

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

FEDERAL COMMUNICATIONS COMMISSION,)
ET AL.,)
Petitioners,)
v.) No. 24-354
CONSUMERS' RESEARCH, ET AL.,)
Respondents.)

SCHOOLS, HEALTH & LIBRARIES)
BROADBAND COALITION, ET AL.,)
Petitioners,)
v.) No. 24-422
CONSUMERS' RESEARCH, ET AL.,)
Respondents.)

Pages: 1 through 180

Place: Washington, D.C.

Date: March 26, 2025

HERITAGE REPORTING CORPORATION

Official Reporters

1150 Connecticut Avenue, N.W., Suite 305

Washington, D.C. 20036

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13 v.) No. 24-422
14 CONSUMERS' RESEARCH, ET AL.,)
15 Respondents.)
16 - - - - -
17 Washington, D.C.
18 Wednesday, March 26, 2025

19
20 The above-entitled matter came on for
21 oral argument before the Supreme Court of the
22 United States at 10:16 a.m.

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24
25

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8 the Respondents.

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1 P R O C E E D I N G S

2 (10:16 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 24-354, Federal
5 Communications Commission versus Consumers'
6 Research, and the consolidated case.

7 General Harris.

8 ORAL ARGUMENT OF SARAH M. HARRIS
9 ON BEHALF OF THE PETITIONERS IN CASE 24-354

10 GENERAL HARRIS: Mr. Chief Justice,
11 and may it please the Court:

12 Section 254 is no delegation running
13 riot. Congress first told the FCC what policy to
14 follow: To give all Americans access to basic
15 telecommunications services at reasonable
16 charges, i.e., universal service. So FCC can
17 promote phone service but not faxes.

18 Second, Congress said how to do it, by
19 charging carriers a fee, then reimbursing
20 carriers that serve universal service programs.

21 Third, Congress dictated how much to
22 charge, only what's sufficient to achieve
23 universal service, so no more than needed to
24 support specified programs.

25 Fourth, Congress prescribed how to

1 allocate fees. They must be equitable and
2 non-discriminatory. So FCC can't charge by
3 carrier size or revenue.

4 Fifth, Congress detailed what
5 underserved areas FCC must target, low-income,
6 rural, insular, and high-cost areas, plus
7 schools, libraries, and healthcare providers.

8 On top of that, Congress enacted 254
9 against the backdrop of a half-century history
10 where FCC advanced universal service for rate
11 subsidies. That delegation leaves key policy
12 choices to Congress and is definite and precise
13 enough for courts to tell if FCC followed
14 Congress's limits when filling in details.

15 Indeed, this scheme resembles the
16 pipeline safety fee in *Skinner*, which this Court
17 deemed an easy case. Like in *Skinner*,
18 Respondents do not ask this Court to revisit
19 precedents approving far broader delegations.
20 Respondents instead press a special
21 non-delegation rule for taxes, the very rule
22 *Skinner* rejected.

23 Respondents' private non-delegation
24 challenge likewise fails. They challenged FCC's
25 reliance on USAC to calculate carriers' proposed

1 contribution fee. But FCC itself reviews,
2 publishes, and adopts the fee for it to take
3 effect. That is a basic delegation of accounting
4 tasks, not grounds for the Magna Carta.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: Do any of the
7 principles that you just listed apply to the
8 revenue-raising activities of the -- of -- of the
9 FCC?

10 GENERAL HARRIS: All of the principles
11 I identified apply to them -- well, all of the
12 principles I identified apply to them in that
13 it's a -- a sort of unitary scheme in which the
14 FCC is constrained and not raising more than is
15 sufficient to support specified programs.

16 So under the Fifth Circuit's Alenco
17 decision, which we agree with, FCC can't just say
18 wouldn't it be nice to have a rainy day fund
19 where there's an additional \$10 billion lying
20 around. It has to be -- teed to the specific
21 universal program -- service programs that have
22 been in existence and that Congress prescribed
23 for the FCC to pursue.

24 JUSTICE THOMAS: How does that
25 constrain the revenue raising?

1 GENERAL HARRIS: It constrains the
2 revenue raising because it has to be sufficient.
3 Congress uses that word three times in different
4 parts of the statute, in 254(d), 254(e), and also
5 in -- in also in (b)(5).

6 And "sufficient" means it can't be,
7 again, excessive. It -- and that's what the
8 Fifth Circuit decision that we agree with is
9 saying.

10 So, again, if the programs are running
11 at a particular rate, which they have been for
12 the last 10 years, Congress -- the FCC can't just
13 turn around and say: Why don't we charge more.
14 Why don't we put more -- why don't we -- why
15 don't we make the carriers pay more of a fee?

16 And -- and so that is a real limit.
17 It's a qualitative limit, and it is the type of
18 limit that is common throughout statutory
19 schemes. We cite a number of other ones at our
20 reply brief at pages 8 to 9 where -- where
21 various agencies, and indeed this Court, are
22 allowed to -- are -- are allowed to charge
23 reasonable fees, which is construed in -- against
24 the backdrop of a statutory --

25 JUSTICE THOMAS: Can you -- do you

1 have any examples of fees that did not have a
2 monetary limit or taxes that did not have
3 monetary limits that were imposed either by
4 agencies or by Congress?

5 GENERAL HARRIS: Well, yes. Again,
6 all of the ones on pages 8 to 9 are examples of
7 that. They're all -- either -- you could
8 classify them as either taxes or fees, but they
9 involve such things as supporting the Office of
10 the Comptroller of the -- of the currency's
11 functions with fees from regulated parties --

12 JUSTICE THOMAS: And those have no
13 limits and/or no rates?

14 GENERAL HARRIS: So we are not arguing
15 for a no limits at all approach where you can
16 just raise whatever revenue we feel like -- you
17 feel like. And we don't think 254 follows that
18 approach either. It -- the idea is there are
19 qualitative limits that are baked into the
20 statutory scheme, not raise whatever amount of
21 money; you know, a trillion dollars.

22 And, again, I'll just point out it's a
23 little perverse in two senses to think that you
24 can cure a non-delegation problem and give no
25 other guidance than giving a cap of, say, like \$1

1 trillion to raise and leave the rest for the
2 agency to figure out. Not only is that a very
3 arbitrary separation of powers rule but it would
4 require overturning such cases as Skinner and
5 J.W. Hampton, where this Court not only said
6 there's no special non-delegation rule for taxes
7 but did -- didn't seem to adopt that basic
8 proposition.

9 CHIEF JUSTICE ROBERTS: Should --
10 should we be looking to sort of a -- a common law
11 -- approach, in other words, what the Commission
12 has done, or instead what the Commission could
13 do?

14 GENERAL HARRIS: I think you should
15 look first and foremost at the statutory text.
16 And the statutory text itself incorporates the
17 concept of universal service that applied from
18 -- from the inception of the FCC Act. And so let
19 me just sort of explain why that is.

20 Section 254 obviously itself is a
21 reticulated scheme that prescribes all the
22 details and constraints that I described, but on
23 top of that, it is preserving and advancing the
24 concept of universal service that was set forth
25 in Section 151 of the Act that harks back to

1 1934.

2 So, for instance, when the FCC is
3 directed to figure out what universal service
4 entails, the FCC is not just looking to Section
5 254(c), which is defining universal service as an
6 evolving level of telecommunications services
7 that have to meet sort of four specified
8 parameters, including the objective -- objective
9 criterion of -- that a substantial majority of
10 residential customers adopted it.

11 The FCC also has to consider the
12 backdrop of Section 151, which originally defined
13 "universal service" as mandating the FCC to make
14 available, so far as possible, to all the people
15 of the United States, a rapid, efficient,
16 nationwide wire and radio communications service
17 with adequate facilities at reasonable charges.

18 Congress was enacting this statute in
19 1996 against that backdrop and against the way
20 the FCC had implemented this system.

21 CHIEF JUSTICE ROBERTS: Well, what if
22 the law said the level of service that the --
23 should be afforded is -- is service that is fair?
24 Would that present a constitutional problem?

25 GENERAL HARRIS: It could but not

1 against this statutory scheme because I think the
2 level of service that could be fair would, again
3 in this particular context -- and something this
4 Court has recognized in other non-delegation
5 cases with rate setting or other stuff, if you
6 have a regulatory backdrop that Congress is
7 acting against, a term that's otherwise amorphous
8 like "fair" or "equitable" or whatever it is gets
9 meaning through the -- through the particular
10 regulatory context in which it exists.

11 And, again, I'll also just point out
12 Section 254 is a heck of a lot more specific than
13 just do what is fair. Section (b)(3), for
14 instance, is prescribing in like very specific
15 detail how exactly --

16 CHIEF JUSTICE ROBERTS: But your --
17 your answer, I guess, is that it could, that
18 could be sufficient?

19 GENERAL HARRIS: It could be a problem
20 --

21 CHIEF JUSTICE ROBERTS: In -- it --

22 GENERAL HARRIS: -- or it could be --

23 CHIEF JUSTICE ROBERTS: You would
24 look -- in -- in a particular context or
25 something, but --

1 GENERAL HARRIS: Absolutely. And
2 that's exactly what this Court has done in other
3 rate-setting contexts.

4 So, for instance, in the Court's past
5 cases with respect to Rock Royal, for instance,
6 where the question is what is a reasonable rate
7 for milk prices, to -- to achieve price parity,
8 you could say in the abstract sort of just and
9 reasonable, if you looked at it divorced from
10 anything else, might be a pretty significant
11 delegation of policy-making authority. But in
12 the particular context of the history of
13 rate-making, it gains meaning and gains teeth.

14 And I think that's consistent with the
15 objective when the Court is looking at a
16 constitutional challenge. The aim is to look for
17 constraints and means of -- and -- and -- and --
18 and constitutional avoidance, as opposed to
19 saying Congress didn't give any meaningful
20 limits.

21 And again, that is very consistent
22 with the highly detailed nature of 254 in this
23 particular context, which is providing much more
24 than just abstract rates.

25 And again, looking back at the 19- --

1 pre-1996 scheme, the FCC did, for, you know, a
2 half century, use its power to impose just and
3 reasonable rates to provide universal service
4 through a system of implicit subsidies.
5 Respondents aren't challenging that, and I think
6 that history of what the FCC did just gives more
7 substance and more guidance to what's happening
8 here.

9 And --

10 JUSTICE JACKSON: Can you speak to the
11 combination theory or the combination argument?

12 GENERAL HARRIS: Yes. It's meritless.
13 And the reason is -- there's a couple of reasons
14 for this.

15 One is the idea that Congress can't
16 delegate legislative power is a basic restriction
17 on Congress -- on -- on what Congress can do and
18 the constitutional design.

19 Congress can't pass legislative power
20 to anyone. It doesn't matter if it's an agency
21 or a private party. And it doesn't matter if
22 someone then sort of passes it along. Like, you
23 just can't pass go. Congress can't do that.

24 So the idea that there's sort of an
25 aggravated constitutional offense just by having

1 a -- a -- a subdelegation, just really doesn't
2 track the nature of the Article I challenge.

3 The second issue is just the way in
4 which the combination theory has kind of morphed
5 in this Court.

6 I am, candidly, not sure at this point
7 whether we are dealing with an Article I sub --
8 delegation challenge from the FCC to USAC, where
9 there's an additional pass-along of legislative
10 power that's the problem, or if we're dealing
11 with an Article II challenge, where there is a
12 supposedly excessive delegation of executive
13 power to USAC but the FCC would presumably be
14 okay in at -- at least possessing that power.

15 And if it's the latter category, I'm
16 not sure what constraints Respondent is offering
17 here or, you know, the -- the presentation of
18 that particular argument. But what I can tell
19 you is it's -- it's definitely meritless, because
20 USAC is not exercising any kind of problematic
21 power. It is just making recommendations --

22 JUSTICE JACKSON: Let me ask you.
23 Does the private non-delegation theory suffer
24 from the same kind of lack of clarity in terms of
25 its origins? I mean, I -- I -- I'm trying to

1 understand its distinction with the traditional
2 non-delegation theory.

