No. 00-1621

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GWI PCS 1, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondents do not dispute that, in *In re NextWave PCS, Inc.*, 200 F.3d 43, 54 (1999), cert. denied, 121 S. Ct. 298 (2000), the Second Circuit held that the full and timely payment conditions contained in FCC spectrum licenses—conditions the bankruptcy court altered here—are regulatory in nature and thus beyond the jurisdiction of bankruptcy courts to modify. See also *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14 (1942) ("no court can grant an applicant an authorization which the Commission has refused"). Congress, the Second Circuit observed, had authorized the competitive bidding process to enable the FCC to award licenses to those that value them most highly and thus are most likely to use them effectively in the public interest. *NextWave*, 200 F.3d at 52-53. Consequently, a bidder's failure to meet its obligations has "more than financial implications. It indicate[s] that under the predictive mechanism created by Congress to guide the FCC," the bidder is "not the applicant most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted." *Id.* at 54. See also Pet. App. 7a; Pet. 3-5, 18-20. Moreover, requiring licensees to meet bid obligations is indispensable to the integrity of the auction mechanism: It prevents insincere bidding by entities that speculate that, if they are unable to pay, they may be permitted to retain the licenses without making full payment. *NextWave*, 200 F.3d at 52; Pet. 8, 20. For that reason, the FCC refused to grant C-Block licensees including respondents forgiveness of the payment conditions of their licenses in regulatory proceedings specifically dedicated to that issue. *Ibid.* Yet that is the relief the bankruptcy court gave respondents here.

In light of that, the court of appeals in this case recognized that, by altering the terms of respondents' licenses, the bankruptcy court may have usurped the FCC's authority, erroneously "taking onto itself [the] quasi-regulatory function held by the FCC." Pet. App. 31a. Accord *NextWave*, 200 F.3d at 55 (abrogation of payment condition improperly "exercise[s] the FCC's radio-licensing function"). The court of appeals, however, declined to vindicate the FCC's authority on appeal, invoking instead the judicially developed bankruptcy doctrine of equitable mootness to protect the interests of the reorganized debtor and other private parties. That extension of equitable mootness has important ramifications, because it exposes the authority of the myriad agencies to which Congress and the States have statutorily delegated regulatory authority to potentially unreviewable usurpation by bankruptcy courts, whenever the "equities"—as measured by the interests of the reorganized entity, private investors, and the absence of a stay—support that result.

Respondents do not contend otherwise. Instead, they argue that the doctrine of equitable mootness is well established and rely on supposed litigation waivers or defaults. Respondents, however, did not raise those supposed defaults before the court of appeals; the court of appeals squarely resolved both questions presented by the petition; and the claims of default are without merit.[1] Moreover, there is nothing well established about applying equitable mootness to insulate judicial usurpation of executive authority and impairment of regulatory programs. Nor is there anything well established about the Fifth Circuit's invalidation of

[1] For example, respondents erroneously assert that the government failed to appeal the bankruptcy court order enjoining FCC enforcement of license conditions. Br. in Opp. 13, 28. The government appealed the confirmation order, Pet. App. 101a-123a, which "enjoined" the FCC from "taking any action whatsoever against the Debtors to revoke their PCS licenses," *id.* at 118a. Respondents elsewhere concede that to be the case. Br. in Opp. 8-9 (conceding that the "Confirmation Decision * * * enjoined the FCC from canceling GWI's licenses for failure to pay more than the adjusted amount of the FCC's claims" and that the "FCC appealed the Confirmation Decision"). See also Pet. App. 31a-32a. There was no other order enjoining the FCC from enforcing license conditions that could have been appealed, and respondents cite none. See also pp. 8-9, *infra*.

respondents' payment obligation as constructively fraudulent; in fact, that holding squarely conflicts with a decision of the Second Circuit.

