No. _____

In The
Supreme Court of the United States

ALPINE PCS, 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

The question presented is:

> Whether A Takings Claim Against The Federal Communications Commission Can Only Be Brought In The United States Court of Federal Claims Given The Requirement Of Final Agency Action In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), And The Absence Of Congressional Intention To Require That Such Claims Be Filed Elsewhere.

On January 5, 2010, after bewildering delays, the Federal Communications Commission made a final agency determination that Alpine PCS was not entitled to a waiver of licensure fees or a restructuring of installment debts relating to broadband licenses issued to Alpine in 1996. Alpine had first sought relief from the agency in 2002. Only after the agency had made its final determination that Alpine was not entitled to relief did Alpine turn to United States Court of Federal Claims, contending that, given the particular history of its relationship with the FCC, the agency had engaged in an unlawful taking of Alpine property in violation of the Fifth Amendment prohibition against taking property without just compensation.

On January 4, 2016, Alpine availed itself of the six-year statute of limitations for raising claims in the United States Court of Federal Claims, and filed a suit raising, among other claims, a takings claim. The trial court granted the Government's motion to dismiss that

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action, ruling that the statute of limitations accrued before final FCC action, accruing, at the very latest, when the FCC sold the broadband licenses out from under Alpine in 2008, thus making the latest possible date a takings claim could be filed during 2014.

Alpine sought relief in the United States Court of Appeals for the Federal Circuit, arguing that, under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the trial court erred in that Alpine's right to bring a takings claim did not, and could not, as a matter of law, accrue until final agency action by the FCC. The appellate court sidestepped this issue, deciding the case on an issue neither party briefed, to wit: Alpine could have, and should have, brought its takings claim to the FCC, because Congress had created a specific remedial scheme establishing an exclusive framework for liability under the Federal Communications Act, *citing United States v. Bormes*, 568 U.S. 6, 12-13 (2012) and its progeny.

The appellate court ignored this Court's requirement of final agency action before a takings claim accrues. In effect, the appellate court held that Alpine was required to bring a claim before the claim was ripe for adjudication. Nothing in the Federal Communications Act requires a party to bring a takings claim to the FCC; this Court's holding in *Williamson* prohibits doing so. When Alpine asked the appellate court to

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reconsider so that it could effectively brief this issue, the Court denied the motion without explanation.

The ripeness requirement in *Williamson* has confounded scholars, litigants, and, from time to time, lower courts since *Williamson* was decided in 1985. Alpine seeks certiorari to settle whether ripeness means what it says: Until final action, a party cannot bring a takings claim. Simply put, Alpine contends Congress lacks the authority to supplant this Court's clear requirement that until final agency action, no takings claim accrues. As a result, the only forum in which a takings claim can be raised is the United States Court of Federal Claims.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner Alpine PCS, Inc., is a corporation engaged in the business of telecommunications. Its principal and exclusive owner is Robert Broz, a resident of the State of Michigan.

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

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PETITION FOR A WRIT OF CERTIORARI

Alpine PCS, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this matter.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Federal Circuit, reported at 878 F.3d 1086 (2018), is reprinted in the Appendix (App.) at 1-25. The appellate court's ruling denying the petitioner's request for a rehearing is reprinted at App. 42. The underlying decision of the United States Court of Federal Claims is reprinted at App. 26-40.

JURISDICTION

The United States Court of Appeals for the Federal Circuit issued its decision on January 2, 2018, and denied a motion for rehearing on February 1, 2018. App. 1, 42. Jurisdiction of this Court is evoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall

private property be taken for public use, without just compensation."

Title 47 Section 402(b)(5) provides in pertinent part: "Appeals may be taken from decisions and orders of the [Federal Communications] Commission to the United States Court of Appeals for the District of Columbia in any of the following cases: . . . By the holder of any . . . station license which has been modified or revoked by the Commission."

Title 28 Section 1491(a)(1) provides in pertinent part: "The *United States Court of Federal Claims* shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution,. . . ."

INTRODUCTION

The Takings Clause of the Fifth Amendment is not simply a prohibition against the government's taking property; it is a prohibition against taking property without just compensation. It is the just compensation requirement that drives the ripeness doctrine applicable to takings claims. Until a government acts with finality on a taking, it cannot be said, as a matter of law or fact, whether the compensation offered is just. A party seeking judicial review of a taking must wait until there is a final agency action before turning to the courts for relief. Only then will a court be able to determine whether the compensation given was just.

