No. 99-605

In the Supreme Court of the United States

WILLIAM THOMAS, ET AL., PETITIONERS

v.

NETWORK SOLUTIONS, INC., 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 RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that certain fees charged by respondent Network Solutions, Inc. for registration and renewal of Internet domain names pursuant to a cooperative agreement between Network Solutions and the National Science Foundation did not constitute unconstitutional, unauthorized taxes once Congress explicitly ratified those fees and authorized their collection.

2. Whether the court of appeals correctly held that the Independent Offices Appropriations Act, 31 U.S.C. 9701, does not apply to fees charged by Network Solutions for registration and renewal of Internet domain names.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 176 F.3d 500. The initial opinion of the district court (Pet. App. 41a-78a) is reported at 2 F. Supp. 2d 22. The district court's later order dismissing petitioners' claims (Pet. App. 25a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1999. The petition for rehearing was denied on July 8, 1999 (Pet. App. 93a-94a, 94a-1 to 94a-22). The petition for a writ of certiorari was filed on October 6,

1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The federal respondent, National Science Foundation (NSF), provides federal financial support for scientific research and science education programs through cooperative agreements, grants, loans, and other forms of financial assistance, 42 U.S.C. 1862(a)(1), but does not itself engage in scientific operations, 42 U.S.C. 1873(b). Among other things, Congress has charged the NSF with the mission of "foster[ing] and support[ing] the development and use of computer and other scientific and engineering methods and technologies, primarily for research and education in the sciences and engineering." 42 U.S.C. 1862(a)(4).

In that role, NSF support was instrumental in the development of a computer network known as NSFNET,[1] which provided a "backbone" that permitted the networks of educational institutions, nonmilitary government entities, and commercial concerns involved in scientific research to be linked together. NFSNET was eventually linked with other networks and, when limits on commercial access to those networks were lifted (primarily after 1992), they coalesced into the backbone of the modern Internet. See Improvement of Technical Management of Internet Names and Addresses, 63 Fed. Reg. 8826 (1998); Pet. App. 7a n.5.

Access to the Internet takes place through "host computers," each with a unique numerical address

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[1] NSFNET was developed in 1987 by IBM, MCI and Merit, Inc. under an NSF award. *Management of Internet Names and Addresses*, 63 Fed. Reg. 31741, 31742 (1998).

(known as an Internet Protocol or IP number) that allows other computers to identify and locate it. The assignment of IP numbers was initially managed by the late Dr. Jon Postel working through the Internet Assigned Numbers Authority (IANA) at the University of Southern California. Pet. App. 3a-4a. Because IP numbers are complex and difficult to remember, the Internet community also has developed a system that allows Internet computers to be identified by unique, user-friendly alphanumeric combinations, such as "IBM.com"; those user-friendly addresses are known as "domain names." Various computers (domain name servers) keep track of the domain names and the IP number to which each domain name corresponds; they thus enable messages to be sent and received without the end-user knowing the IP number. *Id.* at 4a. To ensure that each domain name is associated with the proper IP number, and to ensure that each domain name remains uniquely associated with that number, the Internet community also has, by consensus, developed a registration system. That system was not imposed by the federal government. See *id.* at 3a-4a, 7a.

2. Effective functioning of NSFNET (and other government-supported networks) requires administrative support, including domain name registration. NSF supported the provision of those services primarily through cooperative agreements and grants with private sector entities.[2] In March, 1992, NSF issued a

[2] In 1992, Congress clarified NSF's authority to provide financial support for, *inter alia*, the development and operation of a domain name registration system that extended beyond the realm of the scientific research and education community to include purely commercial uses, so long as "the additional uses will tend to increase the overall capabilities of the networks to support such research and education activities." See Advanced-Technology Act

solicitation for proposals on a set of five-year cooperative agreements involving the development and operation of network information systems for NSFNET and a parallel scientific network, the National Research and Education Network (NREN). C.A. App. 44. The solicitations specified that the awardee would be required to operate the Internet domain name registration system under policy statements issued by the IANA (a non-governmental organization) and developed through a consensus-building procedure. *Id.* at 45.

