

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - - X
3 FEDERAL COMMUNICATIONS COMMISSION, :
4 Petitioner :
5 v. : No. 01-653
6 NEXTWAVE PERSONAL COMMUNICATIONS :
7 INC. , ET AL. ; :
8 and :
9 ARCTIC SLOPE REGIONAL :
10 CORPORATION, ET AL. , :
11 v. : No. 01-657
12 NEXTWAVE PERSONAL COMMUNICATIONS :
13 INC. , ET AL. :
14 - - - - - X
15 Washington, D. C.
16 Tuesday, October 8, 2002
17 The above-entitled matter came on for oral
18 argument before the Supreme Court of the United States at
19 10:03 a.m.
20 APPEARANCES:
21 PAUL D. CLEMENT, ESQ. , Acting Solicitor General,
22 Department of Justice, Washington, D. C. ; on behalf of
23 Petitioner Federal Communications Commission.
24
25

1 JONATHAN S. FRANKLIN, ESQ., Washington, D.C.; on behalf
2 of the Petitioners Arctic Slope Regional Corp., et
3 al.

4 DONALD B. VERRILLI, ESQ., Washington, D.C.; on behalf of
5 the Respondents.

6 LAURENCE H. TRIBE, ESQ., Cambridge, Massachusetts; on
7 behalf of Creditors NextWave Communications, Inc., as
8 amicus curiae.

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	PAUL D. CLEMENT, ESQ.	
4	On behalf of the Petitioner Federal Communications	
5	Commission	4
6	ORAL ARGUMENT OF	
7	JONATHAN S. FRANKLIN, ESQ.	
8	On behalf of the Petitioners Arctic Slope Regional	
9	Corporation, et al.	19
10	ORAL ARGUMENT OF	
11	DONALD B. VERRILLI, ESQ., Washington, D.C.; on behalf	
12	of the Respondents	29
13	ORAL ARGUMENT OF LAURENCE H. TRIBE, ESQ., Cambridge,	
14	Massachusetts; on behalf of Creditors NextWave	
15	Communications, Inc., as amicus curiae	46
16	REBUTTAL ARGUMENT OF	
17	PAUL D. CLEMENT, ESQ.	
18	On behalf of the Petitioner Federal Communications	
19	Commission	53
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 01-653, Federal Communications Commission v.
5 NextWave Personal Communications and a companion case.
6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONER

9 FEDERAL COMMUNICATIONS COMMISSION

10 GENERAL CLEMENT: Mr. Chief Justice and may it
11 please the Court:

12 Congress has directed the FCC to use auctions to
13 allocate scarce wireless spectrum in a manner that
14 furthers the public interest. Those auctions allocate
15 spectrum to the party who will -- who values the spectrum
16 most highly and, by assumption, will use it most
17 effectively to serve the public. In addition, Congress
18 has directed the FCC to consider a number of specific
19 factors in assessing the public interest, including
20 promoting opportunities for small business and ensuring
21 the rapid deployment of wireless services. Nothing in
22 that public interest regulatory regime runs afoul of
23 section 525 of the Bankruptcy Code.

24 To be sure, in administering its auctions the
25 FCC does place consequences on the regulatory signals

1 provided by the failure to meet regulatory payment
2 deadlines. In particular, the FCC views the failure to
3 make a timely regulatory payment as a proxy for a
4 determination that continued possession of the license is
5 not in the public interest.

6 QUESTION: But your point is, is that the
7 regulatory discretion and authority of the agency has been
8 replaced under the statutory scheme in large part by the
9 dynamics of the free market. The highest bidder shows us
10 which is the most qualified person.

11 GENERAL CLEMENT: That's right. It's been
12 replaced in large part but not exclusively, and I think
13 both aspects that are important --

14 QUESTION: Well, as to the first part, isn't the
15 Bankruptcy Code and the policy of new start and creditors
16 and so forth, isn't that really part of the free market
17 structure?

18 GENERAL CLEMENT: Well, I think there's a
19 difference, though, when a regulator regulates solely for
20 timely payment for its own sake, and in that case it
21 implicates only the policies that are addressed by the
22 Bankruptcy Code, and I think it's a different situation
23 when the regulator looks at the failure to make timely
24 payment as a proxy for something else.

25 QUESTION: Well, but Mr. Clement, in your

1 petition for certiorari, the question presented speaks of
2 an obtained option automatically canceled. That suggests
3 that it is indeed automatic.

4 GENERAL CLEMENT: Well, it's automatic in the
5 sense --

6 QUESTION: I mean, automatic means without any
7 discretion.

8 GENERAL CLEMENT: With respect, Justice, Chief
9 Justice Rehnquist, when it says automatic, what it means
10 is that it cancels without any, the need for any further
11 action from the commission, but in any given case, the
12 cancellation of a license is a result both of the
13 automatic cancellation rule and the fact that a payment
14 deadline has come forward, and where the commission has
15 discretion is in relaxing the payment deadline, and you
16 can see that in this very case. NextWave's license is
17 canceled, according to the FCC, because NextWave failed to
18 make the very first installment payment due under those
19 licenses.

20 Now, according to the licenses in the first instance,
21 that payment was due on April 30, 1997, but the licenses
22 didn't cancel on April 30, 1997 because the commission in
23 its discretion, as part of a multifactor public interest
24 determination, extended the payment deadline a full 18
25 months.

1 QUESTION: Well, Mr. Clement, it appears to me
2 that the FCC went along with the bankruptcy filing, filed
3 a claim for the amount that wasn't paid, and apparently
4 went along with the proposals for a while to work this out
5 and then, very shortly before the decision to reactuate
6 the things, the FCC decided not to go along with it. That
7 doesn't sound like some automatic cancellation. I mean,
8 the FCC appeared to treat it very much like the bankruptcy
9 claim for quite some time, didn't it?

10 GENERAL CLEMENT: Well, to be sure, the FCC
11 participated in the bankruptcy proceedings and protected
12 its interests as a creditor, but at the same time it has
13 independent interests as a regulator, and the FCC, as we
14 point out on page 19 of the reply brief, made clear at
15 various points well before NextWave went into bankruptcy
16 that it did not view bankruptcy as an exception from the
17 regulatory provisions of the Communications Act, and I
18 think if you look at the specific event that NextWave
19 points to as the automatic cancellation, it's the failure
20 to make a payment that was due on October 29, 1998, and it
21 was due on the 29th of October, 1998, rather than April
22 30, 1997, precisely because of a public interest
23 determination by the commission.

24 QUESTION: You say a public interest
25 determination, but the only correlation that seems clear

1 to me is a purely economic correlation. When the value of
2 the leases dropped, the FCC apparently went into the
3 Bankruptcy Court and said, we want our full \$4 billion,
4 and when the value of the leases went up, the FCC took the
5 position, we want to reacquire them and get the increase
6 in value. It seems at each point at which the FCC made a
7 decision, it was making an economic decision, not a
8 regulatory decision.

9 GENERAL CLEMENT: With respect, Justice Souter,
10 I don't think that's correct. When -- I mean, it is true
11 that the FCC tried to go in and protect its interests as a
12 creditor, but at the point that NextWave was trying to
13 keep its regulatory licenses that it promised to pay \$4.7
14 billion for, and trying to keep those licenses for just
15 over a billion, the result of that process would have been
16 that the rest of that amount, the \$3 billion plus, would
17 have been an unsecured claim of the FCC, that would have
18 been really worth virtually nothing, so I think the better
19 way to understand this case is that the FCC does have
20 interests as a creditor, and it has tried to protect those
21 interests in the bankruptcy proceedings and has
22 participated in those proceedings, but at the same time,
23 it has interests with the -- as a regulator, and in its
24 capacity as a regulator it hasn't acted in a way that
25 would result in a sole-cause cancellation.

