No. 24-354

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,
v.
CONSUMERS' RESEARCH, ET AL.,
Respondents.

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

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

(1) Whether 47 U.S.C. § 254 violates the nondelegation doctrine by imposing no limit on the FCC's power to raise revenue for the USF.

(2) Whether the FCC violated the private nondelegation doctrine by transferring its revenue-raising power to a private company run by industry interest groups.

(3) Whether the combination of Congress's delegation to the FCC and the FCC's delegation to the private Universal Service Administrative Company violates the nondelegation doctrine.

PARTIES TO THE PROCEEDING

Petitioners are the Federal Communications Commission and the United States of America.

Respondents are Consumers' Research; Cause Based Commerce, Inc.; Kersten Conway; Suzanne Bettac; Robert Kull; Kwang Ja Kirby; Tom Kirby; Joseph Bayly; Jeremy Roth; Deanna Roth; Lynn Gibbs; Paul Gibbs; and Rhonda Thomas.

Intervenors below are Benton Institute for Broadband & Society; Schools, Health & Libraries Broadband Coalition; National Digital Inclusion Alliance; USTelecom – The Broadband Association; Center for Media Justice d/b/a MediaJustice; National Telecommunications Cooperative Association d/b/a NTCA – The Rural Broadband Association; and Competitive Carriers Association.

CORPORATE DISCLOSURE STATEMENT

Consumers' Research and Cause Based Commerce, Inc., have no parent corporations, and no publicly held company owns 10% or more of their stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceeding:

- *Consumers' Rsch. v. FCC*, No. 22-60008 (5th Cir.) (*en banc* opinion issued July 24, 2024).

The same legal issues for different quarterly contribution rates arise in the following related proceedings:

- *Consumers' Rsch. v. FCC*, No. 23-456 (U.S.).
- *Consumers' Rsch. v. FCC*, No. 23-743 (U.S.).
- *Consumers' Rsch. v. FCC*, Nos. 22-60195, 22-60363, 23-60359, 23-60525, 24-60006, 24-60160, 24-60330, 24-60494 (5th Cir.).
- *Consumers' Rsch. v. FCC*, Nos. 21-3886, 22-4069 (6th Cir.).
- *Consumers' Rsch. v. FCC*, No. 22-13315 (11th Cir.).
- *Consumers' Rsch. v. FCC*, No. 23-1091 (D.C. Cir.).

There are no additional proceedings in any court that are directly related to these cases within the meaning of this Court's Rule 14.1(b)(iii).

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BRIEF FOR THE RESPONDENTS

Respondents respectfully submit this brief in response to Petitioners' petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The *en banc* Fifth Circuit's July 24, 2024, opinion (Pet.App.1a) is reported at 109 F.4th 743. The Fifth Circuit's March 24, 2023, vacated panel opinion (Pet.App.125a) is reported at 63 F.4th 441.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The *en banc* Fifth Circuit entered its judgment on July 24, 2024.

STATEMENT

Respondents in this case ("the Challengers") have long contended that the taxing system used to fund the Universal Service Fund ("USF") is unconstitutional under nondelegation principles. Indeed, the Challengers include all petitioners in two other cases currently pending before this Court raising nondelegation challenges to the USF. *See Consumers' Research v. FCC*, Nos. 23-456 & 23-743 (certiorari denied June 10, 2024; rehearing sought June 18, 2024). Those cases arose out of the Sixth and Eleventh Circuits, respectively.

The *en banc* Fifth Circuit's scholarly decision below adopted the Challengers' arguments and held the USF funding mechanism violates Article I of the U.S. Constitution. As the *en banc* Fifth Circuit explained, "there is no record of any government program like [the] USF in all the U.S. Reports." Pet.App.67a. Rather than pay for a multi-billion-dollar social welfare program with an appropriation from federal revenues, Congress requires telecommunications carriers to contribute to the USF, 47 U.S.C. § 254(d), with carriers passing along a portion of that cost to consumers via line-item charges in their monthly phone bills, 47 C.F.R. § 54.712(a).

