

No. 05-766

In the Supreme Court of the United States

APCC SERVICES, INC., ET AL.,

Petitioners,

v.

SPRINT COMMUNICATIONS COMPANY L.P., ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

MICHAEL W. WARD
Michael W. Ward, P.C.
1608 Barclay Boulevard
Buffalo Grove, IL 60089
(847) 243-3100

ROY T. ENGLERT, JR. *
DONALD J. RUSSELL
DAMON W. TAAFFE
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

**Counsel of Record*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. There Is An Irreconcilable Conflict Between The D.C. Circuit’s Decision In This Case And The Ninth Circuit’s Decision In <i>Metrophones</i>	1
II. The Court Should Correct Erroneous Interpretations Of <i>Alexander v. Sandoval</i> By The Ninth And D.C. Circuits	5
III. The Court Should Resolve The Circuit Split Concerning The Meaning Of “Order” In The Communications Act	7
IV. It Is Clear That Petitioners Have Standing To Sue	8
V. This Case Should Be Accepted for Plenary Review and Consolidated With <i>Metrophones</i>	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:	Page(s)
<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001) . . .	1, 5, 6, 7, 10
<i>AT&T Corp. v. FCC</i> , 317 F.3d 227 (D.C. Cir. 2003)	4
<i>Bowen v. Georgetown University Hosp.</i> , 488 U.S. 204 (1988)	4
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> 467 U.S. 837 (1984)	4, 5, 6
<i>Columbia Broadcasting System, Inc. v. United States</i> , 316 U.S. 407 (1942)	8
<i>Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.</i> , No. 05-705 . . .	1
<i>Greene v. Sprint Communications</i> , 340 F.3d 1047 (2003), cert. denied, 541 U.S. 988 (2004)	5
<i>In re Long Distance Telecommunications Litigation</i> , 831 F.2d 627 (6th Cir. 1987)	4
<i>MCI Telecommunications Corp. v. AT&T</i> , 512 U.S. 218 (1994)	3-4
<i>MCI Telecommunications Corp. v. FCC</i> , 59 F.3d 1407 (D.C. Cir. 1995)	4
<i>MCI Telecommunications Corp. v. FCC</i> , 917 F.2d 30 (D.C. Cir. 1990)	3

TABLE OF AUTHORITIES—Continued**Page(s)**

<i>Metrophones Telecommunications, Inc. v. Global Telecommunications, Inc.</i> , 423 F.3d 1056 (9th Cir. 2005), cert. granted, No. 05-705 (Feb. 21, 2006)	8
<i>Pacific Tel. & Tel. Co. v. MCI Telecommunications Corp.</i> , 649 F.2d 1315 (9th Cir. 1981)	4
<i>Reiter v. Cooper</i> , 507 U.S. 258 (1993)	3
<i>Spiller v. Atchison, Topeka & Santa Fe Ry.</i> , 253 U.S. 117 (1920)	9
<i>Titus v. Wallick</i> , 306 U.S. 282 (1939)	9
<i>Vermont Agency of Natural Resources v. United States</i> <i>ex rel. Stevens</i> , 529 U.S. 765 (2000)	9

Statutory Provisions:

47 U.S.C. § 201(b)	1, 2, 3, 4
47 U.S.C. §§ 206-207	1, 2, 5, 6
47 U.S.C. §§ 206-208	2, 5
47 U.S.C. § 276	1, 5, 6, 10
47 U.S.C. § 276(b)(1)(A)	2
47 U.S.C. § 402	8
47 U.S.C. § 416	8

TABLE OF AUTHORITIES—Continued**Page(s)****Miscellaneous:**

<i>Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Third Report and Order, 14 F.C.C.R. 2545 (1999) (1999 Order)</i>	2, 3, 4
<i>Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Second Order on Reconsideration, 16 F.C.C.R. 8098 (2001) (2001 Order)</i>	2, 3
<i>Implementation of the Pay Telephone Reclassification and Compensation Provision of the Telecommunications Act of 1996, Report and Order, 18 F.C.C.R. 19,975 (2003) (2003 Order)</i>	2, 4

