No. 97-1838

In the Supreme Court of the United States

OCTOBER TERM, 1997

NORTHEAST CELLULAR TELEPHONE COMPANY,
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 COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

The public protection provision of the Paperwork Reduction Act, 44 U.S.C. 3512, has provided since 1980 that the public may not be penalized for failing to comply with a collection of information that has not been approved by the Office of Management and Budget. In 1995, Congress amended this statute to provide that the public protection provision "may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto." 44 U.S.C. 3512(b) (Supp. I 1995). The questions presented in this case are:

1. Whether the amendment to the Paperwork Reduction Act applies to cases that were pending before the Federal Communications Commission at the time the amendment was enacted.

2. Whether, if the amendment to the Paperwork Reduction Act applies to pending cases, it is nonetheless an unconstitutional congressional interference with a judicial judgment to apply it in a licensing case that has been remanded to the FCC by a court without any discussion or decision regarding any provision of the Paperwork Reduction Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 133 F.3d 25. The decision of the Federal Communications Commission (Pet. App. 24a-49a) is reported at 11 FCC Rcd 1997.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1998. A petition for rehearing was denied on March 19, 1998. Pet. App. 20a-23a. The petition for a writ of certiorari was filed on May 15, 1998. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1986, the Federal Communications Commission (FCC) held a lottery for a license to provide cellular service on Block B frequencies in Portland, Maine. Seacoast Cellular, Inc. (Seacoast), was selected first in the lottery, but amended its application to substitute the Portland Cellular Partnership (PortCell), which included Seacoast itself and some of the other applicants, as the tentative selectee. The Commission's rules required PortCell to submit a showing shortly after its announcement as the tentative selectee to demonstrate that it had a "firm financial commitment" of funds (consisting of a showing that a lender was committed to provide the necessary funding, the lender has assessed the selectee's credit worthiness, and the selectee and the lender agreed to the essential loan terms and conditions) necessary to build and operate its proposed system for a year. 47 C.F.R. 22.917(b) (1986). To satisfy that requirement, PortCell submitted a letter of credit from NYNEX Credit Corporation, the parent corporation of one of the PortCell partners.

Two other applicants for the Portland license, including petitioner Northeast Cellular Telephone Company, L.P., objected that PortCell was ineligible for the license because it failed to comply with the financial showing requirement of Section 22.917(b). The Commission agreed that the PortCell letter was deficient because it did not include the terms of the loan commitment and did not indicate that PortCell's credit worthiness had been assessed. *Portland Cellular Partnership*, 4 FCC Rcd 2050, 2051 (1989). However, the Commission concluded that there was good cause to waive the financial showing require-

ment because it was familiar with the source of PortCell's financing, NYNEX Credit, and was therefore confident PortCell was financially qualified. *Ibid.* PortCell's application was granted, and PortCell built and began to operate the cellular system. Northeast and another applicant appealed.

2. The court of appeals held that "[t]he agency failed to state any legitimate basis for granting PortCell a waiver from the Commission's financial qualifications requirements." *Northeast Cellular Telephone Co., L.P.* v. *FCC*, 897 F.2d 1164, 1167 (D.C. Cir. 1990). The court explained that "[a]bsent a finding that [specific information regarding NYNEX] was considered and used in formulating an articulable standard at the time the waiver was granted, the FCC must disqualify Port Cell's application." *Ibid.* Therefore, the court held that the Commission's waiver decision was "arbitrary and capricious because it was not based on any rational waiver policy." *Ibid.* The court accordingly "vacated and remanded" the FCC's order. *Ibid.*

3. On remand, the FCC concluded that it could not justify a waiver of the financial showing requirement and dismissed PortCell's application. *Portland Cellular Partnership*, 6 FCC Rcd 2283 (1991) (*Remand Order*). Northeast was designated the new tentative selectee, and PortCell was allowed to continue to operate the system until Northeast was ready to begin operating. *Id.* at 2284.

Pursuant to the Communications Act and the FCC's regulations, another applicant for the Portland license timely petitioned the Commission for reconsideration of the *Remand Order*. Later, PortCell also sought FCC reconsideration of the *Remand Order*, arguing for the first time that the require-

ment that it make a showing of a firm financial commitment violated the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Since its enactment in 1980, the Paperwork Reduction Act has provided that "[n]otwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information" that was not approved by OMB. 44 U.S.C. 3512. See *Dole* v. *United Steelworkers*, 494 U.S. 26, 40 (1990). PortCell asserted that the FCC had imposed the firm financial commitment requirement of Section 22.917(b) without obtaining the approval of OMB. Accordingly, PortCell argued that it could not be penalized for failing to satisfy that requirement.

