No. 21-719

In the Supreme Court of the United States

SANDWICH ISLES COMMUNICATIONS, 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 orders of the Federal Communications Commission regarding the amount of federal subsidy funding that petitioner is eligible to receive, 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(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 992 F.3d 1355. The opinion of the Court of Federal Claims (Pet. App. 24-42) is reported at 145 Fed. Cl. 566.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22-23) was entered on April 1, 2021. A petition for rehearing was denied on June 16, 2021 (Pet. App. 49-50). By orders dated March 19, 2020, and July 19, 2021, this Court extended the time within which to file any petition for a writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing, as long as that judgment or order was issued before July 19, 2021. The petition for a writ of certiorari was filed on November

12, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress created the Federal Communications Commission (FCC), and enacted the Communications Act of 1934, 47 U.S.C. 151 *et seq.* (Communications Act or Act), "to make available * * * to all the people of the United States * * * a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. 151. The FCC must establish "specific, predictable and sufficient * * * mechanisms to preserve and advance universal service." 47 U.S.C. 254(b)(5). That universal-service mandate applies to, *inter alia*, all "rural, insular, and high cost areas." 47 U.S.C. 254(b)(3).

To promote universal service, the FCC created the Universal Service Fund, which is administered by the Universal Service Administrative Company and overseen by the FCC. See 47 C.F.R. 54.701(a). The Universal Service Fund consists of four separate funds, including a high-cost support fund, which enables certain eligible telecommunications carriers that serve rural, insular, and high-cost areas to recover reasonable costs of providing service. Telecommunications carriers that receive high-cost support funds must use them "only for the provision, maintenance, and upgrading of facilities and services for which the [funds are] intended." 47 U.S.C. 254(e). Telecommunications carriers in high-cost areas may also receive support from the National Exchange Carrier Association (NECA) pool, which is separate from the high-cost support fund. See 47 C.F.R. 69.601; *In re Sandwich Isles Commc'ns, Inc.*, 31 FCC Rcd 12,999, 13,006 n.42 (2016), recons. denied, 34 FCC Rcd 577 (2019), pet. dismissed, No. 19-1056, 2019 WL 2564087 (D.C. Cir. May 17, 2019).

2. Petitioner was formed in the mid-1990s to provide telecommunications services to native Hawaiians. Pet. App. 4. In 1997, petitioner was designated as an eligible telecommunications carrier for customers in the Hawaiian home lands, which consist of 200,000 acres in 70 noncontiguous parcels on six Hawaiian islands. *Ibid.* Because the Hawaiian home lands are "rural, insular, and high cost areas," 47 U.S.C. 254(b)(3), petitioner received high-cost support funds and participated in the NECA pool, Pet. App. 4.

a. Petitioner initially served the Hawaiian home lands by leasing capacity on an existing underwater cable for $1.9 million annually. Pet. App. 4, 29 n.1. Around 2007, petitioner entered into an exclusive, 20-year lease of an underwater cable owned by Paniolo, LLC. *Id.* at 4. The new lease was a variable lease for which the contractually required payments began at $15 million annually and rose to $24 million annually by 2018. *Id.* at 4-5. Petitioner is a wholly owned subsidiary of Waimana Enterprises, a Hawaiian corporation, and Paniolo is another corporate vehicle of Waimana. *Id.* at 4.

Petitioner sought inclusion of the lease in its "revenue requirement," 47 C.F.R. 69.601(b), so that it could receive reimbursement from the NECA pool for the cost of the lease. *Sandwich Isles Commc'ns, Inc.* v. *FCC*, 741 Fed. Appx. 808, 809 (D.C. Cir. 2018) (per curiam). In 2010, the FCC's Wireline Competition Bureau issued a declaratory ruling that permitted 50% of petitioner's lease expenses to be included in the revenue requirement, based on the Bureau's finding that this amount was justified in part by the potential for future growth. *Id.* at 809-810. On application for review, the FCC found that, because the projected growth had not materialized, reimbursement of 50% of petitioner's lease

costs was unjustified. *Id.* at 810. The FCC determined that petitioner was entitled to recover from the NECA pool only $1.9 million annually—the amount petitioner had spent under its previous lease—but that petitioner could retain the funds it had received at the 50% rate during the pendency of the appeal. *Ibid.* The D.C. Circuit denied petitioner's petition for review. *Id.* at 809-811.

b. In 2011, the FCC comprehensively reformed its regulatory system governing telephone service. Pet. App. 5. As part of those reforms, the FCC capped payments from the high-cost support fund at $250 per month per covered line, effective July 2014. 47 C.F.R. 54.302(a); see Pet. App. 5-6. The FCC permits a carrier to seek a waiver of the payment cap if the carrier demonstrates that the reduction in high-cost support funds would put consumers at risk of losing service. Pet. App. 6; see *In re Connect Am. Fund*, 28 FCC Rcd 6553, 6555 (2013).