3 It seems as if, you know, if there's a
4 problem with Congress delegating this power, this
5 -- status of the party that receives it shouldn't
6 matter. And if the party that receives it, being
7 private is the problem, that seems more like an
8 appropriations issue.

9 So I -- I guess I'm just trying to
10 understand what the source of that theory is as
11 well.

12 GENERAL HARRIS: Yes. So the --
13 the -- I think the source of the theory is in
14 question in this case. I will say, again, for
15 Article I, you can't delegate that power to
16 anyone. So it wouldn't matter if it's the
17 agency, if it's directly to a private party.
18 But, like, there's no additional offense from
19 subdelegating it.

20 JUSTICE ALITO: Ms. Harris --

21 GENERAL HARRIS: With respect to
22 Article II --

23 JUSTICE ALITO: Well, why is -- why --
24 why is that true? You -- you want to
25 compartmentalize the delegation of authority from

1 Congress, the alleged delegation of authority
2 from Congress, to an executive branch agency and
3 -- and then separately look at the delegation of
4 authority from the agency to a private party.

5 But when it is alleged that Congress
6 has delegated legislative authority to an
7 executive branch agency, we run into the problem
8 of drawing a line between the execution of the --
9 the -- the formulation of the law and the
10 execution of the law.

11 But when the agency then goes ahead
12 and just passes that off to a private party, then
13 doesn't the argument in favor of the position
14 that all that the agency is doing is exercising
15 -- executive authority in enforcing the law
16 disappear, or at least is -- is diminished?

17 GENERAL HARRIS: I don't think so.
18 And I think this scheme, I mean, just on the
19 merits would illustrate why. But just as a
20 conceptual matter, we're talking about two
21 different things.

22 One is Congress can't pass off its
23 power to anyone. And two is if Congress does
24 give the FCC something to execute in its
25 executive power, that's a separate category of

1 issues. The question in that case is, is there
2 too much executive power being delegated to
3 someone else?

4 Appointments clause might be a sort of
5 way of looking at it, but in this case I don't
6 even think you need to get there, because the
7 bottom line is I think the Fifth Circuit and
8 Respondents are misconceiving of exactly what
9 USAC does. It is doing math.

10 It is saying we are looking to exactly
11 how the projections for universal service, based
12 on historical numbers, work and making a
13 recommendation to the FCC on that score, 60 days
14 before the quarterly contribution fee is due.

15 And then on -- sort of for the
16 denominator for the fee, it is summing up reports
17 from telecommunications carriers as to what their
18 eligible revenues are for a quarter.

19 Both of those things get -- get passed
20 on to the FCC, the FCC reviews them, it has to
21 publish them in the Federal Register as its own,
22 and then it has 14 days in which to revise what
23 is essentially a proposed rate and make it its
24 own.

25 JUSTICE ALITO: But when we're --

1 we're inquiring whether the agency is -- has
2 simply asked a private group to -- to perform
3 some ministerial functions, why shouldn't we look
4 at the record of what the FCC has actually done?

5 And if you look at the record here,
6 isn't it really hard to say anything other than
7 the fact that they just have rubber-stamped
8 whatever the USAC has -- has told them? Except
9 -- there are a few exceptions, but basically they
10 just say okay, fine. Right?

11 GENERAL HARRIS: No. So two points of
12 pushback, one on the law and one on the facts.

13 With respect to the law, this Court
14 has in no context of sort of looking at
15 recommendations said: Who's really making the
16 recommendations? Is there a lot of sway?

17 So take Skinner, for instance. The
18 Secretary of Transportation in that case, which,
19 again, easy case, gave -- consulted the Private
20 Surface Pipeline Carriers Association about,
21 like, hey, what would be a good way of figuring
22 out the usage fee in that case? And a PS rep
23 just said great, you guys have a good idea. I'm
24 going to run with it.

25 This Court did not sort of peak behind

1 the hood and say: Was that, you know, too much
2 influence by a private group or not?

3 In Sunshine Anthracite, when there
4 were coal producers who were proposing prices
5 but -- that -- that had to be -- that actually
6 had to be adopted by the federal agency, this
7 Court didn't sort of ask for record evidence, or
8 assessments of was that too much influence, how
9 much independent work was actually done by the
10 agency, should there be discovery?

11 There are tons of blue ribbon
12 commissions that do similar stuff like this, and
13 this Court never says: Who is actually the
14 driver -- in the driver's seat? Because it's a
15 very formal inquiry in the non-delegation
16 context.

17 The actor is an officer of the United
18 States who's adopting the actual form of policy.
19 And, again, this sort of happens every day.
20 But the fact --

21 JUSTICE ALITO: Well, I know -- I know
22 that's true as a formal matter, but isn't it a
23 fact that the GAO reports about what the USAC has
24 been done'ing or has been doing are pretty
25 damning?

1 I mean, they say that the -- the GAO
2 couldn't verify the eligibility of 36 percent of
3 those who receive USF benefits? Nearly
4 80 percent of the Lifeline Program users may --
5 may be legally ineligible for the benefits
6 they're receiving?

7 GENERAL HARRIS: So here's what I'll
8 say on this. One, with respect to whether
9 there's meaningful review of the contribution
10 factor, which is the question in this particular
11 case, there are four instances in which the FCC
12 has, in fact, said USAC is not doing it right.

13 Two of them, as Respondents point out,
14 have happened since this lawsuit, but others
15 happened in the third quarter of 2003. And in
16 2016 there was an award of relief when there was
17 a disagreement with how the administrator
18 calculated the contributions.

19 So there are empirical examples of
20 this not just being a rubber stamp.

21 And more broadly, to the extent that
22 GAO -- GAO report raises concerns with you with
23 respect to how exactly these programs are
24 administered, that sounds like the stuff of an
25 APA challenge, not a non-delegation challenge.

1 Again, there are limits on what the
2 FCC is supposed to be doing, the kinds of
3 programs it's supposed to be supporting and --

4 JUSTICE GORSUCH: Ms. -- Ms. Harris,
5 I -- I -- I find it -- sorry, just to shift gears
6 a little bit -- notable that in your reply brief,
7 in terms of the legal task that you think we're
8 -- we're supposed to be engaged in, made a couple
9 of comments. And I would just like to confirm
10 this is your thoughts.

11 One is that in distinguishing between
12 lawful conferrals of discretion from unlawful
13 delegations, that that requires more than asking
14 in the abstract whether there is an intelligible
15 principle.

16 GENERAL HARRIS: Yes, Justice Gorsuch,
17 we think there are two paths for this Court to
18 do. And one path could be just to sort of stay
19 the course and say is this delegation any worse
20 than ones the Court has approved?

21 We think the -- to the extent the
22 Court is interested in looking to past precedents
23 to sort of tighten the reins, the better approach
24 is not just say, you know, there is kind of mush
25 for the intelligible principle, look to past

1 cases, but to look at the parameters I talked
2 about.

3 Including one of the most important is
4 is there sufficiently definite and precise
5 language in the statute to enable Congress, the
6 courts, and the public to ascertain whether
7 Congress's rules are followed?

8 And, again, taking from Chief Justice
9 Marshall's opinion of Wayman, if -- when you have
10 a broad delegation, making sure there are
11 sufficient rules.

12 JUSTICE GORSUCH: And -- and I'm sorry
13 to prolong this, Chief --

14 CHIEF JUSTICE ROBERTS: Go ahead,
15 please.

16 JUSTICE GORSUCH: -- but -- but just
17 to finish up.

18 One -- one critical element you
19 indicated is that there have to be sufficiently
20 -- defined boundaries, that judicial review is --
21 is possible?

22 GENERAL HARRIS: Absolutely. And we
23 think 254 passes that with flying colors in -- in
24 numerous respects, just with respect to how the
25 fee has to be assessed.

1 JUSTICE GORSUCH: And then finally,
2 that it -- there not -- needs not just be a
3 general policy for the agency to pursue but
4 boundaries also clearly delineated; is that
5 right?

6 GENERAL HARRIS: Absolutely. And we
7 think --

8 JUSTICE GORSUCH: Okay.

9 GENERAL HARRIS: And we think that --

10 JUSTICE GORSUCH: All right.

11 GENERAL HARRIS: -- 254 satisfies it.

12 JUSTICE GORSUCH: No, I understand
13 that.

14 GENERAL HARRIS: Okay.

15 CHIEF JUSTICE ROBERTS: Justice
16 Thomas? Anything further?

17 JUSTICE THOMAS: Would you -- is there
18 any direct statutory constraint on the revenue
19 raising?

20 GENERAL HARRIS: The direct statutory
21 constraint is the sufficiency provision that
22 appears three times throughout the statute. It
23 is a qualitative limit. It is tied to -- you
24 cannot raise more funds than would be needed to
25 provide universal service to the standards that

1 are provided in the statute. So basic
2 telecommunications services have to be at that
3 level.

4 Again, it's also historically defined
5 by what the FCC has done. And I think this is
6 telling because the -- the -- while Respondents
7 are saying this is an out-of-control program,
8 where it's gone from 3 percent to 35 percent
9 contribution rate, the math is not -- is pretty
10 misleading on that. This program actual -- the
11 actual amounts for the revenues have stayed flat
12 for 10 years.

13 The complaint that they seem to have
14 with respect to their percentage actually deals
15 with -- is explainable because the -- it's
16 technical -- but the contribution base for the
17 telecommunications revenues has fallen from \$288
18 billion in 2014 to \$116 billion today. That has
19 to do with the fact that the carriers' revenues
20 for -- intrastate telecommunications has fallen,
21 not with respect to some out-of-control program.

22 JUSTICE THOMAS: So -- if I understand
23 your argument, it is that indirect constraints or
24 at least constraints to the services being
25 offered are sufficient to constrain the

1 revenue-raising side as far as non-delegation is
2 -- is -- is concerned?

3 GENERAL HARRIS: Absolutely. A couple
4 of reasons for that. One is because that is the
5 best reading of the statutory scheme. It would
6 prevent the FCC, again, from doing like the rainy
7 day fund or raising an indefinite amount of
8 money.

9 Two, it's consistent with upholding a
10 range of other statutory schemes that similarly
11 say that an agency or, again, this Court has the
12 discretion as to how much fees or analogous
13 devices to be charged. We think that that is
14 tethered to the statutory structure and that
15 there are real limits on what can be imposed.

16 JUSTICE THOMAS: And, finally, can you
17 give me an example where this indirect approach
18 has been accepted for non-delegation purposes?

19 GENERAL HARRIS: So the Court's
20 non-delegation cases don't really sort of map
21 onto this, other than, I guess, in the tariff
22 context. So if you want to accept the tariff
23 context as on all fours, the tariff context has a
24 number of examples in which the president was not
25 just empowered to set tariffs to a particular

1 rate but where the tariffs were tethered to sort
2 of qualitative judgments by the president with
3 respect to what would promote trade or what would
4 equalize production levels.

5 And I think that's not uncommon. It's
6 sort of if your teeing something to a level that
7 requires some sort of expertise or might change
8 over time, it kind of makes sense that that would
9 be true.

10 Again, you could also look to Skinner
11 where there is a lot of discretion with respect
12 to -- exactly what level the fee was going to be
13 set at for surface pipeline fee purposes. It did
14 have like an ultimate cap of 105 percent of,
15 like, what the programs were running at for
16 appropriations, but, like, within there, there's,
17 like, a wide range of discretion.

