No. 07-803

In the Supreme Court of the United States

DONALD A. THACKER, TRUSTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a winning bidder in a Federal Communications Commission spectrum auction that defaults on its payment obligations and consents to the cancellation of its licenses has a claim to the proceeds of a subsequent auction allocating new licenses to use the spectrum.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 503 F.3d 984. The opinion of the district court (Pet. App. 45a-57a) is unreported. The opinion of the bankruptcy court (Pet. App. 24a-44a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2007. The petition for a writ of certiorari was filed on December 14, 2007. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, Congress sought "to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not

the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." 47 U.S.C. 301. To that end, the statute establishes the Federal Communications Commission (FCC or Commission) and vests it with the authority to issue radio licenses upon its determination that doing so will serve the "public interest, convenience, and necessity." 47 U.S.C. 309(a).

Congress has authorized the FCC to award licenses for spectrum dedicated to certain commercial services "through a system of competitive bidding," or auction. 47 U.S.C. 309(j)(1). Congress has also directed the Commission to promote "economic opportunity and competition * * * by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses." 47 U.S.C. 309(j)(3)(B). The FCC has accordingly designated certain blocks of spectrum for auction to small businesses known as "designated entities," and it also has provided bidding credits to such businesses. 47 C.F.R. 1.2110. At the time of the auctions at issue in this case, the FCC allowed designated entities to pay in installments during the term of the license, even though other licensees were required to pay the full bid price at the time of the auction. 47 C.F.R. 1.2110(g); see generally *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 F.C.C.R. 2348 (1994).

2. In 1996 and 1997, Magnacom Wireless, LLC (Magnacom) was a winning bidder in FCC auctions for wireless telecommunications licenses. Pet. App. 3a, 46a. Magnacom qualified as a designated entity in those auctions and was therefore awarded the licenses after making only a down payment on its winning bids, with the

remainder of its bid payable in quarterly installments over the ten-year term of the licenses. *Id.* at 3a.

Magnacom soon experienced financial difficulty, and, in October 1998, it petitioned for bankruptcy protection. The FCC sought relief from the automatic stay imposed by 11 U.S.C. 362 so that it could cancel Magnacom's licenses, as provided by FCC regulations, based on Magnacom's failure to make its installment payments. See 47 C.F.R. 1.2110(f)(4) (1998). Without objection by Magnacom, the bankruptcy court entered an order permitting 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. 32a. After cancelling the licenses, the FCC filed a proof of claim in the bankruptcy court as an unsecured creditor for Magnacom's defaulted auction debt of approximately $48 million. *Id.* at 26a. The bankruptcy court initially allowed the claim. *Ibid.*

In 2001, several years after the cancellation of Magnacom's licenses, the FCC completed a new auction to assign licenses covering spectrum that had been unused since earlier licenses (including Magnacom's) were cancelled. Pet. App. 6a; *C & F Block Broadband PCS Spectrum Auction Scheduled for Dec. 12, 2000*, 15 F.C.C.R. 19,485 (2000). The rules for that auction were different from those in which Magnacom had participated; most notably, installment payments were no longer allowed. *Id.* at 19,504. In addition, the licenses awarded in that auction differed significantly from the licenses that had been awarded to Magnacom. For example, each new license was granted for a new 10-year term ending in 2011 (Magnacom's licenses would have expired in 2006 and 2007), and each license was subject

to new deadlines for constructing facilities to use the spectrum. Pet. App. 6a. Magnacom did not object to the FCC's rulemaking proceeding, and it did not seek judicial review of the final revised auction rules.

Because the demand for spectrum had increased, the winning bids for the spectrum licenses in the 2001 auction were far higher than those in the earlier auctions. Winning bidders in the 2001 auction bid approximately $238 million more than Magnacom's winning bids in 1996 and 1997 for licenses covering the same spectrum. As required by statute, the proceeds of the auction were paid into the Treasury. Pet. App. 7a, 67a; see 47 U.S.C. 309(j)(8).