The Commission dismissed PortCell's petition for reconsideration because it was filed more than 30 days after the *Remand Order*. 47 U.S.C. 405 (petitions for reconsideration must be filed within 30 days). *Portland Cellular Partnership*, 8 FCC Rcd 4146, 4146 n.4 (1993). In this order the Commission also denied the other pending petition for reconsideration (*id.* at 4149-4150) and granted Northeast's application. *Id.* at 4150-4152. PortCell petitioned for further reconsideration of the dismissal of its application, again raising its Paperwork Reduction Act objection. The Commission denied that petition, explaining that its arguments were "grossly untimely." *Portland Cellular Partnership*, 9 FCC Rcd 3291, 3292 (1994).

In a separate petition, PortCell timely sought reconsideration of the grant of Northeast's application, arguing that Northeast was not qualified to hold the Portland cellular license. The petition alleged that Northeast was in fact controlled by a large firm that had a substantial interest in Northeast but was

ineligible for the license, rather than by Mr. Timothy Hutchison, who purported to control Northeast and was eligible for the license. The Commission deferred action on this petition for reconsideration. 9 FCC Rcd at 3291 n.2. Notwithstanding the pending petition, Northeast constructed its cellular system and began operations (Pet. App. 6a), at which time PortCell ceased its operations.

5. In 1995, while the licensing proceedings remained pending before the Commission, Congress reenacted and revised the Paperwork Reduction Act. Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163. The 1995 Act retained the provision under Section 3512—now denominated Section 3512(a)—that no person could be subject to any penalty for failing to comply with an unauthorized information collection. The 1995 Act added, however, in a new Section 3512(b) that this protection could "be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto." § 2, 109 Stat. 181.

6. Shortly after the 1995 Act became effective, PortCell filed a motion to reinstate and grant its application. It argued it could do so under Section 3512(b) because a violation of the Paperwork Reduction Act could be raised "at any time" while the administrative proceeding was pending, and petitions for reconsideration were still pending in this matter before the Commission. In November 1996, the Commission agreed. Pet. App. 24a-47a. It concluded that the amended Section 3512 applied to the pending PortCell proceeding, based on the clear congressional intent that the 1995 amendment applies to pending cases. Pet. App. 33a-34a. The Commission also re-

jected a claim that to entertain the Paperwork Reduction Act defense would nullify the court of appeals' *Northeast Cellular* decision, contrary to *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

The Commission reinstated and then granted PortCell's application based on PortCell's amendment that now showed a firm financial commitment. Pet. App. 39a. In doing so, the Commission rejected Northeast's complaint that PortCell had solicited impermissible *ex parte* contacts with the agency. *Id.* at 39a-44a. Northeast was permitted to continue to operate until PortCell was ready to recommence service. *Id.* at 45a-46a. In light of that disposition, the Commission dismissed as moot PortCell's petition for reconsideration that raised questions concerning the identity of the party that controlled Northeast and Northeast's qualifications to hold the Portland cellular license. *Id.* at 46a, 47a.

7. The court of appeals rejected all of Northeast's arguments challenging the Commission's reinstatement and grant of PortCell's application. Pet. App. 1a-17a. It agreed with the Commission that Section 3512 of the amended Act permitted a violation of the Act to be raised "without limitation." Pet. App. 8a. The court noted that because Section 3512 applies "notwithstanding any other provision of law" it "simply trumps" any restrictions in the Communications Act on the timeliness of raising arguments. Pet. App. 9a, quoting Pet. App. 32a-33a. Rejecting the argument that the application of Section 3512(b) would have an impermissible retroactive effect, the court explained that because

> § 3512(b) governs only the conduct of litigation after the effective date of the statute and does

> nothing to reopen matters litigated before that date, it does not offend any norm against retroactive lawmaking.
>
> Nor is a statute retroactive "merely because it is applied in a case arising from conduct antedating the statute's enactment [* * *] or upsets expectations based in prior law." *Landgraf* v. *USI Film Prods.*, *Ltd.*, 511 U.S. 244, 269 (1994). By permitting parties to raise the [Paperwork Reduction Act] issue 'at any time' in ongoing proceedings, the statute does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. Rather, it simply prevents an agency or court from refusing to consider a [Paperwork Reduction Act] argument on the ground that it is untimely.