1 QUESTION: Mr. Clement, suppose -- and I
2 consider this a classic case for what this provision of
3 the Bankruptcy Code was directed to. Suppose you have a
4 State law that says anyone who is in default of traffic
5 tickets that amount to more than \$500 shall have his
6 license revoked, okay, and the person in question goes
7 into bankruptcy, doesn't pay the \$500, gets the \$500
8 discharged in bankruptcy, the State you think can revoke
9 his license?

10 GENERAL CLEMENT: No, I don't, but let me give
11 you --

12 QUESTION: Why not? Isn't there a regulatory
13 purpose there?

14 GENERAL CLEMENT: No. The only regulatory
15 purpose there, at least as I understand your hypothetical,
16 is in providing for timely payment, but suppose a State --

17 QUESTION: No, the regulatory purpose is having
18 financially responsible drivers so people don't run around
19 the road hurting people and leaving them to bleed on their
20 own account.

21 GENERAL CLEMENT: Well --

22 QUESTION: There's just as much a regulatory
23 purpose in that hypo as there is here.

24 QUESTION: You can always find a regulatory
25 purpose. I mean, it's the easiest thing in the world to

1 do.

2 GENERAL CLEMENT: But again, but if a State had
3 a regulatory purpose in ensuring that its drivers were
4 financially responsible, and presumptively said that a
5 license would fail to cancel for the failure to pay \$500
6 in traffic tickets, but provided a mechanism for the
7 driver to go in before the regulatory commission and say,
8 look, I know I haven't paid \$500 worth of traffic tickets,
9 but I'm actually financially responsible. I have a ton of
10 money in the bank, and so you ought to give me a
11 relaxation of the rules or a waiver --

12 QUESTION: There's always such a mechanism
13 whenever you have a debtor and a creditor. The creditor
14 can always extend the payment.

15 GENERAL CLEMENT: Right, but --

16 QUESTION: You need some special power from the
17 State to do that?

18 GENERAL CLEMENT: Well, but again, if you look,
19 and what the regulator is doing is extending the --
20 extending the payment not as a creditor, but as a
21 regulator, I think you're in a very different situation.

22 QUESTION: So you're just making up a regulatory
23 purpose, as a regulator. I mean, as a regulator, as a
24 creditor you can always say it's being done as a
25 regulator, always.

1 GENERAL CLEMENT: I really don't think that's
2 true, with respect. I think the kind of waiver proceeding
3 or opportunity to relax the rules would be out of place in
4 a regulatory regime that was only concerned with timely
5 payment. It's precisely because the FCC uses the timely
6 payment, or the failure to make timely payment, as a proxy
7 for a public interest determination that it has this
8 waiver proceeding, and it gives the regulating entity --

9 QUESTION: That's something that I don't fully
10 grasp in your argument. First you say, this is fully
11 automatic, this cancellation of the license. You don't
12 pay up, license gone. But then you say, but we can extend
13 the time if we want to. We can use our discretion. Well,
14 the automatic argument seems at war with the discretion
15 argument.

16 GENERAL CLEMENT: Well, I mean, there is some
17 tension there, and the FCC has been at pains to try to
18 make sure that it doesn't bend over one way too far or the
19 other. In its restructuring order that I think is
20 critical in this case. It froze the payments -- it
21 suspended the payments ultimately for 18 months, and then
22 it also provided some restructuring options that required
23 further modifications of its rules.

24 QUESTION: Well --

25 GENERAL CLEMENT: When it did that --

1 QUESTION: Go ahead.

2 GENERAL CLEMENT: When it did that, not only did
3 some people complain that they didn't give enough
4 regulatory relief, but other disappointed bidders ran to
5 the D.C. Circuit and said, look, you've acted arbitrarily
6 and capriciously because you haven't stuck with your
7 pre-auction rules.

8 QUESTION: But this doesn't sound at all like
9 the question presented, which says at auction,
10 automatically cancel upon the winning bidder's failure to
11 make timely payments to fulfill its winning bid. It --
12 when you were drafting that question, it sounds like your
13 perception of the thing was quite different than it is
14 now.

15 GENERAL CLEMENT: Well, again I think the key
16 is, the payments do cancel automatically after all the
17 efforts to get the payments extended have failed, and
18 that's just not like a hypothetical consideration in this
19 case, because in this very case --

20 QUESTION: I agree, you've said two different
21 things there. If it's automatic, it happened without
22 whatever happened next. But you're saying it
23 automatically canceled after attempts to collect failed.

24 GENERAL CLEMENT: No, no, not after attempts
25 to --

1 QUESTION: So when was the automatic trigger?

2 GENERAL CLEMENT: The automatic trigger is when

3 somebody fails to make a payment --

4 QUESTION: All right. Is that enough?

5 GENERAL CLEMENT: And -- no, it's really not

6 enough, if you look at the broader perspective of the

7 regulation, because there's an alternative way to get out

8 of the automatic cancellation. It's not -- if you're a

9 regulated entity and you don't want your license to

10 cancel, you don't go to the commission and say, don't

11 apply the automatic cancellation. What you do is, you go

12 to the commission and you say, I've a regulatory payment.

13 It's going to be due April 30. I'm not in a good position

14 to make that payment, so what I'd like you to do is relax

15 the payment deadline, and --

16 QUESTION: And you say you have the authority to

17 relax the payment date?

18 GENERAL CLEMENT: Not only does the commission

19 have the authority to do that --

20 QUESTION: If that's true --

21 GENERAL CLEMENT: -- it did it in this very

22 case.

23 QUESTION: If that's true, why don't you settle

24 the case today? They say they can pay in full today.

25 GENERAL CLEMENT: Well, the reason we don't

1 settle the case today, although obviously there were
2 efforts to try to settle this, which would require
3 congressional legislation, which we were unable to get in
4 a timely fashion, but the reason that they are not in a
5 position to cure their defaults, if you will, is because
6 our view is that they have -- the opportunity to cure has
7 passed. The licenses have actually already --

8 QUESTION: But is the option to cure -- if you
9 wanted to settle, would you be disabled from settling, or
10 could you settle, decide, well, we think it would be wise
11 regulation now to accept the payment?

12 GENERAL CLEMENT: I think it would be within the
13 agency's discretion to settle the litigation at this
14 point. Now, of course, if we did that, I'm sure, as in
15 the last time the commission tried to relax its rules, I'm
16 sure we'd draw a D.C. Circuit challenge to that exercise
17 of discretion to relax the rules. But the very fact that
18 there is that reservoir of discretion to relax the rules
19 demonstrates that the ultimate cancellation is not a
20 sole-cause cancellation.

21 QUESTION: I think -- so it is really a legal
22 issue, whether you have that discretion or not? I mean,
23 there are people who say you don't have that discretion.

24 GENERAL CLEMENT: Absolutely.

25 QUESTION: Well, do we have to decide that in

1 this case? I didn't realize that was one of the issues
2 presented. That may be a more important issue than the,
3 you know, few billion dollars involved here.

4 GENERAL CLEMENT: Well --

5 QUESTION: Right?

6 (Laughter.)

7 GENERAL CLEMENT: But I don't think -- whether
8 or not the FCC has the authority to exercise that
9 discretion in a particular case might be an issue, but
10 it's undisputed that they have that right as a general
11 matter and, in fact, NextWave wouldn't be here today if
12 the FCC didn't have the authority to offer discretionary
13 relaxation of its rules. When NextWave's --

14 QUESTION: Well, you might not be here, but I
15 mean, we're just assuming that it had that. The case is
16 here. That is not one of the questions presented. I
17 frankly don't want to decide that question, because that
18 is not one of the things I've given a lot of attention to.
19 It sounds to me very, you know, at least quite arguable
20 whether they ought to have that authority.