Sovereign immunity prohibits claims against the government unless the sovereign consents to be sued. The Tucker Act waives sovereign immunity for takings claims, requiring such claims to be filed in the United States Court of Federal Claims. While Congress is free to create other statutory schemes offering relief to those who have been aggrieved by the government, Congress has not sought to do so in the context of takings claims. That is because of this Court's requirement that claims arising under the Fifth Amendment be ripe for adjudication before a litigant seeks judicial relief. Takings claims don't accrue, they don't exist as a matter of law, until there is a final agency action.

Logically, it follows that until an agency has acted with finality no court, and certainly no administrative agency, has jurisdiction over such a claim. As a matter of law, then, it follows that whatever the Congressional intent in creating the Federal Communications Commission (FCC), Congress could not have intended to repose the power to adjudicate takings claims in the FCC. It simply defies reason to suggest that an agency can review its own final action; if the claim cannot accrue until the agency acts with finality, there simply is no logical way a party can bring a takings claim to an agency for review.

Congress certainly can, and in fact has, created alternatives for raising contract claims against the government. Thus, in the case of the Federal Communications Act, a party seeking judicial review of a breach of contract claim against the Federal Communications Commission, must seek review by the United

States Court of Appeals for the District of Columbia. Claims of breach of contract can be perfected in administrative proceedings as special and affirmative defenses against agency licensure actions. No such opportunity exists to raise a claim, and make a record, with regard to takings claims.

In Alpine's case, the FCC granted broadband licenses after an auction. App. 3. The agency required a hefty licensure fee for these licenses: Alpine was offered installment notes secured by the licenses themselves to pay the licensure fees. App. 3. The FCC, paradoxically, required that claims of breach of the agreement be litigated in a court with no jurisdiction to hear them, the United States District Court of the District of Columbia. App. 8. When Alpine sought relief from adverse agency action in that court under the contract's choice of forum clause, the government claimed the court lacked jurisdiction, and the case was dismissed. On appeal, the D.C. Circuit made clear that only Congress can waive the requirements of sovereign immunity. App. 8-9. Whatever the FCC's contract stated, waiver of sovereign immunity was not the prerogative of the executive branch: Alpine lost years of time and incurred enormous expense trying to honor the contract it signed with the sovereign.

When Alpine turned to the United States Court of Federal Claims for relief, the Court dismissed the action, ruling that the statute of limitations had expired on such a claim. App. 9-10. Significantly, the Claims Court drew an important distinction. It ruled that the contract claims Alpine asserted must, as a matter of

law, be brought to the United States Court of Appeals for the D.C. Circuit. App. 36. The Claims Court drew the proper distinction between contracts and takings claims, however. It ruled that it had jurisdiction over the takings claim, implicitly recognizing what the United States Court of Appeals for the Federal Circuit could not see: A takings claim is not a contract claim. App. 37-38. Congress cannot direct takings claims to regulatory agencies because, by definition, takings claims can only be brought once there is a final agency action. It simply makes no sense to suggest that an agency can review its own final action.

The Claims Court only got it half right, however. While it parsed the sovereign immunity correctly, it ignored the ripeness requirement. While the FCC sold Alpine's licenses out from under Alpine in 2008, the FCC did so before it had completed final agency action as to Alpine's request for relief from its inability to meet the terms of the installment note. The Claims Court erred concluding that the takings action had accrued in 2008. App. 38. In doing so, it neglected to consider the full scope and sweep of the Fifth Amendment prohibition against taking property *without just compensation*. Only when the agency had completed its action could the extent of Alpine's loss be known. Alpine could not file a claim for a taking in any court until, at the earliest, January 2010, almost two years after the agency had auctioned *its property.* The Federal Circuit fared little better in handling Alpine's takings claim, effectively repeating the same error the Claims Court committed – it simply failed to account for finality

requirement for determining what just compensation would be. The Circuit Court ruled that Alpine could have brought its takings claim to the agency without saying just how Alpine could bring a claim that was not yet ripe to an agency. App. 22.

Ripeness is not exhaustion. Exhaustion requires a party to bring a claim to an inferior tribunal as a prerequisite for later judicial review. Ripeness, by contrast, entails the recognition that a claim cannot be made prematurely, until all the facts, in this case, the extent of a loss, are known.