A. 1. Respondents first argue that equitable mootness is well accepted by the lower federal courts. See Br. in Opp. 13-20. This Court, however, has never recognized that extra-statutory bankruptcy doctrine. And, significantly, respondents cite no decision of any court (other than the decision below) applying equitable mootness to preclude an agency from reclaiming its *regulatory authority* when that authority is usurped by a bankruptcy court. Pet. 23-24. Instead, each case cited by respondents involves financial claims by private creditors.

The decision below's unprecedented extension of the judge-made equitable mootness doctrine—to defeat lawful regulatory authority—warrants this Court's review. See Pet. 17-20, 23-26. As this Court has explained, it is "problematic" for bankruptcy courts "to scrutinize the validity of every administrative or enforcement action brought against a bankrupt entity," both "because it conflicts with the broad discretion Congress has expressly granted many administrative entities and because it is inconsistent with the limited authority Congress has vested in bankruptcy courts." *Board of Governors of the Fed. Reserve* v. *MCorp*, 502 U.S. 32, 40 (1991). The decision below is beyond "problematic." It does not merely authorize bankruptcy courts to "scrutinize" agency decisions. It renders unreviewable bankruptcy court orders usurping agency authority when appellate courts consider that equitable.

Respondents cite no statute supporting that result. To the contrary, although respondents assert (at 17-18) that equitable mootness "implements" the express protections of 11 U.S.C. 1127(b), 1142(a), and 1144 against delayed changes to a confirmed reorganization plan, that assertion highlights the doctrine's lack of statutory basis. No court of appeals has ever suggested that those Bankruptcy Code provisions *create* the equitable mootness doctrine; instead, the courts developed the doctrine as a "discretionary power" that flows from balancing equities. *In re AOV Indus.*, 792 F.2d 1140, 1148 (D.C. Cir. 1986); *In re Manges*, 29 F.3d 1034, 1038 (5th Cir. 1994). And the provisions cited by respondent are plainly inapposite. Section 1127(b), for example, provides that the "*proponent of a plan* or the *reorganized debtor* may modify such plan" following confirmation only "before substantial consummation," Br. in Opp. 18 n.21 (quoting 11 U.S.C. 1127(b)) (emphases added and omitted). That provision thus limits when plan proponents and debtors can alter the plan. It does not limit an aggrieved party's right to appeal or the appellate jurisdiction of Article III courts.[2] Where Congress intended to bar appellate review of bankruptcy court orders, it did so expressly. Pet. 22-23; *e.g.*, 11 U.S.C. 363(m), 364(e). But no provision of the Code authorizes federal courts to refuse jurisdiction over an otherwise live appeal based on the equities. And certainly none authorizes federal courts to override Congress's statutory delega-

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[2] Similarly, although respondents claim (Br. in Opp. 10, 18) that 11 U.S.C. 1144 precluded their plan of reorganization from being "revoked for any reason" after 180 days, Section 1144 addresses when a *bankruptcy court* can "revoke" a confirmation order "*[o]n request of a party in interest*" on grounds of fraud. 11 U.S.C. 1144 (emphasis added). It says nothing about the authority of *courts of appeals* to *vacate* unlawful confirmation orders on appeal, and respondent cites no court decision suggesting that confirmed reorganization plans automatically become unreviewable if the appeal takes more than 180 days. Section 1142 (Br. in Opp. 18) provides that the debtor must carry out the organized plan and comply with orders of the court. But it says nothing about the ability of courts of appeals to reverse or vacate unlawful confirmation orders. Moreover, if respondents did not wish to comply with plan provisions pending appeal, they should not have proposed immediate implementation in the plan, and they certainly should not have *opposed* the FCC's request for a stay pending appeal. Finally, the "substantial consummation" standard of 11 U.S.C. 1101(2) hardly supports the doctrine. As the Fifth Circuit has acknowledged, to the extent equitable mootness considers "substantial consummation," it has "borrowed" that standard as a "yardstick" because Section 1101(2) does not apply of its own force. *Manges*, 29 F.3d at 1041.

tions of regulatory authority by refusing to hear appeals of bankruptcy court orders that usurp agency authority.

