No. 10-834

IN THE

Supreme Court of the United States

COUNCIL TREE INVESTORS, INC., BETHEL NATIVE CORPORATION, AND THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

BRIEF OF PROFESSOR DANIEL B. RODRIGUEZ AS *AMICUS CURIAE* ON BEHALF OF PETITIONERS

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QUESTION PRESENTED

Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, provides that a reviewing court "*shall*— (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action . . . found to be . . . not in accordance with law . . . [or] without observance of procedure required by law" (emphasis added). In this case, the United States Court of Appeals for the Third Circuit held that the Federal Communications Commission conducted two licensing auctions for electromagnetic spectrum pursuant to seriously deficient, unlawfully promulgated rules. Those new rules effectively precluded significant participation by small businesses in the spectrum licensing auctions, contrary to 47 U.S.C. §§ 309(j)(3)(B) and (4)(D), which require the Commission to design its auctions so as to promote the participation of small businesses therein and to avoid the excessive concentration of licenses. Despite the APA's mandatory language, the Third Circuit concluded that it had discretion to decline to set aside the results of the licensing auctions, or order any other remedy for petitioners' effective exclusion from the auctions, in conflict with the decisions of other circuits. The question presented is:

Whether a reviewing court has the discretion under Section 706 of the APA to decline to set aside, or provide any remedy for, unlawful agency action?

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INTEREST OF THE AMICUS[1]

Professor Daniel B. Rodriguez is a distinguished teacher and scholar of administrative law who has authored an important article on the specific topic of remand without vacatur, the basic practice in dispute in this case and the subject of the petition before this Court. *See* Daniel B. Rodriguez, *"Of Gift Horses and Great Expectations: Remands without Vacatur in Administrative Law,"* 36 Ariz. St. L.J. 599 (2004).

Professor Rodriguez submits this brief in support of petitioners' request for certiorari but without any opinion about, or expertise in, the underlying Federal Communications Commission proceeding involved in this case. His interest is limited to issues concerning remedies and judicial practice under general principles of federal administrative law.

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[1] Pursuant to Supreme Court Rule 37.2(a), amicus represents that counsel of record for all parties received timely notice of the intent to file this brief and all parties have provided written consent. A letter from the Petitioners reflecting their global consent to the filing of amicus curiae briefs is on file with the Clerk of the Court. No counsel for any party has authored this brief in whole or in part, nor has any person or entity, other than amicus and his counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Amicus respectfully urges this Court to grant certiorari in this case in order to resolve a hotly disputed issue in administrative law that is, the question whether and in what circumstances a reviewing court should grant remand without vacatur when the court finds unlawful an administrative agency action. Certiorari is warranted for the following reasons: First, remand without vacatur, a practice of fairly recent origin, is in tension with the language and structure of the Administrative Procedure Act ("APA"); second, the standards the D.C. Circuit and other appellate courts use to decide whether the remand without vacatur device is warranted in a particular case are ill-defined and hard to apply; third, this rudderless discretion threatens important administrative values by creating unfortunate incentives in agencies and relying on courts to make speculative judgments without adequate information; and, finally, this Court can usefully settle a matter of national importance to the process of administrative law by articulating – of the Court declares this practice to be legally permissible – sensible guidelines for the exercise of judicial discretion.

