No. 10-__

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

PETITION FOR A WRIT OF CERTIORARI

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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?

PARTIES TO THE PROCEEDING BELOW

The petitioners in this case include Council Tree Investors, Inc., Bethel Native Corporation, and the Minority Media and Telecommunications Council.[1]

The respondents include the Federal Communications Commission and the United States of America.

The intervenors on the side of respondents include CTIA – The Wireless Association, T-Mobile USA, Inc. and Cellco Partnership d/b/a Verizon Wireless.

CORPORATE DISCLOSURE STATEMENT

No petitioner has a parent company and no publicly held company owns 10% or more of the stock of any petitioner.

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[1] At the time of the December 1, 2009 oral argument before the Third Circuit, Council Tree Investors, Inc. informed the court of its name change from Council Tree Communications, Inc., but this change was not reflected in the case caption of the court's opinion.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Council Tree Investors, Inc. ("Council Tree"), Bethel Native Corporation ("BNC"), and The Minority Media and Telecommunications Council respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 619 F.3d at 235.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2010. Pet. App. 1a. Justice Alito extended the time for filing the petition to and including December 22, 2010. No. 10A467. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Reproduced in an appendix to this petition are the relevant provisions of (1) the Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.* ("APA"); and (2) the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.* ("Communications Act").

STATEMENT OF THE CASE

I. Introduction

This petition presents a question of vital importance concerning the remedy required under

the APA for unlawful agency action. In this case, the Third Circuit held that the Federal Communications Commission ("FCC" or "Commission") had conducted two important spectrum licensing auctions pursuant to unlawful rules. Those rules pervasively excluded small businesses, including petitioners, from competing in the auctions, contrary to key provisions of the Communications Act that require the FCC to take steps to prevent concentration of the nation's airwaves in the hands of large incumbent carriers. Although the Third Circuit set aside the rules as unlawfully promulgated, and did not question their devastating consequences for small businesses in the auctions, the court of appeals declined to set aside the auction results or order any other relief for petitioners' injuries. That decision was premised on that court's view that Section 706 of the APA – which provides that a reviewing court "shall . . . set aside" unlawful agency action – allows reviewing courts significant remedial discretion, including the authority to decline to set aside or otherwise remedy such unlawful action. That interpretation of the APA is the subject of deep and historic divisions within the circuits that should be resolved by this Court in this case.

II. Statutory/Regulatory Framework

1. The Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.*, directs the FCC to auction licenses for publicly-owned electromagnetic spectrum. 47 U.S.C. § 309(j) (2006). Congress viewed the auctions as an opportunity to allow new entrants into a heavily concentrated telecommunications industry and, therefore, in order to prevent the largest and

best-financed incumbent companies from dominating licensing auctions, Congress directed the FCC to design an auction system that seeks to "promot[e] economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses . . . ," while also seeking the "avoidance of unjust enrichment through the methods employed to award" licenses. *Id.* §§ 309(j)(3)(B), (C); *see also id.* § 309(j)(4)(D). Small business entities Congress intended to assist are classified by the FCC as "designated entities," 47 C.F.R. § 1.2110(a) (2005), also known in agency parlance as "DEs."

The FCC implemented these directives through a number of regulatory measures. To help DEs counteract the substantial financial advantages enjoyed by incumbents, FCC regulations grant DEs auction "bidding credits" that reduce the amounts winning DEs pay by a specified percentage. *Id.* § 1.2110(f) (2005). The amount of the credit varies with the average gross annual revenues for the preceding three years of the entity controlling the DE. *Id.* § 1.2110(f)(2)(i)-(iii) (2005). To avoid "unjust enrichment," however, the FCC imposes a graduated system of penalties on a DE that loses DE eligibility or sells its acquired spectrum licenses to a non-DE within a specified period of time after acquisition, a period set at five years for almost a decade prior to the rulemaking challenged in this case. Pet'rs Br. 7 n.7; *see also* 47 C.F.R. § 1.2111(d)(2) (2005).

At the same time, the Commission historically recognized that it was unrealistic to think that new entrant DEs could immediately amass enough capital

not only to build new wireless network facilities, but also to sell telecommunications services directly to customers in retail competition with large, entrenched incumbents. Consequently, FCC regulations and policies historically endeavored to promote competition by allowing DEs the flexibility to sell spectrum at wholesale and to lease substantial quantities of spectrum to third parties, without triggering the unjust enrichment penalties.[2] By allowing successful DE bidders to generate immediate sources of wholesale and resale revenue, the Commission enabled startup DEs to attract outside investors who would otherwise be unwilling to risk waiting for such new businesses to try to establish themselves in the retail marketplace against such long competitive odds. With such flexibility, DEs could use their licenses to compete with the largest incumbents through such means as alliances with other companies, already established in that marketplace, that have an abiding need for additional spectrum capacity.

2. The promulgation of these regulations, their subsequent amendment, and the licensing auctions themselves, are governed by the APA, 5 U.S.C.

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[2] Pet. App. 40a (quoting *In re Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and Further Notice of Proposed Rulemaking, 18 F.C.C.R. 20604, 20654-55 (2003)). The "leasing" model allows a *lessee* to use spectrum leased from a DE to provide service to consumers over technical facilities which that *lessee* has already constructed and owns, whereas the "wholesale" model calls for the DE that owns the spectrum to build out and operate new technical facilities and then *wholesale* spectrum capacity to third parties who provide service to consumers.

§§ 551(13), 553. Section 553 of the APA obligates agencies to publish in the Federal Register "[g]eneral notice of proposed rule making," including "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3) (2006). These requirements "serve important purposes of agency accountability and reasoned decisionmaking," that are at the core of the APA. *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995).

