Nos. 01-653 & 01-657

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

ARCTIC SLOPE REGIONAL CORPORATION,
COUNCIL TREE COMMUNICATIONS, LLC, AND
VOICESTREAM WIRELESS CORPORATION,
Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* CREDITORS OF NEXTWAVE PERSONAL COMMUNICATIONS, INC., SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Federal Communications Commission ("FCC") acted lawfully in retroactively canceling NextWave's communications licenses for failure to make timely installment payments while in Chapter 11 proceedings, and in denying NextWave any opportunity to cure, because the FCC was acting in a "fundamentally regulatory" capacity and was therefore exempt from the usual provisions of the Bankruptcy Code.

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Cases

Statutes, Regulation and Rule

Other Authorities

INTEREST OF *AMICI CURIAE*

Creditors of NextWave Personal Communications, Inc., including the Official Committee of Unsecured Creditors ("the Creditors Committee") and BFD Communications Partners, L.P. ("BFD"), respectfully submit this brief *amici curiae* in support of respondents.[1]

The Creditors Committee is the official representative of the thousands of businesses and investors who extended hundreds of millions of dollars in services, goods, and financing to NextWave to enable NextWave to acquire its licenses, build out its network, and fund its operations.[2] This large and diverse group includes corporate investors such as Sony, QUALCOMM, and Hughes Network Systems; hundreds of small businesses which provided supplies and services toward the build-out of the network; and large investment funds which manage money for banks, pension funds, and insurance companies.

The Creditors Committee has a vital interest in ensuring that the Federal Communications Commission ("FCC") is subject to the same rules the Bankruptcy Code applies to all other creditors. The members of the Creditors Committee stand to lose hundreds of millions of dollars if this Court sustains the FCC's contention that it is exempt from important provisions of the Code and is on

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for any party authored this brief in whole or in part. No persons other than the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Letters reflecting the parties' consent to the filing of this brief have been submitted to the Clerk. In July 2000, Elizabeth Warren briefly served as a consultant to special counsel for respondent NextWave Personal Communications, Inc. with respect to a petition for rehearing. Since then, she has not represented any party in this case in any way.

[2] The Bankruptcy Code provides that, as soon as practicable after the commencement of a Chapter 11 case, "the United States Trustee shall appoint a committee of unsecured creditors holding unsecured claims" against the debtor. 11 U.S.C. § 1102(a)(1). The Creditors Committee's function is to represent the interest of general unsecured creditors in the debtor's Chapter 11 case, and § 1109(b) of the Code grants committees the right to appear and be heard on any issue in a Chapter 11 case.

that basis allowed retroactively to cancel NextWave's licenses. Under its reorganization plan, NextWave proposes to pay in full not only the FCC's claim, but also each of the claims of the Creditors Committee's constituents (whose claims exceed $500 million).

BFD is NextWave's post-petition lender and is not otherwise affiliated with NextWave. As the Bankruptcy Code contemplates, 11 U.S.C. §§ 364, 1101, BFD and other lenders made various loans after the commencement of the Chapter 11 case in order to allow NextWave to continue operating. In conjunction with this financing, the lenders took liens on the proceeds of NextWave's licenses to secure repayment of its loans. As the Code requires, NextWave and the lenders obtained the bankruptcy court's prior approval of these liens upon notice to the FCC. Significantly, the FCC never objected to the liens on the ground that the licenses had canceled (or could be canceled) for nonpayment during NextWave's bankruptcy case. On the contrary, the lenders relied on the FCC's repeated acknowledgments that NextWave's licenses would *not* cancel while NextWave attempted to reorganize. Accordingly, BFD requests that this Court affirm the judgment of the court of appeals.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici reasonably relied on the FCC's longstanding and publicly articulated position that, having chosen to create standard debt obligations as part of its installment payment scheme, it was bound by the same bankruptcy rules as all other creditors. At a time when the licenses were increasing in value, the FCC changed its tune and is now seeking special bankruptcy treatment, even though Congress has repeatedly rejected its pleas for such treatment. Not satisfied with its multiply protected status under the Bankruptcy Code as a fully secured creditor – a status it actively sought by taking installment notes, securing liens, and filing UCC financing statements – the FCC insists on special treatment as a kind of super-creditor, armed with the power either to participate in the bankruptcy process or to exit it at will, as its financial interests might dictate.

The Government argues for this judicially created bankruptcy exemption on the ground that the FCC is acting in a "fundamentally regulatory" capacity. Govt. Br. 15. According to the Government, this controversy is not about the money but the principle of the thing: the Commission's ability to enforce the discipline of its auction mechanism and to punish "insincere bidding." Govt. Br. 29. Thus, concludes the Government, applying the Bankruptcy Code to prevent the Commission from revoking the bankrupt estate's spectrum licenses "would create clear incentives for speculation by permitting heads-I-win, tails-you-lose opportunities: If the value of the spectrum increased, winning bidders could eventually sell the license at a profit; and if the value decreased, licensees could seek to renegotiate license terms in bankruptcy court." *Id*. at 32.

The Government's argument is both wrong and irrelevant. It is wrong because NextWave did not make its bid on the gamble that it could sell its licenses at a profit if their value went up – a purpose in any event precluded by the anti-assignment provisions of Section 310(d) of the Communications Act – but with the firm intention of itself rapidly developing the technical and commercial structures for the full utilization of the licenses. This is exactly the intention expressed by Congress in Sections 309(j)(3)(A) and (D). It is captious to suggest that, because NextWave did not have the full amount of its bid in hand in disposable cash at the time of its bid, it was merely a gambler gaming the system. Of course, NextWave, or any other successful bidder, would seek equity and non-equity partners to finance not only the licenses but also the extensive (and expensive) physical and commercial infrastructures necessary to offer telecommunications service. If Congress had contemplated an exclusively cash-on-the-barrel-head system, in which only bidders with both technical expertise and vast resources could participate, it would not have suggested that the FCC consider the use of "guaranteed installment payments" to provide "economic opportunities for a wide variety of applicants, including small businesses . . . ." 47 U.S.C. § 309(j)(4)(C). NextWave is exactly the kind of bidder, and *amici* are exactly the kinds of creditors, that Congress sought to encourage.

The Commission's story is wrong for another reason. NextWave was unable to meet its payment obligation not because it had gambled extravagantly (and *amici* did not lend and invest as an imprudent gamble), but because beginning in 1997 the telecommunications sector experienced a general market downturn in which some seventy-seven companies have filed for bankruptcy.

In any event, this dispute is no longer solely about NextWave. It is about the rights of its creditors who lent and invested money in a venture that may have entailed risk – but risk whose boundaries are set out in the bankruptcy laws. As lenders they were entitled to expect that they would be treated like other lenders of their class. As investors they were entitled to expect that their investments were subject to no greater hazard than the law imposes. They took a risk, but it is the very risk Congress in Section 309(j)(3)(A) wanted small businesses and their creditors to take.

