Nos. 23-456 and 23-743

In the

Supreme Court of the United States

CONSUMERS' RESEARCH, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

On Petitions for Writs of Certiorari
to the United States Courts of Appeals
for the Sixth and Eleventh Circuits

BRIEF IN OPPOSITION FOR INTERVENOR RESPONDENTS

Sean A. Lev
Jason Neal
Counsel of Record
Helen Marie S. Berg
HWG LLP
1919 M St NW, 8th Fl.
Washington, DC 20036
(202) 730-1300
jneal@hwglaw.com

Counsel for SHLB Coalition

Jennifer Tatel
Daniel H. Kahn
Morgan O. Schick
Wilkinson Barker
Knauer LLP
1800 M St. NW, Ste. 800N
Washington, DC 20036
(202) 783-4141
jtatel@wbklaw.com

Counsel for USTelecom, NTCA, and CCA

MAY 3, 2024

Additional Counsel Listed on Inside Cover

Andrew Jay Schwartzman
525 9th Street NW, 8th Fl.
Washington, DC 20004
(202) 241-2408
AndySchwartzman@gmail.com

Counsel for Benton Institute,
NDIA, and MediaJustice

QUESTIONS PRESENTED

In the Telecommunications Act of 1996, Congress required that the Federal Communications Commission ("FCC") create mechanisms to promote "universal service," supported by statutorily required contributions from carriers offering interstate telecommunications service. Congress defined universal service and provided several specific principles to guide the FCC's exercise of the authority it was granted. *See* 47 U.S.C. §§ 254(b), (c), (h).

Based on Congress's directive, the FCC has administered the Universal Service Fund for roughly twenty-five years, with support from the Universal Service Administrative Company ("USAC"). The FCC's rules limit USAC's role to administrative matters, prohibit USAC from making policy decisions, and provide for *de novo* FCC review of any USAC decision upon request. To date, every federal court of appeals to review this scheme has determined that it satisfies established constitutional standards.

The questions presented are:

1. Whether Congress provided an intelligible principle to guide the FCC's exercise of discretion regarding the Universal Service Fund under 47 U.S.C. § 254.

2. Whether the FCC sufficiently oversees the ministerial and fact-gathering functions of USAC.

PARTIES TO THE PROCEEDING

Intervenor Respondents largely adopt the Petitioners' statement of Parties, but add the following, which was omitted from the Petition filed in Case No. 23-456:

Intervenor Respondents are the Schools, Health & Libraries Broadband Coalition; USTelecom – The Broadband Association; Competitive Carriers Association; National Telecommunications Cooperative Association dba NTCA; Benton Institute for Broadband & Society; National Digital Inclusion Alliance; and Center for Media Justice dba MediaJustice.

Intervenor Respondents also note that the petitioners in Case No. 23-456, listed in that case's Petition, are also petitioners in Case No. 23-743, with the addition of Edward J. Blum, Kersten Conway, Suzanne Bettac, Robert Kull, Kwang Ja Kirby, Tom Kirby, and Rhonda Thomas.

CORPORATE DISCLOSURE STATEMENT

Schools, Health & Libraries Broadband Coalition has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

USTelecom – The Broadband Association has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

Competitive Carriers Association has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

National Telecommunications Cooperative Association dba NTCA has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

Benton Institute for Broadband & Society has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

National Digital Inclusion Alliance has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

Center for Media Justice dba MediaJustice has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING........................... ii
CORPORATE DISCLOSURE STATEMENT iii
TABLE OF AUTHORITIES.......................................v
STATEMENT OF THE CASE 1
REASONS FOR DENYING THE PETITION............5
I. Petitioners' non-delegation doctrine challenge does not warrant review. 5
II. Petitioners' private non-delegation doctrine challenge does not warrant review..........................9
CONCLUSION 11

