No. _____

In the
Supreme Court of the United States

SANDWICH ISLES COMMUNICATIONS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the lower court's holding that a regulatory taking claim based on confiscatory rates must be made at the Federal Communications Commission "within the comprehensive statutory scheme established by the Communications Act" denies Petitioner's right to due process of law because the precedents, including the precedents of this Court, hold that a regulatory taking claim of this nature would be premature at any time it could be made under the Federal Communications Commission's procedures.

PARTIES TO THE PROCEEDING

Petitioner, and plaintiff-appellant below, is Sandwich Isles Communications, Inc., a Hawaii corporation.

Respondent is the United States of America, acting through the Federal Communications Commission.

CORPORATE DISCLOSURE STATEMENT

Sandwich Isles Communications, Inc. is a closely held Hawaii corporation. Sandwich Isles Communications, Inc. is wholly owned by Waimana Enterprises Incorporated a closely held Hawaii corporation. Waimana Enterprises Incorporated has no parent or publicly held company owning 10 percent or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This cases arises from the following proceedings:

- *Sandwich Isles Communications, Inc. v. United States of America*, No. 20-1446 (Fed. Cir.) (opinion affirming judgment of the Court of Federal Claims, issued April 1, 2021)
- *Sandwich Isles Communications, Inc. v. United States of America*, No. 1:1-19-cv-00149-LAS (Fed. Cl.) (order granting motion to dismiss filed, May 16, 2019)

Other cases which may be considered related to this case are: (1) *Michael Katzenstein vs. Sandwich Isles Communications, Inc.,* Adv. No. 19-90022 (United States Bankruptcy Court for the District of Hawaii 2019) resulting in a judgment and writ of execution taking from Petitioner substantially all of Petitioner's assets; and (2) *United States of America vs. Sandwich Isles Communications, Inc.*, Civil No. 18-145 JMS RT (United States District Court for the District of Hawaii resulted in a writ of execution which literally took from Sandwich Isles Communications, Inc. all of its assets not already taken by the *Katzenstein* case).

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The Federal Circuit's opinion is reported at 992 F.3d 1355 (2021) and reproduced at App.1-21. The Court of Federal Claims' order granting the United States' motion to dismiss is reported at 145 Fed.Cl. 566 (2019) and reproduced at App.24-42.

JURISDICTION

The Federal Circuit issued its opinion on April 1, 2021, and on June 16, 2021, issued its order denying panel rehearing and rehearing en banc. App.1-23; 49-51. On July 19, 2021, this Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the Takings Clause, U.S. Const. amend. V is reproduced at App.51. The relevant portions of 28 U.S.C. § 1491(a), 48 U.S.C. § 402(a), and 28 U.S.C. § 2342 are reproduced at App.51-54.

STATEMENT OF THE CASE

I. Legal and Factual Background

The Telecommunications Act of 1996 ("'96 Act") amended the Communications Act of 1934 ("'34 Act") in part, to insure the Federal Communications Commission ("FCC") made modern telecommunications services available to **all** Americans without regard to

race, color, religion, national origin or sex. 47 U.S.C. § 151. The FCC had failed to reach all Americans under the '34 Act mandate. The '96 Act specifically mandates that the FCC provide support that is "specific, predictable and sufficient" for modern telecommunications services to "rural, insular, and high cost areas" where the costs of constructing and maintaining the infrastructure necessary to provide basic telecommunications services are prohibitively high. *See* 47 U.S.C. § 254(b)(5). The FCC met its Congressional mandate to those native Hawaiian citizens living on Hawaiian Home Lands, a "rural, insular, and high cost area," by designating Sandwich Isles Communications, Inc. ("SIC") an Eligible Telecommunications Carrier, and providing "specific, predictable and sufficient" support. The Hawaiian Home Lands were established by the Hawaiian Homes Commission Act of 1921, enacted by the United States Congress placing approximately 200,000 acres of land in trust for the benefit of native Hawaiians. It was on the basis of FCC's certification that SIC provided telecommunications service as a public utility under the federal law.

After inducing SIC to build the network it approved, the FCC then violated its statutory mandate by cutting off all support to SIC causing the taking.