The arrangements made in the seventy-seven telecommunications bankruptcies since 1997 show how the Code in fact promotes communications policy by preserving ongoing businesses while they use the breathing space afforded by the Code to rehabilitate themselves. Yet the FCC proposes retroactively to single out the NextWave creditors from other creditors in the industry that have made investments on the same assumption of the operation of the bankruptcy laws – perversely, at just the moment that NextWave was poised to implement a full payment plan.

Bidders such as NextWave require third-party financing in order to acquire licenses and build out their networks. Such financing will disappear if the FCC's arguments in this case are accepted, for no rational creditor would invest in a company like

NextWave if the FCC were authorized in the event of bankruptcy to revoke the essential licenses on which the company's business plan depends. The Congress that enacted Section 309(j) could not possibly have shared the view of the FCC's regulatory powers that the Government asserts in this case.

The Government's argument is also legally irrelevant in the sense that there exists no basis for this Court to craft a "regulatory exception" to the Bankruptcy Code, nor any basis for ignoring the clear words of Section 525(a) that "a governmental unit may not . . . revoke . . . a license, permit, charter, franchise, or other similar grant . . . solely because [the] debtor . . . has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. § 525(a). Section 525(a) necessarily applies when the Government is acting in a regulatory capacity through the issuance of licenses and similar grants. The FCC's plea for special treatment echoes similar claims by other governmental agencies that this Court has repeatedly rebuffed. *See Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552 (1990); *Ohio v. Kovacs*, 469 U.S. 274 (1985). That line of precedent controls here and establishes an approach to interpreting the Bankruptcy Code and Communications Act in which Congress has acquiesced. When Congress decides to grant special bankruptcy status to a particular government agency or program, it does so explicitly: it has created special regulatory exceptions to the automatic stay provision, Section 362(b)(4); to the executory contracts provision, Section 365; to the discharge provision, Section 523(a); and to Section 525(a) itself.

In stark contrast, Congress has not created any FCC exception to the Bankruptcy Code. Indeed, Congress has squarely rejected legislative proposals to confer special bankruptcy status on the FCC. If NextWave may be deprived of its licenses because it did not promptly pay required installments, then so may every debtor that falters in its monetary obligations to some unit of government – high or low, federal, state or local. If NextWave and its creditors may be punished for venturing to seek the public's business on credit – if that qualifies as "gaming" the system – then Section 525(a) might as well be read out of the Code. Because governmental agencies frequently appear as creditors in bankruptcy cases, accepting the FCC's argument in this case will set a disastrous precedent that will disrupt bankruptcy cases nationwide.

The judgment below must in any event be affirmed, on the ground that the FCC's cancellation of the licenses violated NextWave's right to "cure" any default under Sections 1123(a)(5)(G) and 1124(2)(a). Under its Chapter 11 plan, NextWave proposes to pay the FCC in full, with interest and late fees. Indeed, had the FCC not announced its surprise cancellation, NextWave already would have emerged from bankruptcy, paid the FCC and all other creditors in full, and put the spectrum covered by its licenses to immediate use. If the FCC is permitted to proceed with the cancellation and resale of NextWave's licenses, the FCC will be the only party to receive satisfaction of its claim – three times over, for the Commission claims that the licenses are now worth $15 billion. Govt. Br. 12. The FCC's position thus violates the critical bankruptcy principle of equality among creditors.

ARGUMENT

I. THE FCC IS IMPROPERLY SEEKING SPECIAL TREATMENT AT THE EXPENSE OF OTHER CREDITORS.

From the perspective of the Bankruptcy Code, this case is remarkable only in its ordinariness. NextWave seeks to do what several hundred thousand debtors do every year when they declare bankruptcy: pay what the law requires them to pay to their secured and their unsecured creditors, reorganize their affairs, and emerge from bankruptcy. The FCC has no experience or expertise in bankruptcy matters, and its views regarding the Code are of course not entitled to deference. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990). Having voluntarily assumed secured creditor status, the FCC should be governed by the same rules as every other secured creditor.

A. The FCC Is Seeking Special Treatment That Congress Denied It.

The bankruptcy system was developed to address a "common pool" problem: if each individual creditor relies on unilateral debt-collection remedies to seize as much of the debtor's estate as he can for himself, the creditors *as a group* may be worse off overall. Bankruptcy responds to this economically destructive behavior by enforcing a system of cooperation among creditors. The Bankruptcy Code's efficacy depends on the ability of a bankruptcy court to marshal a debtor's assets and prevent creditors, including governmental agencies, from engaging in individual debt collection activities that diminish the debtor's value or prevent the orderly administration of the debtor's affairs. *See Bank of Am. Nat'l Trust & Savings Ass'n v. 203 North LaSalle St. Partnership*, 526 U.S. 434, 453 (1999) (purposes of Chapter 11 are "preserving going concerns and maximizing property available to satisfy creditors").

Government agencies appear frequently as creditors in bankruptcy cases, whether to collect license fees, judgments, or tax liens. If they are accorded super-creditor status, or are otherwise immunized from the usual bankruptcy rules that govern every other creditor, then the administration of bankruptcy cases will be severely disrupted and the basic purpose of Congress will be frustrated. Not only will post-petition lending come to an immediate halt for any company dependent on a government license, but the effects would ripple through the marketplace in the start-up and expansion investment phases for any company.

The ability of any creditor to ignore the Bankruptcy Code's provisions and act on its own initiative jeopardizes the congressional scheme for the rehabilitation of bankrupt debtors. In this case, for example, NextWave has long been prepared to consummate its Chapter 11 plan, which would permit NextWave to pay its creditors in full (including the FCC), with interest and late fees, retain its assets, provide employment for its workers, produce a return for its investors, and permit the continued construction and operation of its network. Now that it believes it can re-sell the licenses for more money, the FCC wants none of this. It asserts its own short-term institutional interest to the detriment of NextWave's other creditors, employees, and customers, in violation of the "prime bankruptcy policy of equality of distribution among creditors of the debtor." *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991).

The Bankruptcy Code does not grant federal agencies immunity from the requirements of the statute. To the contrary, Section 106 of the Code expressly provides for the application of the Code to agencies like the FCC. *See* 11 U.S.C. § 106(a) ("governmental units"); *id.* § 101(27) (defining "government unit" to include federal agencies). Thus, in *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983), this Court declined to create a special Internal Revenue Service exception to the Code (there, the "turnover" provision of Section 542(a)). This Court opined that "[w]e see no reason why a different result should obtain when the IRS is the creditor. The Service is bound by § 542(a) to the same extent as any other secured creditor." *Id.* at 229. "Nothing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector . . . ." *Id.*

This lesson is especially salient here, because Congress has repeatedly rejected requests for an FCC exemption from the Bankruptcy Code in light of the potential adverse impact on creditors. In fact, Congress declined to enact even more modest relief – an FCC exception to the automatic stay provision of Section 362(b) – than the Commission seeks here.[3] Having been

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[3] In a letter dated May 12, 2000, Members of the House Judiciary Committee explained that "[e]very member of the [Commercial and Administrative Law] Subcommittee present at the hearing expressed his

turned down by Congress, the FCC now asks this Court for an even more ambitious exemption from Section 525(a). *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000) (considering congressional rejection of bills granting the FDA jurisdiction over tobacco).