After the auction, Magnacom moved for reconsideration of the bankruptcy court's order allowing the FCC's claim for the amount that was still owed on the licenses. Magnacom relied on the FCC's policy against double recovery. See *Leonard J. Kennedy, Esq.*, 11 F.C.C.R. 21,572, 21,576 (1996). The FCC explained that the policy was not based on an obligation to mitigate damages but was instead one of "equitable debt forgiveness." Pet. App. 64a-65a. Relying on that FCC policy, the bankruptcy court disallowed the FCC's claim. *Id.* at 58a-68a. In the court's view, "the distinction between formal 'mitigation' and 'equitable debtor forgiveness,' if any, [may be] relevant to the issue of whether the estate has any remaining claims before the FCC," but it was not relevant to the FCC's claim against Magnacom. *Id.* at 65a. Allowing that claim, the court concluded, would be "contrary to the FCC's position as stated in" *Leonard J. Kennedy, Esq. Id.* at 67a.

3. Petitioner, trustee of the Magnacom bankruptcy estate, then filed an adversary complaint against the FCC and the United States, seeking payment of more

than $238 million—the difference between the amount bid by Magnacom for its licenses and the amount of the winning bids for new licenses awarded at the 2001 auction. The bankruptcy court dismissed the complaint. Pet. App. 24a-44a.

The bankruptcy court acknowledged that the FCC had held security interests in Magnacom's licenses, and it explained that if the FCC had exercised its security interests and treated them as collateral, then the Uniform Commercial Code (UCC) might have given Magnacom a claim to the proceeds of the subsequent auction. Pet. App. 38a. The court emphasized, however, that the FCC had not exercised the commercial remedy of repossession or foreclosure but instead had taken the regulatory step of cancelling Magnacom's licenses. *Ibid.* "[U]pon cancellation," the court concluded, "the Debtor retained no further interest in the licenses or the proceeds," and "[o]nce canceled, * * * the estate's interest in any later surplus terminated." *Id.* at 40a-41a. Petitioner appealed to the district court, which affirmed the bankruptcy court's decision. See Pet. App. 45a-57a.

4. The court of appeals affirmed. Pet. App. 1a-23a. The court of appeals began its analysis by noting that, "[u]nder 47 U.S.C. § 301, licenses 'provide for the use' of the spectrum, 'but not the ownership thereof.'" *Id.* at 8a (quoting 47 U.S.C. 301). Licensees therefore "have a property interest only in the use of the spectrum, not in the underlying spectrum itself." *Ibid.* For that reason, the court concluded that "once an FCC license is cancelled, a licensee no longer has any right derived from that license and therefore has no entitlement to the proceeds from the auction of a new license." *Id.* at 9a.

The court of appeals next addressed this Court's decision in *FCC* v. *NextWave Personal Communications*

Inc., 537 U.S. 293 (2003), which held that 11 U.S.C. 525(a) prohibits the FCC from cancelling a license solely because of the licensee's failure to pay a debt that would be dischargeable in bankruptcy. Pet. App. 10a-11a. Under *NextWave*, the court of appeals explained, "the FCC's decision to cancel Magnacom's licenses for nonpayment would be subject to challenge." *Id.* at 11a. The court determined that *NextWave* was inapplicable, however, because petitioner had never objected to the cancellation, under 11 U.S.C. 525(a) or otherwise, either in the bankruptcy court or before the court of appeals. *Ibid.*

The court of appeals rejected petitioner's argument that the subsequent auction of new licenses covering the same spectrum had yielded "proceeds" of the original licenses that remained the property of the bankruptcy estate. That argument, the court explained, rested on the mistaken "premise that Magnacom retained an interest in the spectrum after the FCC cancelled its licenses." Pet. App. 13a. The court acknowledged that, "if the FCC had sold Magnacom's licenses, the Magnacom estate might have rights to proceeds from such a sale," but here there was no such sale—only a cancellation resulting in extinguishment of the licenses. Pet. App. 11a. Cancellation is the "lawful extinction of a property right in the bankruptcy estate," and "does not give the trustee in bankruptcy rights to other property created by that creditor." *Id.* at 14a.