21 GENERAL CLEMENT: Well, Justice Scalia, I don't
22 really think it's in dispute, because in this very case
23 the payment deadline --

24 QUESTION: I agree it's not in dispute, which
25 means we don't have to decide it. It's not presented in

1 the case.

2 QUESTION: -- the question.

3 GENERAL CLEMENT: Well, I --

4 QUESTION: Mr. Clement, the respondent also
5 makes a right-to-cure argument under the bankruptcy law,
6 and you haven't addressed that, I take it, in your briefs,
7 anyway.

8 GENERAL CLEMENT: No. We think the
9 right-to-cure argument is best addressed on remand. I do
10 think there are two reasons why the right to cure is not
11 any longer available to NextWave. One is that the
12 licenses automatically canceled on their own terms. The
13 second reason is that the license restriction, the
14 licenses themselves had a restriction on transfer or
15 alienation, and there's law under 11 U.S.C. 365 that deals
16 with executory obligations that says that the debtor in
17 possession cannot take possession of a license, assume the
18 obligations of a license if there are restrictions on its
19 alienation or transfer.

20 QUESTION: In FCC practice, have you ever
21 revoked a license and then decided that you're going to
22 reissue it to the initial holder?

23 GENERAL CLEMENT: Well, there have been
24 situations like that, not necessarily in the C-Block
25 license situation, but there was a situation with respect

1 to a different program where a license canceled by its own
2 terms by a failure to renew, and the commission renewed
3 that license largely on the basis of the fact that that
4 licensee was already providing service, and so the result
5 of revoking the license would be to deny people service
6 that was currently being provided.

7 Now, in the reconsideration order that's the
8 subject --

9 QUESTION: Well, a reconsideration order is
10 different, but a new issuance it seems to me is quite
11 questionable so far as the discretion of the agency, and I
12 think I agree with some of my colleagues, I'm not sure
13 that's before us.

14 GENERAL CLEMENT: Well, I think that particular
15 instance is particularly relevant, because NextWave relied
16 on that in its reconsideration proceedings before the
17 commission. And the commission, in rejecting that, I
18 think demonstrated why this isn't a case of sole-cause
19 cancellation. If you look at the commission's reasoning
20 on page 82a of the petition appendix, the commission says,
21 quote, "NextWave is providing no service. The spectrum
22 licensed to NextWave has gone unused since early 1997, and
23 represents licenses in 90 markets across the United
24 States."

25 QUESTION: But that same order repeatedly refers

1 to the automatic cancellation rule.

2 GENERAL CLEMENT: Absolutely, it does, and what
3 the commission decided in this order, which is under
4 review in this case, is that it was not going to relax or
5 provide an exception to the automatic cancellation rule,
6 but the reason it decided that is because NextWave wasn't
7 providing service, and that others stood ready to provide
8 service under that spectrum, and what I would respectfully
9 suggest is that under those circumstances the cancellation
10 is not a sole-cause cancellation.

11 It also reflects the fact that NextWave wasn't
12 providing service, that others stood ready to do it, and
13 that's enough to take it out of 525, which is, after all,
14 a very narrowly written provision. It only protects
15 against sole cancellation. It allows the failure to pay a
16 dischargeable debt to be a contributing factor in a
17 regulatory decision, indeed, the primary factor in the
18 regulatory decision, just not the sole cause.

19 QUESTION: May I ask just one question about
20 your interpretation of the automatic cancellation? Is it
21 the commission's view that they could -- there would be a
22 cancellation, they could reactuate the licenses, and that
23 the original licensee would still remain liable for the
24 entire debt?

25 GENERAL CLEMENT: I think the position is they

1 might have an opportunity to go after that as an unsecured
2 debt in bankruptcy.

3 QUESTION: Yes, but they would remain liable for
4 the entire debt, in your view?

5 GENERAL CLEMENT: That's true.

6 I'd like to reserve the remainder of my time for
7 rebuttal.

8 QUESTION: Well, may I just follow up on that?
9 I mean, I assumed that was not an issue here because they
10 had auctioned them off again and they had mitigated their
11 damages. Is that the way the commission treated it?

12 GENERAL CLEMENT: That's an open question before
13 the commission that they haven't addressed.

14 Thank you.

15 QUESTION: Very well, Mr. Clement.

16 Mr. Franklin, we'll hear from you.

17 ORAL ARGUMENT OF JONATHAN S. FRANKLIN

18 ON BEHALF OF PETITIONERS ARCTIC SLOPE

19 REGIONAL CORPORATION, ET AL.

20 MR. FRANKLIN: Mr. Chief Justice, and may it
21 please the Court:

22 The question in this case is whether section 525
23 of the Bankruptcy Code permits a bankrupt company and a
24 bankruptcy judge to override the FCC's regulatory
25 determination of the public interest and thereby allow the

1 company to retain an exclusive entitlement to use the
2 Nation's airwaves that the FCC and Congress have
3 determined is not in the public interest for it to hold.

4 QUESTION: You refer to it as a regulatory
5 determination which, of course, assumes the whole point at
6 issue.

7 MR. FRANKLIN: Well, I don't think it -- I think
8 that that, in fact, is undisputed as this case comes
9 before the Court, that the FCC had valid regulatory
10 reasons for taking the action it did.

11 QUESTION: Then why is it phrased in terms of an
12 automatic cancellation rule?

13 MR. FRANKLIN: Because the automatic
14 cancellation happened in November of 1998, but one cannot
15 look at that as a mere snapshot. You have to look at the
16 reasons why the FCC had that rule and the reasons why the
17 FCC had their auction --

18 QUESTION: Why do you have to look at the
19 reasons? I mean, that's what troubles me. The language
20 of the statute simply says that a governmental unit may
21 not revoke a charter, franchise, or other similar grant,
22 okay -- it goes on, solely because --

23 MR. FRANKLIN: Right.

24 QUESTION: -- such person is or has been a
25 debtor, blah, blah, or hasn't made a payment. Solely

1 because.

2 MR. FRANKLIN: Right.

3 QUESTION: Now, let's assume that there is a
4 Federal statute that makes discrimination because of, or
5 failure to hire someone, or let's say, let's say killing
6 someone solely because of his race --

7 MR. FRANKLIN: Yes.

8 QUESTION: -- a crime, a separate crime. And
9 someone, let's assume he kills someone who is Jewish, and
10 he said, well, I didn't kill him solely because he was
11 Jewish; I killed him because I disagree with the policies
12 of Israel. Does that get him out of the statute?

13 MR. FRANKLIN: Well, I'm not aware of a statute
14 like that, that says, solely because --

15 QUESTION: Oh, I made it up.

16 MR. FRANKLIN: I know that, but --

17 (Laughter.)

18 MR. FRANKLIN: But it's important. The section
19 525 is drafted -- is an antidiscrimination statute, but
20 it's drafted differently than other -- title VII, for
21 example, does not use the word --

22 QUESTION: I'm getting to the question of
23 whether the fact that you have some other motive --

24 MR. FRANKLIN: Yes.

25 QUESTION: -- eliminates the sole causality.

1 The only reason this person was killed was because he was
2 Jewish, and so also here, the only reason this license was
3 terminated is because the person hadn't paid.

4 Now, there may be some regulatory motive in the
5 background, just as in the hypothetical that I invented
6 there was some international political motive in the
7 background, but that doesn't alter the fact that the
8 person was killed solely because he was Jewish, and it
9 seems to me that the license here was revoked solely
10 because the payment hadn't been made.

11 MR. FRANKLIN: With respect, Your Honor, the
12 term because, when it is used in antidiscrimination
13 statutes, and we have cited cases on page 3 of our reply
14 brief, is used to mean motive. Because means, for the
15 reason that. That's what the definition of the word,
16 because -- when Congress drafted section 525, it drafted
17 the statute narrowly. It intended to prohibit
18 arbitrary --

19 QUESTION: Then the statute doesn't cover
20 anything, because every regulatory body that cancels a
21 license, whenever there's a license involved, you can say
22 that there is some regulatory motive, as in the
23 hypothetical that I gave to Mr. Clement.

