

Nos. 24-354 and 24-422

In the
Supreme Court of the United States

—◆—
FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,

v.

CONSUMERS' RESEARCH, ET AL.,
Respondents.

—
SHLB COALITION, ET AL.,
Petitioners,

v.

CONSUMERS' RESEARCH, ET AL.,
Respondents.

—
ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—
**BRIEF OF THE OGLALA SIOUX TRIBE AS
AMICUS CURIAE IN SUPPORT OF PETITIONER
SHLB COALITION**

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INTEREST OF AMICUS CURIAE

The *Amicus Curiae*,¹ the Oglala Sioux Tribe (“the Tribe”), is a federally recognized Indian Tribe. Established by the Act of March 2, 1889 (25 Stat. 888), the Pine Ridge Indian Reservation is home to the Tribe, which is the sovereign governmental entity with regulatory authority within the reservation’s land boundaries. Oglala Sioux Tribe website, Pine Ridge Indian Reservation, <https://www.oglala.gov/#:~:text=Established%20in%201889%2C%20the%20Pine,than%2052%2C000%20enrolled%20tribal%20members> (last visited Jan. 4, 2025) [hereinafter “Oglala Sioux website”]. The Tribe maintains a membership of more than 52,000 enrolled tribal members, some of whom reside off the reservation. *Id.* The Tribe’s membership benefits from the Universal Service Fund (USF) that supports the Pine Ridge Indian Reservation health care delivery systems, education systems and allows affordable rates for telecommunication services.

A. The Universal Service Fund and fulfillment of federal trust responsibilities

The Telecommunications Act of 1996, 47 U.S.C. 254, has been successfully implemented by the Federal Communications Commission (FCC) through USF subsidies that have directly benefited the Oglala Sioux tribal members living on the Pine

¹ No counsel for a party authored this *amicus curiae* brief, either in whole or in part. No party and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person, other than the *amicus*, its members, or counsel for the *amicus*, made such a contribution. *See* U.S. Sup. Ct. Rules 37.2 & 37.6.

Ridge Indian Reservation. The subsidies enhance the delivery of health care to remote reservation communities, benefit reservation schools and libraries, allow a large number of tribal members to access telecommunication services and support reservation telecommunications infrastructure development.

It is also important to acknowledge that USF subsidies received by the Tribe from the Government, are part of the Government's treaty and statutory trust obligations to provide financial assistance to the Tribe in consideration for the use of approximately 7 million acres of 1868 Treaty lands and natural resources from the lands. When the Oglala Sioux and other Sioux bands refused to sell the 7 million acres to the United States in a proposed 1876 agreement, Congress enacted the agreement into law thereby confiscating the 7 million acres of treaty lands, including the Black Hills in 1877.²

Thus, Section 5 of the Act of February 28, 1877 (19 Stat. 254) provides *inter alia* that: "In consideration of the foregoing [taking] of territory and rights . . . the United States does agree to provide all necessary aid to assist the said Indians in the work of civilization" This includes USF funding for broadband services needed for a civilized Indian population on the Pine Ridge Indian Reservation in consideration for the use of the 7

² In *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), the Court held that the 1877 Act amounted to a "confiscation" of approximately 7 million acres of the western end of the Sioux reservation established by Article 2 of the 1868 Fort Laramie Treaty (15 Stat. 635).

million acres of Sioux land and natural resources, and hundreds of millions of dollars realized from the land and resources each year by the United States and its citizens.

Without continued USF support, the Tribe would suffer immediate and severe telecommunications setbacks that will diminish the current beneficial and evolving efforts to develop reservation connectivity to be comparable to off-reservation levels.

B. The Pine Ridge Indian Reservation

A great many Oglala Sioux live on the Pine Ridge Indian Reservation, located in southwestern South Dakota and northwestern Nebraska, one of the largest Indian reservations in the United States. It consists of 3.5 thousand square miles, more than twice the size of Rhode Island. Oglala Sioux website. The reservation, which occupies the entirety of Oglala Lakota (formerly Shannon) County, the southern half of Jackson County and Bennett County in South Dakota, covers 2.1 million acres. Re-Member website, About the Pine Ridge Reservation, <https://www.re-member.org/pine-ridge-reservation> (last visited Jan. 4, 2025) [hereinafter “Re-Member website”].