In December, 1992, after an independent review of proposals responsive to the NSF solicitation, NSF selected Network Solutions, Inc. (Network Solutions) for the contract. Pet. App. 7a-8a. NSF and Network Solutions entered into a cooperative agreement (the Cooperative Agreement) for domain name registration for non-military users of the NSFNET and the NREN. (The Cooperative Agreement is reproduced in Petitioner's Lodging Appendix 111a.) The Cooperative Agreement provided for NSF support under a cost-plus-fixed-fee structure, but it also contemplated that a structure based on user fees would be established in the future. Pet. App. 8a.

The Cooperative Agreement, like all NSF assistance awards, was subject to NSF's Grant General Conditions (Conditions), Article 1a of which clarified that the development and operation of the registration of domain names (the subject of the Cooperative Agreement) was not operated or regulated by NSF. See Pet. App. 22a. Finally, the Agreement provided for a mid-term performance review to be conducted by December 31, 1994, to determine whether to continue NSF funding and to

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of 1992, Pub. L. No. 102-476, § 4, 106 Stat. 2300 (codified at 42 U.S.C. 1862(g)).

provide direction regarding the level of future support for the duration of the Agreement. Cooperative Agreement Art. 5.B (Lodging Appendix 117a).

The performance review was conducted by a diverse 16-member panel (the Panel) representing the Internet community, none of whom was employed by, or represented the interests of, NSF or Network Solutions. The Panel noted Network Solutions' "excellent service in the face of exponential growth in demand," C.A. App. 415, but questioned Network Solutions' ability "to keep up with the * * * exponential growth of the Internet," *id.* at 435. Accordingly, the Panel recommended that more resources be allocated to help Network Solutions "meet [the] increasing work load." *Id.* at 436. Specifically, the Panel stated:

> At present, the management of .COM [second-level domain names used by commercial entities] is paid for by the NSF, and hence increasing demand for .COM registrations will require increasing support from the NSF. The panel recommends that [Network Solutions] begin charging for .COM domain name registrations and later charge for name registrations in all domains.

Ibid.

Accordingly, after further negotiations, in September 1995, NSF and Network Solutions amended the cooperative agreement to specify fees to be charged for registration services, and provided rules concerning allocation of the resulting revenues. In particular, the amendment provided:

> a. 70% will be available to [Network Solutions] as consideration for the services provided.

> b. the remaining 30% will be placed into an interest-bearing account which will be used for the preservation and enhancement of the "Intellectual Infrastructure" of the Internet. [Network Solutions] will develop and implement mechanisms to insure the involvement of the Internet communities in determining and overseeing disbursements from this account.

Cooperative Agreement Art. 8a (as amended) (Lodging Appendix 133a). See also Pet. App. 8a-9a.

During the appropriations process for fiscal year 1998, Congress directed NSF to withdraw $23 million from the Intellectual Infrastructure Fund (the Fund) contemplated by the amendment for use in supporting the "Next Generation Internet" initiative. H.R. Rep. No. 297, 105th Cong., 1st Sess. 134 (1997). The subject $23 million was later transferred to NSF's appropriations, but none of it had been spent when the district court below preliminarily enjoined NSF from spending any part of the Fund pending resolution of the suit. See Pet. App. 79a. As explained in greater detail below, Congress later specifically ratified and authorized the portion of the registration fees collected for the Fund. See pp. 7-8, *infra*.

3. Petitioners filed this action in October, 1997, and an amended complaint on January 30, 1998. The amended complaint asserted that the portion of the domain name registration fee that Network Solutions was supposed to deposit in the Intellectual Infrastructure Fund (30% of the registration fee) constituted an unconstitutional tax under Article I, Section 8 of the Constitution because Congress had not authorized its imposition (Counts I and II). The amended complaint further alleged that the Independent Offices Appro-

priations Act, 31 U.S.C. 9701, applied to the registration fee charged by Network Solutions and rendered that fee unlawful insofar as it exceeded Network Solutions' actual costs (Counts III and IV).[3]

On February 2, 1998, the district court enjoined all disbursements of monies deposited into the Fund pending resolution of the lawsuit. Pet. App. 92a. On April 6, 1998, the district court dismissed all claims against NSF and Network Solutions except Count I. With respect to Count I, the district court granted partial summary judgment as to liability in favor of petitioners. The 30% portion of the fees collected by Network Solutions for deposit in the Intellectual Infrastructure Fund, the district court concluded, constituted a "tax." Because taxes may not be imposed without congressional authorization, and because that authorization was lacking here, the district court also concluded that the 30% portion of the fee was illegal under Article I, Section 8 of the Constitution. Pet. App. 59a. Final judgment, the court ruled, would await the adjudication of remedies. *Id.* at 62a-63a.

