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

REPLY BRIEF FOR THE PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the Petition for a Writ of Certiorari in this case remains accurate.

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REPLY BRIEF FOR THE PETITIONERS

The petition and supporting amicus briefs demonstrate a longstanding conflict in the lower courts over whether Congress meant what it said when it provided in Section 706 of the APA that a reviewing court "shall . . . hold unlawful and set aside agency action" not in accordance with law or required procedures, 5 U.S.C. § 706. *See* Pet. 16-23. That question has deep, historic roots and is the subject of an ongoing, animated debate among the courts of appeals, within the D.C. Circuit, and in the academic literature. *Id.*, *see also* Rodriguez Br. 5-12. The Government does not deny that the proper construction of Section 706 is a recurring question of enduring importance in the administration of hundreds of federal regulatory regimes. *See* S.Ct. R. 10(c). The Government instead resists certiorari on narrow grounds, attempting to show that this case is not a proper vehicle for resolving undeniably important questions regarding the scope of courts' remedial authority under the APA. Because those objections are baseless, the petition should be granted.

I. The Decision In This Case Contributes To A Longstanding Circuit Conflict.

The Government makes little effort, and even less headway, in attempting to deny the widely recognized division and confusion among the courts of appeals over whether courts have discretion under Section 706 to decline to set aside unlawful agency action. *See* BIO 14 n.12. It argues instead that the conflict is not implicated by this case. BIO 14 & n.12. The Government is wrong. The split is real

and squarely presented for this Court's resolution in this case.

The Government does not deny the petition's showing that prior to the 1990s, courts (including this Court) accepted as a matter of course that an unlawful agency action must be vacated. *See* Pet. 16-17 & n.15. The Government further acknowledges that recently, some circuits have changed course and declined to give force to the mandatory language of Section 706. BIO 14 n.12. Even more, the Government concedes that the Tenth Circuit categorically rejected that trend in *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999). *See* BIO 14 n.12.

The Government nonetheless denies there is a circuit conflict. While not disputing the plain holding of *Forest Guardians*, it contends that the Tenth Circuit limits its recognition of the mandatory requirements of Section 706 to cases under Section 706*(1)*, and applies the exact opposite rule under Section 706*(2)*. *Id.* This would be exceedingly strange, if it were true. The operative language – the word "shall" – applies equally to both subsections. *See* 5 U.S.C. § 706. The Government is thus reduced to arguing that the Tenth Circuit reads "shall" to mean "shall" with respect to subsection (1) and "may" with respect to subsection (2).

Unsurprisingly, the Government's authority does not support its assertion. To start, nothing in the analysis in *Forest Guardians* turned on anything in the statute specific to subsection (1). Quite to the contrary, the entire basis of that decision was the court's simple, but unassailable, conclusion that

"when a statute uses the word 'shall,' Congress has imposed a mandatory duty upon the subject of the command." 174 F.3d at 1187. The Government relies instead on *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001), which, it implies, cabined the rule of *Forest Guardians* to Section 706(1) cases. BIO 14 n.12. To the contrary, *Qwest* cited *Forest Guardians* not to distinguish it, but for the proposition that the word "shall" in a statute "indicates a mandatory duty." 258 F.3d at 1200. Moreover, having found an FCC order unsupported, the court held that it "therefore *must* reverse the order and remand for further proceedings." *Id.* at 1205 (emphasis added).

Unable to support its reading of Tenth Circuit precedent on the basis of that court's precedential opinions, the Government cites instead a single unpublished (and, indeed, publically unavailable) order issued after the decision in *Qwest*. BIO 14 n.12. But an unpublished order cannot establish the law of the Tenth Circuit, or undermine the clear authority of prior published precedent. *See* 10th Cir. R. 32.1(A).[1]

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[1] Even if the order were relevant authority, it would indicate, at most, that the Tenth Circuit would allow an agency a chance to further explain the basis of its rules before conclusively determining that a rule was unlawful and, therefore, subject to the mandatory remedy of Section 706. *See* Pet. 19 n.16. *Compare Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1380 (Fed. Cir. 2001) (allowing an agency a second chance to better explain its action), *with PGBA, LLC v. United States*, 389 F.3d 1219, 1225-26 (Fed. Cir. 2004) (construing Section 706 as mandating vacatur of unlawful agency action).