Both the Claims Court and the Circuit Court failed to give due regard to ripeness and, as a result, deprived Alpine of meaningful review of its claim. Alpine ultimately seeks a remand to the United States Court of Federal Claims on grounds that its takings claim was timely filed in the right court in a timely fashion. This Court's ripeness jurisprudence requires nothing less.

The federal appellate court skirted the ripeness issue in this case, ruling that any claim for a taking should have been brought first to the FCC and then to the United States Court of Appeals for the District of Columbia under Title 47 United States Code Section 402(b)(5), a section of the Federal Communications Act that directs litigants seeking review of licensing decisions, and decisions ancillary to licensing decisions: the appellate court. App. 24. This ruling is unsupported by the required finding that Congress intended such claims to go to the federal appellate court.

Nothing in the legislative history of the Federal Communications Act, or in the reported cases interpreting Title 47 U.S.C. Section 402(5) supports such a ruling.

STATEMENT OF THE CASE

The uncontested facts are reported as follows. Alpine won several broadband licenses at auction by the FCC in 1996, agreeing to pay the licensing fees associated with the licenses by way of installment notes. App. 3. It made timely payments on the note until 2002, when it fell behind on payments and sought relief from the FCC by way of waivers and restructuring requests available to it under the contract it signed with the FCC. App. 28-29. It did not seek immediate relief in the bankruptcy courts, as did Nextwave, a fellow licensee who never even made its first installment payment. *See FCC v. Nextwave Personal Communications Inc*., 537 U.S. 293 (2003). The FCC changed its default rules as to licensees by regulatory fiat in 1999. However, when it presented Alpine PCS with an offer to modify its contract it provided Alpine with a new contract reflecting those changes, Alpine PCS did not sign the modification contract, thus declining the FCC offer. App. 5-6.

In 2002, the FCC acknowledged receipt of Alpine's requests for relief, but mistakenly listing Alpine's licenses as having reverted to the FCC. The agency continued to discuss restructuring with Alpine. App. 6-7. In 2004, the FCC notified Alpine that it considered the

firm in default on the notes without having acted on Alpine's timely filing of its waiver and restructuring requests. App. 7. It was not until 2007, that the FCC's Wireless Telecommunications Bureau issued a written decision denying Alpine's requests for relief. App. 7. Upon receipt of the telecommunications bureau's rejection of its request for relief, Alpine immediately filed a request for full agency review of the bureau's decision. Alpine sought a stay of any FCC enforcement action regarding the licenses in the bankruptcy court, and that stay was denied. The FCC held an auction and resold the licenses in 2008, before final agency action had occurred on the waiver and restructuring requests. The FCC did not issue a final agency decision until January 5, 2010. App. 7.

Alpine then sought to bring a claim against the FCC for breach of contract in the United States District Court for the District of Columbia, the forum in which the FCC's contract required such claims to be filed. Upon filing, the FCC took a position at variance with the contract, arguing that the choice of forum language in the contract was invalid in that it amounted to an unlawful waiver of sovereign immunity by the executive branch. The District Court agreed, and dismissed the action, noting that only Congress can waive sovereign immunity, and that, under the terms of the Federal Communications Act, disputes over licensure were required to be brought directly to the United States Court of Appeals for the District of Columbia. Alpine appealed this ruling, and lost. App. 7-9.

Thereafter, Alpine filed in the United States Court of Federal Claims, seeking relief for, among other things, an unlawful taking without just compensation. That action was filed on January 4, 2016, falling within the six-year statute of limitations for Tucker Act claims. App. 9.

The FCC again moved to dismiss, claiming, among other things, that Alpine's claim in the United States Court of Federal Claims was time-barred in that Alpine's takings claim accrued no later than 2008, when the FCC resold Alpine's licenses. The FCC, and the Court of Claims, failed to account for, or rule on, the accrual issue presented by the fact that the FCC did not make a final agency determination on Alpine's waiver and restructuring requests until January 5, 2010. On Alpine's theory, its takings claim was timely filed in the United States Court of Federal Claims because its claim could not have accrued until there was final agency action.