Pet App. 10a.

The court of appeals also rejected petitioner's argument that application of Section 3512(b) in this proceeding would be unconstitutional under *Plaut*, because it would nullify a final judgment in a prior case—the court of appeals' earlier *Northeast Cellular* decision resulting in the remand to the FCC. Pet. App. 10a-11a. The court reasoned that application of the revised Paperwork Reduction Act did not unconstitutionally nullify a final judgment, both "because no party in *Northeast [Cellular]* raised, and we did not purport to resolve, the [Paperwork Reduction Act] issue," and because the *Northeast Cellular* court did not in any event "render a final judgment terminating the case" but instead "remanded it to the Commission for further proceed-

ings." *Id.* at 11a. The court of appeals concluded that, in the proceeding on remand, the Commission simply applied the rule that "each court, at every level, must 'decide according to existing laws.'" *Ibid.*, quoting *Plaut*, 514 U.S. at 226 (quoting *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 102, 109 (1801)).

ARGUMENT

This is a unique case arising under the Paperwork Reduction Act that is unlikely to recur, that does not raise any issue of general importance warranting this Court's review, and is not in conflict with any decision of this Court or any other court of appeals. Moreover, it is not clear that petitioner would benefit from its effort to disqualify PortCell, in view of the unresolved issue of petitioner's own qualifications. Further review is therefore not warranted.

1. Under 44 U.S.C. 3512(a) (Supp. I 1995), if an agency promulgates an information collection without OMB approval, "members of the public may ignore it without risk of penalty." *United Steelworkers*, 494 U.S. at 40. Because that provision applies "notwithstanding any other provision of law," it overrides contrary provisions of other statutes and regulations. 44 U.S.C. 3512(a) (Supp. I 1995). When Congress reenacted and revised Section 3512 in 1995, Congress strengthened its protection by making clear that the public should be able to take advantage of its protection "at any time" during pending administrative or judicial proceedings. 44 U.S.C. 3512(b) (Supp. I 1995). See 141 Cong. Rec. S5275 (daily ed. Apr. 6, 1995) (statement of Senator Roth, co-sponsor of 1995 Act) ("[T]he protection of Section 3512 may be raised at any time during the life of the matter."); 141 Cong.

Rec. H4376 (daily ed. Apr. 6, 1995) (statement of Rep. Clinger) (same).

This proceeding began prior to the 1995 reenactment and revision of the Paperwork Reduction Act, and it was still pending before the Commission when the 1995 Act went into effect on October 1, 1995. The lengthy procedural history of this case, see pp. 2-8, *supra*, indicates that similar cases are unlikely to recur. We are not aware of any other proceedings before the federal government or in any court that would raise the same questions under the Paperwork Reduction Act that petitioner seeks to bring before the Court. The Commission and the court of appeals correctly addressed the application of the reenacted and revised Paperwork Reduction Act to this continuing proceeding. For those reasons, review by the Court is not warranted.

2. Petitioner contends (Pet. 14-21) that application of Section 3512(b) to this proceeding nullifies the court of appeals' prior decision in *Northeast Cellular*, in contravention of this Court's decision in *Plaut*. That contention is mistaken, for three reasons.

a. First, the rule of *Plaut* has no application to licensing and other proceedings in which the relief sought is essentially prospective. The issue in this case does not concern a party's right to a money judgment as compensation for a past wrong—as in *Plaut*, see 514 U.S. at 218-219—but a party's qualifications to operate as a cellular telephone licensee in the future. As this Court recognized in *Plaut*, it has long been settled that Congress may "alter[] the prospective effect of injunctions entered by Article III courts," *id.* at 232, citing *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856). The same principle applies to licensing

proceedings. Thus, even if Congress had enacted a statute altering —or eliminating—the very law that had been the basis of the court of appeals' decision in *Northeast Cellular*, that statute would be fully applicable in proceedings like this, in which the ultimate determination of what party obtains the license has an entirely prospective effect.