II. This Case Fairly Presents The Question Upon Which The Courts Of Appeals Are Divided.

The Government argues next that the Third Circuit's refusal to set aside the auction results in this case does not implicate the circuit conflict. BIO 15. But that claim is unpersuasive as well.

The Government contends that the Third Circuit expressly declined to engage the circuit conflict over the scope of remedial discretion under Section 706, because "it found remand without vacatur inappropriate" in this case with respect to the *rules*. BIO 14. But the Government ignores that the same remedial question necessarily arose with respect to the unlawfully conducted *auctions*. *See* Pet. App. 47a-50a (deciding separately whether to vacate rules and whether to vacate auction results). And it does not contest that the Third Circuit treated *that* remedial question as a matter of discretion. *See* BIO 15. The decision not to vacate the auction results was in line with prior Third Circuit precedent, which has remanded rules without vacating them, consistent with the "remand without vacatur" precedent of the D.C. Circuit. *See Prometheus Radio Project v. FCC*, 373 F.3d 372, 411-12 (3d Cir. 2004) (remanding without vacating Commission rule issued, to petitioner's prejudice, without notice of underlying methodology).

The Government nonetheless fails to acknowledge that the Third Circuit was merely following its own precedent in this case, and contends instead that petitioners failed to argue that Section 706 precluded equitable discretion as applied to the auction results. BIO 15. Not so. The

Government acknowledges that petitioners argued in no uncertain terms that the mandatory language of Section 706 left no room for remedial discretion with respect to the rules. BIO 14. There was no need to repeat that argument in the same level of detail with respect to the auctions – the proposition that the same language of the same provision means the same thing in both contexts goes without saying. In any event, petitioners repeatedly pressed the argument below that the auctions *and* the rules would *necessarily* stand or fall together. Petitioners argued, for example, that the rules were "inextricably intertwined with actual auctions" and that it was "logically impossible to separate the New DE Rules from the auctions that were conducted on the basis of those rules." Pet'rs. Supp. Br. 32-33. Because the "rules and auctions themselves are 'joined at the hip,'" petitioners insisted that "[i]f the basic auction rules fall, so *must the auction results produced by those rules*." *Id.* (emphasis added) (footnote omitted).[2]

To be sure, as the court of appeals noted, petitioners also argued in the alternative that the court should exercise any remedial discretion it had in favor of vacating the auction results. Pet. App. 47a. But the Third Circuit's opinion did not conclude that petitioners took the unsupportable and illogical position that identical language of Section 706 was mandatory as applied to the rules and discretionary as applied to the auction results.

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[2] *See also* Pet'rs. Br. 5, 19, 49.

III. The Government's Alternative Grounds For Affirmance Are Unavailing.

The Government further argues that certiorari is unwarranted because petitioners' claims "fail on the merits." BIO 16. Tellingly, the Government makes no attempt to defend the proposition that Section 706 afforded the Third Circuit discretion to refuse to set aside unlawful agency action. Nor could it. In the similar context of *FCC v. NextWave Pers. Comm'ns Inc.*, this Court affirmed the D.C. Circuit's decision setting aside the FCC's revocation of NextWave's spectrum licenses in violation of federal bankruptcy law. 537 U.S. 293, 307-08 (2003). This Court explained that the APA "*requires* federal courts to *set aside* federal agency action that is 'not in accordance with law,' 5 U.S.C. § 706(2)(A)." *Id.* at 300 (emphasis added). Just as the APA required setting aside the FCC's unlawful revocation of licenses in *NextWave*, it demands vacatur of the FCC's unlawful conduct of auctions in this case.

The Government presents two alternative grounds for affirmance, neither of which was passed upon below or provides a reason to abstain from resolving the circuit conflict presented by the Third Circuit's actual decision.

