No. 23A-_____

IN THE
Supreme Court of the United States

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CONSUMERS' RESEARCH; CAUSE BASED COMMERCE, INC.; JOSEPH BAYLY; JEREMY ROTH; DEANNA ROTH; LYNN GIBBS; AND PAUL GIBBS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION; AND UNITED STATES OF AMERICA,

Respondents.

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

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APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI

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To the Honorable Brett Kavanaugh, Associate Justice and Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 21, 22, and 30 of this Court, Petitioners respectfully request a 60-day extension of time, to and including October 27, 2023, within which to file a Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit in this case. The Sixth Circuit issued its panel opinion on May 4, 2023, and denied rehearing *en banc* on May 30, 2023. A petition for a writ of certiorari is currently due on or before August 28, 2023. This application is being filed more than ten days before that date.

The Sixth Circuit panel opinion is reported at 67 F.4th 773 and attached as Exhibit 1. The Sixth Circuit's order denying rehearing *en banc* is unreported but attached as Exhibit 2. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254.

BACKGROUND

Petitioners raise core separation-of-powers challenges to the Federal Communications Commission's Universal Service Fund (USF). In the decision below, the Sixth Circuit rejected those challenges, but in a parallel suit the Fifth Circuit recently granted Petitioners' request for *en banc* rehearing on those same issues, arising out of a different quarterly ratemaking proceeding. *See Consumers' Rsch. v. FCC*, 72 F.4th 107 (5th Cir.), *vacating panel opinion* at 63 F.4th 441 (5th Cir. 2023). That grant of *en banc* rehearing confirms the importance of these issues and portends well for the possibility of a circuit split.

The USF collects nearly $10 billion every year—25 times the FCC's annual budget—by imposing a tax on consumers' monthly phone bills. Those funds are then used for a galaxy of telecommunications programs that allegedly expand service for the general public. But the USF is bankrolled by a historically "unique revenue raising mechanism." *Consumers' Rsch.*, 63 F.4th at 450. It is "unique" because it takes Congress's revenue-raising and taxing powers and hands them over to an unelected agency bureaucracy, without Congress itself having imposed clear and meaningful limitations. This delegation was accomplished via a combination of aspects that render the USF unlike any other program currently or previously seen.

First, unlike other general welfare or taxing programs, there is an "absence of a limit on how much the FCC can raise for the USF." *Id.* at 448. "Congress neither capped the amount that the FCC may raise in contributions for the Fund nor imposed a formula for how to calculate the contributions to the Fund." Ex. 1 at 17. And any implied limitations found in the definition of "universal service" are written in such vague and broad language that courts and the FCC itself have labeled them as merely "aspirational," *Tex. Off. of Pub. Util. Couns. v. FCC*, 183 F.3d 393, 421 (5th Cir. 1999). As Judge Newsom stated during a recent Eleventh Circuit oral argument

involving these same provisions, "When you read this statute it just feels like a lot of words … like a lot of soaring rhetoric." Oral Argument Recording 15:40–15:52, *Consumers' Rsch. v. FCC*, No. 22-13315 (11th Cir. June 21, 2023). But an agency limited only by its own "aspirations" and Congress's "soaring rhetoric" has no limit at all. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001).

Second, the USF features a rare "dual-layer" delegation, where Congress not only allowed the agency to raise money for "universal service" but then allowed the FCC to redefine universal service and add new universal service "principles" virtually at will. 47 U.S.C. § 254(c)(1), (b)(7). This Court has previously held that similar multi-layer regimes are especially suspect from a constitutional perspective, including in the nondelegation context. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 538–39 (1935); *see also Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 495 (2010). Letting an agency daisy-chain its own revenue-raising authority is "delegation running riot." *Schechter*, 295 U.S. at 553 (Cardozo, J., concurring).

Third, the USF charges are taxes, i.e., money raised for the benefit of the general public, as confirmed by the very name of the program: *Universal* Service Fund. The taxing power is the most jealously guarded legislative prerogative, borne out by centuries of legislatures fighting to check the executive via the power of the purse. Even the label of these forced payments as "contributions" to the executive, 47 U.S.C. § 254(d), is reminiscent of the abusive history of English kings avoiding Parliament's purse strings by demanding payment from subjects under the euphemistic title of "loving contributions."[1] Allowing an agency to exercise this grand taxing power without meaningful limits is therefore especially egregious.