ARGUMENT

I. Remand without vacatur is in tension with the language and structure of the Administrative Procedure Act

Although the APA can be, and certainly has been, criticized as ambiguous in key respects, the text relevant to this dispute over remand without vacatur is a model of clarity. Section 706 provides that a reviewing court "shall . . . set aside [unlawful] agency action." 5 U.S.C. § 706. Be that as it may, reviewing courts – most conspicuously, the D.C. Circuit – have read "shall" out of the statute, arguing in essence that the APA does not disturb the historic power of the federal courts to fashion remedies which suit practical considerations in the complex administrative state of the modern era. See, e.g., *Comcast Corp. v. FCC*, 579 F.3d 1 (2009) *and sources cited therein*. This proposition is in tension with the basic apparatus of administrative remedies embodied in the APA. The APA, *inter alia*, provides the structure in which reviewing courts carry out their responsibilities and exercise their discretion. That some discretion remains notwithstanding the enactment of the APA is clearly correct. However, the general policies underlying the APA and modern administrative law do not provide support for the idea that the APA left undisturbed the pattern of equitable judicial remedies and thus is primarily hortatory rather than mandatory. *See, e.g.*, *Darby v. Cisneros*, 509 U.S. 137 (1993); *Bowen v. Georgetown Hospital*, 488 U.S. 204 (1988); *NLRB v. Food Store Employees Union, Local 347*, 417 U.S. 1 (1974); *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S.

17 (1952). See also Antonin Scalia, "Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court," 1978 Sup. Ct. Rev. 347.

This Court's decision in *Hecht Co. v. Bowles*, 321 U.S. 321 (1944) is not to the contrary. In that case, this Court declined to read the relevant statute to displace district court's traditional equity power to issue or decline to issue injunctions. The decision did not suppose that APA guidelines are subordinate to equity power, but only that Congress must act to displace such power "unequivocal[ly]." 321 U.S. at 329-30. As one judge put it in a recent concurring opinion involving remand without vacatur: "[T]he *Hecht* canon – if it is that – does not preserve a court's remedial discretion . . . if Congress has limited the discretion in clear terms." *Comcast*, 579 F.3d at 12 n.1 (Randolph, J., concurring).

Judicial remedies in administrative law should be understood against the backdrop of the larger administrative law system, a system which is structured since 1946 around the APA's guidelines, along with statutory rules embodied in other pertinent regulatory legislation. While, to be sure, "pragmatism and flexibility have been recurrent and durable themes in the jurisprudence of administrative law remedies,"[2] such pragmatism can best be understood in connection with the responsibilities of reviewing courts to give force to their judgments about the legality of administrative

[2]Ronald M. Levin, 'Vacation' at Sea: Judicial Remedies and Equitable Discretion in Administrative Law, 53 Duke L.J. 291, 345 (2003).

rules. For example, a court may look at a problematic rule as revealing a plausible policy choice by an agency and thus within the scope of agency discretion. In doing so, the court is acting with appropriate humility – that is, it is acting pragmatically. Or a court may find a statute as so open-ended as to leave the court with "no law to apply," thereby concluding that the agency decision is "committed to agency discretion by law." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). Pragmatism and flexibility are sensible lodestars in these contexts. Indeed, the basic prerogative of remand indicates that a pragmatic, rather than a more mechanical, approach, may be warranted in a given case. But just as the agency lacks the power to simply decline to follow a clear rule of administrative procedure because it would be hugely inconvenient or expensive to do so, the reviewing court equally lacks the power to pick and choose among the obligatory rules of the APA in an effort to preserve flexibility and discretion.

II. Even if the remand without vacatur device is a legally permissible option, the standards the courts use to exercise their discretion are ill-defined and hard to apply

The D.C. Circuit, the court most prominent in the development and implementation of the remand without vacatur device, has indicated that the decision to order a remand without vacatur would depend on "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of

an interim change that may itself be changed." *International Union, UMW v. FMSHA*, 920 F.2d 960, 967 (D.C. Cir. 1990); *Accord Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n.*, 988 F.2d 146 (D.C. Cir. 1993). These standards are opaque and incorrigible. Requiring the court to make a judgment about how confident they were in their holding that the agency violated the law is an unusual request; and although focusing on the consequences of the change jibes with analogous situations of judicial discretion in the remedial context, the nexus between consequences and the risk that the interim change "may itself be changed" poses a different matter. The reviewing court will typically lack the information that is centrally relevant to his determination, that is, the likelihood that the agency will take another stab at creating a rule and, thereafter, the likelihood that a panel of the circuit court will or will not find that substitute rule (and rationale) wanting.