b. Second, *Plaut* in any event has no application because the newly enacted statute in this case had nothing to do with the court of appeals' judgment in *Northeast Cellular*. Unlike in *Plaut*, where the newly enacted statute essentially lengthened the statute of limitations to revive cases that had already been dismissed based on a shorter limitations period, Congress did not alter the Commission's financial qualifications requirements that were construed in *Northeast Cellular*. Instead, Congress reenacted and revised the Paperwork Reduction Act. The court of appeals in *Northeast Cellular* was not presented with, did not discuss, and did not decide any question regarding the application of the Paperwork Reduction Act. Accordingly, Congress took no action that affected the judgment of the court of appeals in *Northeast Cellular*, and application of the reenacted Paperwork Reduction Act could not violate the rule of *Plaut*.

c. Third, unlike in *Plaut*, where the prior lawsuit was completed at the time Congress attempted to revive it, in this case there was no "last word of the judicial department," *Plaut*, 514 U.S. at 227, that is protected by the separation of powers concerns articulated in *Plaut*. The *Northeast Cellular* decision did not itself terminate proceedings regarding the cellular license, nor could it have done so. Instead, it remanded the case to the Commission,

which "means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law." *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 374 (1939). Such action, which included resolution of timely filed challenges to petitioner's own qualifications, remained pending before the agency when the Paperwork Reduction Act was reenacted and revised.[1]

Even without further congressional action, the administrative proceedings on remand could have resulted in an alteration of the rule of law announced by the judicial department in *Northeast Cellular*. For example, PortCell had the right to challenge any dismissal of its application on remand in a new appeal to the District of Columbia Circuit, 47 U.S.C. 402(b), and thereafter, if necessary, in a petition for certiorari to this Court. In such a post-remand appeal, there remained the possibility that the court of appeals could reconsider its *Northeast Cellular* holding and agree with PortCell that the court erred in its construction of the Commission's financial qualification requirements. Even if the court of appeals adhered to *Northeast Cellular*, this Court on certiorari from any such later appeal could rule on the validity of the remand instructions given to the Commission by the court of appeals in *Northeast Cellular*. *E.g.*, *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 488 n.6 (1968);

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[1] The 1995 amendment of the Paperwork Reduction Act permits violations of the Act to be raised "at any time" only in proceedings still pending before an agency or the courts. 44 U.S.C. 3512(b) (Supp. I 1995). It therefore does not permit the Paperwork Reduction Act defense to be raised when an underlying proceeding is no longer pending.

Mercer v. *Theriot*, 377 U.S. 152, 153-154 (1964) ("[I]t is settled that we may consider questions raised on the first appeal, as well as 'those that were before the Court of Appeals upon the second appeal.'"), quoting *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257 (1916); see also *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955) (this Court may "consider all of the substantial federal questions determined in the earlier stages of the litigation"); *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) ("A petition for writ of certiorari can expose the entire case to review."), citing *Panama R.R.* v. *Napier Shipping Co.*, 166 U.S. 280, 283-284 (1897). *Plaut* itself recognized that in a situation like this, Congress can properly enact new law that applies to pending cases. 514 U.S. at 226-227, citing *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801), and *Landgraf* v. *USI Film Products, Ltd.*, 511 U.S. 244 (1994).

d. None of petitioner's attempts to endow the court of appeals' remand order in *Northeast Cellular* with the kind of "finality" necessary to trigger the rule of *Plaut* is persuasive.

Petitioner attempts to rely (Pet. 5, 19) on Section 402(j) of the Communications Act of 1934, 47 U.S.C. 402(j), to establish that the court of appeals' decision was "the last word of the judicial department" under *Plaut*.[2] That reliance is misplaced. In discussing the

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[2] Section 402(j) provides that the judgment of the court of appeals on review of an FCC decision "shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari * * *, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court."

counterpart to Section 402(j) in the Federal Power Act, this Court has explained that the purpose of such statutes is to "preclude[] *de novo* litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review." *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). Thus, "all objections to the [administrative] order * * * must be made in the Court of Appeals or not at all." *Ibid.* In the absence of a petition for certiorari in *Northeast Cellular*, the judgment of the Court of Appeals would therefore become "final" under Section 402(j), in the sense that it would finally settle the question whether the Commission's order was enforceable at that time or instead had to be remanded to the Commission; no further litigation of that question in any other forum or by any other means would be permissible. Section 402(j), however, does not have the peculiar effect, attributed to it by petitioner, of having given the *Northeast Cellular* court authority—indeed requiring that court—to finally settle the question of which party must be awarded the cellular license. The court's remand order expressly and quite properly left that question open. And, as we have explained, even that decision remained subject to review by this Court in a later-filed petition for certiorari from a final judgment (which could possibly have led to a decision by this Court that the further proceedings on remand had been legally superfluous).