The statute further prohibits agency action that is "arbitrary [or] capricious," and creates a private right of action to challenge agency violations of law. 5 U.S.C. §§ 702, 706(2)(A) (2006). As part of the Act's enforcement regime, Section 706 mandates that a court reviewing challenged agency action

> 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.

Id. §§ 706(1), 706(2)(A), (D).

III. Procedural History

1. In 2006, the FCC conducted a major auction (referred to as "Auction 66") for licenses for large amounts of highly desirable electromagnetic spectrum allotted for the provision of advanced wireless services.[3] Petitioners and other DEs

[3] The FCC had begun planning for Auction 66 many years earlier. *See generally Second Report and Order*, ET Docket No. 00-258, 17 F.C.C.R. 23193 (2002).

engaged in extensive preparations to participate in the auction, negotiating partnerships and working to obtain investment funding from various sources based on the then-existing DE rules. *See* CA-JA 1267-68, 1277, 1537-38.[4]

In February 2006, just three months before applications were due for the scheduled June 2006 commencement of Auction 66, the FCC announced that it was undertaking a rulemaking to make certain limited modifications to the DE program, to be applied to the upcoming Auction 66 and all subsequent auctions.[5] In particular, the Commission proposed to preclude certain material relationships between DEs and large, in-region incumbent wireless carriers and also requested comment on whether to extend any such limitations to DE relationships with other large companies with significant communications interests. The FCC gave no indication that it was contemplating any larger changes, and petitioners Council Tree and BNC continued to prepare for Auction 66.

However, in April 2006, a little more than two weeks before Auction 66 applications were due, the

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[4] The administrative record contained in the Joint Appendix and Supplemental Joint Appendix before the Third Circuit is hereby cited to as "CA-JA" or "CA-SJA," respectively.

[5] *See Further Notice of Proposed Rule Making*, WT Docket No. 05-211, 21 F.C.C.R. 1753 (2006). CA-JA 60.

FCC issued final rules[6] that bore no resemblance to those in the proposed rulemaking and instead dramatically altered the DE regulations in ways that substantially harmed DEs, ultimately preventing petitioners from competing with the incumbent carriers in Auction 66 and any subsequent licensing auction. In particular, the new rules:

(1) *doubled* the unjust enrichment penalty repayment period from five to ten years ("Ten Year Rule") and made corresponding changes in the related schedule of graduated repayment penalties over those ten years, including the imposition of a 100 percent bid credit repayment obligation (plus interest) during the first five years;[7]

(2) *eliminated* DE eligibility altogether for any entity that leased or resold (including on a wholesale basis) to third parties more than 50 percent of the aggregate spectrum capacity won at auction ("50 Percent Rule");[8] and

(3) through changes in the rules for determining a DE's gross revenues (and, therefore, its

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[6] *Second Report and Order and Second Further Notice of Proposed Rule Making*, WT Docket No. 05-211, 21 F.C.C.R. 4753 (2006) ("*Second R&O*"), CA-JA 82, *recon. granted in part and denied in part sua sponte, Order on Reconsideration of the Second Report and Order*, WT Docket No. 05-211, 21 F.C.C.R. 6703 (2006) ("*First Reconsideration Order*"), CA-JA 142, *recon. denied, Second Order on Reconsideration of the Second Report and Order*, WT Docket No. 05-211, 23 F.C.C.R. 5425 (2008) ("*Second Reconsideration Order*"), CA-SJA 29.

[7] *See* 47 C.F.R. § 1.2111(d)(2)(i) (2006) (now vacated).

[8] *See id.* § 1.2110(b)(3)(iv)(A) (now vacated).

> eligibility for DE status), effectively limited DEs to leasing or reselling (including on a wholesale basis) to any single third party no more than twenty-five percent of the aggregate spectrum capacity won at auction ("25 Percent Rule").[9]

2. Petitioners immediately challenged the new rules as adopted in contravention of the APA notice and comment provisions and as substantively arbitrary and capricious. In a petition for reconsideration (and expedited request for stay) filed with the FCC, CA-JA 1279 and 1245, respectively, petitioners pointed out that the 11th hour rule changes had emerged without warning from a proceeding that was originally focused primarily on whether to limit large incumbent wireless service provider involvement in the DE program. *See id.* at 1281 and 1285.

Petitioners further pointed out that substantively, the new rules would have a devastating effect on DEs' business plans and access to capital in Auction 66, by driving away those able and willing to invest in DEs. *Id.* at 1254-1255. Petitioners emphasized that no rational investor would tolerate having to retain ownership of an expensive asset for *ten years* without a viable exit plan in a field as dynamic as telecommunications. *Id.*

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[9] The rule accomplished this result by attributing to each DE the gross revenues of any company to which it leased or resold this amount of spectrum capacity, which would in most cases have the effect of putting the DE's gross revenues above the maximum level permitted for DE status eligibility. *See id.* § 1.2110(b)(3)(iv)(B) (2006).

Moreover, the 50 Percent Rule effectively required all DEs to use at least half of their spectrum to compete directly with entrenched incumbents in the *retail* marketplace, where an incumbent's advantages are most pronounced (*e.g.*, advertising, storefront presence, branding). *See id.* at 1524, 1558. The combination of rules deprived DEs of flexibility essential to attracting start-up capital, causing the immediate withdrawal of petitioners' private equity investors and significant strategic partners cultivated over many months. *See id.* at 1527, 1538.[10]

3. The FCC declined to grant petitioners' reconsideration and stay requests, although some Commissioners expressed ambivalence and concern about the new DE rules. FCC Chairman Kevin Martin stated his belief that these "last-minute" changes were not "needed" but that he agreed to them only to "obtain the support" necessary to ensure that the Auction 66 would be held in the Summer of 2006. CA-JA 166. Commissioner Jonathan Adelstein, who had earlier noted that the rule changes were made on an "incredibly aggressive" timetable, *id.* at 80, worried on reconsideration that they, and the FCC's subsequent "legal maneuvering" in the "troubled proceeding," might "prove to be the undoing of [the FCC's] most significant auction in 10 years." *Id.* at 168.