18 And I just think it just doesn't pan
19 out, the idea that you have to have some sort of
20 magic number inquiry. It's not consistent with
21 how this Court has treated the Tax Clause as
22 indistinguishable from other Article I powers.
23 And it just doesn't make a lot of sense. Like,
24 \$2 trillion is where cap is constitutional
25 without any other guardrails? That can't be

1 right.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

3 JUSTICE ALITO: Well, the amount to be
4 raised is tied to the provision of universal
5 services, so -- but universal services can
6 evolve. How far can it evolve?

7 GENERAL HARRIS: Not so far for two
8 reasons. One is that evolving technological
9 landscape is specifically tied to four different
10 things that -- define universal service under
11 254(c). So the most objective of those, although
12 there's a bunch of them, is one I mentioned, that
13 it's a substantial majority of residential
14 customers have chosen to subscribe. So, again,
15 that would throw out faxes. Most people are not
16 subscribing to faxes today as their means of
17 communicating with each other. It's phones.

18 And the other constraint is 151. You
19 have to pick things that are similar to radio and
20 wires as they were in -- sort of envisioned in
21 1934 and just this history of what universal
22 service has been.

23 JUSTICE ALITO: So if a new form of
24 very expensive telecommunications services popped
25 up, then this -- that could be covered?

1 GENERAL HARRIS: I don't think
2 so because --

3 JUSTICE ALITO: If enough people
4 subscribed to it?

5 GENERAL HARRIS: Well, it would have
6 to have a substantial majority of residential
7 customers have chosen to subscribe through market
8 forces. So, again, if the -- the entire country
9 is suddenly able to afford extremely expensive
10 telecommunications, that might be an issue --

11 JUSTICE ALITO: Well, what's a
12 substantial --

13 GENERAL HARRIS: -- but then you'd
14 have other --

15 JUSTICE ALITO: What is a substantial
16 portion?

17 GENERAL HARRIS: A substantial
18 majority.

19 JUSTICE ALITO: Substantial.

20 GENERAL HARRIS: Substantial majority.
21 So more than a majority.

22 JUSTICE ALITO: More --

23 GENERAL HARRIS: Certainly, more than
24 50 percent. And I'll just also point out that
25 (b)(1) would be an additional constraint in your

1 hypothetical because the quality services have to
2 be available at just, reasonable, and affordable
3 rates.

4 And so, again, the scheme would work
5 out so that you're not -- it's hard to imagine
6 that you would have like Cadillac.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 JUSTICE SOTOMAYOR: To that point, the
10 Act has only subsidized two services, phone and
11 Internet, correct?

12 GENERAL HARRIS: So it's actually --
13 phone is the universal service --

14 JUSTICE SOTOMAYOR: Mm-hmm.

15 GENERAL HARRIS: -- and then, for the
16 Internet, it comes in under the express directive
17 under (h)(2) that the FCC "shall establish
18 competitively neutral rules to enhance, to the
19 extent feasible [...]" -- advanced -- "access to
20 advanced telecommunications and information
21 services."

22 JUSTICE SOTOMAYOR: So --

23 GENERAL HARRIS: Internet is an
24 advanced information services.

25 JUSTICE SOTOMAYOR: So whatever, there

1 is a real constraint. Because only two services
2 have been identified?

3 GENERAL HARRIS: Yes. It is a very
4 real constraint. And it's --

5 JUSTICE SOTOMAYOR: All right.

6 GENERAL HARRIS: -- constrained
7 further.

8 JUSTICE SOTOMAYOR: Justice Thomas
9 and -- and the other side makes a great deal, and
10 you've been answering it, about the fact that
11 there has never been a tax-raising law that we
12 have addressed where Congress has not put an
13 upper limit on the tax.

14 I think your -- you say that may be
15 true, but we have a lot of tariff situations
16 where historically, from the beginning of the
17 country, Congress didn't set a limit, correct?

18 GENERAL HARRIS: There's that and also
19 just the -- the history on pages 8 to 9 of the
20 reply brief --

21 JUSTICE SOTOMAYOR: Right.

22 GENERAL HARRIS: -- where, like,
23 there's a lot of statutory examples. The Court
24 just hasn't addressed them.

25 JUSTICE SOTOMAYOR: Okay. So,

1 historically, we have a lot of examples of it?

2 GENERAL HARRIS: Yes, and the only
3 other thing on the history is the 1798 real
4 estate tax, if we want to get there. The extent
5 of the discretion there, while there was a cap,
6 is just -- extremely broad.

7 JUSTICE SOTOMAYOR: Yeah. The federal
8 boards, the -- the boards there could set
9 different rates in different places and did a lot
10 of -- gave it extraordinarily broad power,
11 correct?

12 GENERAL HARRIS: Exactly right.
13 Allegheny County, Pennsylvania, for instance, got
14 a 50 percent downward departure on their
15 assessments because of the Whiskey Rebellion.
16 That's a policy judgment.

17 JUSTICE SOTOMAYOR: All right. I want
18 to -- so to -- now, I think why that's important
19 is twice we've said that the taxing power
20 shouldn't be looked at any differently than
21 tariffs or customs or duties.

22 And the reason for that is the
23 Constitution itself, right? The Tax Clause is
24 part of duties, it says, I think -- let me just
25 get the language -- it -- basically, it's the

1 same clause with -- talking about the same power,
2 correct?

3 GENERAL HARRIS: Exactly right.

4 JUSTICE SOTOMAYOR: All right. Now, I
5 want to go back to Justice Alito's questions with
6 respect to the contribution limit and the --
7 these -- the complaints about whether some of the
8 people who have received the funds are proper or
9 not.

10 I think the point you were making is
11 that the delegation issue is the contribution
12 base?

13 GENERAL HARRIS: Yes.

14 JUSTICE SOTOMAYOR: Not whether or not
15 the agency itself or the person it's delegated to
16 is actually functioning properly and who it's
17 identifying to receive the funds, correct?

18 GENERAL HARRIS: Correct.

19 JUSTICE SOTOMAYOR: So the
20 contribution limit, he says the history is very
21 sparse that the agency has reviewed that
22 contribution base that was recommended.

23 The reason I see that's -- the reason
24 for that, I think, is because the FCC controls
25 every component of calculating that, correct?

1 GENERAL HARRIS: Yes. It sure does.

2 JUSTICE SOTOMAYOR: So it tells -- it
3 determines and tells USAC what information to get
4 from the people that it's surveying, correct?

5 GENERAL HARRIS: Yes.

6 JUSTICE SOTOMAYOR: And then the FCC
7 says -- determines what the final contribution
8 base calculation should be, correct?

9 GENERAL HARRIS: Absolutely.

10 JUSTICE SOTOMAYOR: It determines what
11 expenses should be covered?

12 GENERAL HARRIS: Yes.

13 JUSTICE SOTOMAYOR: So what USAC is
14 doing is a mathematical calculation?

15 GENERAL HARRIS: That is correct.

16 JUSTICE SOTOMAYOR: So we would hope
17 that there's not much more than four examples of
18 them -- getting math wrong, correct?

19 GENERAL HARRIS: That is certainly the
20 hope.

21 JUSTICE SOTOMAYOR: If -- if there
22 were a lot more, I'd be much more worried, but at
23 the end, the number they're given is a number
24 where each component has been set by the -- by
25 the agency?

1 GENERAL HARRIS: By the parameters the
2 FCC sets, correct. Under the regulations.

3 JUSTICE SOTOMAYOR: All right. Now,
4 Justice Gorsuch asked you a list of principles.
5 And -- and you said -- I'm assuming he's asking
6 whether, I think -- and he can speak for himself
7 -- and he often does.

8 (Laughter.)

9 JUSTICE SOTOMAYOR: But those
10 principles are from our cases, correct?

11 GENERAL HARRIS: Absolutely.

12 JUSTICE SOTOMAYOR: And the best
13 example of what those principle mean --
14 principles mean is not us redefining them, but us
15 looking to how they've been applied in our
16 precedents, correct?

17 GENERAL HARRIS: I would just give one
18 caveat, which is I know members of the Court are
19 concerned that specific cases have not followed
20 the principles that the Court has actually laid
21 out in the cases. And there is arguably some
22 tension there.

23 And so that's why we've identified two
24 paths for the Court to go.

25 JUSTICE SOTOMAYOR: Okay.

1 GENERAL HARRIS: One is the metrics of
2 the cases. Just, you know, is the delegation
3 worse or better? And two is what do the
4 principles mean?

5 JUSTICE SOTOMAYOR: But none of our
6 precedents have been rejected by the court below?

7 GENERAL HARRIS: None -- none your --
8 correct. The court below and Respondents are not
9 asking you to overturn any of them.

10 JUSTICE SOTOMAYOR: Any. And if we
11 were going to overturn any precedent, we should
12 have brief -- briefing on that, correct?

13 GENERAL HARRIS: You certainly could.

14 JUSTICE SOTOMAYOR: Could. But we
15 should?

16 GENERAL HARRIS: Sure, yes.

17 JUSTICE SOTOMAYOR: Okay. It's a
18 better practice, isn't it, if we're going to
19 overturn precedent, to find out what -- what all
20 the stare decisis factors are?

21 GENERAL HARRIS: Stare decisis is
22 important. Again, I think we're not saying that
23 the Court cannot constrain or sort of revitalize
24 the principles in the cases by overturning
25 things, though.

1 JUSTICE SOTOMAYOR: Oh, sure. We're
2 always free to do that, but we should proceed
3 with caution when we're looking at overturning
4 precedent.

5 GENERAL HARRIS: Yes.

6 JUSTICE SOTOMAYOR: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?

8 JUSTICE KAGAN: The easiest parts of
9 an argument are where you just have to say yes to
10 everything.

11 (Laughter.)

12 JUSTICE SOTOMAYOR: Remember, I was a
13 prosecutor.

14 (Laughter.)

15 JUSTICE KAGAN: This is going to be
16 just a little bit harder. But just a little bit.

17 (Laughter.)

18 JUSTICE KAGAN: You mentioned to
19 Justice Thomas when you were first talking to him
20 that there are other schemes that function
21 exactly like this one, in the sense of
22 revenue-raising provisions that don't have
23 specific numerical limits.

24 And you pointed to your list on page
25 8, which is like the Federal Reserve and the FDIC

1 and a bunch of others.

2 And I just want you to talk a little
3 bit more about that and to tell me: How close
4 are those? Or, you know, otherwise put, like,
5 are there distinctions -- if I looked at all of
6 these more carefully than I have, would I be able
7 to say no, these are distinguishable in various
8 ways? Or are these, like, really right there?

9 GENERAL HARRIS: I think they are
10 right there, in the sense that especially the
11 ones that are the agencies using their
12 fee-raising power to cover the cost of the
13 agency's function -- the programs that the
14 agencies are doing, it's going to the regulated
15 party. So here, telecommunications carriers for
16 their OCC banks, and saying: Please support the
17 programs that we're doing.

18 Even though, oftentimes the programs
19 that are being supported are not things for the
20 benefit of the bank's, per se. It's like
21 enforcement proceedings, or here, it's not it --
22 the telecommunication carriers that participate
23 in universal service are getting the money back
24 at the back end.

25 So I think it is on all fours in that

1 sense. The idea is you have a special
2 fee-raising provision to a specific subcomponent
3 of the industry that's used to sort of fund
4 programs that affect that industry. So in that
5 sense, it's on all fours.

6 JUSTICE KAGAN: Thank you, General.

7 CHIEF JUSTICE ROBERTS: Justice
8 Gorsuch?

9 JUSTICE GORSUCH: They're going to get
10 harder still. But you can handle it.

11 (Laughter.)

12 JUSTICE GORSUCH: Ms. Harris, let's
13 suppose that Congress passed a statute saying
14 that every American should pay an equitable and
15 non-discriminatory contribution to paying down
16 the national debt, sufficient to reduce the
17 national debt by 1 percent a year. Okay?

