No. 17-1507

In the Supreme Court of the United States

ALPINE PCS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's takings claim, which challenges the lawfulness of the Federal Communications Commission's revocation of petitioner's wireless-spectrum licenses, may proceed in the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491(a)(1), or instead must be presented through the judicial-review scheme of the Communications Act of 1934, 47 U.S.C. 402(b)(5).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 878 F.3d 1086. The opinion of the Court of Federal Claims (Pet. App. 26-40) is reported at 128 Fed. Cl. 303.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 2018. A petition for rehearing was denied on February 1, 2018 (Pet. App. 42-43). The petition for a writ of certiorari was filed on May 1, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Communications Act of 1934 (Communications Act), 47 U.S.C. 151 *et seq.*, authorizes the Federal Communications Commission (Commission or FCC) to license the use of the electromagnetic spectrum by pri-

vate entities in order to provide communications services. 47 U.S.C. 307; 47 U.S.C. 309 (2012 & Supp. IV 2016). The Communications Act requires the FCC to award certain spectrum licenses "through a system of competitive bidding," *i.e.*, by auction. 47 U.S.C. 309(j)(1).

In May 1996, the Commission conducted an auction for ten-year wireless-spectrum licenses for "personal communication services" (PCS). Pet. App. 3; see *id.* at 28. Petitioner was the winning bidder for two such licenses in the San Luis Obispo and Santa Barbara markets, for which petitioner agreed to pay $8.9 million and $17.3 million, respectively. *Id.* at 3, 28; see Compl. ¶ 7.

As allowed by then-applicable regulations, petitioner chose to enter into an installment plan for paying its bid amounts. Pet. App. 3, 28. Petitioner executed promissory notes through which it promised to make quarterly payments to the Commission between December 1996 and September 2006. *Id.* at 3. The notes stated that petitioner would be in default of its obligations if it was delinquent in its payments to the Commission for more than 90 days and either failed to apply for any grace period made available by regulations or applied for such a grace period and later failed to resume payments. *Id.* at 3-4, 28.

To secure its debt to the Commission, petitioner entered into security agreements in which petitioner's two PCS licenses were designated as collateral. Pet. App. 3, 28. The security agreements provided that, if petitioner defaulted, the FCC could cancel the licenses. *Id.* at 4. Both the promissory notes and the security agreements stated that they would "be governed by and construed in accordance with the Communications Act of 1934, as amended, the then-applicable orders and regulations of

the Commission, and federal law." *Ibid.* (quoting promissory notes, C.A. App. 25, 33); see also *ibid.* (quoting materially identical language in security agreements, C.A. App. 42, 50).

As of 1996, the Commission's regulations had "provided that a licensee 'making installment payments . . . shall be in default' if a payment 'is more than ninety (90) days delinquent,' but could 'request that the [FCC] permit a three to six month grace period, during which no installment payments need be made.'" Pet. App. 4-5 (quoting 47 C.F.R. 1.2110(e)(4)(i)-(ii) (1995)) (brackets in original). In 1998, the FCC amended its regulations to provide that a three-month grace period would be automatic in all cases. Thus, "instead of requiring a request for a grace period upon default," the amended regulations "provided for a 90-day non-delinquency period and a subsequent 90-day grace period—effectively, two 3-month grace periods—as a matter of course." *Id.* at 5 (citing 47 C.F.R. 1.2110(f)(4)(ii) (1998)). The amended regulations further provided that, if the licensee did not make the delinquent payment by the end of that 180-day period, the licensee would be declared in default; its licenses would be "automatically cancel[ed]"; and the outstanding debt would be referred for collection. *Id.* at 5-6 (citing 47 C.F.R. 1.2110(f)(4)(iii) (1998) and quoting 47 C.F.R. 1.2110(f)(4)(iv) (1998)) (brackets in original).

b. In January 2002, petitioner failed to make a payment when it was due. Pet. App. 6. Under the then-applicable amended regulations, petitioner "received two 3-month grace periods as a matter of course, and its new payment deadline was July 31, 2002." *Ibid.*

Petitioner did not make payment by the new deadline. Instead, "a week before the deadline," petitioner asked the Commission to restructure its payment plan. Pet.