Petitioners sought an emergency stay of the rule changes and of Auction 66 from the Third Circuit.

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[10] In fact, the rule revisions prevented Council Tree from bidding to implement a business plan that called for the emergence of a new nationwide competitive wireless carrier network. Pet'rs Supp. App. V, Tab 1.

The court of appeals denied the stay and the auction proceeded. Pet. App. 24a-26a.

4. Petitioners' objections proved prophetic, as the new rule changes ultimately had a dramatic impact on DE performance not only at Auction 66, but also at a second major spectrum licensing auction, "Auction 73," conducted pursuant to the new DE rules early in 2008. Historically, DEs had won on average 70% of auction licenses, measured by value. *Id.* at 26a-27a.[11] But DEs won just 4% of the nearly $14 billion worth of auctioned licenses in Auction 66. *Id.* at 26a. In contrast, four large bidders won 78% of the total dollar value of the licenses auctioned. Pet'rs Supp. App. III, Tab 1, Exh. H.

Those results were so startling that the Office of Advocacy of the U.S. Small Business Administration asked the FCC to suspend application of the demonstrably harmful new rules to Auction 73. Pet'rs Supp. Br. 8 n.12. The FCC summarily rejected that request,[12] and the results in Auction 73 were even worse. That auction generated more than $19 billion in winning bids, but DEs' percentage of the total dollar value fell even more precipitously, to 2.6%. Pet. App. 27a. Just two companies, Verizon Wireless and AT&T Wireless, captured more than 84% of the total dollar value of the licenses auctioned. Pet'rs Supp. App. III, Tab 1, Exh. I.

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[11] That is, in an auction that garnered $100 million in winning bids, DEs typically purchased approximately $70 million worth of spectrum.

[12] *See Second Report and Order*, WT Docket No. 06-150, 22 F.C.C.R. 15289, 15472 n.1083 (2007).

Thus, despite Congress's intent that the auctions be structured to increase competition and avoid concentration of spectrum licenses in the hands of a few dominant carriers, under the new rules, by 2008, only four companies controlled 90% of subscribers in the mobile telephone market, up from 62.6% controlled just five years earlier by the top four companies.[13]

5. Petitioners sought judicial review of the rule changes and both licensing auctions in the Third Circuit.[14] On August 24, 2010, the Third Circuit issued its opinion, striking down the most significant rule changes but declining to vacate the license sales or provide any remedy for petitioners' effective exclusion from the auctions.

a. The court first narrowly upheld the 25 Percent Rule, although it found it a "close" question whether the rule was arbitrary and capricious, given its effect

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[13] *Compare Annual Services Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile*, Ninth Report, WT Docket No. 04-111, 19 F.C.C.R. 20597, 20697 (2004) (reporting 2003 subscriber by carrier data), *with Annual Services Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile*, Fourteenth Report, WT Docket No. 09-66, 25 F.C.C.R. 11407, 11648 (2010) (reporting 2008 subscriber by carrier data).

[14] The court ruled that petitioners' initial petition was premature, as the Commission had not yet issued a final order disposing of petitioners' request for reconsideration of the rule changes. *See Council Tree Comm'ns v. FCC*, 503 F.3d 284, 293 (3d Cir. 2007). When the Commission continued to fail to act on the reconsideration petition, petitioners sought a writ of mandamus, after which the Commission finally denied reconsideration. *Second Reconsideration Order*, *supra* note 6. Petitioners then filed the present case in the Third Circuit.

on DEs' ability to raise capital and the FCC's limited justification for the rule. Pet. App. 34a.

Turning to the 50 Percent and Ten Year Rules, the court expressed serious doubt whether either was substantively lawful. The panel "note[d] that the FCC does not appear to have thoroughly considered the impact of the extended repayment schedule on DEs' ability to retain financing." *Id.* at 46a n.10. It further found that the Commission was "confused" about "the maximum period for which investors are willing to lock up their capital (before being able to liquidate the spectrum license, in the event the DE proves unprofitable) . . . ." *Id.* at 46a-47a n.10. Likewise, the court criticized the agency's "inattention to the nature of the wireless wholesaling business," in which a DE would "build and operate" new, wireless transmission facilities and then sell that new capacity to other existing companies, thereby promoting competition. *See id.* at 42a n.8.

