No. 04-1106

In the Supreme Court of the United States

GENE A. FOLDEN, ET AL., 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 the court of appeals erred by concluding that a challenge to a decision of the Federal Communications Commission not to hold lotteries to distribute cellular telephone licenses in certain markets falls within the exclusive jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under 47 U.S.C. 402(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 379 F.3d 1344. The opinion of the Court of Federal Claims (Pet. App. 37a-77a) is reported at 56 Fed. Cl. 43.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2004. A petition for rehearing was denied on November 18, 2004. Pet. App. 35a-36a. The petition for a writ of certiorari was filed on February 16, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During the late 1980s, petitioners individually applied to the Federal Communications Commission (FCC or Commission) for licenses to provide cellular radiotelephone service in seven rural service areas (RSAs). Pet. App. 79a-80a, 83a-84a. Applying its rules in effect at the time, the Commission conducted lotteries to identify "tentative selectees" for the licenses from among the hundreds of applicants. *Id.* at 84a-85a. None of petitioners was chosen as a tentative selectee. *Id.* at 7a. In some markets, the tentative selectees were later disqualified. *Id.* at 86a-90a. The Commission rules then in effect provided that a second lottery would be held if the tentative selectee were disqualified. *Id.* at 82a. The rules set no time limit for conducting a second lottery. See *ibid.*

Second lotteries did not occur for any of the licenses at issue here. Although the Commission issued relottery notices for six of the seven RSAs, the Commission's Wireless Telecommunications Bureau (WTB or Bureau) issued a notice postponing the relotteries in order to consider an ex parte petition requesting that the license for one of the RSAs be distributed by auction rather than lottery. Pet. App. 9a. The WTB then sought public comment on the proposal to act by auction rather than lottery. Before the Commission could take further action on the matter, Congress enacted the Balanced Budget Act of 1997, Pub. L. No. 105-33, Tit. III, § 3002(a)(2), 111 Stat. 251, which abolished the Commission's authority to use lotteries for distributing cellular licenses and required the Commission to change its rules governing the issuance of those licenses. Pet. App. 93a. In administrative staff orders, the Commission dismissed, without prejudice, pending applications

for licenses in the affected markets, including those of petitioners. *Id.* at 93a-96a.

On December 21, 2000, Congress reinstated the original tentative selectees for three of the seven RSAs at issue in this case. See Launching Our Communities' Access to Local Television Act of 2000, Pub. L. No. 106-553, Tit. X, § 1007, 114 Stat. 2762A-138 to 2762A-140. In January 2002, after notice and comment, the Commission adopted rules governing auctions for licenses in the remaining four markets. Pet. App. 11a. Petitioners did not re-apply for those licenses or participate in those auctions. Nor did petitioners request review or reconsideration by the Commission of the Bureau's orders dismissing their applications. *Id.* at 12a.

2. In August 2001, petitioners filed suit in the Court of Federal Claims on behalf of themselves and "all others similarly situated" (Pet. App. 78a), asserting causes of action for breach of "implied-in-fact contracts to hold lotteries to award licenses to provide cellular radiotelephone service in seven rural service areas" and for "taking of [petitioners'] contract rights in violation of Article III and the Fifth Amendment of the Constitution." *Id.* at 79a; see *id.* at 78a-112a (complaint). Petitioners alleged that the Commission's public notices constituted an "offer" to contract, which they accepted by preparing and timely filing applications, and that petitioners provided consideration by paying the requisite filing fees. *Id.* at 18a. Petitioners argued that the Commission breached the implied contracts when it decided not to hold relotteries for the seven RSAs. *Ibid.*; *id.* at 98a, 100a, 102a, 104a, 106a, 108a, 110a.[1]

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[1] The Court of Federal Claims stayed consideration of petitioners' request for class certification pending resolution of the government's motion to dismiss. Pet. App. 13a-14a.