18 A lot of language sort of like what we
19 have here, but then left it up to the IRS to
20 figure out marginal tax rates, deductions, do you
21 get your charitable deduction, unrealized income.
22 You figure it out, IRS.

23 Good to go or not?

24 GENERAL HARRIS: Not good to go. Two
25 differences from this particular scheme.

1 JUSTICE GORSUCH: Okay.

2 GENERAL HARRIS: One is the breadth of
3 the delegation obviously matters. We talked
4 about that before. The --

5 JUSTICE GORSUCH: So it's okay if it
6 does it to a subset of citizens, but it can't do
7 it to all citizens?

8 GENERAL HARRIS: It's not just a
9 subset of citizens that's different for 254.
10 It's the specified nature and the details of the
11 programs.

12 You are talking about a tax for the
13 entire country that has no other parameters and
14 wouldn't sort of be building on the history of
15 IRS regulation. And we are talking here --

16 JUSTICE GORSUCH: No, no, there would
17 be IRS regulate -- there have been IRS
18 regulations for some time.

19 GENERAL HARRIS: I take the premise of
20 the hypothetical to be --

21 JUSTICE GORSUCH: Quite a few of them.
22 So let's -- let's assume it's -- you know, you
23 can make the same kind of old soil arguments,
24 they know how to do this. They are very good at
25 it. The IRS has been at it for a long time.

1 GENERAL HARRIS: So I wouldn't say the
2 old soil argument here is they're great at this.
3 It is that Congress understood when enacting the
4 particular scheme that it was incorporating those
5 restraints and concepts --

6 JUSTICE GORSUCH: Don't you think --

7 GENERAL HARRIS: -- that go into
8 universal soils --

9 JUSTICE GORSUCH: -- you would
10 have the -- make -- be making the same argument
11 in the case that I just posited, that -- that --
12 that the IRS would?

13 Or -- or maybe if you want to make it
14 narrower. Same -- same delegation, but to secure
15 universal healthcare, for example, sufficient to
16 secure advanced universal healthcare on a
17 non-discriminatory basis. That's a narrow one
18 for you.

19 GENERAL HARRIS: Again, I think the
20 problem there is you are using the words of this
21 particular statutory scheme out of context in
22 ways that divorce it from the constraints in this
23 particular scheme.

24 JUSTICE GORSUCH: Okay.

25 GENERAL HARRIS: It's the idea that

1 universal healthcare is a goal that has not sort
2 of been a --

3 JUSTICE GORSUCH: Well, then -- in
4 this scheme there is no cap on how much can be
5 raised, right?

6 GENERAL HARRIS: I disagree. I
7 think --

8 JUSTICE GORSUCH: No numerical cap.

9 GENERAL HARRIS: -- there is a --
10 there is a qualitative cap.

11 JUSTICE GORSUCH: There's no numerical
12 cap.

13 GENERAL HARRIS: There is absolutely
14 no numerical cap.

15 JUSTICE GORSUCH: There is no rate.

16 GENERAL HARRIS: There is no rate, but
17 the rate is something that is historically
18 defined in ways that your hypotheticals aren't.
19 And --

20 JUSTICE GORSUCH: Let's -- let's talk
21 about your -- the constraints you do mention.
22 What are advanced services?

23 GENERAL HARRIS: Advanced information
24 services or technical -- and -- or
25 telecommunications services are things that are,

1 again, above the baseline of what's been
2 considered universal services. So like existing
3 telecommunications and -- are, again, a more
4 novel technology.

5 JUSTICE GORSUCH: Those evolve over
6 time, right?

7 GENERAL HARRIS: It could evolve over
8 time --

9 JUSTICE GORSUCH: Sure.

10 GENERAL HARRIS: -- but the statutory
11 parameter for (h)(2) would be something that
12 someone could challenge. Again, an APA suit --
13 suit could be a great way to go if --

14 JUSTICE GORSUCH: Okay.

15 GENERAL HARRIS: -- you thought that
16 it was misdefined.

17 JUSTICE GORSUCH: Let's talk about
18 (b)(6) in schools, for example, as well. The
19 FCC's interpreted that to mean that it can
20 provide mobile WiFi hotspots for off-premises use
21 and in school buses, right?

22 GENERAL HARRIS: It has. And I would
23 also point you to (h)(1)(B), which is providing
24 yet more specificity with respect to the how the
25 school and library programs are supposed to go

1 and how the rates are charged.

2 And, again, I'll just do the refrain.

3 If you think that there is a problem, or people
4 think that there is a problem, with the way in
5 which the FCC's rules are interpreting the
6 parameters of the program, you can bring a
7 challenge to exceeding the scope of the statutory
8 authority.

9 JUSTICE GORSUCH: Could the FCC use
10 the program to give everybody a mobile hotspot?

11 GENERAL HARRIS: To give everyone a
12 mobile hotspot? I do not --

13 JUSTICE GORSUCH: Yeah, everybody
14 who's a library patron at least.

15 GENERAL HARRIS: Everyone who is a
16 library patron? I think the question there would
17 be whether it fits within (h)(2) to the extent
18 feasible to give access to -- advanced telecom
19 and information services for schools and
20 libraries.

21 JUSTICE GORSUCH: Yeah.

22 GENERAL HARRIS: So, like --

23 JUSTICE GORSUCH: It's -- it's
24 feasible. It just costs a lot.

25 GENERAL HARRIS: Right. And then the

1 other constraints with respect to the costs would
2 be making sure that the ensuing -- any sort of
3 ensuing program for that would not interfere with
4 just reasonable and affordable rates for
5 universal services.

6 Again, I think when you see how the
7 system works --

8 JUSTICE GORSUCH: And then -- and then
9 with respect to (b)(7), it -- it allows FCC to
10 come up with new principles that aren't found
11 anywhere in the statutory text, right?

12 GENERAL HARRIS: I don't think that's
13 quite right. And here's why.

14 JUSTICE GORSUCH: Why -- why not?

15 GENERAL HARRIS: Because the
16 principles have to be consistent with the rest of
17 the chapter. And the proof is how FCC has
18 interpreted -- I think FCC's way of interpreting
19 this shows that it's more of a
20 belts-and-suspenders provision than a
21 do-whatever-you-feel-like provision.

22 The two things that FCC has done under
23 (b)(7) are, one, to require competitive
24 neutrality --

25 JUSTICE GORSUCH: Well, now, hold on.

1 You say we shouldn't look at what's actually been
2 done; we should look at the statute. So let's --

3 GENERAL HARRIS: So --

4 JUSTICE GORSUCH: -- let's look at the
5 statute, okay? I mean, that's your argument
6 everywhere else, so I think it's only fair to
7 hold you to it here, Ms. Harris.

8 GENERAL HARRIS: That's fine.

9 JUSTICE GORSUCH: It says the -- the
10 commission -- anything they determine is
11 "necessary and appropriate for the protection of
12 the public interest, convenience, and necessity,"
13 and are "consistent with" this chapter.

14 GENERAL HARRIS: Yeah, "and are
15 consistent with." And so --

16 JUSTICE GORSUCH: Yeah -- well, how
17 about everybody gets a Starlink account?

18 GENERAL HARRIS: Why would -- I'm not
19 sure why that would be sort of -- the idea that
20 it's consistent with the rest of the chapter,
21 they wouldn't need (b)(7) to do that. It would
22 be are you pursuing the (h)(2) advanced services
23 --

24 JUSTICE GORSUCH: All right.

25 GENERAL HARRIS: -- or something else

1 and --

2 JUSTICE GORSUCH: They could do it
3 under (7), too, right?

4 GENERAL HARRIS: Well, then it
5 wouldn't be an additive power. It would just be
6 pursuing a different statutory command and --

7 JUSTICE GORSUCH: So they don't even
8 need (7) to -- to give everybody in America a
9 Starlink account?

10 GENERAL HARRIS: I'm not saying
11 everyone in America is getting a
12 Starlink account. What I am saying --

13 JUSTICE GORSUCH: It sounds like it.
14 It's a pretty good deal. I'd like one.

15 And then what about (c)(3), which says
16 that, "in addition to the services included in
17 universal service ... the Commission may
18 designate additional services for support
19 mechanisms for schools, libraries, and healthcare
20 providers"?

21 At least -- at least one court has
22 pointed out that that's not even limited to
23 telecommunications services.

24 GENERAL HARRIS: Again, I would read
25 that alongside the many other provisions that

1 give content to exactly what the programs with
2 respect to schools and libraries and healthcare
3 providers are supposed to do, not only (b)(6) but
4 254(h)(1)(A) with respect to rural healthcare
5 providers and exactly how their rates are
6 supposed to work --

7 JUSTICE GORSUCH: Mm-hmm.

8 GENERAL HARRIS: -- and what the
9 services are, and (h)(1)(B), which is with
10 respect to the school and libraries, what the --
11 what the services are supposed to be, what the
12 rates are supposed to look like.

13 Again, I think you read this -- this
14 scheme in context. And the goal in reading it is
15 not to look for ways of reading the language in
16 a -- one isolated provision in a way that would
17 create non-delegation problems.

18 JUSTICE GORSUCH: Yeah.

19 GENERAL HARRIS: But you're looking
20 at --

21 JUSTICE GORSUCH: No, for sure, of
22 course. I take that point.

23 It -- it's interesting to me, though,
24 that the cases that you cite on page 8 and 9 of
25 your reply brief are all fees, basically. And

1 fees have been historically understood, as, in
2 fact, we've said, this Court has said, and Judge
3 Cooley has said, right, way back when, to cover
4 the costs of the program in question or the
5 services rendered, things like that. They're --
6 they're pretty particularly tied. And, in fact,
7 many of the examples you cite, even the snippets
8 you take, point that out.

9 GENERAL HARRIS: Yeah.

10 JUSTICE GORSUCH: And we don't have
11 that here with respect to this tax.

12 GENERAL HARRIS: I disagree because I
13 think this is a similar -- and, again, I -- I
14 think whether you think this is a fee or a tax,
15 you have the same problem with a lot of the
16 examples on pages 8 to 9. It's not so much that
17 there is sort of like you're paying for the
18 privilege of going to the OCC; it is that there
19 is a regulated industry that is being asked to
20 support the global costs of whatever the
21 regulatory agency is doing --

22 JUSTICE GORSUCH: Well, here's what we
23 said in -- a National Cable, that fees are
24 typically based on either the value to the
25 recipient or the cost to the government. That's

1 -- that's what this Court -- that's how we've
2 described fees. That's how Cooley 100 years ago
3 described fees. That's how all your examples
4 line up.

5 Now, I take the just and reasonable
6 rate argument with respect to rate setting, but
7 that's rate setting for monopolies and public
8 utilities. And their just and reasonable is a
9 long-embodied common law tradition of trying to
10 say, okay, you get your costs back and a
11 reasonable profit to try and approximate a
12 competitive market, acknowledging that we don't
13 have a competitive market; we have a monopolist,
14 a regulated utility.

15 And that's what -- that's -- that's
16 that body of law. So we've a fee body of law.
17 We've got a rate-setting body of law. This isn't
18 either one of those. This is -- this is just a
19 straight-up tax without any -- any -- any
20 numerical limit, any cap, any rate. And we --
21 we've never approved something like that before.

22 GENERAL HARRIS: So here's what I
23 would point you to. I think Skinner makes that a
24 much harder argument in terms of this is so
25 clearly a tax --

1 JUSTICE GORSUCH: It's --

2 GENERAL HARRIS: -- versus a fee.

3 JUSTICE GORSUCH: I -- I'm -- I'm not
4 saying -- I'm not saying taxes are special. I'm
5 just saying what's unique about this case is we
6 have a tax that's unlike any other tax that this
7 Court's ever approved. And -- and -- and -- and
8 it's not a fee related to costs, and it's not
9 rate setting of a monopolist.