Ultimately, however, the court concluded that it did not have to decide whether the rule changes were arbitrary and capricious, because they were made in clear violation of the APA's notice and comment requirements. *Id.* The court found that the "contrast could not be more stark between the transparent discussion of [the issues in a prior rulemaking] and the run up to the rules promulgated in 2006." *Id.* at 41a. In this case, the Further Notice of Proposed Rulemaking "had not so much as hinted that" the Commission was contemplating anything like the 50 Percent Rule. *Id.* at 39a. Similarly, the court found that the FCC had failed to provide even "inferential notice" of the Ten Year Rule, *id.* at 44a, observing that "[i]ndeed, no commenter manifested

an understanding that the FCC was considering changing the existing repayment schedule." *Id.* at 45a.

b. The court then turned to remedy. The FCC and intervenors had argued that, even if the rules had been issued in violation of the APA, the Third Circuit should provide no remedy for petitioners' injuries, but should instead leave undisturbed both the auction results and the illegally issued rules, while remanding the case to give the Commission an opportunity to retain the rules pursuant to proper procedures. *See id.* at 47a. In the alternative, the Commission and intervenors argued that if petitioners were entitled to a remedy for their injuries, the court should either vacate the rules and leave the auctions intact, or follow precedent from the D.C. Circuit and remand the case to allow the Commission to craft appropriate alternative relief relating to the auctions. *Id.* at 49a; *see also* Resp'ts Supp. Br. 33-34 (citing *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1171-72 (D.C. Cir. 1987)); Intervenors CTIA - The Wireless Association and T-Mobile USA, Inc. Supp. Br. 16-17 (citing, *inter alia*, *Freeman Eng'g Assocs. v. FCC*, 103 F.3d 169 (D.C. Cir. 1997)).

Petitioners, on the other hand, argued that a remand without vacatur was impermissible, noting that "[t]he APA's command that '[t]he reviewing court shall . . . set aside [unlawful] agency action,' 5 U.S.C. § 706(2)(A), means quite straightforwardly, that 'a "reviewing court" . . . "shall" – **not may** – "hold unlawful and set aside" the agency action. Setting aside means vacating; no other meaning is apparent.'" Pet'rs Supp. Br. 25 n.43 (quoting

Checkosky v. SEC, 23 F.3d 452, 491 (D.C. Cir. 1994) (Randolph, J., dissenting in part) (emphasis in original) (some internal citations omitted)). Petitioners further insisted that a "prospective-only" remedy that set aside the rules for future auctions, but provided no remedy for the past harm done to DEs, would be entirely inadequate. *Id.* at 36. Instead, they asked the Third Circuit to set aside the rules and, as this Court had done in *FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293 (2003), vacate the auction results. Pet'rs Supp. Br. at 25-26; Pet'rs Reply Br. 23, 28.

In light of the "serious" deficiencies in the rulemaking process, the Third Circuit denied the Commission's request for remand without vacatur of the Ten Year Rule and the 50 Percent Rule ("Vacated Rules"), without resolving there petitioners' claim that the plain language of the APA deprived the court of the discretion to decline to set aside an unlawful agency action. Pet. App. 49a & n.13. The court did not hesitate, however, to treat its decision of whether to set aside the rest of the challenged agency action – the FCC's licensing auctions conducted pursuant to the Vacated Rules – as a matter of equitable discretion. It concluded that the difficulties and assumed inequities of reinitiating the spectrum license sales justified providing no remedy at all with respect to the auctions themselves. *Id.* at 48a. The court did not dispute that the FCC has been required to vacate the results of unlawfully conducted auctions in the past, as demonstrated in *NextWave*. And the court acknowledged that it would be possible to mitigate the impact of a rescission by allowing winning bidders to maintain their licenses "unless

and until they are won by another bidder at re-auction." *Id.* Nonetheless, the court concluded that "it would be imprudent and unfair to order rescission of the auction results." *Id.* at 49a.

At the same time, the court declined to order any other relief to compensate for the unfairness to petitioners inherent in refusing to vacate the spectrum license sales or to remand the case to the FCC to consider whether some alternative form of relief was appropriate and available to address petitioners' injuries. *See id.*

REASONS FOR GRANTING THE WRIT

This case raises important questions concerning the remedy required by Section 706 of the APA, 5 U.S.C. § 706, when the court finds that a federal agency has acted unlawfully. The decision below adds to a deep and historic division of authority within the circuits.

I. This Court Should Resolve The Division Among The Courts Of Appeals On The Important Question Of Whether Section 706 Deprives Reviewing Courts Of The Discretion To Decline To Set Aside Unlawful Agency Action.

This case presents the Court with an opportunity to address and resolve an unsettled issue of profound and recurring importance within the field of administrative law. Under Section 706, 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— (A) arbitrary, capricious, an abuse of discretion,

or otherwise not in accordance with law; . . . [or] (D) without observance of procedure required by law." 5 U.S.C. § 706 (emphasis added). Some circuits have held that this seemingly mandatory language is permissive, allowing courts to exercise equitable discretion to decline to set aside unlawful agency action. Others have read the same language to mean precisely the opposite, construing "shall" to preclude any room for equitable discretion. The conflict is considered and will not be resolved absent a decision from this Court. Accordingly, as a leading treatise has noted, "[t]he Supreme Court needs to resolve the growing dispute about the range of remedies available to a reviewing court when the court detects one or more flaws or gaps in an agency's reasoning in support of a rule." Richard J. Pierce, Jr., *Administrative Law Treatise* § 7.13, at 693 (5th ed. 2010).

A. The Circuits Are Intractably Divided Over Whether Courts Retain Discretion To Refuse To Set Aside Unlawful Agency Action Under Section 706.

For many years after enactment of the APA, the practice of vacating unlawful agency action as a matter of course was "generally accepted and relatively uncontroversial." American Bar Association, Section of Administrative Law and Regulatory Practice and Business Law, Report to the

House of Delegates 1, 1 (1997).[15] By the early 1990s, however, the D.C. Circuit had confirmed its departure from the plain language of Section 706 in favor of exercising equitable discretion to remedy APA violations. That practice has also been adopted by the Ninth and now the Third. However, the Tenth Circuit has directly rejected these Circuits' interpretation of Section 706, concluding that the provision's mandatory language means what it says.