Nor was it significant, the court of appeals explained, that the FCC had held a security interest in the licenses. Assuming—but not deciding—that the UCC applied to the security agreement between Magnacom and the FCC, the court observed that petitioner could prevail "only if the FCC's cancellation of the licenses was a lien-

enforcement remedy under the UCC." Pet. App. 15a. But the court held that cancellation was not equivalent to lien enforcement: the terms of the security agreement "do[] not make cancellation a lien-enforcement remedy." *Ibid.*

ARGUMENT

Petitioner renews his argument (Pet. 17-34) that the holder of an FCC license who defaults on installment-payment obligations and who consents to the cancellation of that license is entitled to recover the proceeds of a later auction to reassign the spectrum to new license holders. According to petitioner, that claim is supported by the decisions in *NextWave Personal Communications Inc.* v. *FCC*, 254 F.3d 130 (D.C. Cir. 2001), aff'd, 537 U.S. 293 (2002). The only issue in *NextWave*, however, was whether the FCC could cancel a license based on the licensee's failure to make installment payments when the licensee objected to cancellation in reliance on 11 U.S.C. 525(a). *NextWave* would lend support to petitioner's position if he were challenging the cancellation of Magacom's licenses under Section 525(a), but he has not presented such a challenge at any stage of this litigation. In *NextWave*, neither the D.C. Circuit nor this Court had any occasion to consider the issues presented here, which arise only *after* the licenses are cancelled and the spectrum is reauctioned.

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, since the events giving rise to this case, the FCC's auction procedures have changed significantly. Because the FCC no longer permits installment payments, it is unlikely that a future case will arise in which the agency is a creditor of a bankrupt licensee,

and therefore the question presented here is of little ongoing significance. Further review is not warranted.

1. Petitioner asserts (Pet. 19-25) that the decision below conflicts with the decision of the D.C. Circuit in *NextWave*. According to petitioner (Pet. 19), *NextWave* established that the FCC's cancellation of licenses "is *both* a regulatory act *and simultaneously* an action to enforce the FCC's security interest in the licenses." Petitioner misreads the opinion of the D.C. Circuit.

In *NextWave*, the D.C. Circuit held that the Bankruptcy Code prohibited the FCC from cancelling NextWave's spectrum licenses for failure to make installment payments. 254 F.3d at 149. The court based its decision on Section 525, which provides that a government agency may not "revoke * * * a license" because the holder of the license "has not paid a debt that is dischargeable" under the Bankruptcy Code. 11 U.S.C. 525(a); *Nextwave,* 254 F.3d at 149. The court concluded that Section 525(a) "prevents the Commission * * * from canceling the licenses of winning bidders who fail to make timely installment payments while in Chapter 11." *Id.* at 155. This Court affirmed, agreeing with the D.C. Circuit's interpretation of Section 525(a). See *NextWave*, 537 U.S. at 304.

Had petitioner challenged the cancellation of Magnacom's licenses in this case under Section 525(a), *NextWave* suggests that he might well have been successful. But as the court of appeals explained, petitioner did not object when the FCC asked the bankruptcy court for relief from the automatic stay to allow it to cancel the licenses, and he did not argue that Section 525 prohibited the cancellation. Pet. App. 11a. Nor does he make such an argument here. Instead, he contends that a business may win an auction for licenses, default on its

payment obligations, consent to cancellation, and then reap a windfall when the market subsequently improves and new licenses are issued. Nothing in *NextWave* supports that proposition.

In support of his argument, petitioner isolates an inapposite discussion from the D.C. Circuit's decision. The court in *NextWave* determined that Section 525 of the Bankruptcy Code need not be read to include an exception for regulatory actions, an exception explicitly provided in the automatic-stay provision, 11 U.S.C. 362(b)(4). *Nextwave,* 254 F.3d at 150. In reaching that conclusion, the court emphasized that the text of Section 525, unlike that of Section 362, makes no reference to a "regulatory" exception. See *ibid.* ("Nothing in section 525 or 362 states that section 525 is subject to subsection 362(b)(4)'s regulatory power exception, or that the exception should be read to limit section 525's clear reach."). The court also pointed out that Sections 362 and 525 prohibit different conduct, so the absence of a regulatory exception in Section 525 would not create any inconsistency in the Bankruptcy Code. *Id*. at 150-151.