Alpine sought review in the United States Court of Appeals for the Federal Circuit, urging the Court to apply the ripeness doctrine of *Williamson*. In its written decision, the Federal Circuit failed even to address the applicability of ripeness doctrine to Alpine's takings claims, instead ruling that Alpine should have filed its takings claim in the United States Court of Appeals for the D.C. Circuit. The Federal Circuit concluded that because Congress had created a complete remedial scheme for parties aggrieved by the FCC in the Federal Communications Act of 1934, the Tucker Court's jurisdiction over takings claims was

supplanted. Relying upon this Court's ruling in *Horne v. Dep't of Agriculture*, 569 U.S. 513, 526-28 (2013), the appellate court ruled that the Claim's Court's jurisdiction was "displaced" because Congress had crafted a complete remedial scheme in the Federal Communications Act of 1934. However, the appellate court refused to make any effort to distinguish between Congress's right to waive immunity, and this Court's interpretation of what ripeness requires in making a takings claim.

Horne's displacement theory was an issue never raised by the United States Court of Federal Claims in it takings claim decision, and it was an issue unaddressed in the Government's briefs at both the trial and appellate level. Indeed, the issue was not even argued in the Federal Circuit arguments on the case. When Alpine sought rehearing to be given a chance to address the *Williamson* issue, the Federal Circuit denied the request in a terse ruling.

To date, no court considering this case has yet to issue a decision discussing the applicability of the ripeness doctrine in *Williamson* to the facts in this case. That is most likely because the ripeness doctrine in takings claims has befuddled both scholars and litigators for years. This Court needs to clarify an unsettled area of the law, and the Alpine case presents an opportunity to do so.

REASONS FOR GRANTING THE PETITION

I. The Ripeness Doctrine's Pivotal Role In Takings Claims Is Undermined By A Legal Rule Permitting Claims To Be Brought Before "Final Agency Action"

One needn't go so far as has Erwin Chemerinsky and assert that "sovereign immunity deserves no place in American law"[1] to be troubled by this case. Like it or not, sovereign immunity is a fixed point in this Court's jurisprudence. But when the sovereign consents to be sued, a litigant has every right to expect something other than legerdemain when it seeks to hold the sovereign accountable. Alpine rightly suspects that its claims have been given short shrift. To date, no court considering the issues raised by Alpine has yet to do what this Court's jurisprudence requires: Apply the ripeness requirement necessary to making a takings claim.

The requirements of *Williamson's* ripeness doctrine are intended to assure that takings claims are not brought prematurely; in this case, both the United States Court of Federal Claims, and the United States Court of Appeals for the Federal Circuit have misapplied the ripeness doctrine in ways that will yield confusion in future cases. If permitted to stand, the rulings will only contribute to the confusion that the ripeness has created among scholars and practitioners

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[1] Chemerinsky, Erwin, *Against Sovereign Immunity*, 53 Stanford L. Rev. 1201, 1202 (2001).

nationwide.[2] Although widely regarded as applicable only to state regulatory proceedings, nothing in the language of *Williamson* confines its ripeness requirement to state proceedings. Alpine contends the ripeness requirements are identical in both state and federal proceedings – certainly there is no language in *Williamson* that defeats Alpine's claim.

Williamson makes clear that a takings claim does not accrue until there is a final agency action.

> [T]he application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulation to the property at issue.

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[2] A sampling of the difficulties the ripeness requirement entails is evident from the following: *See, for example*: David Breemer, *Overcoming Williamson County's Troubling State Procedures Rule: How the England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209 (2003); David Breemer, *You Can Check Out But You Can Never Leave: The Story of San Remo Hotel – the Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review*, 33 B.C. Envtl. Aff. L. Rev. 247 (2006); John Martinez & Karen L. Martinez, *A Prudential Theory for Providing a Forum for Federal Takings Claims*, 36 Real Prop. & Tr. J. 445 (2001); Scott Keller, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the Williamson County State Litigation Requirement for Regulatory Takings Claims*, 85 Tex L. Rev. 199 (2006); Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 Wm. & Mary L. Rev. 251 (2006).

Williamson, at 186, *citing*, *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981).

"[W]hat constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a question of considerable difficulty," the Court went on to say:

> [T]his Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. . . . Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue.

Williamson, at 190-91 (citation omitted).

Although widely regarded as a legal doctrine applicable to state takings, this Court has recognized the applicability of *Williamson's* ripeness requirement in federal takings. "[A] Fifth Amendment claim is premature until it is clear that the Government has both taken property and denied just compensation." *Horne v. Dep't of Agric.*, 569 U.S. 513, 525-26 (2013). *See also*, Echeveria, John, Horne v. Department of Agriculture: *An Invitation to Reexamine "Ripeness" Doctrine in Takings Litigation*, 43 ELR 10735 (2013).