The reservation is remote, being located approximately 100 miles from Rapid City, South Dakota, and is surrounded by rolling prairie, Badlands, and the Black Hills. Re-Member website.

The reservation is sparsely populated. The 2020 United States Census reports that the total population of the Pine Ridge Reservation is 18,850. U.S. Census Bureau website, Profile of Pine Ridge

Reservation, [https://data.census.gov/profile/Pine Ridge Reservation, SD--NE?g=2500000US2810](https://data.census.gov/profile/PineRidgeReservation,SD--NE?g=2500000US2810) (last visited Jan. 4, 2025) [hereinafter “Census Bureau Profile”]. The population density is estimated to be only 4.3 people per square mile. Census Reporter website, Pine Ridge Reservation, <https://censusreporter.org/profiles/25000US2810-pine-ridge-reservation/#:~:text=Pine%20Ridge%20Reservation%20%2D%20Profile%20data,2022%205%2Dyear%20unless%20noted> (last visited Jan. 4, 2025) [hereinafter “Census Reporter website”].

The tribal population on the reservation suffers from poverty and a lack of economic opportunities. The median household income on the reservation is estimated to be only \$36,424, as compared to the national median household income of \$77,718. Census Bureau Profile. The poverty rate is 48.7%, as compared to the poverty rate of all people in the United States of 12.5%. *Id.* The labor participation rate for the reservation’s population is only 35.9%, as compared to the labor participation rate for the entire population of the United States of 60.6%. *Id.*

There are 3,143 counties in the United States. Oglala Lakota County, contained entirely within the boundaries of the Pine Ridge Reservation, has the lowest per capita income (\$8,768) in the country, and ranks as the "poorest" county in the nation. Re-Member website.

Members of the Tribe living on the reservation face severe educational challenges that negatively impede on educational success. The school dropout rate is over 70%. Re-Member website. Just 28.7% of the native population of Pine Ridge Reservation reports having attained a high school diploma, GED

or alternative. *Id.* Only 11.9% of the population of the Pine Ridge Reservation have attained either a Bachelor's degree or higher level of education, while 36.2% of the population of the United States as a whole have a Bachelor's degree or higher. Census Bureau Profile.

The overall health of the members of the Tribe living on the reservation is severely compromised due to various reservation specific issues. Approximately 40.2% of the population of the Pine Ridge Reservation are without health care coverage, as compared to 7.9% of the nation's population having no health care coverage. Census Bureau Profile. Average life expectancy on the reservation is about 48 years for men, 52 for women. Dr. Bryan A. Smith, White House Fellow, "Service Delivery on Pine Ridge – Meeting the Oglala Lakota People Where They Are," <https://blog.ssa.gov/service-delivery-on-pine-ridge-meeting-the-oglala-lakota-people-where-they-are/> (last updated Aug. 26, 2024). By contrast, average life expectancy in the U.S. is 73.5 for men, 79 for women, according to the latest Social Security data. Social Security Actuarial Table, <https://www.ssa.gov/oact/STATS/table4c6.html> (last visited Jan. 4, 2025)).

Statistics produced by the Tribe illustrate that tribal members living on the reservation are at risk of serious health problems:

Tuberculosis is 800% higher than in America as a whole.

Infant mortality is 300% higher than in America as a whole.

Teen suicide is 150% higher than in America as a whole.

Approximately 85% of Lakota families are affected by alcoholism.

Approximately 58% of grandparents of Lakota families are raising their grandchildren.³

Approximately 50% of adults over the age of 40 have diabetes.

Re-Member website.

With respect to the younger members of the Tribe living on the reservation, “42.4% of the population was identified as being younger than 20 years old in the 2010 U.S. Census. By comparison, the state of South Dakota average for this demographic is 27.8%.” Re-member website. As for older members of the Tribe residing on the reservation, 19.8% of the population was identified as being older than 50 years old. The South Dakota average for this demographic is 33.8%. *Id.*

One in four children born on Pine Ridge are diagnosed with Fetal Alcohol Syndrome. Oliver Laughlin & Tom Silverstone, “Liquid genocide: alcohol destroyed Pine Ridge reservation – then they fought back,” *The Guardian*, <https://www.the>

³ By contrast, according to the 2017-2021 American Community Survey, 5-year estimates, 8.0% of children under age 18 lived in their grandparents’ home nationwide. U.S. Census Bureau website, Grandparents and their co-resident grandchildren: 2021, <https://www.census.gov/newsroom/press-releases/2024/grandparents-coresident-grandchildren.html#:~:text=The%20report%20also%20provides%20estimates,lived%20in%20their%20grandparents%20home> (last visited Jan. 4, 2025).

guardian.com/society/2017/sep/29/pine-ridge-indian-reservation-south-dakota (last visited Jan. 4, 2025).