REPLY BRIEF FOR PETITIONERS

This Court has granted certiorari in *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, No. 05-705, to decide whether payphone service providers (PSPs) may invoke the right of action created by 47 U.S.C. §§ 206-207 to assert claims that common carriers have engaged in an “unjust and unreasonable” practice, in violation of 47 U.S.C. § 201(b), when those carriers fail to pay compensation to PSPs in accordance with FCC regulations. This case squarely presents the same question. In *Metrophones*, the Ninth Circuit held that PSPs have a right of action grounded on a violation of Section 201(b); in this case, the D.C. Circuit majority reached the opposite conclusion.

This case (unlike *Metrophones*) presents two other closely related issues that also merit review: (1) an acknowledged conflict between (on one side) the First and D.C. Circuits, both of which have held that the term “order” in the Communications Act refers only to adjudicatory orders, and (on the other) the Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits, which have held that the term also encompasses certain rulemaking orders; and (2) whether *Alexander v. Sandoval*, 532 U.S. 275 (2000), precludes plaintiffs from invoking the express right of action in Sections 206-207 to allege violations of 47 U.S.C. § 276 merely because Congress, in Section 276, chose to delegate to the FCC the details of complying with the congressional ultimatum that PSPs be “fairly compensated for each and every completed intrastate and interstate call.”

Respondents argue that none of these issues warrants review by this Court. They are wrong.

I. There Is An Irreconcilable Conflict Between The D.C. Circuit’s Decision In This Case And The Ninth Circuit’s Decision In *Metrophones*

Respondents do not dispute that (1) Congress *expressly* required that PSPs be compensated for “each and every com-

pleted intrastate and interstate call” and delegated authority to the FCC to take “all actions necessary” to “ensure” that PSPs receive compensation, 47 U.S.C. § 276(b)(1)(A); (2) Congress *expressly* “declared to be unlawful” common carrier practices that are “unjust or unreasonable,” 47 U.S.C. § 201(b); (3) Congress *expressly* created a right of action to sue in federal court *or* to complain to the FCC to recover damages suffered in consequence of any practice by a common carrier that is “declared to be unlawful,” 47 U.S.C. §§ 206-208; (4) the FCC *expressly* determined that “[a] failure to pay compensation in accordance with the Commission’s payphone rules * * * constitutes * * * an unjust or unreasonable practice in violation of section 201(b) of the Act,” 2003 Order ¶ 32. Those undisputed propositions provide ample support for petitioners’ (and the Ninth Circuit’s and the FCC’s) position that a carrier’s refusal to pay the required compensation violates Section 201(b), and that PSPs may recover unpaid compensation through suits in federal court pursuant to the right of action created by Sections 206-207.

Respondents have now invented a new rationale for the D.C. Circuit’s decision, suggesting that the conflict between the D.C. and Ninth Circuits can be reconciled because the D.C. Circuit examined claims arising under the FCC’s 1999 payphone compensation order, while the Ninth Circuit examined claims arising under the 2001 Order. Br. in Opp. 15-16. That argument fails for two reasons.

First, there is *nothing* in the Ninth Circuit’s *Metrophones* decision that suggests the decision turned on whether the claims arose under the 2001 Order or the 1999 Order, and there is *nothing* in the D.C. Circuit’s decision suggesting that this distinction mattered. Indeed, there is nothing in respondents’ own arguments to suggest that this factual distinction should matter. Respondents argue that the FCC’s determination in 2003 that a violation of its payphone orders is an unjust and unreasonable practice cannot properly be applied to violations

of the 1999 Order *or* the 2001 Order, because such application would constitute a “retroactive” rule. Br. in Opp. 17-18. If that argument had any validity (as we show below, it does not) it would not reconcile the circuit conflict; it would merely indicate that the Ninth Circuit (rather than the D.C. Circuit) erred.

Second, respondents’ retroactivity theory is, in any event, squarely inconsistent with decisions of this Court and many courts of appeals. Thus, even if that theory could explain the D.C. Circuit’s decision, it would merely demonstrate that the decision conflicts in other respects with settled law.