To see how some of these difficulties might emerge, consider the different contexts in which agency decisions post-remand will come to reviewing courts: First, and perhaps most commonly, there is the situation in which the agency must come up with a different rationale for essentially the same rule. *See, e.g.*, *Milk Train, Inc. v. Veneman*, 310 F.3d 747 (D.C. Cir. 2002). Predicting whether the agency will be able to furnish a suitable rationale is a difficult enterprise at best, and it surely goes beyond what this Court has determined to be the proper role of the reviewing court. *See SEC v. Chenery*, 318 U.S. 80, 87-89 (1943) (holding that reviewing courts should not uphold an agency decision on a basis other than the one advanced by the agency). Second, there are

situations in which the rationale for the agency action is unclear. *See Checkosky v. SEC*, 23 F.3d 452 (D.C. Cir. 1994). While remand without vacatur in order to yield a clearer basis for evaluating the agency's reasoning seems most defensible in this circumstance, this Court has not warranted this practice and, indeed, the circuit courts' adoption of the practice is of fairly recent origin.[3] Third, and finally, situations arise in which the agency's rationale is straightforward and, although it cannot be squared with the law, the court invokes "obvious hardship" to justify a no-vacatur order. *See, e.g., American Medical Ass'n v. Reno*, 57 F.3d 1129 (D.C. Cir. 1995). This is the reasoning behind the Third Circuit's remand without vacatur decision in this case. In this third category of cases, the problem is not a lack of information, but a patent unwillingness to upset the apple cart. That these three scenarios involve profoundly different situations and thus implicate very different rationales and policy matters reveals why this broad judicial discretion is best characterized as rudderless.

The problem of incoherent standards is especially acute in the context of administrative law. Here the standard for determining whether remand without vacatur is appropriate requires not only an assessment by the reviewing court about the costs and benefits of the rule's invalidation, but also, critically, on speculations about what an agency may

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[3] See Levin, *Remand*, supra n.1 at 298 ("Until recently, reviewing courts routinely vacated agency actions that they found to have been rendered unlawfully. That practice was generally accepted and essentially taken for granted").

or may not do after the remand order. The basic puzzle, then, is that a court is supposed to make a judgment about whether or not to vacate the rule without knowing what the agency will do and how they will do it. Judge Randolph, who has frequently dissented from his court's remand without vacatur practice, puts his finger on the essential dilemma: "[R]emand-only decisions are being made without sufficient information, which is one of the main reasons the cases are so difficult to reconcile." *NRDC v. EPA*, 489 F.3d 1250, 1263 (Randolph, J., concurring). *See also Comcast*, 579 F.3d at 11 (Randolph, J., concurring); *Checkosky*, 23 F.3d at 491 (Randolph, J., dissenting in part).

III. This rudderless discretion threatens important administrative law values

The uncertainty embedded in the remand without vacatur doctrine presents perils for both administrative agencies and reviewing courts. With respect to agencies, key decisionmakers may make the unfortunate calculation that adopting an administrative rule that is ill-reasoned and ultimately unsupportable under the APA or the relevant organic act is worth the price of invalidation, given that no direct consequence, other than a remand, follows from a court's order. Without making any extravagant claim that such calculations are frequent, that administrative decisionmakers have the opportunity which remand without vacatur makes possible to game the system is for that reason alone a risk not worth running. The consequences for

sound administration are certainly problematic and perhaps worse than that.