Congress enacted Section 309(j) of the Communications Act against the background understanding that federal agencies are governed by the Bankruptcy Code. There is no conflict between the two statutes involved in this case, but if there were it would be resolved by a fundamental principle governing the orderly development of federal statutory law: Whenever Congress enacts a statute and entrusts a federal agency to apply its terms or to fill in gaps to implement that statute's policies, there is at the very least a strong presumption (on which creditors can rely) that the agency is not exempt from preexisting background federal statutes, except where the laws expressly so provide. "[L]egislative repeals by implication will not be recognized, insofar as two statutes are capable of coexistence, 'absent a clearly expressed congressional intention to the contrary.'"[4]

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concern or disagreement with the FCC's position that it is exempt from the automatic stay provision – a position contrary to congressional intent when it enacted section 362(b) in 1997. . . . [The FCC's proposals] conflict with one of the Bankruptcy Code's fundamental tenets that all similarly situated creditors be treated equally absent significant public policy reasons warranting some form of preferred treatment (e.g., police and regulatory enforcement officials, spousal and child support claimants, victims of fraud). These proposals, however, would endow the FCC with more protections than virtually any other creditor, including the Internal Revenue Service, has under the current bankruptcy law. . . . If enacted, this proposed legislation could potentially destroy a debtor's prospect for economic rehabilitation and deprive creditors of a major source of repayment." *See* 145 Cong. Rec. S14104 (daily ed. Nov. 5, 1999) (Johnson Amendment No. 2523 to Bankruptcy Reform Act of 1999, S. 625).

[4] *Astoria Fed. Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 109 (1991) (citation omitted); *see also Hagen v. Utah*, 510 U.S. 399, 416 (1994); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *Ex parte Yerger*, 8 Wall. 85,

This Court has recognized the particular importance of this rule in harmonizing federal statutes with the Bankruptcy Code.[5]

B. NextWave's Commercial Creditors Reasonably Relied on the FCC's Repeated Acknowledgments That It Was Bound by Ordinary Bankruptcy Rules.

The FCC was nowhere compelled by Section 309(j) to enter into a creditor-debtor relationship with bidders. Although Section 309(j) of the Communications Act suggested the possibility of using installment payments of some kind, it also suggested alternative methods of encouraging small business participation in auctions. 47 U.S.C. § 309(j)(4)(A). Yet the FCC deliberately designed its system of installment payments to create a debtor-creditor relationship. The FCC recognized the attendant risk. "By allowing payment in installments," the Commission stated, "the government is in effect extending credit to licensees . . . ." Pet. App. 4a. In 1998 the FCC decided to suspend installment payments as a financing method. Pet. App. 50a.[6]

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105 (1869). *Cf. Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 257-62 (1827) (contracts, as forms of private law, are deemed to be undertaken subject to the prior law, particularly bankruptcy law); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435 (1934) (prior law includes, for this purpose, the underlying "postulate[s] of the legal order" even when not reduced to positive enactments). On the collaborative relation between Congress and the Court in the matter of construing federal statutes, see *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

[5] *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 521-23 (1984) (Bankruptcy Code rather than NLRA governed the assumption or rejection of collective bargaining agreement); *Kokoszka v. Belford*, 417 U.S. 642, 650-52 (1974) (Bankruptcy Act rather than Consumer Protection Act governed garnishment of certain property); *see also Johnson v. Home State Bank*, 501 U.S. 78, 86 (1991) (court must "[p]resum[e] . . . that Congress was familiar with the prevailing understanding of 'claim'").

[6] *See* Pet. App. 91a ("the culprit was installment payments") (statement of Commissioner Furchtgott-Roth); *Second Report and Order*, 12 FCC Rcd. 16,436, 16,502 (1997) ("the Commission, *as a creditor*, ought to behave in a

Until January 12, 2000, the FCC itself repeatedly acknowledged that it wore the hat of a prepetition creditor, bound by the ordinary bankruptcy rules that apply to all other creditors. As a result, the FCC induced DIP lenders to advance millions of dollars to NextWave and other creditors to continue doing business with the company. *Amici* would have been paid in full (along with the FCC) in January 2000, if the Commission had not repudiated its prior position. *Amici* have now sat stranded for thirty months after their reliance on the FCC's representations.

From the beginning, the FCC had NextWave sign promissory notes for the licenses; took security interests (liens) in each of the licenses; and perfected its interests by filing UCC financing statements. Pet. App. 2a, 5a, 401a-416a. The FCC's own regulations treated NextWave's payment obligation as a debt. *See* 47 C.F.R. § 1.2110(g)(4)(iv) (license holder in default for nonpayment "will be subject to debt collection procedures, if the payment due on the payment resumption date . . . is more than ninety (90) days delinquent"). These pre-bankruptcy actions by the FCC were undertaken long before litigation commenced in this case and did not reflect any attempt to "hedge" against unfavorable court rulings. When NextWave filed for bankruptcy, the FCC continued its pattern of behaving as an ordinary creditor by submitting proofs of claim in NextWave's bankruptcy case asserting debts in excess of $4 billion,

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commercially reasonable manner") (statement of Chairman Hundt) (emphasis added); Letter from Chief Counsel for Advocacy, U.S. Small Business Administration to Chairman Reed Hundt, FCC, dated Sept. 8, 1997, at 4 ("[T]he FCC operates not only as a regulator and banker/debt-collector, but also serves in the capacity of government-as-contractor."); Letter of Prof. Douglas Baird, Vice Chair of National Bankruptcy Conference, to Rep. Henry Hyde, dated Feb. 8, 2000 (the FCC "wears the hat of a prepetition creditor. It entered into a transaction with NextWave in which it agreed to issue a license in return for a promissory note. As an entity that is owed a fixed sum, the FCC should participate in the bankruptcy process on the same basis as any other creditor.").

representing the amount of installment payments owed to the FCC. Pet. App. 37a.

