

**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

◆

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

◆

PETITION FOR REHEARING

◆

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QUESTIONS PRESENTED

1. Whether the FCC's Universal Service Fund (USF) grant program is a legitimate exercise of Congressional spending power under *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981) where the FCC failed to unambiguously specify the conditions and consequences of accepting the USF grant money.
2. Whether the FCC denied Blanca's Fifth Amendment right to equal protection and judicial review by authorizing private parties to interfere with Blanca's due process and property rights.

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PETITION FOR REHEARING

Pursuant to Rule 44.2, Blanca Telephone Company hereby seeks rehearing of the Court’s November 15, 2021 order denying certiorari in No. 21-472. Petitioner further requests that the Court defer consideration of this case pending final resolution of the Government’s argument asserted in *United States v. Texas*, No. 21-588. In support whereof, the following is respectfully submitted:

A. Summary

Rule 44.2 requires a rehearing petitioner to demonstrate either substantial intervening circumstances or substantial grounds not previously presented. This rehearing petition satisfies both prongs of Rule 44.2.

First, the expenditure of Federal USF funds under the Spending Power authorized by Article I, Section 8, Clause 1 of the Constitution must be accompanied by “unambiguous” conditions. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17-18 (1981) (Rehnquist, J.). Not only did the FCC fail to cite an “unambiguous” rule, it failed to cite any rule violation whatsoever. *See* Section B.1. below.¹

Second, Blanca filed No. 21-472 on September 24, 2021. On October 18, 2021 the United States, Respondent here, filed as petitioner in *United States v. Texas, et al.*,

¹ New questions presented can be raised in a rehearing petition because “the Court’s jurisdiction over the case is established by a timely petition for certiorari.” Stephen M. Shapiro, *et al.*, *Supreme Court Practice* 15-23 (11th ed. 2019).

No. 21-588; certiorari was granted in on October 22, 2021. In No. 21-472 the FCC authorized private companies to interfere with Blanca's property and procedural due process rights. In No. 21-588 the Government asserts that it is improper for government to authorize private parties, acting under color of law, to interfere with protected rights. The Government's inconsistent positions taken in No. 21-472 and No. 21-588 violate Blanca's right to equal protection. *See* Section B.2. below.²

B. Grounds For Rehearing

1. USF Funding: Spending Power Violation

USF funding is in the nature of a contract for services between the Government which promotes universal telecom service, 47 U.S.C. § 151, and rural carriers which provide telecom service to high cost areas. Using its own funds a carrier seeking USF funding makes an up front investment in telecom equipment and then applies for USF reimbursement. From the USF funding recipient's point of view, the USF acts as a revolving fund of the carrier's own money.³ Blanca's CA10 Brief at 6-8; Blanca's CA10 Reply at 18-19. From the Government's perspective, the nation receives telecom service in hard

² Similar issues coming to the court in other still pending cases are properly raised in a rehearing petition. Stephen M. Shapiro, *et al.*, *Supreme Court Practice* 15-19 (11th ed. 2019).

³ The Government concedes that the USF funds are Blanca's personal property: the FCC is seizing Blanca's USF funding stream to pay down the "debt" that the FCC asserts that Blanca owes to the Universal Service Administrative Company (USAC), a non-governmental entity. Blanca's CA10 Brief at 50.

to serve areas it would not otherwise have received. Contrary to the express purpose of § 151, the FCC's penalty in this case did not expand telecom service in rural areas, it terminated and penalized it.

In No. 21-472 Blanca used USF funding to provide telecom service to USF eligible areas. However, without specifying any rule violation, *Slip Op.* App. 36, 37 n.17; Blanca Cert. Petition i, 1, 10, 13, 18-20, 25-27, and years after knowingly accepting the benefit of Blanca's universal telecom service, the FCC determined that Blanca's telecom service was ineligible for USF reimbursement in a novel asset forfeiture proceeding which improperly used the Debt Collection Improvement Act (DCIA) to assess damages in favor of the USAC, a non-governmental entity. The FCC is requiring Blanca to pay for the public telecom service which was provided up to eleven years before the FCC issued its June 2016 asset forfeiture order.

Respondents argued below that the USF is a Federal "grant" program. Respondents' CA10 Brief at 33. However, that circumstance is not a license for the Government to avoid the "unambiguous" notice requirement or to make up rules in an asset forfeiture order. Federal grant programs promulgated under the Federal spending power, like the subject USF program, are viewed "in the nature of contract" and "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17-18 (1981) (Rehnquist, J.).

If Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.

South Dakota v. Dole, 483 U.S. 203, 208 (1987) (Rehnquist, C.J.). The legitimacy of a Federal grant program rests upon whether the grant recipient "voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State School & Hospital v. Halderman*, 451 U.S. at 18.⁴

The lower court found that the FCC never cited any rule which prohibited Blanca's use of USF funding. Blanca Cert. Petition at 25. Accordingly, the FCC never provided the required "unambiguous" notice, or any notice, to Blanca regarding USF fund use. Therefore, the FCC's ongoing monthly seizure of Blanca's property violates Blanca's right to procedural due process.

The FCC's June 2016 civil asset forfeiture violated Blanca's due process right to prior notice because:

- the FCC failed to provide "unambiguous" notice of the conditions attached to the Federal spending of USF money. *Pennhurst v. Halderman*.

⁴ If the *Halderman* rule requires State participation, the State of Colorado authorizes Blanca's receipt of USF funding and has never objected to Blanca's use of USF funding. Blanca and Colorado are required to follow Federal USF regulations. Blanca Cert. Petition at 3-4, 37. Colorado's USF responsibility is substantial.

