Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

DONALD A. THACKER, TRUSTEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case arises from the same FCC auction and credit program addressed by this Court and the D.C. Circuit in *NextWave Personal Communications Inc. v. FCC*, 254 F.3d 130, 151 (D.C. Cir. 2001), *aff'd*, 537 U.S. 293 (2003). Acting as a secured creditor, the FCC financed the purchase of exclusive licenses by petitioner Magnacom, took security interests in the licenses as collateral to protect itself as creditor, then disposed of its collateral by canceling the licenses and reselling the same rights to others when Magnacom could not repay its loan. The question presented is:

Whether the Ninth Circuit erred in ruling – contrary to *NextWave* – that the FCC's roles as regulator and creditor are mutually exclusive and that use of its regulatory power to cancel licenses was not an act to enforce its security interest, thereby permitting the FCC to circumvent Magnacom's unwaivable right to receive the surplus proceeds from the license reauction under the creditor-debtor law that binds federal agencies?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Donald A. Thacker, in his capacity as Trustee of the bankruptcy estate of Magnacom Wireless, LLC. Magnacom Wireless, LLC is owned by two privately held companies, The Whalebone Group, LLC, and Pacwest Networks, Inc., neither of which issues shares to the public.

Respondents are the Federal Communications Commission and the United States of America.

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The Ninth Circuit's opinion is reported at 503 F.3d 584 and is reprinted at Pet. App. 1a-23a. The order of the District Court is unreported and is reprinted at Pet. App. 45a-57a. The order of the Bankruptcy Court is unreported and is reprinted at Pet. App. 24a-44a.

JURISDICTION

The Ninth Circuit's decision and judgment were filed on September 17, 2007. This petition is timely filed on December 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the interaction of federal statutes (the Bankruptcy Code and Communications Act), an FCC regulation (47 C.F.R. § 1.2110(g)(4)(iv)), and Article 9 of the Uniform Commercial Code, which applies here as federal common law because the FCC assumed the role of secured creditor. The relevant provisions are set out in the appendix at Pet. App. 69a.

STATEMENT OF THE CASE

This case arises from the same FCC program and auctions considered by this Court and the D.C. Circuit in *NextWave Personal Communications Inc. v. FCC*, 254 F.3d 130, 151 (D.C. Cir. 2001), *aff'd*, 537 U.S. 293 (2003) – but with startlingly different results. Under this FCC program, the agency wears "two hats – that of regulator and creditor." Pet. App.

39a. The issue is whether the FCC may use its status as regulator to circumvent its obligations as creditor under long-established federal law. In stark tension with *NextWave*, the Ninth Circuit allowed just that. The Ninth Circuit reasoned that when the FCC acts as a creditor in the market it regulates and then uses its regulatory authority to repossess collateral for failure to debt, it can effectively bypass the obligations that otherwise attach to every federal agency under settled federal debtor-creditor law. The Ninth Circuit thus held that the FCC's regulatory power is entirely "separate and independent" from its creditor status and exempts it from the obligations of a secured creditor. Pet. App. 19a.

The Ninth Circuit's either/or logic – the FCC acts *either* as a regulator *or* as a creditor, not simultaneously as both – is contrary to *NextWave* and to settled federal law governing federal agencies that choose to act as creditors in the market. It is in direct conflict with the D.C. Circuit's specific holding in *NextWave* that when the FCC cancels licenses in response to nonpayment under the very regulation at issue here, the cancellation is *both* a regulatory act *and* enforcement of the agency's security interest. Indeed, the Ninth Circuit went out of its way to disparage Judge Tatel's opinion on this point as not being the D.C. Circuit's "reasoned conclusion." Pet. App. 16a. In addition, the Ninth Circuit's reasoning is contrary to this Court's *NextWave* decision, which affirmed the D.C. Circuit and likewise rejected the either/or approach, because "a debt is a debt, even when the obligation to pay it is also a regulatory

condition." *FCC v. NextWave Personal Commc'ns*, 537 U.S. 293, 303 (2003). Finally, the Ninth Circuit's reasoning upends well-established federal law holding that *all* federal agencies are subject to the uniform and predictable debtor-creditor law that applies to other market actors – and upon which private actors justifiably rely in structuring their transactions in the market that the agency regulates.

As the FCC itself urged when it sought and obtained this Court's review in *NextWave*, the orderly administration of hybrid regulatory and credit programs like that here requires legal certainty – for private parties who rely on settled commercial law when they make their investments as well as for the agency. Every federal agency that extends credit subject to security interests does so in furtherance of a broader regulatory agenda. But the Ninth Circuit's decision lets a federal agency switch back and forth between "separate and independent" regulatory and creditor roles according to its immediate pecuniary advantage, thereby undermining the certainty that is otherwise provided by commercial law. The FCC's actions here provide a stark example of such gamesmanship to the agency's advantage – and to the detriment of a debtor's investors and other creditors. Given the direct split with the D.C. Circuit's decision in *NextWave*, and the palpable tension with this Court's decision in *NextWave* and with other cases requiring federal agencies to comply with uniform debtor-creditor law, the Ninth Circuit's opinion calls for review by this Court.

Factual Background

1. The FCC credit and auction program at issue here is described at length in the D.C. Circuit's and this Court's *NextWave* opinions. Briefly, in § 309(j) of the Communications Act, Congress directed the FCC to use auctions ("competitive bidding") to assign new radio spectrum licenses. 47 U.S.C. § 309(j)(1). Congress also directed the FCC to design its auction mechanisms to "disseminat[e] licenses among a wide variety of applicants, including small businesses," *id.* § 309(j)(3)(B), and to "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payment . . . or other schedules or methods," *id.* § 309(j)(4)(A).

The FCC chose to implement these broad statutory directives by limiting auctions for some licenses to small or entrepreneurial businesses ("designated entities") and to allow such businesses to pay for their licenses through installment payments. 47 C.F.R. § 24.709(a)(1) (1997). The FCC thereby chose to become a creditor financing the purchase of licenses by the small businesses it was supposed to aid.