Before the 2011 reforms, petitioner received more than $1150 per month per covered line. Pet. App. 5-6. Petitioner sought a payment-cap waiver, which the FCC's Wireline Competition Bureau denied in May 2013. *In re Connect Am. Fund*, 28 FCC Rcd at 6553. The Bureau found that petitioner had "failed to show good cause for a waiver at th[at] time" because the requested waiver "would allow it to retain a number of significant and wasteful expenses, totaling many millions of dollars, including significant payments to a number of affiliated and closely-related companies." *Ibid.* The Bureau also noted that petitioner's "corporate expenses [we]re 623 percent greater than the average for compa-

nies of similar size with the highest corporate operations expenses." *Ibid.* Petitioner did not petition for review of that order. Pet. App. 6.

c. In 2015, Albert Hee, who was then the manager of both petitioner and Waimana, and who had previously been the president of petitioner and the sole owner of Waimana, was convicted on six counts of tax fraud and one count of corruptly impeding the administration of internal revenue laws. Pet. App. 4, 6, 32; see 26 U.S.C. 7206(1), 7212(a). Those convictions were based on Hee's longstanding practice of categorizing personal expenses as business expenses and failing to report personal-expense payments as income. Pet. App. 6. Between 2002 and 2012, Hee received more than $4 million from Waimana for his personal expenses. *Id.* at 6-7.

After Hee's conviction, the Universal Service Administrative Company, at the FCC's direction, "suspended high-cost funding to [petitioner] pending completion of further investigation and/or other ameliorative measures to ensure that any funding provided is used solely in a manner consistent with Commission rules and policies." *In re Sandwich Isles Commc'ns*, 31 FCC Rcd at 13,012. In 2015, petitioner petitioned the FCC to rescind that suspension; that petition remains pending. Pet. App. 7. In 2017, petitioner asked the D.C. Circuit to issue a writ of mandamus ordering the FCC to reinstate petitioner's high-cost support funds; the court denied the mandamus petition in 2018. *In re Sandwich Isles Commc'ns, Inc.*, No. 17-1248, 2018 U.S. App. LEXIS 4139 (Feb. 16, 2018) (per curiam).

d. An audit by the Universal Service Administrative Company determined that, from 2002 to 2015, petitioner had received more than $27 million of high-cost support funds that it should not have received. *In re Sandwich*

Isles Commc'ns, 31 FCC Rcd at 13,012-13,014. In 2016, the FCC ordered petitioner to repay that amount and continued the suspension of petitioner's high-cost support funds. *Id.* at 13,043-13,044. Petitioner sought reconsideration of that order, which the FCC denied in 2019. *In re Sandwich Isles Commc'ns, Inc.*, 34 FCC Rcd 577, 579 (2019). The D.C. Circuit dismissed petitioner's petition for review as untimely. *Sandwich Isles Commc'ns, Inc.* v. *FCC*, No. 19-1056, 2019 WL 2564087 (May 17, 2019) (per curiam).

3. a. In January 2019, petitioner filed this suit in the Court of Federal Claims (CFC). Pet. App. 8. Petitioner alleged that the cumulative effect of the reductions of its subsidies was to take petitioner's property without just compensation, in violation of the Fifth Amendment. *Id.* at 8-9. The CFC dismissed petitioner's complaint. *Id.* at 24-42. The court explained that the Communications Act and the Hobbs Act, 28 U.S.C. 2341 *et seq.*, prevented it from exercising jurisdiction over a challenge to an FCC decision or order. See Pet. App. 37-38. Because petitioner's Fifth Amendment takings claim was "targeted at invalidating * * * FCC orders," the CFC held that it lacked jurisdiction over that claim. *Id.* at 42.