On March 28, 2003, the Court of Federal Claims dismissed the action. Pet. App. 37a-77a. The court first held (*id.* at 52a-62a) that petitioners' amended complaint failed to state a claim on which relief could be granted. The court stated that petitioners had "failed to establish that an implied-in-fact contract existed between the plaintiffs and the [Commission]" because they had "failed to establish the first element of an implied-in-fact contract, mutuality of intent." *Id.* at 62a. The court concluded that the "long tradition of Commission authority" (*ibid.*) to "modify its rules and regulations when doing so will advance the public interest" (*id.* at 61a) "effectively precluded the FCC from making a contractual promise to [petitioners]." *Id.* at 62a. The court termed petitioner's contract claim "insubstantial." *Id.* at 72a.

The court also held (Pet. App. 62a-72a) that it lacked subject-matter jurisdiction over the claim under the Tucker Act, 28 U.S.C. 1491, holding that "review of [the] FCC decisions" like those at issue here "falls within the exclusive jurisdiction of the District of Columbia Circuit" under 47 U.S.C. 402(b). Pet. App. 63a; see generally Addendum, *infra*, 1a (reproducing text of 47 U.S.C. 402(a) and (b)). The court observed that "Section 402(b) states that: 'Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia' in nine classes of cases involving the Commission's exercise of its radio licensing power." Pet. App. 62a (quoting 47 U.S.C. 402(b)). The court noted that while the Bureau's staff orders that petitioners challenged were not themselves "final FCC orders," if petitioners "[h]ad * * * exhausted their administrative remedies, an appeal of the FCC decision would have been proper in the District of Columbia Circuit * * *, the court with statutory authority to review FCC licensing decisions." *Id.* at 67a.

Accordingly, the court concluded, the orders were properly subject to the exclusive jurisdiction of the D.C. Circuit.[2]

3. The court of appeals affirmed, holding that the District of Columbia Circuit had exclusive jurisdiction under 47 U.S.C. 402(b) to review claims of the sort made by petitioners. Pet. App. 1a-34a. The court concluded that it is "clear that the D.C. Circuit's jurisdiction over claims that fall within [47 U.S.C.] 402(b) is exclusive." *Id.* at 21a. Citing *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984), in which this Court held that, under 47 U.S.C. 402(a), "[e]xclusive jurisdiction for review of final [Commission] orders * * * lies in the Court of Appeals," the court of appeals reasoned that "[i]t follows that the D.C. Circuit's jurisdiction pursuant to subsection 402(b) is also exclusive: subsections 402(a) and (b) comprise the entire statutory regime by which parties may obtain judicial review of Commission decisions." Pet. App. 21a-22a.

The court of appeals then concluded that the orders at issue fell within the exclusive jurisdiction of the D.C. Circuit under Section 402(b). Citing the legislative history of Communications Act amendments, Pet. App. 29a, the court noted that the D.C. Circuit, the Federal Circuit, and other federal courts of appeals had long held that "[S]ection 402(b) also extends to licensing decisions of the Commission that are 'ancillary' to those [categories] set forth" specifically in that provision. *Id.* at 27a. The court concluded that "the Commission's decision not to hold relotteries

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[2] The Court of Federal Claims also held that petitioners had failed to state a takings claim under the Fifth Amendment, Pet. App. 72a-77a, explaining that actors "in a highly regulated field such as FCC licensing can have no distinct investment-backed expectations [to rely] upon a legislative and regulatory status quo." *Id.* at 75a. Petitioners did not challenge that conclusion on appeal, nor do they seek to revisit that conclusion before this Court.

* * * constituted action[] ancillary to the licensing power of the Commission, specifically to the denial of a station license set forth in subsection 402(b)(1)," *id.* at 31a, because "by failing to hold the relotteries, the Commission necessarily determined that [petitioners'] lottery applications would not result in their receiving licenses." *Id.* at 32a. Thus the agency's actions "'in fact' denied [petitioners'] lottery applications." *Ibid.* The court stated that although petitioners had "frame[d] their challenge to the Commission's action in terms of a claim for breach of contract, * * * we must look to the true nature of [petitioners'] claim, not how [petitioners] characterize it. At root, [petitioners'] action plainly represents a challenge to the Commission's failure to hold relotteries for the seven RSA licenses at issue." *Id.* at 27a n.13.[3]