For the same reasons, respondents err in opposing further review on the ground that the government did not seek a stay from this Court. Br. in Opp. 13, 19. The Fifth Circuit's denial of the government's stay request did not preclude that court from considering whether equitable mootness can be applied to bankruptcy court decisions usurping agency regulatory authority; nor does it bar this Court from doing so. Moreover, the suggestion that state and federal agencies must now routinely seek stays *from this Court*—or permanently forfeit their right to challenge bankruptcy court usurpations of their authority—is impractical and unrealistic.

2. Notably, respondents nowhere defend the court of appeals' view that equitable mootness may properly be invoked to preclude federal agencies from vindicating their regulatory authority on appeal. Instead, respondents deny that the FCC license conditions at issue here were regulatory, Br. in Opp. 20-24, and characterize this case as an ordinary "commercial transaction [with the FCC] as a creditor of GWI," *id.* at 21. The court of appeals concluded otherwise. It agreed that the bankruptcy court, by altering license terms, may have "tak[en] onto itself a quasi-regulatory function held by the FCC." Pet. App. 31a. The Second Circuit in *NextWave* reached the same conclusion, labeling the argument respondents now assert—that this is a "simple bankruptcy case" involving a mere "debtor-creditor relationship between the FCC and" the licensee—"fundamentally mistaken." 200 F.3d at 54. See Pet. App. 33a n.31.[3] Respondents thus seek to defend the judgment on a ground that, if

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[3] *NextWave* cannot be distinguished on "jurisdictional" grounds (Br. in Opp. 15, 22). As the Second Circuit explained, a bankruptcy court has jurisdiction to apply bankruptcy law to the "financial transactions between [the FCC and a licensee that] do not touch upon the FCC's regulatory authority," but that grant of jurisdiction does not authorize it to alter the terms of the FCC's licensing decisions. *NextWave*, 200 F.3d at 55.

accepted by any court, would conflict with an on-point decision of the Second Circuit.

Indeed, the Communications Act's text makes it clear that the aim of competitive bidding is *not* to allow the FCC to "c[o]me to the market to sell PCS licenses," Br. in Opp. 20, but rather to harness market forces in aid of the ultimate goal of spectrum licensing—to identify the best user of radio spectrum in pursuit of "the public interest." See 47 U.S.C. 309(j)(3) (1994 & Supp. IV 1998). "The FCC was not asked to sell off the spectrum (something it did not own) * * *. Instead, it was told to auction licenses * * * because such a system was thought likely to promote the development of new technologies," "encourage efficient use of the spectrum," and "ensure that licenses end up in the hands of those most likely to further congressionally defined objectives." *NextWave*, 200 F.3d at 52, 54. The full and timely payment requirements are, as the FCC and the Second Circuit have concluded, an integral and indispensable part of that market-based mechanism. *Id.* at 52; Pet. 2-5, 14-17; p. 1, *supra*. Thus, this case does not concern the restructuring of solely financial obligations or an effort by a mere government creditor to collect additional funds. Rather, as the Fifth Circuit and the Second Circuit both understood, it poses a fundamental question of substantive authority—whether judge-made bankruptcy law can authorize a licensee to retain FCC spectrum licenses through abrogation of regulatory license conditions notwithstanding the FCC's refusal, in a specific regulatory proceeding dedicated to the issue, to eliminate those conditions.

