

No. 23-743

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IN THE  
*Supreme Court of the United States*

CONSUMERS' RESEARCH, ET AL., *Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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

**PETITION FOR REHEARING**

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**PETITION FOR REHEARING**

Petitioners Consumers' Research *et al.* respectfully petition for rehearing of this Court's June 10, 2024, order denying their petition for a writ of certiorari.<sup>1</sup>

The petition raised nondelegation and private nondelegation claims arising out of the Federal Communications Commission's Universal Service Fund. Each quarter, a new tax rate is announced for the USF, providing a new opportunity for challengers to sue. *See, e.g., Consumers' Rsch. v. FCC*, 67 F.4th 773, 786–87 (6th Cir. 2023); *Consumers' Rsch. v. FCC*, 63 F.4th 441, 446 (5th Cir.), *reh'g en banc granted, opinion vacated*, 72 F.4th 107 (5th Cir. 2023).

Challengers lost at the Sixth and Eleventh Circuits, and this Court denied certiorari petitions arising out of those circuits on June 10, 2024. Challengers initially lost at the Fifth Circuit, *see* 63 F.4th 441, but that court then granted a petition for rehearing *en banc* and heard oral argument in September 2023. No opinion has yet issued from the *en banc* court.

1. In opposing certiorari in the cases arising out of the Sixth and Eleventh Circuits, the government told this Court that it should deny review of those cases and then consider whether to grant review of the *en banc* Fifth Circuit's ruling once it was issued. BIO17–18 (“[T]he *en banc* Fifth Circuit has not yet issued its

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<sup>1</sup> A similar petition for rehearing is simultaneously being filed in No. 23-456.

decision in that case. Once it does so, the parties can determine whether to seek, and this Court can determine whether to grant, certiorari to review that decision. For now, however, the absence of any circuit conflict counsels in favor of denying the petitions for writs of certiorari.”).

It now seems the FCC’s position may have been a litigation stratagem to prevent this Court from *ever* reviewing the *en banc* Fifth Circuit’s decision. After this Court accepted the FCC’s request to deny the petitions arising out of the Sixth and Eleventh Circuits, counsel for the FCC informed Petitioners’ counsel that the agency would seek to dismiss the pending *en banc* Fifth Circuit proceeding on preclusion grounds, arguing that because this Court had denied review in the Sixth and Eleventh Circuit cases, the challengers in the *en banc* Fifth Circuit case were precluded from continuing their suit even though that court already heard *en banc* oral arguments.

Petitioners dispute that their claims will be precluded in the Fifth Circuit, including because they will soon file a new petition featuring new parties in that Court, which can be consolidated with the pending *en banc* case. But this is a classic case for granting rehearing. Rule 44.2 authorizes a petition for rehearing based on “intervening circumstances of a substantial ... effect.” The FCC persuaded this Court to deny review in the Sixth and Eleventh Circuit cases by suggesting that such a denial would not hamper its ability to consider reviewing the *en banc* Fifth Circuit’s decision, once it is issued. But now the FCC

claims that the *en banc* Fifth Circuit case must be dismissed without ever touching the merits.

The FCC’s attempt to bank-shot this Court’s denial of certiorari in two cases into a dismissal of the pending *en banc* case at the Fifth Circuit undoubtedly qualifies as “intervening circumstances of a substantial ... effect.” Rule 44.2.

2. Rehearing is warranted for the independent reason that this Court just granted review in a case that raises questions about whether the Universal Service Administrative Company (USAC)—the target of Petitioners’ private nondelegation claim—is an “agent” of the United States for False Claims Act purposes. *See Wisc. Bell, Inc. v. United States ex rel. Heath*, No. 23-1127. That case is relevant because the FCC has opposed Petitioners’ private nondelegation claims by arguing (*inter alia*) that USAC is a private company but operates under the supervision of the FCC.

The grant of a case raising related issues is again a textbook example of “intervening circumstances of a substantial ... effect.” Rule 44.2; *see Supreme Court Practice* § 15-19 (11th ed. 2019).

\* \* \*

This Court should grant rehearing and grant the Petition for a writ of certiorari, or at least hold the Petition until this Court’s resolution of any petitions for a writ of certiorari arising out of the Fifth Circuit proceedings.

**CONCLUSION**

The Court should grant rehearing.

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June 18, 2024

## CERTIFICATE OF COUNSEL

Pursuant to Rule 44.2, I, R. Trent McCotter, counsel for Petitioners, hereby certify that the petition for rehearing is restricted to the grounds specified in Rule 44.2. I further certify that the petition for rehearing is presented in good faith and not for delay.

June 18, 2024

/s/ R. Trent McCotter

R. Trent McCotter