Consistent with its creditor position, the FCC required winning bidders who used installment payments to execute security agreements granting the FCC "a first lien on and continuing security interest in all of the Debtor's rights and interest in the License[s] and all proceeds, profits and products of any sale of or other disposition thereof (collectively, the 'Collateral')." Pet. App. 80a; *see* 47 C.F.R. § 1.2110(g)(3).

The FCC's security agreement defines a debtor-licensee's failure to pay its debt to the FCC as an event of default under the security agreement and specifies several remedies the FCC has for such default under the agreement. Pet. App. 87a-88a. First among these FCC remedies under the security agreement is that the debtor's "License shall be automatically canceled pursuant to 47 C.F.R. § 1.2110." Pet. App. 88a; *see* 47 C.F.R. § 1.2110(g)(4)(iv) (providing that when a debtor-licensee does not make timely payments on its installment notes, "it shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures"). The security agreement also purports to waive the debtor-licensee's right to proceeds from the resale of its license rights in the event the FCC exercises its right under the security agreement to proceed against its collateral – the licenses – by cancelling them. Pet. App. 88a-89a.

As this Court explained in *NextWave*, the FCC's decisions to finance licenses through installment payment plans and – more importantly – to cancel licenses in the event of repayment default are not choices dictated by Congress, but represent mere "policy preferences on the FCC's part." 537 U.S. at 304. "[N]othing in [§ 309(j)] demands that cancellation be the sanction for failure to make agreed-upon periodic payments. Indeed, nothing in those provisions even requires the Commission to permit payment to be made over time, rather than leaving it to impecunious bidders to finance the full purchase price with private lenders." *Id.*

In short, the FCC chose to carry out its regulatory mission by assuming the role of a secured creditor, financing the purchase of licenses, requiring security agreements as protection for its position as creditor, and making regulatory cancellation of the licenses a remedy for enforcing those security interests in the event the debtor-licensee defaulted on its loan.

2. In the late 1990s, the FCC sold 18 licenses for exclusive use of specific radio spectrum for personal communications services to Magnacom Wireless, LLC, a designated entity eligible for secured financing from the FCC. Magnacom was awarded these licenses in the exact same C- and F-Block auctions that were at issue in *NextWave*. *See* 537 U.S. at 296; Pet App. 3a. Each of the licenses gave Magnacom the exclusive right to use a unique segment of the radio spectrum in a specific geographic area. As long as Magnacom held its licenses, the FCC could not license any other company to use those airwaves in those localities.

To purchase its licenses, Magnacom made down payments of about $7 million and executed the FCC-required installment plan notes and security agreements for the rest of the purchase price, approximately $48 million. A representative security agreement is included at Pet. App. 79a-94a.

After Magnacom bought its licenses, made its down payments, and executed the secured loan documents required by the FCC – but before its first installment payment was due – the bottom fell out of the spectrum market. Virtually every C-Block and F-Block debtor-licensee, including both NextWave

and Magnacom, was forced into bankruptcy or defaulted on its loans when it could not raise the money needed to repay the FCC. Like NextWave, Magnacom filed for Chapter 11 bankruptcy protection just before going into default on its FCC installment payments.[1]

3. After Magnacom was forced into bankruptcy, the FCC filed a motion in the bankruptcy court for an order lifting the automatic stay, *see* 11 U.S.C. § 362, so that the FCC could cancel Magnacom's licenses under its rule providing for automatic cancellation of licenses when the debtor-licensee defaults on its installment payments, 47 C.F.R. § 1.2110(g)(4)(iv). As previously noted, cancellation under that very rule is the FCC's primary remedy as a secured creditor for default under the security agreement and installment notes. *Supra* at 5; Pet. App. 87a-88a.

As a result of the market downturn, Magnacom was left without equity in its licenses when it filed for bankruptcy, *i.e.*, its secured debt to the FCC exceeded the licenses' current value.[2] Magnacom

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[1] The FCC's own Chairman chastised the agency for failing to reasonably accommodate debtor-licensees like Magnacom during this temporary market downturn, thereby creating "a substantial risk of bankruptcies that Congress and any commercially reasonable enterprise would have us eliminate." Separate Statement of Chairman Reed E. Hundt, *In re Amendment of the Comm'n's Rules Regarding Installment Payment Fin. for Pers. Commc'ns Servs. (PCS) Licensees*, 12 F.C.C.R. 16,436 (1997).

[2] The same was true at the initial stages of NextWave's bankruptcy. At that time, NextWave's licenses were worth less

therefore consented to an order lifting the automatic stay under Bankruptcy Code provisions that allow undersecured creditors like the FCC to enforce their security interests. *See* 11 U.S.C. § 362(d)(1), (2). Magnacom also consented to specific language proposed by the FCC that expressly allowed the agency to exercise its right to enforce its interests through cancellation of the licenses.

Magnacom's consent was predicated on the FCC's representation that lifting the stay to allow it to proceed by cancellation would be "economically neutral for the government fisc and certainly confers no economic advantage to the government over third parties in relation to the Debtor's estate." E.R. 102.[3] The bankruptcy court therefore entered the FCC's proposed lift-stay order, specifically citing the court's authority to lift the stay under § 362(d)(1), (2) – provisions that allow undersecured creditors to enforce their security interests. E.R. 78. The order lifted the automatic stay to allow "the FCC [to] pursue immediately any and all of its remedies, including its right to cancel the Defaulted Licenses if such licenses have not already canceled as a matter of law." Pet. App. 6a, 59a.[4]

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than one-fourth what NextWave owed the FCC for them. *See* 537 U.S. at 298.

[3] "E.R" denotes Appellants' Excerpts of Record filed in the Ninth Circuit below.

[4] Two months later, Magnacom's bankruptcy was converted from a Chapter 11 reorganization to a Chapter 7 liquidation.