App. 6. On the date when payment was due, petitioner asked the Commission to waive its regulations to the extent those rules would mandate automatic cancellation of licenses in the event of a licensee's default. *Ibid.*

When petitioner failed to make the required payment, the Commission determined that petitioner was in default and automatically cancelled its licenses. Pet. App. 6-7, 29. It also "denied both the payment-restructuring and waiver-of-cancellation requests." *Id.* at 7. In 2004, the Commission returned petitioner's payment-restructuring request "without action" in light of petitioner's default, *ibid.* (quoting C.A. App. 14), and in 2007, the FCC's Wireless Telecommunications Bureau (Bureau) issued a written decision denying petitioner's waiver-of-cancellation request, see *In re Alpine PCS, Inc.*, 22 FCC Rcd 1492, 1503. Petitioner sought reconsideration of the Bureau's decision by the full Commission, and in January 2010, the Commission denied petitioner's request for waiver of cancellation of its licenses. See *In re Alpine PCS, Inc.*, 25 FCC Rcd 469, 509, aff'd, 404 Fed. Appx. 508 (D.C. Cir. 2010).[1]

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[1] In the interim, the Commission announced a new auction of PCS spectrum, including the spectrum previously licensed to petitioner. Pet. App. 7. Petitioner asked the FCC to postpone the auction pending a ruling on its request for reconsideration of the Bureau's decision denying a waiver of license cancellation, but the Commission declined to do so. *Id.* at 7-8; see *In re Alpine PCS, Inc.*, 23 FCC Rcd 10,485, 10,492 (2008). Petitioner then filed for bankruptcy and moved for an automatic stay of the auction, alleging that the auction would interfere with property of petitioner's bankruptcy estate. Pet. App. 8. The bankruptcy court denied the motion, explaining that "[b]ecause [petitioner's] Licenses were automatically canceled on August 1, 2002, they do not constitute property of the bankruptcy estate." *In re Alpine PCS, Inc.*, No. 08-543, 2008 WL 5076983, at *4 (Bankr. D.D.C. Oct. 10, 2008), aff'd, 404 Fed. Appx. 504 (D.C. Cir. 2010). The Commission

c. Petitioner sought judicial review of the FCC's January 2010 order by filing an appeal in the D.C. Circuit under 47 U.S.C. 402(b)(5), which provides that "[a]ppeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia * * * [b]y the holder of any * * * station license which has been modified or revoked by the Commission." *Ibid.*; see Pet. App. 30. Petitioner argued, *inter alia*, that the Commission had breached contracts with petitioner and had otherwise acted unlawfully when it cancelled petitioner's licenses and denied petitioner's payment-restructuring and waiver-of-cancellation requests. Appellant Final C.A. Br. at 24-39, *Alpine PCS, Inc.* v. *FCC*, 404 Fed. Appx. 508 (D.C. Cir. 2010) (No. 10-1020). The court of appeals summarily rejected those arguments and affirmed "the Order of the Commission * * * for the reasons stated therein." *Alpine PCS, Inc.* v. *FCC*, 404 Fed. Appx. 508, 508 (D.C. Cir. 2010).

d. In 2013, petitioner filed suit against the FCC in the United States District Court for the District of Columbia. Petitioner asserted claims for breach of contract, unjust enrichment, fraud in the inducement, and breach of fiduciary duty, and it sought a declaratory judgment that petitioner had not defaulted on its payment obligations. Pet. App. 8. The district court dismissed the suit for lack of subject-matter jurisdiction, holding that review of the FCC's license-revocation decision was committed to the D.C. Circuit's jurisdiction under the Communications Act, 47 U.S.C. 402(b)(5). See Pet. App. 8-9.[2] The D.C. Circuit

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proceeded with the auction, and in 2008 it resold both of the licenses previously held by petitioner. Pet. App. 8, 30.

