No. 25-1792

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

LIGADO NETWORKS LLC,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

On Appeal from the United States Court of Federal Claims,
Case No. 23-1797, Senior Judge Edward J. Damich

Brief Of USTelecom—The Broadband Association As *Amicus Curiae* In Support Of Plaintiff-Appellee

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Certificate Of Interest

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 47.4, USTelecom—The Broadband Association states that it is a trade association that represents service providers and suppliers for the communications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks. Its broad membership ranges from international publicly traded corporations to local and regional companies and cooperatives, serving consumers and businesses across the country.

USTelecom vigorously advocates at all levels of government for policies that foster continued telecommunications innovation and investment.

USTelecom has no parent company, and no publicly held corporation has a 10% or greater ownership interest in USTelecom.

No law firm, partner, or associate who has not yet entered an appearance is expected to appear for USTelecom in this Court. No law firm, partner, or associate who has not yet entered an appearance appeared for USTelecom in the Court of Federal Claims in this matter.

USTelecom is not aware of any related or prior cases that meet the criteria outlined in Federal Circuit Rule 47.5.

Dated: October 6, 2025

/s/ Helgi C. Walker
Helgi C. Walker

Counsel for Amicus Curiae

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Statement Of Identity, Interest, And Authority To File

USTelecom—The Broadband Association files this brief in support of Ligado Networks LLC with respect to the question whether those who hold spectrum licenses possess a protected property right for purposes of the Takings Clause. USTelecom represents service providers and suppliers for the communications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks. Its broad membership ranges from international publicly traded corporations to local and regional companies and cooperatives, serving consumers and businesses across the country.

USTelecom vigorously advocates at all levels of government for policies that foster continued telecommunications innovation and investment.

USTelecom has an interest in this proceeding because its members are regulated by the Federal Communications Commission ("FCC"). Some of USTelecom's members hold FCC licenses authorizing use of specific bands of electromagnetic spectrum to provide voice and data wireless services. Those members invest billions of dollars per year in reliance on their right to use spectrum and often obtain the licenses through an auction process in which bids can amount to billions of dollars. Accordingly, *amicus* has an interest in the protection of the property interest that those licenses create.

Statement Of Authorship And Funding

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), this brief is filed with the consent of all parties. *See* Practice Notes to Circuit Rule 29. No counsel for any party authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of the brief. *See* Fed. R. App. P. 29(a)(4)(E).

Introduction

Telecommunications providers invest hundreds of billions of dollars in the American economy in reliance on their exclusive right to use spectrum pursuant to licenses issued by the FCC under the Communications Act, 47 U.S.C. § 151 *et seq*. These investments are essential for providing critical services to American consumers and others. The government's arguments in this case would undermine wireless providers' ability to rely on those licenses and providers' statutory rights safeguarding those licenses under the Communications Act, which in turn would dampen incentives to invest in critical infrastructure and potentially deny the government significant revenue by reducing the value of the spectrum it auctions for commercial use.

The United States takes the position that spectrum licenses *never* confer *any* property right protected by the Takings Clause of the Fifth Amendment. If that were right, any federal agency or actor could unilaterally usurp a wireless provider's right to use spectrum without triggering the constitutional right to compensation. And the same logic would apply to other authorized uses of public assets, including the federal lands and natural resources for which the government routinely grants leases, permits, and licenses to private parties. That theory is breathtakingly broad—and it cannot be right.

The Court should instead adopt a more common-sense rule that is more measured, more faithful to the principles of the Takings Clause, and more respectful of the certainty that wireless providers need in order to keep investing huge sums in spectrum licenses and the wireless networks that rely on them. A license holder's property interest can be limited by the conditions imposed by Congress and the FCC pursuant to its statutorily granted authority. Even if that means a license holder may lack a property interest as to the FCC—a question not presented in this appeal—that would not allow a *different* federal agency with *no* statutory licensing authority to take the license holder's right to use spectrum without respecting the FCC's exclusive authority over spectrum. That action would implicate a protected property interest and require compensation under the Takings Clause. USTelecom takes no position on any other issue in this case.

Argument

I. Telecommunications Companies Invest Massive Amounts of Money in the American Economy in Reliance on Their Right to Use Spectrum.