Petitioner filed a motion for reconsideration, which the CFC denied. Pet. App. 45-48. The court reiterated its prior conclusion that "the true nature of [petitioner's] case was a challenge to FCC orders," so that the case was "outside of th[e] [c]ourt's jurisdiction." *Id.* at 46-47. The court also stated that, because petitioner "ha[d] not yet received a decision regarding its 2015 petition challenging the suspension of its high-cost subsidies, any takings claim, to the extent that one even exists, remain[ed] unripe." *Id.* at 48.

b. The court of appeals affirmed. Pet. App. 1-21. The court explained that "a claim for just compensation under the Takings Clause must be [brought to] the [CFC] in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." *Id.* at 15 (quoting *Horne* v. *Department of Agric.*, 569 U.S. 513, 527 (2013)). The court noted that Tucker Act, 28 U.S.C. 1491 *et seq.*, 2341 *et seq.*, jurisdiction is displaced in part by the Communications Act and the Hobbs Act, which provide (with exceptions for certain claims that must be brought in the D.C. Circuit) that the regional courts of appeals "have 'exclusive jurisdiction' to 'enjoin, set aside, suspend (in whole or in part), or to determine the validity of' all final orders of the Commission" in "'[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission.'" Pet. App. 12 (quoting 28 U.S.C. 2342 and 47 U.S.C. 402(a)) (brackets in original).

The court of appeals explained that petitioner's takings claim was "based on its disagreement with FCC decisions regarding the amount of subsidies [petitioner] could receive from the [Universal Service Fund] and NECA pools," and on its disagreement with the FCC's denial of its request "for waiver of the $250 per-line, per-month cap on high-cost universal service support." Pet. App. 17. Because petitioner's "allegations take aim at FCC orders and seek to 'enjoin, set aside, annul, or suspend' them," the court found that "the statutory scheme set forth in the Communications Act displaces the [CFC's] Tucker Act jurisdiction" over those claims. *Ibid.* (quoting 47 U.S.C. 402(a)). The court explained that, "if [petitioner] wanted to challenge the FCC orders, it was required to do so within the comprehensive statutory scheme established by the Communications

Act—that is, by first filing an appeal with the FCC before pursuing a judicial remedy" in the appropriate regional court of appeals. *Id.* at 18.

The court of appeals also rejected petitioner's argument that petitioner could not have raised its takings claim in a challenge to any of the relevant FCC orders. Pet. App. 18-20. The court explained that petitioner "could have raised a constitutional takings claim [in] the FCC, challenging the rate; the FCC had authority to grant relief, including waiver of the rate it set; and if the FCC denied the waiver, [petitioner] could appeal that decision to the full commission and then to the court of appeals." *Id.* at 19. The court noted, however, that petitioner had "not raised its takings claim before the FCC." *Ibid.* And the court emphasized that petitioner "cannot, on alleged ripeness grounds, bypass the comprehensive statutory scheme for judicial review established by Congress in the Communications Act." *Id.* at 20.

ARGUMENT

Petitioner contends (Pet. 6-15) that the CFC should have exercised Tucker Act jurisdiction over its takings claim premised on allegedly confiscatory rates. The court of appeals correctly rejected that contention, holding that the Communications Act's judicial-review provision displaced the Tucker Act remedy, and its decision does not conflict with any decision of this Court or of another court of appeals. This Court recently denied review in another case that presented similar issues, see *Alpine PCS, Inc.* v. *United States*, 139 S. Ct. 78 (2018) (No. 17-1507), and the same result is warranted here.

1. The Tucker Act waives sovereign immunity and vests the CFC with jurisdiction over certain monetary

claims against the United States. 28 U.S.C. 1491(a)(1). The CFC's Tucker Act jurisdiction encompasses "claim[s] 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 the United States, or for liquidated or unliquidated damages in cases not sounding in tort." *Ibid.* "The Tucker Act's jurisdictional grant, and accompanying immunity waiver, suppl[y] the missing ingredient for an action against the United States for the breach of monetary obligations not otherwise judicially enforceable." *United States* v. *Bormes*, 568 U.S. 6, 12 (2012). But the Tucker Act does not apply "when a law assertedly imposing monetary liability on the United States contains its own judicial remedies," because such a statute "supersedes the gap-filling role of the Tucker Act." *Id.* at 12-13.