First, the Government argues that petitioners did not "timely challenge any order regarding the AWS or 700 MHz auctions." BIO 16. The Government admits petitioners timely challenged the order establishing the offending DE rules, *id.*, but asserts that petitioners were also required to challenge some other agency order to establish jurisdiction over the auction results. *Id.* The

Government cites no case establishing that proposition, nor does it even say clearly which order it believes petitioners should have challenged. *Id.* & n.14. It seems, however, to concede that it would be sufficient to have challenged an "order regarding the AWS or 700 MHz auctions," *id.* at 16, including an order reflecting the "decision to apply the DE rules in the [relevant] auction," FCC Br. 16, D.C. Circuit Case No. 07-1454.

Petitioners did just that, challenging the *Second R&O*, which had not only modified the DE rules, but expressly applied those modifications *to impending Auction 66 and all future auctions*. *See* BIO App. 6a ("These rules *will be applied* to *any application* filed to participate in *auctions* in which bidding begins after the effective date of the rules adopted herein . . . .) (emphasis added); *see also First Reconsideration Order*, BIO App. 107a-112a (reviewing at length, and rejecting, arguments that the new rules should not apply to the then imminent Auction 66). The *Second R&O* thus is plainly not only an "order regarding the . . . auction," BIO 16, within the meaning of the APA's review provisions, but the order which most directly harmed petitioners, making it the most appropriate vehicle for challenging the unlawful agency action in this case.[3]

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[3] The Government's criticism of petitioners for an alleged failure to challenge in the D.C. Circuit the issuance of particularized licenses to auction winners is misplaced. BIO 17 n.15, *citing* 47 U.S.C. § 402(b)(6). *Freeman Eng'g Assocs., Inc. v. FCC* held that although the FCC's grant of a pioneer's preference "effectively . . . guarantees [the grantee] a license," that grant is not an award of a license within the meaning of

Second, the Government argues that the Third Circuit had no authority to set aside the auction results because "that court nowhere found that the Commission's decision to hold the auctions under its revised DE rules violated any provision of the APA." BIO 17. That assertion is specious. Had the Third Circuit concluded that the auctions themselves were lawful, it would not have undertaken to decide whether it should exercise discretion to set the auction results aside. Nor was there any ground for the court to doubt that it was unlawful for the Commission to conduct an auction in accordance with unlawful rules. Congress required the Commission to conduct spectrum auctions in accordance with rules that promote DE participation, and the APA required that those rules be issued through certain procedures. The Commission's failure to comply with those requirements meant that the auctions themselves were conducted "without observance of procedures required by law," 5 U.S.C. § 706(2)(D), and therefore were subject to remedy under Section 706.

Of course, as petitioners have acknowledged, the mandatory remedy under Section 706 is tempered by

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47 U.S.C. § 402(b)(6) because it "does not irrevocably commit the Commission to grant a license." 103 F.3d 169, 174, 177 (D.C. Cir. 1997). The grantee must still apply and qualify for an actual license. Petitioners here challenge auctions which also do not "irrevocably commit" the FCC to grant a license. Rather, auction winners obtain the right to later file particularized license applications, which are then subject to public notice and petitions to deny. *See* Public Notice, *Auction of Advanced Wireless Services Licenses Closes*, 21 F.C.C.R. 10521, 10526-27 (2006).

the provision's recognition of the "rule of prejudicial error." *See* Pet. 28 (quoting 5 U.S.C. § 706). But the Government has never claimed that applying the unlawful DE rules to these auctions was non-prejudicial. Nor could it. Although the Government now attempts to minimize the damage done to Congress's policy of promoting small business participation in the telecommunications market and preventing concentration of power in that industry, the effects of the illegal rules on the auction results were significant by any measure,[4] and so detrimental to small businesses' success in the auctions that even the FCC's sister agency, the Office of Advocacy, U.S. Small Business Administration, objected to their continued use. Pet. 10.

