No. 02-980

In the Supreme Court of the United States

CORE COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals had the discretion under the Administrative Procedure Act to remand an agency decision without vacating that decision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 288 F.3d 429. The order of the Federal Communications Commission (excerpted at Pet. App. 14a-37a) is reported at 16 F.C.C.R. 9151.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2002. A petition for rehearing was denied on September 24, 2002 (Pet. App. 10a-11a). The petition for a writ of certiorari was filed on December 23, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress sought in the Telecommunications Act of 1996 (1996 Act), 47 U.S.C. 251 *et seq.*, to open local telecommunications markets to competition. See *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). To further that purpose, the 1996 Act imposes certain duties on all local carriers (sometimes referred to as LECs) and additional duties on incumbent carriers (sometimes referred to as ILECs). One of the duties imposed on all local carriers is "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. 251(b)(5). This case arises out of a challenge to the rules promulgated by the Federal Communications Commission (FCC) to implement that duty.

Reciprocal compensation arrangements address the situation in which the party who places a call and the party who receives that call are customers of different local carriers. See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 F.C.C.R. 9151, 9158 (2001) (*ISP Remand Order*). Each carrier incurs costs in transmitting and terminating the call. Ordinarily, reciprocal compensation mechanisms require the calling party's carrier to compensate the called party's carrier on the theory that the calling party "causes" those costs. See *id.* at 9182 n.129.

For traditional voice calls, a carrier can expect that its customers, in the aggregate, will make approximately as many calls as they receive (generally measured in terms of total minutes of calling). See *ISP Remand Order*, 16 F.C.C.R. at 9162, 9182. Calling patterns changed in the 1990s, however, as a result of the increased use of the Internet. Internet service

providers (ISPs) began to lease local telephone lines to enable their customers to connect to the Internet by dialing a local telephone number. See *id.* at 9157-9158, 9178. As ISPs gained customers, calls to ISPs grew dramatically in number and duration. See *id.* at 9162. At the same time, ISPs made few, if any, local calls themselves. See *id.* at 9183. As a consequence, when one of the local carriers in a community predominantly has ISPs as customers, that carrier ordinarily receives far more in reciprocal compensation than it pays. See *id.* at 9182-9183.

This phenomenon has given competing (*i.e.*, non-incumbent) carriers an "enormous incentive" to seek out ISP customers. *ISP Remand Order*, 16 F.C.C.R. at 9183. The FCC has found that competing carriers receive, on average, 18 times more traffic than they send, resulting in reciprocal compensation billings of approximately $2 billion a year, 90% of which is for ISP-bound calls. See *ibid.* Indeed, the FCC has found that many competing carriers have "target[ed] ISPs in large part because of the availability of reciprocal compensation payments," and that some ISPs have sought to become carriers "to share in the reciprocal compensation windfall." *Ibid.*

2. The FCC first addressed the question of reciprocal compensation for dial-up Internet traffic in a 1999 declaratory ruling. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 F.C.C.R. 3689 (1999). The FCC concluded that dial-up Internet traffic was "largely interstate" in nature because, under FCC precedents, such traffic terminates not at the ISP, but at websites that generally are not located in the calling party's State. See *id.* at 3690, 3701-3702. Because the FCC had previously held that Section 251(b)(5), the reciprocal

compensation provision of the 1996 Act, applied only to "local" calls, the FCC concluded that Section 251(b)(5) did not apply to compensation for this "largely interstate" traffic. *Id.* at 3689-3990. The FCC initiated a rulemaking proceeding to consider what compensation mechanism it should adopt for dial-up Internet traffic. See *id.* at 3707-3710. As an interim measure, the FCC stated that incumbent and competing carriers could agree on how to compensate each other for such traffic and that state public utility commissions could establish appropriate compensation mechanisms in arbitration proceedings conducted under 47 U.S.C. 252. See 14 F.C.C.R. at 3703-3705.