The bankruptcy court identified "countless written and oral utterances and acts of the FCC" during the bankruptcy proceeding in which the FCC repeatedly acknowledged that NextWave's licenses were subject to the protections of the Bankruptcy Code. Pet. App. 135a; *see also id.* at 21a-22a. For example, the FCC represented in court that "NextWave will still enjoy bankruptcy protection from collection of C block license payments pending reorganization of its business affairs," Pet. App. 181a; that "[d]uring the pendency of the bankruptcy, the Bankruptcy Court and the automatic stay would hold creditors at bay, including the Federal Communications Commission," *id.* at 182a; and that cancellation of the licenses "hasn't [happened] in this case due to the automatic stay." *Id.* The bankruptcy court found that "*at no time* prior to the January 12 [2000] Declaration did the FCC ever assert the position, or even intimate," that NextWave's licenses had automatically canceled. *Id.* at 148a (emphasis in original). "To the contrary, the FCC made repeated declarations in judicial proceedings utterly inconsistent with the notion that NextWave's Licenses automatically canceled in January 1999, and all three Federal courts which have issued rulings in these proceedings have done so upon the assumption that the licenses were not cancelled." *Id.* In addition, "the parties . . . spen[t] millions of dollars in litigation costs, DIP lenders . . . continue[d] lending millions of dollars secured by the licenses, [and NextWave] continue[d] to expend money in preparation to build out its PCS systems," "all on the assumption that the licenses ha[d] not cancelled." *Id.* at 154a. The bankruptcy judge described the FCC's about-face as "shocking." *Id.* at 135a.

The FCC never sent NextWave an invoice for installment payments, even though it provided licensees who had not filed for bankruptcy with new payment schedules in the summer of 1998 and payment reminders in July and October 1998. CAJA

925.[7] In these restructuring orders, the FCC described licensee payment obligations as "debts."[8] The FCC took no action to cancel NextWave's licenses when it did not make its first interest payment in October 1998. Had the FCC believed that the licenses canceled automatically in October 1998, as it now contends, there would have been no need to wait fifteen months to seek cancellation – especially in light of the Commission's professed desire to put the spectrum to use without delay.

Moreover, although the October 1998 payment date applied equally to NextWave's C- and F-block licenses, and despite the fact that NextWave made no payments on the F-block licenses while in bankruptcy, the FCC *never* sought to lift the automatic stay to allow for cancellation of the F-block licenses. The FCC told the bankruptcy court that "[t]here is no trigger for the automatic cancellation . . . to date with regard to [NextWave's] the F-block licenses," and that NextWave "can comply with . . . payment obligations" and keep its F-block licenses. Pet. App. 172a n.12.

Indeed, ten months *after* the purported cancellation date, the FCC continued to reaffirm that the licenses had not canceled. On August 10, 1999, the FCC signed a "term sheet" with Nextel (a competitor of NextWave) providing "for the transfer of substantially all of the assets of the NextWave Debtors, including the Licenses, to Nextel." CAJA 538-39. The FCC's agreement with Nextel was premised on the assumption, shared by all parties, that the licenses had *not* canceled but continued to be held by NextWave. In a letter dated September 27, 1999 to Rep. Bliley, the FCC Chairman stated that "the government would support an alternative reorganization plan proposed by

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[7] Citations to the Joint Appendix in the court of appeals are styled "CAJA __."

[8] *See Amendment of the Commission's Rules Regarding Installment*, 13 FCC Rcd. 8345, ¶ 31 (1998); *Amendment of the Commission's Rules Regarding Installment*, 12 F.C.C.R. 16,436, ¶ 40 (1998).

Nextel Communications Inc. ('Nextel') for the PCS licenses now held by NextWave Personal Communications, Inc. ('NextWave')." The FCC proposed to "grant a waiver of the C and F block eligibility rules to allow a transfer of NextWave's licenses to Nextel pursuant to a court-approved reorganization plan."

In the Nextel term sheet, the FCC acted as a secured creditor in preparing an alternative plan of reorganization that provided for the discharge of its claim and the disposition of the licenses in accordance with the provisions of the Bankruptcy Code. The document refers to and treats the FCC as a "creditor." It provides for the classification and treatment of all claims, including the FCC's claim as a secured creditor. Part IV, entitled "Secured Claims of the Federal Communications Commission," begins with the description: "This claim is held by the FCC on account of promissory notes, the FCC's rules and regulations and the Licenses. The obligations under such notes are secured by first liens on the respective licenses and the proceeds thereof." See RCR Magazine, Sept. 28, 1999 ("The federal government was acting as a creditor – not a regulator – when two officials . . . signed a letter indicating Nextel could buy the spectrum awarded to NextWave") (statement of Ari Fitzgerald, legal advisor to FCC Chairman William Kennard).

The FCC similarly acted as a secured creditor in the bankruptcy of Pocket Communications, Inc., the second highest C-block bidder, which filed for bankruptcy in March 1997, fifteen months before NextWave. The FCC intervened in the Pocket bankruptcy as a creditor. In March 1998, the FCC announced an agreement with Pocket creditors discounting Pocket's bid obligations by approximately sixty percent and extending the pay-back period to twelve years. *See* FCC Public Notice in DA 98-547 (released Mar. 23, 1998).

This pattern of behavior by the FCC created important "investment-backed expectations" on the part of *amici*.[9] These expectations are entitled to protection even when (indeed, especially when) the government regulator acts in a proprietary capacity as a creditor or business partner. *See United States v. Winstar*, 518 U.S. 839 (1996) (holding Government liable for breaching regulatory contract with savings and loans).

In fact, government action should be scrutinized "more closely" when "the Government has a direct pecuniary interest in the outcome of the proceeding." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 56 (1994) (citation omitted). The FCC's actions in this case bear the unmistakable signs of gamesmanship. Only after the licenses had increased in value did the FCC renounce its willingness to participate in the bankruptcy proceeding and claim super-creditor status in order to revoke the licenses and sell them to a higher bidder. Accordingly, the County of Westchester appeared as an *amicus* in the Second Circuit to accuse the FCC of seeking an "economic windfall for itself." *See* Brief of the County of Westchester in No. 99-5063, at 8-9 (2d Cir. filed Mar. 6, 2000). Whether or not the FCC had that intent here, a ruling in its favor would clearly have that effect, and its legal theory certainly invites such opportunistic behavior by all government agencies, any of which could decide to press claims in bankruptcy whenever a license's value had fallen, or instead to revoke licenses in bankruptcy whenever the license's value had risen. The impact of such manipulation on commercial creditors – in this case at the very moment they were to be paid in full – would be devastating.

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[9] *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 518, 523, 527, 532 (1998) (plurality opinion); *id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 556-58 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). At minimum, the Code should be construed to avoid the serious constitutional question that would be presented by an interpretation that defeats these expectations. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

II. THE ASSERTION OF A "REGULATORY PURPOSE" DOES NOT DISPLACE THE BANKRUPTCY CODE.

A. The FCC's Purported Cancellation of the Licenses Violates Section 525(a).

Amici were entitled to rely on the plain language of Section 525(a) of the Bankruptcy Code. By its terms, the statute proscribes the FCC's purported cancellation of NextWave's licenses. That provision commands that "a governmental unit may not . . . revoke . . . a license, permit, charter, franchise, or other similar grant . . . [or] condition such a grant . . . solely because [the] debtor . . . has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. § 525(a). Section 525(a) is an important bankruptcy provision that protects not merely debtor interests, but creditor interests as well. No rational creditor would lend to or invest in any business requiring a license if local, state, and federal agencies could claim super-creditor status in the event of bankruptcy. Because licenses, permits, and the like are frequently important elements of an estate, Section 525(a) protects this value for the benefit of creditors. The statute ensures equality among creditors by preventing the Government from playing a "regulatory" trump card.