ARGUMENT

Petitioners claim (Pet. 21-26) that the court of appeals erred by concluding that the D.C. Circuit has exclusive jurisdiction pursuant to 47 U.S.C. 402(b) over their lawsuit challenging the Bureau's decision not to hold relotteries in the seven RSAs at issue in this case. Petitioners also argue (Pet. 2-3, 9-10, 16-17) that, by tendering completed license applications, they accepted the Commission's invitation to contract and created binding contracts enforceable through suits for money damages in the Court of Federal Claims. And petitioners further contend (Pet. 22-25) that the court of appeals applied an incorrect test for determining whether their claims were essentially contractual or regulatory, and that the decision of the court of appeals "will play havoc with the D.C. Circuit's jurisdiction" by rendering it

[3] Because the court of appeals affirmed dismissal for lack of subject matter jurisdiction, it did not review the Court of Federal Claims' alternative holding dismissing for failure to state a claim.

essentially limitless. Pet. 25. All of those arguments lack merit. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals correctly concluded that the D.C. Circuit has exclusive jurisdiction to review challenges to the Bureau's decision not to hold relotteries to distribute licenses. It is well established that Section 402(b) vests the D.C. Circuit with exclusive jurisdiction over specified classes of licensing decisions. See, *e.g.*, *Sykes* v. *Jenny Wren Co.*, 78 F.2d 729 (D.C. Cir.) (concluding that the jurisdiction of the D.C. Circuit under Section 402(b) is exclusive), cert. denied, 296 U.S. 624 (1935); accord *Sprint Communications Co.* v. *FCC*, 274 F.3d 549, 552 (D.C. Cir. 2001); *City of Rochester* v. *Bond*, 603 F.2d 927, 934 (D.C. Cir. 1979) (stating that "[i]n § 402 of the Communications Act * * * Congress has * * * prescribed the exclusive mode of judicial review of such controversies as this"). The language of Section 402(a) provides that the courts of appeals have jurisdiction over "[a]ny proceeding to enjoin, set aside, annul or suspend any order of the Commission * * * except those appealable under subsection (b) of this section." This Court held in *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463 (1984), that section 402(a) gives the courts of appeals "[e]xclusive jurisdiction for review of final FCC orders" identified in that provision. *Id.* at 468. As the court of appeals correctly concluded (Pet. App. 21a-22a), it follows that "the D.C. Circuit's jurisdiction pursuant to subsection 402(b) is also exclusive," because "subsections 402(a) and (b) comprise the entire statutory regulatory regime by which parties may obtain judicial review of Commission decisions." See *Columbia Broad. Sys.* v. *FCC*, 211 F.2d 644, 647 (D.C. Cir. 1954) (appeals from all Commission decisions that do not fall within subsection 402(b)

are encompassed by 402(a)). That reading is confirmed by the legislative history of amendments to Section 402. See S. Rep. No. 44, 82d Cong., 1st Sess. 10 (1951) ("The language of * * * subsection [402(b)], when considered in relation to that of subsection (a), * * * would make it clear that judicial review of all cases involving the exercise of the Commission's radio-licensing power is limited to that court [the D.C. Circuit].").

It is likewise well established that, to avoid interference with the comprehensive regulatory scheme established by Congress in the Communications Act of 1934, the scope of Section 402(b)'s exclusive jurisdiction extends not only to the nine specific categories of orders identified in that provision, but also to orders that "are 'ancillary' to those explicitly set forth in subsection 402(b)." Pet. App. 30a. For over forty years, federal courts of appeals have held that the D.C. Circuit's exclusive jurisdiction extends to Commission orders ancillary to those specifically identified in subsection 402(b). See *Cook* v. *United States*, 394 F.2d 84, 86-87 (7th Cir. 1968); *Tomah-Mauston Broad. Co.* v. *FCC*, 306 F.2d 811, 811-812 (D.C. Cir. 1962) (collecting authorities); *Kessler* v. *FCC*, 326 F.2d 673, 678 (D.C. Cir. 1963); *Helena TV, Inc.* v. *FCC*, 269 F.2d 30, 30 (9th Cir. 1959) (per curiam) (holding that a "Commission order * * * ancillary" to licensing proceedings "is cognizable only under section 402(b)"); accord *La Voz Radio de la Communidad* v. *FCC*, 223 F.3d 313, 318 (6th Cir. 2000) (D.C. Circuit "has exclusive jurisdiction over 'any suit seeking relief that might affect' its future statutory power of review" under Section 402(b)). Petitioners cite no authority to the contrary.