This practice disrupts the work of reviewing courts as well. Without clear standards for sorting out when remand without vacatur is warranted and when it is not, courts will exercise their discretion in unpredictable, if not random, ways. One temptation, illustrated well by this case, is to look at the economic impact of their judgment and to conclude that some agency actions are "too big to fail." By hypothesis, rules which matter greatly to the well-being of particular persons impacted by them but are not of widespread economic consequence will therefore fall more easily under the category of "discretion" and will more commonly be subject to remand without vacatur. To be fair, this depiction, as with the claim made about agency incentives above, is theoretical and speculative. But supposing that agencies and reviewing courts act consistently with not only the doctrinal rules and standards announced by this Court and other federal courts but also with the structure of incentives generated by doctrine, we should be wary of the unintended consequences of a judicial practice which is so flexible as to be unmoored in transparent, articulable, and predictable guidelines.[4]

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[4] An additional consideration, noted here but not explored in depth, is the salutary incentives that vacating agency rules would perhaps have for Congress to address these issues with clearer legislation. As one commentator shrewdly notes, "vacatur also advances the original structure of constitutional lawmaking by giving Congress incentives to replace defective agency rules with specific legislation." Boris Bershteyn, Note,

This rudderless discretion is of particular concern in the context of administrative law. Regulatory agencies wield immense public power. The consequences of both good and bad rules can be enormous. That these agencies act in the lacuna of formal constitutional structure, that is, they are not part of any of the three named institutions of the federal government but are, as famously noted, a "headless fourth branch of government," raises special concerns for American democracy and constitutional governance. Our system of law works hard to assuage these concerns by creating sensible checks on administrative power. The function of these checks is undermined where the rules of hard to identify and to follow. Although it is always tempting to valorize pragmatism and flexibility in judicial review of agency action, especially when it pertains to the crafting and implementation of remedies, this Court has made clear in its administrative law jurisprudence that both agencies and reviewing courts should be guided by clear, transparent, and reliably enforced legal rules. *See, e.g., Georgetown Hospital*, 488 U.S. 204, 208 (1988) (declined to find agency discretion to engage in retroactive rulemaking "unless that power is conveyed by Congress in express terms); *see also id.* at 216-25 (Scalia, J., concurring) (acceptance of agency's position would "make a mockery . . . of the APA") (quoting from court below at 821 F.2d at 758).[5]

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*An Article I, Section 7 Perspective on Administrative Law Remedies,*114 Yale L.J. 359, 391 (2004).

[5] It is telling that the remand without vacatur devise arose soon after this Court's *Georgetown Hospital* decision. Indeed, Professor Richard Pierce has noted, remand without vacatur

IV. This Court should consider this case to determine whether remand without vacatur is legally permissible and, if concluding that the practice is permissible, clarify the circumstances under which reviewing courts should exercise their discretion to employ or not to employ the practice

Neither this case nor, frankly, any other case will provide an ideal vehicle for this Court to decide and explain once-and-for-all what it means for reviewing courts to have meaningful remedial discretion. However, this Court should take the opportunity presented by this case to establish a clearer set of guidelines for determining when remand without vacatur is and is not appropriate. At the very least, these guidelines should be shaped by considerations that (1) can be reconciled at both the specific and general level with the APA's procedural structure and purpose, (2) involve considerations that a reviewing court can evaluate without resort to predictions about future agency behavior, and (3) do not create unfortunate incentives for administrative agencies to game the system after remand. While not presuming

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"was motivated largely by a desire to avoid the potential disruptive effects" of *Georgetown Hospital.* Richard J. Pierce, Jr., *"Seven Ways to Deossify Agency Rulemaking,"* 47 Admin. L. Rev. 59, 75-76 (1995). Perhaps so. But one need not attribute particular motives to judges on the D.C. Circuit or elsewhere to reach the conclusion that administrative law remedies must track the requirements of the APA – not only as a matter of judicial fidelity to statutory requirements, but because of the sound policy reasons for tethering both administrative and judicial discretion to the rule of law in regulatory administration.

here to fashion a set of coherent guidelines for this purpose, this Court would greatly assist the development of administrative law remedies by taking the opportunity to clarify whether and when remedial discretion is appropriate in the context of judicial review of agency rulemaking.

CONCLUSION

For the foregoing reasons, as well as those set for in the petition, this *amicus curiae* urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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