4. After the stay was lifted and the FCC exercised its remedy of automatically canceling Magnacom's licenses – but before it disposed of those license rights in a subsequent auction – the FCC filed a proof of claim in Magnacom's bankruptcy for the entire $48 million Magnacom owed for the licenses. As the FCC subsequently explained, it filed this proof of claim to protect its right to recover "any *deficiency* amount between the amount owed by Magnacom and the amounts bid at a subsequent auction" for the license rights. FCC Br. (9th Cir.) at 10 n.5 (emphasis added). In other words, the FCC acted like any other secured creditor in asserting a deficiency claim for the shortfall in the value of its collateral compared to the amount of the debt it secured. The bankruptcy court allowed the FCC's claim. Pet. App. 6a, 60a.

The FCC then waited out the market downturn in license values before reauctioning the exclusive spectrum rights it had taken back from Magnacom. Once spectrum values rebounded, the FCC resold Magnacom's former license rights in the very same auction, subject to the same terms, in which it reauctioned NextWave's licenses, which it had also previously cancelled. Not surprisingly, then, the FCC received the same windfall from canceling and reselling Magnacom's licenses as it initially obtained from NextWave's – an enormous increase in values not only above the extremely depressed market prices that had forced Magnacom and NextWave into bankruptcy, but even far above the values that prevailed before the market downturn, when Magnacom and NextWave originally invested in the

licenses.[5] In Magnacom's case, although it owed the FCC only $48 million for the licenses (on top of the $7 million in down payments it had already made), the FCC reauctioned the exclusive rights to use the same spectrum for $287 million. Pet. App. 7a.

5. In light of the reauction, the Trustee of Magnacom's bankruptcy estate and certain creditors moved in the bankruptcy court for reconsideration and disallowance of the FCC's $48 million deficiency claim, on the ground that Magnacom's debt to the FCC had been fully satisfied by the proceeds from the reauctioned licenses. The FCC vigorously opposed disallowance of its claim. Pet. App. 60a. It argued that Magnacom had no interest in the proceeds from the reauction, because cancellation had eliminated any interest it had in the spectrum rights and the FCC had auctioned entirely new licenses unrelated to Magnacom's. Pet. App. 64a.

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[5] Because NextWave contested the cancellation of its licenses, the FCC reauctioned those license rights subject to NextWave's prior rights if its lawsuit succeeded. *See C and F Block Broadband PCS Spectrum Auction Scheduled for December 12, 2000*, 15 F.C.C.R. 19,485, 19,493 (2000). When NextWave prevailed, the FCC had to cancel the award of the licenses to the winning bidders in the reauction of NextWave's licenses in order to restore them to NextWave. *See In re Disposition of Down Payment & Pending Applications by Certain Winning Bidders in Auction No. 35*, 17 F.C.C.R. 23,354, 23,359-62 (2002). As this sequence of events shows, the FCC could dispose of these *exclusive* rights only by repossessing them from the original licensee through cancellation or some other means. And when the licenses were restored to NextWave, it (rather than the FCC) benefited from the license's appreciation in value above the amount of NextWave's debt to the agency.

The bankruptcy court rejected the FCC's arguments. "The Court is unconvinced by the FCC's argument that the claim may not be reconsidered because the licenses that it subsequently auctioned were different licenses than the ones previously held by the Debtor. . . . No matter how labeled, . . . the FCC could not have auctioned these licenses to new users, *but for* the Debtor's default." Pet. App. 64a. Accordingly, "the FCC's claim against the Debtor's estate" was "satisfied" by the reauction proceeds. *Id.* Continuing to allow the claim would improperly permit the agency "to collect from the debtor twice." *Id.* 65a. The court therefore disallowed the FCC's claim. *Id.* 67a-68a. The FCC did not appeal that ruling.

Proceedings Below

The Trustee, acting on behalf of the bankruptcy estate, then commenced this adversary proceeding against the FCC to recover the *surplus* proceeds from the license reauction, of which $239 million remained after $48 million was used to pay off Magnacom's debt to the FCC. The bankruptcy court's jurisdiction arose under 28 U.S.C. §§ 157 and 1334.[6]

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[6] Sovereign immunity does not bar the Trustee's adversary claim. Congress has waived the United States' sovereign immunity where – as here – the Government itself files a proof of claim in a bankruptcy case and the claim asserted against the Government belongs to the bankruptcy estate and arises out of "the same transaction or occurrence" as the United States' own claim. 11 U.S.C. § 106(b). Accordingly, the FCC has never asserted a sovereign immunity defense to the Trustee's adversary proceeding. Indeed, the Government

The Trustee's primary claim (the one at issue here) is that under well-established law that applies to federal agencies when they assume the role of a secured creditor, Magnacom has an unwaivable right to the surplus proceeds that resulted when the FCC disposed of its collateral – the licenses – by canceling them and reselling the same exclusive rights to others solely because Magnacom was forced to default on its debt. Under *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), when a federal agency assumes the role of "a voluntary commercial lender," "federal law" governs the relationship between the government and the private debtor. *Id.* at 722, 726.[7] But in the absence of any statute or extraordinary circumstances requiring another rule, federal law must "adopt state law," *id.* at 728-29 – particularly where, as with secured transactions, the U.C.C. provides a *uniform* body of law adopted by nationwide, *id.* at 732 n.28. U.C.C. Article 9 therefore applies here as federal law. And Article 9 mandates that whenever, "[a]fter default, a secured party [chooses to] sell, lease, license, or otherwise dispose of any or all of the collateral," "the secured party *shall account to and pay a debtor for any surplus*." U.C.C. §§ 9-610(a), 9-615(d)(1) (Wash. Rev. Code 62A.9A-610(a), -615(d)(1)). Article 9 also provides that the debtor's right to the surplus proceeds *cannot be waived*. U.C.C. § 9-602(5) (Wash. Rev. Code § 62A.9A-602). These provisions are

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has consistently sought and obtained rulings on the merits of the Trustee's claim.

