

**Nos. 24-354 and 24-422**

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IN THE  
**Supreme Court of the United States**

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FEDERAL COMMUNICATIONS COMMISSION, *et al.*,  
*Petitioners,*

v.

CONSUMERS' RESEARCH, *et al.*,  
*Respondents.*

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SCHOOLS, HEALTH & LIBRARIES BROADBAND  
COALITION, *et al.*,

*Petitioners,*

v.

CONSUMERS' RESEARCH, *et al.*,  
*Respondents.*

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

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**BRIEF OF REED SMITH LLP AS *AMICUS  
CURIAE* IN SUPPORT OF NEITHER PARTY**

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## **INTEREST OF THE AMICUS**

Reed Smith LLP is a law firm with lawyers throughout the United States.<sup>1</sup> Reed Smith frequently represents clients in litigation challenging taxes, fees, and other government exactions, so Reed Smith is interested in the orderly development of the law regarding judicial jurisdiction, sovereign immunity, and the recovery of monetary damages and tax refunds from the government.

## **SUMMARY OF ARGUMENT**

Respondents' underlying complaint was brought under jurisdictional statutes authorizing judicial review of one of the Federal Communications Commission's (FCC) orders establishing a quarterly Universal Service Fund (USF) contribution rate. 47 U.S.C. 402; 28 U.S.C. 2342(1); Pet. App. 11a. Respondents had simply requested that the FCC set that rate at 0% for the first quarter of 2022. See Gov't C.A. Br. 17. Respondents did not seek monetary damages or refunds, and thus the question of whether damages or refunds are possible was not raised by respondents and is not at issue in this litigation.

However, federal petitioners have stated in their opening brief that "because the applicable judicial-review statute does not waive the government's immunity from damages claims ... *a court may not order the government to repay universal service contributions....*" See Gov't Br. 14 (emphasis added).

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, Reed Smith states that no counsel for a party authored this brief in whole or in part and that no person other than Reed Smith or Reed Smith's counsel made a monetary contribution to the preparation or submission of this brief.

That language in federal petitioners' brief implies that, not only are money damages or refunds unavailable in *this* litigation, money damages or refunds of USF would be categorically unavailable in *any* litigation. But that statement goes too far and answers a question that is simply not before the Court. This Court should leave that question open for another day if and when it is actually raised in litigation involving a claim for money damages or refunds.

### **ARGUMENT**

This case arrived at the Court by way of direct appeal from an order of the FCC to the Fifth Circuit. Gov't Br. 8. The litigation originated when respondents, under the authority of 47 U.S.C. 402, appealed the FCC's order setting the USF contribution rate for the first quarter of 2022. In reviewing the FCC's rate-setting order, the relevant administrative review statute only provided the Fifth Circuit with a limited set of remedies: by statute, it could "enjoin, set aside, suspend (in whole or part), or . . . determine the validity of" the FCC's order. 28 U.S.C. 2342. Notably, these administrative review statutes did not provide the Fifth Circuit with the jurisdiction to grant monetary damages or order refunds of USF against federal petitioners. Furthermore, respondents have not sought monetary damages or refunds from federal petitioners.

In their opening brief, federal petitioners correctly point out that respondents are not entitled to monetary damages or refunds in this case. Gov't Br. 14. However, federal petitioners went a step too far. Instead of pointing just to the limited remedies permissible under 47 U.S.C. 402 and 28 U.S.C. 2342, or to the fact that respondents have not sought monetary damages or refunds in this case, federal petitioners instead suggest that sovereign immunity broadly and categorically

protects them from monetary damages or refunds related to the USF in every instance. Gov't Br. 14.

As this specific case is before the Court in a procedural posture that does not allow monetary damages or refunds, the Court should limit its analysis to the relief requested in this case—namely the legal question of whether the USF is or is not constitutional. If it is necessary to mention the availability of monetary damages or refunds, the Court should simply note that respondents are not entitled to monetary damages or refunds *in this case* because they are not authorized by 47 U.S.C. 402 or 28 U.S.C. 2342.

It would be imprudent for the Court to weigh in on whether sovereign immunity would apply in an action brought against the federal petitioners under other statutory provisions authorizing claims or refunds against the government. If the Court finds that the USF is unlawful, the degree to which sovereign immunity protects the federal government from monetary damages or refunds would be better addressed by resolving a concrete case involving a claim by a party burdened by the USF who claims monetary damages or refunds from the federal government.

**CONCLUSION**

For the foregoing reasons, Reed Smith respectfully requests that the Court avoid opining on the question of whether sovereign immunity categorically protects federal petitioners from any claims for monetary damages or refunds related to the USF because that question is not before the Court in this case. If it is necessary to address monetary damages or refunds in this case, the Court should hold that respondents are not entitled to monetary damages or refunds *in this case* because 47 U.S.C. 402 and 28 U.S.C. 2342 do not authorize monetary damages or refunds.

Respectfully submitted,

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