The Government's plea that "it's not about the money" could be made in any case where a government agency appears as a creditor. That plea cannot render the Bankruptcy Code inapplicable. Indeed, Section 525(a) addresses *precisely* the context where government agencies are acting in a *regulatory* capacity: in the administration of licenses, permits, charters, franchises, and similar grants. Because of the need to encourage investment, protect market expectations, and ensure orderly reorganizations, Congress decided to create *no* catch-all regulatory exception. As the Government acknowledges, Govt. Br. 30, Section 525 was intended to build on *Perez v. Campbell*, 402 U.S. 637 (1971), which held that a regulatory purpose or motive is irrelevant. *Id.* at 651-52. The Government's argument would resuscitate the very cases that *Perez* explicitly overruled. *Id*. at 652 (discussing *Kesler v. Department of Public Safety*, 369 U.S. 153 (1962), and *Reitz v. Mealey*, 314 U.S. 33 (1941)). Nor does the application of Section 525(a) depend in any way on whether the license is deemed to be "property of the estate." *Cf.* Govt. Br. 46 n.15.

Section 525(a) has a well-developed meaning in the regulatory context, on which the creditors were entitled to rely. Case after case has established that government agencies are prohibited from revoking licenses or similar grants in a wide range of settings based on the past or present nonpayment of dischargeable debts to government agencies as well as to third parties. For example, public housing agencies may not deny continued occupancy in public housing based upon the nonpayment of dischargeable debts for past rent;[10] public educational institutions may not deny student transcripts based upon the nonpayment of dischargeable tuition or student loan debts;[11] and agencies may not revoke or deny – based on the nonpayment of dischargeable debts – rights to participate as providers in the Medicare program,[12] contractor's licenses,[13] real

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[10] *Gibbs v. Hous. Auth. of City of New Haven*, 76 B.R. 257 (D. Conn. 1983); *In re Szymecki*, 87 B.R. 14, 16 (Bankr. W.D. Pa. 1988); *In re Sudler*, 71 B.R. 780, 786-87 (Bankr. E.D. Pa. 1987).

[11] *Lee v. Board of Higher Educ.*, 1 B.R. 781, 787 (S.D.N.Y. 1979); *In re Dembek*, 64 B.R. 745, 750-51 (Bankr. N.D. Ohio 1986); *Board of Trustees v. Howren (In re Howren)*, 10 B.R. 303, 305-06 (Bankr. D. Kan. 1980); *In re Heath*, 3 B.R. 351, 353-54 (Bankr. N.D. Ill. 1980).

[12] *In re St. Mary Hosp*., 89 B.R. 503, 510-12 (Bankr. E.D. Pa. 1988).

[13] *In re Walker*, 64 B.R. 751 (Bankr. S.D. Ohio 1986); *In re Lambillotte*, 25 B.R. 392, 393-94 (Bankr. M.D. Fla. 1982); *In re Fintel*, 10 B.R. 50, 52 (Bankr. D. Or. 1981).

estate licenses,[14] liquor licenses,[15] licenses to practice law,[16] insurance agent licenses,[17] or casino licenses.[18]

If the FCC were treated as a super-creditor, government agencies in every bankruptcy case would claim a similar privilege, destroying the estate's value, as in this case, or otherwise claiming a right to special treatment not recognized by the Bankruptcy Code. In virtually every case, a government agency could claim an ostensibly "regulatory" motive for its concern with timely payment, and move in and out of bankruptcies as it saw fit, leaving the statute all but meaningless.

The Government contends that its cancellation of NextWave's licenses did not violate Section 525(a) because it did not "discriminate" against the debtor. Govt. Br. 40-41. But, as its text states, Section 525(a) prohibits and in that sense *defines* as a forbidden form of "discrimination" against debtors the revocation of a license based solely on the nonpayment of a dischargeable debt. Section 525(a) extends to "discrimination *or other action* based solely . . . on the . . . nonpayment of a debt discharged in the bankruptcy case." H. REP. NO. 95-595, at 366-67 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6322 (emphasis added). The Government's argument that there must in addition be some kind of animus against the bankrupt is inapposite to the point of absurdity.

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[14] *In re Walker*, 927 F.2d 1138, 1141 (10th Cir. 1991); *In re Harris*, 85 B.R. 858 (Bankr. D. Colo. 1988).

[15] *In re Tell*, 38 B.R. 327, 330 (N.D. Ill. 1983).

[16] *In re Williams*, 158 B.R. 493, 495-96 (Bankr. D. Id. 1993).

[17] *In re Jacobs*, 149 B.R. 983 (Bankr. N.D. Okla.1993).

[18] *In re Elsinore Shore Assocs.*, 66 B.R. 723, 739 (Bankr. D.N.J. 1986).

1. The Government's Effort to Create a "Regulatory" Exception Should Be Rejected.

Section 525(a) carves out three exceptions to the general rule.[19] Notably, the Communications Act is not one of those exceptions. And all three exceptions would have been unnecessary if Congress had shared the FCC's view that "regulatory" debts are outside the scope of the Bankruptcy Code. When Congress intends to create special bankruptcy exceptions for particular government agencies or programs, it does so explicitly. *See, e.g.*, 11 U.S.C. § 362(b)(8) (Department of Housing and Urban Development); § 362(b)(12), (13) (Departments of Transportation and Commerce); § 362(b)(16) (Department of Education); § 365(d)(5)-(d)(9), (f)(1) (landing rights at airports).

There is no "regulatory" exception to Section 525(a), a fact on which both pre-petition and post-petition creditors relied when they lent money to NextWave. No such exception may be manufactured by transplanting the regulatory power exception from the automatic stay, which is a wholly different provision, narrowly tailored to fit very different circumstances. 11 U.S.C. § 362(b)(4).[20] The FCC has already asked Congress to expand

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[19] The exceptions are the Perishable Agricultural Commodities Act, 1930, 7 U.S.C. § 499a-s; *see Melvin Beene Produce v. Agricultural Mktg. Serv.*, 728 F.2d 347 (6th Cir. 1984); the Packers and Stockyard Act, 1921, 7 U.S.C. §§ 181-299; and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943. 7 U.S.C. § 204.

[20] The "regulatory power" exception of Section 362(b)(4) is in any event inapplicable here, because the FCC's cancellation of NextWave's licenses served to protect its pecuniary rather than its regulatory interest. In addition, Section 362(b)(4) does not extend to the stay of acts to "create, perfect, or enforce" liens against property of the estate under Sections 362(a)(4) and (a)(5). The FCC took the position below that canceling the licenses and seeking to collect on the debt was "tantamount . . . to foreclosing on the

Section 362(b)(4), and the legislature rejected the request. *See* n.3, *supra.* Section 362(b)(4) confirms that the absence of a "regulatory" exception to Section 525(a) is deliberate: when Congress wished to create a "regulatory" power exception in the Bankruptcy Code, it knew full well how to do so.