Although a "claim for just compensation under the Takings Clause" generally "must be brought to the [CFC] in the first instance," such a claim 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). In *Horne*, this Court held that raisin handlers could not bring a takings claim in the CFC because the "comprehensive remedial scheme" established by the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, "afford[ed] handlers a ready avenue to bring takings claims against" the United States Department of Agriculture and thereby "withdr[ew] Tucker Act jurisdiction over [the handlers'] takings claim." 569 U.S. at 527-528.

2. a. In this case, the court of appeals correctly held that petitioner's takings claim may not proceed under

the Tucker Act because the Communications Act provides the exclusive path for review of that claim. The Communications Act provides for judicial review of FCC orders in 47 U.S.C. 402. Section 402(b) gives the D.C. Circuit exclusive jurisdiction over appeals from certain FCC orders that are not at issue here. 47 U.S.C. 402(b). Section 402(a) states that "[a]ny 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" the Hobbs Act. 47 U.S.C. 402(a). The Hobbs Act in turn provides that "[t]he court[s] of appeals (other than the United States Court of Appeals for the Federal Circuit) ha[ve] exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of * * * all final orders of the [FCC] made reviewable by [S]ection 402(a)." 28 U.S.C. 2342(1). This Court has held that the regional courts of appeals' jurisdiction over claims covered by Section 402(a) is exclusive. *FCC* v. *ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984).

To determine whether Section 402(a) covers a particular claim, a court must consider the "substance" of the claim rather than accepting a litigant's characterization of it. See *ITT World Commc'ns, Inc.*, 466 U.S. at 468 (finding that "[t]he appropriate procedure for obtaining judicial review" was a petition for review under Section 402(a) where, "[i]n substance, the complaint * * * raised the same issues and sought to enforce the same restrictions upon agency conduct as did [a] petition for rulemaking that was denied by the FCC"). The court of appeals correctly applied that framework here. The court recognized that petitioner's allegations, although not framed as a direct challenge to any FCC order or

action, "take aim at FCC orders and seek to 'enjoin, set aside, annul, or suspend' them." Pet. App. 17 (quoting 47 U.S.C. 402(a)). The challenged agency actions include FCC orders limiting and denying high-cost support funds and declining to waive caps on those funds. See pp. 3-6, *supra*. The court therefore correctly held that petitioner's takings claim was "governed by [Section] 402(a)" and could not be brought in the CFC. Pet. App. 17.[1]

b. Petitioner argues (Pet. 6-7) that takings claims alleging confiscatory rates cannot be raised within the Communications Act's scheme for review because such claims "can only be made long after FCC appeals are over" when "the impacts of the FCC orders * * * have been manifested and experienced." That argument reflects a misunderstanding of this Court's precedents and of the facts of this case.

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[1] When a plaintiff asserting a takings claim assumes or concedes the lawfulness of the relevant government conduct, but argues that the lawful action has eliminated or constrained a preexisting property right in a manner requiring just compensation, the plaintiff's recourse ordinarily is a Tucker Act suit in the CFC. See Br. in Opp. at 12, 14-15, *Alpine PCS*, *supra* (No. 17-1507). That situation is not presented here, however, because petitioner's takings claim rests on the premise that the FCC acted *unlawfully* in denying petitioner high-cost support funds. See, *e.g.*, Pet. 8 ("The FCC's failure to disburse or replace [Universal Service Fund] support is contrary to the * * * Communications Act."); Pet. 9 ("[T]he Federal Circuit's holding authorizes and encourages the FCC to violate the [Communications Act] by arbitrarily setting rates" and "denying * * * statutor[ily] mandated support."); Compl. 25 ("The FCC violated provisions of the [Communications] Act[] mandating compensation through Universal Service Fund disbursements."); see also Br. in Opp. at 15-16, *Alpine PCS*, *supra* (No. 17-1507).

This Court has recognized "the general rule * * * that any question about the constitutionality of ratesetting is raised by" the "rates" that are set, "not [the] methods" of setting those rates. *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467, 525 (2002). Although that general rule requires a plaintiff to wait until a *rate* is set before bringing a takings claim, it does not require all "impacts" of the rate to "be[] manifested and experienced" before a rate-setting order can be challenged. Pet. 6-7; see Pet. 13.