Although those holdings were sufficient to dispose of the FCC's Section 362 argument, the *NextWave* panel went on to identify another reason that the argument could not succeed: "[S]ubsection 362(b)(4) does not apply to the stay of acts to 'create, perfect, or enforce' liens against property of the estate." 254 F.3d at 151 (quoting 11 U.S.C. 362(a)(4) and (5)). Because the automatic stay applies—notwithstanding the regulatory exception—to "self-help remedies against collateral such as repossession," and because counsel for the FCC in the *NextWave* bankruptcy proceeding had "acknowledged that canceling the licenses and seeking to collect on the debt was 'tantamount . . . to foreclosing on col-

lateral,'" the court concluded that the automatic stay would equally have applied to bar the cancellation of NextWave's licenses. *Ibid*.

Petitioner seizes (Pet. 21) upon the "tantamount . . . to foreclosing on collateral" language, *NextWave*, 254 F.3d at 151, which he deems "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." But the court in *NextWave* had no occasion to issue a "ruling" on the question presented here: whether the regulatory act of license cancellation should be treated as equivalent to the commercial remedy of lien enforcement where the debtor has consented to the cancellation and agreed that the Bankruptcy Code poses no barrier to that regulatory step. Instead, the court simply rejected the FCC's argument about the relationship between Sections 525 and 362(b)(4), based on the FCC's concession that, for purposes of those provisions, cancellation was tantamount to foreclosure. Nothing in the opinion suggests that the court had concluded that license cancellation is necessarily equivalent to lien foreclosure in all circumstances. Not only was that question not presented in the case, but the court did not consider any of the factors that the court below extensively and carefully analyzed in answering the question here. For example, the *NextWave* opinion did not address the inconsistency between the position urged by petitioner and the express statutory limitations on a licensee's interest under 47 U.S.C. 301, see Pet. App. 8a-9a, nor did it take account of the FCC's analysis of the effect of cancellation in *Leonard J. Kennedy, Esq.*, 11 F.C.C.R. at 21,572; see Pet. App. 9a-10a n.7, 17a, 20a-21a.

For that reason, the court below was correct to conclude that the "brief discussion" in *NextWave* was not a "reasoned conclusion that cancellation of an FCC license is a lien-enforcement action." Pet. App. 16a. Because the D.C. Circuit did not articulate any reasons to support the view that petitioner attributes to it, there is no basis for assuming that it intended to establish a position that conflicts with the authorities considered by the court of appeals here. Although petitioner asserts (Pet. 22) that the court below "openly acknowledged that it was rejecting the D.C. Circuit's ruling because it disagreed with it," just the opposite is true. The court of appeals did not reject any ruling of the D.C. Circuit, but simply determined—correctly—that the D.C. Circuit had not addressed the question presented here.[1]

2. Petitioner similarly errs in contending (Pet. 25-30) that the decision below conflicts with this Court's decision in *NextWave*. As the court of appeals recognized, this Court in *NextWave* "did not address the question whether license cancellation constituted lien enforcement." Pet. App. 17a. Indeed, *NextWave* specifically described the FCC's cancellation of licenses as "elimination of the licenses through the regulatory step of 'revoking' them." 537 U.S. at 307-308. And the Court distinguished that step from "the enforcement of [a security] interest in the bankruptcy process" by enforcing a lien on the licenses. *Ibid*.

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[1] Petitioner's argument is not bolstered by the D.C. Circuit's observation that the Second Circuit had earlier declined to reach the question whether license cancellation constitutes lien enforcement for purposes of 11 U.S.C. 362(b). See Pet. 23 n.10 (citing *NextWave*, 254 F.3d at 148-149, and *In re FCC*, 217 F.3d 125, 138 nn.7-8 (2d Cir. 2000), cert. denied, 531 U.S. 1029 (2000)). That observation merely demonstrates that no court has previously addressed the substance of petitioner's argument.

Petitioner seeks (Pet. 25) to characterize this Court's opinion as having categorically "rejected the dichotomy that the FCC has attempted to drive between its regulatory and creditor roles." The Court did no such thing, as that broad issue was not before it. Petitioner notes (Pet. 26) that the Court in *NextWave* held that the terms "debt" and "claim" under the Bankruptcy Code have "the broadest available definition" and encompass a payment obligation whether that obligation is intended to serve regulatory or commercial purposes. *NextWave*, 537 U.S. at 302-303 (quoting *Johnson* v. *Home State Bank*, 501 U.S. 78, 83 (1991)). But the resolution of that question of statutory interpretation offers no guidance here. At most, this Court held that an FCC obligation could have both regulatory and financial aspects. It did not hold that those two aspects are intertwined in every circumstance.