Reiter v. Cooper, 507 U.S. 258 (1993), explains why. There, the Court reinstated a claim under the Interstate Commerce Act¹ for recovery of “unreasonable” charges, even though the claim was asserted before the agency had made any determination about the reasonableness of the charges, and even though such an agency determination was a prerequisite for plaintiff’s recovery. The Court did not “discern within the ICA an intent that * * * ICC determination of the reasonable-rate issue must be obtained before filing the civil action.” 507 U.S. at 269-270. If an agency properly can make a determination of unreasonableness after a suit is filed, as *Reiter* holds, then *a fortiori* it may make such a determination after the conduct that gave rise to the suit.

That principle is a necessary predicate for many decisions in cases alleging violations of Section 201(b) of the Communications Act, in which plaintiffs asserted claims that a practice or rate was unreasonable, even though the FCC had not yet made such a determination when the suit was filed. See, *e.g.*, *AT&T*

¹ “The Communications Act, of course, was based upon the [interstate] C[ommerce] A[ct] and must be read in conjunction with it.” *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990), *cited with approval in MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 229-230 (1994).

Corp. v. FCC, 317 F.3d 227 (D.C. Cir. 2003); *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407 (D.C. Cir. 1995); *In re Long Distance Telecommunications Litigation*, 831 F.2d 627 (6th Cir. 1987); *Pacific Tel. & Tel. Co. v. MCI Telecommunications Corp.*, 649 F.2d 1315 (9th Cir. 1981).

The only authority that respondents cite in support of their retroactivity theory is *Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988), but that case involved a retroactive adjustment to the compensation owed for services rendered before the adjustment. There is no such retroactivity in this case or in *Metrophones*. Petitioners seek only compensation that is owed under the 1999 Order for calls that were made *after* the 1999 Order established respondents' legal obligation to pay compensation. They do not seek retroactive application of the compensation obligations imposed by the 1999 Order or by any other order. Moreover, the statute that was violated here, Section 201(b), was enacted in 1934, long before respondents engaged in the unjust or unreasonable practice that gave rise to this case.

As we explained in our petition (at 16), the D.C. Circuit should have asked (as the Ninth Circuit asked) whether the violation of the payphone compensation orders is an unjust or unreasonable practice, and, under *Chevron*, it should have deferred to the FCC's answer (in its 2003 Order and in its amicus brief) to that question.² Instead, the D.C. Circuit asked whether

² On the merits, respondents make the insubstantial – and misleading – argument that deference is unwarranted because the FCC provided no notice and opportunity for comment before it reached its determination that a failure to comply with the payphone compensation orders is an unjust or unreasonable practice violating Section 201(b). Br. in Opp. 17. Respondents' argument is misleading because they focus on the notice preceding the 1999 Order to the exclusion of the notice preceding the 2003 Order. And respondents' argument is insubstantial because, as we showed in the petition (at 8-9), the 2003 rulemaking expressly placed in issue the question of what remedies exist for violations of the payphone compensation orders. AT&T itself

the FCC *has declared* the practice to be unjust and unreasonable, provided an answer to that question that is indisputably wrong, and dismissed the case on that basis.

II. The Court Should Correct Erroneous Interpretations Of *Alexander v. Sandoval* By The Ninth And D.C. Circuits

Respondents rely on *Alexander v. Sandoval*, 532 U.S. 275 (2000), to assert that – notwithstanding the FCC’s *Chevron*-deference-worthy conclusion to the contrary – petitioners cannot invoke the express right of action created in Sections 206-207 by alleging a violation of Section 276. They argue that even if two courts of appeals (the D.C. Circuit in this case and the Ninth Circuit in *Greene v. Sprint Communications Co.*, 340 F.3d 1047 (9th Cir. 2003)) have misconstrued *Sandoval*, this Court should not clarify the meaning of that decision. Br. in Opp. 22.