TABLE OF AUTHORITIES

Cases

AT&T, Inc. v. FCC,
886 F.3d 1236 (D.C. Cir. 2018) 1

Biden v. Nebraska,
143 S. Ct. 2355 (2023) 8

Gundy v. United States,
139 S. Ct. 2116 (2019) 8

Nat'l Fed'n of Indep. Bus. v. Dep't of Labor,
595 U.S. 109 (2022) 8

Qwest Commc'ns. Int'l v. FCC,
398 F.3d 1222 (10th Cir. 2005) 8

Qwest Corp. v. FCC,
258 F.3d 1191 (10th Cir. 2001) 8

Rural Tel. Coal. v. FCC,
838 F.2d 1307 (D.C. Cir. 1988) 9

Skinner v. Mid-Am. Pipeline Co.,
490 U.S. 212 (1989) 6

Tex. Off. of Pub. Util. Couns. v. FCC,
183 F.3d 393 (5th Cir. 1999) 7

Tex. Off. of Pub. Util. Couns. v. FCC,
265 F.3d 313 (5th Cir. 2001) 1

West Virginia v. EPA,
597 U.S. 697 (2022) 8

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001) 6

Statutes

47 U.S.C. § 254 .... i, 1, 7

47 U.S.C. § 254(b) .... i, 2

47 U.S.C. § 254(c) .... i, 2

47 U.S.C. § 254(d) 2

47 U.S.C. § 254(h) .... i, 2

Telecommunications Act of 1996,
Pub. L. 104-104 1

Regulations

47 C.F.R. § 54.702(c) 3, 10

47 C.F.R. § 54.706 2

47 C.F.R. § 54.709 ....2, 3, 10

47 C.F.R. § 54.719 3

47 C.F.R. §§ 54.701-.717 3

Administrative Materials

In re Fed.-State Joint Bd. on Universal Serv.,
Report and Order, 12 FCC Rcd. 8776 (1997) 2

Other Authorities

Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 Admin. L. Rev. 475 (2021) 8

FCC, *Universal Service*, https://www.fcc.gov/general/universal-service 2

Supreme Court Rule 10(c).. 2

STATEMENT OF THE CASE

The FCC administers the Universal Service Fund pursuant to authority Congress granted in the Telecommunications Act of 1996, Pub. L. 104-104 (the "1996 Act"). Before the 1996 Act, the FCC "achieved universal service by authorizing rates to monopoly providers sufficient to enable revenue from easy-to-reach customers, such as city dwellers, to implicitly subsidize service to those in areas that were hard to reach." *AT&T, Inc. v. FCC*, 886 F.3d 1236, 1242 (D.C. Cir. 2018) (citation omitted).

The 1996 Act, however, changed many aspects of telecommunications law in order to promote competition in the industry. Congress recognized that its efforts to introduce competition could undermine the FCC's previous efforts to promote universal service. Because competition and implicit subsidies operated in tension with each other, Congress "required that the implicit subsidy system of rate manipulation be replaced with explicit subsidies for universal service." *Tex. Off. of Pub. Util. Couns. v. FCC*, 265 F.3d 313, 318 (5th Cir. 2001). The provisions Congress adopted to do so are codified at 47 U.S.C. § 254 and provide significant and specific direction to the FCC.

For example, Section 254 defines universal service and identifies several "principles" upon which the Commission must "base [its] policies for the preservation and advancement of universal service," including that quality services "should be available at just, reasonable, and affordable rates" and that "advanced telecommunications and information

services" should be accessible "in all regions of the Nation." 47 U.S.C. §§ 254(b)(1)-(2), (c). It also requires that every telecommunications carrier "shall contribute, on an equitable and nondiscriminatory basis," to mechanisms supporting universal service. *Id.* § 254(d). Finally, it includes specific rules and structures for mechanisms to support universal service to rural healthcare providers, schools, and libraries. *Id.* § 254(h).

Beginning in 1997, the FCC adopted regulations to implement Congress's directions and create the mechanisms necessary to promote universal service. *See In re Fed.-State Joint Bd. on Universal Serv.*, Report and Order, 12 FCC Rcd. 8776, 8780 (1997). Those mechanisms fall into four categories: (1) support for rural and other high-cost areas, (2) Lifeline support for low-income consumers, (3) E-rate program to support affordable telecommunications and broadband for schools and libraries, and (4) rural health care support to fund telecommunications and broadband access for healthcare providers outside urban areas. *See generally* FCC, *Universal Service*, https://www.fcc.gov/general/universal-service (last updated Apr. 29, 2024). The FCC also created a mechanism to implement Congress's direction that telecommunications carriers providing interstate telecommunications services "contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." 47 U.S.C. § 254(d); *see, e.g.*, 47 C.F.R. §§ 54.706, 54.709. Finally, the FCC appointed USAC to help administer these mechanisms, *see generally* 47

C.F.R. §§ 54.701-.717, with all USAC actions subject to FCC review, *see id.* § 54.719. The FCC forbade USAC from "mak[ing] policy" or "interpret[ing] unclear provisions" of the 1996 Act or FCC rules. *Id.* § 54.702(c).