[2] The district court also denied petitioner's alternative request to transfer the suit to the Court of Federal Claims, concluding that the

affirmed, holding that the Communications Act gives "the court[] of appeals, not the district court, exclusive jurisdiction over review of final FCC orders." *Alpine PCS, Inc.* v. *FCC*, 563 Fed. Appx. 788, 789, cert. denied, 135 S. Ct. 246 (2014).

2. In January 2016, petitioner brought this suit in the Court of Federal Claims (CFC). As in petitioner's prior actions, the complaint alleged that the Commission had acted unlawfully by cancelling petitioner's licenses and denying petitioner's requests for payment restructuring and waiver of license cancellation. Pet. App. 9, 27. Petitioner asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud in the inducement. Compl. ¶¶ 50-65. Petitioner further alleged that this "wrongful" conduct had "resulted in" a taking of petitioner's property without just compensation. *Id.* ¶¶ 68-69; see *id.* ¶¶ 66-71.

The CFC dismissed petitioner's complaint for lack of jurisdiction. Pet. App. 26-40. The court concluded that petitioner's contract claims "f[e]ll within the comprehensive administrative and judicial remedial scheme set forth by the [Communications Act] to resolve disputes over the cancellation of spectrum licenses." *Id.* at 35-36. The court explained that the FCC's cancellation of petitioner's licenses was "exclusively appealable" to the D.C. Circuit under 47 U.S.C. 402(b)(5), Pet. App. 35, and that "the availability" of this remedy "displace[d] this court's jurisdiction over [petitioner's] contractual claims under

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Communications Act established the exclusive remedy for petitioner's claims of unlawful Commission conduct and thus "exclude[d] alternative relief under the general terms of the Tucker Act." 6/3/13 Tr. at 38, *Alpine PCS* v. *FCC*, No. 13-cv-6 (D.D.C.) (oral decision); see *id.* at 36-39.

the Tucker Act," *id.* at 36; see Tucker Act, 28 U.S.C. 1491(a)(1).

The CFC dismissed petitioner's takings claim on a different jurisdictional ground. The court held that the takings claim was untimely because petitioner had not filed suit until 2016, more than six years after both the cancellation and reauction of petitioner's PCS licenses. Pet. App. 37-39; see 28 U.S.C. 2501 (establishing six-year statute of limitations for "[e]very claim of which the United States Court of Federal Claims has jurisdiction"); *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 134-139 (2008) (reaffirming that Section 2501's limitations period is jurisdictional).[3]

3. The court of appeals affirmed. Pet. App. 1-25. The court upheld the CFC's determination that "the comprehensive scheme for review provided in the Communications Act" acted to "displace[]" any "Tucker Act jurisdiction over [petitioner's] contract claims." *Id.* at 13. The court of appeals explained that petitioner's contract-based theories were ultimately directed at challenging the lawfulness of the Commission's cancellations of petitioner's licenses, actions that "fall squarely within" the scope of 47 U.S.C. 402(b)(5). Pet. App. 14; see *id.* at 15 (explaining that "§ 402(b)(5) provided [petitioner] the opportunity to argue that the FCC's decision was contrary to the terms of the contract").

The court of appeals also affirmed the dismissal of petitioner's takings claim. Petitioner argued on appeal that its takings claim was timely because the claim had not

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[3] The CFC also dismissed petitioner's fraud-in-the-inducement claim, explaining that "[t]he Tucker Act specifically excludes tort cases from the jurisdiction of the Court of Federal Claims." Pet. App. 39 (citing 28 U.S.C. 1491(a)(1)).

ripened until 2010, when the Commission had denied petitioner's request for reconsideration of the Bureau's denial of waiver of license cancellation. Pet. App. 18-20. The court acknowledged this argument, see *ibid.*, but expressly declined to reach it because the court found that the takings claim failed for a "more straightforward" reason, *id.* at 17.