The telecommunications industry engages in extraordinary levels of investment. In particular, the wireless industry ranks second-highest for levels of investment among industries in the United States, and U.S. wireless providers invest more than wireless providers anywhere else in the world.[1] To date, U.S. wireless

[1] Timothy J. Tardiff, *Wireless Investment and Economic Benefits*, at 2, Advanced Analytical Consulting Group (Apr. 30, 2024), https://api.ctia.org/wp-

providers have invested almost $734 billion to build, upgrade, and maintain their networks; in 2024 alone, they invested almost $30 billion.[2] This investment fuels the global competitiveness of the U.S. economy and enables wireless providers to deliver reliable, resilient, and secure connectivity to their customers.

A significant portion of wireless providers' investments have gone toward increasing the availability and efficiency of their networks. Over the last five years, there were over 50,000 new cell sites activated and nearly 450,000 total operational cell sites across the United States.[3] And modern wireless networks have become significantly faster, too: 5G networks are over 100 times faster than their 4G counterparts, and wireless spectrum efficiency is up approximately 40 times since 2010.[4]

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content/uploads/2024/04/Wireless-Investment-and-Economic-Benefits.pdf; Dr. Robert F. Roche & Sean McNicholas, *CTIA's Wireless Industry Indices Report*, CTIA, at 54 (Sept. 2025) (Sept. 2025).

[2] CTIA, *Summary of CTIA's Annual Wireless Industry Survey*, at 1 (Sept. 8, 2025) ("Summary of 2025 Annual Survey"), https://api.ctia.org/wp-content/uploads/2025/08/2025-CTIA-Survey-Summary-and-Background.pdf; *2025 Annual Survey Highlights*, CTIA, at 7 (Sept. 8, 2025) ("2025 Annual Survey Highlights"), https://www.ctia.org/news/2025-annual-survey-highlights.

[3] Summary of 2025 Annual Survey at 1.

[4] CTIA, *Smarter and More Efficient: How Americas Wireless Industry Maximizes Its Spectrum*, at 3 (July 9, 2019), https://api.ctia.org/wp-content/uploads/2019/07/Spectrum_Efficiency.pdf; CTIA, *The Wireless Industry: An American Success Story*, https://www.ctia.org/the-wireless-industry/wireless-industry (last visited Sept. 6, 2025).

These monumental levels of investment—and the positive results that have followed—are driven by the boundless demand for wireless data. Americans used more than 132 trillion megabytes of data last year, up by over 30% from the year before, and the third straight year of roughly 35% annual growth.[5] As these numbers show, wireless has become a vital source of connectivity for consumers.

But none of that works unless wireless providers can rely on their access to dedicated, licensed spectrum. This is because wireless communication uses the transmission and reception of electromagnetic waves. Those waves are defined by their frequencies—the number of times the wave oscillates per second—and are organized along an electromagnetic spectrum. A given range of spectrum is known as a "band," and each band's capacity is limited.[6] When users' demand outstrips the capacity that a spectrum band supports, it creates interference and can make the band unusable.[7]

To manage this valuable and finite resource, Congress passed and the President signed the Communications Act of 1934. 47 U.S.C. § 151 *et seq*. The Act authorizes the FCC to oversee licensed spectrum for commercial use, *id*., and the

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[5] 2025 Annual Survey Highlights at 2.

[6] CTIA, *What is Spectrum? A Brief Explainer*, https://www.ctia.org/news/what-is-spectrum-a-brief-explainer (June 5, 2018).

[7] Accenture, *Securing the Future of U.S. Wireless Networks: The Looming Spectrum Crisis*, at 2 (2025) ("Looming Spectrum Crisis Report"), https://api.ctia.org/wp-content/uploads/2025/03/Looming-Spectrum-Crisis-Accenture.pdf.

National Telecommunications and Information Administration to oversee licensed spectrum for federal use, *id.* §§ 305(a), 902(b)(2)(A). The licensing process gives licensees the exclusive right to "use" a specific band "for limited periods of time," while the federal government retains "ownership thereof." *Id.* § 301. Commercially licensed spectrum enables 5G services, as well as other mobile broadband services, broadcast television, broadcast radio, and satellite communications.