Each quarter, the FCC adopts a "contribution factor" that specifies the percentage of telecommunications providers' "end-user interstate and international telecommunications revenues" that must be paid into the Universal Service Fund. *Id.* § 54.709(a)(2). Under the FCC's rules, USAC calculates and submits "projections of demand" and administrative expenses for the FCC's universal-service mechanisms, "at least sixty (60) calendar days prior to the start of that quarter." *Id.* § 54.709(a)(3). USAC also submits the total "contribution base" (*i.e.*, "contributors' projected collected interstate and international revenues" from domestic end users for telecommunications services) at least 30 days before the start of each quarter. *Id.* § 54.709(a)(1); *see id.* § 54.709(a)(3). The FCC's Office of Managing Director then issues a public notice with the proposed contribution factor based on the demand and contribution-base projections, and it is "deemed approved" by the Commission if not altered within 14 days of the release of the public notice. *See id.* § 54.709(a)(3).

In 2021, Petitioners[1] in these cases began challenging each of the FCC's adoptions of the

[1] Petitioners in these cases overlap, but are not identical. Consumers' Research, Cause Based Commerce, Inc., Joseph Bayly, Jeremy Roth, Deanna Roth, Lynn Gibbs,

quarterly contribution factor in the courts of appeals. The Sixth Circuit Petitioners filed a challenge to the contribution factor for the fourth quarter of 2021. *See* 6th Cir. Pet. App. 47a. The Eleventh Circuit Petitioners filed a challenge in that court to the contribution factor for the fourth quarter of 2022. *See* 11th Cir. Pet. 16. Substantially overlapping sets of parties have also filed challenges in the Fifth and D.C. Circuits to the contribution factors for other quarters. *See* 11th Cir. Pet. iv (listing related proceedings).

Petitioners in both these cases make substantively identical arguments. They contend: (1) that Congress violated the non-delegation doctrine in granting the FCC authority regarding universal service in Section 254 and (2) that the FCC violated the private non-delegation doctrine in relying on USAC to calculate the projected demand and contribution base that inform the quarterly contribution factor. Panels in both courts of appeals unanimously rejected those arguments; the Sixth Circuit also denied a petition for *en banc* rehearing (the Eleventh Circuit Petitioners did not seek rehearing). *See* 6th Cir. Pet. App. 2a-3a, 56a-57a; 11th Circuit Pet. App. 2a. The challenges in the Fifth Circuit and D.C. Circuit remain pending.

---

and Paul Gibbs are petitioners in both cases. There are additional individual petitioners identified *supra* at ii, in the petition from the Eleventh Circuit. Unless otherwise indicated, we use "Petitioners" to include the parties to both proceedings, and the "Sixth Circuit Petitioners" and "Eleventh Circuit Petitioners" to refer to the parties to the particular cases.

REASONS FOR DENYING THE PETITION

Neither of Petitioners' challenges warrants review. As Petitioners admit, "there is no circuit split yet on these issues," 6th Cir. Pet. 6; 11th Cir. Pet. 8, and they do not assert that the circuit courts' decisions conflict with this Court's precedents. To the contrary, both courts of appeals properly applied this Court's established precedent on the non-delegation doctrine. And with respect to Petitioners' private non-delegation doctrine argument in particular, Petitioners' challenges are essentially disagreements with the government (and the Sixth and Eleventh Circuits) regarding the nature of USAC's role as a matter of fact.

I. Petitioners' non-delegation doctrine challenge does not warrant review.

Petitioners admit that there is no circuit split on the non-delegation doctrine issue. They nonetheless argue that "the Fifth Circuit is poised to create one," having granted *en banc* rehearing after a unanimous panel decision in favor of the government. 6th Cir. Pet. 6-7; 11th Cir. Pet. 8. Should the Fifth Circuit or any other court of appeals—including the D.C. Circuit, which held oral argument on January 26, 2024—create a circuit split by ruling for Petitioners, certiorari may be warranted. That possibility is no basis for certiorari at this point.