Specifically, the court of appeals explained that "the same conclusion" it had just reached as to the contract claims also "applie[d] to [petitioner's] takings claim," Pet. App. 17—namely, that "the Communications Act provides 'a ready avenue to bring'" petitioner's claim and therefore effects a "displacement of Tucker Act jurisdiction," *id.* at 21 (citation omitted). The court observed that petitioner had "insist[ed]" that the Commission could have resolved its takings claim by "eliminating the taking, providing compensation, or some combination." *Ibid.* The court noted that the government also had not disputed that the FCC could have "provided [petitioner] adequate relief" if it had found petitioner's arguments to be meritorious. *Id.* at 21-22. The court thus explained that "[t]he displacement question before [it] * * * [wa]s limited to a situation in which the parties do not dispute the adequacy of the non-Tucker Act remedial regime both to adjudicate the takings claim and, if a taking is found, to provide the constitutionally required relief." *Id.* at 22.

Petitioner filed a petition for panel rehearing, which the court of appeals denied. Pet. App. 42-43.

ARGUMENT

Petitioner urges (Pet. i-iii, 11-23) this Court to grant a writ of certiorari and to hold that a takings claim does not become "ripe," and therefore does not "accrue" for limitations purposes, until after "final agency action." But this case does not fairly present that question. The

court of appeals did not dispose of petitioner's takings claim on ripeness or timeliness grounds, but instead concluded that the specific provision for judicial review under the Communications Act foreclosed general Tucker Act jurisdiction over the takings claim that petitioner had asserted. The court's decision was correct, and it does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. Petitioner bases its argument for further review on this Court's decision in *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). In *Williamson County*, a plaintiff landowner filed suit under 42 U.S.C. 1983, alleging that application of local zoning regulations to the plaintiff's land would effect a taking without just compensation. See 473 U.S. at 175, 182. The Court held that the landowner's claim was premature for two reasons.

First, the Court explained that "a claim that the application of government regulations effects a taking * * * is not ripe" until the relevant governmental body "has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question," *Williamson County*, 473 U.S. at 186, 191, including by deciding whether to grant any zoning "variance," *id.* at 190; see *id.* at 187-190. Second, the Court concluded that the plaintiff could not bring its Section 1983 claim until after it had "unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation." *Id.* at 195. The Court stated that, "because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action

* * * is not 'complete' until the State fails to provide adequate compensation for the taking." *Ibid.*

Petitioner seeks this Court's review to determine whether and how those principles apply to petitioner's challenge to the FCC's termination of its PCS licenses. While stating that *Williamson County* is "widely regarded as applicable only to state regulatory proceedings," petitioner argues (Pet. 12) that "the ripeness requirements" should be "identical in both state and federal proceedings." Asserting that "[t]he ripeness requirement in *Williamson* [*County*] has confounded scholars, litigants, and * * * lower courts," petitioner argues (Pet. iii) that, under *Williamson County*, petitioner's claim did not ripen until "final agency action" by the FCC.

This case, however, offers no occasion to address whether or how *Williamson County*'s holding about ripeness under Section 1983 (cf. Pet. 11) would apply to takings claims based on federal agency action.[4] The court of appeals acknowledged petitioner's *Williamson County*-based arguments, see Pet. App. 18-20, but it expressly declined to reach them, concluding that petitioner's claim was subject to dismissal for a "more straightforward" reason, *id.* at 17; see also *id.* at 20 (explaining that the court's examination of the Tucker Act

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[4] In *Knick* v. *Township of Scott*, No. 17-647 (Mar. 5, 2018), this Court has granted a writ of certiorari to decide whether to overrule *Williamson County* to the extent it is understood to bar a property owner from filing suit in federal court seeking just compensation for an asserted taking by a local government without first pursuing a claim for just compensation in state court. This case need not be held pending the disposition of *Knick*. As explained, see pp. 10-18, *infra*, the court of appeals did not rely on ripeness principles or undertake any application of *Williamson County*. Moreover, this case does not involve any alleged taking by a state or local government.