The court of appeals vacated the declaratory ruling and remanded the case to the FCC. Pet. App. 38a-53a. The court did not dispute the FCC's determination that, because most dial-up Internet traffic terminates at out-of-state websites, such traffic is jurisdictionally interstate and thereby subject to federal regulation. See *id.* at 45a. The court held, however, that the FCC's jurisdictional determination did not necessarily resolve whether such traffic is eligible for reciprocal compensation under Section 251(b)(5). See *id.* at 45a-48a. In addition, the court faulted the FCC for failing to consider how dial-up Internet traffic fits within the statutory definitions of "telephone exchange service" (which generally describes local calling services, see 47 U.S.C. 153(47)) and "exchange access" (which is a service that local carriers provide to, among others, interexchange (*i.e.*, long-distance) carriers, see 47 U.S.C. 153(16)). Pet. App. 51a-52a. Because the FCC had stated that all calls must fall within one of those categories, the court held that the FCC should have assigned dial-up Internet traffic to a category. See *id.* at 51a.

3. On remand, the FCC concluded that Section 251(b)(5), by its terms, requires local carriers to establish reciprocal compensation arrangements for all "telecommunications." *ISP Remand Order*, 16 F.C.C.R. at 9165-9166. The FCC concluded, however, that Section 251(b)(5) is limited by Section 251(g), which generally preserves local carriers' pre-1996 Act obligations to "provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers," such as ISPs, until that obligation is "explicitly superseded" by FCC regulations. 47 U.S.C. 251(g). The FCC concluded that dial-up Internet traffic "falls under the rubric of 'information access,'" and thus is exempt from Section 251(b)(5) until the FCC expressly removes the exemption. See 16 F.C.C.R. at 9168-9171.

After concluding that Section 251(g) exempts dial-up Internet traffic from Section 251(b)(5), the FCC reaffirmed its prior finding that most such traffic is "indisputably interstate in nature" and therefore subject to the FCC's regulatory authority under 47 U.S.C. 201. *ISP Remand Order*, 16 F.C.C.R. at 9178; see *id.* at 9175-9181. The FCC found that applying the reciprocal compensation regime to dial-up Internet traffic had resulted in "market distortions" that "undermine[] the operation of competitive markets" by interfering with "accurate price signals" and artificially encouraging competing carriers to serve ISPs exclusively or primarily. *Id.* at 9182-9186. The FCC proposed to address the problem by adopting a "bill-and-keep" model for dial-up Internet traffic under which each carrier would recover all of its costs of transmitting and terminating calls from its own customers. *Id.* at 9153 & n.6, 9184-9185. Thus, a carrier would recover its costs of serving

an ISP through the rates that the carrier charged the ISP. *Id.* at 9153 & n.6.

The FCC initiated a separate rulemaking proceeding to consider adopting a bill-and-keep model for all intercarrier compensation involving the local telephone network. *In re Developing a Unified Intercarrier Compensation Regime*, 16 F.C.C.R. 9610, 9611-9612 (2001). The FCC decided to await the completion of that proceeding before adopting bill-and-keep for dial-up Internet traffic alone. The FCC noted, however, that there was "a need for immediate action" to develop an interim compensation mechanism for such traffic in order to eliminate existing "arbitrage opportunities" and provide a transition to bill-and-keep. *ISP Remand Order*, 16 F.C.C.R. at 9155. The FCC adopted an interim mechanism that essentially caps (subject to certain annual adjustments) the number of compensable minutes and the per-minute compensation rate that a carrier may receive for dial-up Internet calls. See *id.* at 9187. In addition, a carrier entering a new local market is required to adopt bill-and-keep for dial-up Internet calls during the interim period. See *id.* at 9188. The FCC also determined that, because it had exercised its federal authority, state commissions could not regulate such traffic. See *id.* at 9189.

4. The court of appeals remanded the *ISP Remand Order*. Pet. App. 1a-9a. The court rejected the FCC's conclusion that Section 251(g) exempts dial-up Internet traffic from the Section 251(b)(5) obligation to establish reciprocal compensation arrangements. The court reasoned that Section 251(g) "provide[s] simply for the 'continued enforcement' of certain pre-[1996] Act regulatory" obligations, *id.* at 5a, and does not allow the FCC to "override virtually any provision of the 1996 Act" by promulgating rules that are "in some way,

however remote, linked to LECs' pre-Act obligations," *id.* at 7a. In addition, the court reasoned that Section 251(g) does not apply because "there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic" and, even if there had been, Section 251(g) preserves local carriers' obligations to inter-exchange carriers and information service providers, not to other local carriers. *Id.* at 7a-8a.