Petitioners also do not argue for a grant of certiorari based on a "conflict[] with relevant decisions of this Court." S. Ct. R. 10(c). Instead, they disagree with the Sixth and Eleventh Circuits' application of this Court's intelligible-principle test, *see, e.g.*,

Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 218 (1989), because, they argue, the circuit courts failed to infer a requirement of mathematical caps or formulas from several of this Court's cases. *See* 6th Cir. Pet. 22-27; 11th Cir. Pet. 28-31. They make that argument, even though the Court itself has said it has "never demanded" such a "determinate criterion." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001) (internal quotation marks omitted); *see* 6th Cir Pet. 24; 11th Cir. Pet. 28-29. They also claim more generally that both courts of appeals erred in finding sufficiently intelligible principles in Section 254. *See* 6th Cir. Pet. 24-27; 11th Cir. Pet. 27-31.

Neither argument warrants this Court's review absent a circuit split—particularly given that these same issues are currently before two other federal appellate courts.

The decisions below are correct in any event: This Court's non-delegation doctrine cases do not require the use of a "formula," despite Petitioners' arguments to the contrary. *See* 6th Cir. Pet. App. 27a-30a. To the contrary, in *Skinner*, the Court expressly rejected the application of a "different and stricter nondelegation doctrine" based on the nature of the type of statute at issue. 490 U.S. at 222-23. As the Sixth Circuit explained, the Court in *Skinner* "did not hold, or even imply, that an intelligible principle required a price cap," and the Court later "repeated this very point in *Whitman*." 6th Cir. Pet. App. 28a-29a (citing *Skinner*, 490 U.S. at 220, and *Whitman*, 531 U.S. at 475).

Both circuit courts likewise correctly concluded that Section 254 easily "provide[s] an intelligible principle" to guide the FCC's exercise of discretion,

"especially relative to other statutes that have been upheld as constitutional." 6th Cir. Pet. App. 31a; *see also* 11th Cir. Pet. App. 8a ("An analysis of § 254 confirms that Congress' delegation provides an intelligible principle and therefore passes constitutional muster."). Indeed, in the Eleventh Circuit, Judges Newsom and Lagoa, while expressing disagreement with the test itself in their concurrences, acknowledged that under the binding decisions of this Court the delegation at issue here "satisfies" the "intelligible-principle standard." 11th Cir. Pet. App. 28a (Newsom, J., concurring in the judgment); *see id.* at 43a (Lagoa, J., concurring) (this Court's cases "require us to find that 47 U.S.C. § 254's statutory language likewise satisfies the intelligible principle test").

Nor does this case present an appropriate vehicle to reconsider the Court's near-century old intelligible-principle test absent a disagreement among the courts of appeals. Section 254 has been in force for more than a quarter century. Over that time, millions of rural and low-income Americans, health care providers, and schools and libraries have come to rely on its provisions to ensure access to affordable broadband and other telecommunications. In addition, court and regulatory decisions have provided added gloss on the already-significant statutory text and imposed meaningful constraints on the FCC. For instance, contrary to Judge Newsom's view that Section 254 does not "constrain the FCC's policymaking discretion," *id.* at 25a, federal courts have in fact reversed FCC determinations on multiple occasions based on the text of Section 254. *See Tex. Off. of Pub. Util. Couns. v. FCC*, 183 F.3d 393, 434-35 (5th Cir.

1999) (invalidating the "agency's interpretation of 'equitable and nondiscriminatory'" in Section 254(d) because it permitted the FCC to impose a disproportionate burden on carriers that carry little interstate traffic and more significant international traffic); *Qwest Corp. v. FCC*, 258 F.3d 1191, 1201-03 (10th Cir. 2001) (remanding FCC order that did not sufficiently detail agency's understanding of "reasonably comparable" service and "sufficient" service); *Qwest Commc'ns. Int'l v. FCC*, 398 F.3d 1222, 1234-37 (10th Cir. 2005) (concluding that FCC definitions of terms were inconsistent with the statute).

Beyond that, there is good reason for the Court to defer considering the non-delegation issue. Over the past several Terms, the Court has increasingly invoked the major questions doctrine to serve the same interest the Petitioners claim to champion here: protecting "the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency." *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting); *see, e.g., Biden v. Nebraska*, 143 S. Ct. 2355, 2372-73 (2023); *West Virginia v. EPA*, 597 U.S. 697, 723-24 (2022); *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 595 U.S. 109, 124-26 (2022) (Gorsuch, J., concurring); Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 Admin. L. Rev. 475, 483-84 (2021) (arguing that recent cases apply the major questions doctrine as "a nondelegation canon"). Thus, as Justice Gorsuch has explained, the Court "still regularly rein[s] in Congress's efforts to delegate legislative power; [it] just call[s] what [it's] doing by different names." *Gundy*, 139 S. Ct. at 2141 (Gorsuch,

J., dissenting). The Court should allow time for the lower courts to apply its most recent pronouncements on the major questions doctrine before undertaking the potentially unnecessary task of considering the abandonment of established constitutional precedents. Notably in this regard, Petitioners here have never invoked the major questions doctrine, so this case would be an especially poor vehicle to reconsider the appropriate judicial mechanism or mechanisms for ensuring that Congress does not improperly divest itself of legislative authority.

