NOS. 24-354, 24-422

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,

v.

CONSUMERS' RESEARCH, ET AL.,
Respondents.

SCHOOLS, HEALTH & LIBRARIES BROADBAND COALITION,, ET AL.,
Petitioners,

v.

CONSUMERS' RESEARCH, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE FOR AD HOC HEALTHCARE GROUP IN SUPPORT OF PETITIONERS

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Amicus curiae the New England Telehealth Consortium, ADS Advanced Data Services, Inc., Community Hospital Corporation, HealthConnect Networks, the North Carolina Telehealth Network Association, the Colorado Hospital Association, and the Southern Ohio Healthcare Network (collectively, the "Ad Hoc Healthcare Group") respectfully submit this brief in support of Petitioners.[1]

INTEREST OF THE AMICUS CURIAE

The Ad Hoc Healthcare Group is comprised of healthcare institutions and their consultants.[2] Numerous hospitals and other healthcare institutions rely upon support from the universal service fund's Rural Healthcare Program for affordable voice and broadband connections to better serve rural patients. For example, the Rural Healthcare Program enables many patients in rural communities to access telehealth services that would otherwise be cost-prohibitive or simply unavailable. The ability of hospitals and their medical professionals to continue to provide such connected health services to rural areas across the country would be seriously impaired

[1] In accordance with Rule 37.6, counsel certifies that counsel for the Ad Hoc Healthcare Group authored this brief in whole. Neither counsel nor any party made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The Ad Hoc Healthcare Group consists of not-for-profit entities who facilitate the participation of consortia of health care providers in the Rural Health Care program, a hospital association whose members participate in the program as a consortium, and for-profit consulting groups which assist health care providers participating in the program.

if the FCC is unable to continue to operate the Rural Healthcare Program.

SUMMARY OF THE ARGUMENT

This case is not moot. Sovereign immunity is not a basis for rendering the case moot because the money received to support universal service is owned by USAC and not the property of the United States. Furthermore, redress is made available by 47 U.S.C. § 207, which entitles complaints for money damages to be filed with either the FCC or a federal district court.

The rate for universal service is not unconstitutional. Section 254 of the Communications Act provides intelligible principles, and the FCC maintains control over USAC's assistance in administering the rate for universal service. Furthermore, section 254 should not be construed in a vacuum without any consideration of its place in the overall statutory scheme, as the Fifth Circuit attempts.

In addition to the intelligible principles mandated by Congress in section 254, the rate for universal service is ultimately cabined by a clear Congressional rule: Congress declared in 47 U.S.C. § 201(b) that such a rate is unlawful if it is unjust or unreasonable. Section 201(b) limits the universal service costs that telecommunications carriers can incur and include in their rates as well as the rates that telecommunications carriers may charge consumers to pass through payments to the federal universal service fund. When a telecommunications carrier elects to pass through to consumers the payments made to the universal service fund, the

telecommunications carrier must file with the FCC a rate in a tariff known as a Federal Universal Service Charge or Federal Universal Service Fund Surcharge, which is reviewed by the FCC under section 201(b)'s just and reasonable intelligible standard before the rate becomes effective.

The FCC has never abdicated its ratemaking power to determine whether Federal Universal Service Charge or Federal Universal Service Fund Surcharge tariff rates are just and reasonable. USAC has merely ministerial control over computing the initial rates for universal service support. Furthermore, in enacting 47 U.S.C. §§ 206-208, Congress made the FCC, USAC, and private telecommunications carriers accountable to those citizens that ultimately foot the bill for universal service by ensuring that no citizen shall pay any amount for universal service that is unjust or unreasonable.

ARGUMENT

I. In Accordance With The Constitution, Congress Authorized The FCC's Ratemaking That Sets The Rate For Universal Service Subject To The Intelligible Principle That All Rates Paid By Citizens Be Just And Reasonable.