The collected funds are then redistributed by the private Universal Service Administrative Company ("USAC") to entities and projects that ostensibly will expand telecommunications services. 47 U.S.C. § 254(b), (e).

But Congress imposed no formula, ceiling, or other meaningful restrictions on how much money can be raised for the USF. To be sure, Congress provided a list of universal service "principles." 47 U.S.C. § 254(b). But they are so amorphous and non-binding that courts—adopting the FCC's *own* language—have long labeled them "aspirational only," *Tex. Off. of Pub. Util. Couns. v. FCC*, 265 F.3d 313, 321 (5th Cir. 2001), meaning Congress "suppl[ied] no principle at all," Pet.App.27a. In addition, Congress expressly authorized the FCC to *redefine* "universal service" and "universal service principles" as often as it wishes, giving the agency even broader authority to raise billions of dollars in taxes for a program designed to benefit the country more broadly. *See* 47 U.S.C. § 254(b)(7), (c)(1).

The FCC then off-loaded authority over the USF to USAC, a private entity of self-described industry insiders with an incentive to push USF charges increasingly higher. Each quarter, USAC exercises its discretion in determining the desired budget for the USF, which includes the cost of funding USAC itself. The FCC then ministerially converts that figure into a contribution factor that will apply to certain telecommunications revenues, and that tax rate is then passively "deemed approved" by the FCC 14 days later, without the FCC ever taking any affirmative action or even issuing an approval order. 47 C.F.R. § 54.709(a)(3). There is no evidence the FCC itself ever actually reviews USAC's work or agrees with USAC's discretionary decisions about how much

money to raise, which is far from a ministerial undertaking.

This entire process happens only days before the new quarter begins, giving the FCC no real option but to accept whatever numbers USAC demands. USAC then collects the forced contributions and chooses how to disburse the funds. In essence, a private company is taxing Americans in amounts that total billions of dollars every year, under penalty of law, without true governmental accountability.

The *en banc* Fifth Circuit correctly held the USF's revenue raising is unconstitutional under Article I of the U.S. Constitution. *See* Pet.App.64a–81a. The court concluded there are "grave concerns about § 254's constitutionality under the Supreme Court's nondelegation precedents," as Congress handed over its core legislative taxing power to an agency with nothing more than "'aspirational'" limits. Pet.App.28a–29a, 42a. The Fifth Circuit also had "serious trouble squaring FCC's subdelegation [to USAC] with Article I, § 1 of the Constitution." Pet.App.54a–55a.

Rather than hold independently unconstitutional Congress's delegation to the FCC *and* the FCC's delegation to USAC, the Court concluded that the combination was unconstitutional. "[T]he unprecedented nature of the delegation" of broad taxing power from Congress to the FCC, "combined with other factors" like the FCC's subsequent redelegation to USAC, was more than "enough to hold [the USF] unlawful." Pet.App.42a.

The dual layers of delegation—from Congress to the FCC, then from the FCC to USAC—"obscure lines of accountability the Framers intended to be clear" and "render the promise of recourse to the judiciary illusory because they give reviewing courts no standard against which to measure the compatibility of executive action with the prescriptions of the people's elected representatives." Pet.App.75a.

The Fifth Circuit concluded: "American telecommunications consumers are subject to a multibillion-dollar tax nobody voted for. The size of that tax is de facto determined by a trade group staffed by industry insiders with no semblance of accountability to the public. And the trade group in turn relies on projections made by its private, for-profit constituent companies, all of which stand to profit from every single tax increase. This combination of delegations, subdelegations, and obfuscations of the USF Tax mechanism offends Article I, § 1 of the Constitution." Pet.App.81a.