The court of appeals did not decide any other question presented in the case. The court specifically declined to decide whether dial-up Internet traffic involves "telephone exchange service," "exchange access," or potentially some other type of service. Pet. App. 8a. The court also declined to consider "the scope of the 'telecommunications' covered by" Section 251(b)(5) or "whether the [FCC] may adopt bill-and-keep for ISP-bound calls" pursuant to that provision. *Ibid.* In addition, the court did not decide whether the FCC's interim compensation mechanism was "inadequately reasoned," observing that, without knowing the content or legal basis for the FCC's "ultimate rules," it had "no meaningful context in which to assess these explicitly transitional measures." *Ibid.*

The court of appeals remanded the case to the FCC for further proceedings without vacating the *ISP Remand Order*. Pet. App. 8a-9a. In doing so, the court applied the standard articulated in *Allied-Signal, Inc.* v. *United States Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-151 (D.C. Cir. 1993), under which a decision whether to vacate depends on "the seriousness of the order's deficiencies" and "the disruptive consequences of an interim change that may itself be changed." Here, the court observed that "[m]any of the petitioners themselves favor bill-and-keep" and that "there is plainly a non-trivial likelihood" that the FCC has

authority to adopt a bill-and-keep system. Pet. App. 8a-9a. The court cited Section 251(b)(5) and Section 252(d)(2) as possible sources of such authority. *Ibid.*

ARGUMENT

Petitioner contends that Section 706(2) of the Administrative Procedure Act (APA), 5 U.S.C. 706(2), required the court of appeals to vacate the *ISP Remand Order* and thereby void the interim compensation mechanism prescribed in that Order. Petitioner is mistaken. Although the APA provides that reviewing courts "shall * * * set aside" agency action that does not meet the standards set forth in Section 706(2), this Court has recognized that such language does not, without more, limit a court's traditional discretion to structure equitable remedies. See *Hecht Co.* v. *Bowles*, 321 U.S. 321, 328-330 (1944). Ordinarily, courts are "not mechanically obligated to grant [equitable relief] for every violation of law," but retain the authority to "mould each decree to the necessities of the particular case." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312-313 (1982). The application of that discretion to the facts of this particular case does not warrant review by this Court.

Moreover, this case does not actually frame the question presented in the petition—whether a court of appeals must vacate "rules held to have been promulgated without statutory authority" (Pet. i)—because the court of appeals did not hold that the FCC lacked statutory authority to adopt the rules at issue here. The decision in this case also does not conflict with the decision of any other court of appeals. To the extent that other circuits have considered whether Section 706(2) requires vacatur in all circumstances, they have

resolved the question consistently with the D.C. Circuit. The petition should therefore be denied.

1. Section 706(2) of the APA provides that a court "shall * * * hold unlawful and set aside agency action, findings, and conclusions" found to be, *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2). That provision, properly understood, does not require courts to vacate each and every agency order that presents one of those deficiencies.

a. Vacatur is an equitable remedy. See *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 25 (1994). It is well-settled that limits on the judiciary's equitable discretion are not lightly presumed, see *Romero-Barcelo*, 456 U.S. at 313, and that "the bare fact of a statutory violation" does not compel injunctive relief, *id.* at 314. A court retains the authority to grant or withhold equitable remedies "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity." *Id.* at 313 (quoting *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946)); accord *Hecht*, 321 U.S. at 329-330; cf. *Miller* v. *French*, 530 U.S. 327, 336-337 (2000) (when statute provided "automatic" stay until motion was acted upon, court did not have equitable discretion to "stay the stay"); *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 173 (1978) (court was required to enjoin action that would harm endangered species in violation of Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*).

Although Section 706(2) uses the words "shall set aside" in describing the remedies available to courts in reviewing agency action under the APA, those words are insufficient to remove the courts' equitable discretion to remand an agency's order without vacating it.