Petitioner also attempts to rely (Pet. 18) on the Court's statement in *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6 (1987), that "[b]y 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certio-

rari finally denied." That definition of "finality" was cited in *Plaut*. See 514 U.S. at 214. The *Griffith* definition, however, implicitly makes clear that where there has been a remand—*i.e.*, where *no* judgment of conviction or the like has yet been rendered that purported to terminate the controversy —"finality" in the relevant sense is not present.

e. Contrary to petitioner's contention (Pet. 15-18), there is no conflict between the court of appeals' decision in this case and the First Circuit's decision in *United States* v. *Vazquez-Rivera*, 135 F.3d 172 (1998). In *Vazquez-Rivera*, the court of appeals had previously remanded an appeal from a final judgment in a criminal case for resentencing, because the record had not been developed sufficiently to support a particular sentencing enhancement. While the case was on remand, the district court applied a newly-enacted statute broadening the enhancement to cases like the one before the court. On a second appeal, the court of appeals held that applying the new provisions "to appellant for the crime for which he was convicted violates the ex post facto clause of the Constitution." 135 F.3d at 177.

Initially, the First Circuit's holding in *Vazquez-Rivera* rested squarely on the Ex Post Facto Clause, not on the separation of powers principles of *Plaut*. In addition, whereas the First Circuit in its original decision had squarely and definitively construed the very sentencing enhancement provision that Congress amended, in this case the original D.C. Circuit decision did not in any way address the statute that Congress reenacted and revised—the Paperwork Reduction Act—and whose application on remand is

at issue.[3] Finally, the First Circuit's decision in *Vazquez-Rivera* involved an appeal from a final judgment in a criminal case regarding the legal consequences of the defendant's wholly past conduct; in this case, as noted above, the appeal arose from a licensing proceeding in which the ultimate issue has at all times been whether petitioner or some other party will have the right to operate as a cellular telephone licensee in the future.

3. Petitioner errs in contending (Pet. 22-29) that the D.C. Circuit's holding that Section 3512(b) applies to pending cases is contrary to this Court's decision in *Landgraf* v. *USI Film Products*, *Ltd.*, 511 U.S. 244 (1994).

a. Petitioner does not dispute that where Congress has clearly indicated its intent that a new statute apply in pending cases, that intent governs even if the new statute thereby operates retroactively. *Landgraf*, 511 U.S. at 280. The requisite intent is present here. The statute at issue provides that a party should be allowed to raise a Paperwork Reduction Act defense "at any time during" an

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[3] For this reason, the First Circuit's citation to *Plaut* does not suggest any conflict in reasoning with the D.C. Circuit's decision in this case. In the course of discussing whether to give weight to Congress's characterization of the new statute as a "clarification" of its intent in the original legislation, the First Circuit cited *Plaut* to support the conclusion that "post hoc statements regarding the original legislative intent do not affect this court's previous, and final, finding as to what that intent was." 135 F.3d at 177. Because *Northeast Cellular* did not contain a "previous, and final, finding" regarding any aspect of the Paperwork Reduction Act, the D.C. Circuit's decision in this case is in no way inconsistent with the First Circuit's conclusion.

ongoing administrative proceeding, which includes the right to raise the defense for the first time on judicial review of the proceeding. 44 U.S.C. 3512(b) (Supp. I 1995). Congress thus made clear that the Paperwork Reduction Act defense should be available regardless of ordinary waiver rules requiring the defense to be raised at some specific stage in the proceedings. In other words, Congress intended that making the defense available was more important than the need to respect any expectations that the parties to a given case may have developed, based on ordinary waiver or procedural default rules. In light of that expressly stated intent, the Commission and the D.C. Circuit quite properly concluded that this procedural change should be applied to cases pending at the time it was adopted.