Companies often spend extraordinary amounts of money to obtain these spectrum licenses from the FCC. The FCC sometimes offers spectrum licenses to the highest bidder in an auction, and when it does, wireless providers bid millions or even billions of dollars for access to a specific band. In all, providers have paid the government $233 billion in auctions for spectrum licenses.[8]

Unless providers can continue to rely on the rights granted to them in spectrum licenses, the U.S. economy could face significant ramifications. Experts anticipate that demand for data will exceed the current capacity of wireless networks as early as 2027.[9] And lacking additional spectrum, networks could become "congested" and slow; consumers could "experience degraded wireless performance"; innovation

[8] Summary of 2025 Annual Survey at 1.

[9] Looming Spectrum Crisis Report at 5.

could "be diminished"; and the U.S. economy could "lose $300 billion of GDP growth annually."[10]

II. FCC Spectrum Licenses Confer Property Rights Protected by the Takings Clause.

A. Licensees' Right to Use Spectrum Shares all the Traditional Hallmarks of a Property Right.

Spectrum licenses confer a property interest—namely, the exclusive right to use particular bands of spectrum for a particular period of time, subject only to the limitations established by Congress and the FCC pursuant to the Communications Act. As this Court has explained, "intangible property such as government issued permits and licenses" can "give rise to property interests protected by the Fifth Amendment." *Members of Peanut Quota Holders Ass'n, Inc. v. United States*, 421 F.3d 1323, 1330 (Fed. Cir. 2005). So can time-limited property interests such as leases. *United States v. Petty Motor Co.*, 327 U.S. 372, 374, 378–79 (1946). And so can property interests such as patents, which like FCC licenses are defined by a statutory regime pursuant to which the government grants an interest that comes with conditions and qualifications making the holder's interest less than absolute. *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 584 U.S. 325, 338 (2018).

[10] *Id.* at 5.

Rights to use public resources can create private property rights, too. *E.g.*, *International Paper Co. v. United States*, 282 U.S. 399, 407 (1931) ("The petitioner's right was to the use of the water" in the Niagara River); *United Nuclear Corp. v. United States*, 912 F.2d 1432, 1433 (Fed. Cir. 1990) (right to mine uranium on federal land). "A property right accrues when the government has seen fit to take a limited resource and secure it for the benefit of an individual or a predetermined group of individuals." *Peanut Quota Holders*, 421 F.3d at 1334.

To determine whether a particular interest granted by the government counts as a property right, this Court first asks whether "express statutory language . . . prevent[s] the formation of a protectable property interest." *Peanut Quota Holders*, 421 F.3d at 1330. "In the absence of express statutory language, this court has looked to whether or not the alleged property had the hallmark rights of transferability and excludability, which indicia are part of an individual's bundle of property rights." *Id.* FCC licenses granting the exclusive right to use a specific band of spectrum satisfy both prongs of the test.

1. Nothing in the Communications Act expressly "prevent[s] the formation of a protectable property interest" in a spectrum license. *Peanut Quota Holders*, 421 F.3d at 1330. To the contrary, Section 301 provides that the statute's purpose is to "provide for the use of channels, but not the ownership thereof," confirming that even though the licensee lacks absolute ownership of the spectrum itself, a license

holder has the exclusive right to "use" the spectrum "for limited periods of time under licenses granted by" the FCC. 47 U.S.C. § 301. There are, of course, many different "sticks in the bundle" of property rights that fall short of complete ownership. *Cienega Gardens v. United States*, 331 F.3d 1319, 1329 (Fed. Cir. 2003).

Section 301 goes on to state that no license is to be "construed to create any right, *beyond the terms, conditions, and periods of the license*." 47 U.S.C. § 301 (emphasis added). That language similarly "implies the creation of rights akin to those created by a property interest limited only by the 'terms, conditions and periods'" imposed by the FCC. *In re Atlantic Business & Community Dev. Corp*., 994 F.2d 1069, 1074 (3d Cir. 1993). The Act also establishes "procedural safeguards against arbitrary revocation of FCC licenses," which is further "indicative of a limited property interest." *Id*. (citing 47 U.S.C. § 312).