24 MR. FRANKLIN: Well --

25 QUESTION: The motor vehicle cancellation.

1 MR. FRANKLIN: I think that -- under section
2 525, the mere fact that an agency has said it has a
3 regulatory motive is not sufficient. It has to be a valid
4 one that is not simply an arbitrary attempt to collect a
5 debt, and, Your Honors --

6 QUESTION: Okay, can -- on that point, do you
7 agree that the statute is a response to -- the Perez case,
8 the automobile cancellation?

9 MR. FRANKLIN: Yes.

10 QUESTION: There was a regulatory motive there.
11 The regulatory motive is financially responsible drivers.
12 The benefits of that are obvious.

13 MR. FRANKLIN: Well --

14 QUESTION: So if that situation is supposed to
15 be covered by the statute, then by a parity of reasoning,
16 so would this one be.

17 MR. FRANKLIN: But in Perez the Court examined
18 that motive and determined that looking at the statute and
19 looking at the way it operated, in fact, as the Court put
20 it, the sole emphasis of the statute was not the
21 regulatory purpose. It was -- as the Court said, the sole
22 emphasis was the collection of debts.

23 QUESTION: Okay, then sole emphasis and sole
24 purpose really boils down not to exclusiveness but a kind
25 of proximate or principal causation theory, and if that's

1 the case, certainly here the FCC treated the debtor
2 relationship as the principal determinant of the various
3 steps that it took. First, it insisted on its 4 billion,
4 then when the market changed it said, forget it, we want
5 to reauction, and if it's a principal or proximate kind of
6 causation theory, I don't see how you can prevail.

7 MR. FRANKLIN: I don't think that section 525
8 embodies a causation theory in the way that Your Honor is
9 postulating. I think that section 525 most specifically
10 speaks about which are the valid considerations that an
11 agency can look at, and in this case one needs to look at
12 the auction system that Congress established.

13 Congress intended to replace the cumbersome
14 comparative hearings and unjust lotteries of the past with
15 a new, more streamlined mechanism under which an
16 entitlement to use our airwaves, everybody's airwaves, is
17 allocated to the person that, or the company that values
18 it the most, and the way we know that is that they must
19 make good on the promises embodied in their auction bid.

20 QUESTION: Then why doesn't automatic mean
21 automatic? Your brother has just explained that automatic
22 means sometimes.

23 MR. FRANKLIN: Automatic --

24 QUESTION: It means automatic without teeth.

25 MR. FRANKLIN: Automatic means automatic,

1 although there are opportunities, as --

2 QUESTION: Automatic except where it isn't.

3 MR. FRANKLIN: Well --

4 (Laughter.)

5 MR. FRANKLIN: Our position in this case is
6 that the cancellation was automatic, but that it was
7 supported by valid regulatory concerns, and those
8 concerns -- I mean, the auction system mandated by
9 Congress would be completely vitiated if a bidder -- and I
10 represent people that, companies that are repeat players
11 in this game. Bidders cannot come in and obtain an
12 entitlement to use our airwaves by promising that they
13 will make a payment, and that's the reason why they're
14 selected --

15 QUESTION: Then Mr. Franklin, why didn't
16 Congress provide an exception, as it did in, for
17 perishable commodities for the Department of Agriculture?

18 MR. FRANKLIN: Well --

19 QUESTION: If there is this nonbankruptcy
20 overriding concern, then we have one example where
21 Congress responded to it by saying the bankruptcy
22 provision isn't going to prevail.

23 MR. FRANKLIN: Well, I -- no exception was
24 needed here. The agriculture programs allow the Secretary
25 of Agriculture to do what the FCC may not do here, and

1 that is to cancel a license solely because of a failure, a
2 bankruptcy status.

3 Now, if you look at the statutes that are cited
4 in our reply brief, the agriculture statutes, they allow
5 the Secretary of Agriculture to terminate an agricultural
6 license where somebody has been discharged from
7 bankruptcy, ever in the past, or even if a partner or a
8 shareholder of a company has been discharged from
9 bankruptcy.

10 Now, the legislative history of that specific
11 exemption makes clear that Congress -- there was a debate
12 in Congress as to whether the solely because language
13 would cover that, whether there was a regulatory purpose
14 or not, and Congress felt like they didn't want to have to
15 deal with that.

16 In this case, however, it is undisputed there
17 was a valid regulatory purpose, and with respect, Justice
18 Scalia, I do not --

19 QUESTION: Of course, nothing in the Federal
20 Communications Act requires the Federal Communications
21 Commission to stand as the guarantor, you know, to hold
22 the bag for the person that they're giving away this
23 multibillion-dollar license to. They could require cash
24 on the barrelhead, couldn't they? And let the person who
25 wants the license get a loan from some bank, let them be

1 stuck holding the bag.

2 MR. FRANKLIN: But even in that --

3 QUESTION: So there's no regulatory necessity
4 for this whole tragedy, is there?

5 MR. FRANKLIN: No, with respect, if one looks at
6 a cash-on-the-barrelhead system, the way the FCC auctions
7 work, and our clients are deeply involved in them, one
8 does not get the license right after becoming the high
9 bidder. There is a period of time in which the FCC has to
10 look at various factors and people have the right to file
11 petitions to deny. Under NextWave's interpretation of
12 section 525, which prohibits an agency from denying a
13 license to anyone for failing to pay a dischargeable debt,
14 under their interpretation the FCC would be required to
15 grant a license to somebody who has been declared the high
16 bidder and then declares bankruptcy the next day.

17 What NextWave is doing here is truly gaming the
18 system. They are saying, it's a heads I win, tails you
19 lose scenario. We can go into bankruptcy, we get the
20 license because we promised that we would pay more than
21 anybody else would --

22 QUESTION: May I stop you in your hypothetical,
23 because I thought you don't get the license till after you
24 have made the down payment.

25 MR. FRANKLIN: You make a down payment, and

1 NextWave made their down payment.

2 QUESTION: Yes, but they didn't have any license
3 until they did that.

4 MR. FRANKLIN: But what I'm saying is, even on a
5 cash-on-the-barrelhead system the FCC does not require
6 full payment, it can't require full payment until they
7 actually grant the license, and that is a several-month
8 lag between the time when you're declared the high
9 bidder -- in one case, in my client's case it was more
10 than a year after they were declared the high bidder for
11 licenses, and they actually received them, because of
12 proceedings that were filed.

13 QUESTION: The rationale offered by the
14 commission here was that the policies of the FCC outweigh
15 the policies of the Bankruptcy Act. Is there authority
16 for us to defer to the commission in making that kind of a
17 determination? I mean, why don't we defer to the
18 Bankruptcy Court, which says the policies of the
19 Bankruptcy Act are more important than the policies of the
20 --

21 MR. FRANKLIN: I don't think that the FCC has
22 deference in interpreting the Bankruptcy Code, but I don't
23 think it's a question of whether one policy outweighs the
24 other. I think --

25 QUESTION: Well, that's the explicit rationale

1 of the commission.

2 MR. FRANKLIN: Well, our rationale --

3 QUESTION: That's what it said.

4 MR. FRANKLIN: Our rationale is that they can be
5 harmonized, and should be harmonized. For example, the
6 exception, the regulatory exception to the automatic --

7 QUESTION: So that you don't defend the
8 rationale offered by the commission?

9 MR. FRANKLIN: I'm not sure that that is the
10 exact rationale, but we think that the policies can be
11 harmonized and should be harmonized.