The Tribe has a vital interest in having the constitutionality of the USF authorized by 47 U.S.C. § 254 of the Telecommunications Act of 1996, P.L. No. 104-104, 110 Stat. 56 (1996), upheld as these funds are critical to address the dire conditions for the on-reservation Indian population as described by the information and statistics above. In accordance with the Act, the Federal Communications Commission has established four universal service programs to subsidize the provision of telephone and broadband services (1) in remote, “high cost” areas; (2) to low-income consumers; (3) for schools and libraries; and (4) for rural healthcare providers.

C. The USF Funded Program Subsidizing the Provision of Telephone and Broadband Services in Remote, “High-Cost” Areas Has Benefited Pine Ridge Reservation.

Telecommunications networks consist of miles of fiber optics, cell towers, radio access networks, switching equipment, and the employees that must operate and maintain the network. The cost of the network facilities in rural America, and, more particularly, on Tribal Lands is costly, and the service providers do not recover enough from monthly recurring service charges to fully fund these networks that cover rural areas, including Tribal lands. A “high-cost”⁴ supplement payment from the

⁴ The term “high-cost area” is defined by the 1996 Telecommunications Act as meaning “an unserved area in which the cost of building out broadband service is higher, as compared with the average cost of building out broadband service in unserved areas in the United States (as determined

USF is thus sent to an Eligible Telecommunications Carrier (ETC) on a monthly basis to help subsidize the provision of telecommunications services on Tribal lands. *See* Universal Service Administrative Co. website [hereinafter “USAC website”], High Cost, <https://www.usac.org/high-cost/> (last visited Jan. 4, 2025).

Wireline ETCs currently servicing the Pine Ridge Indian Reservation/Oglala Sioux Tribe are Mt. Rushmore Telephone, Golden West Telecommunications Cooperative, and Great Plains Communications. All three of these service providers are incumbent local exchange carriers (ILECs),⁵ and all three currently receive high-cost supplements from the USF.

by the Assistant Secretary, in consultation with the Commission), incorporating factors that include-- (I) the remote location of the area; (II) the lack of population density of the area; (III) the unique topography of the area; (IV) a high rate of poverty in the area; or (V) any other factor identified by the Assistant Secretary, in consultation with the Commission, that contributes to the higher cost of deploying broadband service in the area.” 47 U.S.C. § 1702(a)(2)(G)(i); *see* 47 C.F.R. § 54.1814(a)(4) (“For purposes of the administration of the Affordable Connectivity Program high-cost area benefit, the term “high-cost area” means an area as defined by 47 U.S.C. 1702(a)(2)(G) as determined by the National Telecommunications and Information Administration.”).

⁵ An incumbent local exchange carrier (ILEC) refers to a U.S. phone company that provided local service when the Telecommunications Act of 1996 opened local service to competitors. ILECs provide local telephony access and may still be used where landlines operate. ILECs provide the physical network infrastructure that connects businesses and people. *See* 47 U.S.C. § 251(h)(1); *Southern New England Tel. Co. v. Comcast Phone of Connecticut, Inc.*, 718 F.3d 53, 55 (2d Cir. 2013); *Ohio Bell Tel. Co. v. PUC of Ohio*, 711 F.3d 637, 639 n. 1

The wireless ETC currently servicing the Pine Ridge Indian Reservation is AT&T Mobility, which also currently receives high-cost supplements from the USF. The Oglala Sioux Tribe's wireless residential company, Oglala Lakota Telecommunications, LLC ("Oglala Lakota Telecom"), desires to take over the wireless service from AT&T Mobility and fulfill the ETC commitment as ordered in FCC 01-284. *In re Western Wireless Corporation Petition for Designation as an ETC for the Pine Ridge Reservation in South Dakota*, FCC 01-284, <https://docs.fcc.gov/public/attachments/FCC-01-284A1.pdf>. Oglala Lakota Telecom would then receive the high-cost supplements from the USF.