The case will consider the constitutionality of the rate approved in 2022 by the FCC to support universal service, which among other goals, ensures the availability of modern telecommunications services to rural health care providers at reasonable

rates.[3] In order to comply with Article 1, § 1 of the U.S. Constitution and the associated nondelegation doctrine, the involvement of the FCC and USAC in determining the rate for universal service must be limited by intelligible principles enacted by Congress. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power "); *Gundy v. United States,* 588 U.S. 128, 135 (2019) (citations omitted) ("The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion").

The nondelegation inquiry hinges on statutory interpretation to determine whether the Communications Act places constitutionally adequate limits on the FCC's discretion to set rates for universal service. "Only after a court has determined a challenged statute's meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I." *Gundy*, 588 U.S. at 136. Statutory interpretation is a "'holistic' endeavor which determines meaning by looking not to isolated words, but to text in context, along with purpose and history." *Id.* at 140.

The text of the Communications Act makes clear that in implementing Congress's universal service policy, the FCC is prohibited from requiring any citizen to pay a rate for universal service that is

[3] The rate for universal service is also referred to as the universal service contribution rate proposed by USAC for the universal service fund, which includes the Rural Health Care Program.

unjust or unreasonable. In creating the FCC, Congress announced that the agency's purpose is "to make available, so far as possible, 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 (emphasis added). Congress delegated to the FCC and authorized it to adopt rules and regulations to implement this universal service policy. "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter." 47 U.S.C. § 201(b). Congress also limited the FCC's discretion with a well-recognized intelligible principle that rates be just and reasonable, stating that "[all] charges, practices, classifications, and regulations for and in connection with such communication service, shall be *just and reasonable*, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." *Id.* (emphasis added). With the amendment of the Communications Act in 1996, Congress enacted seven additional directives guiding the FCC's authority to implement Congress's universal service policy, which included the intelligible ratemaking principle that "[q]uality services should be available at *just, reasonable*, and affordable rates." 47 U.S.C. § 254(b)(2) (emphasis added). The Communications Act's delegation to the FCC to set rates for universal service falls well within permissible constitutional bounds.

The Fifth Circuit, the only federal circuit court to find section 254's principles to be insufficiently

intelligible, considered section 254 in isolation.[4] The Fifth Circuit ruled that the Communications Act grants the FCC the unlimited power to require citizens to pay excessive rates for universal service.[5] "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Gundy*, 588 U.S. at 141 (citation omitted). Accordingly, this Court has long refused to construe one section of a statute in a vacuum, as the Fifth Circuit attempts.

In addition to the intelligible principles mandated by Congress in section 254, the rate for universal service is ultimately cabined by a clear Congressional rule: Congress declared in 47 U.S.C. § 201(b) that such a rate is unlawful if it is unjust or unreasonable. It is undisputed that the just and reasonable standard is an intelligible principle that avoids unlawful delegation concerns. *Gundy*, 588 U.S. at 146 (quoting *Yakus v. United States*, 321 U.S. 414, 427 (1944)) ("We have sustained authorizations for agencies to set 'fair and equitable' prices and 'just and reasonable' rates."); *J.W. Hampton, Jr., & Co.*, 276 U.S. at 407-8 ("common sense requires that in the fixing of such rates Congress may provide a Commission, as it does, called the [Federal Communications Commission], to fix those rates, after hearing evidence and argument concerning them from interested parties, all in accord with a general rule that Congress first lays down that rates shall be just and reasonable"); *Sunshine*

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[4] *Consumers' Rsch. v. FCC*, 109 F.4th 743, 758 (5th Cir. 2024).

[5] *Id.* at 760, 762.

Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940).