[7] The security agreements here also provide that they are governed by "federal law." Pet. App. 92a.

intended to protect debtors in the very circumstances here – where a secured creditor takes advantage of a temporary market downturn, seizes collateral from a distressed debtor who cannot make payments, waits out the depressed market, and then sells the collateral after the market recovers for a windfall above the amount of the debt that was secured by the collateral.

The Trustee also asserted a separate claim directly under the Bankruptcy Code, on the theory that the licenses and their proceeds represent "property of the bankruptcy estate." Pet. App. 13a. Finally, the Trustee argued that although the bankruptcy court's earlier order disallowing the FCC's proof of claim had not decided the Trustee's *claim* for the surplus, it had decided the *issue* of whether the reauction proceeds were traceable to Magnacom's licenses – "the FCC could not have auctioned these licenses to new users, *but for* the Debtor's default", Pet. App. 64a – so that issue preclusion barred the FCC from relitigating that specific issue.

The FCC moved to dismiss the Trustee's complaint. In ruling on the motion, the bankruptcy court recognized that under the agency's auction and loan program, "the FCC is wearing two hats – that of regulator and creditor." Pet. App. 39a. The court also recognized that "nothing in the Federal Communications Act (FCA) or FCC regulations governs this issue [of entitlement to the surplus proceeds], allowing this Court to look to the UCC for guidance in determining federal common law," and that "despite the express waiver contained in

paragraph 8(d) of the Security Agreements, the Debtor possesses an unwaivable interest in the proceeds under the UCC." Pet. App. 38a. Therefore, if the FCC was acting as a secured creditor (as well as a regulator) when canceling the licenses solely because Magnacom could not pay its debts, the Trustee would have a valid claim to the surplus.

Nonetheless, the bankruptcy court granted the FCC's motion to dismiss, on the ground that the FCC chose to act as a regulator rather than a creditor in response to Magnacom's default on its debt:

> When the Debtor filed [for] bankruptcy and defaulted on its payment obligations to the FCC, the FCC had two options available. It could either act as a secured creditor and seek to enforce its security interest (in which case the UCC would likely apply and the Debtor would retain an interest in the proceeds), or act as regulator and cancel the licenses. The FCC chose the second option.

Pet. App. 40a. In other words, the FCC could pick and choose whether to wear its regulator or creditor "hat" according to its immediate interest at any given time. By choosing to act as a regulator in this instance, it circumvented its obligation as creditor to account to the debtor for surplus proceeds.[8] The district court affirmed. Pet. App. 57a.

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[8] The bankruptcy court also ruled that its order disallowing the FCC's proof of claim was without *issue* preclusive effect, because the court's earlier order reserved judgment on the Trustee's *claim* to the surplus. Pet. App. 31a-

On further appeal, the Ninth Circuit also affirmed. It first rejected the claim asserted by the Trustee under the Bankruptcy Code. The court of appeals reasoned that under the Communications Act, the FCC's cancellation of Magnacom's licenses terminated Magnacom's interest in the licenses and the underlying spectrum, and that therefore "the proceeds from the auction of the new licenses were not property of the bankruptcy estate." Pet. App. 8a; *see also id.* at 13a-14a.

The Ninth Circuit then turned to the Trustee's claim under federal common law incorporating the U.C.C. and rejected that claim under the same rationale as the bankruptcy court. The court assumed *arguendo* that the U.C.C. governs the FCC's security agreements, and observed that "the UCC would support the trustee's claim of entitlement to proceeds from the FCC's sale of new licenses only if the FCC's cancellation of [Magnacom's] licenses was a lien-enforcement remedy under the UCC." Pet. App. 15a. Like the bankruptcy court, however, the Ninth Circuit held that the FCC was free to choose whether to act as a creditor or instead purely as a regulator when canceling Magnacom's licenses in response to Magnacom's default on its debt:

> The FCC had a regulatory and contractual right to cancel Magnacom's licenses. This right was separate and independent from the FCC's rights as a secured creditor. Nothing in

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32a. That preclusion ruling was affirmed by the district court and the Ninth Circuit. *Id.* 51a-52a, 22a-23a.

> the Security Agreement or the applicable regulations indicates that a license cancellation must be viewed as a lien-enforcement remedy, and we decline to do so. *Because the FCC's license cancellation is not a UCC lien-enforcement remedy, the UCC's requirements are simply inapplicable.*

Pet. App. 19a (emphasis added).

In support of this ruling, the Ninth Circuit first stated, inexplicably, that "the Security Agreement does not make cancellation a lien-enforcement remedy." Pet. App. 15a. In fact, the security agreement defines an "Event of Default" as a "default under this Agreement," and provides that "[i]f an Event of Default shall occur, the Commission shall thereafter have the following rights and remedies . . . : the License[s] shall be automatically canceled pursuant to 47 C.F.R. § 1.2110." Pet. App. 87a-88a. Thus, the security agreement *does* "make cancellation a lien-enforcement remedy." That should not be surprising, given that the event that triggers cancellation is default on the very debt that is secured by the licenses as collateral.

The Ninth Circuit also rejected the D.C. Circuit's ruling in *NextWave*, 254 F.3d at 151, that regulatory cancellation under precisely these circumstances is *also simultaneously* an act to enforce the FCC's lien or security interest. The Ninth Circuit disparaged the D.C. Circuit's holding as a "statement[] made in passing, without analysis," in response to a "highly technical argument," and said that it would "not consider [*NextWave*'s] brief discussion to be the D.C.

Circuit's reasoned conclusion that cancellation of an FCC license is a lien-enforcement action." Pet. App. 16a-17a. The Ninth Circuit also declined to follow the D.C. Circuit on this issue because the latter court's opinion had been "superceded" by this Court's *NextWave* decision – which *affirmed* the D.C. Circuit – but "which did not address the question whether license cancellation constituted lien enforcement." *Id.* 17a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit allowed the FCC to use its regulatory authority to circumvent obligations that otherwise attach under federal law when an agency acts as a creditor. That ruling represents an acknowledged, specific, and outcome-determinative split with the D.C. Circuit's decision in *NextWave*. It also conflicts with this Court's *NextWave* decision, which rejected the dichotomy between regulatory and creditor actions that has now been resurrected by the Ninth Circuit here. Most fundamentally, the Ninth Circuit's ruling would free every federal agency that acts as a creditor from the constraints of federal creditor-debtor law whenever it invokes a regulatory motive or power for its creditor actions. For each of these reasons, the Ninth Circuit's ruling should be reviewed by this Court.