3. For the same reasons, respondents' reliance (Br. in Opp. 22-23) on 11 U.S.C. 525 is unavailing. The court of appeals did not address the effect of Section 525(a) on license cancellation; it relied on equitable mootness to abstain from hearing the appeal. Besides, Section 525(a) provides that "a governmental unit may not" revoke a license "*solely* because" the debtor "has not paid a debt that is *dischargeable*

in the case under this title." 11 U.S.C. 525(a) (emphases added). As the Second Circuit concluded in *NextWave*, Section 525 is not applicable because the regulatory payment obligation in FCC licenses is *not* "dischargeable" where, as here, the licensee retains the licenses; instead, because the obligation is (unlike any payment obligation following return of the licenses) regulatory, it is beyond the power of bankruptcy courts to discharge or adjust. 200 F.3d at 55-56; *In re FCC*, 217 F.3d 125, 135-136 (2d Cir.), cert. denied, 121 S. Ct. 606 (2000). Moreover, as Section 525's heading ("Protection against discriminatory treatment") attests, Section 525 "protects bankruptcy debtors from various forms of discrimination" based on insolvency; it thus bars agencies from canceling licenses "solely" for nonpayment, and is "not applicable" where an agency merely enforces a financial requirement related to the purpose of licensing, such as requiring "financial responsibility in a particular licensing process." 4 King, *Collier on Bankruptcy* ¶ 525.02 (15th ed. 2001). See S. Rep. No. 989, 95th Cong., 2d Sess. 81 (1978) (Section 525 "does not prohibit consideration of other factors, such as future financial responsibility or ability, and does not prohibit imposition of requirements such as net capital rules."). That precisely describes the FCC's payment requirement. A licensee's spectrum rights are contingent on meeting that condition because nonpayment "indicate[s] that under the predictive mechanism created by Congress to guide the FCC, [it is] not the applicant most likely to use the [l]icenses efficiently for the benefit of the public," 200 F.3d at 54, and because default serves as "an 'early warning' that a winning bidder * * * may be financially unable to meet its obligation to provide service to the public." *Mountain Solutions, Ltd.* v. *FCC*, 197 F.3d 512, 518 (D.C. Cir. 1999).

B. Respondents do not dispute that the Fifth Circuit's decision on the second question presented—whether respondents' obligation to the FCC can be avoided as a "fraudulent conveyance" under 11 U.S.C. 548—squarely conflicts with the Second Circuit's decision in *NextWave*. See Pet. App. 37a, 40a. The Second Circuit deferred to the FCC's interpretation of its own regulations, 200 F.3d at 57-60; concluded that a winning bidder's payment obligations arise at the close of the auction, *id.* at 61; and held that a decline in license value between the close of auction and license issuance cannot render fulfillment of a bidder's obligations constructively fraudulent, *id.* at 62. The Fifth Circuit reached the opposite result on each of those issues. Pet. App. 36a-37a ("disagree[ing] with the Second Circuit[]" on deference); *id.* at 40a ("[w]e respectfully disagree" that payment obligations arise "at the close of the auction"); *id.* at 46a (fulfillment of obligations constructively fraudulent).

Respondents, however, argue that the question was not preserved because the government "did not appeal the bankruptcy court's valuation methodology" and because the bankruptcy court "relied on a * * * § 506(a) procedure" rather than avoidance under 11 U.S.C. 548. Br. in Opp. 25. Those claims, never asserted below, are factually incorrect. The bankruptcy court unmistakably relied on Section 548, not Section 506, to invalidate $894 million of respondents' payment obligations as constructively fraudulent[4]; the court of appeals understood that "[t]he bankruptcy court avoided approximately $894 million of [respondents' obligations] to the FCC as a constructive fraudulent transfer *under 11 U.S.C. § 548(a)(2)*," Pet. App. 34a (emphasis added); the government raised the issue, Gov't C.A. Br. 33-45; and the court of appeals addressed the issue at length, Pet. App. 34a-47a. See *United States* v. *Williams*, 504 U.S. 36, 40-45 (1992) (review proper if issue presented *or* reached by court below);

[4] See Pet. App. 124a-126a, 129a, 154a-156a, 160a-163a. See, *e.g.*, *id.* at 151a (obligations to FCC "avoid[ed]" or "voided" "under Section 548"). See also *id.* at 65a ("Under Section 548, any obligation above $166 million * * * was avoided. The debtors had already paid the government $106 million. Thus, the government's secured claim is $60 million."); *id.* at 126a (reducing respondents' obligations "pursuant to [Section] 548(c)").