Likewise, petitioner relies (Pet. 26-27) on this Court's statements that cancellation for failure to pay runs afoul of 11 U.S.C. 525 irrespective of an agency's motivation for cancellation, and that there is no conflict between the Bankruptcy Code and the Communications Act because the latter does not require installment payments. See *NextWave* 537 U.S. at 301, 304. But those holdings, which focus on the meaning of 11 U.S.C. 525 and related language in the Bankruptcy Code, say nothing about the unrelated question urged by petitioner—whether the cancellation of a license in circumstances permitted by the Bankruptcy Code necessarily constitutes enforcement of a lien. There was no occasion for the Court to address that question, and it did not do so.

3. Petitioner contends (Pet. 17) that the decision below is erroneous because it "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." Petitioner is incorrect, because the cancellation of the spectrum licenses under FCC regulations "was separate and independent from the FCC's rights as a secured creditor." Pet. App. 19a. Petitioner points to the security agreement in an effort to equate the cancellation and the exercise of a security interest, but neither that document nor any other authority supports petitioner's argument.

a. Petitioner's argument mischaracterizes the purpose and effect of the FCC's security interest in Magnacom's licenses. The FCC did not intend, and has never sought, to enforce a lien as an alternative to license cancellation in the event of default. Rather, the FCC required licensees to execute security agreements out of an abundance of caution, in light of uncertainty concerning the priority of payment obligations if a licensee were to purport to grant a security interest in a license to a private creditor. See, *e.g.*, *MLQ Investors, L.P.* v. *Pacific Quadracasting, Inc.*, 146 F.3d 746, 748 (9th Cir. 1998) (permitting only a limited third-party security interest in the proceeds of a licensee's sale of a license under the UCC, and only to the extent that it does not interfere with the Commission's regulatory interests), cert. denied, 525 U.S. 1121 (1999).[2] The FCC has never sought to recover a license by foreclosing on

[2] The licenses and security agreements at issue here were executed before *MLQ Investors* was decided, and the FCC was concerned that a court could enforce a putative security interest in spectrum licenses themselves, thereby defeating the FCC's priority right to payment of the winning bid amount.

its collateral in a security agreement, whether in a bankruptcy proceeding or otherwise.

As the court of appeals explained, the security agreement, by its terms, "does not make cancellation a lien-enforcement remedy." Pet. App. 15a. The agreement merely points out that, in the event of non-payment, certain consequences will follow. One consequence is that "the License shall be automatically canceled pursuant to 47 C.F.R. § 1.2110." Pet. App. 88a. Notably, the security agreement expressly provided that the creditor rights conveyed in that agreement did not override the FCC's regulatory rights to cancel the licenses for a regulatory violation (including a payment default). Pet. App. 82a (the security interest is "not in derogation of any of the Commission's regulatory authority over the License"). And it also provided that, in the event of cancellation of the license, "Debtor has no right or interest in any moneys * * * given to the Commission by a subsequent licensee of the spectrum." *Id.* at 88-89.

Petitioner asserts (Pet. 23) that "regulatory cancellation is the agency's primary remedy for default under the agreement itself." But the language of the agreement refutes that characterization. Cancellation is "pursuant to" a previously established regulation, Pet. App. 88a, not pursuant to "the agreement itself." Moreover, petitioner overlooks that license cancellation is also a consequence of other violations of FCC regulations and requirements, and is not unique to default for non-payment. For example, a license may be cancelled for the licensee's failure to build out a telecommunications network by the deadline set forth in the licenses, even if the licensee has no installment-payment obligation. See, *e.g.*, *P&R Temmer* v. *FCC*, 743 F.2d 918, 928

(D.C. Cir. 1984) (affirming order cancelling channel assignments for failure to complete construction on time) In other words, cancellation is a generic consequence that applies in the event of non-payment and in other circumstances. That the agreement reminded Magnacom that regulations provided for automatic cancellation upon default does not change the character of that regulatory mandate.