1. In *NextWave*, the D.C. Circuit specifically held that the FCC's cancellation of licenses under circumstances identical to those here is *both* a regulatory act *and* a creditor action to enforce the agency's security interest. The Ninth Circuit held just the opposite – that the cancellation was a purely

regulatory and not also a lien enforcement action. The Ninth Circuit acknowledged that circuit split, and it was outcome-determinative.

2. The Ninth Circuit ruling is also contrary to this Court's decision in *NextWave* that the FCC cannot exploit its regulatory status to evade creditor-protection laws. In *NextWave* the Court made clear that the FCC's roles as a regulator and creditor are inextricably intertwined in the program at issue here. Thus, the Court *rejected* the FCC's contention that because it had regulatory motives and was enforcing regulatory conditions, it had not canceled NextWave's licenses solely because NextWave did not pay its debts to the agency. The Court thereby rejected the FCC's dichotomy between its regulatory and creditor roles. But the Ninth Circuit accepted the FCC's invitation to resurrect the regulator-creditor dichotomy here, ruling that these roles are "separate and independent" and that one and the same act cannot be both the exercise of a regulatory power and enforcement of creditor rights.

3. Most fundamentally, the Ninth Circuit's ruling allows the FCC or any other federal agency to freely switch back and forth between distinct roles as regulator and market participant in pursuit of its immediate fiscal advantage. Agencies often act both as regulators and as creditors in a single administrative program, but (absent specific directives from Congress to the contrary) they have always been bound by federal debtor-creditor law like any other creditor under this Court's precedent in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). That uniform application of commercial law

provides the certainty that is necessary for structuring everyday commercial relationships in regulated markets. But the Ninth Circuit now allows any agency to exempt itself from the constraints that apply to other creditors whenever doing so is in the agency's immediate pecuniary interest, by the simple expedient of invoking "separate and independent" regulatory motives and powers. The concern that an agency might try to exploit its dual roles is hardly speculative – in this case, as in *NextWave*, the FCC proceeded like any other secured creditor until an upturn in the market made it more attractive to label its actions "regulatory." Although this Court refused to allow such conduct in *NextWave*, the Ninth Circuit condoned and even applauded it here.

I. The Ninth Circuit's Decision Is in Direct Conflict with the D.C. Circuit's Ruling in *NextWave*.

In Judge Tatel's carefully reasoned opinion in *NextWave*, the D.C. Circuit expressly held that the FCC's automatic cancellation of licenses under circumstances identical to those here is *both* a regulatory act *and simultaneously* an action to enforce the FCC's security interest in the licenses. 254 F.3d at 151. The FCC canceled NextWave's licenses under 47 C.F.R. §1.2110(g)(4)(iv) – the same automatic cancellation rule it invoked here – because NextWave (like Magnacom) could not make its installment payments on the licenses after it was forced into bankruptcy. 254 F.3d at 138, 149-50; *see also* 537 U.S. at 298. NextWave challenged the cancellation under 11 U.S.C. § 525(a), which bars the

Government from revoking licenses of a bankruptcy debtor solely because the debtor has not paid a dischargeable debt. In response, the FCC and its supporting intervenors vigorously argued that § 525 should not be construed to reach the FCC's regulatory cancellation, because that would conflict with the Bankruptcy Code's exemption of "regulatory" actions from the scope of the automatic stay, *see* 11 U.S.C. § 362(b)(4). The FCC contended that if the § 362 automatic stay permitted the FCC to exercise its regulatory power to cancel licenses for nonpayment, then § 525 could not be construed to prohibit the same thing. *See* 254 F.3d at 150.

The D.C. Circuit rejected that argument precisely because the FCC's license cancellation was *both* a regulatory act *and* an "act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. § 362(a)(4); *see NextWave*, 254 F.3d at 151. In enacting § 362, Congress specifically provided that although most regulatory acts are exempt from the automatic stay, regulatory acts to enforce liens (including consensual security interests) are *not* exempt. 11 U.S.C. § 362(b)(4) (regulatory exception to stay does not extend to lien enforcement actions covered by § 362(a)(4)).[9] Thus, Congress (unlike the Ninth Circuit) fully understood that there is nothing mutually exclusive about regulatory and creditor actions and that a government agency like the FCC

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[9] Under the Bankruptcy Code, the term "lien" encompasses consensual security interests like that here. 11 U.S.C. § 101(37), (51).

might use its regulatory power to enforce a security interest.

In *NextWave* the D.C. Circuit held that the FCC had done exactly that when exercising precisely the same powers it exercised here: using its regulatory powers to enforce its security interest. The court observed that "NextWave [like Magnacom] executed security agreements giving the Commission a 'first lien' on the company's interest in the licenses"; that lien enforcement actions "include self-help remedies against collateral such as repossession"; and that "Commission counsel acknowledged that canceling the licenses and seeking to collect on the debt was 'tantamount . . . to foreclosing on collateral.'" 254 F.3d at 151 (internal quotation marks omitted from second quotation; ellipsis in original). "Thus, contrary to the Commission's argument, and notwithstanding the applicability of the regulatory power exception, section 362's automatic stay *does* apply here" – precisely because the regulatory cancellation was *also* an action to the enforce the FCC's security interest. *Id.* Therefore, the statutory conflict posited by the FCC did not exist. *Id.* ("This is thus not a case in which section 525, if applicable, would bar an action exempt from the automatic stay").