In *Sandoval*, the plaintiffs asserted that the implied right of action to sue for violations of Section 601 of Title VI, which prohibits only intentional discrimination, should be expanded to encompass violations of regulations (promulgated under Section 602) prohibiting conduct that was *not* addressed by Section 601, *i.e.*, practices that have a disparate impact. *Sandoval* held there is no implied right of action to sue for violations of such disparate-impact regulations. “[T]he disparate-impact regulations do not simply apply § 601 – since they indeed forbid conduct that § 601 permits – and therefore [it is] clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations.” 532 U.S. at 286. Because the regulations are not an “authoritative interpretation”

emphasized in response the existence of remedies under Sections 206-208, the very remedies AT&T (and Sprint) now claim do not exist. Furthermore, as far back as 1999 *both* AT&T and Sprint touted the existence of such remedies in a D.C. Circuit brief. See Pet. 7. Other than their incorrect “retroactivity” argument, respondents are noticeably silent about the inconsistency between their their current position and positions they took in 1999 and 2003.

of Section 601, a failure to comply with those regulations “that is not also a failure to comply with Section 601 is not actionable” under the right of action for violations of Section 601. *Id.* at 284. A private right of action would have been available if but only if Section 602 (like Section 601) conferred such a right of action. *Id.* at 286.

Here, Sections 206-207 provide the necessary *express* cause of action, and there is no dispute that the FCC’s payphone compensation orders “apply” Section 276 and constitute an “authoritative interpretation” of that statutory provision. The FCC did precisely what Congress required: it devised a plan to “ensure” compensation for “each and every” completed payphone call. The statute contains “rights-creating language” (*Sandoval*, 532 U.S. at 288) in the only sense that matters: Congress conferred on PSPs a right to compensation because any failure by the FCC to “ensure” compensation would violate Congress’s express command. The court of appeals failed to recognize PSPs’ rights only because *Congress* did not require compensation to be paid by respondents, but instead delegated to the FCC the responsibility of deciding which parties should pay compensation. Pet. App. 14a (“Nothing in the statute requires the Commission to designate the IXC as the party responsible for dial-around payment.”).

Two circuits have now misinterpreted *Sandoval*. That decision, properly read, requires courts to ask whether Congress intended to create private rights. Here, *Sandoval* has been misconstrued as a limitation on Congress’s authority to delegate to a regulatory agency the responsibility for devising detailed rules to ensure protection of the rights that Congress unequivocally meant to create. That misinterpretation of *Sandoval* seriously undermines *Chevron* principles and ignores the cautionary language in *Sandoval* that specifically sought to avoid such a result. *Sandoval* emphasized that, when an agency exercises authority delegated by Congress to construe and implement a

statutory directive, “it is meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.” *Id.* at 285.

The transformation of *Sandoval* into a broad limitation on Congress’s ability to delegate authority to devise detailed rules necessary to implement congressional policy threatens serious mischief. There is no reason to defer correction of this misinterpretation until other circuits commit the same error, or until a circuit split is created because another court of appeals correctly interprets *Sandoval*.

III. The Court Should Resolve The Circuit Split Concerning The Meaning Of “Order” In The Communications Act

Respondents concede, as the D.C. Circuit acknowledged in this case (Pet. App. 18a-19a), that the courts of appeals have adopted inconsistent interpretations of the term “order” as it is used in critical provisions of the Communications Act. Br. in Opp. 27. The First and D.C. Circuits have construed the term to encompass only adjudicatory orders; the Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits have held that the term may also encompass rulemaking orders. Respondents do not even try to reconcile these conflicting decisions. They only argue that the circuit conflict is “unworthy of this Court’s attention” (*ibid.*) – even though the question involves statutory provisions that are central to the enforcement of FCC orders – because cases presenting this issue are “rare” (*ibid.*) – even though respondents themselves refer to eight cases (not including *Metrophones*) involving this precise issue that have been decided by courts of appeals (*id.* at 27 n.7). Those cases demonstrate that this issue arises on a recurring basis in cases presenting

violations of substantial economic importance.³ The disparate holdings of the Ninth Circuit in *Metrophones* and the D.C. Circuit in this case (Pet. 22-25) are a direct result of this Court's failure thus far to resolve the conflict among the circuits. If the conflict is not resolved now, it will inevitably produce still more confusion in future cases.