This Court has repeatedly protected creditors by rejecting attempts by governmental agencies to exempt themselves from the Code. In *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552 (1990), for example, this Court held that restitution obligations imposed as conditions of probation in state criminal actions constitute dischargeable "debts." This Court rejected the argument – also made by the FCC here – that the Government's purpose determines whether its claim is a "debt" within the meaning of the Bankruptcy Code: the Code "makes no reference to purpose. The plain meaning of a 'right to payment' is nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve

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collateral" (Pet. App. 41a) and that such pursuit of monetary indebtedness did not fall within Section 362(b)(4). *See* Pet. App. 21a-22a, 174a-176a.

Although a license may not confer an ownership interest in the spectrum itself, *see* Govt. Br. 46 n.15, it plainly confers a right to *use* the designated frequencies for the specified purpose. This right is sufficient to trigger the concept of "property of the estate" under Section 541(a) for the specialized purposes of the Code. The FCC itself has treated the right as an "asset" of NextWave's estate. *See* Part I-B, *supra*; *see also In re Kan. Pers. Communications Servs., Ltd.*, 256 B.R. 807, 810 (D. Kan. 2000) ("The FCC apparently acknowledges that a licensee holds a limited property interest in a license"); *In re Ridgely Communications, Inc.*, 139 B.R. 374, 377 (D. Md. 1992) (FCC has "acknowledged that a license confers certain private rights upon the licensee and that these rights may be sold for profit to a private party, subject to Commission approval"); *In re Welch*, 3 FCC Rcd. 6502, 6503, 6505 n.27 (1988) (acknowledging that licensee holds limited property interest in license). The FCC treats licenses as assets of the debtor-in-possession, transferred by operation of law under *Second Thursday*, 33 F.C.C.2d 703, *recon. denied*, 34 F.C.C.2d 685 (1972), and it routinely approves such transfers as pro forma transactions to protect "innocent creditors." *La Rose v. FCC*, 494 F.2d 1145, 1148 (D.C. Cir. 1974).

in imposing the obligation." *Id.* at 559.[21] *See also Cohen v. De La Cruz*, 523 U.S. 213, 218 (1998) (statutory treble damages for violation of New Jersey Consumer Fraud Act qualified as "debt": "a 'right to payment' . . . 'is nothing more nor less than an enforceable obligation,'" and "[t]hose definitions reflec[t] Congress' broad . . . view of the class of obligations that qualify as a 'claim' giving rise to a 'debt'") (citations omitted); *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985) (debtor's obligation to clean up hazardous waste site under state environmental statute was "debt" subject to discharge under the Code because "Congress desired a broad definition of a 'claim' and knew how to limit the application of a provision to contracts when it desired to do so.").

The Government's argument would have consequences it could hardly welcome outside the circumstances of this single case. If NextWave's obligation to the FCC were not a "debt," then the Government would have talked itself out of any share at all of the assets in Chapter 7 and Chapter 11 cases. *See Kovacs*, 469 U.S. at 286 (O'Connor, J., concurring). To be sure, canceling the licenses so that they revert to the FCC for re-auction may suit the Commission on the facts of this case, where the market rose after the bankruptcy petition was filed, but the opposite will be true in instances of declining license values – precisely when bankruptcies are most likely.

2. Section 525(a) Cannot Be Evaded By Describing Payment As a "Condition" of the Licenses.

According to the FCC, the licenses were conditioned on the requirement that the licensee make timely installment payments, so that nonpayment resulted in automatic cancellation – despite the filing of bankruptcy, Section 525(a), and the FCC's earlier

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[21] Although Congress subsequently overruled the result in *Davenport*, it did so by creating an exception to dischargeability and did not disturb this Court's "conclusions on the breadth of the definition of 'claim' under the Code." *Johnson v. Home State Bank*, 501 U.S. 78, 83 n.4 (1991).

representations. But any license could be said to be "conditioned" on a payment obligation. If that were enough to render Section 525(a) inapplicable, the statute would be a dead letter. The Government's argument is reminiscent of other attempts to squirm out of the bankruptcy laws, such as the old conditional sales device. *Every* installment sale could be recast as a "condition" – if the buyer pays, the seller will give up control of the item. This conception is so routine that the Uniform Commercial Code explicitly notes that a secured creditor's efforts to recast its secured loan as a condition will be completely unavailing. Rev'd UCC § 9-109(a)(1), comment 1.

The creditors were entitled to rely on the expectation that the FCC could not circumvent the Code through such legerdemain. Section 525(a) prohibits not merely revoking a license based on the nonpayment of a dischargeable debt but also conditioning a license on a bankrupt's payment of an otherwise dischargeable debt.[22]

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[22] *In re General Dev. Corp.*, 163 B.R. 216 (S.D. Fla. 1994) (city could not condition approval of platting land upon payment of dischargeable taxes); *In re Williams*, 158 B.R. 493 (Bankr. D. Id. 1993) (reinstatement application could not be conditioned upon payment of dischargeable costs of disciplinary proceeding); *In re Couture*, 225 B.R. 58 (D. Vt. 1998) (public housing tenant may not be required to pay discharged unpaid rent as condition of lease agreement); *In re Curry*, 148 B.R. 966 (S.D. Fla. 1992) (same); *Gibbs v. Housing Auth. of City of New Haven*, 76 B.R. 257 (D. Conn. 1983) (same); *In re Day*, 208 B.R. 358 (Bankr. E.D. Pa. 1997) (same); *In re Szymecki*, 87 B.R. 14 (Bankr. W.D. Pa. 1988) (same); *In re Geffken*, 43 B.R. 697 (Bankr. N.D. Ohio 1984) (conduct of business may not be conditioned on payment of prepetition premiums due to state workers' compensation fund); *In re Elsinore Shore Assocs.*, 66 B.R. 723, 739 (Bankr. D.N.J. 1986) (gaming commission could not require payment of prepetition fees "as a condition of relicensure").

B. The FCC's Purported Cancellation of the Licenses Violates NextWave's Statutory Right to Confirm a Plan that Permits NextWave to Cure Any Default and Retain the Licenses.

The court of appeals' judgment would in any event have to be affirmed on the alternative ground that the FCC's purported revocation of the licenses violated NextWave's rights under Section 1123, which grants a Chapter 11 debtor the right to cure "any" default, "[n]otwithstanding any otherwise applicable nonbankruptcy law." 11 U.S.C. § 1123(a)(5)(G). Section 1124(2)(a) similarly contemplates a plan which "(A) cures any such default that occurred before or after the commencement of the case under this title," and this applies "(2) notwithstanding any contractual provision or applicable law that entitles" a creditor to demand accelerated payment.