This is a far cry from the kind of statutory language that the Supreme Court has interpreted to foreclose the formation of a property interest. Take the Taylor Grazing Act, which broadly provides that the issuance of a grazing permit "shall not create *any* right, title, interest, or estate in or to the lands," without qualifications similar to those in the Communications Act. *United States v. Fuller*, 409 U.S. 488, 489, 494 (1973) (quoting 43 U.S.C. § 315) (emphasis added).

2. FCC licenses also carry the "hallmark rights of transferability and

excludability." *Peanut Quota Holders*, 421 F.3d at 1330. An entity that holds a spectrum license has the sole and exclusive right to operate in the licensed spectrum band. All others are legally prohibited from "us[ing] or operat[ing] any apparatus for the transmission of energy or communications or signals by radio" in that spectrum. 47 U.S.C. § 301. "The right to exclude others is 'one of the most treasured strands in an owner's bundle of property rights,'" and by itself would indicate that the spectrum license conveys a property interest protected by the Fifth Amendment. *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1356 (Fed. Cir. 2006), *aff'd*, 552 U.S. 130 (2008) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)).

A spectrum licensee also has the right to "transfer[]" the license. *Peanut Quota Holders*, 421 F.3d at 1332. The right to use the spectrum may be "transferred, assigned, or disposed of" by the licensee. 47 U.S.C. § 310(d); 47 C.F.R. §§ 1.9001(b), 1.9005. While some of these decisions require FCC approval (*e.g.*, transfers), 47 U.S.C. § 310(d), others do not (*e.g.*, certain leases), 47 C.F.R. § 1.9020(a).

Licensees also enjoy other rights included "in the bundle of rights that are commonly characterized as property." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 150 (2021). Licensees have the right "to . . . use" the spectrum. *Loretto*, 458 U.S. at 435. And they have the right to derive income from the spectrum by using

it for commercial purposes. *See Placer Min. Co. v. United States*, 98 Fed. Cl. 681, 686 (2011) (recognizing company's property right to conduct "a commercial mining operation" on its land).

The fact that licensees enjoy these rights only for a specific time period is no barrier to constitutional protection. The same is true of leases, *Petty Motor Co.*, 327 U.S. at 374, 378–79, patents, *Oil States*, 584 U.S. at 338, and contracts, *Lynch v. United States*, 292 U.S. 571, 579 (1934). Licensees may lack "ownership" of the underlying spectrum itself, 47 U.S.C. § 301, but "the ability to exercise every one of the 'sticks' (rights) in the 'bundle'" of property rights "is not a prerequisite to establishing a valid property interest under the Fifth Amendment," *Cienega Gardens*, 331 F.3d at 1329. Nor is the right to use spectrum disqualified due to its intangible nature. The right to use spectrum is analogous to the right to use federal waters, *International Paper*, 282 U.S. at 407, the right to mine uranium on federal land, *United Nuclear Corp.*, 912 F.2d at 1435–36, or the right to a "peanut quota allotment[]," *Peanut Quota Holders*, 421 F.3d at 1331—all of which have been granted some measure of constitutional protection by this Court or the Supreme Court.

The Communications Act and the "background principles" of property law thus point in the same direction: Spectrum licenses confer certain property rights that are protected by the Takings Clause.

B. The Government's Arguments to the Contrary Misunderstand the Caselaw and Disregard the FCC's Exclusive Spectrum Licensing Authority.

The government's contrary approach boils down to the argument that spectrum is "a public asset" and thus an FCC license *never* conveys a cognizable property interest. United States Br. 33–34. According to the government, because licensees must obtain the FCC's permission to use spectrum, and because the FCC retains the authority to "'modify,'" "revoke," or "reallocate" the license under some circumstances, licensed spectrum must be "beyond the purview" of the Takings Clause entirely. *Id.* at 35 (quoting 47 U.S.C. § 316(a)(1)).

That gets things backwards. The FCC's exclusive and carefully circumscribed authority to modify or otherwise strip a licensee of its right to use spectrum confirms that the rest of the world (including the rest of the government) *cannot* intrude on a licensee's right to use spectrum. The government's own case explains that "[t]he FCC was 'expected to serve as the single government agency with unified jurisdiction and regulatory power over all forms of electrical communication.'" *In re NextWave Personal Comms., Inc.*, 200 F.3d 43, 53 (2d Cir. 1999) (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968)). The "FCC's exclusive jurisdiction extends not only to the granting of licenses, but to the conditions that may be placed on their use." *Id*. at 54. Other government actors, such as the bankruptcy court in *NextWave*, therefore lack authority to

interfere with the FCC's decisions and impede "the FCC's radio-licensing function." *Id.* at 55. And if a bankruptcy court cannot require the *retention* of a spectrum license without infringing that function, then another agency cannot *take away* a license either. *See id*.