This Court has held that the term "order" (in Section 402) encompasses rulemaking orders that are "adopted by the Commission in the avowed exercise of its rule-making power" and that "have the force and effect of law." *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 417 (1942). It should resolve confusion in the lower courts by granting certiorari to decide, in this case, whether the term has the same meaning in Section 416, a companion provision to Section 402.

IV. It Is Clear That Petitioners Have Standing To Sue

This case does not present any "thorny" issues of standing, notwithstanding respondents' efforts (Br. in Opp. 27-29) to suggest otherwise. Respondents concede, as the D.C. Circuit unanimously acknowledged, that some of the petitioners are PSPs suing to recover unpaid compensation and that those petitioners have alleged a direct injury in fact sufficient to confer standing. Therefore, there is no question that the Court could reach and resolve the circuit conflicts presented by this case, regardless of whether the subset of petitioners who sued as assignees have standing.

Even as to the standing of assignees, this case involves an unremarkable – and clearly correct – application of established

³ These cases also show that concerns about enabling frivolous lawsuits for "every" violation of an FCC regulation (see Pet. App. 19a; *Metrophones*, 423 F.3d at 1071) have no foundation in practical experience or, as we explained in our petition (at 24 n.13) in the language of the statute.

law. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), squarely held that “the assignee of a claim has standing to assert the injury in fact suffered by the assignor.” *Id.* at 773.

Respondents argued in the court of appeals that *Vermont Agency* does not control here, because the assignee in *Vermont Agency* intended to keep a portion of its recovery under the assigned claims, whereas the assignees here have agreed to pass back to the assignors all damages recovered. But *Vermont Agency* clearly rejected that argument. Standing in that case did not depend on the assignee’s “bounty” because the bounty, much like a wager on the outcome of a case, was “an interest that * * * cannot give rise to a cognizable injury in fact for Article III standing purposes.” 529 U.S. at 773. The relevant question is whether the *assignor* suffered an injury in fact sufficient to confer standing, not whether the assignee intends to keep some, all, or none of the damages resulting from that injury. *Id.* at 774 (“We conclude, therefore, that *the United States’* injury in fact suffices to confer standing on respondent Stevens.”) (emphasis added). In addition, as the district court (Pet. App. 66a-73a) and court of appeals majority (Pet. App. 8a-11a) correctly determined, two older decisions of this Court squarely hold that assignees-for-collection are entitled to assert the assignors’ injury, and there is no contrary authority. See *Titus v. Wallick*, 306 U.S. 282, 289 (1939); *Spiller v. Atchison, Topeka & Santa Fe Ry.*, 253 U.S. 117, 134 (1920). Petitioners’ standing cannot be seriously doubted.

V. This Case Should Be Accepted for Plenary Review and Consolidated With *Metrophones*

Because this case presents questions that are intertwined with the questions presented in *Metrophones*, and because the additional questions presented in this case merit review, the Court should grant the petition in this case and consolidate it with *Metrophones*. By doing so, with very little expenditure of

additional resources or effort, the Court will be able to consider all rather than just some major aspects of the problem presented. It will have the opportunity to resolve another significant circuit conflict, to correct the misinterpretation of its decision in *Sandoval*, and to construe the specific statutory provision (Section 276) in which Congress focused on the problem underlying both cases, *i.e.*, the right Congress wished to confer on PSPs to receive compensation for dial-around calls.

If the Court chooses not to grant this petition and consolidate it with *Metrophones*, it should hold this petition for appropriate disposition after it decides *Metrophones*.

CONCLUSION

The petition for a writ of certiorari should be granted and this case should be consolidated with *Metrophones*. If the petition is not granted for plenary review at this time, it should held and disposed of as appropriate in light of the Court's disposition of *Metrophones*.

Respectfully submitted.

MICHAEL W. WARD
Michael W. Ward, P.C.
1608 Barclay Boulevard
Buffalo Grove, IL 60089
(847) 243-3100

ROY T. ENGLERT, JR.*
DONALD J. RUSSELL
DAMON W. TAAFFE
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

**Counsel of Record*

MARCH 2006