Shortly after the district court entered its April 6, 1998 order, the President signed the 1998 Supplemental

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[3] The amended complaint also alleged that (a) that the Administrative Procedure Act's rulemaking provisions required NSF to provide for notice and comment before entering into the amendment of the Cooperative Agreement providing for registration fees (Count V); (b) NSF had bestowed upon Network Solutions federal property in violation of Article IV, Section 3 of the Constitution (Count VIII); and (c) NSF had violated the antitrust laws by conspiring with Network Solutions to help Network Solutions control the domain name registration market (Count IX). The district court dismissed those claims, Pet. App. 41a-78a, the court of appeals affirmed, *id.* at 15a-20a, 24a, and petitioners do not seek further review.

Appropriations and Rescissions Act, Pub. L. No. 105-174, 112 Stat. 58. Section 8003 of that Act expressly authorized and ratified the 30% portion of the fee invalidated by the district court. In particular, it provided:

> SEC. 8003. RATIFICATION OF INTERNET INTELLECTUAL INFRASTRUCTURE FEE. (a) The 30 percent portion of the fee charged by Network Solutions, Inc. between September 14, 1995 and March 31, 1998 for registration or renewal of an Internet second-level domain name, which portion was to be expended for the preservation and enhancement of the intellectual infrastructure of the Internet under a cooperative agreement with the National Science Foundation, and which portion was held to have been collected without authority in William Thomas et al. v. Network Solutions, Inc. and National Science Foundation, Civ. No. 97-2412, is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had, by prior Act of Congress, been specifically authorized and directed.
>
> (b) The National Science Foundation is authorized and directed to deposit all money remaining in the Internet Intellectual Infrastructure Fund into the Treasury and credit that amount to its Fiscal Year 1998 Research and Related Activities appropriation to be available until expended for the support of networking activities, including the Next Generation Internet.

112 Stat. 93 (Pet. App. 97a-98a).

On May 5, 1998, following enactment of Section 8003, NSF moved to dismiss Count I of the Amended Complaint. Section 8003, NSF argued, authorized imposi-

tion of the 30% portion of the fee challenged by petitioners; it therefore eliminated any basis for petitioners' contention that the fee was unauthorized. Relying on Section 8003, the district court agreed, granting NSF's motion and dismissing the case in its entirety. Pet. App. 25a-40a.

4. Petitioners appealed, and the court of appeals affirmed. The court of appeals first assumed, *arguendo*, that the 30% portion of the domain name registration fee destined for the Intellectual Infrastructure Fund in fact constituted an illegal tax, as the district court had held. The issue, the court of appeals reasoned, was therefore whether or not Congress had the power retroactively to ratify that "tax" through Section 8003. Relying on this Court's decision in *United States* v. *Heinszen & Co.*, 206 U.S. 370 (1907), the court of appeals held that "Congress 'has the power to ratify the acts which it might have authorized' in the first place, so long as the ratification 'does not interfere with intervening rights.'" Pet. App. 11a (quoting *Heinszen*, 206 U.S. at 384).