A. Through Multiple Orders, the FCC Established the Rates SIC Could Charge so Low that SIC's Lenders Foreclosed and Sold SIC's Assets

SIC is a public utility, which only serves Native Hawaiians living on Hawaiian Home Lands ("HHL").

The HHL are primarily rural, isolated, non-contiguous areas, scattered across six different islands. Relying on the FCC's designation of SIC as a public utility and an eligible telecommunications carrier, SIC was able to borrow funds from US Department of Agriculture, Rural Utilities Service ("RUS") to invest in the infrastructure and equipment necessary to provide modern telecommunications to the previously unserved or underserved HHL. SIC continues to provide services as is required under federal law and the FCC's 2005 Order. *See* 47 U.S.C. § 214(a).

The rates SIC is allowed to charge its customers are set by the FCC. The rates, which Congress has mandated must be reasonably comparable to the rates paid in urban areas, *see* 47 U.S.C. § 254(b)(3), do not generate what it costs SIC to provide services to its customers on the HHL – most significantly, the service of the debt SIC undertook when investing in its infrastructure. Before 2011, the FCC supported the rates it allowed SIC to charge its customers by providing SIC with sufficient high-cost support from the Universal Service Fund ("USF") (as it continues to do with other carriers serving high-cost areas).

The FCC has not raised the rates SIC can charge its customers. However, the FCC has cut, and then terminated financial support for those customer rates. As a result, SIC lacks the revenues necessary to continue providing service to its customers as it is obligated to do under the FCC's 2005 Order and as a public utility. SIC has done everything it could to try to survive, but the low customer rate imposed by the FCC coupled with the absence of support have resulted

in foreclosure of SIC's equipment and infrastructure necessary to provide the service FCC mandates. Indeed, as a result of the low rates SIC is allowed to charge, on March 6, 2020, a creditor held an execution sale and auctioned off many of SIC's assets. The balance of SIC's equipment and infrastructure have been levied upon and are subject to imminent foreclosure auction at the election of the lender.

B. Unconstitutional Taking without Compensation Occurs When the Government-Mandated Rate is Too Low for the Utility to Generate a Reasonable Revenue on its own Investment

The law is well established that an unconstitutional taking occurs in the public utility context when the government (in this case, the FCC) sets rates so low that they are "so unjust as to be confiscatory" or when the rates "destroy the value of the utility's equipment and infrastructure for all purposes for which it was acquired, and in doing so practically deprives the owner without due process of law." *Duquense Light Co. v. Barasch*, 488 U.S. 299, 307 (1989). SIC had spent literally hundreds of millions of dollars on equipment and infrastructure necessary to service the HHL, all of which was rendered valueless, by the confiscatory rates imposed by the FCC. Based on this well recognized legal analysis, SIC filed its lawsuit against the United States in the Court of Federal Claims.

II. Procedural History

On October 11, 2019, the Court of Federal Claims ruled that SIC's taking claim was actually "targeted at

invalidating the FCC orders" and therefore dismissed the taking claim for lack of jurisdiction. App.9. On October 22, 2019, SIC moved for reconsideration on the ground that no takings claim was ripe at the time of the timely appeals before the FCC and therefore the proper, and only available, venue for a takings claim was before the Court of Federal Claims. SIC's motion for reconsideration was denied on January 31, 2010. App.45-48. In denying the motion, the Court of Federal Claims agreed that the takings claim could not have been raised before the FCC because it was not ripe. Moreover, the Court of Federal Claims expressly found any takings claim is still not ripe, stating "any takings claim, to the extent that one even exists, remains unripe," App.48, despite the fact that SIC was in foreclosure and most of its property has already been taken from it.

SIC appealed to the Federal Circuit, which on April 1, 2021 upheld the ruling of the Court of Federal Claims. App.1-21. The Federal Circuit ignored the precedent clearly holding that SIC could not have made a takings claim under the FCC's procedures for challenging the FCC's orders because a takings claim is not ripe when FCC's procedures mandate that challenges to FCC orders must be made:

> The fact remains that SIC has not raised its takings claim before the FCC, which it was required to do before seeking judicial review.

App.18-19. The Federal Circuit relied on *Alpine PCS, Inc. v. United States*, 878 F.3d 1086, 1096 (Fed. Cir. 2018). Unlike the present case, *Alpine* involved license revocation. *Alpine* is a limited ruling inapplicable

because an appeal from a license revocation is ripe immediately, while the authorities clearly hold that a taking claim based on confiscatory-rates is not ripe at the time an appeal could be filed from an FCC order.