10 In fact, the '96 Act blew up the
11 monopolies and said we're done with that. We're
12 setting up a new regime with explicit, explicit
13 subsidies. So --

14 GENERAL HARRIS: So I would warn
15 against overemphasizing the novelty. And the
16 part of Skinner that I think is even more
17 relevant than just saying there's no special rule
18 for taxes is the fact that the Court thought it
19 was actually unclear whether the surface pipeline
20 fee, which was paid by the pipeline -- like,
21 users of pipelines to support -- to support
22 various things, including enforcement actions, it
23 was unclear whether that was a tax or a fee.

24 I'm not sure how that would fit within
25 the framework of thinking that there is this sort

1 of very neat distinction among them. And I think
2 it is a very good analogy to the way the
3 telecommunication carriers are doing this here.
4 It's not just that being they are being -- having
5 things exacted from them for the benefit of a
6 general welfare program. The carriers then
7 themselves get the subsidy if they opt to support
8 the universal service program. I just don't
9 think these -- these --

10 JUSTICE GORSUCH: And many of them are
11 recipients, too, and sit on the board, but that's
12 a whole 'nother set of issues. Yeah.

13 GENERAL HARRIS: It is not a
14 constitutional issue, though.

15 JUSTICE GORSUCH: Okay. Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh.

18 JUSTICE KAVANAUGH: How exactly would
19 you define tax versus fee, to the extent the
20 other side's position could, or at least one
21 version of the other side's position could,
22 depend on this being a tax?

23 GENERAL HARRIS: So for tax v. fee, I
24 think we would point you to Skinner and the --
25 the lines that the Court was struggling to draw

1 in that case. A tax is something that is to
2 raise general revenue. It can be on a specified
3 set -- sort of a subset of someone. And a fee is
4 often, but not always, conceived of as a payment
5 for a particular service or license.

6 That could be a line that you draw.
7 Again, I think the problem with trying to draw
8 that line, as Skinner points out, is it's
9 unbelievably murky in practice, and the Court has
10 not sort of -- at least in Skinner, was not even
11 comfortable drawing it.

12 And the other problem with that line
13 is, if it's a murky line, it's going to be a
14 pretty hard non-delegation test in any case that
15 plausibly involves fees or taxes to -- to have
16 the threshold question be is this a tax or a fee
17 or something else, and then go on to which
18 non-delegation lens are you supposed to go on.

19 JUSTICE KAVANAUGH: Based on the
20 definition you just gave or the principles you
21 just gave, is this a tax or a fee?

22 GENERAL HARRIS: So the government is
23 assuming it could be classified as a tax. Again,
24 there -- like -- but I don't think you have -- I
25 think under Skinner, there's genuine --

1 ambiguity on that score.

2 JUSTICE KAVANAUGH: But your position,
3 it's a tax?

4 GENERAL HARRIS: We are willing to
5 have it treated as a tax. We just don't think it
6 matters for constitutional purposes because the
7 non-delegation framework doesn't distinguish on
8 this basis. And this is also a Commerce Clause
9 power.

10 JUSTICE KAVANAUGH: Should it matter
11 in how we think about this that the delegation is
12 to an independent agency rather than to the
13 president or to an executive agency? Does that
14 heighten the concern about unaccountable power
15 to, in some of Justice Gorsuch's questions,
16 unaccountable power to raise money to determine
17 the rate, to determine the amount, that it's not
18 someone accountable to the president?

19 GENERAL HARRIS: I don't think so for
20 two reasons. One is that the FCC does not have
21 statutory for-cause removal protections. It is
22 something that's been read into the statutes.
23 And so --

24 JUSTICE KAVANAUGH: So you don't --
25 okay. Your answer is the FCC is not an

1 independent agency?

2 GENERAL HARRIS: Not in the sense of
3 having for-cause removal protection. It's
4 something -- it depends on what you mean. Is it
5 one that sort of --

6 JUSTICE KAVANAUGH: That's usually
7 what I mean about independent.

8 GENERAL HARRIS: Okay.

9 JUSTICE KAVANAUGH: So --

10 GENERAL HARRIS: So that is what I
11 would mean. There's no statutory for-cause
12 removal protections for the FCC. So in that
13 sense, that's less of a concern. But even if you
14 wanted to say, is there some sort of additional
15 heightened concern with respect to accountability
16 to the president, that's an Article II problem
17 that's sort of separate from the broader
18 non-delegation issues.

19 And even if you wanted to sort of say
20 it is a -- when executive power is being
21 delegated to an agency that's not controlled by
22 the president, that's the bigger problem, not is
23 there then a body that is not performing things
24 that are executive power that is then doing
25 something.

1 It's sort of like if you have the FTC
2 or other bodies accepting recommendations from
3 someone, that's not a problem, but the problem
4 may well be is the FTC accountable to the
5 president?

6 JUSTICE KAVANAUGH: If the other side
7 were correct that it's a tax, and you acknowledge
8 that it could be considered a tax, and it was
9 held that a tax has to have a -- a tax that's
10 delegated to an agency has to have a cap or a
11 rate, what other programs would be at risk?

12 GENERAL HARRIS: A cap or a rate? I
13 mean, I think, you -- again --

14 JUSTICE KAVANAUGH: If it's a -- so
15 tax, if it's a tax, it has to have a cap or rate.
16 Are there other programs that you think -- and
17 this picks up on Justice Kagan's questions but
18 I'm not sure those are taxes, that's why I'm
19 asking the question.

20 GENERAL HARRIS: Well, I think you
21 would have a -- a heck of a lot of litigation
22 over whether they are taxes, and we think they
23 would probably qualify based on the nature of --
24 like, just depending on how you define a tax, how
25 they would work. So, yes, I think you would have

1 a panoply of issues of are -- like various other
2 measures that don't have a cap.

3 And on top of that, you would sort of
4 incentivize a system where Congress would think
5 it could do its work just by saying a trillion
6 dollars is a good cap and no other constraints
7 are necessary. So, again, a very perverse
8 separation of power scheme that would feel -- I
9 think also require you to overturn a couple of
10 cases, Skinner and J.W. Hampton to start.

11 JUSTICE KAVANAUGH: And then on
12 Justice Gorsuch's hypothetical about the IRS, I
13 just want to make sure I have this nailed down
14 exactly what your answer is for why that's
15 different.

16 GENERAL HARRIS: Why it's different?

17 JUSTICE KAVANAUGH: Yeah, the
18 delegation --

19 GENERAL HARRIS: One is the breadth of
20 the --

21 JUSTICE KAVANAUGH: -- of the IRS to
22 set tax rates.

23 GENERAL HARRIS: Yep. One is the
24 breadth of the delegation. So I took the
25 hypothetical to be it's sort of a tax rate for

1 the entire country. It is for the general --
2 it's supposed to be quote/unquote, "equitable"
3 but a different meaning from, obviously, 254,
4 which is a constraint on what you actually have
5 to be imposing, and that it's to accomplish
6 1 percent of reducing the national debt.

7 And so it gives the IRS plenary
8 discretion to figure out exactly how else to
9 operate the tax in ways that would be pretty --
10 that -- that I take it not to be drawing upon the
11 ways in which the IRS had historically done so.
12 And so if it's divorced from that context and you
13 can't use the IRS's regulatory history because
14 this is a novel type of tax, that would be a
15 problem.

16 Now, again, I think the outer limit of
17 Justice Gorsuch's hypothetical is going to have
18 to be the 1798 real estate tax. And that is
19 because that was not too far apart from the idea
20 of giving federal tax assessors the power to
21 reach a cap of \$2 million, a ton of money back
22 then, and figure out how to calibrate the
23 assessments in a very discretionary manner.

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: So, Ms. Harris, let
3 me just narrow the hypothetical then, a little
4 bit.

5 What about a law that gave the IRS the
6 authority to impose taxes on the sale of food in
7 interstate commerce to fund programs that would
8 provide food for the needy?

9 GENERAL HARRIS: Provide food for the
10 needy? So I think the deal there is you don't
11 have a sufficiency limit. So provide food for
12 the needy, two issues that would distinguish that
13 potentially.

14 One is what does provide food for the
15 needy mean? Is it something similar to you need
16 to provide a basic level of, you know, three --
17 like, two meals a day or something? Which is
18 sort of more similar to this system.

19 JUSTICE BARRETT: Sure. Make it two
20 meals a day.

21 GENERAL HARRIS: Okay. So it's
22 sufficient to provide two meals a day, and there
23 is sort of -- I think then you'd be looking at
24 are there other constraints on the statutory
25 scheme on top.

1 JUSTICE BARRETT: What would -- what
2 would -- so do you think if there were no other
3 constraints, it would be too far? If it's just
4 provide two meals a day for the needy.

5 GENERAL HARRIS: If it's --

6 JUSTICE BARRETT: So impose taxes on
7 the sales sufficient to fund programs that
8 provide two meals a day to the needy.

9 GENERAL HARRIS: I think the operative
10 question ends up being is there an ability to
11 figure out, as a qualitative matter, what that
12 -- what that would look like.

13 JUSTICE BARRETT: Is there?

14 GENERAL HARRIS: I think you can get
15 it closer -- I think --

16 JUSTICE BARRETT: That's the question.

17 GENERAL HARRIS: I know. I -- I think
18 you can get it closer to being constitutional
19 because of the limit of if it is something that
20 you can measure that is sufficient to give two
21 meals a day, I -- I might give them that one, but
22 I think reasonable minds could disagree on
23 exactly what other constraints you would look
24 for, who -- who it's being assessed -- who is
25 being assessed for it, and what exactly the

1 mechanism for delivering this -- this sort of
2 food is.

3 JUSTICE BARRETT: Okay. Let me zoom
4 out for a minute.

5 In Mistretta, Justice Scalia said that
6 once you agree that you can confer discretion,
7 then we are just talking about matters of degree.
8 You know, and ever since the beginning, founding
9 error debates, or Wayman versus Southard,
10 Justice -- Chief Justice Marshall says this is a
11 delicate and difficult line-drawing task. And so
12 it's obviously been a long time since we've held
13 that something was unconstitutional under the
14 non-delegation doctrine.

15 Do you think this is an area in just
16 which -- in which there are just not judicially
17 manageable standards?

18 GENERAL HARRIS: No. There are
19 judicially manageable standards. And the two
20 paths we've identified are both versions of that.

21 One is your manageable standard is
22 like a common law system, where you look to
23 previous delegations and see how they stack up.

24 And two is the standards that we are
25 offering that are drawn from the Court's cases

1 where obviously there is a judgment line on how
2 much discretion is too much, but at a minimum
3 Congress is obviously having to provide
4 parameters that you can tell, yes or no, did the
5 agency transgress the boundaries? And this
6 scheme is full of them.

7 JUSTICE BARRETT: So this doesn't have
8 a cap, as, you know, many people have pointed out
9 to you. And so you agree that there's a broad
10 range. I mean, what is it, about \$9 billion
11 right now?

12 GENERAL HARRIS: It's \$9 billion, but
13 it's dedicated to very specific programs. So it
14 is a qualitative cap, in our view.

15 JUSTICE BARRETT: But it could be
16 3 billion?

17 GENERAL HARRIS: It could be 3 billion
18 if that were sufficient to support the way the
19 programs operate.

20 JUSTICE BARRETT: Could be 30 billion?

21 GENERAL HARRIS: Again, tied to the
22 nature of the scheme. And that's no different
23 from other delegations that are tied to some sort
24 of qualitative number. The Court could have fees
25 at all sorts of rates. The OCC could have fees

1 at all sorts of rates depending on what kind of
2 functions it's performing and exacting them.

3 And that has not been seen as
4 something that is a problem because there are
5 qualitative limits built into the scheme that
6 constrain sort of -- that -- again, we think it
7 is what's necessary to support the defined
8 programs that Congress has provided.