b. The decision below is also supported by fundamental principles of bankruptcy law, which recognize that filing for bankruptcy does not expand a debtor's interest in property. The nature and extent of a debtor's interest in property is determined by non-bankruptcy law, and the estate has no greater rights in property than the debtor would have outside of bankruptcy. See, *e.g.*, *In re Coupon Clearing Serv., Inc.*, 113 F.3d 1091, 1099 (9th Cir. 1997); *In re Gull Air, Inc.*, 890 F.2d 1255, 1261 (1st Cir. 1989).

Here, federal law makes clear that a spectrum license confers only limited rights and interests, which are circumscribed by statute and regulation. Most importantly, the Communications Act precludes any private property interest in the underlying wireless spectrum. See 47 U.S.C. 301 (FCC license "provide[s] for the use of such channels, but not the ownership thereof, by persons for limited periods of time, * * * and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license"). Thus, "once Magnacom's licenses were cancelled by the FCC, Magnacom's licenses had no value and Magnacom's interest in the underlying spectrum was extinguished. This valueless asset could not generate any traceable proceeds for purposes of the Bankruptcy Code." Pet. App. 19a.

Even apart from Section 301, the decision below comports with common sense. For example, a property owner may confer limited rights to use the property—such as by a lease or an easement—and may subject those rights to a requirement of timely payment. If the user fails to comply with the terms and the property owner cancels the agreement, the defaulting party would have no further right to use the property. A subsequent lease or grant of an easement to a new user would not be a transfer of the prior user's interest, but a creation of a new set of rights. And if changed market conditions dictated a higher price for the new lease or easement, the prior user would not be entitled to receive any additional amount charged by the property owner.

c. The UCC does not compel a different result. Petitioner argues (Pet. 30-34) that the decision below is contrary to *United States* v. *Kimbell Foods*, 440 U.S. 715, 722-729 (1979), which held that the enforcement and priority of liens in favor of federal agencies is governed by federal law, which in turn may incorporate state law where there is no need for federal uniformity and where state law would not frustrate federal objectives. But that argument begs the question whether license cancellation constitutes lien enforcement. Even if petitioner were correct that the UCC governed the security agreement, petitioner could not prevail because the cancellation of the licenses was not equivalent to lien enforcement under the UCC. Pet. App. 15a-19a.

In any event, it is far from clear that the UCC applies to the security agreement under the *Kimbell Foods* standard. Cf. *In re Airadigm Commc'ns, Inc.*, No. 07-2212, 2008 WL 649704, at *8 (7th Cir. Mar. 12, 2008) ("[L]iens held by the FCC are unlike liens held by the federal government as part of other federal lending pro-

grams, where the lien secures the loan by attaching to property that is otherwise defined by state law. Instead, the property itself—the license—is a creature of federal law.") (citation omitted). The FCC has determined that the UCC does not apply, and that the Communications Act preempts the UCC's requirement that a secured party account to the debtor for any surplus over the amount remaining on the debtor's obligation. See *Leonard J. Kennedy, Esq.*, 11 F.C.C.R. at 21,580 n.4. The court below had no need to address that question, Pet. App. 15a, and no other court of appeals has resolved it. Since the potential inapplicability of the UCC would provide an alternate ground for affirming the decision below, the unsettled nature of that issue counsels against this Court's reaching out to decide it in the first instance.

4. This Court's review is also unwarranted because the question presented in this case is unlikely to recur. The FCC has discontinued the practice of allowing installment payments by licensees. See Public Notice, 15 FCC Rcd at 19,489-19,490; Sixth Report and Order and Order on Reconsideration, *In Re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 15 F.C.C.R. 16,266 (2000). Thus, the FCC has ceased to act as both a creditor and a regulator in this context, and licensees who seek bankruptcy protection will not be able to retain their licenses for less than the promised auction payment (as in *NextWave*). Nor will defaulting licensees be in a position to invoke the UCC as a theoretical basis for seeking payment from the Treasury based on higher winning bids paid by future licensees (as in this case). For that reason, the

question presented here is of little or no future significance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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