[1] *See Benevolence*, 3 ENCYCLOPEDIA BRITANNICA 728 (1911), https://en.wikisource.org/wiki/Page%3AEB1911_-_Volume_03.djvu/748.

Fourth, this revenue-raising power is perpetual, not a one-time or limited grant. *See Community Fin. Servs. Ass'n of Am. v. CFPB*, 51 F.4th 616, 638 (5th Cir. 2022) (labeling an agency's "self-actualizing, perpetual funding mechanism" as "[m]ost anomalous").

Taken together, this "unique" revenue scheme means the FCC can self-raise billions of dollars in taxes from the general public in perpetuity, with no meaningful limits. Such a novel delegation raises serious alarm bells for the separation of powers. After all, "[p]erhaps the most telling indication of a severe constitutional problem with an executive entity is a lack of historical precedent to support it." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2201 (2020).

This scheme violates both the original and modern understandings of the nondelegation doctrine. The Framers knew "that it would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce *vague aspirations* and then assign others the responsibility of adopting legislation to realize its goals," *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (emphasis added), but that is precisely what Congress did here when it delegated the difficult policy-making decision of how much money to raise for the USF based on nothing more than "aspirational" limits, *Tex. Off.*, 183 F.3d at 421.

And although this Court has found the modern intelligible-principle test satisfied by relatively open-ended statutory delegations in the context of variegated matters largely incapable of advance definition, the Court has found an intelligible principle in delegations of *revenue-raising* powers only in cases where there was an objective statutory limit on the executive's ability to self-fund. *See Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 220 (1989); *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 401 (1928). This distinction makes sense. The decision of how much money to raise for a multi-billion-dollar welfare program is not some trifling point or highly scientific technical detail for agency bureaucrats. The revenue-raising power is at the core of

Congress's legislative power under Article I, and Congress is the expert when it comes to revenue-raising, meaning Congress itself must set that limit.

In fact, this Court has expressly warned—in a case involving the FCC, no less—that allowing an agency to raise money based only on vague statutory phrases like "'public policy or interest served, and other pertinent facts'" raises the specter of "forbidden delegation of legislative power" by "carr[ying] [the] agency far from its customary orbit and put[ting] it in search of revenue in the manner of an Appropriations Committee of the House." *NCTA v. United States*, 415 U.S. 336, 341–42 (1974).

The government has conspicuously failed to cite any similar regime either currently or previously on the books. And scholars have explained that "[u]nlike 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 (2000).

Moreover, the USF suffers from the tell-tale symptoms of improperly delegated power. Without meaningful political checks, the USF taxing rate has skyrocketed from around 2% to over 30% and now collects approximately 25 times the FCC's *entire* annual budget. The lack of accountability also means the USF is perpetually the subject of tremendous waste, fraud, and abuse. And the USF tax is among the most regressive in the country.

If replicated elsewhere, Congress would never have to appropriate funds or pass a budget again. Federal agencies could raise billions, even trillions, of dollars under the euphemistic label

of "contributions." Congress could even replace the Internal Revenue Code with a simple delegation to the IRS to collect mandatory "contributions" that are "sufficient and equitable" to fund the entire federal government. It would be a politician's dream: faux-low taxes, yet the bureaucracy still flush with cash.

But it gets worse. The FCC has subsequently delegated USF operations to a *private* corporation, the Universal Service Administrative Company (USAC), which is led by a group of self-described industry "interest groups." Each quarter, USAC proposes the new USF tax, which is *automatically* "deemed approved" if the FCC Commissioners do nothing during the "small window" for review. *Consumers' Rsch.*, 63 F.4th at 451. There is accordingly not even a pretense of review by the Commissioners themselves, and the process occurs so close to the start of a new quarter that the FCC would have no choice but to accept USAC's figures anyway. Unsurprisingly, the FCC has never substantively changed USAC's proposals over the last 25 years.

If a private company can perpetually collect billions of dollars in taxes pursuant to a statute with no objective ceiling, and without the FCC Commissioners lifting a finger, it is difficult to imagine what remains of the political accountability mandated by the nondelegation and private nondelegation doctrines.