In *Hecht*, the Court considered a provision of the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23 (50 U.S.C. App. 901 *et seq.*), that stated that, if a statutory violation had occurred or would occur, "a permanent or temporary injunction, restraining order, or other order shall be granted." 321 U.S. at 322. The Court explained that the phrase "shall be granted" was "less mandatory than a literal reading might suggest." *Id.* at 328. The Court construed the phrase *not* to impose "an absolute duty" to issue compliance orders "under any and all circumstances," but rather to grant authority to the courts to issue all appropriate equitable remedies. *Id.* at 329. Here, as well, Congress's use of the term "shall" does not mean that courts must vacate every agency order that they remand for further consideration. As in *Hecht*, Congress used the term "shall" in a "less mandatory" sense to describe the scope of the courts' authority in reviewing agency actions. See United States Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 108 (1947) (observing that "[c]ourts having jurisdiction have always exercised the power *in appropriate cases* to set aside agency action" that has been determined to be unlawful) (emphasis added).[1]

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[1] Contrary to petitioner's assertions, *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988), casts no doubt on the courts' equitable discretion to decline to vacate orders that are found deficient under the APA. See Pet. 9, 10, 15; see also Br. of Resps. Focal Corporation, et al. 9. In *Bowen*, this Court held that an agency cannot promulgate retroactive rules "unless that power is conveyed by Congress in express terms." 488 U.S. at 208. Nothing in *Bowen* speaks to whether a court possesses the equitable discretion not to vacate an agency's order when the rationale supporting the order is found to be inadequate. Nor does *Bowen* or any other decision of this Court suggest that a court, in

That understanding of Section 706(2) is buttressed by common sense. If the APA required vacatur of every agency action that failed to meet Section 706 standards, even the most vital agency actions would have to be nullified, without regard to the disruptive consequences of doing so, for minor technical errors or easily correctable gaps in the agency's reasoning. See, *e.g.*, *Sugar Cane Growers Coop.* v. *Veneman*, 289 F.3d 89, 97-98 (D.C. Cir. 2002) (remanding agency rule involving support program for sugar producers for lack of notice and comment, but declining to vacate rule when crops had already been plowed under pursuant to the program and vacatur would be "an invitation to chaos"); *Davis County Solid Waste Mgmt.* v. *United States EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (on rehearing, deciding to vacate only in part to avoid "significantly greater pollution emissions" than full vacatur would require); *Idaho Farm Bureau Fed'n* v. *Babbitt*, 58 F.3d 1392, 1405-1406 (9th Cir. 1995) (declining to vacate when doing so would risk extinction of endangered species and waste of a "significant expenditure of public resources"). By evaluating the "seriousness of the order's deficiencies" and "the disruptive consequences of an interim change that may itself be changed" (Pet. App. 9a), the court of appeals adopted a reasonable approach to vacatur that is consistent with the judiciary's traditional authority to tailor equitable remedies.

b. Petitioner asserts (Pet. 18) that Section 706(2) requires a court to vacate action that exceeds an

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exercising such discretion, cannot consider the consequences for the regulatory regime of an agency's inability to apply any new rule retroactively. Cf. *Romero-Barcelo*, 456 U.S. at 312 (instructing that courts should "pay particular regard for the public consequences" of a grant of equitable relief).

agency's "statutory jurisdiction," but permits a court to remand without vacatur when the agency's error is "insubstantial" or "clearly curable." There is no textual support for such a distinction. Nor does petitioner contend otherwise. Instead, petitioner relies on the assumption that, although an agency's reasonable interpretation of an ambiguous statute is ordinarily entitled to deference, an agency's reasonable interpretation of its own statutory authority is not. See Pet. 11.[2]

Here, even if one accepts that Section 706(2) draws the distinction identified by petitioner, the court of appeals properly exercised its equitable discretion. Although petitioner asserts (Pet. i) that the court "held [the interim compensation mechanism] to have been promulgated without statutory authority," the court held no such thing. In its first decision on reciprocal compensation, the court held that the FCC had not adequately explained why dial-up Internet traffic should not be treated as "local" traffic for purposes of Section 251(b)(5). In its second decision, the court held that Section 251(g) does not exclude that traffic from Section 251(b)(5). Those decisions speak only to the FCC's reasoning. They do not, as petitioner contends (Pet. 9), decide the agency's "statutory authority" to "regulate intercarrier compensation for ISP-bound