In short, the D.C. Circuit rejected the FCC's automatic stay argument based on an express ruling that regulatory cancellation under these circumstances is *also* an action to enforce the FCC's security interest against the licenses as collateral. In the present case, however, the Ninth Circuit reached the exact opposite result, holding that

cancellation under the same FCC rule, which is triggered by nonpayment of the licensee's secured debt, is a pure regulatory action and not also a lien-enforcement action. Pet. App. 19a ("The FCC had a regulatory . . . right to cancel Magnacom's licenses . . . separate and independent from the FCC's rights as a secured creditor. . . . Because the FCC's license cancellation is not a UCC lien-enforcement remedy, the UCC's requirements are simply inapplicable").

That split in the Ninth and D.C. Circuit's holdings is plainly outcome-determinative in this case. Had the Ninth Circuit followed the D.C. Circuit and held that cancellation was a lien-enforcement remedy, then the U.C.C. would have applied to the FCC's actions, and Magnacom would have an unwaivable right to the surplus proceeds of the collateral. As the bankruptcy court acknowledged, if the FCC were found to be "act[ing] as a secured creditor and seek[ing] to enforce its security interest," then "the UCC would likely apply and [Magnacom] would retain an interest in the proceeds." Pet. App. 40a. The Ninth Circuit tacitly recognized this as well. *Id.* 19a ("Because the FCC's license cancellation is not a UCC lien-enforcement remedy, the UCC's requirements are simply inapplicable"). Indeed, as this Court made clear in *Kimbell Foods*, the U.C.C. applies as federal law binding agencies that act as creditors in the market.

The Ninth Circuit openly acknowledged that it was rejecting the D.C. Circuit's ruling because it disagreed with it. Indeed, the Ninth Circuit even belittled the relevant part of Judge Tatel's opinion as "statements made in passing, without analysis," in

response to a "highly technical argument" from the FCC. Pet. App. 16a-17a. But whether or not the FCC's argument was "highly technical," the D.C. Circuit's treatment of it was analytically rigorous. Nor is this surprising. The applicability of the automatic stay – and, specifically, of the lien enforcement exception to the regulatory exception to the stay – was extensively briefed and argued in the D.C. Circuit in *NextWave*. The Ninth Circuit's assertion that this ruling was not "the D.C. Circuit's reasoned conclusion that cancellation of an FCC license is a lien-enforcement action," Pet. App. 16a, is unsupportable.[10]

If anything, the Ninth Circuit, not the D.C. Circuit, resolved this issue "in passing, without analysis." Ignoring the express terms of the security agreement, the Ninth Circuit asserted, without citation or elaboration, that "the Security Agreement does not make cancellation a lien-enforcement remedy." Pet. App. 15a. In fact, as previously noted, the security agreement expressly states that regulatory cancellation is the agency's primary remedy for default under the agreement itself. *Id.* 87a-88a. Small wonder, then, that earlier in

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[10] Indeed, the D.C. Circuit carefully analyzed an earlier Second Circuit decision in litigation between the FCC and NextWave to determine its preclusive effect with respect to this very issue, and held that the Second Circuit left open the question whether the license cancellation was a lien enforcement action and was therefore stayed regardless of its regulatory character. *NextWave*, 254 F.3d at 148-49. That demonstrates the painstaking care the D.C. Circuit took in addressing this issue.

NextWave the FCC's own counsel conceded that regulatory cancellation under these circumstances is tantamount to foreclosure on collateral. 254 F.3d at 151.[11]

The Ninth Circuit also suggested that the authority of the D.C. Circuit's ruling on this issue was somehow diminished by the fact that this Court's own *NextWave* decision simply "did not address the question whether license cancellation constituted lien enforcement." Pet. App. 17a. But this Court did not vacate or reverse the D.C. Circuit in *NextWave* – it *affirmed* it, without in any way disturbing the court of appeals' ruling on this issue. Certainly, the affirmance by this Court did not reduce the authority of the D.C. Circuit's decision on any issues this Court declined to address.[12]

To be sure, because this Court in *NextWave* did not itself address the precise question of whether the

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[11] The D.C. Circuit also rejected the FCC's automatic stay argument on additional independent grounds. 254 F.3d at 150. But the existence of alternative rationales for a ruling does not diminish the authority of each alternative. "Courts routinely decide cases on multiple grounds, each of which has been fully litigated and given careful consideration due to their potentially dispositive role in the case. . . . [I]t would be curious to conclude that none of these findings were necessary to the judgment . . . ." *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 253 (3d Cir. 2006), *cert. denied*, 127 S.Ct. 1878 (2007).

[12] *See, e.g., Sierra Club v. Whitman*, 285 F.3d 63, 68 (D.C. Cir. 2002) (relying on holding by court of appeals on an issue that was not reached by Supreme Court in affirming that decision in *Georgetown University Hospital v. Bowen*, 821 F.2d 750, 756-58 (D.C. Cir. 1987), *aff'd*, 488 U.S. 204 (1988)).

license cancellation was also an act to enforce the FCC's security interest, the Ninth Circuit was not *bound* by precedent on that specific issue. It was therefore free to disagree with the D.C. Circuit, and it did so. Review by this Court is, however, appropriate under just these circumstances.

II. The Ninth Circuit's Rigid Dichotomy Between the FCC's Roles as Regulator and Creditor Is Contrary to this Court's *NextWave* Decision.

Review of the Ninth Circuit's decision is also warranted because its reasoning runs directly counter to this Court's approach in *NextWave*. While the *NextWave* majority did not address the specific issue whether the FCC's regulatory cancellation is also an act to enforce its security interest, the Court did grapple with the overarching question of the relationship between the FCC's roles as regulator and creditor. In both *NextWave* and this case, the FCC's constant argument has been that because its actions have a regulatory aspect, those actions have no creditor dimension and are therefore exempt from creditor-debtor law. In this case, the Ninth Circuit accepted the FCC's either/or framing of the issue and held that because the FCC used its regulatory power to respond to default on a debt to it, the agency was not acting as a creditor and commercial law simply did not apply.

