

Nos. 23-456 and 23-743

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IN THE  
*Supreme Court of the United States*

CONSUMERS' RESEARCH, ET AL., *Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

CONSUMERS' RESEARCH, ET AL., *Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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

**SUPPLEMENTAL BRIEF**

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**ARGUMENT**

Petitioners previously asked for rehearing of this Court’s June 10, 2024, order denying their petitions for a writ of certiorari in these two cases, arising out of the Sixth and Eleventh Circuits, respectively.

The primary basis for rehearing was that Respondents had argued this Court should deny those petitions because it could still review a forthcoming decision from the *en banc* Fifth Circuit—which was likewise considering a nondelegation and private nondelegation challenge to the Federal Communications Commission’s Universal Service Fund (“USF”)—yet Respondents then told the *en banc* Fifth Circuit that it could not reach the merits after all because this Court’s denials meant Petitioners’ challenges were precluded.

On July 24, 2024, the *en banc* Fifth Circuit issued its decision. It first rejected Respondents’ preclusion arguments, finding them untimely and forfeited. *Consumers’ Rsch. v. FCC*, \_\_ F.4th \_\_, No. 22-60008, 2024 WL 3517592, at \*7 (5th Cir. July 24, 2024). It also found that preclusion would be inequitable: “Had FCC told the Supreme Court it thought petitioners’ claims in [the Fifth Circuit] were issue precluded, the Court might have granted certiorari in those other cases. It would be unjust to allow FCC to raise an issue to evade *en banc* review so soon after it hid that issue to evade Supreme Court review.” *Id.* at \*7 n.5.

On the merits, the Fifth Circuit then held that the USF violates the nondelegation doctrine, recognizing

“the 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 a private entity, was “enough to hold [the USF] unlawful.” *Id.* at \*16.

Breaking from the Sixth and Eleventh Circuits, the *en banc* 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.” *Id.* at \*31.

Given this development, the Court should grant rehearing and grant the petitions for writs of certiorari in Nos. 23-456 and 23-743, as a new circuit split is a textbook example of “intervening circumstances of a substantial ... effect.” Rule 44.2; *see Supreme Court Practice* § 15-19 (11th ed. 2019).

**CONCLUSION**

The Court should grant rehearing.

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July 25, 2024