12 QUESTION: Thank you, Mr. Franklin.

13 Mr. Verrilli.

14 ORAL ARGUMENT OF DONALD B. VERRILLI

15 ON BEHALF OF THE RESPONDENTS

16 MR. VERRILLI: Mr. Chief Justice, and may it
17 please the Court:

18 The record is clear that the FCC revoked
19 NextWave's licenses solely because NextWave deferred a
20 payment to the FCC while reorganizing in bankruptcy. Two
21 and a half years ago the FCC blocked NextWave's bankruptcy
22 reorganization, and it did so by announcing that
23 NextWave's licenses had automatically canceled because
24 NextWave had deferred a loan payment to the FCC in 1998.

25 QUESTION: What do you mean, had deferred it?

1 MR. VERRILLI: Well, because NextWave --
2 QUESTION: You mean, failed to make it?
3 MR. VERRILLI: It did not make it, yes. It did
4 not make it.
5 QUESTION: Why don't we say that?
6 MR. VERRILLI: It did not make it --
7 (Laughter.)
8 MR. VERRILLI: -- in 1998.
9 QUESTION: There might have been some legal
10 mumbo-jumbo that had caused the payment not to be due.
11 MR. VERRILLI: Well, we were reorganizing in
12 bankruptcy --
13 QUESTION: You didn't pay it. You didn't pay
14 it.
15 MR. VERRILLI: -- and we did not pay because we
16 were reorganizing, that's right.
17 Now, throughout the proceedings in this case the
18 FCC has never identified a ground, other than that single
19 nonpayment, that would support revocation of the licenses,
20 and that's because there isn't one. What the FCC has done
21 instead, and what it's done here this morning, is to
22 instead suggest that section 525 of the Bankruptcy Code
23 ought not apply because the FCC had a regulatory or public
24 interest purpose for making a nonpayment an automatic sole
25 trigger for revocation of a license, but in passing the

1 Bankruptcy Code, Congress already weighed the public
2 interests, and section 525 of the code is a clear
3 expression of Congress's judgment about where the public
4 interest lies.

5 QUESTION: But they say it's not automatic.
6 What do you say to that?

7 MR. VERRILLI: I think the record utterly and
8 completely refutes that proposition, and it does so in the
9 following ways. The regulation that they cite, which is
10 1.2110 of their rules, and it's at page 495 of the
11 appendix to the petition, says that the licenses cancel
12 automatically upon nonpayment. The face of the license
13 says that the licenses cancel automatically upon
14 nonpayment and for no other reason.

15 The announcement of the license cancellation in
16 this case in January 2000 said that the licenses canceled
17 automatically for nonpayment and no other reason.

18 QUESTION: But we know how the commission has
19 interpreted it. I mean, they did say, we're going to give
20 you a moratorium. We're going to give you a chance, and
21 we'll make a deal for you. You give back some of those
22 licenses, and we'll work out a settlement, and for one
23 year the FCC said, it's okay if you don't pay while we're
24 considering some kind of settlement, so --

25 MR. VERRILLI: Yes, Justice Ginsburg, in the

1 restructuring orders they did do that, but that doesn't
2 make the revocation any less automatic. All it did was
3 move the date back in a legislative, quasi-legislative
4 rulemaking, move the date from when it would initially
5 have occurred to a later time. When --

6 QUESTION: But if there had been such a
7 settlement, then there could have been some, at least,
8 licenses retained even though there had been the
9 nonpayment, which is supposed to be an automatic trigger.

10 MR. VERRILLI: Well, yes, Justice Ginsburg, but
11 the date was suspended by the FCC well in advance. The
12 payment date was suspended well in advance of its
13 occurrence, so a payment date never came and went without
14 NextWave or any other licensee failing to make a payment.
15 All that happened here was that in advance of the payment
16 date, the FCC moved the payment date, but when it did so,
17 it reaffirmed --

18 QUESTION: There had not been a failure to make
19 an earlier payment?

20 MR. VERRILLI: That's exactly right, Justice
21 Scalia. This was suspended in advance of the due date for
22 the first payment.

23 QUESTION: Okay, so --

24 QUESTION: Mr. Verrilli, let me ask you about
25 something else. The bankruptcy court, as I understand it,

1 ordered a \$3.7 billion reduction in the purchase price on
2 constructive broad grounds, is that right?

3 MR. VERRILLI: That is right, Justice O'Connor.

4 QUESTION: And if we were to affirm here, does
5 the FCC have any power to prevent a bankruptcy court from
6 reducing the price in that fashion?

7 MR. VERRILLI: Yes.

8 QUESTION: That's very strange.

9 MR. VERRILLI: Yes, it does, and it's already
10 been taken care of, in fact. The question under the
11 avoidance provisions of the Bankruptcy Code is when the
12 debtor's obligation becomes due, and the issue here was
13 whether the obligation became due on the date of the
14 auction or, instead, later, at the time the licenses were
15 awarded. Now, that is a matter entirely within the
16 control of the FCC. All they have to do is make clear in
17 their regulations when the obligation attaches.

18 The reason that there was a problem here was
19 that the regulations suggested that the obligation
20 attached later and, therefore, if the value of the asset
21 declined from the time of the initial auction to the time
22 of the license award, section 544 would apply. But the
23 FCC has changed its regulations, and at this point it is
24 unambiguous that the obligation attaches at the time of
25 the auction -- and therefore 544 can't operate.

1 QUESTION: Well, didn't the second circuit set
2 aside the bankruptcy order in that case?

3 MR. VERRILLI: -- and it did. It's just a
4 nonissue. It's just -- that issue is just a nonissue, and
5 in any event it isn't -- the question really here is
6 whether the FCC, when it effectively acts as a lender, is
7 going to be treated any differently than a private company
8 when it acts as a lender.

9 QUESTION: That is the question. That's my
10 question. As I read the statute, it seems to me, for at
11 least your argument's sake, it is solely because, and
12 moreover, of course this statute governs the FCC, but in
13 reading the statute, I don't see how this statute was at
14 all intended to govern the instance in which the
15 Government is acting as creditor in respect to receiving
16 payment for a good that it has sold.

17 Now, I base that on first reading the purposes
18 of this in the history, and reading the whole legislative
19 history, which will not convince some of my colleagues,
20 but nonetheless is a factor in what I think, and I think
21 that this is clearly about a future loan, a future
22 situation in which the future situation, the Government is
23 forbidden to discriminate against a human being because he
24 was once in bankruptcy.

25 This seems to be to balance, to bring back into

1 balance the Government vis-a-vis the private creditor. If
2 you're right in your interpretation, and I am wrong, I see
3 no way whatsoever in which the Government would have the
4 right to take a secured interest or in any other way
5 collect a debt which a human being owes it for buying a
6 license.

7 Now, that's my question. I want to get your
8 response.

9 MR. VERRILLI: My response is the following,
10 Justice Breyer. First, the text of 525 is unambiguous.
11 It applies to someone who is or was a debtor, and it
12 applies to debts that are dischargeable, as well as those
13 that have been discharged and, therefore, it is clear on
14 the face of the statute that it applies and protects
15 companies while they are reorganizing and before the debts
16 are discharged, so I think on the face of the statute
17 that's -- it's not correct. It's not the right reading of
18 the statute.

19 And in terms of what it does in operation, it's
20 this. Now, if -- if this had been a situation where the
21 FCC had demanded cash on the barrelhead up front, and
22 NextWave had gone and bid and gone out and borrowed that
23 money from a bank, and had to pay the bank over time, and
24 then filed for bankruptcy, there would be no question that
25 that, that the debt to the bank could be reorganized and

1 disposed of in the normal manner in bankruptcy.

2 QUESTION: Well, I'm not sure about that. I
3 think if you accept the FCC's argument here, they would
4 say we have a regulatory purpose, because we want it -- we
5 want these licenses to be given to people who have the
6 financial responsibility to operate the radio stations and
7 so forth. The arguments they made would continue to apply
8 to that situation.