D. Qualifying Low-Income Consumers on the Reservation Receive Enhanced Monthly Service Fee Benefits, As Well As Reductions in Initial Connection Charges for Telephone Service.

The USF also funds Lifeline, a federal benefit that lowers the monthly cost of phone or internet services for qualifying low-income consumers living on Tribal lands, including on the Pine Ridge Indian Reservation. USAC website, Lifeline, Enhanced Tribal Benefit, <https://www.usac.org/lifeline/enhanced-tribal-benefit/#Enhanced> (last visited Jan. 4, 2025). Such consumers can receive a Lifeline monthly discount of up to \$34.25 per month. *Id.* In addition, such consumers can receive up to a \$100 reduction for first-time connection charges for voice service at their primary residence, a benefit known as Tribal Link-Up. *Id.* The wireline and

(6th Cir. 2013); *Pacific Bell v. Cook Telcom, Inc.*, 197 F.3d 1236, 1238 (9th Cir. 1999).

wireless ETCs servicing the Pine Ridge Indian Reservation all participate in the Tribal Lifeline and Tribal Link-Up programs.

E. The Rural Health Care Program Funded by the USF Also Benefits the Pine Ridge Indian Reservation.

The Rural Health Care program funded by the USF provides funding for two different services. First, the Telecommunications (Telecom) Program provides reduced rates to rural health care providers (HCPs) for telecommunications and voice services for the use of telemedicine and telehealth. USAC website, Rural Health Care, Telecommunications Program, <https://www.usac.org/rural-health-care/telecommunications-program/> (last visited Jan. 4, 2025). Eligible services are discounted at the difference in cost between urban and rural areas in the HCP's home state. *Id.*

The Pine Ridge Indian Reservation Health Care system is primarily provided by the United States Department of Health and Human Services' Indian Health Service (IHS). A portion of the programs, services, functions and activities provided by the IHS are contracted to the Oglala Sioux Tribe pursuant to the Indian Self-Determination and Education Assistance Act of 1975, P.L. 93-638. IHS participates in the Rural Health Care Telecom Program, whereby eligible services are discounted at the difference in cost between rural and urban areas in South Dakota.

The other Rural Health Care service funded by the USF is the Healthcare Connect Fund Program, which provides a 65% discount on eligible broadband connectivity expenses for eligible rural HCPs. USAC

website, Rural Health Care, Healthcare Connect Fund Program, <https://www.usac.org/rural-health-care/healthcare-connect-fund-program/> (last visited Jan. 4, 2025). IHS also participates in the Healthcare Connect Fund Program. The IHS Pine Ridge Service Unit is larger than the Pine Ridge Indian Reservation in that it provides services to eligible Indians in the counties surrounding the reservation that are not in another IHS Service Unit. Examples of the Healthcare Connect Fund services in this area are the broadband network connections between Pine Ridge Hospital, Kyle Health Center, Wamblee Center, and other medical facilities, and the provision of access to the Internet.

F. Schools and Libraries on the Reservation Also Benefit from the USF Funded E-Rate Program.

The USF also funds the Schools and Libraries (E-Rate) program, which subsidizes the provision of internet access, telecommunications services, and related equipment to eligible schools and libraries. USAC website, E-Rate, <https://www.usac.org/e-rate/> (last visited Jan. 4, 2025).

The Pine Ridge Indian Reservation has many K-12 school entities including county, private, and seven (7) United States Department of Interior, Bureau of Indian Education (BIE) funded schools. Pine Ridge School(s) is a K-12 school located in Pine Ridge, South Dakota that is operated directly by the federal government.