Thus, even if there had been a default in the timely payment of installments, the Code would provide the right to cure the default and reinstate the obligation. Curing a default "tak[es] care of the triggering event and return[s] to predefault conditions. The consequences are thus nullified." *In re Taddeo*, 685 F.2d 24, 26-27 (2d Cir. 1982). A debtor who cures a default and assumes the debt on the original terms "abrogates" creditors' rights arising from default. *Rake v. Wade*, 508 U.S. 464, 472 n.9 (1993). "[T]he Code provides a broad right to cure, regardless of whether the agreement itself would permit cure." 3 COLLIER ON BANKRUPTCY ¶ 365.05[3][b]. For example, "Section 1124(2) permits the plan to reverse a contractual or legal acceleration." *Id.* 1124.03. A cure is adequate so long as it offers the creditor "the substantial equivalent to its economic rights." *Id.* ¶ 365.05[3][b]. The right to cure is an "important reorganization technique" that furthers the Code's goal of giving debtors a "fresh start" and at the same time granting relief to creditors. S. Rep. No. 989, 95th Cong., 2d Sess. 120 (1978); *see also In re Southeast Co.*, 868 F.2d 335, 336 (9th Cir. 1989) (holding that plan properly denied creditor post-default-rate interest specified in note, because cure "restores the relation of contracting parties to pre-default status . . . . [T]he Code 'authorizes a plan to nullify all consequences of default, including avoidance of default penalties such as higher interest.'") (quoting *In re Entz-White Lumber and Supply, Inc.*, 850 F.2d 1338, 1342 (9th Cir. 1988)).

No more dramatic example of the rehabilitative objectives of the "cure" provisions of the Code could be imagined than this case. NextWave's plan provides for full payment to the FCC, including installment payments, interest, late charges, and penalties. The Commission's interests are thus completely protected. Conversely, if the statutory right to cure were not honored and the FCC were permitted to cancel NextWave's licenses retroactively, the result would be economic catastrophe for its commercial creditors.

It would be impermissible to create a "regulatory" exception to the right to cure, based on the assertion that installment payments to federal agencies were "untimely." Debtors are explicitly authorized to cure both pre-petition and post-petition breaches, thus permitting a debtor to correct its earlier difficulties through its plan of reorganization. 11 U.S.C. §§ 1123(a)(2), 1124(2)(A) (unimpairment "cures any such default that occurred before or after the commencement of the case"). Debtors may cure defaults in obligations to governmental as well as commercial creditors. *See, e.g.*, *Brattleboro Hous. Auth. v. Stoltz*, 197 F.3d 625, 629-31 (2d Cir. 1999) (affirming debtor's right to cure default under lease with government agency); *In re Kan. Pers. Communications Servs., Ltd.*, 252 B.R. 179, 195 (Bankr. D. Kan.) (Chapter 11 debtor could cure default in payment obligations to FCC), *rev'd on other grounds*, 256 B.R. 807 (D. Kan. 2000).[23]

[23] *See also RTC v. Firstcorp., Inc. (In re Firstcorp., Inc.)*, 973 F.2d 243, 247 (4th Cir. 1992) (savings and loan holding company required to cure default to regulator in capital maintenance obligation before it could reorganize under Chapter 11); *Matter of Gordon*, 217 B.R. 973, 975 (Bankr. S.D. Ga.1997) (holding that defaults regarding tax claims could be cured and rejecting

Nothing in Sections 1123 and 1124 limits the right to cure to "non-regulatory" actions by governmental creditors. Rather, the plain language of Section 1123(a)(5)(G) extends to "any" default, "[n]otwithstanding any otherwise applicable nonbankruptcy law" – words that this Court has recognized should be given the broadest possible meaning. In *Patterson v. Shumate*, 504 U.S. 753, 758-59 (1992), for example, this Court held that the phrase "applicable nonbankruptcy law" encompasses "any relevant nonbankruptcy law." *See also id. at* 766 (Scalia, J., concurring) (suggesting that narrower readings of this language depart so far from the text as to negate the ideal of "a government of laws, not of men"); *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) ("notwithstanding" signals intent "to supersede all other laws," and a "clearer statement is difficult to imagine"); *Long Island Railroad Co. v. Aberdeen & Rockfish Rail Road Co.*, 439 U.S. 1, 5 (1978) (per curiam) ("notwithstanding any other provision of law" includes federal law); *Ehrenberg v. Southern California Permanente Med. Group (In re Moses)*, 167 F.3d 470, 475 (9th Cir. 1999) ("'applicable nonbankruptcy law' clearly include[s] federal and state law").

III. THE FCC'S POSITION WOULD FRUSTRATE THE PURPOSES OF THE COMMUNICATIONS ACT.

Ironically, the FCC's position would defeat rather than promote the congressional policies embodied in Section 309(j). For private financing will be chilled, if not eliminated altogether,

argument that debts to the Government are outside the right to cure: "Because the plain meaning of this statute encompasses not only mortgage loans but also obligations such as the one before me, I reject the United States' first contention. Where Congress' intent is unmistakably evident from plain language, no further inquiry need be made into the scope of the statute."); *In re Cox*, 186 B.R. 744, 746 (Bankr. N.D. Fla. 1995) (although the "federal government's need for the repayment of student loans [is] an important policy objective," default regarding student loans could be cured); *In re Benner*, 156 B.R. 631 (Bankr. D. Minn. 1993) (student loan defaults cured).

if the FCC is allowed to cancel licenses retroactively. Creditors such as *amici* will not supply needed funds to enable licensees to bid for spectrum – let alone to build out their communications networks – if the FCC can claim super-creditor status and cancel critical licenses in the event of bankruptcy. The Commission's ability to grab valuable licenses whenever it decides to do so will thus retard the asserted interest in the prompt and effective utilization of the spectrum.

In fact, Congress would never have suggested installment payments as an option if it had shared the FCC's view of the law. Section 309(j)(3)(B) instructs the FCC to promote the allocation of licenses among "a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by minority groups and women." These new entrants could not succeed without extensive third-party financing. The consideration of installment payments as an option reflects the congressional recognition that bidders – having already raised the maximum available in private capital markets – might need even *more* credit from the FCC in the form of installment payments spread out over time. The FCC, however, would choke off such financing by placing its immediate institutional interests above those of NextWave's other creditors.

The Government contends that the FCC must be granted super-creditor status in order to prevent what it describes as "opportunities for speculation" in license auctions. Govt. Br. 24. Even if it were valid, the Government's policy argument would provide no basis for departing from the clear language of the Bankruptcy Code. *See Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). But there is no significant danger of speculation, any risk of which has been fully addressed by Congress.

First, the economic reality is that bidders without well-founded business plans and appreciable prospects for success in the marketplace will not attract needed third-party investment. *Amici* in this case provided funds to NextWave not as part of some speculative venture but because NextWave had a viable business plan. *Amici* included a wide range of large corporate strategic investors, small businesses, investment funds, insurance companies, and retirement funds, with their own financial and fiduciary responsibilities to shareholders and investors. It is absurd to suggest that NextWave, or any other bidder, could organize such a diverse group of creditors and convince them to invest in a $500 million "jump into bankruptcy" strategy.