REASONS FOR GRANTING THE PETITION

I. A Public Utility Cannot Make a Takings Claim in any Proceeding Authorized by the FCC for Challenging the FCC's Orders, and the Federal Circuit was Wrong to Conclude Otherwise

Upon review of this case, this Court will find that SIC has filed its takings claim at the right time and in the right court because there is nowhere else SIC could have presented its claim. The complaint filed in this case alleged that the FCC set the rates SIC is allowed to charge its customers so low as to be confiscatory, and constitute an unconstitutional taking of SIC's property without just compensation. Courts, including the United States Supreme Court, have unequivocally recognized that public utilities have the right to make such claims. *Duquesne Light Co.*, 488 U.S. at 307 (holding "[t]he Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory.") The courts have made it equally clear that a takings claim cannot be asserted in appeals from FCC orders. The federal courts have repeatedly held that a takings claim can only be made long after FCC appeals are over, because the impacts of the FCC orders must have been manifested and experienced before a taking claim can be made. As the Supreme Court noted "[t]he Constitution does not bind rate-making bodies to the

service of any single formula or combination of formulas. . . . [I]t is the result reached not the method employed which is controlling. It is not theory but the **impact** of the rate order which counts." *Duquesne*, 488 U.S. at 619 (citing *Fed. Power Comm'n v. Nat. Gas Pipeline Co. of Am.*, 315 U.S. 575, 586 (1942)) (emphasis added). This Court has consistently maintained the view that a plaintiff bringing a confiscatory rate takings claim must have hard and fast numbers in hand in order to avoid dismissal on ripeness grounds in subsequent cases. *See*, *e.g., Verizon Commc'ns, Inc. v. FCC,* 535 U.S. 467, 497 (2002); *Duquesne Light Co.,* 488 U.S. at 314.

Because the impacts cannot be known at the time of an appeal of a rate order under the FCC's procedures, a utility's claim of an unconstitutional taking because of confiscatory rates is routinely rejected as unripe. *See e.g., Verizon Commc'ns, Inc.* 535 U.S. 467. The Federal Circuit acknowledged these authorities, but failed to recognize that the FCC has no procedure for reviewing a takings claim after the impact of the rate are known. The only place such a claim could be made is in the Court of Federal Claims, under the Tucker Act. *See In re FCC 11-161*, 753 F.3d 1015, 1142 (10th Cir. 2014), in which the Tenth Circuit expressly held that a takings claim brought as an appeal from an FCC order would be subject to dismissal for lack of ripeness.

The Tenth Circuit cited *Verizon Commc'ns, Inc., supra*, wherein the Supreme Court expressly recognized "this Court has never considered a taking challenge on a ratesetting methodology without being presented with specific rate orders alleged to be

confiscatory." *Verizon Commc'ns, Inc.*, 535 U.S. at 471-72. The Court found that a takings claim is not ripe until a new rate has been set and the public utility has attempted to continue operations and remain economically viable under the new rate. A taking claim is not ripe until after the resulting rates have been determined and applied. *Id.* at 496. Only then, long after the opportunity to appeal from an FCC order has passed, can the public utility make a claim of an unconstitutional taking of its private property because of insufficient rates.

The controlling cases thus make it clear that SIC could not have brought its takings claim as an objection to FCC orders. The conclusion that SIC is making a disguised challenge to the FCC's orders is obviously wrong.

II. The Government Regulatory Ratemaking Imposed on SIC Effected a Taking

SIC did not plead its claims as challenges to FCC orders because the claims are not, in fact, facial challenges to FCC orders. As alleged in the complaint, SIC's rate is comprised of the rates paid by its customers and the support payments (reimbursements) it receives through various avenues, such as recovery from the NECA pool or through USF's high-cost fund. In addition to previous rate reducing orders, since 2015 the FCC's refusal to release a single penny in high cost USF reimbursements to SIC – was not dictated, or even suggested, by a single administrative order issued by the FCC. The FCC's failure to disburse or replace USF support is contrary to the 1934 Communications Act as amended by the '96 Act and has reduced SIC's

rate to such an extent that the rate is confiscatory. The foreclosure by SIC's lenders of all its assets is the "impact" this Court requires to meet the definition of an unconstitutional taking under the Fifth Amendment caused by Regulatory Rate Making.