The court of appeals' decision represents a straightforward application of that well-established principle. "[T]he Commission's decision not to hold relotteries [for the

RSA licenses] * * * constituted action[] ancillary to the licensing power of the Commission, specifically to the denial of a station license set forth in subsection 402(b)(1)." Pet. App. 31a. As the court of appeals reasoned, "by failing to hold the relotteries, the Commission necessarily determined that [petitioners'] lottery applications would not result in their receiving licenses" and thus "'in fact' denied [petitioners'] lottery applications." *Id.* at 32a.

2. The conclusion that the D.C. Circuit has exclusive jurisdiction over claims such as petitioners' is not altered simply because, as petitioners contend (Pet. 22-23), their lawsuit was styled as one seeking money damages. As the court of appeals concluded, what matters is "the true nature of [petitioners'] claim, not how [petitioners] characterize it." Pet. App. 27a n.13. Petitioners concede (Pet. 22) that they "are asserting their rights to have chances to win valuable cellular licenses in FCC relotteries." As both the Court of Federal Claims (see, *e.g.*, Pet. App. 71a) and the court of appeals correctly concluded, "[a]t root, [petitioners'] action plainly represents a challenge to the Commission's failure to hold relotteries for the seven [rural service area] licenses at issue." *Id.* at 27a n.13. Petitioners err in contending (Pet. 21) that the court of appeals reached that conclusion only by "depart[ing] from the text of Petitioners' complaint." The amended complaint itself makes clear that petitioners sought review of staff orders of the WTB. The amended complaint specifically cited and discussed in detail several Bureau staff orders, including staff orders specifically rejecting petitioners' contract claims. See Pet. App. 93a-95a.[4] The amended complaint

[4] Petitioners contend that "[a] contract claim similar to that of Petitioners' [sic] was never before the [Bureau] and never rejected in a [Bureau] order." Pet. 29 (emphasis omitted). That is incorrect. The complaint itself alleges that petitioners presented a contract claim to

asked the Court of Federal Claims to overturn the Bureau's rejection of petitioners' contract claims.

Petitioners err in contending (Pet. 22-23) that the standard employed by the court of appeals for determining whether a claim falls within the exclusive jurisdiction of the D.C. Circuit conflicts with that used by the D.C. Circuit itself and by other courts. See *Megapulse, Inc.* v. *Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982); Pet. 22 n.20 (citing decisions of the Second, Fourth, Sixth, and Ninth Circuits following *Megapulse*). As noted above, see p. 8, *supra*, the D.C. Circuit has long held that it has exclusive jurisdiction to review FCC actions that are "ancillary" to orders covered by 47 U.S.C. 402(b). *Megapulse*, which set forth some general and non-exclusive factors to consider in determining whether a claim was properly characterized as a contract action or as an Administrative Procedure Act claim, is not to the contrary. Indeed, *Megapulse* itself emphasized that "the mere existence of * * * contract-related issues" in a case does not convert a case into a contract action within the purview of the Tucker Act. 672 F.2d at 969.[5]

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the Bureau, which "summarily rejected" it. Pet. App. 95a; see *id.* at 96a (noting that one petitioner "requested the FCC to * * * declare that it breached implied-in-fact contracts" and to "award damages * * * in the amount of $102.6 million").

[5] *Loveladies Harbor, Inc.* v. *United States*, 27 F.3d 1545 (Fed. Cir. 1994) (en banc), cited by petitioners, Pet. 23, is also inapposite. That case involved interpretation of 28 U.S.C. 1500, which in relevant part provides that the Court of Federal Claims does not have jurisdiction over "any claim * * * in respect to which the plaintiff * * * has pending in any other court any suit or process against" the government. The court there simply addressed whether causes of action pending in various courts represented the same "claim" in the sense that term is used in the law of res judicata. See Restatement (Second) of Judgments § 24 (1982).