IV. The Court Of Appeals Improperly Failed To Provide Any Remedy At All For Petitioners' Effective Exclusion From The Unlawfully Conducted Auctions.

Finally, the Government's tepid defense of the Third Circuit's refusal to provide petitioners any remedy at all is entirely unconvincing. The

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[4] The Government attempts to obscure the damage by focusing on the absolute number of DEs participating in the auction and winning at least some spectrum. BIO 9. But these statistics include many incumbent DEs that were able to purchase low-value licenses in thinly populated rural areas that were of no interest to the dominant carriers. *See* Antares Holding, LLC et al. Br. 11-12 n.9. They do nothing to obscure the harm done to Congress's policy of preventing consolidation of the telecommunications industry in major markets. *Id.* Nor do they say anything about the harmful effects of the unlawful actions on the particular parties to this action. *See* Pet. 5-6, 8-9.

Government does not dispute that even if the APA affords some remedial discretion, it does not go so far as to permit a court to deny an injured party all relief when some remedy short of setting aside the agency action is reasonably available. It argues instead that petitioners were, in fact, given a remedy because the Third Circuit prospectively precluded the Commission from using the unlawful rules in future auctions. BIO 20-21.

That argument ignores that petitioners demonstrated two independent violations with distinct harms. The first was the promulgation of the unlawful rules, which the Third Circuit remedied by setting those rules aside. The second violation occurred when the agency applied those rules to the particular auctions. As petitioners and supporting amici (Antares Holding, LLC et al.) have made clear, vacatur of the offending rules provided no relief for the specific injuries to those shut out from participating in these particular auctions.[5] No court would accept, for example, that an order prohibiting an employer from engaging in future racial discrimination would remedy (let alone "set aside") a prior discriminatory hiring decision. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) ("Where racial discrimination is concerned, 'the

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[5] The Government cannot seriously claim that the injury from conduct of the auctions to Council Tree – much less to petitioner Bethel Native Corporation and the members of petitioner Minority Media and Telecommunications Council – was remedied by the circumstance that another company, owned in small minority part by several Council Tree principals, received some limited benefit from rule vacatur. *See* BIO 21; *Cf.* Pet. 9 n.10.

(district) court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future'").

As the amicus brief of John Muleta, former Chief of the FCC's Wireless Telecommunications Bureau, demonstrates, the Commission could have provided (and can still provide) alternative remedies that would not have had the disruptive effects the FCC claims would make a reauction impractical. *See* Muleta Br. 11-15. The Government's brief raises no objections to any of those options. In fact, the Commission itself suggested to the Third Circuit that alternative remedies could be explored by the agency in a remedial remand, pointing to the D.C. Circuit's practice of such remands in similar cases. Respts. Supp. Br. 33-34. Nor have any of the private intervenors in this case come forward in this Court for any purpose, much less to defend the complete denial of relief to petitioners or to suggest that it would be unfair or impractical to provide petitioners an alternative remedy.[6]

In such circumstances, this Court should, at the very least, summarily vacate the decision with

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[6] The Government suggests that no remedy is due because petitioners committed a "jurisdictional misstep" that, the Government asserts, delayed final resolution of this case. BIO 7, 19. In fact, the FCC's own jurisdictional gamesmanship caused concurrent, and ultimately lengthier delay. *See* Pet. App. 11 n.14 (recognizing that the FCC's refusal to rule on petitioners' long pending reconsideration request was preventing adjudication of their challenges to the DE rule changes).

respect to the auction results and require the Third Circuit to remand the case to the agency to consider alternative remedies, consistent with the FCC's own advice and the established practice of the D.C. Circuit. Pet. 30-31.

* * * *

In the end, review is particularly merited in this case because the underlying agency violation of law was serious and stark, leading both to "blind" regulation without the notice and opportunity to comment demanded by the APA, and to auctions that devastated the interests of statutorily favored stakeholders (DEs) and the public, to the benefit of a very few large, dominant companies, all in derogation of clearly articulated Congressional objectives favoring competition and diversity.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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