

In The
Supreme Court of the United States

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BLANCA TELEPHONE COMPANY,

Petitioner

v.

THE UNITED STATES OF AMERICA;
FEDERAL COMMUNICATIONS COMMISSION,

Respondents

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On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

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SUPPLEMENT TO
PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 DISCLOSURE STATEMENT

Petitioner, Blanca Telephone Company, is a nonpublic, closely held, Incumbent Local Exchange Carrier (ILEC), with no publicly owned subsidiaries, and is organized, and located in, Colorado. The sole owner is a citizen of the United States.

ARGUMENT

Pursuant to Rule 15.8, Blanca Telephone Company, Petitioner in No. 21-472, hereby supplements its September 24, 2021 Petition for a Writ of Certiorari to call the Court's attention to a significant case matter which was not available at the time the Petition was filed. In support whereof, the following is respectfully submitted:

On October 18, 2021 the United States, Respondent in No. 21-472, filed as petitioner in *United States v. Texas, et al.*, No. 21-588; cert. granted October 22, 2021. Thereafter, on October 22, 2021 the United States filed a Waiver of its right to file a response in Blanca's case No. 21-472 ("Waiver"). With all due respect, the Waiver in No. 21-472 causes the United States to assert conflicting positions before this Court regarding governmental use of private parties who infringe upon protected constitutional rights.

In No. 21-588 the United States argues that the Constitution prohibits the State of Texas from using its sovereign law making power to avoid judicial review of a state law which impinges upon the constitutionally protected abortion right by authorizing private citizen, rather than government officer, law enforcement. Petition for a Writ of Cert. Before Judgment at 3, No. 21-588, filed 10/18/21; Reply in Support at 1, No. 21-588, filed 10/22/21.

In No. 21-472 Blanca argues that the Government violated Blanca's procedural due process right by using private parties, the National Exchange Carrier

Association (NECA) and the Universal Services Administrative Company (USAC), to enforce an industrial code and an interpretation of FCC rules. Blanca Petition 9-10, 13-14, 19, 23-24 (“The FCC-USF Conundrum”), 34, 40; *Slip Op.* App. 3. Moreover, the Government misuses the Debt Collection Improvement Act of 1996 (DCIA) to vindicate NECA/USAC’s private interests by allowing them to use the DCIA to collect from Blanca a debt judgment, DCIA and other penalties, and interest. Blanca Petition 16, 34-35, 40-41.¹

The Waiver provides no rationale whereby:

1. Texas cannot shield from judicial review a state law which impinges upon the constitutionally protected abortion right by empowering private citizens, rather than state officials, to enforce a state health law.
2. But the FCC can shield from judicial review USF settlement and administration which impinges upon

¹ A basic problem in No. 21-472 is the lower court waffled on whether NECA and USAC are private parties or government agents; NECA and USAC were assigned public and private characteristics depending upon which characteristic facilitated deference to the FCC’s decision. For instance, NECA provided the government function of rule notice, *Slip Op.* App. 37 n.17, but the lower court determined that the 2013 NECA settlement did not bind the United States because USF settlement and USF administration are “private” activities not subject to judicial review. *Slip Op.* App. 41. Blanca Petition at 31. On the other hand, the lower court determined that the debt adjudication was “pure debt collection” under the DCIA, *Slip Op.* App. 21, even though the “debt” does not involve any Federal funds and is payable to a private party rather than to the United States.

Blanca’s constitutionally protected property right merely by empowering “private” corporate entities, NECA and USAC, to enforce Federal telecommunications law. *Slip Op.* App. 40-41; *FCC3* App. 54 ¶ 5, 76 ¶ 30 (USF settlement and day-to-day USF administration are unreviewable “private” activities which do not implicate governmental functions). Blanca Petition 23-24 (“The FCC-USF Conundrum”).²

There is no readily discernible constitutional principle which prohibits Texas from using private parties to shield from judicial review a state law which denies the constitutionally protected abortion right, but which permits the Federal Government to use private parties to shield from judicial review Federal telecommunications regulation which denies procedural due process in depriving Blanca of its property.

The United States provides its rule in No. 21-588, but then ignores that rule the very same week in No. 21-472 via the Waiver.³ Given the Government’s position in No. 21-588 that States cannot authorize private party violation of constitutionally protected rights, and given the obviously inconsistent position the Waiver assumes in No. 21-472 by implicitly, but necessarily, asserting that the Federal Government can use private parties to

² The FCC used the “private” settlement with NECA as an admission of wrongdoing by Blanca. Blanca Petition at 19.

³ In No. 21-588 the United States asserts that the Texas statute is an “unprecedented enforcement scheme.” Petition for a Writ of Certiorari Before Judgment at 32. However, the FCC’s USF program pioneered a similar “enforcement scheme” long ago.

deny procedural due process and deprive Blanca of its property, and given the various circuit conflicts which the Waiver in No. 21-472 fails to address,⁴ the only reasonable construction of the Waiver is as a confession of error *sub silentio*. *See Brown v. Barr*, 140 S. Ct. 2662 (2020) (upon Solicitor General’s confession of error, petition for writ of certiorari granted, judgment vacated, and case remanded); *Hicks v. United States*, 137 S. Ct. 2000, 2001 (2017) (GVR appropriate where the Court is able “with ease determine the existence of an error of federal law”) (Gorsuch, J. concurring). Ease of determination is not an issue here given the fact that the United States literally filed a case, No. 21-588, to argue that government cannot use private parties to enforce laws which impinge upon constitutionally protected rights.

In No. 21-588 the United States seeks constitutional consistency and uniformity and argues that judicial review guards against nullification of constitutional rights by private parties. Petition for a Writ of Certiorari Before Judgment at 31-32, No. 21-588, filed 10/18/21. Sauce for the goose is sauce for the gander. Blanca is entitled to consistent treatment and the same access to judicial review and protection from private enforcement which interferes with its constitutional rights, but the Waiver, without any analysis whatsoever,

⁴ For instance, the lower court affirmed the FCC’s DCIA debt adjudication as “pure debt collection,” *Slip Op.* App. 21; Blanca Petition at i, 13, 33-34, but *Agility Pub. Warehousing v. U.S.*, 969 F.3d 1355, 1364 (CAFC 2020) determined that the DCIA “does not give the United States a freestanding mechanism to create a debt.”

delivers a constitutional rights hierarchy where judicial review is shielded by the FCC's use of private parties and the abortion right is preferred over Blanca's property right, even though the property right is textually guaranteed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
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