The Federal Circuit appellate decision invites, indeed, it requires, litigants to ignore *Williamson* and the ripeness requirement. "Alpine could have raised a constitutional takings claim; the FCC had the authority to

grant relief;" the Federal Circuit ruled, "and the D.C. Circuit had jurisdiction to review whether a taking occurred. . . . The [Communications Act of 1934] affords Alpine 'a ready avenue' to bring its takings claim and displaces Tucker Act jurisdiction over that claim." App. 20. The Federal Circuit reliance on *Horne v. Dep't of Agriculture*, 569 U.S. 513, 526-28 (2013), is misplaced. *Horne* teaches that explicit waivers of sovereign immunity under the Tucker Act are supplanted when Congress creates other statutory remedial schemes. Nothing in *Horne* abrogates, or even implicates, *Williamson*: How and when Congress may make an explicit waiver of sovereign immunity sheds no light on the ripeness requirement for making a just compensation claim under the Fifth Amendment.

On the Federal Circuit's claim that Alpine could have brought its takings without just compensation claim to the FCC, the appellate court offers no response to the inevitable objection: There is nothing to review until there is final agency action. Just how would Alpine bring a claim that had not, as a matter of law, accrued? And just how would the D.C. Circuit Court of Appeals, the tribunal reviewing agency action, be in a position to review a claim that had not yet, and could not yet have been, filed? While the Federal Communications Act may well supplant the jurisdiction of the United States Court of Federal Claims under *Horne*, the Federal Communications Act commits the D.C. Circuit to review of agency action. If an agency has not acted on a takings claim because the agency has no jurisdiction over such a claim, it follows that the D.C.

Circuit cannot review what does not yet exist. Nothing in the Federal Communications Act of 1934 made clear Congress's intent to supplant the jurisdiction of the United States Court of Federal Claims as to takings claims against the FCC.

Additionally, there are good grounds to suspect that the Federal Circuit Court read too much into the Federal Communications Act. This Court has made clear that supplanting the jurisdiction of the United States Court of Federal Claims requires explicit Congressional intention. Writing in the context of a claim against the Interstate Commerce Commission, this Court noted:

> The proper inquiry is not whether the statute "expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy," but rather "whether Congress has in the [statute] *withdrawn* the Tucker Act grant of jurisdiction to the [Claims Court] to hear a suit involving the [statute] 'founded . . . upon the Constitution.'" . . . Under this standard, we conclude that the Amendments did not withdraw the Tucker Act remedy. Congress did not exhibit the type of "unambiguous intention to withdraw the Tucker Act remedy," . . . that is necessary to preclude a Tucker Act claim. *See Glosemeyer v. Missouri-Kansas-Texas R. Co.*, 685 F.Supp. 1108, 1120-21 (E.D. Mo 1988), aff'd, 879 F.2d 316, 324-25 (CA8 1989). Neither the statute nor its legislative history mentions the Tucker Act.

Preseault v. ICC, 494 U.S. 1, 12 (1990).

The Federal Circuit cites no precedent for its unorthodox assignment of jurisdiction of the Fifth Amendment takings claim to a court other than the United States Court of Federal Claims. That is because there is no precedent. There are no comparable decisions issued by any court in the United States. Neither does the Circuit Court conduct the sort of analysis of Congressional intent to displace the Tucker Act's jurisdiction over these claims. The Court's sua sponte decision to reassign jurisdiction, without briefing, and without citing good grounds, arguably amounts to a violation of the separation of powers doctrine. However much the appellate court may believe that the FCC should have jurisdiction over takings claims, it is Congress's role, and not the court's, to explicitly waive sovereign immunity. Simply put, the Federal Circuit overreached in a manner that confounds the well-settled jurisprudence of this Court.