The lower courts' emphasis was on numerous orders issued by the FCC, changing the methodology the FCC uses to calculate reimbursement rates, is an apparent effort to recast SIC's claims as facial, rather than as-applied, takings claims. SIC's claims are not based on the methodology(ies) adopted by the FCC. Focusing on FCC Orders is a distraction from the reality. SIC has not received one cent of USF support in years. Nothing in the FCC's orders suggested, compelled or directed that result. The government makes much of the order holding SIC liable for $27 million in reimbursement. But even that alleged liability was fully set off years ago by the amount that has been withheld. If allowed to stand, the Federal Circuit's holding authorizes and encourages the FCC to violate the '96 Act by arbitrarily setting rates so low by denying sufficient and predictable statutory mandated support resulting in the public utility losing all of its assets to foreclosure without remedy. This violates the public utility's right to due process of law.

As was alleged in the Complaint, the FCC approved SIC's construction of the same exact network approved by the U.S. Department of Agriculture, Rural Utilities Service that was ultimately built (and as it stands today) as evidenced by the FCC's 2005 Order made after reviewing all of the Rural Utilities Service approved the engineering, construction, and loans. If

the Rural Utilities Service had not made the loans to SIC and the FCC had not approved and initially paid the level of support necessary for a network of the scope that was ultimately built, SIC would not have built the network. The FCC set confiscatory rates after it approved the network as it exists today. Without the FCC's approval, SIC would not have invested the hundreds of millions of dollars in infrastructure necessary to service HHL.

III. The Court of Federal Claims' Holding that SIC's Taking Claim is Still Not Ripe Highlights the Unconstitutional Taking

Because of the rates imposed by the FCC, SIC has lost all of its investment in all of its assets. SIC's assets, infrastructure and equipment are all the subject of foreclosure proceedings, with most of them having been auctioned off to the highest bidder. The Court of Federal Claims' notion that SIC's taking claim is **still** not ripe demonstrates the absurdity of the denial of due process caused by the lower courts' holdings in this case.

In *In re FCC 11-161*, 753 F.3d at 1142, the court accepted the FCC's position that takings claims can arise out of USF ratemaking. The court quoted one of the FCC orders at issue in this case stating that if "any rate-of-return carrier can effectively demonstrate that it needs additional support to avoid constitutionally confiscatory rates, the [FCC] will consider a waiver request for additional support." *Id.* at 1069.

Moreover, the Court recognized that "[n]o takings claim is ripe until a party has invoked that process and

been denied." *Id.* SIC did invoke the waiver process and was denied. The Tenth Circuit went on to state that the "facial challenge fails because the FCC's Order will not necessarily lead to confiscatory rates." *Id.* at 1135. The court declined to entertain "the as-applied challenge because it is not ripe." *Id.* "When a carrier faces an insufficient return, it can seek greater support . . . . Until this process is invoked, the as-applied challenge is premature. If the FCC imposes confiscatory rates, carriers could then bring as-applied challenges." *Id.* at 1136 (citation omitted). There is no procedure for making a takings claim before the FCC. After the waiver is denied, the utility is allowed only 30 days to appeal; clearly not sufficient to meet the requirement in a taking case that the utility first attempt to survive with the lower rate before bringing an as-applied challenge.

SIC's takings claim is ripe now. SIC made a waiver request as contemplated by the FCC order, and it was denied. *See In re Connect America Fund*, 28 FCC Rcd. 6553 (F.C.C.), WC Docket No. 10-90, May 10, 2013. SIC then did all it could to survive under the impossible conditions imposed by the FCC. The damage has been done and is not prospective; there is nothing for the Court to guess about, and the claim is ripe. The Supreme Court, the courts of appeals, and even the FCC, have recognized that a takings claim may be brought under the 1934 and 1996 Acts. SIC's right to due process demands no less.