Legislative history is also relevant in determining congressional intent with respect to the application of a new statute to a pending case. *Landgraf*, 511 U.S. at 262-263. When the House of Representatives adopted the Conference Report on the reenactment of the Paperwork Reduction Act, there was a colloquy between Representative Crapo, the original sponsor of the bill adding the "at any time" language to the Paperwork Reduction Act, and the bill's floor manager, Representative Clinger. Representative Crapo asked, "[I]s it the chairman's understanding that section 3512 will become effective as of October 1, 1995, and will apply to all cases then pending before the Federal agencies or the courts?" 141 Cong. Rec. H4376 (daily ed. Apr. 6, 1995). Representative Clinger replied, "Mr. Speaker, the gentleman is absolutely correct. As of October 1, 1995, the defense provided in section 3512 is available at any time in an ongoing dispute." *Ibid.* Because Congress clearly intended

that the revised Paperwork Reduction Act should apply in cases pending on the Act's effective date, it is unnecessary for the Court to consider petitioner's argument concerning the rules governing retroactivity where the congressional intent is not clear.

b. Moreover, petitioner's view on the proper standard for determining when the application of a new procedural rule in a pending case would be retroactive is based on a misreading of *Landgraf*. Contrary to petitioner's argument, *Landgraf* does not hold that the application of a new procedural statute in a pending case is retroactive whenever the previously governing procedural rule on the matter at issue has already been the subject of a decision by a tribunal. *Landgraf* instead recognized that "[b]ecause rules of procedure regulate secondary rather than primary conduct," new procedural rules "may often be applied in suits arising before their enactment without raising concerns about retroactivity." 511 U.S. at 275; see also *Lindh* v. *Murphy*, 117 S. Ct. 2059, 2063 (1997) (noting "the natural expectation" for "merely procedural" rules to "apply to pending cases"). Here, of course, the legal standard that governed PortCell's primary conduct at the time it occurred remains unchanged, and only the procedures affecting adjudication of that conduct under that standard in an ongoing case have been altered.

The Court in *Landgraf* did note that as a matter of "common-sense," new procedural rules sometimes should not be applied to pending cases. 511 U.S. at 275 n.29. It gave two examples of such cases, explaining that "[a] new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence would not

require an appellate remand for a new trial." *Ibid.* But the Court did not suggest that new procedural rules generally should not be applied in any case in which a tribunal had already reached a ruling based on a different procedural rule on the point.[4] To the contrary, the Court cited *Collins* v. *Youngblood*, 497 U.S. 37 (1990), as an example of the proper application of "intervening procedural changes" in pending cases. See *Landgraf*, 511 U.S. at 275 n.28. In *Collins*, a new statute allowing the reformation of an improper jury verdict was applied after a lower court had already concluded prior to the adoption of the new statute that the only remedy for the improper jury verdict was a new trial. Just as in *Collins*, it does not offend "common-sense" to apply the new procedural rule—contained in the reenacted and revised Paperwork Reduction Act—to PortCell's case.

c. Contrary to petitioner's contention (Pet. 26-27), the court of appeals' ruling does not conflict with this Court's decision in *Hughes Aircraft Co.* v. *United States*, 117 S. Ct. 1871 (1997). The court of appeals held that Section 3512(b) "merely required

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[4] Petitioner's argument that the "old" procedural rule had been "applied" in this case in the relevant sense is in any event doubtful. This Court has never held that the retroactivity analysis applicable to procedural changes in administrative proceedings is identical to the analysis applicable to changes in judicial procedure. Yet here, the only "application" of the old procedural rule prior to Congress's adoption of the reenacted and revised Paperwork Reduction Act had been by the Commission—not by any court. Although the Commission had concluded that PortCell's earlier Paperwork Reduction Act defense was untimely, that decision had not been judicially reviewed at the time the reenacted and revised Act became effective.

the Commission, when the [Paperwork Reduction Act] issue was raised anew," to rule on the merits of that issue. Pet. App. 9a-10a. Applying Section 3512(b) to pending cases would therefore not be retroactive because, so understood, Section 3512(b) "governs only the conduct of litigation after the effective date of the statute and does nothing to reopen matters litigated before that date." Pet. App. 10a. Nothing in that ruling is inconsistent with this Court's decision in *Hughes*, *Landgraf*, or any other case.

To support its conclusion that the application of Section 3512(b) to pending cases would not be retroactive, the court of appeals also noted that such application did not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Pet. App. 10a (quoting *Landgraf*, 511 U.S. at 280). In *Hughes*, this Court stated that it is not the case that "*only* statutes with one of these effects are subject to [the] presumption against retroactivity." 117 S. Ct. at 1876. The court of appeals did not in any way challenge that ruling; it merely held that the fact that a law (here, Section 3512(b)) does not have one of the listed effects supports—even if it does not conclusively establish—the conclusion that the law is not impermissibly retroactive.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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