preemption question "leads to a conclusion of no jurisdiction in this case without routing that conclusion through a determination regarding timeliness"); *id.* at 21 ("Finding such displacement of Tucker Act jurisdiction, we need not further explore the timeliness issue."). This case therefore does not present an appropriate vehicle for addressing petitioner's ripeness arguments. See *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (explaining that this Court "is a court of final review and not first view," and thus "[o]rdinarily * * * do[es] not decide in the first instance issues not decided below") (citations and internal quotation marks omitted).[5]

2. Rather than deciding this case on ripeness or timeliness grounds, the court of appeals held that the CFC's Tucker Act jurisdiction over each of petitioner's claims—including its takings claim—had been displaced by the judicial-review provision of the Communications Act, 47 U.S.C. 402(b)(5). That disposition was correct and does not warrant further review.

a. The Tucker Act waives sovereign immunity and establishes jurisdiction in the CFC over certain monetary claims against the United States. 28 U.S.C. 1491(a)(1). The Tucker Act directs that the CFC "shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with

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[5] Petitioner acknowledges (Pet. ii) that the court of appeals "sidestepped th[e] issue" on which petitioner now seeks review. See, *e.g.*, Pet. 9 ("In its written decision, the Federal Circuit failed even to address the applicability of ripeness doctrine to [petitioner's] takings claims."); Pet. 10 ("To date, no court considering this case has yet to issue a decision discussing the applicability of the ripeness doctrine in *Williamson* [*County*] to the facts in this case.").

the United States, or for liquidated or unliquidated damages in cases not sounding in tort." *Ibid.* Among the suits against the United States that are generally cognizable under the Tucker Act are actions for breach of contract; for the payment of monies mandated by statute; and for just compensation for a taking of private property for public use.

As the government has explained in its recent briefing, a suit under the Tucker Act "provides a constitutionally sufficient mechanism for obtaining just compensation for takings by the federal government." Gov't Amicus Br. at 11-12, *Knick* v. *Township of Scott*, No. 17-647 (June 5, 2018). In turn, the availability of this "generally applicable mechanism ensures that federal actions are not rendered invalid or subject to injunctions merely because they may effect a taking." *Id.* at 12. Thus, in circumstances where a plaintiff concedes the lawfulness of federal agency action, but contends that the action effected a taking of property without just compensation, a plaintiff's recourse ordinarily is to bring a suit for compensation in the CFC. See *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016 (1984) (explaining that "[e]quitable relief is not available to enjoin an alleged taking of private property * * * when a suit for compensation can be brought," and noting that "[g]enerally, an individual claiming that the United States has taken his property can seek just compensation under the Tucker Act, 28 U.S.C. § 1491"); see also *Williamson County*, 473 U.S. at 195 (citing *Monsanto* and noting that the Court has "held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491").

The jurisdiction conferred by the Tucker Act, however, is subject to limitations. For example, if a plaintiff's claim rests on an alleged statutory entitlement to federal funds, the Tucker Act will be "displaced" if the "law assertedly imposing [the] monetary liability on the United States contains its own judicial remedies." *United States* v. *Bormes*, 568 U.S. 6, 12 (2012). "In that event, the specific remedial scheme establishes the exclusive framework for the liability Congress created under the statute." *Ibid.*; see, *e.g.*, *United States* v. *Fausto*, 484 U.S. 439, 454-455 (1988).

Similarly, although "a claim for just compensation under the Takings Clause" generally is brought in the CFC, such claims cannot proceed in that forum if "Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." *Horne* v. *Department of Agric.*, 569 U.S. 513, 527 (2013) (citation omitted); see *Monsanto*, 467 U.S. at 1017. In *Horne*, for example, this Court held that raisin handlers were foreclosed from bringing a takings suit in the CFC because the "comprehensive remedial scheme" established by the Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246, "afford[ed] handlers a ready avenue to bring takings claims against the [federal agency]" and thereby "withdr[ew] Tucker Act jurisdiction over [the handlers'] takings claim." 569 U.S. at 527-528.[6]

b. As the court of appeals correctly held, petitioner's contract claims may not proceed under the Tucker Act because the Communications Act provides a more specific path for review of those claims. Pet. App. 13-17. The

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[6] Petitioner's categorical assertions that "Congress cannot direct takings claims to regulatory agencies," Pet. 5, and that "there is no precedent" of "any court in the United States" recognizing such a displacement, Pet. 16, are inconsistent with, *inter alia*, this Court's decision in *Horne*.