Review is also not warranted based on Petitioners' speculation that Congress might "replicate[]" the Universal Service Fund in other areas of the government, such as the Internal Revenue Service. *See*, *e.g.*, 6th Cir. Pet. 34-35; 11th Cir. Pet. 39. As noted, Congress passed Section 254 over twenty-five years ago to continue and build upon a long-standing system of FCC subsidies that had already been ruled constitutional. *See Rural Tel. Coal. v. FCC*, 838 F.2d 1307, 1311-12, 1315 (D.C. Cir. 1988). Petitioners do not cite any other laws or even bills to suggest that Congress has considered taking its universal service approach out of its well-established communications context.

II. Petitioners' private non-delegation doctrine challenge does not warrant review.

Petitioners' private non-delegation doctrine challenge does not warrant review for substantially the same reasons. There is no circuit split on this challenge, either, and Petitioners do not assert a conflict with this Court's precedents. *See* 6th Cir. Pet. 6; 11th Cir. Pet. 7.

At bottom, Petitioners' argument rests on a fact-bound disagreement with the consistent judicial and administrative understanding of USAC's role. Petitioners claim that this issue warrants this Court's review because, "[u]nder the Sixth Circuit's framing, there is nothing stopping agencies from handing over vast powers" to private parties. 6th Cir. Pet. 33; *see* 11th Cir. Pet. 37 (same as to Eleventh Circuit). This case does not present such concerns, however, as both circuit courts to consider the argument have now concluded. Rather, "USAC is subordinate to the FCC" and performs only "ministerial and fact-gathering functions." 6th Cir. Pet. App. 43a; *see* 11th Cir. Pet. App. 14a ("[b]ecause the USAC functions subordinately to the FCC, and the FCC maintains authority," there is no violation of the private non-delegation doctrine).

USAC's role with respect to the calculation of the contribution factor is to submit (1) "projections of demand" and administrative expenses for the FCC's universal-service mechanisms and (2) a calculation of the total "contribution base" based on contributors' projected revenues. *See* 47 C.F.R. §§ 54.709(a)(1), (3). USAC lacks any authority to "make policy" or "interpret unclear provisions" of the 1996 Act or FCC rules. *Id.* § 54.702(c). "[I]t is the FCC that calculates the contribution factor," with USAC's "fact-gathering, ministerial, and administrative support." 6th Cir. Pet. App. 43a-44a. And the FCC "is not bound by USAC's projections" in any way. *Id.* at 44a (citing 47 C.F.R. § 54.709(a)(3)).

Petitioners dispute as a factual matter whether the FCC actually exercises its authority to review and

independently decide the issues involved in setting the quarterly Universal Service Fund contribution factor. *See* 6th Cir. Pet. 31-32. Both circuit courts have determined otherwise, however. *See* 11th Cir. Pet. App. 15a-18a ("the FCC maintains deep and meaningful control over the USAC"); 6th Cir. Pet. App. 44a-45a. This fact-bound issue does not require this Court's intervention.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

Jennifer Tatel
Daniel H. Kahn
Morgan O. Schick
Wilkinson Barker
Knauer LLP
1800 M St. NW, Ste. 800N
Washington, DC 20036
(202) 783-4141
jtatel@wbklaw.com

Counsel for USTelecom, NTCA, and CCA

Sean A. Lev
Jason Neal
Counsel of Record
Helen Marie S. Berg
HWG LLP
1919 M St NW, 8th Fl.
Washington, DC 20036
(202) 730-1300
jneal@hwglaw.com

Counsel for Schools, Health & Libraries Broadband Coalition

MAY 3, 2024

Counsel Listing Continues on Next Page

Andrew Jay Schwartzman
525 9th Street NW, 8th Fl.
Washington, DC 20004
(202) 241-2408
AndySchwartzman@gmail.com

*Counsel for Benton Institute,
NDIA, and MediaJustice*