9 JUSTICE BARRETT: Let me ask you about
10 universal service. So Justice Gorsuch asked you
11 about Starlink, but I'm going to ask you just
12 about cell phone plans.

13 Could universal service include having
14 the FCC provide every American with a cell phone
15 and a cell phone plan?

16 GENERAL HARRIS: So the cell phone and
17 cell phone plan, the question would be does that
18 fit within the concept of the (h)(2) support for
19 advanced services and the parameters of the
20 specific programs that are supposed to be
21 tethered to providing advanced services.

22 JUSTICE BARRETT: So it could or
23 couldn't?

24 GENERAL HARRIS: I think it could, but
25 there would be questions with respect to whether

1 that's within bounds.

2 JUSTICE BARRETT: Okay.

3 GENERAL HARRIS: And again, whether
4 that would have collateral consequences for the
5 other parameters in the scheme of would it be
6 something that then imposed so many costs that
7 there would no longer be universal services
8 provided of -- at affordable charges, for
9 instance, because of like the pass-on by the
10 telephone -- by the telecom carriers.

11 Again, I think this is a scheme.
12 It -- it is hard to see how this scheme would be
13 the thing that crosses the line for
14 non-delegation purposes and yet much broader
15 delegations are okay.

16 JUSTICE BARRETT: Last question. Can
17 you think of any other statutory scheme that
18 gives the agency the authority to identify the
19 additional principles that constrain its power?

20 GENERAL HARRIS: Yes. The Securities
21 and Exchange Act gives the SEC -- there's --
22 there's -- I think there are a bunch of them that
23 give agencies the power to say are there other
24 consistent principles to consider in a
25 multi-factor test?

1 And even in (2)(B), where this Court
2 said it was a perfectly fine delegation for the
3 AG to decide what is a controlled substance,
4 there's often a balancing of factors that are
5 kind of open-ended within the scheme.

6 So that one is sort of the nature and
7 pattern of the abuse -- of the controlled
8 substance abuse, how -- how prevalent it is, how
9 much of a danger to public safety. Sort of
10 factors that -- each one of them might not be
11 particularly strong, but the AG could decide
12 would be enough, just in their judgment.

13 So I don't think that's anything
14 novel. And if you had a problem with (b)(7),
15 there is a severability provision in the statute
16 under 608, and so, again, you could sever that.
17 It would be sort of pointless, because the only
18 thing the FCC has ever done with this is hark to
19 other principles in the statute.

20 JUSTICE BARRETT: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Jackson?

23 JUSTICE JACKSON: So I guess I'm
24 struggling with trying to understand what
25 difference it makes that we do the hard work of

1 trying to characterize this as a tax or a fee.

2 My understanding was that the
3 non-delegation doctrine, as you've said a few
4 times this morning, is that Congress is not
5 allowed to give away or delegate legislative
6 powers. And I don't hear any serious argument
7 that Congress doesn't have both the power to tax
8 and to levy fees.

9 So I don't -- I -- it seems to me that
10 any restriction on Congress's ability to do this
11 would run to both. Is that right?

12 GENERAL HARRIS: Not -- yes. That's
13 not only right, but also perverse. Because the
14 other issue here is even if you go through the
15 tax-fee fee analysis, you have a separate
16 inquiry. When Congress is doing overlapping
17 powers, at is -- as it is here, using the
18 commerce power and the tax power, you have to
19 figure out which one you picking.

20 There's no sort of, like, pick the
21 more restrictive power and impose a special test
22 rule. That's -- that's the exact opposite of
23 what the Court has done in all sorts of cases
24 that implicated both the tax power and the
25 commerce power or the tax power and the war

1 powers.

2 And so you're exactly right that the
3 tax-free fee inquiry doesn't have any
4 constitutional rooting for which non-delegation
5 test you pick, and it -- above -- above and
6 beyond that, there is another layover -- layer of
7 complexity that I don't think Respondents have
8 dealt with on that.

9 JUSTICE JACKSON: And -- and you've
10 said many times that there is a cap. I mean,
11 there's sort of characterizations being made that
12 there's no cap in this statute. And you say
13 there's a qualitative cap.

14 Can you just say more about how you
15 see this as actually imposing a limit on the
16 amount that can be collected through this
17 program?

18 GENERAL HARRIS: Yes. So in three
19 different places of the statute, in 254(d) and
20 254(e) and also in -- in 254(b)(5), it is a
21 sufficient -- the -- the -- it has been to be a
22 sufficient mechanism to achieve the objectives of
23 the programs that Congress has set out.

24 The Fifth Circuit in Alenco
25 interpreted that -- as we agree with -- to mean

1 you can't charge excessive things for the
2 program. It can't be more than the programs need
3 to accomplish the specified objective that
4 Congress set out.

5 JUSTICE JACKSON: So this is not an
6 opportunity to just raise money for the FCC to
7 use for whatever reason or et cetera?

8 GENERAL HARRIS: Exactly. It can't be
9 used for whatever reason. There's also
10 constraints on once you have raised this -- once
11 -- once you essentially have the
12 telecommunication carriers' contributions, how
13 they are supposed to be allocated and how the
14 carriers that participate in these specified
15 programs are supposed to then not, themselves, be
16 able to get too much money from the program.
17 They only are able to get what they are spending
18 to support universal service.

19 JUSTICE JACKSON: And so the call for
20 a particular number, it's sort of hard to even
21 figure out how Congress would do that in this
22 situation, right?

23 GENERAL HARRIS: That's exactly right,
24 and why qualitative -- why sort of these
25 qualitative judgments are common. Again, think

1 of the tariff system, where there were sort of
2 judgments with respect to changing circumstances.

3 There are programs where you can have
4 qualitative limits that are trying to accomplish
5 defined objectives that might change over time,
6 and Congress can give that flexibility to an
7 agency without violating the non-delegation --

8 JUSTICE JACKSON: And --

9 GENERAL HARRIS: -- factors.

10 JUSTICE JACKSON: And you say in your
11 page 8 here that there are a number of different
12 agencies that have similar kinds of revenue
13 generating -- I know some people call them fees
14 and not taxes. I've already established that in
15 my view that doesn't make a difference -- a
16 number of agencies that have these kinds of
17 general statements about raising revenue that
18 they determine is necessary or appropriate to
19 carry out responsibilities.

20 So let me just say that if we find
21 that this one is unconstitutional, are all of
22 these programs in jeopardy, in your view?

23 GENERAL HARRIS: Yes.

24 JUSTICE JACKSON: Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Ms. Harris.

2 Mr. Clement.

3 ORAL ARGUMENT OF PAUL D. CLEMENT

4 ON BEHALF OF THE PETITIONERS IN CASE 24-422

5 MR. CLEMENT: Mr. Chief Justice and
6 may it please the Court:

7 There is no delegation problem here.
8 Congress did not decide out of the blue in 1996
9 that it wanted to impose a tax on certain
10 telecommunication carriers to subsidize other
11 carriers.

12 Instead, what Congress did in 1996 was
13 to make explicit the universal -- service
14 subsidies that had long been implicit in rate --
15 monopoly rate regulation.

16 Now, that rate regulation was classic
17 Commerce Clause legislation that did no more to
18 guide the agency than tell them to regulate in
19 the public interest.

20 So when Congress in 1996 decides not
21 only to deregulate but to expressly embrace these
22 subsidies, and then specified who should pay
23 what, that is a victory both for competition and
24 for non-delegation principles.

25 The resulting statute is fully

1 consistent with all of this Court's precedents,
2 none of which my friends on the other side ask
3 this Court to overrule, nor do they confront the
4 massive reliance interests on this program or
5 many of the other programs that might be taken
6 out by overruling this Court's cases.

7 This is simply not the right vehicle
8 for this Court to revamp its non-delegation
9 doctrine.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: Do you agree with the
12 government's argument as to the constraints on
13 the revenue raising?

14 MR. CLEMENT: I -- I do. We also
15 think that sufficiency can be construed to be
16 both a ceiling and a floor. But I guess the only
17 thing I would add to the government's answer is I
18 think where the real constraints come from are in
19 the parameters of the universal service program
20 itself.

21 It is not a charge to the agency to
22 just do anything it wants. With respect to rural
23 customers, for example, what it's supposed to
24 guarantee them is reasonably comparable services
25 at reasonably comparable rates.

1 So if the agency wants to say, you
2 know, actually, rural rates, it's -- it's hard to
3 be a farm, the rural rates should be lower, that
4 would violate the statute. It would also in the
5 process make the program more expensive.

6 And so one way to think about where
7 the -- where the real caps are coming from is the
8 fact that in the four major programs, rural,
9 low-income, rural health, and the schools, none
10 of those are things where the agency isn't
11 constrained and can't just add sort of things
12 willy-nilly to the program.

13 And that's why, if you look at the --
14 the graph on page 3 of the SHLB reply brief where
15 it shows you the total revenues of the fund over
16 time, it has been remarkably flat. And I think
17 that's a reflection of the basic parameters of
18 universal service in the four major buckets that
19 the agency has adopted have all been relatively
20 stable over time, and that's why, though you
21 might see that rate going up because the
22 contribution base is shrinking, the total
23 revenues raised are actually lower,
24 inflation-adjusted terms, over the last decade.

25 JUSTICE THOMAS: Now to take the flip

1 side of this, what would a -- a -- a program look
2 -- of this sort look like and -- in order to
3 violate the non-delegation clause?

4 MR. CLEMENT: So I think a program
5 like this -- I mean, you know, the first thing
6 you -- you would do is you would say, all right,
7 if you gave some agency that doesn't have --
8 hadn't had -- previously had rate regulation
9 authority, doesn't have jurisdiction over a
10 industry where there's network effects and a
11 reason to have some degree of regulation even
12 after you get rid of the -- the monopolies, if in
13 that kind of industry you just basically said,
14 you know, have at it, do fair competition or do
15 some kind of fund, I -- I think that would be
16 problematic.

17 And, you know, I mean, I'd start with
18 this Court's cases. Obviously, there haven't
19 been a lot of cases striking things down on
20 delegation doctrine, but you do look to Schechter
21 Poultry, that says if you try to do something
22 that's economy-wide and you use a term that,
23 because it's economy-wide, doesn't have any
24 particular specialized meaning like fair
25 competition, okay, that's out of bounds.

1 If, Panama Refining, you try to
2 basically tell the executive branch, go -- go
3 deal with hot oil, that's a problem, but you
4 don't give them any direction --

5 JUSTICE GORSUCH: So --

6 MR. CLEMENT: -- and --

7 JUSTICE GORSUCH: So -- so -- I'm
8 sorry to interrupt there, but I think that's a
9 -- a really interesting and a good point. So,
10 for example, when you say just and reasonable
11 rates and a regulated monopoly that's
12 historically been understood to mean cost plus
13 some reasonable profit approximating, what would
14 happen in a competitive environment, that's --
15 that -- that's something.

16 But if you were to say go forth and
17 create a just and reasonable tax system, that
18 would be different, even -- even though you're
19 applying the same principle of -- intelligible
20 principles across the board because one has
21 historical content and the other doesn't. Is
22 that -- is that the gist of it?

23 MR. CLEMENT: That's the gist of it.

24 JUSTICE GORSUCH: Okay.

25 MR. CLEMENT: And I also would think,

1 just to take -- you know, because -- because this
2 is I think all consistent --

3 JUSTICE GORSUCH: So -- so -- so -- so
4 if that's true, just -- I'm sorry to interrupt
5 --

6 MR. CLEMENT: Yeah.

7 JUSTICE GORSUCH: -- but so that's
8 true, you'd agree that there are some judicially
9 manageable standards that we can apply when it
10 comes to delegations?