The E-Rate program provides telecommunications support to K-12 school and libraries on the Pine Ridge Indian Reservation for eligible services at a 90% discount due to persistent

poverty, as documented by the United States Department of Agriculture (USDA) free school lunch program.⁶ With regard to Crazy Horse School, located in Wamblee, South Dakota, and Wounded Knee School, located in Manderson, South Dakota, these schools participate in the E-Rate program through a consortium headed by the United States Department of Interior Assistant Secretary of Indian Affairs (ASIA) / Bureau of Indian Affairs (BIA) [ASIA/BIA], which operates a telecommunications connection to the internet. Little Wound School, located in Kyle, South Dakota, American Horse School, located in Allen, South Dakota, Porcupine School, located in Porcupine, South Dakota, and Loneman School, located in Loneman, South Dakota, are Tribal Grant schools funded by BIE, that each participate in the E-Rate program independently.

SUMMARY OF ARGUMENT

The USF contribution program established by 47 U.S.C. § 254 of the Telecommunications Act of 1996 does not violate the nondelegation doctrine, a conclusion reached by both the Sixth and Eleventh Circuits. Upholding the conflicting decision of the Fifth Circuit would leave rural Americans, including the inhabitants of remote Native American reservations such as the Pine Ridge Indian Reservation, on the wrong side of the technology divide between rural and urban areas of the nation,

⁶ Discounts provided by the E-Rate program range from 20% (no students eligible for free and reduced lunch) to 90% (over 75% of the school's students are eligible for free and reduced lunch) for Category 1 internet access services. USAC website, Discount Matrix, <https://www.usac.org/wp-content/uploads/e-rate/documents/samples/Discount-Matrix.pdf>.

and would nullify a program that has served millions of Americans, including tribal members living in remote, rural areas, for over twenty-five (25) years.

ARGUMENT

THE UNIVERSAL SERVICE FUND CONTRIBUTION SYSTEM DOES NOT VIOLATE THE NONDELEGATION DOCTRINE.

The Sixth Circuit in *Consumers' Research v. FCC*, 67 F.4th 773, 787-795 (6th Cir. 2023), *cert. denied*, ___ U.S. ___, 144 S. Ct. 2628 (2024), and the Eleventh Circuit in *Consumers' Research v. FCC*, 88 F.4th 917, 923-24 (11th Cir. 2023), *cert. denied*, ___ U.S. ___, 144 S. Ct. 2629 (2024), held that the FCC's establishment of the USF, under the Telecommunications Act of 1996, was not an unconstitutional violation of the nondelegation doctrine rooted in the separation of powers, since Congress provided intelligible principles in delegating power to FCC to establish the USF.

The Fifth Circuit, en banc, reached the opposite conclusion, *Consumers' Research v. FCC*, 109 F.3d 743 (5th Cir. 2024) (*en banc*), *cert. granted*, 2024 WL 4864036 (Nov. 22, 2024) (No. 24-254), over two vigorous dissents. *See id.* 109 F.4th at 788-801 (Stewart, C.J., dissenting) and 109 F.4th at 801-805 (Higginson, C.J.).

One of the dissenters, Circuit Judge Higginson, opined that “Congress designed a vital, nationwide program [i.e., the Universal Service Fund program,] in an area—telecommunications—where the only constant has been rapid change in both technology and markets.” 109 F.4th at 803. He further pointed out that “Congress made the policy decision that

rural Americans [a group of Americans which includes the inhabitants of the Pine Ridge Indian Reservation, as well as of all other Native American reservations,] *should not be abandoned on the wrong side of the technology divide.*” *Id.* (emphasis added).

He elaborated as follows:

Without the ability to predict what types of services urban Americans would have access to and what rates they would pay, Congress decided to require FCC to ensure that rural Americans have “access to telecommunications and information services” “reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.” [47 U.S.C.] § 254(b)(3). The majority offers Congress no guidance on how it should address this rapidly evolving area, or any number of others, differently.

Id. at 803-804.

By holding the USF program unconstitutional, the Fifth Circuit *en banc* majority improperly “nullifies a program that has served millions of Americans [, including the residents of the Pine Ridge Indian Reservation,] for over a quarter of a century, which Congress, FCC experts, industry, and consumers revisit yearly in the face of changing technology and markets.” *Id.* at 805.

CONCLUSION

In view of the above arguments and citations of authority, the Amicus Curiae Oglala Sioux Tribe respectfully requests that the Fifth Circuit’s decision

in *Consumers' Research v. FCC*, which determined that the USF program established by 47 U.S.C. § 254 violates the nondelegation doctrine and is therefore unconstitutional, be reversed.

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