Put differently, the *FCC* has statutory authority to grant, modify, or revoke licenses, so when it lawfully exercises that authority it may not violate the Takings Clause (an issue not presented by this case). But if a different federal agency with no statutory authority over spectrum allocation obstructs a license, then that action can implicate a protected property interest.

The government points to cases that, it says, hold that an FCC license can *never* "confer[] a property right for purposes of asserting a takings claim." *See* United States Br. 35–36. But the Court of Federal Claims correctly held that these cases stand for a far narrower proposition and simply illustrate the *scope* of a licensee's property right under the Communications Act.

In the government's leading case, *Mobile Relay Associates v. FCC*, 457 F.3d 1 (D.C. Cir. 2006), two mobile communications operators challenged the *FCC's* decision to reconfigure a band of spectrum by "dividing the . . . band into several smaller blocks and assigning [the different entities] to appropriate blocks according to their respective network architectures." *Id*. at 3, 6. The operators challenged the reconfiguration on numerous grounds—including the Takings Clause—because

they believed it "reduce[d] the value of their spectrum assignments." *Id*. at 11–12. The D.C. Circuit rejected the takings claim in just two paragraphs, briefly noting that a licensee's right to use spectrum is "expressly limited by statute subject to the Commission's considerable regulatory power and authority." *Id*. at 12. Thus, "[t]his right does not constitute a property interest protected by the Fifth Amendment." *Id*. That decision makes sense, if at all, in the context of what the FCC—the respondent in that case—was trying to accomplish. Licensees' right to use spectrum is subject to the limitations Congress included in the Communications Act, including the Act's delegation to the FCC of certain statutory authority over spectrum, such as the power to assign licensees to particular bands of spectrum. But whatever the merit of the Court's reasoning, nothing in *Mobile Relay* addresses whether a licensee can have a property interest in other contexts involving agencies *without* spectrum allocation power.

Similarly, *NextWave* was a bankruptcy case in which the bankruptcy court found that the FCC's grant of spectrum licenses to NextWave was "a constructively fraudulent conveyance." 200 F.3d at 47–49. The Second Circuit disapproved of this "interfer[ence] with the FCC's system for allocating spectrum licenses." *Id.* at 46, 50–53. "Licenses are revocable by the FCC, and the FCC can impose conditions upon them in the name of the public good." *Id.* at 51. Thus, the Second Circuit explained, a license "merely permits the licensee to use the portion of the spectrum

covered by the license in accordance with its terms" and "does not convey a property right." *Id*. This language about the lack of a property interest simply confronted (and rejected) the claim that licenses confer property rights that are violated when the *FCC* lawfully exercises its regulatory authority—a situation that looks nothing like this case. Indeed, as explained above, *NextWave* actually undermines the government's position. *Supra* 11-12.

FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940), is likewise unhelpful to the government. This century-old case—containing broad dicta about the FCC's power that is out of step with contemporary administrative law—addressed whether "economic injury to a rival station" is a consideration that the FCC "must weigh and as to which it must make findings in passing on an application for a broadcasting license." *Id*. at 473. In explaining why not, the Court pointed out that the Communications Act does not "regulate the business of the licensee" or aim to "protect a licensee against competition." *Id.* at 475. The Court also stated that "[t]he policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license." *Id*. But this statement—in addition to being dicta in a case about a completely different question—was based in part on the short duration of the license at issue in that case, which was "limited to a maximum of three years' duration." *Id.*; *cf.* 47 C.F.R. § 25.121(a)(1) (establishing a base 15-year duration for the license at issue in this case).

