

No. 24-354

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

CONSUMERS' RESEARCH, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

REPLY BRIEF FOR THE PETITIONERS

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Respondents agree (Br. 6-8) that the en banc Fifth Circuit's decision in this case creates a circuit conflict and that the questions presented in the government's petition for a writ of certiorari warrant this Court's review. Apart from the merits, the only dispute between respondents and the government concerns which petitions the Court should grant. Respondents contend (Br. 7) that, either in addition to or instead of granting the petition in this case, the Court should grant the petitions in *Consumers' Research v. FCC*, 144 S. Ct. 2628 (2024) (No. 23-456), and *Consumers' Research v. FCC*, 144 S. Ct. 2629 (2024) (No. 23-743), which seek review of decisions of the Sixth and Eleventh Circuits respectively. In the government's view, the Court should grant the two pending petitions that seek review of the Fifth Circuit's decision—the government's petition in this case

and the private intervenors' petition in *Schools, Health & Libraries Broadband Coalition v. Consumers' Research*, No. 24-422 (filed Oct. 11, 2024) (*SHLB Coalition*).

1. For multiple reasons, the two petitions seeking review of the Fifth Circuit's decision are better vehicles for clarifying the law in this sphere than the petitions seeking review of the Sixth and Eleventh Circuit decisions. First, only the petitions seeking review of the Fifth Circuit decision present all three of the potentially dispositive questions: (1) whether Congress impermissibly delegated legislative power to the Federal Communications Commission (FCC); (2) whether the FCC impermissibly delegated governmental power to the Administrator; and (3) whether the combination of the two alleged delegations violates the Constitution. See Pet. I; Pet. at i, *SHLB Coalition, supra* (No. 24-422). The other petitions for writs of certiorari, by contrast, present only the first two questions. The Sixth and Eleventh Circuits did not specifically discuss whether the combination of the two alleged delegations violates the Constitution, and the petitions seeking review of those circuits' decisions do not raise that question. See Pet. at i, *Consumers' Research, supra* (No. 23-456); Pet. at i, *Consumers' Research, supra* (No. 23-743).

Second, the Fifth Circuit is the only court of appeals that has found a nondelegation violation in the FCC's implementation of 47 U.S.C. 254. Granting certiorari in this case would allow the Court to directly review the Fifth Circuit's reasoning.

Third, this Court previously denied the petitions seeking review of the Sixth and Eleventh Circuit decisions. See *Consumers' Research*, 144 S. Ct. at 2628; *Consumers' Research*, 144 S. Ct. at 2629. Respondents have filed petitions for rehearing in those cases. But contrary to respondents' suggestion (Br. 7), the rehearing

petitions are not yet “fully briefed,” since the Court has not asked the government or the intervenors to file responses to those petitions. See Sup. Ct. R. 44.3 (“In the absence of extraordinary circumstances, the Court will not grant a petition for rehearing without first requesting a response.”). Granting either or both of those certiorari petitions could therefore involve unnecessary delay.

2. Various private entities that intervened on the government’s side in the Fifth Circuit have filed their own petition for a writ of certiorari seeking review of the Fifth Circuit’s decision. See Pet. at i, *SHLB Coalition, supra* (No. 24-422). When multiple parties have filed petitions seeking review of the same court of appeals decision and this Court has concluded that the decision warrants its review, the Court has often granted all the petitions and consolidated the cases. See, e.g., *Hewitt v. United States*, 144 S. Ct. 2713 (2024) (No. 23-1002); *Yegiazaryan v. Smagin*, 143 S. Ct. 645 (2023) (No. 22-381); *Arizona v. Navajo Nation*, 143 S. Ct. 398 (2022) (No. 21-1484). Consistent with that practice, the Court should grant the government’s petition and the petition filed by the intervenors and should consolidate the two cases. Alternatively, the Court should grant the government’s petition and hold the intervenors’ petition.

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The petitions for writs of certiorari in this case and in *SHLB Coalition* should be granted, and the cases should be consolidated. In the alternative, the petition in this case should be granted, and the petition in *SHLB Coalition* should be held pending the resolution of this case. Otherwise, both petitions should be held pending the resolution of *Wisconsin Bell v. United States ex rel. Heath*, No. 23-1127 (oral argument scheduled for Nov. 4, 2024), and then disposed of as appropriate.

Respectfully submitted.

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