9 MR. VERRILLI: Well --

10 QUESTION: So I wouldn't say there's no
11 question.

12 MR. VERRILLI: That's a --

13 QUESTION: I think if we accept their argument
14 here, we would probably have to accept it in the other
15 situation.

16 MR. VERRILLI: Well, I think if we -- well, I
17 think that that point is exactly right, Justice Scalia,
18 that the Government's regulatory purpose argument, if
19 accepted, would give them the authority to revoke licenses
20 not only when the payment was not made to the Government,
21 but not made to private parties.

22 QUESTION: So far, I'm trying to get the answer
23 to my question, and so far, in terms of my interpretation,
24 the second point you made is in terms of to the
25 applicability, if my interpretation is right. I want to

1 know if it's right, and I only come up with one thing that
2 you've said so far, which is text, which is important --

3 (Laughter.)

4 QUESTION: -- but I learned the second year of
5 law school, I learned the second year of law school -- and
6 obviously many of my colleagues don't agree with me, but I
7 learned the second year of law school that when you have a
8 text which says "all," that there are often implied, not-
9 written exceptions. All animals in the park. No animals
10 in the park doesn't necessarily apply to a pet oyster,
11 okay, and so --

12 QUESTION: Well, it's not an animal.

13 QUESTION: Thank you. An oyster in my course in
14 biology is an animal, all right.

15 (Laughter.)

16 QUESTION: Maybe in yours it was a rock, or a
17 vegetable or a mineral. But regardless, you see my point,
18 and my question, of course, is that since that's how I
19 read statutes -- not everybody -- is that I find
20 exceptions implicit in statutes where to fail to read that
21 exception is to destroy the purpose of the statute, and is
22 not backed by anything in respect to what the people who
23 wrote it want.

24 MR. VERRILLI: Well --

25 QUESTION: Now, I believe it destroys the

1 purpose of the statute because I see no way in which the
2 Government as creditor could collect the money it's owed
3 through a secured interest in what they've sold, if my
4 interpretation is wrong.

5 MR. VERRILLI: No, it --

6 QUESTION: Now, I'm putting that as strong as I
7 can. I want to get a complete answer.

8 MR. VERRILLI: Two points. First, the
9 Government can collect its interest as a secured creditor
10 in exactly the same way a private lender could through the
11 bankruptcy system. It has enormous protections through
12 the bankruptcy system as a secured creditor. It gets,
13 it's 100 percent entitled under the Bankruptcy Code to the
14 full value of the licenses, and it has numerous other
15 protections under the code. It can make an election
16 under --

17 QUESTION: Can I stop you right there? How does
18 it do that? Because when it goes to enforce its secured
19 interest, I take it it's revoking the license because of
20 the money that was due it. And so how do you -- when you
21 go in to enforce your secured interest in the bankruptcy
22 court, and the bankruptcy judge on the other side reads
23 525(c), 525 on your interpretation, how does he do it?
24 Because it's just like this case. They're revoking it.

25 MR. VERRILLI: You can't -- the FCC, like a

1 private lender, can't foreclose on the lien. It has to --
2 its debt has to be processed through the bankruptcy
3 system

4 QUESTION: Of course it should. That's logical.
5 My point is, how does the bankruptcy judge at that point
6 get around the language of 525, on your interpretation of
7 it, since on your interpretation of it, you would be
8 taking back the license because of failure to pay a debt.

9 MR. VERRILLI: Right. They can't -- under the
10 Bankruptcy Code they can't take back the license. They
11 can get their secured claim paid to the same extent that a
12 private lender could, but they can't --

13 QUESTION: So they cannot take a secured
14 interest in the license?

15 MR. VERRILLI: Yes, they can, and -- but just
16 as --

17 QUESTION: They don't take the license back if
18 they cause the debtor to have to sell the license and to
19 take the money from the sale of the license and give it to
20 the FCC. Isn't that what's going on? That's different
21 from a cancellation of the license. The license subsists,
22 and the debtor can sell it to somebody else, or the
23 bankruptcy court on behalf of the debtor can sell it to
24 somebody else, is that right? Does that need approval
25 from the FCC?

1 MR. VERRILLI: The transfer would, to somebody
2 else would need approval from the FCC, but the key point
3 here is that section 525 --

4 QUESTION: But that's different from a
5 cancellation, isn't it?

6 MR. VERRILLI: Yes, it is different from a
7 cancellation, and the key point here I think, Justice
8 Breyer, in answer to your question ultimately, is that 525
9 is in the Bankruptcy Code to protect the right to
10 reorganize. What it says is that those who hold
11 Government licenses cannot be denied the ability to invoke
12 the bankruptcy process and reorganize solely because they
13 do what the Bankruptcy Code allows them to do.

14 Without this protection, licensing agencies would
15 have the ability to force insolvent debtors to liquidate,
16 because it would have the power to revoke their permission
17 to do business solely because they hadn't paid a debt, or
18 solely because even they were in bankruptcy, and that
19 would --

20 QUESTION: Can the FCC -- can an FCC licensee
21 encumber the license? Can it pledge the license to
22 some -- to a bank that's giving it a loan?

23 MR. VERRILLI: Yes, it can. It can give it as
24 a -- it can -- the answer to that is yes. There are some
25 restrictions on it, but the answer to that is yes, it can.

1 If I could, I'd like to get back to the question
2 of whether this was, in fact, an automatic revocation, and
3 the reconsideration order, which is the order under review
4 here, is the order in which the FCC says principally that
5 it departed from the automatic character of the
6 revocation, but that reconsideration order says no fewer
7 than 14 times by my count that the revocation was
8 automatic, and there's one statement in that in particular
9 which I think should put to rest as a factual matter the
10 question of whether this was anything other than an
11 automatic cancellation, and that's at page 74a of the
12 appendix to the petition, and it's right at the bottom of
13 the page, before the footnote.

14 And the FCC says in the reconsideration order,
15 thus, the only way that NextWave could have avoided the
16 loss of its licenses, even under the rule interpretation
17 it urges, was to avoid a default by making full and timely
18 payment on or before the payment due date. If the only
19 way that NextWave could have avoided default was by making
20 the payment, then there is nothing else that could have
21 been shown, and nothing else that could have happened in
22 the reconsideration process or any waiver process, that
23 would have provided an additional ground for revocation.

24 And if I could also point the court to a
25 statement on the prior page, page 73a: For all these

1 reasons we reject NextWave's interpretation of our default
2 and cancellation rules and reaffirm that the failure to
3 make full payment in a timely manner, following exhaustion
4 of all applicable grace periods, constitutes a default and
5 results in the automatic cancellation of the license
6 without further commission action.

7 Their theory is that this happens by operation
8 of law on the day after nonpayment. It is as automatic as
9 anything can be, and nothing about the reconsideration
10 process, and nothing about their waiver authority changes
11 that one iota.

12 QUESTION: Well, at least according to this
13 presentation the FCC said that it does have discretion to
14 grant relief from the automatic cancellation.

15 MR. VERRILLI: Well, but they said in the
16 reconsideration order that they were not going to do that,
17 ever, because it was an automatic cancellation.

18 They also said in the restructuring orders,
19 Justice Ginsburg, that you referred to earlier, in each of
20 the restructuring orders they said they would not grant a
21 waiver of the payment deadline under any circumstances,
22 and then when individual licensees sought waivers, the FCC
23 rejected the waiver requests, and it cited back to those
24 provisions in the restructuring order saying, we told you
25 this was an automatic rule, and we reject your request,

1 and it did so even in instances, in two cases where the
2 licensees were providing service. And so there's just no
3 question that this was an automatic cancellation rule and
4 therefore precisely at the core of what section 525
5 forbids the FCC or any other licensing agencies from
6 doing.