The government further stresses the "'pervasive Government control'" over spectrum licenses. United States Br. 37 (quoting *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1330 (Fed. Cir. 2012)). "[T]he Government sets th[e] terms" of a license, the government says, and a license's transferability is "always contingent on the Government's approval." United States Br. 37. That is imprecise. The *FCC* sets the terms of the license before it is granted, and a license's transferability is contingent on the *FCC's* approval. And even the FCC is limited to statutorily defined criteria and must follow certain procedural protections when revoking or modifying a license. *See* 47 U.S.C. §§ 312, 316. More broadly, the government does not explain why the FCC's authority should be imputed to every other federal actor for purposes of the Takings Clause. Nor does the government address the caselaw holding that the FCC's authority over spectrum licenses is exclusive. *E.g.*, *Nextwave*, 200 F.3d at 53–54.

Next, the government asserts that the existence of a property interest "turns on the plaintiff's relationship to the interest in question, not on which actor in the Government is doing the alleged taking." United States Br. 38. But it is black-letter law that the extent of a person's property rights can depend on the relationship to the other party. For example, a property owner can "unilaterally alienate" her share if she has a tenant in common, but not if she has a joint tenant. *United States v. Craft*, 535 U.S. 274, 280 (2002). A landlord may exclude a third-party from his property

but not a lawful tenant. Restatement (Second) of Property, Land. & Ten. § 6.1 (1977). A landowner may exclude a trespasser but not the owner of an easement. Restatement (Third) of Property (Servitudes) § 1.2 (2000). And so on. The owner's relationship to the party who is allegedly infringing on a property interest *does* matter, because some property rights exist only as to certain parties. There is nothing unusual about license holders enjoying property rights vis-à-vis other federal agencies even assuming that they may not always enjoy them vis-à-vis the FCC.

The United States' only other argument is that the holding of the Court of Federal Claims was novel because there is no on-point precedent holding that agencies other than the FCC cannot take over spectrum whenever they want it. United States Br. 4, 38–39. Maybe so, but that does not demonstrate that the Court of Federal Claims got it wrong. It just means that the fact pattern presented here has apparently never happened before, which is not surprising given that the FCC's exclusive power over spectrum licensing has been well-established for decades.

The issues implicated by the government's overbroad legal position in this case are unusual—remarkable, even. The logical consequence of that position is that other agencies can ignore the Communications Act and the FCC's decisions concerning the allocation of spectrum, take any spectrum they want to use for themselves, and provide no compensation to the company that had the exclusive right to use that spectrum under a valid license that may have cost billions of dollars.

Unsurprisingly, neither party has pointed to a remotely analogous case saying that the government can (or cannot) do something like that without violating the Takings Clause.

The government's overbroad legal theory violates the basic premise of the Takings Clause: The government must "pay for what it takes" to "save[] individual property owners from bearing 'public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Sheetz v. County of El Dorado*, 601 U.S. 267, 274 (2024) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). That one federal agency can strip or modify a private party's interest pursuant to the statutory regime that created that interest in the first place does not mean *other* federal agencies can take whatever they please, however they like.

III. The Government's Position Threatens to Undermine Spectrum Licensing Altogether—and Countless Other Public Licensing, Permitting, and Leasing Regimes.

In the context of wireless spectrum, the government's position would be devastating. If licensees cannot count on their exclusive right to use spectrum for the term of their licenses, subject only to the FCC's exclusive and statutorily constrained authority to modify or revoke, their incentive to invest in the wireless networks that power the modern American economy could be undermined. This could have ripple effects for the entire U.S. economy, including for the government

itself, since the government currently generates billions in revenue in spectrum auctions.

The extreme implications of the government's legal position would extend to other contexts too. The federal government regularly authorizes private parties to use natural resources and public assets through leases, permits, licenses, or other instruments. One example is physical land. The Bureau of Land Management ("BLM") has the authority to grant "easements, permits, leases, licenses, published rules, or other instruments" governing "the use, occupancy, and development of the public lands." 43 U.S.C. § 1732(b). BLM can use this authority to "permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns." *Id*.

Similarly, the Secretary of Agriculture is authorized to "permit the use and occupancy . . . of land within the national forests . . . for the purpose of constructing or maintaining," "hotels," "resorts," "summer homes," "industrial or commercial" facilities, or any other facilities "necessary or desirable for recreation, public convenience, or safety." 16 U.S.C. § 497. The Secretary of Agriculture can also issue permits "for the use and occupancy of suitable lands within the National Forest System for skiing and other snow sports and recreational uses." *Id.* § 497b(b). And the Secretary of Interior can grant a right-of-way through "any [f]ederal lands" "for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous

fuels." 30 U.S.C. § 185(a); *see also* 43 U.S.C. § 1334 (same for "the submerged lands of the outer Continental Shelf").