1. Under the D.C. Circuit's "remand without vacatur" practice, an "inadequately supported rule . . . need not necessarily be vacated." *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993)). Instead, "[t]he decision whether to vacate depends on the seriousness of the [rule's] deficiencies . . . and the disruptive consequences of an interim change that may itself be changed." *Comcast*, 579 F.3d at 8 (quoting *Allied-Signal*, 988 F.2d at 150-51); *see, e.g.*,

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[15] *See also* Merrick B. Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 505, 568 (1985) ("Traditionally, courts faced with an arbitrary and capricious regulatory decision . . . normally vacate[] the decision and remand[] the matter to the agency for further proceedings 'consistent with' the court's opinion."); Ronald M. Levin, *Vacation at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291, 298 (2003) ("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."); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59, 75 (1995) ("Until the 1990s, a reviewing court routinely vacated and remanded an agency rule if the court held the rule arbitrary and capricious . . . .").

Natural Res. Def. Council v. EPA, 489 F.3d 1364, 1374-75 (D.C. Cir. 2007); *see In re Barr Labs., Inc.*, 930 F.2d 72, 74-76 (D.C. Cir. 1991).

Judges within the D.C. Circuit have objected that the court's remand without vacatur practice cannot be squared with the plain language of Section 706. Judge Randolph, for example, has argued the APA requires "in the clearest possible terms" that a reviewing court faced with an unlawful "agency decision 'shall' – **not may** – 'hold unlawful and set aside' the agency action." *Checkosky v. SEC*, 23 F.3d 452, 491 (D.C. Cir. 1994) (Randolph, J., dissenting in part) (emphasis in original). Remanding without vacating, therefore, is "contrary to law. It rests on thin air. No statute governing judicial review of agency action permits such a disposition and the controlling statute – 5 U.S.C. § 706(2)(A) – flatly prohibits it." *Id.* at 490; *accord Comcast Corp.*, 579 F.3d at 10 (Randolph, J., concurring) ("'Set aside' means vacate, according to the dictionaries and the common understanding of judges, to whom the provision is addressed. And 'shall' means 'must.' I see no play in the joints."); *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 757-58 (D.C. Cir. 2002) (Sentelle, J., dissenting).

The Ninth Circuit has adopted the same interpretation of Section 706, refusing to set aside unlawful agency action for equitable reasons. *See, e.g., Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) ("Ordinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid. However, when equity demands, the regulation can be left in place while the agency follows the necessary procedures.") (citation

omitted); *W. Oil and Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980).[16]

The Third Circuit followed suit in this case. Although the court vacated the unlawfully promulgated rules, it made clear that it did not do so under the compulsion of the mandatory language of Section 706, but rather, because it viewed vacatur as the most appropriate remedy. *See* Pet. App. 49a n.13 (declining to exercise any discretion court might have to refuse vacatur). At the same time, the panel refused to "exercise [its] equitable authority to rescind" the auctions conducted pursuant to the unlawful rules, *id.* at 47a, because it considered that result "imprudent and unfair," *id.* at 49a, and not in "the public interest." *Id.* at 48a. Accordingly, while the court of appeals found no need to decide whether it had discretion to refuse to vacate the *rules*, it did not hesitate to treat the proper remedy for the unlawful auctions as a matter of discretion, consistent with the law in the Ninth and D.C. Circuits.

2. That assertion of discretionary authority has been squarely rejected by the Tenth Circuit. In *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir.

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[16] The First, Fifth, and Federal Circuits have taken a more limited, phased approach, holding in certain cases that courts have discretion to remand a case to an agency for a fuller explanation of the agency's rationale, without deciding whether the agency action was unlawful, or vacating the agency action pending further proceedings on remand. *See, e.g., Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001); *Cent. & S. W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1380 (Fed. Cir. 2001).

1999), the Tenth Circuit was faced with the Department of the Interior's decision to unlawfully withhold, beyond an expired statutory deadline, a determination on the critical habitat of an endangered species. The court acknowledged that the D.C. Circuit had, in similar circumstances, concluded that relief "'does not necessarily follow a finding of a violation,'" but rather called for the exercise of remedial discretion. *Id.* at 1191 (quoting *In re Barr Labs., Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991)). The Tenth Circuit, however, rejected that conclusion:

> In light of the clear command of § 706, *we cannot agree*. Section 706 requires that a reviewing court 'shall compel agency action . . . unreasonably delayed,' and despite the *In re Barr* court's contrary conclusion, we believe that once a court deems agency delay unreasonable, it *must compel* agency action.

174 F.3d at 1191 (emphasis added).

The Federal Circuit has expressed the same understanding. In *PGBA, LLC v. United States*, 389 F.3d 1219 (Fed. Cir. 2004), the court contrasted the discretionary remedial standard created by the text of the Administrative Dispute Resolution Act of 1996 ("ADRA"), 28 U.S.C. § 1491(b)(2) (providing that "the courts *may* award any relief the court considers proper") (emphasis added), with the mandatory requirement of Section 706. 389 F.3d at 1224. The plaintiff in *PGBA* argued that, because the ADRA requires courts to review agency contracting decisions "pursuant to the standards set forth in section 706," 28 U.S.C. § 1491(b)(4), and because Section 706

leaves courts no "discretion to decide whether to set aside arbitrary and capricious government action," the ADRA likewise requires courts to set aside any contracting decision found to be unlawful. 389 F.3d at 1225. The Federal Circuit did not question that the plaintiff's construction of Section 706 was correct. Instead, it proceeded on the premise that if Section 706's remedial standards applied under the ADRA, unlawful contracting decisions must be set aside, and asked solely whether the ADRA's reference to Section 706 "merely incorporates the arbitrary and capricious standard of review from Section 706(2)(A), or whether it means that the reviewing court must set aside any action it finds arbitrary or capricious without consideration of the relative harms of such action." *Id.* [17]