7 If I may, I want to turn to the question of
8 whether there is any conflict between the FCC's exercise
9 of its authority under section 309(j) and the Bankruptcy
10 Code. The answer is, as a statutory matter there is no
11 conflict, because the FCC was not required to have an
12 installment payment plan, and even if it were required to
13 have one there wouldn't be a conflict because Congress
14 didn't say that the FCC had to make license revocation
15 automatic upon nonpayment. So the FCC's argument really
16 is an implied repeal argument here, that 309(j) implicitly
17 repeals 525 in some applications, but --

18 QUESTION: Assuming we think there's a conflict,
19 is there any authority for the agency's assertion that it
20 has the authority to determine which statute outweighs the
21 other?

22 MR. VERRILLI: Yes, and the authority is exactly
23 contrary to the position that the FCC deserves deference.
24 The FCC deserves deference only with respect to
25 interpretation of its own statute, not with respect to the

1 Bankruptcy Code. So the answer is clearly that they don't
2 get any deference, and -- but there isn't any conflict.
3 All there is is the FCC -- there isn't any statutory
4 conflict. All there is, the only conflict arises from the
5 FCC's desire to make this an automatic cancellation rule,
6 and the conflict is between an FCC policy choice and a
7 directive from Congress. When the conflict is at that
8 level, there's no doubt about what the answer is, which is
9 that the directive from Congress prevails.

10 QUESTION: If they just simply changed their
11 rules to say the FCC "may" cancel the license in the event
12 of the nonpayment of any installment, that would be
13 enough?

14 MR. VERRILLI: No.

15 QUESTION: No?

16 MR. VERRILLI: No, because what 525 forbids are
17 the grounds on which the license is revoked, so if the
18 license is revoked solely because of nonpayment of
19 dischargeable debt, then whether there's a rule or not --

20 QUESTION: Oh, it isn't solely because of that.
21 That is a necessary but not a sufficient condition. The
22 FCC would be saying, we will consider the regulatory
23 situation. If you fail to make a payment, you are
24 revocable, but we won't revoke necessarily. It depends
25 upon the regulatory situation.

1 MR. VERRILLI: I think that would violate 525,
2 but for a different reason.

3 QUESTION: Ah, okay.

4 MR. VERRILLI: And it's this. 525 doesn't
5 merely forbid revocation for nonpayment. It forbids
6 discrimination, and it forbids imposing conditions solely
7 because of nonpayment, solely because of being in
8 bankruptcy, so --

9 QUESTION: What does the word "solely" do? I
10 can follow what you just said if it simply said because
11 of, but Congress wrote solely, and that has to have some
12 function.

13 MR. VERRILLI: I think it does have several
14 functions. For example, Your Honor, the FCC has a build-
15 out rule for these licenses, says you have to build them
16 out within 5 years, and to serve, a requirement that we
17 were in compliance with, by the way. But if we hadn't
18 been in compliance with them and the FCC had moved to
19 revoke the licenses because we weren't in compliance with
20 the build-out rule, and we had said, well, the reason we
21 are not in compliance with the build-out rule is that
22 we're in bankruptcy and we can't pay the vendors to build
23 it out, that would be a situation in which the FCC could
24 enforce its rule, even though at some level it is because
25 we were in bankruptcy. It's just not "solely" because.

1 It's because we violated a neutral rule that was not
2 focused solely on nonpayment. And I think there would be
3 other circumstances in which the fact of nonpayment could
4 be a consideration in a broader or a different -- in a
5 broader or different set of circumstances.

6 But when you have what you have here, is where
7 it is the only consideration, the only factor, the
8 determinative consideration, that is the paradigm case of
9 violation of 525. What the FCC has done, it's --

10 QUESTION: Thank you, Mr. Verrilli.

11 Mr. Tribe, we'll hear from you.

12 ORAL ARGUMENT OF LAURENCE H. TRIBE

13 ON BEHALF OF CREDITORS NEXTWAVE

14 COMMUNICATIONS, INC., as amicus curiae

15 MR. TRIBE: Mr. Chief Justice, and may it please
16 the Court:

17 Clearly, we're dealing in 525 with something
18 that is an exercise of regulatory power, and as several
19 members of the Court have noted, it's always possible to
20 say, even though we are revoking or canceling this license
21 automatically because you didn't make the payment, we have
22 other motives in mind, responsible, financially
23 responsible drivers on the road. We are not simply out to
24 get you because of the dollars.

25 That's, of course, not what this statute is

1 about. The whole point of the Perez decision was to get
2 rid of Kesler and Reitz, which required peering into the
3 mind of the bureaucrats, not always a wonderful vision to
4 behold, and not clear. This is a causation provision, and
5 let me turn to Justice Ginsburg's question from the
6 perspective of creditors who need to be able to rely on a
7 bright line test of whether something was done solely
8 because of nonpayment of a dischargeable debt, or solely
9 because of insolvency, or solely because of an invocation
10 of Chapter 11.

11 The word solely, I think, does serve a function
12 there, and that is, in its absence I suppose it would be
13 possible for a licensee in regulatory default, a licensee
14 who hadn't built out, to hide behind the existence of a
15 fiscal default and say, you see, it's because of the fact
16 that I didn't make a payment, not because I didn't build
17 out. Then one has a complicated mess, and from the point
18 of view of creditors who need to know whether an agency is
19 going to pull out the lifeline without which this entire
20 edifice collapses and is just a bunch of hardware, not
21 worth anything more than the separate parts, from the
22 point of view of creditors who need to know, it seems to
23 me a very clear test is needed, and that is, was this the
24 sole trigger? Have they come up with some other
25 substantive, independent basis which either was the

1 necessary cause or a sufficient cause? That's what the
2 D.C. Circuit said, and it makes sense.

3 QUESTION: Mr. Tribe, what do you say in
4 response to Justice Breyer's point that the statute really
5 deals with a situation in which the Government agency is
6 not the creditor? That's what it basically was --

7 MR. TRIBE: Well, I -- in a way, I think that
8 that makes our point all the stronger, that is, even when
9 the agency has no conflict of interest, it might not be in
10 it for the money, and one wonders here why, for example,
11 why they don't yank the license when the debt is owed to
12 private creditors? Doesn't that show in just the same way
13 that they're not reliable? That is, in this very case --

14 QUESTION: No, no -- well, they want their money
15 is all.

16 MR. TRIBE: Well, money --

17 QUESTION: They want their money, but there are
18 taxicab licenses, there are nuclear power licenses --
19 licensing is the most common thing in the world. You
20 often pay for it, and what I really am worried about is,
21 imagine they took a secured interest in the license, and
22 on your interpretation, how do they get the taxicab
23 license back --

24 MR. TRIBE: Well --

25 QUESTION: -- which the guy never paid the

1 \$100,000 for?

2 MR. TRIBE: -- the license on my
3 interpretation --

4 QUESTION: Yes. Yes.

5 MR. TRIBE: -- does not cancel and at
6 confirmation the license is one of the assets of the
7 estate, and at that point --

8 QUESTION: Well, they could get it back -- in
9 other words, they could take it back because they didn't
10 revoke it.

11 MR. TRIBE: No, they don't take it back. That
12 is, when -- there are a number of things in the estate at
13 confirmation.

14 QUESTION: I'm a creditor, I'm a private
15 creditor, I say I have a secured interest in this, it's
16 mine, okay. I sell it at auction. Now, the FCC --

17 MR. TRIBE: I'm sorry, Justice Breyer. The
18 bankruptcy court is filled with elaborate rules about when
19 you can and cannot foreclose. That is, an asset is part
20 of the estate at confirmation, and whether you're going to
21 be able to get your money back is a function of whether
22 you are under or oversecured. There are provisions in
23 1111(b) for dealing with both situations. Your situation
24 is no worse when you are a regulator than the Bank of
25 America, or one of the clients in our case, Citicorp, and

1 no better.