USAC's calculation of a universal service contribution rate and the FCC's approval of such a rate subject to the just and reasonable standard is ratemaking, not the exercise of a taxing power. A telecommunications carrier is not required to pass through to consumers the payments that it makes to the universal service fund, and consumers are free to purchase service from carriers that do not pass through universal service contributions. However, when a telecommunications carrier elects to pass through to consumers the payments made to the universal service fund, the telecommunications carrier must file with the FCC a rate in a tariff known as a Federal Universal Service Charge or Federal Universal Service Fund Surcharge (hereinafter referred to as the "Federal Universal Service Tariff Rate").[6] 47 U.S.C. §203; see also, *Evanns v. AT&T Corp.*, 229 F.3d 837, 841 (9th Cir. 2000). Before a Federal Universal Service Tariff Rate becomes effective, the Communications Act requires the FCC to review the rate to determine whether it complies with section 201's just and reasonable standard.[7] If

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[6] See e.g., Nat"l Exch. Carrier Ass'n, Inc. Tariff F.C.C. No. 5, § 17.1.3, at 17-3 (filed Dec. 17, 2021); Verizon Tel. Cos. Tariff F.C.C. No. 1, § 4.1(D), at 4-14.1 (filed Dec. 17, 2021); Sw. Bell Tel. Co. Tariff F.C.C. No. 73, § 4.4(H), at 4-13 (filed Dec. 17, 2021); BellSouth Telecomms. Tariff F.C.C. No. 1, § 4.7(F), at 4-9 (filed Dec. 17, 2021); and Ameritech Operating Cos. Tariff F.C.C. No. 2, § 4.1.7(D), at 80.7 (filed Dec. 17, 2021); https://apps.fcc.gov/etfs/public/browseLec.action?lecType=ilec&list=50.

[7] *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, 12 FCC Rcd. 2170, 2197 (1997)

the FCC does not take any action to reject the Federal Universal Service Tariff Rate that a telecommunications carrier files with the FCC, the rate becomes effective. 47 U.S.C. § 204(a)(3). The FCC exercises final decision-making authority under section 201(b) over what Federal Universal Service Tariff Rate a telecommunications carrier may bill consumers for universal service.

The size of the federal universal service fund is limited by section 201's command that charges, practices, and regulations remain just and reasonable. Whether payments to the universal service fund are considered "charges," "practices," or "regulations," telecommunications carriers are prohibited by section 201(b) from making payments to the universal service fund that are unjust or unreasonable. Section 201(b) limits the universal service costs that telecommunications carriers can incur and include in their rates as well as the rates that telecommunications carriers may charge consumers to pass through payments to the federal universal service fund. If the rate that a telecommunications carrier is charged for universal service support would cause unreasonable rates for consumers, such a rate for universal service would violate section 201(b)'s unreasonable standard and is "declared unlawful" by Congress.

Placing such limitations on the rates that can be charged is a sine qua non for rate regulation. The FCC's ratemaking is not limited to any single formula in determining rates. "Under the statutory standard

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("We conclude that pre-effective tariff review is required by the statute").

of 'just and reasonable' it is the result reached not the method employed which is controlling." *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 602 (1944) (citations omitted). The FCC has never abdicated its ratemaking power and regularly reviews the reasonableness of the Federal Universal Service Tariff Rates when they are filed in tariffs at the FCC and before they become effective. USAC has merely ministerial control over computing the rates for universal service support but has absolutely no control over ratemaking, leaving it completely within the FCC's power to decide how much a telecommunications carrier should pay USAC and what Federal Universal Service Tariff Rate a telecommunications carrier can charge consumers for universal service support.

The Communications Act provides judicially workable standards to redress the injuries of aggrieved citizens. 47 U.S.C. § 207 provides a private right of action for citizen redress and government oversight. For example, if a citizen is billed a Federal Universal Service Tariff Rate that violates section 201(b)'s just and reasonable standard, section 207 allows that citizen to file a complaint for money damages with either the FCC or a federal district court. In enacting 47 U.S.C. §§ 206-208, Congress made the FCC, USAC, and private telecommunications carriers accountable to those citizens that ultimately foot the bill for universal service by ensuring that no citizen shall pay any amount for universal service that is unjust or unreasonable.