II. Nothing In 47 U.S.C. Section 402 Demonstrates A Congressional Intent To Displace The Jurisdiction Of The United States Court Of Federal Claims As The Required Forum In Which To Raise A Takings Claim

Nothing in the legislative history of the Federal Communications Act, or its legislative history, demonstrates a Congressional intent to supplant the jurisdiction of the United States Court of Federal Claims to hear takings claims of the sort raised by Alpine against the FCC, and nothing in the briefing, or the opinions below, demonstrates such an intent. Yet, the Tucker

Act rings clear: The sovereign has waived its immunity and directed litigants raising constitutional takings claims to the United States Court of Federal Claims. The Federal Court of Appeals lacks the authority to redirect these claims. Only Congress can waive sovereign immunity.

A waiver of sovereign immunity must be "unequivocally expressed" in statutory text. *Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996); *United States v. Nordic Village, Inc*., 503 U.S. 30, 33, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990). Legislative history cannot supply a waiver that is not clearly evident from the language of the statute. *Lane*, *supra*, at 192, 116 S.Ct. 2092, 135 L.Ed.2d 486. Any ambiguities in the statutory language are to be construed in favor of immunity, *United States v. Williams*, 514 U.S. 527, 531, 115 S.Ct. 1611, 131 L.Ed.2d 608 (1995), so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires, *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983) (citing *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686, 47 S.Ct. 289, 71 L.Ed. 472 (1927)). Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government. *Nordic Village*, *supra*, at 34, 37, 112 S.Ct. 1011, 117 L.Ed.2d 181. Moreover, "[federal] courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute . . . which is not to be

expanded by judicial decree. . . . It is to be presumed that a cause lies outside this limited jurisdiction, . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction . . . " *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citations omitted). The judiciary, no less than the executive branch, is bound by these principles.

It is beyond dispute that the Tucker Act is a waiver of sovereign immunity and that Congress established the United States Court of Federal Claims as the forum for adjudicating allegations against the United States and its constituent parts. The jurisdiction of the Federal Circuit is set forth in 28 U.S.C. § 1295, et seq. While the Telecommunications Act does direct aggrieved litigants to raise claims regarding FCC licensure decisions to the D.C. Circuit, nothing in the act demonstrates, or even suggests, a congressional intent to repose takings claims in the D.C. Circuit. The plain and unambiguous language of Title 47 Section 402(b)(5) provides: "Appeals may be taken from decisions and orders of the [Federal Communications] Commission to the United States Court of Appeals for the District of Columbia in any of the following cases: . . . By the holder of any . . . station license which has been modified or revoked by the Commission." A claim for an unlawful taking, and for consequent money damages, is not an appeal from a licensure decision.

Horne v. Dep't of Agriculture, 569 U.S. 513, 526-28 (2013), was never intended to blur the line distinguishing the legislature from the judiciary. There simply is

no precedent for what the Federal Circuit has done: Eliminating the distinction between Congress's power to waive sovereign immunity, and the courts' more limited role of interpreting the law. The closest thing to a precedent misses the mark by a country mile.

In *Folden v. United States*, 379 F.3d 1344, 1357 (2004), a lower appellate court held that "[i]n the case of a cancellation of a spectrum license for nonpayment, the FCC's decisions are exclusively appealable to the United States Court of Appeals for the District of Columbia Circuit." The remedy sought in *Folden* was return of the license at issue. In the instant case, the FCC irrevocably sold Alpine's licenses out from under Alpine two years *before* the agency had completed a final review of Alpine's request for restructuring of its installment debt. The license could not have been returned at this late stage of the proceeding; money damages were all that realistically remained.

Alpine contends that a strict construction of 47 U.S.C. Section 402(b), governing the sorts of claims that require direct appeal of an agency decision directly to the D.C. Circuit, does not cover claims unrelated to agency expertise. A takings claim, and a claim for money damages, is within the jurisdiction of the United States Court of Federal Claims. Nothing in the Communications Act of 1934 preempts the jurisdiction of the United States Court of Federal Claims over claims for an unlawful taking of property without just compensation.

The tortured legal history of these proceedings makes clear that Alpine is no longer seeking review of a mere licensure decision. Indeed, the FCC all but declared effective review of its decisions practically impossible, re-auctioning the licenses Alpine once possessed to another bidder in 2008, before final agency review had even been completed in 2010. By raising its claim for money damages for a taking without just compensation in the United States Court of Federal Claims, Alpine sought the right to conduct a trial de novo at which it could produce evidence about the value of the licenses it lost as a result of the agency decision to perfect its security interest, a decision Alpine contends constituted an unlawful regulatory taking by the FCC. Nothing in the record assembled in the FCC proceedings at either the staff level, when the Telecommunications Bureau denied Alpine's waiver and restructuring requests in 2007, or in 2010, when the full agency decision affirmed the staff decision, provided Alpine with any meaningful opportunity to perfect a record in support of its pursuit of damages for a taking. Indeed, Alpine could not make a claim for just compensation until the agency had acted with finality, as *Williamson* teaches. Simply put, 402(b) cannot be credibly stretched to cover a takings claim.