The federal government also routinely authorizes the extraction of natural resources from federal land. The Secretary of Agriculture sells "trees, portions of trees, or forest products located on National Forest System lands." 16 U.S.C. § 472a(a). The Secretary of Interior leases federal land for oil and gas exploration and production, 30 U.S.C. §§ 181, 187a, and for coal mining, *id.* § 201(a)(1). The Secretary of Interior also grants prospecting permits for other valuable minerals, *id.* §§ 211(b), 261, 271, 281. These endeavors generate substantial revenue for the federal government, and they benefit the public by ensuring that the country's natural resources are used effectively.

Like a spectrum license, these rights are contingent on the approval of a federal agency and subject to a host of conditions imposed by statute, regulation, or the underlying agreement between the agency and the private party. Accordingly, holders of those rights may not have protectable property interests in certain situations—*e.g.*, where agencies follow the statutory and regulatory procedures that created the holder's interest in the first place—and there may be separate reasons why any particular interest is not eligible for Fifth Amendment protection. But the mere fact that an agency grants rights subject to certain qualifications and conditions

does not create a Constitution-free zone. *See, e.g.*, *Oil States*, 584 U.S. at 338; *International Paper*, 282 U.S. at 407; *Peanut Quota Holders*, 421 F.3d at 1334.

Imagine a ski resort that operates pursuant to a permit from the U.S. Forest Service, issued under the authority of the Secretary of Agriculture. *E.g.*, *Roberts v. Jackson Hole Mountain Resort Corp*., 884 F.3d 967, 978 (10th Cir. 2018). The upshot of the government's argument in this case is that the ski resort lacks any protected property interest in its permit simply because "the Government sets th[e] terms" of the permit and the permit is "always contingent on the Government's approval." United States Br. 37. If the Department of Labor wants to relocate its headquarters for a more scenic view, can it ignore the Forest Service's permitting decision and the statutes and regulations that authorized it, evict the ski resort, and take the mountain, all without even providing compensation for the ski resort's rights under the permit?

What about a mining company that is granted the right to mine coal on federal land by the Secretary of Interior, pays for that right, and then invests significant amounts of money in reliance on it? Can the Department of Education decide that it wants to get into the coal-mining business and take the coal for itself without providing just compensation? The government says yes; ordinary principles of constitutional law say otherwise.

As a final example, consider this Court's decision in *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990). A company bid for the right to mine uranium on a Navajo reservation. *Id.* at 1433. The Secretary of Interior awarded the lease to the company and approved its exploration plan. *Id.* After the company discovered "valuable uranium deposits," it prepared and submitted a mining plan for the Secretary of Interior's approval. *Id.* The mining plan satisfied all of Interior's requirements, but—acting outside his authority—the Secretary decided to give the Navajo Tribe veto power over the mining plan. *Id.* at 1434.

This Court held that the Secretary's actions constituted a regulatory taking because the economic impact of the regulation was "severe"—it caused the company to "los[e] whatever profits it would have made had it been permitted to mine the leased land," and "seriously interfered" with the company's "investment-backed expectations." 912 F.2d at 1435–36. Under the government's theory in this case, the Secretary had the authority to grant or refuse approval of the mining plan, so there should have been no property interest in the first place. But this Court held the opposite. And if a private party can have a cognizable property right as against the agency that conferred the permit, then a private party can certainly have one as against a government interloper.

Put simply, the Constitution does not permit such a massive loophole to the fundamental principle that when the government takes property from someone, it

has to pay for it. Federal agencies acting pursuant to their statutory authority can permissibly condition the property interests they grant to private parties and limit the scope of those property interests accordingly. But that does not immunize the rest of the government from the Takings Clause.

Conclusion

The Court should reject the government's argument that spectrum licenses can never create property rights protected by the Takings Clause. USTelecom takes no position on any of the other issues in this case.

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Respectfully submitted,

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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(4) because this brief contains 5,033 words.

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