Stevens v. *Department of the Treasury*, 500 U.S. 1, 8 (1991) (rejecting waiver argument because court of appeals "decided the * * * issue"). Section 506(a), in any event, does not permit obligations to be "avoided" as "constructively fraudulent." It permits undersecured claims in "cram down" cases to be bifurcated or "divided into secured and unsecured portions." *Associates Commercial Corp.* v. *Rash*, 520 U.S. 953, 960-961 (1997). That bifurcation did not take place here because, as the bankruptcy court noted, respondents had "withdrawn" their Section 506 motion. Pet. App. 82a.[5] Respondents' claim (Br. in Opp. 8, 13) that the government should have invoked 11 U.S.C. 1111(b)(2) is meritless for similar reasons.[6]

Respondents also suggest (at 27-28) that the circuit conflict is acceptable because the FCC has suspended use of installment payments and, as a result, the issue will not recur. Respondents, however, ignore the inevitable delays—9

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[5] Had the FCC's claims been bifurcated under Section 506, the FCC (as the largest unsecured creditor) would likely have been able to block plan confirmation. The passing reference to Section 506 in the bankruptcy court's decision (Pet. App. 84a-86a)—upon which respondents presumably rely for their waiver claim and their claim that reversal would not substantially alter the result in this case (Br. in Opp. 13, 28-29)—concerned a contingent mechanism designed to prevent an FCC appeal from becoming equitably moot by giving the government an unsecured claim against an $18 million fund if the government prevailed on appeal. That mechanism, however, is part of the confirmation order the FCC challenged, and thus cannot preclude this Court from giving the FCC full relief. Moreover, because it is premised on the need to avoid equitable mootness, that provision is of no application unless the FCC's appeal would otherwise be equitably moot. In any event, the issue here is important not for financial reasons (whether $18 million or $954 million is at issue) but because of its ongoing effect on the auction mechanism. See p. 10, *infra*.

[6] Section 1111(b)(2) would not permit the $894 million in avoided debt to be treated as fully secured because that provision applies only in limited circumstances and only "to the extent that such claim is allowed." 42 U.S.C. 1111(b)(2). Section 1111(b)(2) does not permit *disallowed* claims, such as claims avoided as constructively fraudulent, to be converted into fully secured claims.

months in this case—between the close of auction and the FCC's issuance of licenses. As we have explained (Pet. 29 n.15) such delays are necessary because the FCC "is statutorily obligated to ensure that the winning bidder is qualified to hold the license before issuing it," and cannot possibly determine the qualifications of every potential bidder before auction. The circuit conflict created by the Fifth Circuit's decision thus subjects otherwise similarly situated bidders to different legal rules—and requires them to bear different risks—during the period between the close of auction and license issuance. A winning bidder in the Second Circuit bears the risk of a decline in the value of the spectrum between auction and license issuance; if such a decline occurs, a bidder in that circuit cannot avoid its payment obligations as constructively fraudulent, much less retain the licenses while doing so. See *NextWave*, 200 F.3d at 57-62. In contrast, a bidder in the Fifth Circuit does not bear that risk—the FCC does—and such a bidder can avoid payment obligations as constructively fraudulent. That conflict not only results in differential treatment of winning bidders based on happenstances of geography, but also distorts bidding incentives and thus auction results. See Pet. 29 & n.15.[7]

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

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[7] Notably, respondents do not defend the Fifth Circuit's fraudulent conveyance decision on the merits. As we have pointed out (Pet. 29), respondents received "reasonably equivalent value"—and there was no fraudulent conveyance—even if one sets aside deference questions and when the obligation to pay arose. By promising to pay $954 million and declining to default on their winning bids, respondents obtained at least $959 million in value: They received licenses worth (by the bankruptcy's court's estimate) $166 million, and they avoided a default liability of $793 million. *Ibid.* Respondents nowhere respond, and nowhere explain why that is not reasonably equivalent value.

Respectfully submitted.

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