The history of the universal service fund provides further support for the finding that the rate for universal service is the fruit of ratemaking rather

than taxation. Before the establishment of the universal service fund, the costs of supporting universal service were recovered through access charges in a tariff filed with the FCC that the National Exchange Carrier Association ("NECA") billed long distance telephone companies.[8] NECA is USAC's sole stockholder. To recover the costs of advancing universal service from an explicit fund, those costs were later removed from NECA's tariff rates and included in the contributions that long distance telephone companies now pay USAC. *Rural Cellular Ass'n v. FCC*, 685 F.3d 1083, 1085 (D.C. Cir. 2012). It is undisputed that universal service support did not involve the delegation of the taxation power when long distance telephone companies paid NECA's tariff rates that implicitly recovered the costs of universal service. Likewise, there is no delegation of the taxing power when long distance telephone companies contribute to a fund to pay for universal service support explicitly.

A ratemaking regime that removes from NECA's rates the costs of advancing universal service and instead recovers those costs from an explicit fund, here the universal service fund, confers no greater reach for administrative determination than the power to fix just and reasonable rates. The FCC does not delegate government power when it permits private companies to propose rates for universal service. Similar to USAC's initial calculation of the rate for universal service, the FCC did not calculate the rates that NECA filed in its FCC tariff under the

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[8] *In the Matter of Amendment of Part 69 of the Commission's Rules Relating to the Assessment of Charges for the Universal Service Fund and Lifeline Assistance*, 4 FCC Rcd. 6134 (1989).

previous ratemaking model for universal service. Just as NECA's tariff rates with implicit universal service subsidies would go into effect if the FCC did not take formal action to reject those rates, USAC does not exercise government power when its universal service rate projections take effect without formal FCC approval. Long distance telephone companies were permitted to pass through to consumers the payments made to NECA just as they are now permitted, but not required, to pass through to consumers the payments to USAC. The money received by USAC is the property of a private company, USAC, just as the money that NECA received from access charges was not the property of the United States. *In re Incomnet, Inc.,* 463 F.3d 1064, 1073 (9th Cir. 2006) (USAC "holds legal title to the funds in the USF accounts"). Whether universal service is supported by the access charge payments that long distance telephone companies made to NECA or the rates that USAC now charges those same long distance telephone companies, no appropriation of funds by Congress is necessary. Given that Congress has directed the FCC to decide what rate should be charged for universal service subject to the just and reasonable intelligible principle, the rate for universal service should be upheld as constitutional.

II. Sovereign Immunity Is Not A Basis For Rendering This Case Moot Because The Money Received From The Universal Service Rate Is Not The Property Of The United States.

The Fifth Circuit suggested that this case may be moot if sovereign immunity precludes recovery of

money already paid into the universal service fund.[9] However, sovereign immunity is not a basis for rendering the case moot because the funds are owned by USAC, not the U.S. Treasury. *In re Incomnet, Inc.,* 463 F.3d at 1073; see also, *Rural Cellular Ass'n v. FCC*, 685 F.3d at 1090 (holding that the rate for universal service does not "raise[] revenue to support the Government generally"). Whether the money for universal service support is collected from long distance telephone companies through rates paid to NECA under the previous ratemaking model or through a rate paid to USAC under the current regime, the money is not the property of the United States.

If Respondents incurred injury due to the rate it paid for universal service, sovereign immunity would not bar an action for money damages. If USAC charges excessively for universal service, redress is available by filing a suit against USAC for money damages, rather than against the United States which has no property interest in the money that USAC receives. Furthermore, if telecommunications carriers pass on universal service costs to consumers by billing unreasonable rates, redress is made available by 47 U.S.C. § 207, which entitles complaints for money damages to be filed with either the FCC or a federal district court.

CONCLUSION

Congress has directed the FCC to decide what rate should be charged for universal service subject to the just and reasonable standard in 47 U.S.C. § 201(b)

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[9] *Consumers' Rsch. v. FCC*, 109 F.4th at 753.

and the additional intelligible principles set forth in section 254. The FCC has never abdicated its ratemaking power to determine whether the rate for universal service is just and reasonable and USAC's assistance in administering that rate is merely ministerial and controlled by the FCC. Therefore, the rate for universal service should be upheld as constitutional.

Respectfully submitted,

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January 15, 2025