Communications Act vests the D.C. Circuit with exclusive jurisdiction to adjudicate challenges to the lawfulness of the Commission's "revo[cation]" of a "station license," including the wireless-spectrum licenses at issue here. 47 U.S.C. 402(b)(5). That exclusive jurisdiction extends not simply to "review[ing] the grant or denial of FCC licenses" simpliciter, but also to adjudicating disputes "'ancillary'" to the license denial, including "the underlying issue of FCC rules compliance necessary to the licensing decision." *Biltmore Forest Broad. FM, Inc.* v. *United States*, 555 F.3d 1375, 1382-1383 (Fed. Cir.) (quoting *Folden* v. *United States*, 379 F.3d 1344, 1360 (Fed. Cir. 2004), cert. denied, 545 U.S. 1127 (2005)), cert. denied, 558 U.S. 990 (2009). Thus, as petitioner appears to recognize, the availability of judicial review under the Communications Act—the remedy that petitioner itself pursued eight years ago—forecloses petitioner from obtaining review of the same legal theories under the Tucker Act's general grant of jurisdiction. Cf. Pet. 14 ("[T]he Federal Communications Act may well supplant the jurisdiction of the [CFC] under *Horne*."); Pet. 18 ("[T]he Telecommunications Act does direct aggrieved litigants to raise claims regarding FCC licensure decisions to the D.C. Circuit.").

Those principles also mandate dismissal of the takings claim asserted in petitioner's complaint. A plaintiff who asserts a takings claim ordinarily assumes or concedes the lawfulness of the relevant government conduct, but argues that this lawful action (*e.g.*, an exercise of the eminent-domain power) has eliminated or constrained a preexisting property right in a manner requiring just compensation. See, *e.g.*, *Lion Raisins*, *Inc.* v. *United States*, 416 F.3d 1356, 1370 (Fed. Cir. 2005) ("[I]n

a takings case we assume that the underlying governmental action was lawful.") (citation omitted). As discussed above, in such cases, a plaintiff's recourse is ordinarily a Tucker Act suit in the CFC, unless Congress has established a separate remedial scheme by statute. See *Monsanto*, 467 U.S. at 1016-1017.

Here, by contrast, petitioner's takings claim does not assert a right to compensation for otherwise-lawful federal conduct, but instead rests on the premise that the Commission acted *unlawfully* in cancelling petitioner's licenses. See, *e.g.*, Pet. i (alleging that the Commission had "engaged in an *unlawful* taking of [petitioner's] property") (emphasis added); Compl. ¶¶ 68-69 (alleging that the "FCC's *wrongful* denial of the Restructuring and Waiver requests," and its "*contravention* of the clear language of the Notes and Security Agreements," had "resulted in" an uncompensated taking) (emphases added).[7] Petitioner's takings claim thus depends on the same allegations of illegal conduct that form the basis for petitioner's contract-based claims.[8]

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[7] See also Pet. 20 (asserting that the agency's actions to "perfect its security interest * * * constituted an unlawful regulatory taking by the FCC"); Pet. 22 ("[Petitioner] claims the FCC breached that contract by acts of regulatory malfeasance."); Pet. C.A. Br. 13 ("[I]n the current case, [petitioner] seeks monetary relief for the FCC's violation of the terms of the agreement it had struck with [petitioner]."); Compl. ¶¶ 3-49 (factual allegations supporting petitioner's assertion that FCC "contraven[ed]" its contracts). Petitioner's passing assertion that it is "no longer seeking review of a mere licensure decision" (Pet. 20) is thus belied by its acknowledgement that its claim to compensation rests on the allegation that the Commission acted "unlawful[ly]" (*ibid.*).