Applying *Heinszen*, the court of appeals held that Congress had intended, through Section 8003, to ratify the 30% portion of the domain name registration fee, Pet. App. 12a-14a, and that Congress had the power to do so, *id.* at 14a-15a. The court of appeals rejected petitioners' contention that Congress could not have delegated to NSF the power to assess such a registration fee. Petitioners' argument, the court of appeals explained, "miscasts not only what Congress did, but also what Congress could have done initially." *Id.* at 14a. As the court of appeals explained, Section 8003 did not purport to delegate any authority or discretion to NSF for the simple reason that the amount of the assessment had "already been set, the assessments already col-

lected." *Ibid.* Thus, the court reasoned, Section 8003 should be construed simply as if "a prior act of Congress had directed NSF to collect $30 for each new registration and $15 thereafter and to retain the funds in order to support the Internet." *Ibid.* As the court concluded, "we perceive no reason—registrants have offered none—why such legislation would not have been within Congress's constitutional power under Article I, § 8." *Ibid.*

The court of appeals likewise rejected petitioners' contention that the 70% of the registration fee retained by Network Solutions violates the Independent Offices Appropriations Act, 31 U.S.C. 9701. As the court of appeals noted, the IOAA requires that fees charged by agencies for agency services comport with statutorily established criteria. Pet. App. 20a-21a. Yet, as the court of appeals explained, the IOAA applies "only to 'a service or thing of value provided by an agency.'" Pet. App. 22a (quoting 31 U.S.C. 9701(a)). In this case, the court of appeals reasoned, the registration services for which the challenged fees were charged were not provided "by an agency" but rather by Network Solutions, a private company. Pet. App. 22a-23a.

The court of appeals further explained that a broader interpretation of IOAA—one that encompasses all government services, whether actually provided by the agency or by a private entity under contract with an agency—also would not save petitioners' claim because registration of Internet domain names is not a government service. Pet. App. 22a-23a. Noting that Congress never required NSF or any other government agency to provide registration services, the court ruled that the services hardly constitute "a 'quintessential' government service." *Id.* at 23a. Finally, the court of appeals ruled that IOAA also did not apply because

"[t]he Act applies to monies bound for the federal treasury." *Ibid.* As the court noted, the 70% portion of the registration fee was paid to Network Solutions for its services and was never (under the Cooperative Agreement or otherwise) bound for the federal treasury.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioners first challenge the court of appeals' conclusion regarding the effect of Section 8003 of the 1998 Supplemental Appropriations and Rescissions Act, Pub. L. No. 105-174, 112 Stat. 93 (Pet. App. 97a-98a). In this Court, petitioners do not dispute that Section 8003, by its express terms, purports to ratify, legalize, and authorize imposition of the 30% portion of the registration fee (for deposit in the Intellectual Infrastructure Fund) that petitioners sought to invalidate. Rather, petitioners assert that Section 8003 cannot render that fee lawful because to do so would be inconsistent with this Court's "nondelegation doctrine and the separation-of-powers principles that it embodies." Pet. 10. At bottom, petitioners argue that, where a tax is initially formulated and imposed in the absence of a valid legislative delegation of power, that tax cannot retroactively be rendered lawful by subsequent legislation. Pet. 12-13.

Petitioners, however, cite no case of this Court so holding, and this Court's decisions in *United States* v. *Heinszen*, 206 U.S. 370 (1907), and *Rafferty* v. *Smith, Bell & Co.*, 257 U.S. 226 (1921), are to the contrary. *Heinszen* concerned import duties that this Court had,

in earlier decisions, declared unlawful on the ground that Congress had not authorized them. 206 U.S. at 380. By the time *Heinszen* was decided, however, Congress had enacted new legislation that "legalized and ratified and confirmed" the collection of those duties "as fully as to all intents and purposes as if the same had, by prior act of Congress, been specifically authorized and directed." *Id.* at 381 (quoting Act of June 30, 1906, ch. 3912, 34 Stat. 636). Relying on its own precedents and on settled agency principles, the Court held that Congress could legalize and ratify otherwise unauthorized duties whenever Congress could have lawfully imposed those duties in the first instance, so long as the power to impose the duties remained unimpaired—by the creation of intervening rights or otherwise—on the date of ratification. 206 U.S. at 382-384.

In *Smith, Bell & Co.*, this Court reiterated and again applied that principle. There, the Supreme Court of the Phillippines had held that certain taxes were invalid because they had not been authorized by Congress. While that decision was pending on review in this Court, Congress enacted legislation to ratify and legalize the taxes. See 257 U.S. at 231-232. This Court held that Congress's power to ratify and legalize those taxes "necessarily follows from the doctrine announced in *United States* v. *Heinszen & Co.*" *Smith, Bell & Co.*, 257 U.S. at 232. Accordingly, it reversed the judgment of the Phillippines Supreme Court. *Id.* at 232-233.