In *NextWave*, however, this Court took just the opposite tack and emphatically rejected the dichotomy that the FCC has attempted to drive between its regulatory and creditor roles. The FCC argued in *NextWave* that it did not violate § 525 by

automatically canceling NextWave's licenses in response to NextWave's default on its installment payments, because NextWave's obligation to pay was not a "debt" as required by § 525. 537 U.S. at 302. According to the FCC, NextWave's payment obligation was not a debt because it was a "regulatory condition" that the FCC imposed as a regulator rather than as a creditor. *Id.* But this Court rejected the FCC's dichotomy out of hand and dismissed the unfounded notion that regulatory powers and obligations cannot coexist with commercial or creditor-debtor relationships. In the Court's pithy formulation, "a debt is a debt, even when the obligation to pay it is also a regulatory condition." *Id.* at 303.

The Court also rejected the FCC's attempt to escape § 525 by smuggling in its regulator-creditor dichotomy in second guise. Even if NextWave's payment obligation was a debt (as well as a regulatory condition), the FCC argued that because it had a "valid regulatory motive" for the cancellation, it had not canceled NextWave's licenses "solely because" of NextWave's nonpayment of its debt. *See* 537 U.S. at 301. The Court again disagreed. The regulatory motive behind the FCC's actions did not change the fact that it canceled NextWave's licenses for failure to pay a debt. *Id.*

The Court's analysis in *NextWave* is fundamentally at odds with the Ninth Circuit's decision in this case, which accepts the FCC's premise that because the FCC's license cancellation has a regulatory dimension, it is *ipso facto* not a creditor action. In *NextWave*, the FCC could not

escape its obligations under federal creditor-debtor law merely because it was acting pursuant to its regulatory powers. But that is precisely what the Ninth Circuit allowed here.

The Ninth Circuit's opinion also cannot be reconciled with *NextWave* insofar as the Ninth Circuit held that Magnacom's unwaivable right to the surplus proceeds was defeated by sections of the Communications Act providing that spectrum licensees hold their licenses subject to conditions imposed by the FCC and have no property interest in the underlying spectrum. *See* Pet. App. 8a-9a. The FCC made the same argument in *NextWave*, contending that § 525 of the Bankruptcy Code would conflict with these same provisions of the Communications Act if the former prohibited the FCC from enforcing the payment condition on the licenses. FCC Br. in *NextWave*, at 46-48. But the Court rejected the FCC's contention because the Communications Act says nothing at all about the credit and cancellation program here:

> [N]othing in those provisions demands that cancellation be the sanction for failure to make agreed-upon periodic payments. Indeed, nothing in those provisions even requires the Commission to permit payment to be made over time, rather than leaving it to impecunious bidders to finance the full purchase price with private lenders.

537 U.S. at 304. *A fortiori*, nothing in the Communications Act controls the question of the parties' respective rights to the monetary proceeds

when the FCC provides secured financing and then cancels licenses when the bidders cannot make their payments.[13]

Even the dissenting opinion in *NextWave* rejected the FCC's dichotomy between regulatory and creditor actions accepted by the Ninth Circuit in this case. Directly contradicting the Ninth Circuit here – and consistent with the D.C. Circuit's *NextWave* decision – Justice Breyer's *NextWave* dissent recognized that regulatory cancellation under the present circumstances *is* equivalent to enforcement of the FCC's security interest. As he explained, "*In these very cases*, the Government sought to retake its license through enforcement of its security interest." 537 U.S. at 320 (Breyer, J., dissenting). It did so when "the FCC declared the licenses void for nonpayment. In a word, the FCC sought to repossess

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[13] Nor does any other statute or regulation – other than U.C.C. Article 9 – address the issue of the right to proceeds when the FCC cancels licenses for nonpayment. *See* Pet. App. 38a ("nothing in the Federal Communications Act (FCA) or FCC regulations governs this issue, allowing this Court to look to the UCC for guidance in determining federal common law"). Tacitly recognizing that it lacked any other authority for its argument, the FCC contended that an informal opinion letter authored by its general counsel that does briefly address the issues, *Leonard J. Kennedy, Esq.*, 11 F.C.C.R. 21572 (1996), was entitled to *Chevron* deference. But the Ninth Circuit properly rejected that contention under this Court's decisions in *Christensen v. Harris County*, 529 U.S. 576 (2000), and *United States v. Mead Corp.*, 533 U.S. 218 (2001). Pet. App. 10a n.7.

the licenses so that it could auction the related spectrum space to other users." *Id.* at 312.[14]

Thus, all nine Justices in *NextWave* rejected the FCC's position that creditor and regulatory actions are mutually exclusive. This Court's decision cannot be reconciled with the Ninth Circuit's holding in this case that the FCC's "regulatory and contractual right to cancel Magnacom's licenses . . . was *separate and independent* from the FCC's rights as a secured creditor." Pet. App. 19a. The Ninth Circuit did not purport to explain how repossession via cancellation was somehow not a disposition of collateral under federal common law incorporating U.C.C. Article 9 – it merely held that the FCC's exercise of regulatory authority avoided that inquiry altogether. That holding runs contrary to this Court's holding in *NextWave* and merits review by the Court.

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[14] Despite rejecting the FCC's premise, Justice Breyer would have ruled for the agency in *NextWave* because he believed enforcement of § 525 under these circumstances led to an "anomaly" in which ordinary secured creditors can enforce their security interests, but the FCC cannot. 537 U.S. at 319-20. As the Ninth Circuit recognized, the majority in *NextWave* "did not address the question whether license cancellation constituted lien enforcement." Pet. App. 17a. The majority did, however, disagree with Justice Breyer's view that enforcement of the plain language of § 525 created an "anomaly," because the cancellation power that the FCC sought to exercise went beyond the rights of ordinary secured creditors to enforce their security interests "in the bankruptcy process." 537 U.S. at 307.

III. The Ninth Circuit's Decision Is Contrary to *Kimbell Foods* and Other Decisions Holding That Federal Agencies Are Bound by the Same Rules That Apply to other Creditors.