3. Petitioners err in contending (Pet. 25) that "[t]he Federal Circuit's decision will play havoc with the D.C. Circuit's jurisdiction." It is petitioners' novel and expansive view of the Federal Circuit's jurisdiction that would disrupt the "comprehensive statutory and regulatory regime" that Congress established for review of FCC orders. Pet. App. 23a. As the court of appeals noted, *ibid.*, the Communications Act requires a party to exhaust administrative remedies within the FCC "before pursuing a judicial remedy," and carefully "impose[s] * * * filing deadlines for appeals from Commission orders, provide[s] for interested parties to receive notice of an appeal, require[s] appeals to include specific information, and prescribe[s] the procedure by which an interested party may intervene in appeal proceedings." But under petitioners' view of the statute, a disappointed license applicant could circumvent those carefully crafted requirements by the simple expedient of bringing a putative damages action against the Commission challenging a bureau's failure to take the regulatory action it desired. That understanding would completely undermine the administrative review process and compromise the Commission's ability to create coherent policy. There is no reason to conclude that Congress wished the regulatory regime it had created to be so easily circumvented. Cf. *La Voz Radio*, 223 F.3d at 319 (holding that permitting broadcasters to seek review in district court would be "an impermissible end-run around the statutory scheme established in the Federal Communications Act") (internal quotation marks omitted). As the Court of Federal Claims concluded (Pet. App. 71a), "[c]ourts should not give credence to [petitioners'] attempts to circumvent established agency and federal court procedures."

Petitioners are likewise mistaken (Pet. 25) that the court of appeals' decision renders the D.C. Circuit's juris-

diction essentially limitless and is tantamount to "a judicial grant of immunity [to the FCC] from breach-of-contract claims." Pet. 27. Nothing in the court's opinion suggests that the D.C. Circuit would have jurisdiction over bona fide contract actions, or that the Commission could avoid damages liability on a claim that properly was characterized as a claim for breach of contract. By its terms, the decision extends only to Commission orders and actions that are ancillary to specific categories of orders enumerated in 47 U.S.C. 402(b). It did not purport to address the D.C. Circuit's authority to review Commission actions that are not ancillary to the specified classes of applications and licenses set forth in 402(b). Far from creating "immunity" of any sort, the court of appeals' decision preserves the Court of Federal Claims' Tucker Act jurisdiction to review traditional actions for damages arising from contracts.

4. Petitioners contend (Pet. 21) that the court of appeals erred by concluding that the D.C. Circuit had exclusive jurisdiction over the claim without "first * * * decid[ing] whether the Court of Federal Claims had exclusive original jurisdiction" under the Tucker Act. *Ibid.* That argument lacks merit. The court of appeals explicitly addressed whether the Court of Federal Claims had jurisdiction over petitioners' putative breach-of-contract action, and concluded that it did not because of the D.C. Circuit's exclusive grant of jurisdiction. As the court of appeals explained, "[w]here Congress specifically designates a forum for judicial review of administrative action, such a forum is exclusive, and this result does not depend on the use of the word 'exclusive' in the statute providing a forum for judicial review." Pet. App. 22a n.9 (internal quotation marks omitted) (quoting *Amerikohl Mining, Inc.* v. *United States*, 899 F.2d 1210, 1215 (Fed. Cir. 1990)).