At the same time, other courts, including this Court, have continued the tradition of vacating unlawful agency action as a matter of course, without directly addressing the question of discretion. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 392 (1999) ("Because the Commission has not interpreted the terms of the statute in a reasonable fashion, we *must vacate* 47 CFR § 51.319 (1997).") (emphasis added); *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1257-58 (11th Cir. 2006); *Ohio River Valley Envtl. Coalition v. Kempthorne*, 473 F.3d 94, 99, 104 (4th Cir. 2006); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 524 (2d Cir. 2005); *Wall v. EPA*, 265 F.3d 426, 427 (6th Cir. 2001);

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[17] The court ultimately concluded that Congress imported only Section 706's "arbitrary and capricious" standard of review into the ADRA, leaving remedies to be controlled by the ADRA's own broader remedial provision. *See* 389 F.3d at 1226.

Iowa Utils. Bd. v. FCC, 120 F.3d 753, 801 (8th Cir. 1997), *aff'd in part and rev'd in part on other grounds sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

3. The conflict among the circuits is mature and entrenched, incapable of resolution except by this Court. In *Forest Guardians*, the Tenth Circuit acknowledged, but rejected, the contrary authority of the D.C. Circuit, 174 F.3d at 1190-91, and denied a petition for rehearing en banc to reconsider that decision. *Id.* at 1180. The D.C. Circuit likewise has persisted in its interpretation of the APA, despite repeated objections from its own judges, *see supra* pp. 17-18, and the contrary authority in the Tenth Circuit. *See Cobell v. Norton*, 240 F.3d 1081, 1096 n.4 (D.C. Cir. 2001) (noting, but disagreeing with, the Tenth Circuit's contrary position).

This conflict, and the broader uncertainty regarding the proper construction and application of the APA's remedial authority, should not be allowed to persist any longer. The APA was enacted to establish a uniform regime of judicial review of agency action. Its operation should not vary dramatically depending on whether the agency action is challenged in Denver or Dover. The present disuniformity invites forum shopping and unequal treatment of similarly situated individuals based on nothing more than accidents of geography, exactly what Congress intended to prevent by establishing a single, national standard in Section 706.

This case presents an ideal vehicle for resolving this dispute. The conflict in the circuits' interpretation of Section 706 is squarely presented by

the facts of this case and is outcome determinative. Here, the Third Circuit conducted a painstaking and careful review of the administrative record and found the agency's actions clearly unlawful. *See* Pet. App. 33a-46a. The only remedial question was whether that unlawful action should be set aside in whole, in part, or not at all. The court acknowledged petitioners' argument that "the APA requires us to 'hold unlawful *and set aside*' any such agency action," *id.* at 49a n.13 (emphasis in original) (citations omitted), as well as the FCC's defense of the D.C. Circuit's remand without vacatur jurisprudence. *Id.* at 49a. And the choice between those competing constructions of the statute determined the outcome of petitioners' challenge to the unlawfully conducted auctions in this case.

B. Whether Section 706 Permits Courts To Decline To Set Aside Unlawful Agency Action Is A Question Of Recurring Importance, With Profound Implications For The Nation's Telecommunications Policy As Applied In This Case.

Certiorari is further warranted because the proper interpretation of the APA's remedial provision is a frequently recurring question of enduring national importance. The court of appeals' misapplication of Section 706 to this case, moreover, has broad and damaging consequences for the implementation of the nation's telecommunications policy.

1. The scope of courts' remedial discretion under the APA is a question relevant to the disposition of thousands of APA suits arising in a multitude of

contexts. What had historically been a simple remedial matter for reviewing courts, namely to set aside all unlawful agency action, is currently plagued by uncertainty and confusion. In the absence of guidance from this Court, lower courts have been left to grapple with the glaring conflict between the mandatory plain language of Section 706 and departures from that language in certain circuits, including now the Third.

The present uncertainty stands as a deterrent to challenges to even the most blatant agency violations. As things now stand, even those litigants with the resolve and resources to challenge agency action they believe to be unlawful must weigh the substantial costs of a challenge against highly uncertain benefits, where remedial discretion may effectively deny them meaningful relief.

At the same time, the prevalence of doctrines like "remand without vacatur" in some circuits reduces agencies' incentives to adhere carefully to the procedural requirements of the APA, knowing that there is a real chance that if a court finds the agency's conduct unlawful, it will nonetheless decline to set the action aside. It takes little imagination to conclude, for example, that if the FCC knew that licensing auctions conducted pursuant to unlawful rules would ultimately be "set aside" by a reviewing court, the rules vacated in this case would never have

seen the light of day.[18] As noted above, p. 9, at the time of adoption of the Vacated Rules, FCC Commissioner Adelstein was acutely aware that the FCC's actions in the "troubled proceeding" that produced those rules could eventually lead to an overturn of then pending Auction 66. Future FCC Commissioners, faced only with the prospect of the vacatur of unlawfully adopted rules far down the judicial road, with agency "licenses" issued under those unlawful rules insulated by equitable considerations, would have no reason to treat seriously Commissioner Adelstein's concern.

2. The court of appeals' misapplication of Section 706 particularly warrants review in this case because of its detrimental effects on the nation's telecommunications policy. The unlawful agency action in this case directly and substantially harmed small business participation in two of the most important spectrum licensing auctions in the history of this country, encompassing vital nationwide, regional, and local licenses that govern the use of vast amounts of very valuable spectrum.[19] In the

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[18] *See* Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 Ariz. St. L.J. 599, 620 (2004) ("[T]here are good reasons to suppose that an agency will be motivated both *ex ante* and *ex post* to adopt rules in a manner that will pass muster if they know that they face the prospect of vacatur if they fail.").