As the court of appeals correctly recognized, Pet. App. 11a-15a, the same principle controls this case. Petitioners do not dispute that Congress could have imposed the fees at issue here in the first place. Nor do they claim that any intervening right impaired Congress's power to impose the fee at the time it enacted Section 8003. As a result, under *Heinszen* and *Smith*,

Bell & Co., Section 8003(a) rendered those fees, in contemplation of law, no less enforceable than they would be if Congress had expressly authorized their collection in the first instance. In the words of Section 8003(a), the fees now have the same legal status they would have had if they "had, by prior Act of Congress, been specifically authorized and directed." Pub. L. No. 105-174, 112 Stat. 93 (Pet. App. 97a-98a).

Nor can Congress's ratification of the fees be attacked (Pet. 13, 15) as an excess delegation. Congress did not purport to delegate retroactively to NSF unbridled authority to establish registration fees. Rather, Congress, without according any discretionary authority to NSF, simply ratified the very fee—in the same amount—that NSF had previously sought to establish in its cooperative agreement with Network Solutions, but which had initially been set aside by the district court. Because petitioners do not question that Congress could have expressly established the 30% charge itself in the absence of NSF's prior action, it is difficult to see why legalization and ratification of that fee does not constitute a lawful exercise of the congressional power this Court recognized in *Heinszen* and *Smith, Bell & Co.*[4]

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[4] Petitioners at one point (Pet. 13-14) seem to attempt to distinguish *Heinszen* as a case in which Congress merely corrected a drafting error. Petitioners, however, point to no decision of this Court so construing *Heinszen* and—even if we assume *arguendo* that *Heinszen* did involve a drafting error—there is no indication that this Court's decision turned on that alleged fact. To the contrary, the Court's decision in *Heinszen* was based on common law doctrines and prior decisions concerning ratification; nothing in *Heinszen* (or in the Court's later decision in *Smith, Bell & Co.*) suggests that the result was related to the purported fact that a drafting error was involved.

Rather than dispute the principles underlying *Heinszen*, petitioners assert that "[t]he opinion below thus stands for the proposition that whatever Congress does is self-justifying from a separation-of-powers standpoint, which renders the nondelegation doctrine altogether meaningless." Pet. 13. In so asserting, petitioners fail to grasp that this Court's "nondelegation doctrine" is inapplicable where Congress has not "delegated" discretion to an administrative agency but has itself acted to require the very conduct being challenged. Where Congress itself acts, the nondelegation doctrine is irrelevant. Petitioner is thus wrong in asserting that the case involves "Congress' power to delegate to the National Science Foundation the unfettered authority to legislate a tax." Pet. 15. As embodied in Section 8003, the "tax" (if it may properly be called that) in this case was imposed retroactively by Congress without any delegation to NSF. As Section 8003 states, the 30% fee was "legalized and ratified and confirmed as fully to all intents and purposes as if the same had, *by prior Act of Congress*, been specifically authorized *and directed*." Section 8003(a), Pub. L. No. 105-174, 112 Stat. 93 (emphasis added) (Pet. App. 97a-98a).

Finally, petitioners are incorrect (Pet. 15-17) to suggest that this application of *Heinszen* threatens separation of powers principles, or somehow shifts Congress's taxing powers to the executive branch. The power to authorize (or withhold authorization for) the imposition of the fees at issue here rested at all times with Congress, and it was Congress that—by enacting Section 8003—determined the validity of the fees and thus the outcome of this case. What petitioners complain about thus is not an excess delegation of authority to an agency. It is instead the manner in which

Congress, a politically accountable branch, exercised *its* constitutional power to legislate. See Pet. 16 (complaining that the agency's "partisans [might] convince Congress of the usefulness of the already-collected funds"); Pet. 17 (contending that Congress "quietly" slipped the "ratification in an omnibus bill late one evening"). In the absence of some contention that Congress violated one of the specific guarantees contained in the Constitution, however, that sort of complaint is properly directed to the political branches, through the electoral process; it is not actionable in this Court.[5]

2. Petitioners also claim that the 70% portion of the registration fee (which compensates Network Solutions for its services) was imposed in violation of the Independent Offices Appropriations Act (IOAA), 31 U.S.C. 9701. That claim too does not implicate a division in circuit authority, and it too is without merit.