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[2] This Court has not resolved whether an agency's interpretation of its statutory authority should be accorded judicial deference. See *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 765-766 (1999); see also *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 381-382 (1988) (Scalia, J., concurring) (explaining why such deference is warranted). No such question was presented in *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), a decision on which petitioner purports to rely. See Pet. 8-9, 10-11, 15. Nor is there any basis for petitioner's characterization of this case as *Mead*'s "doctrinal companion." Pet. 8.

calls." To the contrary, the court made explicit that it was *not* "decid[ing] whether the Commission may adopt bill-and-keep for ISP-bound calls pursuant to § 251(b)(5)." Pet. App. 8a.

Indeed, in deciding not to vacate the *ISP Remand Order*, the court noted the "non-trivial likelihood" that the FCC had authority to adopt such a compensation regime for dial-up Internet traffic. Pet. App. 8a. The court's view is well-founded. The FCC's statutory authority to regulate interstate communications is undisputed. See, *e.g.*, *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 360 (1986). The FCC's rulemaking authority, moreover, "extend[s] to implementation of the local competition provisions" of the 1996 Act. *Iowa Utils. Bd.*, 525 U.S. at 378. Among those provisions are Section 251(b)(5), the reciprocal compensation provision, and Section 252(d)(2), which generally sets pricing standards for traffic subject to reciprocal compensation and specifically authorizes "bill-and-keep" as a compensation mechanism for such traffic. Accordingly, because the court did not hold that the FCC lacked authority to regulate compensation for dial-up Internet traffic, petitioner's argument rests on an incorrect premise.

2. Contrary to petitioner's suggestion (Pet. 16, 19-21), the decision in this case does not conflict with the decision of any other circuit. To date, three circuits have expressly adopted the D.C. Circuit's *Allied-Signal* test for determining whether agency action that fails to meet Section 706 standards should be vacated. See *Central Maine Power Co.* v. *FERC*, 252 F.3d 34, 48 (1st Cir. 2001); *Central & S.W. Servs., Inc.* v. *United States EPA*, 220 F.3d 683, 692 (5th Cir. 2000), cert. denied, 532 U.S. 1065 (2001); *National Org. of Veterans' Advocates, Inc.* v. *Secretary of Veterans Affairs*, 260 F.3d 1365,

1380 (Fed. Cir. 2001). Petitioner cites no appellate decision holding that the APA eliminates the courts' authority to remand an agency's decision without vacating it.

Petitioner erroneously asserts (Pet. 19) that the Ninth Circuit's decision in *Idaho Farm Bureau*, 58 F.3d at 1405-1406, conflicts with the D.C. Circuit's decision in this case. In *Idaho Farm Bureau*, the Ninth Circuit expressly held that "when equity demands," a regulation that does not meet Section 706(2) standards "can be left in place while the agency follows the necessary procedures." *Id.* at 1405. As support, the Ninth Circuit cited *Fertilizer Institute* v. *United States EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991)—a decision that the D.C. Circuit has since cited as consonant with its *Allied-Signal* approach. See *Sugar Cane Growers*, 289 F.3d at 98.

Nor does the D.C. Circuit's decision in this case conflict with the Eighth Circuit's decision in *United States ex rel. O'Keefe* v. *McDonnell Douglas Corp.*, 132 F.3d 1252 (1998), which petitioner erroneously describes as vacating agency action that was found to have been undertaken without statutory authority. See Pet. 11, 16, 19. *O'Keefe* was a *qui tam* suit under the False Claims Act, not a suit to review agency action under the APA. In that case, the court of appeals held that Justice Department attorneys were subject to local ethics rules, rejecting the contention that the Justice Department had the statutory authority to issue "substantive regulations" governing the conduct of its attorneys that would supersede local rules. *Id.* at 1254-1257. The court had no occasion in *O'Keefe* to consider whether to vacate the regulations or to remand to the

agency without vacatur. The court simply declined to apply the regulations to the case at hand.[3]