Concurring, several judges would have gone further, explaining that "Congress's delegation of legislative power to the FCC and the FCC's delegation of the taxing power to a private entity *each individually* contravene the separation of powers principle that undergirds our Constitutional Republic." Pet.App.82a (Elrod, J., joined by Ho & Englehardt, JJ., concurring) (emphasis added).

The Fifth Circuit's decision was unsurprising. Scholars had long flagged these serious constitutional flaws with the USF. "Unlike the thousands of

responsibilities carried out by governmental agencies on behalf of Congress, this delegation is unique because of the unfettered power given to the FCC in defining the scope of universal service, and because Congress delegated the power to levy a tax to pay for the service with no limits, knowing that the end user, the American public, would ultimately be saddled with the burden." Barbara A. Cherry & Donald D. Nystrom, *Universal Service Contributions: An Unconstitutional Delegation of Taxing Power*, 2000 L. Rev. Mich. St. U. Det. C.L. 107, 110.

Similarly, former FCC Commissioner Harold Furchtgott-Roth has written that the USF charges are a "hidden tax" where "[t]he FCC, by its own logic, [has] as much authority to spend $2.25 trillion as it [has] to spend $2.25 billion." Harold W. Furchtgott-Roth, *A Tough Act to Follow?* at 62, 72 (2006).

The Challengers consented to the government's request to stay the Fifth Circuit's mandate, on condition that the government file its petition for a writ of certiorari by September 30, 2024. The Fifth Circuit granted the government's request. *See* Order, *Consumers' Rsch. v. FCC*, No. 22-60008 (5th Cir. Aug. 26, 2024), ECF No. 349-2.

DISCUSSION

As noted above, the Challengers filed petitions for writs of certiorari from decisions by the Sixth and Eleventh Circuits, which rejected the Challengers' nondelegation claims. *See Consumers' Rsch. v. FCC*, Nos. 23-456 & 23-743. The Challengers have sought

rehearing of this Court's June 2024 denial of those petitions. *Id.* Those rehearing petitions remain pending.

Given their own pending requests for this Court's review of those adverse rulings, the Challengers agree the constitutionality of the USF funding mechanism warrants this Court's review. There is also now a circuit split on whether that funding mechanism violates nondelegation principles.

Time is of the essence because the government continues to collect funds for the USF despite the Fifth Circuit's holding below, as the Fifth Circuit agreed to stay its mandate on condition that the government file its petition for a writ of certiorari by September 30, 2024. *See* Order, *Consumers' Rsch.*, No. 22-60008 (5th Cir. Aug. 26, 2024).

Given the time sensitivity, the Court should grant the petitions for rehearing and certiorari in Nos. 23-456 and 23-743, which are already fully briefed, and thus merits briefing can begin immediately. The Court could then either consolidate all three cases, or hold this case pending a decision in Nos. 23-456 and 23-743.

The Court should realign the parties for any consolidated proceedings so the Challengers are treated as petitioners, given that they first sought this Court's review on these issues and have been petitioners in all lower-court proceedings. The Court has previously realigned the parties in cases raising the same issue, consistent with the parties' status in

the earlier-filed case. *See, e.g.*, *Axon Enter., Inc. v. FTC*, No. 21-86 & *SEC v. Cochran*, No. 21-1239 (realigned parties so the Government was treated as respondent in both cases); *AMG Capital Mgmt., LLC v. FTC*, No. 19-508 & *FTC v. Credit Bureau Ctr., LLC*, No. 19-825 (similar). The Court has also previously granted rehearing and then consolidated several pending cases for merits briefing and argument. *See, e.g.*, *Al Odah v. United States*, No. 06-1196 & *Boumediene v. Bush*, No. 06-1195.

CONCLUSION

The petitions for rehearing and for writs of certiorari in Nos. 23-456 and 23-743 should be granted. If the Court grants this case (No. 24-354), too, it should either hold it pending a decision in Nos. 23-456 and 23-743, or consolidate the three cases and realign the parties here so the Challengers are treated as petitioners.

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