11 MR. CLEMENT: Absolutely. And, you
12 know, I -- I mean, I would add to my list, I
13 mean, just two other things. If you interpreted
14 the statute at issue in Gundy the way that the
15 dissenters interpreted the statute there, then
16 that's just Panama Refining II, right? That's
17 just the Attorney General can do whatever he
18 wants with the preexisting sex offenders. And I
19 think, as interpreted, that would claim --
20 plainly be a non-delegation problem.

21 And then the other thing I would --
22 just to complete the cycle of this Court's cases,
23 and I know it's not a huge cycle, but Carter Coal
24 is also a situation where Congress itself tried
25 to delegate in part to private entities. And

1 that may be a distinct problem, but that's not
2 what happened here.

3 JUSTICE GORSUCH: No, I understand.
4 And with respect to, like, fees, again we have a
5 classic understanding. We said it in National
6 Cable, and, you know, the GAO has repeatedly said
7 it. Those are designed to cover -- cover the
8 costs or the expenses, right? Generally?

9 MR. CLEMENT: That -- that -- that's
10 right.

11 JUSTICE GORSUCH: Yeah.

12 MR. CLEMENT: And I would part company
13 with the government on their answer that you
14 should conceive of this as a tax. I would agree
15 with them on the front-line answer, which is, I
16 mean -- you know, I don't see how Skinner could
17 have been much clearer that you don't have to
18 determine definitively whether it's a tax or a
19 fee.

20 And I would caution that, you know,
21 saying this is a tax could have some implications
22 for the Origination Clause. I think the test is
23 slightly different, but I think there's a lot to
24 be said for not calling this either a tax or a
25 fee.

1 But what I would say is in the
2 universe of things that are -- can be understood
3 like a fee like this, I -- which I think it can
4 because part of the reason that Congress
5 specified in 254(d) that it's the
6 telecommunication carriers are the ones that are
7 going to be -- make contributions to this, is
8 they had, both historically and going forward,
9 been ones that benefited quite considerably from
10 the idea that there would be universal service
11 --

12 JUSTICE GORSUCH: Well --

13 MR. CLEMENT: -- and a network that
14 overcame networking --

15 JUSTICE GORSUCH: -- that -- that's a
16 little hard to understand, though, because we all
17 benefit from tax collection too, right? I
18 mean -- I mean, that's kind of circular. I'm not
19 sure that really helps very much.

20 MR. CLEMENT: So I -- I -- I -- I
21 actually think it does in the following sense,
22 which is I think --

23 JUSTICE GORSUCH: Well -- and let me
24 throw one more thing in --

25 MR. CLEMENT: Okay.

1 JUSTICE GORSUCH: -- before I forget
2 it.

3 MR. CLEMENT: Yeah.

4 JUSTICE GORSUCH: And that is, of
5 course, the '96 Act was new and -- and rejected
6 the whole monopoly rate-making regime and -- and
7 ignited competition and made these subsidies no
8 longer part of the rate-making process, but very
9 explicit.

10 MR. CLEMENT: I -- I mean, I agree,
11 but I think --

12 JUSTICE GORSUCH: Okay.

13 MR. CLEMENT: -- that's a feature and
14 not a bug of my position because it would have
15 been easy for Congress to say, all right, while
16 we're introducing competition, universal service
17 doesn't really work with competition.

18 And Congress here made the critical
19 policy judgment itself -- and I don't think it's
20 at all ambiguous -- that we are going to continue
21 to have universal service and universal service
22 fees even once we get -- we go into a more
23 deregulated environment. But just one --

24 JUSTICE GORSUCH: If we -- if we
25 reject your view that they're fees and accept the

1 government's willingness to characterize it as a
2 tax, what difference does that make, in your
3 mind?

4 MR. CLEMENT: Well, under this
5 Court's --

6 JUSTICE GORSUCH: Because you're --
7 you're fighting it so hard. There -- must make a
8 big difference to you.

9 MR. CLEMENT: Well, two reasons. One
10 is under this Court's precedents which haven't
11 been asked to be overruled, like, it doesn't make
12 any difference at all. So that would be my sort
13 of front-line answer.

14 But to give you my other answer, which
15 is, look, I have the same instinct that I think
16 underlies many of your questions, that if you
17 just tried to delegate the tax power to the
18 Internal Revenue Service, that there's something
19 problematic about that.

20 Now, I think that's in part because
21 those are statutes where raising revenue is the
22 end in itself; whereas I think with fees and
23 whether you call this a fee or a tax --

24 JUSTICE GORSUCH: Really? Raising
25 revenues is an end in and of itself? I thought

1 it was to provide for the common good and
2 protection of this country and all that other
3 stuff.

4 MR. CLEMENT: Yeah, but all that other
5 stuff is taken care of by other agencies. When
6 you're talking about the IRS --

7 (Laughter.)

8 MR. CLEMENT: No, seriously.

9 JUSTICE GORSUCH: So it depends on
10 which agency it is?

11 MR. CLEMENT: Well, if -- if you're
12 delegating --

13 JUSTICE GORSUCH: Really?

14 MR. CLEMENT: If you're delegating
15 something to the IRS --

16 JUSTICE GORSUCH: That's what it all
17 boils down to.

18 MR. CLEMENT: -- you must be
19 delegating to them revenue raising.

20 JUSTICE GORSUCH: So if the IRS is
21 spending the money, then it would be okay? So if
22 the --

23 MR. CLEMENT: No, no. But --

24 JUSTICE GORSUCH: You know if we put
25 the -- Department of Defense reported to the

1 Commissioner of the IRS, it would all be good?

2 MR. CLEMENT: No. I think there is a
3 material difference between a statute that says
4 IRS, as to all the citizenry, raise some revenue,
5 as opposed to a statute that says: Look, we've
6 been doing universal service for 50 years. We
7 want to continue to do it. It's always been
8 implicitly the telecom carriers that are paying
9 for that, and we want to continue to do that, and
10 we're going to put a fee -- I'd call it a fee --
11 on those carriers for that purpose.

12 And I think it's also consistent with
13 the idea that I assume most of these
14 hypotheticals -- where it's the IRS that's
15 getting the delegation, Congress would be
16 explicit. This is our taxing power. We're using
17 Article I, Section 8, clause 1.

18 I don't think the '96 Act at all
19 conceptualized that what it was doing was using
20 the taxing power, just like the '34 Act was a
21 classic regulation of an instrumentality of
22 commerce. When Congress was trying to deregulate
23 that in 1996 --

24 JUSTICE KAVANAUGH: What do you think
25 the role of novelty is in assessing the

1 constitutional issue here? In other words, we've
2 said in other contexts that when Congress does
3 something that it's never done before, that can
4 be an indication of a problem. And that's where
5 the tax/fee issue comes into play, as I see it,
6 potentially, which is, yeah, there have been lots
7 of fees, but this seems somewhat different from
8 what has been done before in terms of the nature
9 of it and how it works and operates. It falls,
10 as the government says, on the tax side of the
11 line.

12 That seems different, novel, and
13 raises the IRS hypothetical, if we go down this
14 road. So how does -- should we think about that?

15 MR. CLEMENT: Well, I -- I mean, that
16 is part of the reason I take -- part -- part
17 company with the government because, I -- I mean,
18 I do take it, you know, it's -- it's -- we've
19 been at this republic thing for quite a while,
20 and when something hasn't been done before, you
21 might think, well, that's at least something we
22 have to look at more carefully.

23 I don't really think this is something
24 that hasn't been done before. In fact --

25 JUSTICE KAVANAUGH: And what -- and

1 what do you think are the best precedents in
2 terms of what Congress has done for this?

3 MR. CLEMENT: Well, I think all of
4 this stuff in Section 8 and Section 9 are
5 precedents for the idea that when you have
6 something that's not a pure revenue-raising
7 scheme, not a delegation to the IRS, but you give
8 some other agency some kind of revenue-raising
9 authority with respect to covering their services
10 or what -- the programs they provide, this fits
11 comfortably within that pretty long tradition
12 that includes delegations to this Court to have
13 fees to cover the cost of certain services.

14 And those -- you know, it -- it -- is
15 like this Court in Whitman, just to take a
16 precedent that nobody is asking to be overruled,
17 it looked at the statute there, and one of the
18 arguments was -- that the lower court has
19 accepted is: Uh, this isn't good enough. There
20 has to be -- the words that they used was "a
21 determinative criterion."

22 And I think, at least in a statute
23 like this where it's not pure revenue-raising, I
24 don't think that asking for a determinant cap
25 makes anymore sense here than asking for a

1 determinative criterion made in Whitman. And the
2 reason is it's not that this is standardless;
3 it's just that the criterion, rather than being a
4 determinative cap, is all the different
5 restrictions on this universal service fund.

6 And there is so many ways -- and I
7 think this was the government's point as well.
8 There is so many ways that by changing a rule
9 here -- I mean, if they -- if the agency,
10 tomorrow, changed the eligibility requirements
11 for the Lifeline Program and substantially
12 loosened those eligibility requirements, that
13 would increase the -- the burdens on the
14 universal service fund. It would increase the --
15 the rate; it would increase the base -- base.

16 But if they did that, that is an
17 agency action that could be challenged under the
18 APA. If they tried to loosen the eligibility so
19 that everybody who is making, you know, seven
20 figures, six figures, whatever it is, can get the
21 Lifeline Program, that would be invalidated in
22 the courts.

23 And so the -- the restraints on this
24 are not a definitive cap, but they are from the
25 substantive limits of the scope of the program.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Thomas?

4 Justice Alito?

5 JUSTICE ALITO: Well, just out of
6 curiosity, the Court has said, as the Appellees
7 note at the very beginning of their brief, an
8 indefinite power to tax is a power to destroy.

9 Do you think that can be said about
10 every power that is conferred on Congress in
11 Article I? The power to establish post -- post
12 offices and post roads is the power to destroy?
13 The power to establish uniform laws on the
14 subject of bankruptcies is the power to destroy?

15 MR. CLEMENT: I -- I'll give you coin
16 money too.

17 JUSTICE ALITO: All right.

18 (Laughter.)

19 MR. CLEMENT: So -- so -- so -- so I
20 don't think -- I don't think death by coining
21 money is a possibility. Or destruction by
22 coining money.

23 But -- but -- but what I will say is
24 there may be other ways in which you think of the
25 tax power as being slightly different or slightly

1 more dangerous, but I don't think non-delegation
2 is -- and this Court unanimously rejected that
3 twice.

4 But what I would say is there's a way
5 to apply your existing jurisprudence. This is
6 what I was trying to get at with my colloquy with
7 Justice Gorsuch -- maybe not successfully -- is
8 if you apply your basic approach to these issues,
9 which does ask at some level has Congress made
10 the basic policy judgment, I think when you're
11 talking about a pure revenue-raising statute, I
12 would say if Congress hasn't given you a cap or a
13 rate, maybe Congress hasn't made the basic policy
14 judgment.

15 But when you're talking about
16 something, whether you call it a fee or a tax,
17 that's directed at a particular industry and is a
18 judgment by Congress that we are going to
19 continue to have universal service even in a
20 deregulated environment, Congress has made the
21 important policy judgment there.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor?

24 JUSTICE SOTOMAYOR: You started at the
25 beginning by talking about what -- invalidating

1 Section 254 would have disastrous effect for your
2 clients. In which ways?

3 And can you summarize why all of the
4 ideas that have been floated as to how to say
5 this is a tax that and -- and that as such, it
6 needs some cap or something else, how -- what
7 effects would that have on our precedents?

8 MR. CLEMENT: So let me take them both
9 in turn.

10 I mean, the disastrous effects are not
11 just for my clients. They're for all the various
12 beneficiaries of this program. And so, like,
13 start in rural Alaska, which is very dependent on
14 this program.

15 Talk about Native American
16 reservations, where people are dependent on this
17 program, both because they're rural and because
18 they're low income. Talk about all the schools
19 and libraries that benefit from this program.