As the court of appeals explained, the IOAA provides criteria for the establishment of the fees to be charged for "a service or thing of value provided by an agency." 31 U.S.C. 9701(a). See Pet. App. 22a. Hence, as the court of appeals held, the IOAA does not apply to this case because neither the NSF nor any other governmental entity provides the registration services for which the challenged fees are charged. *Ibid.* Rather, a

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[5] Nor can it be claimed (Pet. 16) that *Heinszen*'s doctrine may tempt agencies to impose unlawful taxes in the speculative hope that Congress will later ratify those taxes. The normal presumption is that executive officers (and administrative agencies) will attempt to follow the law in good faith, and petitioners have made no showing of bad faith here. In any event, *Heinszen* has been the law for more than 90 years, and petitioners offer no evidence that the practice they purport to fear—the imposition of unauthorized taxes in the hope that Congress will ratify them—has become common.

private organization, Network Solutions, provides the registration services, and Network Solutions charges the fee that petitioners challenge.[6]

For that reason, this case differs dramatically from *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974), upon which petitioners rely (Pet. 19). That case involved licensing fees imposed by the Federal Communications Commission (FCC) on the cable television systems it regulated; the question was whether the FCC had violated the IOAA in selecting the standard for "setting the fee." 415 U.S. at 343. Since the fee was imposed and the services were provided by a government agency, it was undisputed that the IOAA applied. Here, in contrast, the fee is imposed and the services are provided by a private entity not subject to the IOAA.

Petitioners attempt to evade that distinction by arguing that NSF must be charged with the responsibility for the fees assessed by Network Solutions because Network Solutions is supposedly an "agent" of NSF. Pet. 20. That argument assumes its conclusion, namely that Network Solutions is the "agent" of NSF. As explained above, NSF entered into a cooperative agreement with Network Solutions to register domain names, but in doing so, NSF was not contracting out any function or obligation that NSF itself ordinarily fulfills. The court of appeals specifically noted that

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[6] Indeed, as originally enacted, the IOAA contained at least one provision contemplating that revenues from the services or things of value will be deposited in the treasury. Pet. App. 23a (citing 31 U.S.C. 483a (1976)). Although that provision was omitted at recodification as unnecessary in light of other requirements, it strongly suggests that the IOAA was not designed to apply to fees collected by private companies for services provided by those companies. Pet. App. 24a.

point, emphasizing that this is not a situation where an agency has "farmed out" the performance of a statutory duty to a private contractor. Pet. App. 21a. Indeed, it is hard to see how Network Solutions could be NSF's agent given that NSF does not control or direct Network Solutions' actions or operations. See p. 4, *supra*; Pet. App. 22a. Petitioners' argument thus would stretch the law of agency past the breaking point, as it would mean that a government agency's use of a cooperative agreement would render the agency responsible for all the actions of the counterparty to that agreement. That is not, and has never been, the law.

Petitioners also argue that "the registration of '.com' domain names is and always has been a quintessential government service, just as the licensing of wavebands and channels is a government function notwithstanding the increasing commercialization and deregulation of television, cable and radio." Pet. 23. That assertion too is incorrect. Unlike radio wavebands and television channels, which are subject to allocation and control by the FCC,[7] neither the Internet itself nor domain names have ever been under the control of the United States government or otherwise been subject to allocation or licensing by the government. Indeed, domain name registration originally was a function provided not by the government, or Network Solutions, but by the late Dr. Postel at the University of Southern California.

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[7] See, *e.g.*, *Columbia Broad. Sys., Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 104 (1973) ("It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard.") (quoting *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 376 (1969)).

Pet. App. 23a. As the court of appeals noted, "[a] recent and novel function such as domain name registration hardly strikes us as a 'quintessential' government service." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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