Finally, the Ninth Circuit's decision upends the established rule that federal agencies that chose to act as creditors in the marketplace are bound by the same uniform state law rules that applies to all other creditors. *See Kimbell Foods*, 440 U.S. at 722-29.[15] Agencies often act as creditors in the market they regulate. And commercial actors structure their transactions in regulated markets based on the understanding that a uniform set of debtor-creditor law applies to federal agencies acting in the marketplace as well.

Indeed, this Court has long recognized the need for certainty for investors, because "[i]n structuring financial transactions, businessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved." *Kimbell Foods*, 440 U.S. at 739. Giving federal creditors special rights would "undermine that stability. Creditors who justifiably rely on state law . . . would have their expectations thwarted whenever a federal contractual security interest" is exempted from

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[15] When federal agencies become commercial creditors, federal courts must "adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *Kimbell Foods*, 440 U.S. at 740; *see also O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994) ("matters left unaddressed [by a federal regulatory] scheme are presumably left subject to the disposition provided by state law").

generally applicable requirements. *Id.* The Court therefore has refused "to override intricate state laws of general applicability on which private creditors base their daily commercial transactions." *Id.* at 729.

Consistent with *Kimbell Foods*, the lower courts routinely apply the uniform body of commercial law supplied by the U.C.C. to federal agencies conducting commercial transactions. *See, e.g., United States v. Currituck Grain, Inc.*, 6 F.3d 200, 207 (4th Cir. 1993) (applying U.C.C. in context of Farmer's Home Administration loans and holding that "absent congressional direction to the contrary, nondiscriminatory state commercial law applies to . . . federal lenders"); *United States v. Progressive Farmers Marketing Agency*, 788 F.2d 1327, 1329 (8th Cir. 1986) (applying U.C.C. where FmHA acted as creditor); *United States v. Tugwell*, 779 F.2d 5, 7 (4th Cir. 1985) (per curiam) (same).

Moreover, the lower courts routinely apply federal debtor-creditor law incorporating the U.C.C. even when an agency claims it would be inconsistent with its regulations. *See United States v. Walter Dunlap & Sons, Inc.*, 800 F.2d 1232, 1238-39 (3d Cir. 1986) (where FmHA acted as creditor, holding that federal law incorporating U.C.C. applied rather than agency regulation); *Chicago Title Ins. Co. v. Sherred Village Assocs.*, 708 F.2d 804, 808 (1st Cir. 1983) (holding that agency regulations did not displace state law applicable to HUD as lender); *In re Kennedy*, 785 F.2d 1553, 1556 (11th Cir. 1986) (holding that agency regulations did not displace state law applicable to FmHA as lender).

The Ninth Circuit's holding allows every federal agency to evade generally applicable creditor-debtor laws by invoking its regulatory purposes for any action. Every federal agency that extends credit subject to security interests does so in furtherance of a broader regulatory agenda. The FCC is neither the first nor will it be the last federal agency to attempt to use its regulatory authority over a creditor to its benefit – particularly where the "benefit" is recovery of funds that would otherwise go to other creditors under routine application of the U.C.C. As the Court observed in *NextWave*, "[i]t is hard to imagine a situation in which a governmental unit would not have some further motive behind the cancellation – assuring the financial solvency of the licensed entity, or punishing lawlessness, or even (quite simply) making itself financially whole." 537 U.S. at 301 (citations omitted); *see also NextWave*, 254 F.3d at 153 (rejecting theory that "would allow governmental units to escape section 525's limitations simply by invoking a regulatory motive for their concern with timely payment").

The Ninth Circuit's decision undermines the stability provided by uniform commercial law in just the manner *Kimbell Foods* warned against. Magnacom's creditors and equity holders made their investments in the company against the backdrop of state commercial law that gives a debtor like Magnacom an unwaivable right to surplus proceeds when a secured creditor disposes of collateral in response to the debtor's default on its payment. As previously explained, this important guarantee protects debtors (and their other creditors) in the

very situation here: where fluctuating markets leave them in temporary distress. Although a secured creditor has the right to look to its collateral for repayment under these circumstances, that right extends only up to the amount of the debt itself, so that any surplus is available to pay the debtor's other creditors. Indeed, it is undisputed that if the FCC had left "it to impecunious bidders to finance the full purchase price [of the licenses] with private lenders," *NextWave*, 537 U.S. at 304, Magnacom's bankruptcy estate would be entitled to the surplus proceeds from the sale of its licenses after the secured private lender had been paid in full. The entire point of *Kimbell Foods* is that the same rules should apply to the FCC when it chooses to become a secured creditor.

Indeed, at every step of the way in this case, the FCC took advantage of its rights as a creditor. *Supra* at 4-9. But when the reauctioning of the license rights netted *more* than Magnacom owed, the FCC suddenly reversed course and disclaimed its creditor status in an effort to thwart the debtor's unwaivable right to the surplus. *Cf. In re NextWave Personal Commc'ns Inc.*, 244 B.R. 253, 257-63 (Bankr. S.D.N.Y. 2000) (detailing similar reversals of position by FCC in *NextWave* litigation as spectrum prices moved up and down), *vacated sub nom. In re FCC*, 217 F.3d 125 (2d Cir. 2000).

The Ninth Circuit gave its imprimatur to this gamesmanship. It applauded the FCC's exploitation of its regulatory power to avoid its obligations as a creditor. But under *Kimbell Foods*, a federal creditor

must take the bitter with the sweet. As the Seventh Circuit explained in a decision by Judge Easterbrook:

> To say, as *Kimbell Foods* . . . do[es], that federal creditors presumptively have the same rights under state law as do private creditors is to say that they also have the same obligations and limitations. If the federal agency, as creditor, oversteps its rights in seizing collateral, it is answerable under the UCC . . . .

Gorden v. Kreul, 77 F.3d 152, 155 (7th Cir. 1996).

CONCLUSION

The petition for writ of certiorari should be granted.

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