As *Compos v. FCC*, 650 F.2d 890, 893 (CA7 1981) holds: "Section 402(b) is to be narrowly construed and confined to the enumerated categories." Not one of the categories in 402(b) suggests that takings claims are to be brought directly to the D.C. Circuit – how could such actions? – as any such claim would, of necessity, not be

ripe, with no opportunity given to an aggrieved party to prove the extent of their damages. Section 402(b) simply governs review of decisions about whether to grant, modify or deny a license. The FCC is not empowered to award money damages against itself: All it can do is to make licensure decisions of the sort contemplated by Section 402(b). A takings claim cannot, as a matter of law, be brought to the FCC as such claims are not ripe before final agency action. No litigant can make a record about the extent of damages incident to such a claim before the FCC. As a result, any appeal to the D.C. Circuit would, of necessity, be stillborn: A silent record cannot support an appeal.

Congress's intent in passing the Tucker Act was clear: A party seeking money damages for a takings claim must go to the United States Court of Federal Claims where it has the right to make a record at trial about the extent of its losses. The D.C. Circuit does not sit as a de novo forum to take evidence on consequential damages.

Alpine was awarded a license in a proceeding falling squarely within the ambit of the FCC's jurisdiction under the Communications Act. The manner in which Alpine's bid was accepted, its qualifications to operate under the license, the extent of the license – all these are classic FCC determinations.

But the security interest upon which the FCC insisted for the licensure fee is not a matter over which the agency has any special expertise. Congress showed no intent in the Communications Act to make the FCC

into bankers or financiers. The FCC chose a common contractual instrument to secure payment for the note. Alpine claims the FCC breached that contract by acts of regulatory malfeasance; Alpine appealed the agency determination as it was required to by seeking full agency review. It then first sued the FCC under the terms of its contract in the choice of forum clause upon which the FCC insisted. When that case was dismissed on grounds of sovereign immunity, an awkward conclusion that effectively said the FCC's lawyers wrote an illusory term into the contract, Alpine then went to the only court Congress empowered to hear a takings claim, the United States Court of Federal Claims.

The FCC decision that Alpine had defaulted on its note was not a licensing decision. In both *Folden* and *Biltmore Forest Broadcasting FM, Inc. v. FCC*, 540 U.S. 980 (2003), the FCC decisions at issue involved the terms and conditions under which the FCC would grant a license. In the *Folden* case, the FCC changed the method of selecting licenses from a lottery to an auction after determining the applicants under the lottery system were unqualified. *Folden*, 379 F.3d at 1349. In *Biltmore*, the FCC granted a license to a party *Biltmore* thought unqualified under agency rules. *Biltmore*, 555 F.3d at 1377-79. Both *Biltmore* and *Folden* present facts wholly at odds with those present here: The parties challenged agency licensing decisions about the qualifications of those actually granted licenses. This is the sort of decision that is in the very heartland of 402(b).

In the Alpine case, there was no question that Alpine was deemed qualified to hold the license. It did so for years, and operated without incident. When hard times struck, Alpine sought the contractual relief to which the FCC agreed by contract. When the FCC breached, Alpine sought relief for the breach of a contract that *resulted* in forfeiture of licenses. Nothing in the record of proceedings assembled to date suggests that Alpine ever challenged an agency finding as to its qualifications to possess the license. Indeed, the FCC never reached that issue. The agency had already concluded that Alpine was qualified.

Alpine played by the rules in this case, patiently seeking relief in the Courts it was directed to both by contract with the FCC and by a plain reading of Congressional intent as expressed in unambiguous statute. Yet at each turn, the legal rules shifted to Alpine's detriment: The sovereign has eluded accountability in a manner that turns the Tucker Act into a nullity. Congress has never reposed jurisdiction over takings claims in the D.C. Circuit, and only Congress can do that. This Court can and should review the question of whether this misdirection squares both with the separation of powers doctrine and the requirements of statutory construction.



CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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