Petitioners contend (Pet. 26-28) that the conclusion that their claims fall within the exclusive jurisdiction of the D.C. Circuit constitutes a "partial repeal of the Tucker Act" by implication, which they argue is contrary to the principle that repeals by implication are disfavored. Pet. 26. To begin with, however, petitioners' argument is based on the erroneous premise that lotteries conducted for regulatory purposes (such as the distribution of licenses) are properly analyzed as "implied-in-fact" contracts, and that once an agency proposes to distribute licenses by lottery, and applicants tender complete applications, a failure to distribute licenses by lottery constitutes breach of contract subjecting the agency to suit for money damages. Pet. 2-3, 9-10, 16-17. Even if there were a consensus that recreational lotteries subject sponsor States to suit under contract principles, but see John E. Theuman, Annotation, *State Lotteries: Actions by Ticketholders Against State or Contractor for State*, 40 A.L.R. 4th 662, 663 (1985) ("contestants in [state] lotteries have commonly had little success in seeking to recover prizes * * * or [in making] other claims arising out of the games, where the conduct of the lottery had not clearly violated the enabling statutes and regulations"), it would not follow that an agency's announcement that it intends to distribute licenses by lottery constitutes an invitation to contract. Petitioners cite no authority for the proposition that such an announcement would constitute an "offer" under contract principles, and there is every reason to believe it would not.

In the regulatory context, there is a long tradition of agencies "modify[ing] [their] rules and regulations" to "advance the public interest, even if such a change alters

the plans and goals of applicants." Pet. App. 61a.[6] This Court has emphasized in the Contract Clause context the importance of safeguarding the state's regulatory power against restriction. Cf. *Stone* v. *Mississippi*, 101 U.S. 814, 820 (1879) (concluding that Contract Clause does not prohibit a State from outlawing lotteries even after chartering a lottery, emphasizing that "[t]he contracts which the Constitution protects are those that relate to property rights, not governmental"). An applicant for a license therefore has no justifiable expectation that an agency's announced intention to distribute licenses by lottery constitutes a binding promise. As the Court of Federal Claims correctly concluded, "[t]he long tradition of Commission authority to change rules effectively precluded the FCC from making a contractual promise to [petitioners]," and thus there was no "mutuality of intent" to support the conclusion that the Commission and petitioners formed a contract. Pet. App. 62a. Cf. *Stone*, 101 U.S. at 821 ("Any one * * * who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume

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[6] Accord, *e.g.*, *Celtronix Telemetry, Inc.* v. *FCC*, 272 F.3d 585, 590 (D.C. Cir. 2001) ("far from there being any such [contractual] promise, there was, as we've noted, a long tradition of Commission authority to change rules governing already-issued licenses"), cert. denied, 536 U.S. 923 (2002); *Bachow Communications, Inc.* v. *FCC*, 237 F.3d 683, 687-688 (D.C. Cir. 2001) (applicants for broadcast licenses had no "vested right" in enforcement of cut-off rules); *PLMRS Narrowband Corp.* v. *FCC*, 182 F.3d 995, 1000-1001 (D.C. Cir. 1999); *Maxcell Telecom Plus, Inc.* v. *FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987) (rejecting argument that applicant possessed any right to specific procedure for awarding license); see also *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 603 (1981) ("[T]he Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully.").

[the prohibition on lotteries] at any time when the public good shall require, whether it be paid for or not."). Petitioners cite no authority to suggest that regulated parties could reasonably expect an agency's intent to distribute licenses in a particular way to constitute a binding contract.[7] Because petitioners' claim is not properly con-