* * *

Despite these myriad constitutional flaws, the Sixth Circuit panel below wholeheartedly endorsed the USF scheme, holding that broad and vague delegations giving federal agencies the power to raise billions of dollars in revenue are perfectly acceptable "'in our increasingly complex society.'" Ex. 1 at 16, 23. But the "original meaning, history, and structure of our Constitution" confirm that it is no answer to say that "modern society is too complex to be run by legislators—

better to leave it to the agency bureaucrats." *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring).

The panel below also disregarded this Court's admonition in *NCTA* that allowing agencies to extract money limited only by vague statutory phrases—like the "'public policy or interest served'"—raises the specter of "forbidden delegation of legislative power." *NCTA*, 415 U.S. at 341–42. By ignoring *NCTA*, the Sixth Circuit could proceed to deem it a mere coincidence that this Court has approved revenue delegations *only* where there was an objective statutory limit on the executive's ability to self-fund. Ex. 1 at 17–19.

The Sixth Circuit also turned the nondelegation doctrine on its head by holding that the USF's unique dual-layer delegation—where it can redefine and add new principles to "universal service" and then raise money to cover that expanded scope—"reflects the exact rationale that underpins the nondelegation doctrine." Ex. 1 at 23. Of course, the nondelegation doctrine exists precisely to *prevent* the executive branch from exercising and accumulating legislative power via vague statutory enactments.

As for the egregious private nondelegation violation, the Sixth Circuit held that automatically letting a private company set the quarterly taxing rate imposed on millions of Americans was a mere exercise of the FCC's "policymaking discretion … 'not to act.'" Ex. 1 at 29. But letting private proposals automatically become binding under penalty of law is the very definition of a private nondelegation violation. Under the Sixth Circuit's view, Congress could "vote all power to the President and adjourn *sine die*," *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting)—and that would be a constitutional exercise of Congress's "policy-making discretion not to act."

REASONS JUSTIFYING AN EXTENSION OF TIME

Good cause exists for extending the time in which Petitioners can file their petition for a writ of certiorari.

First, as noted above, the Fifth Circuit has recently granted Petitioners' request for *en banc* rehearing of the same issues presented in this case. The questions presented would warrant review by this Court even without a circuit split, but the Fifth Circuit's grant of *en banc* signals that it may soon split from the Sixth Circuit on these important nondelegation matters.

However, the Fifth Circuit's *en banc* argument will not occur until mid-September 2023, so no decision is imminent. The Eleventh Circuit also recently heard oral arguments in a parallel case, and a decision there could also create a split from the Sixth Circuit's decision below. *See Consumers' Rsch. v. FCC*, No. 22-13315 (11th Cir.). Extending the filing deadline for the petition arising out of the Sixth Circuit will allow the parties to put these cases on a similar timeline so this Court can potentially review them all at the same time and with the benefit of the Fifth Circuit's and Eleventh Circuit's forthcoming opinions.

Second, this case raises numerous cert-worthy legal issues requiring additional time to fully brief, especially if the *en banc* Fifth Circuit issues an opinion addressing these issues in the meantime. In particular, these USF cases raise: (1) whether the nondelegation doctrine allows Congress to establish a unique revenue raising mechanism containing no objective ceiling on the amount that a federal agency can self-raise via a tax paid by millions of consumers; and (2) whether the private nondelegation doctrine allows a federal agency to rubber stamp a private company's operation of a nearly-$10-billion-a-year welfare fund.

Third, counsel for Petitioners has numerous other deadlines in pending cases during the intervening period. The *en banc* brief in the Fifth Circuit challenge to USF is due July 31, and then

counsel will need to prepare for the *en banc* argument itself in September. Another brief challenging the USF is due at the D.C. Circuit on August 14. The government also recently sought cert in *Biden v. Feds for Medical Freedom*, No. 23-60, where the undersigned is counsel of record for Respondents, and a response is currently due August 21 (Responds have asked for an extension). Counsel is also involved in drafting and reviewing several as-yet confidential complaints that will likely be filed over the next month. And in his role as the Director of the Separation of Powers Clinic at Scalia Law School, he is drafting a petition for a writ of certiorari due September 15, *see Lewis County, Ky. v. Helphenstine*, No. 23A13, and likely will prepare an amicus due September 6 in *Moore v. United States*, No. 22-800.

PRAYER

For these reasons, Petitioners respectfully request that the Court extend the time to file their petition for a writ of certiorari by 60 days, to and including October 27, 2023.

Dated: July 26, 2023

/s/ R. Trent McCotter

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