, and rely on, recent Wireless Bureau decisions in similar factual circumstances—indeed, the Commission *encouraged* it. Pet. App. 171a n.352. But then, following criticism from disgruntled bidders, the FCC's chairman told Congress that the Commission was planning to apply a test to Petitioners "that had never been applied before." Pet. App. 42a. The full FCC then abandoned its own practice of allowing the

Wireless Bureau to apply the *de facto* control standard *and* "disavow[ed]" the Bureau's prior decisions (as well as the ability to negotiate a cure, which the D.C. Circuit did seize upon).

Third, the court of appeals' standard deprives the public of the critical ability to order their affairs and make informed decisions. "[R]egulated parties should know what is required of them so they may act accordingly." *Fox*, 567 U.S. at 253. Indeed, they *need* to know. Often the stakes are extremely high. Many regulated parties therefore parse every potentially relevant snippet of guidance an administrative agency issues, bearing whatever cost is necessary to do so. Meaningful fair notice respects the reliance interests of regulated parties and minimizes the resources these parties must spend to predict agency conduct and hedge against unpredictability.

III. The Proper Administrative Fair Notice Standard is an Important Issue that Cuts Across Many Administrative Contexts.

Review is further merited because the issue of the proper administrative fair notice standard is deeply important and constantly recurring. The sheer breadth of the modern administrative state guarantees that questions over the required quality and clarity of agency notice will recur with great frequency. This point requires little elaboration. There are hundreds of federal administrative agencies; they make up a "vast and varied federal bureaucracy" that "wields vast power and touches almost every aspect of daily life." *City of Arlington, Tex.* v. *FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (quotation marks omitted). It is critical that these agencies know how much notice they are required to provide—and that courts hold them to the same standard. The regulated public, too, deserves assurances concerning the notice to which they are entitled.

IV. This Is a Worthy Vehicle for Resolving the Appropriate Fair Notice Standard.

This case is a worthy vehicle for resolving the appropriate fair notice standard in the administrative context.

First, there is no dispute that the fair notice doctrine applies in this case. Although agencies have at times advanced the argument in particular cases that administrative action is not severe enough to trigger the fair notice requirement, the FCC has not done so here. Nor could it; the FCC's ruling forced Petitioners to selectively default on licenses worth $3.3 billion, imposed interim default penalties of $516 million, and held out the prospect of still more penalties.

Second, substituting a meaningful fair notice standard in place of the D.C. Circuit's unbridled approach will make a difference in this case. As the decision below recognized, the FCC's scattered guidance regarding the "*de facto* control" standard before the auction created "considerable uncertainty" and "confusion" among potential bidders. Pet. App. 44a–46a. It would have been impossible for Petitioners to ascertain, with any confidence, the appropriate *de facto* control standard without reviewing and abiding by past Wireless Bureau decisions. It would have been irresponsible for any company not to look at prior approved agreements and shape behavior accordingly. And it would have been impossible to predict that the FCC would simply "disavow" those decisions.

Indeed, the Wireless Bureau's approvals and denials of particular contractual arrangements represented the only recent, particularized guidance regulated entities had available to them to navigate by. These decisions generated massive reliance interests, because Petitioners had no choice but to review those case-by-case decisions and copy provisions that had previously passed muster. Was it *possible* that the FCC would, after reviewing previous decisions or interpretations, think them misguided and prefer a different standard? Of course; an agency about-face is always possible. But that result was hardly "ascertainably certain" under the meaningful notice standards applied by the plurality of the circuits, *see supra* at IA. This case thus comes out differently under that standard.

Third, the issue of fair notice is ripe for this Court's review. The D.C. Circuit held that Petitioners received fair notice of the FCC's control standard, and that decision is final. This petition therefore squarely presents an issue of law the determination of which will affect the outcome of this case.

As a separate matter, the D.C. Circuit also remanded so that the FCC could provide Petitioners an opportunity to change their agreements to eliminate the purported transfer of control to DISH. But Petitioners were entitled to rely on the rules as they were applied at the time of Auction 97 and they *did* rely upon them, structuring hugely complex agreements accordingly. These settled expectations have now been scuttled, and whether a mutually advantageous amendment is possible remains to be seen.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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