2 QUESTION: That's the part that's precisely
3 bothering me, my situation is no worse.

4 When I read the statute, it seems to me my
5 situation is worse, because if the statute applies here,
6 it applies there, and you and your colleague both tell me
7 no, that isn't so, and if you can show me it isn't so, my
8 problem disappears.

9 MR. TRIBE: What I'm saying, Justice Breyer, is
10 that after bankruptcy, if NextWave, for example, were to
11 emerge from bankruptcy they would still have the license,
12 but only on conditions in which you as the FCC, like other
13 creditors, in light of your secured interest, had taken an
14 appropriate piece of the pie. You don't get it all,
15 that's the point. Nor does a private creditor get to
16 grab the license and all the value from all the other
17 creditors and, in fact, when you are an agency that is
18 wearing really two sets of shoes, the ordinary regulator's
19 running shoes but also the wing tips of the creditor
20 agency, it makes the situation worse, not better.

21 That is, this law is designed to assure that
22 even the agency, which does not have a monetary interest,
23 can't simply yank all the value for itself because it has
24 the power over this license.

25 If the agency, on top of all that, is a creditor

1 and has that additional set of incentives, then it's all
2 the worse. You wonder, for example, why it is that in the
3 MDS licenses, in which there are licenses that are held
4 by a number of bankrupt licensees who did not make the
5 payments they promised to make, why it is that the FCC
6 does not regard them as not having been what they looked
7 like at the time of the bid. The reason is that it's been
8 paid in full. So it really is a situation in which the
9 FCC's position as a creditor should not redound to its
10 credit. If anything, that makes this statute all the more
11 vital.

12 The capital formation that is necessary to make
13 309(j) work, to make it possible, Justice Scalia,
14 sometimes not to demand all the money up front, but to
15 have something more creative, maybe demand letters of
16 credit, guarantees, none of that can work if creditors who
17 put in over half a billion dollars, not in a gamble but on
18 a very careful business plan that was completely carried
19 out, they're not providing service, but Catch-22, it's
20 because their attempt to emerge and fully cure any default
21 was frustrated by the agency that saw pie in the sky,
22 large numbers.

23 In that situation, for the agency to be able to
24 collapse the capital formation here tells us something
25 rather unpleasant about the future. How likely is it that

1 Citicorp and the California and Kansas pension funds and
2 all of the other organizations that have put money in on
3 reliance on the way section 525 works will do this again
4 next time around?

5 The formation of capital, the market on which
6 the FCC chose to rely, choosing to rely in the capacity of
7 a first lender, with no more or less secured protection
8 than others, that whole system depends on, in the most
9 literal sense, the rule of law. It does not depend on the
10 question whether we can attribute to the regulator some
11 motive that does not relate solely to the money. So if
12 the system is to work the way the FCC claims, 525 is a
13 dead letter.

14 Now, if you were right, Justice Breyer, if there
15 really was a problem that couldn't be solved in the way
16 the confirmation rules work, in the way the pie is divided
17 up, then maybe, as with perishable commodities, there
18 would be a problem for Congress to solve. Congress has in
19 section 523 enumerated 18 categories of debts that are not
20 dischargeable in bankruptcy, and sometimes it does it in
21 another statute, not always in the Bankruptcy Code. These
22 are policy judgments about whether something is unique
23 about the situation that requires treating the Government
24 in some different way, the way the Department of
25 Agriculture is treated.

1 QUESTION: Thank you, Mr. Tribe.

2 MR. TRIBE: Thank you.

3 QUESTION: Mr. Clement, you have 3 minutes
4 remaining.

5 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

6 ON BEHALF OF PETITIONER

7 FEDERAL COMMUNICATIONS COMMISSION

8 GENERAL CLEMENT: Thank you, Mr. Chief Justice.

9 Let me first address Justice O'Connor's very proper
10 concern that licensees are going to be able to enjoy their
11 licenses for much less than they agreed to pay the
12 commission. That is not a dead letter and, in fact, one
13 of the cases that is being held for this case involves
14 Kansas PCS, where the bankruptcy court approved the plan
15 that gave the FCC 5 cents on the dollar for the value of
16 its licenses.

17 Now, it's true that one mechanism to get the
18 licenses for less than they paid for, the fraudulent
19 conveyance theory, is something that the FCC can address.
20 That was the GWI bankruptcy, where the FCC only got 16
21 cents on the dollar. But there's a second way to do it,
22 which is to only give the FCC the value for its security
23 interest, the value of the licenses at that point, and the
24 bankruptcy court did that in Kansas PCS, and only gave the
25 commission 5 cents on the dollar.

1 Second, let me address Justice Kennedy's concern
2 with, where's the authority for the FCC to take into
3 account bankruptcy policy concerns? The authority comes
4 from a D.C. Circuit decision called LaRose, which is cited
5 on page 79a of the decision, the reconsideration decision
6 that's under review. The LaRose decision is a D.C.
7 Circuit decision that tells the FCC that it must take
8 bankruptcy policy considerations into account.

9 Now --

10 QUESTION: It's not binding on us, certainly?

11 GENERAL CLEMENT: Well, it is binding on the
12 FCC, though, and the FCC tried to do its best to take
13 bankruptcy considerations into account. Now, if it failed
14 to do it properly --

15 QUESTION: But this, they're saying that they're
16 not going to take bankruptcy considerations into account.

17 GENERAL CLEMENT: No, they did. They did, and
18 again I think they -- one of the reasons they took
19 bankruptcy considerations into account is by extending
20 payments for all the C-Block licensees for 18 months. But
21 if you think the problem here is that the FCC didn't do
22 the right balancing of bankruptcy policy and
23 telecommunications policy, then the D.C. Circuit or this
24 case could reverse for an arbitrary capriciousness, but
25 that's not the role of 525.

1 525 is an exceedingly narrow provision that
2 simply prevents a regulator under any circumstances from
3 canceling a license solely because, and here it's just not
4 true that the failure to make a payment was the sole
5 trigger, because you have to look at it in context, and
6 what triggered default is the failure to make a payment of
7 a payment that was due for a particular reason.

8 Now, anybody in -- any FCC licensee could have
9 gone to the commission and tried to get a further
10 extension of that payment deadline. They'd already gotten
11 extended 18 months. They could have gotten extended even
12 further, and it's hard for me to understand how there's a
13 sole trigger when the very payment deadline that is
14 supposed to be -- trigger the automatic cancellation is
15 itself the reflection of a multifactor public interest
16 determination by the commission. They extended it 18
17 months but no further, based on a consideration of the
18 public interest.

19 Now, on Justice Breyer's concern about what's
20 going on here, I think your concern is exactly right, and
21 what sense does it make from a bankruptcy policy to
22 disable the Government to make installment payments?

23 QUESTION: Exactly right. Why didn't you argue
24 it?

25 GENERAL CLEMENT: Well, I think -- no, I

1 think -- I think --

2 (Laughter.)

3 GENERAL CLEMENT: I think -- there's two reasons
4 we didn't argue it. One, we did -- there is that flavor
5 in the brief, but the other reason is, you at one point
6 said, doesn't the commission just want the money? That's
7 actually not true. What we want is, we want the licenses
8 back --

9 QUESTION: I know, but if they did, it's such an
10 obvious argument that I feel there's something wrong with
11 it because you didn't argue it.

12 GENERAL CLEMENT: Don't worry -- thank you, Your
13 Honor.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
15 Clement. The case is submitted.

16 (Whereupon, at 11:04 a.m., the case in the
17 above-entitled matter was submitted.)

18

19

20

21

22

23

24

25