The orders that petitioner alleges created a confiscatory taking—the 2016 order limiting petitioner's recovery of its lease costs to $1.9 million annually from the NECA pool; the 2013 order denying petitioner a waiver of the per-line cap on high-cost support funds; the 2015 order suspending all high-cost support funding to petitioner; and the 2016 order continuing that suspension and requiring petitioner to repay $27 million in high-cost support funds—are all analogous to final ratemaking orders, and all involve the FCC's administration of pertinent federal funding provisions. Petitioner could have raised a takings challenge to the relevant FCC action in any of those administrative proceedings, and it could have petitioned for review in the appropriate regional court of appeals if the FCC denied relief. See Pet. App. 19.[2] Because petitioner did not raise a timely

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[2] In *In re FCC 11-161*, 753 F.3d 1015 (2014), cert. denied, 575 U.S. 995, and 575 U.S. 996 (2015), the Tenth Circuit held that a takings challenge to an FCC order was not ripe because a carrier "fac[ing] an insufficient return" upon application of the order could "seek greater support" from the FCC and would have a ripe takings claim "[i]f the FCC impose[d] [a] confiscatory rate[]." *Id.* at 1136. Contrary to petitioner's suggestion (Pet. 7-8, 10-11), that approach would have allowed petitioner to bring a takings challenge in any of

takings claim with the FCC, it was not entitled to judicial review of any such claim under the exclusive review scheme laid out in the Communications Act. But petitioner's failure to pursue its claims administratively cannot create jurisdiction in the CFC.

The experiences of other litigants belie petitioner's assertion that it could not have brought its takings claim under the Communications Act's scheme for review. The courts of appeals have repeatedly adjudicated takings claims where litigants first raised those claims before the FCC and then petitioned for review under Section 402. See, *e.g.*, *Cablevision Sys. Corp.* v. *FCC*, 570 F.3d 83, 98-99 (2d Cir. 2009), cert. denied, 560 U.S. 918 (2010); *Alabama Power Co.* v. *FCC*, 311 F.3d 1357, 1361-1371 (11th Cir. 2002), cert. denied, 540 U.S. 937 (2003); *Sinclair Broad. Grp., Inc.* v. *FCC*, 284 F.3d 148, 166-167 (D.C. Cir. 2002); *Rural Tel. Coal.* v. *FCC*, 838 F.2d 1307, 1313-1314 (D.C. Cir. 1988).[3]

c. Petitioner's remaining arguments lack merit. Petitioner suggests (Pet. 13) that it could not have asserted its Fifth Amendment claim through the Communications Act's review mechanism because "[n]othing in the Communications Act nor [the] FCC rules provides for paying just compensation" for losses that have al-

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the FCC proceedings at issue here. For example, after the FCC denied petitioner's request for "greater support" by declining to waive the cap on high-cost support funds, a claim that the denial of the waiver "impose[d] [a] confiscatory rate[]" would have been ripe. *In re FCC 11-161*, 753 F.3d at 1136.

[3] The government has argued that petitioner's takings claim lacks merit because, *inter alia*, a denial of high-cost support funds does not effect a taking of petitioner's property. See Pet. App. 11. The question presented here, however, concerns the proper forum for bringing such claims, not their proper resolution on the merits.

ready been incurred. But if petitioner had timely asserted a takings claim in any of the relevant FCC proceedings, the FCC could have awarded other relief that might have provided just compensation (including by eliminating any taking or offsetting any taking with a credit against the amount petitioner owed the FCC) if it believed that such relief was warranted. The FCC's denial of any such claim would have been reviewable in the appropriate regional court of appeals, which could have determined "whether a taking occurred and, if so, whether the FCC decision 'yielded just compensation.'" *Alpine PCS, Inc.* v. *United States*, 878 F.3d 1086, 1098 (Fed. Cir.) (brackets and citation omitted), cert. denied, 139 S. Ct. 78 (2018). If the court in such a case found that a taking had occurred and that the FCC had not provided adequate relief, the court could order the FCC to provide monetary compensation.

Petitioner also suggests (Pet. 10-11) that this Court's review is warranted because, in denying petitioner's motion for reconsideration, the CFC stated that "any takings claim, to the extent that one even exists, remains unripe" because petitioner "has not yet received a decision regarding its 2015 petition challenging the suspension of its high-cost subsidies." Pet. App. 48. But that passing statement was unnecessary to the court's determination that it lacked jurisdiction over petitioner's takings claim. Neither of the decisions below rests on a determination that petitioner's takings claim is unripe. And petitioner's speculation (Pet. 6-8) that hypothetical takings claims that it could have presented to the FCC and the appropriate regional court of appeals under Section 402(a) of the Communications Act would have been treated as unripe provides no basis for further review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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