[19] Commissioner Adelstein aptly characterized Auction 66 as the agency's "most significant auction in 10 years," CA-JA 168, and referred to the spectrum made available in Auction 73 as "the finest crown jewels the FCC has to put up for auction." *Second Report and Order*, WT Docket No. 06-150, 22 F.C.C.R. 15289, 15564 (2007).

absence of effective judicial relief, the damage to the public in the form of further entrenchment of incumbents and the loss of benefits, including the lower costs and greater innovation produced by competition, will be deep and irreparable. Such auctions are few and far between, and the licenses confirmed by the Third Circuit here will remain in the hands of large incumbents for the foreseeable future.[20]

C. The Plain Language Of Section 706 Deprives Courts Of Any Equitable Discretion To Refuse To Set Aside Unlawful Agency Action.

The decision below should also be reviewed by this Court because, under the plain language of the statute and this Court's precedents, Section 706 allows reviewing courts no discretion to refuse to set aside unlawful agency action.

Section 706 states in plain and unambiguous terms that courts "shall . . . set aside" actions taken by agencies in violation of the APA. 5 U.S.C. § 706(2)(A) (2006). Numerous decisions of this Court have made clear that "shall" means "shall" (not "may") and leaves no room for the exercise of discretion. *See, e.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007) (language in the Clean Water Act, providing that the EPA "shall approve" an application seeking to transfer permitting authority from the EPA to a state unless the EPA finds the state cannot perform nine

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[20] *See, e.g.*, 47 C.F.R. § 27.13 (setting ten-year license term) and 47 C.F.R. § 27.14 (setting criteria for renewal).

functions listed in the statute, "is mandatory and the list exclusive; if the nine specified criteria are satisfied, the EPA *does not have the discretion* to deny a transfer application") (emphasis added); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting Congress' "use of a mandatory 'shall' . . . to impose *discretionless* obligations") (emphasis added); *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("the mandatory 'shall' . . . normally creates an obligation *impervious to judicial discretion*") (emphasis added).

Indeed, this Court need look no further than the immediately preceding section of the APA for confirmation that Congress uses "may" when it wants to grant permissive authority to an agency or reviewing court. Section 705 states that an agency "*may* postpone the effective date of action taken by it" and a reviewing court "*may* issue all necessary and appropriate process to postpone" such an effective date. 5 U.S.C. § 705 (emphasis added).

Consistent with the APA's plain meaning, this Court has consistently observed that the remedy established by Section 706 is mandatory. In *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, this Court made clear that "[i]f the . . . decision of the agency 'is not sustainable on the administrative record made, then the . . . decision *must* be vacated and the matter remanded . . . for further consideration.'" 423 U.S. 326, 331 (1976) (*quoting Camp v. Pitts*, 411 U.S. 138, 143 (1973) (emphasis added)). To a similar effect is the seminal administrative law case *Citizens to Preserve Overton Park v. Volpe*, which stated that "in *all* cases agency action *must* be set aside if the action was 'arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements." 401 U.S. 402, 413-14 (1971) (citing Section 706(2)(A-D)) (emphasis added); *see also AT&T Corp. v. Iowa Utils. Bd.*, *supra* p. 21, 525 U.S. at 392.

This does not mean that every minor flaw in an agency's administration of its duties requires courts to set aside the resulting rule or other action. The final clause of Section 706 specifically provides that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706 (2006). But where, as here, unlawful agency action has clearly prejudiced a party,[21] Congress has itself determined that the appropriate remedy is to set aside the agency action, leaving no room for any court to reach the contrary judgment.

II. The Third Circuit's Decision To Deny Any Relief At All Independently Warrants Review.

Certiorari is further warranted to decide whether, even if Section 706 permits equitable

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[21] The court below did not find that the agency's violation of notice and comment, or its conduct of the auctions pursuant to the unlawfully issued rules, was non-prejudicial. Nor could it. Rather, the court recognized that the errors were "serious." Pet. App. 50a. Those violations substantially harmed DEs by driving away funding sources through the sudden imposition of a ten-year exit horizon, unacceptable on its face for rational investors in a dynamic, fast-paced industry, and devastating business plans by substituting the rigid 50 Percent Rule for the well established and essential flexibility provided by wholesaling/leasing models.

discretion to decline to set aside unlawful agency action, the statute nonetheless requires the reviewing court to provide an alternative available remedy, which the Third Circuit declined to do in this case, placing it in conflict with the decisions of other courts.

A. The Third Circuit's Denial Of Any Relief At All Conflicts With The Law Of The D.C. Circuit And The Decisions Of This Court.

The Third Circuit did not question that the auctions in this case – conducted pursuant to unlawfully issued rules – constituted unlawful agency action subject to Section 706's "shall . . . set aside" command.[22] The court of appeals nonetheless not only refused to "set aside" the auction results, but declined to provide any remedy at all to petitioners injured by the unlawful agency action. The court did so despite the FCC's and the intervenors' acknowledgement that in prior similar cases, the D.C. Circuit had required the Commission to provide alternative remedies when that Circuit had refused to vacate the results of similar unlawful agency action. *See supra* p. 13. The holding in this case is incompatible with those decisions, the text and purposes of the APA, and the decisions of this Court.

1. The D.C. Circuit has recognized that a party who "makes out its case under the APA is *entitled to remedy.*" *Am. Bioscience Inc. v. Thompson*, 269 F.3d

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[22] An agency's award of a "license" pursuant to an auction, like an agency's adoption of a "rule," is "agency action" under 5 U.S.C. § 551(13).