- the FCC’s June 2016 civil forfeiture order, and the FCC’s subsequent orders, failed to cite a legislative rule violation or any rule which even suggested that Blanca could not use USF funding to provide mobile telephone exchange service in a rural area during the 2005-2010 USF accounting period. Blanca Cert. Petition at 11, 18 & n.5.
- Blanca was cited for violating the FCC’s June 2016 synthesis of three rule parts which the FCC later described as a USF “framework.” Blanca Cert. Petition at 13-14.

Not only does the Tenth Circuit’s deferential ratification of the FCC’s contract adjudication in a civil forfeiture proceeding fail to account for Blanca’s right to notice of a contract rule before the rule is applied, the lower court’s decision conflicts with the Federal Circuit’s decision that the DCIA does not provide Federal agencies with contract adjudication authority. *Agility Public Warehousing v. U.S.*, 969 F.3d 1355, 1364 (CAFC 2020) (the DCA “does not give the United States a freestanding mechanism to create a debt”).⁵ *See also USAC v. Post-Confirm. Comm. of Unsec. Cred. (In re Incomnet)*, 463 F.3d 1064, 1071 (CA9 2006) (the FCC “has no ability to control the USF through direct seizure”). Blanca Cert. Petition at 10-11.

⁵ This case presents the Court with an opportunity to determine whether the Debt Collection Act authorizes federal agencies to adjudicate debt claims, resolving a conflict between the 10th Circuit and the Federal Circuit which has national jurisdiction.

Moreover, the FCC's June 2016 civil forfeiture order is impermissibly "coercive" because it induces USF "framework" compliance by withholding 100% of Blanca's USF funding, plus interest and penalties. *South Dakota v. Dole*, 483 U.S. at 211 (threat of 5% penalty of program money is an acceptable "relatively mild encouragement"). *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 581 (2012). Blanca Cert. Petition at i, 20-21, 34-36 (the FCC's seizure of all of Blanca's USF funding, plus interest and penalties, is punitive).

Failure to review this case would leave Federal agencies empowered, without time limitation, to create *post facto* rules to claw back trillions of Federal dollars which have been spent since 1787. Government by dunning letter is the antithesis of limited government and is plainly prohibited by constitutional and statutory due process and notice requirements.

2. Unreviewable Rights Interference By Private Party Government Agents

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 citizens, rather than government officials, to impinge upon the protected right. Brief of Petitioner United States at 4, 12, No. 21-588, filed October 27, 2021.

In No. 21-472 the FCC violated Blanca's property and 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 to collect a judgment entered by the FCC on behalf of USAC. The damages USAC is collecting for itself include contracted “debt,” interest, and penalties. Blanca Petition 9-10, 13-14, 19, 23-24 (“The FCC-USF Conundrum”), 34, 40; *Slip Op. App.* 3. The FCC misused the Debt Collection Improvement Act of 1996 (DCIA) to vindicate NECA/USAC’s private interests by awarding damages and by authorizing USAC to collect against Blanca as if USAC were itself a governmental entity. Blanca Cert. Petition 16, 34-35, 40-41.

A basic problem in No. 21-472 is that the lower court waffled on whether NECA and USAC are private parties or government agents. NECA and USAC were alternatively assigned public and private characteristics depending upon which characteristic facilitated the lower court’s grant of 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 Cert. Petition at 31. The lower court also determined that the FCC’s 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, and collected by, a non-governmental entity, USAC, rather than the United States. Blanca Cert. Petition at 4, 20.

“Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth

Amendment.” *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *see also Dept. of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1903 (2020) (examining “the equal protection guarantee of the Fifth Amendment’s Due Process Clause” relating to DACA policy rescision). Accordingly, the Government cannot fairly or rationally maintain that private party enforcement of governmental rules which hide from judicial review private party violations of guaranteed rights is proscribed in No. 21-588, but is simultaneously properly prescribed in No. 21-472.

C. No Delay Or Harm From Case Deferral

Holding No. 21-472 in abeyance pending final resolution of the Government’s argument in No. 21-588 that it is improper for government to use private parties to enforce laws which interfere with protected rights will not cause any harm either to the Government or to the FCC’s private party rule enforcers. USAC has been collecting debt, interest, and penalties from Blanca since January 2018. The silver lining underlying the FCC’s continuing, multi-year violation of 47 C.F.R. § 1.1910(b)(3)(I) (prohibiting the FCC from collecting during debt litigation), Blanca Cert. Petition at 16, 20, is that deferring consideration of No. 21-472 will not affect the Government or its private party rule enforcers in the slightest degree. They will continue to extract money from Blanca on a monthly basis, subject to a future return to Blanca upon a ruling favorable to Blanca; case deferral will not impose any cost or delay upon any third party.

Case deferral will ensure that Blanca is not treated differently merely because its case arose first.

On multiple occasions, the Court has adopted the procedure we request here in order to prevent like cases from being treated differently. . . . the “interests of justice” recognize that common claims should not be treated differently on the basis of no more than the “timing of litigation in different courts.”

Stephen M. Shapiro, *et al.*, *Supreme Court Practice* APP-248-249 (11th ed. 2019) citing Eugene Gressman, *et al.*, *Supreme Court Practice* 818-821 (9th ed. 2007).


CONCLUSION

For the reasons presented above, consideration of this case should be deferred pending final resolution of the Government’s private party enforcement argument in No. 21-588. After resolution of the issue in No. 21-588, and for the reasons presented above and in the petition for certiorari, Blanca’s petition should be granted.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay and that it is restricted to the grounds specified in Rule 44.2.

/s/ 
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