NextWave was formed by a group of experienced telecommunications executives, including the former president of the wireless business at QUALCOMM, Inc. CAJA 1183. Its board includes Dr. Allen Puckett (chairman and former CEO of Hughes Aircraft and Electronics) and Judge William Webster. NextWave did not "speculate" at the C-block auctions in May and June 1996. Its bids were within the range of valuation of comparable publicly traded wireless companies such as Omnipoint Corporation. CAJA 1184. By early 1997, NextWave had a staff of nearly 400 employees and 300 contractors in 22 offices; over $2 billion in financing commitments for deployment of network equipment from major vendors; and ninety percent of the microwave links needed for the initial launch of service across the country. CAJA 1184-85. The company had installed and operated network trial systems in Washington, D.C., San Diego, Las Vegas, and San Antonio. In short, NextWave was not a speculator. It was well underway to putting its spectrum to immediate use. Its financial difficulties are attributable to external factors, including a general market downturn in the telecommunications sector which began in 1997 and which has caused some seventy-seven companies to file for bankruptcy.[24]

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[24] Information available at *www.bankruptcydata.com*. Some have identified a direct role by the FCC in NextWave's collapse. *See* H.R. Rep. No. 801, 105th Cong., 2d Sess. 14 (1998) ("the FCC's handling of license-related issues greatly contributed to the C-block debacle"). Whether or not the FCC was responsible for NextWave's financial difficulty, the salient point is that at the very least it was caused by exogenous factors and was not the product of

The risk of speculation in license auctions is even more fanciful in light of the heavy restrictions on license transfers, 47 U.S.C. § 310(d), and the substantial downpayment required under the auction rules. Winning C-block bidders were required to pay five percent of the bid within five days of the close of the auction, and an additional five percent at the time of the license grant. Pet. App. 53a-54a n.4. NextWave was required to make a $504 million deposit when it first received the licenses, and the FCC has taken the position that this deposit is non-refundable.

The FCC has ample means of ensuring that winning bidders put the spectrum to prompt use. It could condition license grants on specified build-out targets, periodic checks of financial health, or other evidence that winning bidders are capable of using their licenses in the public interest. Even if the FCC decided to retain installment payments, it could require winning bidders to obtain third-party guarantees for license fee obligations.

The Government is wrong in claiming that such alternative measures would run counter to Congress' purposes. Govt. Br. 49-50. In fact, Section 309(j) expressly states that the FCC is authorized to "specify[] eligibility and other characteristics of [the] licenses and permits," to "design[] the methodologies for use" of auctions, and to "include safeguards to protect the public interest." 47 U.S.C. § 309(j)(3). The Commission is directed to include "performance requirements, such as appropriate deadlines . . . to prevent stockpiling or warehousing of spectrum by licensees," and to impose "antitrafficking restrictions." *Id.* § 309(j)(4)(B), (E). The FCC is also instructed to develop standards for bidder and licensee qualifications. *Id.* § 309(j)(5). The statute plainly contemplates a system in which the FCC experiments with various eligibility tests and standards in order to ensure that Congress' goals are met. *See id.* § 309(j)(3) ("The Commission shall seek to design and test multiple alternative

"speculation" on NextWave's part.

methodologies"). The FCC demonstrably errs in asserting that Congress has authorized nothing beyond a bare-bones auction scheme, stripped of any eligibility criteria or qualifying tests.

In addition, the Bankruptcy Code protects the Government, as it protects all other creditors, from "heads-I-win, tails-you-lose" speculation. For example, a bankruptcy petition that is not filed in good faith may be dismissed by the court.[25] A debtor which proceeds with its reorganization plan will not be allowed to retain its licenses for free. If the debtor proposes to cure and reinstate its payment obligation to the FCC pursuant to Sections 1123(a)(5)(G) and 1124(2)(a), it will be required to pay its debt to the FCC in full – just as in any case where a default is cured. If the debtor proposes instead to impair the FCC's debt by altering the terms and conditions of the obligation, the FCC, unlike priority and general unsecured creditors, is entitled to the full value of its allowed secured claim. 11 U.S.C. § 506.

If the FCC is oversecured – if the value of its claim is less than the value of the collateral securing it (as the FCC asserts is true in the instant case) – then the FCC is entitled under Section 1129(a)(7) to insist on payment in full, plus interest, fees and costs. Although a debtor may stretch out the term of the debt, it cannot reduce its pecuniary value.

If the FCC is undersecured (as in the case of declining license values), it may choose to have its claim bifurcated into secured and unsecured portions.[26] Or, pursuant to Section 1111(b), it may elect to forgo the bifurcation option and instead insist on

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[25] *See* 11 U.S.C. § 105(a); *id.* § 305(a); *id.* § 362(d); *id.* § 1112(b); 2 COLLIER ON BANKRUPTCY ¶ 301.17 (15th ed. 2001); *see also* 11 U.S.C. § 1129(a)(3) (Chapter 11 plan not confirmable if not "proposed in good faith").

[26] *See Associates Commercial Corp. v. Rash*, 520 U.S. 953, 961 (1997). The debtor is then obligated to pay the present value of the allowed secured claim and to pay the unsecured portion *pro rata* with other unsecured creditors, but with various added protections.

payment in full in nominal dollars – payments whose present value must equal the present value of the collateral and whose total value (although not its present value) must equal the amount of the overall claim. *See* 7 COLLIER ON BANKRUPTCY ¶ 1111.03 (15th ed. 2001) ("[S]ection 1111(b) protects the legitimate expectation of the secured lender that the bankruptcy laws will be used only as a shield to protect debtors and not as a sword to enrich debtors at the expense of secured creditors.").

In short, the FCC's concerns about speculation are resolved by the Bankruptcy Code. Nor is the danger of "speculation" that the Government describes unique to FCC licenses. That danger affects *all* secured creditors, not just government agencies. In fact, the difficulty, which is known as the "*Pine Gate*" problem, first arose not in the communications context but in the field of real estate, a notoriously cyclical market.[27] Accordingly, the Code already contains a provision (Section 1111(b)) addressing the risk of speculation in volatile markets. The FCC's concern (if there were one) should excite no special sympathy, because it is simply the concern of every secured creditor when the bankrupt debtor cannot satisfy all of its creditors completely. The Code balances the competing rights of creditors, giving exceptional – but not unlimited – protection to the secured creditor. It is not for this Court to upset that balance by elevating the FCC to super-creditor status, or to second-guess Congress' solution to the *Pine Gate* problem. As a result of the FCC's strategy, the creditors – instead of being paid in full (along with the Commission) in January 2000 – have endured more than thirty months of delay in litigation attempting to enforce the plain meaning of Section 525(a).

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[27] *See, e.g.*, *In re Pine Gate Assocs., Ltd.*, 2 B.C.D. 1478 (N.D. Ga. 1976); 3 B.C.D. 301 (N.D. Ga. 1977); 3 B.C.D. 813; 3 B.C.D. 838.

Respectfully submitted.

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