IV. The "Comprehensive Scheme" in the Communications Act Cited by the Federal Circuit Does Not Provide for Review of Takings Caused by Rate Regulation

The Federal Circuit relied on *Alpine* for the proposition that jurisdiction over regulatory takings lies in the FCC. However, in *Alpine*, the jurisdiction issue was decided sua sponte without the benefit of briefing and based on limited facts. Significantly, in *Alpine*, "there [was] no disagreement between the parties about the proposition that the FCC had the power to grant Alpine adequate relief, by eliminating the taking, providing compensation, or some combination." *Alpine,* 878 F.3d at 1096. The alleged unconstitutional taking in *Alpine* did not occur as a result of the FCC's rate making authority. The impact of the FCC order was immediate. Additionally, the Court was not required to consider whether the FCC could provide "just compensation" because the parties had agreed that, in their specific case, it could do so by cancelling the debt owed by the plaintiff. The panel in this case broadened *Alpine*'s limited holding' beyond the scope to which it legitimately applies.

The comprehensive scheme in the Communications Act cannot cover rate regulation takings. The Communications Act requires that appeals of FCC actions, which cause the taking occur before the impact of the regulatory rate order are determined. Furthermore, *Alpine* acknowledged that the FCC lacks authority to award monetary damages against itself, when it stated "compensation in a form **other** than monetary damages can be constitutionally adequate."

Alpine, 878 F.3d at 1097 (citation omitted). But it should be obvious to all that the FCC cannot provide non-monetary just compensation once the FCC's confiscatory rates have resulted in the utility's property being auctioned at a foreclosure sale. Nothing in the Communications Act nor FCC rules provides for paying just compensation for utility property unconstitutionally taken through confiscatory rates.

The FCC could have provided the constitutionally required relief and prevented the taking through its ratemaking authority by granting the waiver. However, once they denied the waiver, SIC could not meet the requirements of showing the impact would cause a taking before the thirty days to appeal the waiver denial expired. Additionally, nothing in the Communications Act requires the FCC to act on a Regulatory Rate reconsideration before a taking occurs. The Communications Act gives the D.C. Circuit Court jurisdiction to review the FCC's action (or non-action). The D.C. Circuit Court denied SIC a Writ of Mandamus to get the FCC to reconsider its action over five (5) years ago. This open request was cited by the Court of Claims as the reason the taking was (allegedly) still unripe despite all of SIC's assets being in foreclosure.

The Communications Act gives the FCC authority to decide all communications issues. Many of these decisions cause immediate harm which may result in an unconstitutional taking. For those actions, the Communications Act's comprehensive scheme provides relief **however,** for those whose harm needs to be shown after taking mitigating steps, the

Communications Act does not provide relief. The parties are always free to agree to the FCC's jurisdiction as in *Alpine*. In *FCC v. Florida Power and Light*, 480 U.S. 245 (1987), a rare Fifth Amendment takings case involving the Communications Act, this Court stressed the importance of the parties' agreement when relying on precedent holdings. Neither *Alpine* nor *Florida* addressed Fifth Amendment takings resulting from rate regulation. In *Florida*, both parties agreed on the underlying issue. The Eleventh Circuit Court's holding was reversed because it misapplied *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), a limited holding where the parties disagreed on the underlying issue. The Federal Circuit holding relies on Alpine in which the parties agreed on jurisdiction, here we do not.

When a taking cannot be established before the appeal period expires and the parties do not agree to FCC jurisdiction, the Communication Act's comprehensive scheme is not sufficient to displace the Tucker Act.

CONCLUSION

The law is clear that a public utility's property is unconstitutionally taken, when rates are confiscatory and set so low that the utility cannot achieve a return on its investment. The law is equally clear that a taking claim will be dismissed as unripe if it is made in an appeal from the FCC's orders before the impact is shown. The holding of the Federal Circuit deprives SIC, a public utility, of its right to assert its takings claim by requiring that the taking claim based on

regulatory rates, be filed in the FCC where the authorities uniformly hold it would be dismissed as unripe. The damage is made worse by the Court of Federal Claims' holding that SIC's taking claim is **still** not ripe because the FCC refuses to rule on a petition filed more than 5 years ago requesting they follow their statutory mandate contained in the '96 Act.

The authorities hold that the Tucker Act is a "gap filling" statute. SIC's right to due process of law requires that the gap presented here be filled by the Court of Federal Claims exercising jurisdiction under the Tucker Act.

Respectfully submitted,

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