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[7] The cases petitioners cite are inapposite. *In re NextWave Personal Communications, Inc.*, 200 F.3d 43, 60-62 (2d Cir. 1999), and *NextWave Personal Communications, Inc.* v. *FCC*, 254 F.3d 130 (D.C. Cir. 2001), aff'd, 537 U.S. 293 (2002), cited by petitioner (Pet. 17), involved only the question whether the FCC had the authority *under the applicable regulations and federal bankruptcy law* to cancel licenses on the ground that the license holders had declared bankruptcy and ceased to make payments for the purchase of the license. See 11 U.S.C. 525(a) (prohibiting "governmental unit[s]" from "revok[ing]" a bankrupt or debtor's license "solely because such bankrupt or debtor * * * has not paid a debt that is dischargeable * * * under this title"). Neither case purported to determine whether public notice of intent to distribute licenses by lottery constitutes an invitation to contract. As petitioners concede (Pet. 17 n.17), in *In re NextWave*, the Second Circuit did not reach the question of what law governed FCC auctions and addressed "auction law" *only* as it "confirm[ed] and reinforce[d] the rationality of the FCC's interpretation of its regulations." 200 F.3d at 60. At most, that decision suggested in passing that contract principles might apply to a completed sale of a license, *id.* at 62, and says nothing about what agency communications can constitute an offer to contract. Similarly, in *NextWave* v. *FCC*, the D.C. Circuit held that the Commission "is bound by the usual rules governing the treatment of [licenses] *in bankruptcy*," 254 F.3d at 133 (emphasis added), and did not discuss contract law, much less the formation of contracts. *Cellco P'ship* v. *United States*, 54 Fed. Cl. 260 (2002) (see Pet. 28), involved only the decision whether to grant a stay and did not discuss whether the sale of licenses gives rise to enforceable contracts. *Commodities Recovery Corp.* v. *United States*, 34 Fed. Cl. 282, 289 (1995) (see Pet. 28), involved the auction of abandoned merchandise, not licenses. Petitioners cite no authority for treating the regulatory issuance of licenses as a contractual matter.

sidered a "contract" claim, it does not fall within the scope of Tucker Act jurisdiction.[8]

In any event, case law amply supports the conclusion that Congress intended the D.C. Circuit to be the exclusive forum for consideration of all such claims. This Court has consistently concluded that the creation of a comprehensive statutory and regulatory scheme that directs certain types of claims to be litigated in a specific forum supports the inference that Congress has withdrawn the Court of Federal Claims' Tucker Act jurisdiction over those claims. See, *e.g.*, *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982) (holding that litigation of medicare reimbursements is governed by the "precisely drawn provisions" of the Medicare statute rather than the Tucker Act); *Brown* v. *GSA*, 425 U.S. 820, 828 n.10, 834-835 (1976) (concluding that remedies against the United States for racial discrimination in employment, including under the Tucker Act, were repealed by implication by the Equal Employment Act of 1972); *Matson Navigation Co.* v. *United States*, 284 U.S. 352 (1932) (holding that the Suits in Admiralty Act of 1920 had withdrawn by implication Tucker Act jurisdiction); see also *United States* v. *Fausto*, 484 U.S. 439, 454-455 (1988) (concluding that the enactment of the "comprehensive and integrated review scheme" of the Civil Service Reform Act

[8] Petitioners contend that the Court of Federal Claims' conclusion that no contract was formed in this case represents an exercise of "hypothetical jurisdiction at its very worst" (Pet. 18) and that the court acted "ultra vires" in reaching that conclusion. Pet. 19. Because the Court of Federal Claims held in the alternative that it lacked jurisdiction over petitioners' claims, it appears that court did not engage in the practice of " 'assuming' jurisdiction for purpose of deciding the merits" that this Court has "decline[d] to endorse." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). In any event, this Court reviews only the judgment of the court of appeals, see 28 U.S.C. 1254(1); the trial court's alternative holding provides no basis for review.

repealed by implication judicial constructions of the Back Pay Act to cover certain claims). As the Court has held, "a precisely drawn, detailed statute pre-empts more general remedies." *Brown*, 425 U.S. at 834. Cf. also *Fiorentino* v. *United States*, 607 F.2d 963, 970 (Ct. Cl. 1979) ("It appears that the rule of strict construction of the consent to be sued overrides the rule that repeals by implication are disfavored."); *Puget Sound Power & Light Co.* v. *United States*, 23 Cl. Ct. 46, 57 (1991) (same), cert. denied, 502 U.S. 1091 (1992). In light of the "specific and comprehensive scheme for administrative and judicial review" that Congress provided in the Communications Act, Pet. App. 23a, the court of appeals correctly concluded that claims like petitioners' were within the exclusive jurisdiction of the D.C. Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2005

ADDENDUM

47 U.S.C. 402 provides in pertinent part:

(a) Procedure

> Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in [28 U.S.C. 2342-2351].

(b) Right to appeal

> Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
>
> > (1) By any applicant for a construction permit or station license, whose application is denied by the Commission.
> >
> > (2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.
> >
> > (3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any

rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

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