1077, 1084 (D.C. Cir. 2001) (emphasis added). Thus, in other cases involving FCC action found unlawful under the APA, the D.C. Circuit has required the Commission to provide alternative remedies, even when the court has declined to set aside the unlawful agency action directly.

For example, in *City of Brookings Municipal Telephone Company v. FCC*, *supra* p. 13, the D.C. Circuit held that the FCC acted arbitrarily and capriciously in changing the settlement process for allocating revenue among carriers for interstate telephone calls. The changes had been implemented, and had been used to divide revenue among carriers for some time by the date the D.C. Circuit rendered its decision. The Court therefore declined to "order[] the reassessment of settlement payments made under" the invalid rules, because doing so would "disrupt the settlement process" and "cause economic hardship" for some companies. 822 F.2d at 1171. However, that did not lead the court to hold that no relief should be afforded those injured by the unlawful rules. Instead, the court ordered the FCC to decide "how best to accommodate these various interests in light of the proceedings on remand." *Id.* at 1172.

The D.C. Circuit reached the same conclusion in *Freeman Engineering Associates v. FCC*, *supra* p. 13. There, the court considered the FCC's system of distributing radio spectrum. At the time, the FCC provided a "pioneer's preference" for companies developing innovative services. 103 F.3d at 174. The D.C. Circuit held that the Commission had arbitrarily and capriciously applied its pioneer preference rules to deny Qualcomm a preference, and

remanded to the FCC "for further proceedings to remedy" the violation. *Id.* at 180. While the case was on remand, Congress amended the relevant legislation, leading the Commission to believe that it was required to deny Qualcomm a preference. The Commission subsequently auctioned off some of the spectrum Qualcomm had sought to another company, Sprint. When Qualcomm appealed, the D.C. Circuit held that the Commission had misconstrued the intervening legislation and violated the court's prior mandate in declining to grant Qualcomm spectrum in accordance with the preference to which it was entitled. *Qualcomm, Inc. v. FCC*, 181 F.3d 1370, 1376 (D.C. Cir. 1999). Although the Court did not order the FCC to vacate the auction of spectrum to Sprint, it did not – as the Third Circuit did here – conclude that Qualcomm was entitled to no relief at all for its injuries. Instead, the D.C. Circuit ordered the FCC to provide an alternative remedy, requiring it to "take prompt action to identify a suitable spectrum and award QUALCOMM the license for it." *Id.* at 1381. The Commission subsequently granted Qualcomm a transferable Auction Discount Voucher to be used in any spectrum licensing auction over a three-year period. *QUALCOMM, Inc.*, 16 F.C.C.R. 4042 (2000).

The D.C. Circuit is not alone in its view that the APA requires at least *some* kind of remedy for unlawful agency action. *See Andrx Pharm. Inc. v. Biovail Corp.*, 276 F.3d 1368, 1379 (Fed. Cir. 2002) (holding that a party that "prevails under its APA claim . . . is *entitled to a remedy* under the statute, which normally will be a vacatur of the agency's order") (emphasis added).

2. The Third Circuit's total denial of any auction-related remedy is also in conflict with the text and purposes of the APA. Refusing to provide any relief at all is the precise opposite of "set[ting] aside" unlawful agency action, 5 U.S.C. § 706(2)(A). The APA was specifically designed "to afford parties affected by administrative powers a means of knowing what their rights are, and how they may be protected," and to assure those affected parties "judicial review designed to afford *a remedy* for *every* legal wrong." 92 Cong. Rec. 2151 (1946), *reprinted in* Administrative Procedure Act, Legislative History, S. Doc. No. 79-248, at 304 (1946) (statement of Sen. Pat McCarran) (emphasis added). This guarantee of a judicial remedy, in the event of agency violation of a private right, is one of the "minimum basic essentials" set forth by the APA. *Id.*

Congress thus fully intended the APA to follow the basic American legal tenet that the law provides a remedy for every violation of a legal right. In the same year the APA was enacted, this Court reaffirmed the established principle that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. 678, 684 (1946). That fundamental principle found voice in this Court as long ago as *Marbury v. Madison*, 5 U.S. 137, 163 (1803): "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." And this Court has consistently adhered to it ever since.

See, e.g., *De Lima v. Bidwell*, 182 U.S. 1, 176-77 (1901) ("If there be an admitted wrong, the courts will look far to supply an adequate remedy."); *Franklin v. Gwinnett Co. Pub. Sch.*, 503 U.S. 60, 66 (1992) ("From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court . . . .").

B. Whether Courts Have Authority To Deny All Relief For APA Violations Is A Question Of Recurring Importance That Warrants This Court's Review.

The scope of any remedial discretion under Section 706 – like the availability of any discretion at all – is a recurring question that affects virtually every suit under the APA. The absence of guidance from this Court in this area has led to arbitrary differences in treatment and undermined the basic remedial purposes of the statute.

This case compellingly illustrates how, in the absence of guidance from this Court, the former rule that unlawful agency action must be set aside has in certain cases been replaced by nearly the opposite presumption that relief is to be severely limited or denied altogether if an agency violation is either "too minor to matter"[23] or, as here, "too big to fail." This "Goldilocks" approach led to the denial in this case of all relief with respect to two licensing auctions of

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[23] *See, e.g.*, *La. Fed. Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1085 (D.C. Cir. 2003) (remand without vacatur employed where the agency's "only error was its failure to explain what seems to be a policy difference with the plaintiffs").

highly valuable, publicly-owned electromagnetic spectrum that were conducted pursuant to unlawful, seriously deficient rules.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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