[8] If petitioner had conceded the lawfulness of the FCC's cancellation of its licenses, petitioner would have had no colorable argument that it had been deprived of property for which it was owed just compensation, since a lawful FCC cancellation of the licenses would have

Assuming that this cause of action is properly termed a "takings" claim at all, but see *Lion Raisins*, 416 F.3d at 1369, it must be presented in the same forum as petitioner's other challenges to the lawfulness of the FCC's conduct. Thus, where "the essence of the claims being asserted is that the [Commission] has * * * violated * * * its regulatory and contractual obligations," such claims "are not properly presented as takings challenges in the Court of Federal Claims, and instead must be pursued in the designated administrative and judicial fora." *Id.* at 1368.

This conclusion also follows from the nature of the relief that petitioner has sought in this litigation. As the court of appeals emphasized, petitioner argued below that the Commission itself could and should have provided petitioner with the desired "compensation," such as by "forgiv[ing] any amounts still owing on the licenses," by "refund[ing] * * * some or all the amounts [petitioner] had already paid," by "award[ing] [petitioner] licenses of equivalent value," or by "provid[ing] [petitioner] with a voucher" of funds that could "be used or assigned to third parties in future spectrum auctions." Pet. App. 21 (quoting Pet. C.A. Br. 24). Thus, under petitioner's own theory, the relief that petitioner has requested was within the Commission's power to provide, and the FCC's denial of that relief would have been within the D.C. Circuit's authority to review. Cf.

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extinguished whatever property interest petitioner had previously possessed. Cf. *Bennis* v. *Michigan*, 516 U.S. 442, 452 (1996) (rejecting a takings challenge to an asset forfeiture, and explaining that "[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain"). Any claim that petitioner was owed compensation for property that was not rightfully petitioner's would be insubstantial.

Lion Raisins, 416 F.3d at 1371-1372 (concluding that a takings claim was preempted where "monetary relief[] in the form of equitable restitution" could be awarded on direct review of agency proceedings). The petition for a writ of certiorari essentially reaffirms this understanding: petitioner argues that its "takings" claim did not ripen until 2010 precisely because, in petitioner's view, the Commission was empowered to grant the relief that petitioner had requested, which would have obviated any need for litigation. Cf. Pet. ii.[9]

c. At least under the circumstances presented here, where petitioner's takings claim is entirely derivative of its contract claims, and petitioner asserts that the FCC could have provided constitutionally adequate relief, the Communications Act's remedial scheme displaces the Tucker Act remedy. Congress has established a reticulated statutory framework for resolving disputes concerning the legality of FCC conduct under the Communications Act. See Pet. App. 2 (explaining that "the Communications Act provides a comprehensive statutory scheme through which [petitioner] could raise its contract claims and could challenge the alleged taking and receive a remedy that could have provided just compensation in this case"). That scheme requires potential plaintiffs to present their claims to the agency in the first instance, and then to seek judicial review in the D.C. Circuit. Petitioner cannot circumvent the review mechanisms that Congress has fashioned, and insist that a different court determine the legality of the challenged

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[9] Petitioner's observation that "[t]he FCC is not empowered to award money damages against itself" (Pet. 21) thus overlooks petitioner's own argument that the Commission could have provided compensation in a manner that satisfied petitioner's claim.

FCC actions, simply by appending an allegation that those actions *also* effected a taking.

The Federal Circuit did not expressly limit its holding to takings claims, like this one, that are derivative of some other legal challenge to the relevant FCC conduct. The court did observe, however, that the "question before [it] * * * [wa]s limited to a situation in which the parties do not dispute the adequacy of the non-Tucker Act remedial regime both to adjudicate the takings claim and, if a taking is found, to provide the constitutionally required relief." Pet. App. 22. In any event, "[t]his Court reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation and internal quotation marks omitted). The court of appeals' judgment is correct, and this case offers no occasion for the Court to identify the proper forum for a (more traditional) takings claim that seeks just compensation for *concededly lawful* FCC action. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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