3. Petitioner asserts that the court of appeals' decision, if not reviewed by this Court, will encourage agencies "lawlessly [to] promulgate rules that exceed their authority, confident that under the 'non-trivial likelihood' standard, appellate review will, at worst, only result in a remand." Pet. 25-26. That assertion is wholly without merit. As an initial matter, since the court of appeals did *not* hold that the rules at issue in this case "exceed [the FCC's] authority" (see pp. 12-13, *supra*), its decision provides no indication of how the court would deal with rules that were held to exceed an agency's statutory authority. Cf. *Atlantic City Elec. Co.* v. *FERC*, 295 F.3d 1, 15 (D.C. Cir. 2002) (vacating agency action after finding that the agency "has attempted to exert authority where it has none"). More generally, courts do not presume that government agencies will deliberately disregard the requirements and constraints of their governing statutes. See, *e.g.*, *United States* v. *Mead Corp.*, 533 U.S. 218, 227-228 (2001) (agencies are entrusted to administer regulatory statutes) (citing *Chevron U.S.A. Inc.* v. *Natural Re-*

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[3] Petitioner suggests (Pet. 16-17, 21-22) that this Court's review is necessary to resolve inconsistencies in the D.C. Circuit's own decisions concerning whether to vacate agency orders found deficient under the APA. This Court does not sit to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam). In any event, as the denial without dissent of petitioner's request for rehearing en banc suggests, the law in the D.C. Circuit is settled, notwithstanding that some of its judges have disagreed with that law. See *Milk Train, Inc.* v. *Veneman*, 310 F.3d 747, 756-758 (D.C. Cir. 2002) (Sentelle, J., dissenting); *Checkosky* v. *SEC*, 23 F.3d 452, 490-493 (D.C. Cir. 1994) (Randolph, J., dissenting in part).

sources Defense Council, Inc., 467 U.S. 837, 844 (1984)). Nor does petitioner offer any reason to believe that agencies would be indifferent to the possibility of remand when promulgating their rules. See, *e.g.*, *ICORE, Inc.* v. *FCC*, 985 F.2d 1075, 1077-1078 (D.C. Cir. 1993) (after remand without vacatur of initial decision, FCC responded with subsequent decision that was upheld on review). And, as petitioner itself points out, the D.C. Circuit has not hesitated to vacate agency action when it considers vacatur to be the appropriate remedy. See Pet. 16-17, 22 (citing cases). An agency could thus have no "confiden[ce]" of avoiding vacatur of a rule held not to satisfy Section 706(2) standards.

Similarly unsound is petitioner's assertion that the court of appeals' approach "delegates unfettered discretion to individual appellate panels to decide whether to remand or to vacate unlawful agency rules without any judicially manageable standards." Pet. 22. The "essence of equity jurisdiction" is "[f]lexibility rather than rigidity." *Hecht*, 321 U.S. at 329. The *Allied-Signal* approach is, if anything, more circumscribed than the traditional equitable approach of balancing the interests of the parties and the impact on the public in order to "do equity." *Romero-Barcelo*, 456 U.S. at 312.

Petitioner did not, to be sure, receive all of the relief that it would have liked. But there is never any assurance that a litigant that successfully invokes the courts' equitable authority will receive all of the relief it seeks. See, *e.g.*, *Romero-Barcelo*, 456 U.S. at 312-313, 320; *Hecht*, 321 U.S. at 327-328. That does not mean that the FCC "won in the court of appeals." Pet. 25. It was petitioner that won. The FCC now must reconsider its policies in light of the court of appeals' decision. If the FCC fails to do so, or "unreasonably delay[s]" that task, 5 U.S.C. 706(1), the D.C. Circuit is

fully capable of ensuring that its decision is not ignored. See, *e.g.*, *Radio-Television News Directors Ass'n* v. *FCC*, 229 F.3d 269 (D.C. Cir. 2000); see also *Romero-Barcelo*, 456 U.S. at 320 ("Should it become clear that * * * compliance with the [statute] will not be forthcoming, the statutory scheme and purpose would require the court to reconsider the balance it has struck.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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