20 Talk about all the rural health
21 providers. And that's an area of the statute
22 where Congress has been very specific. The rural
23 healthcare providers get the same rates or
24 reasonably comparable rates to the urban health
25 providers in the same states.

1 So you have very definitive guardrails
2 on the system, and huge beneficiaries. And, of
3 course, we all benefit from having a
4 communication system that is truly universal. I
5 mean, I might not live in rural -- you know,
6 like, rural Alaska, but it's nice to be able to
7 place a call there.

8 And even beyond that, we all benefit
9 from the fact that we have a -- a service network
10 that everybody can use. And that includes, you
11 know, as -- as broadband gets expanded, the fact
12 that people all over the country can access these
13 services.

14 But I promise to get to the second
15 part of this, which is this Court's
16 jurisprudence. And, I mean, I'll tell you, I
17 think all of those statutes at pages 8 and 9 of
18 the government's reply brief are vulnerable.

19 But I go further and say I don't know
20 what else is at issue here. Because, as you
21 pointed out, that's just not the way this case
22 has been briefed.

23 And typically in a -- in a universe
24 where, you know, there's two unanimous Supreme
25 Court cases that say we don't treat taxes

1 different from other legislation for
2 non-delegation purposes, typically if you're
3 going to go into the wall of that, you know,
4 bravely go forth, but say why the stare decisis
5 factors are satisfied in this particular context.

6 And then we can have briefing that
7 really gets to the idea: All right. You know,
8 they have a theory that half those statutes on
9 page 8 are still going to be okay, but we have a
10 theory that other things are going to go.

11 I'll just tack one on that's not on 8
12 and 9, but, you know, I took a look at the way
13 the National Park Service funds itself. It's
14 actually very similar to the way this works.

15 The -- the fees are supposed to cover
16 the services that are provided. If you cut down
17 on the number of national parks, the fees are
18 going to go down. If you add a couple national
19 parks, the fees might go up because you have more
20 to cover.

21 And there's six factors, it turns out,
22 that guide the Park Service on that. And the
23 sixth one is something of a catch-all, a lot like
24 -- (b)(7).

25 So -- but, again, we just haven't had

1 the briefing that would allow me to definitely
2 tell you I know exactly what the damage and the
3 consequences are of overturning your precedents
4 in this case.

5 JUSTICE SOTOMAYOR: On the first part
6 of the answer, Respondents said at the end,
7 recognizing the rather dramatic effects of
8 invalidating this law would have on
9 communications, that we had two alternatives.

10 One, as we did in the bankruptcy
11 context, tell Congress: Figure it out in six
12 months before we made our judgment effective.

13 I'm covering all options in my
14 question. So I hope it's not a hypothetical
15 that's necessary. But I'm covering options or
16 I -- I don't know what the second -- but do you
17 have a preferred manner to do this --

18 MR. CLEMENT: So --

19 JUSTICE SOTOMAYOR: -- to minimize the
20 disruption?

21 Long term, you can't, because we're
22 overruling precedent and putting a lot of
23 programs at risk, but --

24 MR. CLEMENT: Yeah. If the -- if the
25 question is: Do we have a preferred way to

1 lose --

2 JUSTICE SOTOMAYOR: Right.

3 (Laughter.)

4 MR. CLEMENT: -- you know, it's not --
5 not, you know, high on my wish list.

6 But, you know, I mean, look, I don't
7 think the Northern Pipeline sort of -- six-month
8 interregnum was necessarily the height of this
9 Court's remedial jurisprudence. So I am somewhat
10 reluctant to recommend that to you as an option.

11 I actually kind of think it works the
12 other way, which is if you really think you need
13 to do Northern Pipeline, then maybe you shouldn't
14 do what you were doing in the merits part of your
15 opinion.

16 JUSTICE SOTOMAYOR: There's a whole
17 lot of --

18 MR. CLEMENT: But I know that's quite
19 a question --

20 JUSTICE SOTOMAYOR: There's a whole
21 lot of people in that area of law that agree with
22 you.

23 MR. CLEMENT: Yeah.

24 JUSTICE SOTOMAYOR: We shouldn't have
25 done it, but --

1 MR. CLEMENT: Yeah. No. And -- and,
2 you know, so -- so since I think that's
3 doctrinally -- I think the second thing they
4 suggested is you could make this relief only run
5 to the particular parties here at issue.

6 And since it's capable of repetition
7 yet evading review -- I'm not even sure what that
8 means -- and -- and -- and then you -- you could
9 try to fix it.

10 The other thing they suggest, of
11 course, is you could fix this whole thing with
12 half a sentence. Well, gee whiz, I mean -- I --
13 I like, I don't really think that that sort of is
14 right.

15 And I think -- you know, the -- what
16 would -- what would the sentence say? Would the
17 sentence say no more than \$10 billion? Well, if
18 you look at the way the program is operated,
19 that's essentially how it's operated.

20 And if this were delegation run riot,
21 I just don't think you'd see that flat line in
22 terms of the size of the fund.

23 CHIEF JUSTICE ROBERTS: Justice Kagan?

24 JUSTICE KAGAN: Just on these eight to
25 nine programs again.

1 I mean, I -- I -- I take it that maybe
2 one argument is that, well, these are
3 fee-for-service programs; and this is not a
4 fee-for-service program, it's a -- it's a revenue
5 raiser. You want to call it a fee? You want to
6 call it a tax? Not sure, but it's a revenue
7 raising for a program, not for a service.

8 Is that a distinction that's worth
9 making?

10 MR. CLEMENT: So I don't know that
11 that maps up to all of the different things on
12 pages 8 or 9. But what I guess I would say is
13 what -- what I think distinguishes this from
14 almost everything else, in a good way, is that
15 here you are continuing a tradition that predated
16 the statute.

17 In the way the statute worked
18 before -- I mean, the way things worked before
19 1996, it was the same basic, you know, carriers
20 that are covered by 20 -- 254(d), roughly
21 speaking, that were implicitly subsidizing, or
22 their customers were implicitly subsidizing, some
23 rural service and some low-income service.

24 And it's not -- you know -- and -- and
25 just -- this is a historical point that I think

1 is actually relevant, because there was about a
2 10-year gap between when Ma Bell was broken up
3 and the '96 Act. And during those 12 years, or
4 whatever it was, there was something like a
5 universal service fund already being developed
6 through interchange fees and things like that.

7 And Congress was clearly trying to
8 preserve that. One place it's most clear is
9 254(j), little provision nobody looks at. But
10 that says that Congress specifically looked at
11 the Lifeline Program the agency was operating
12 before 1996 and wanted to preserve it.

13 And so this is a situation where there
14 is a program that has always been understood to
15 benefit particular classes because of the most
16 obvious beneficiaries of having a truly universal
17 network. And we're going to put a fee on those
18 people.

19 And then when you move from
20 deregulation to the new system, you impose what I
21 think is a fee, call it whatever you want, on
22 those people for a very specific purpose, subject
23 to very specific constraints.

24 I think that probably does look like
25 some of the things on pages 8 and 9, but in some

1 ways it looks better because of all that
2 pre-history that you can borrow.

3 JUSTICE KAGAN: And -- and,
4 Mr. Clement, you were asked to name some of what
5 you thought were the manageable standards in this
6 area, and you came up with a few. And you said,
7 well, it hasn't often been done, but it's totally
8 possible.

9 And I just wanted to give you the
10 opportunity to sort of do the flip half of that.
11 I mean, you obviously don't think that in terms
12 of the manageable standards that you, yourself,
13 laid out, that this falls on the inappropriate
14 side of the line.

15 So why not?

16 MR. CLEMENT: So I think that if
17 you --

18 JUSTICE KAGAN: As to each of those
19 things you said. I just wanted to peg it to your
20 own sense of what the standards are here.

21 MR. CLEMENT: Yeah. So one of the
22 things I said was if it's economy-wide and it's a
23 made-up new term, that's probably a problem.
24 Well, this isn't economy-wide and it's an oiled
25 -- old soil term. So we do really well on that.

1 And then the second thing is Panama
2 Refining: Go solve a problem for me, hot oil,
3 whatever that is. That's a problem. You go
4 solve it. I'm not going to give you any
5 standards.

6 Or if you accepted the dissenters'
7 view of the statute in Gundy, and I know you
8 don't, but if you accepted their view where it's
9 just --

10 JUSTICE KAGAN: Totally. And --

11 MR. CLEMENT: -- past -- past
12 offenders are a problem, go solve it, like -- you
13 know, that -- that's a problem. But, of course,
14 this is the opposite of that because there are
15 all these different constraints, reasonably
16 comparable rates and services for rural customers
17 and urban customers, affordable for schools, it's
18 got to be cheaper than other rates, and the
19 discount has to be enough to make people take
20 advantage of the program; for rural healthcare
21 providers, it has to be the same rates as the
22 urban healthcare providers in the same state.

23 Like, that is so much better than so
24 many of the statutes that this Court has
25 overruled. But lest you think, to paraphrase

1 Judge Newsom in the Eleventh Circuit, that all of
2 the current jurisprudence is a punch line, like,
3 I -- you know, where this Court has approved the
4 broadest language is typically in regulated
5 industries or regulated circumstances. I suppose
6 Yakus is an exception. That's wartime. You
7 could do with that what you will.

8 But for the most part when -- when --
9 when Congress has used broad language and this
10 Court has approved it, it has been in the context
11 of regulated industries where there actually are
12 a lot of principles to draw from.

13 JUSTICE KAGAN: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

16 JUSTICE GORSUCH: Just back to page 8
17 and 9. It does seem to me that they're --
18 they're all pretty easily distinguishable on the
19 basis that it's an agency collecting fees from a
20 regulated party in order to offset its own
21 operating expenses or providing a service to
22 offset the expenses of the service. Thoughts?

23 MR. CLEMENT: So, I mean, if -- if
24 that had to be the paradigm, I could put this in
25 that paradigm in this --

1 JUSTICE GORSUCH: No, I -- fair
2 enough. But if that's a paradigm and this
3 doesn't fit, then what?

4 MR. CLEMENT: It's still okay.

5 JUSTICE GORSUCH: Yeah.

6 (Laughter.)

7 JUSTICE GORSUCH: Okay.

8 MR. CLEMENT: And it's still okay, I
9 think in part, because, like, even if you think
10 this is sui generis -- and this gets back to the
11 colloquy I was having with Justice Kavanaugh --

12 JUSTICE GORSUCH: Yeah.

13 MR. CLEMENT: -- I mean, the fact that
14 something is unprecedented is like a yellow flag,
15 but it's not a red flag.

16 JUSTICE GORSUCH: Okay.

17 MR. CLEMENT: There's no unprecedented
18 clause in the Constitution.

19 JUSTICE GORSUCH: Okay. Okay. And --

20 MR. CLEMENT: And --

21 JUSTICE GORSUCH: And -- and this is
22 something Congress, you think, could -- could
23 easily fix. Now, you think that's an argument in
24 your favor, but they could easily put in a cap or
25 a rate or something tomorrow?

1 MR. CLEMENT: Sure, but why make them?
2 I mean, is my point. Especially when they have
3 put what I would say are the equivalent -- just
4 to put it in Whitman terms --

5 JUSTICE GORSUCH: Well, maybe because
6 otherwise it's regulated parties who are
7 self-interested in a program making the decisions
8 for themselves.

9 MR. CLEMENT: But they're not.

10 JUSTICE GORSUCH: It's sort of like
11 Schechter Poultry, right? I mean, it's the
12 same -- it was a regulated industry there that
13 was making those decisions for its own benefit.
14 And one -- I'm not -- one can dispute that
15 characterization, but -- but -- but maybe, huh?

16 MR. CLEMENT: No. Give me half a
17 chance to -- to dispute that characterization.

18 JUSTICE GORSUCH: By all means.

19 MR. CLEMENT: Because this is miles
20 away. And this really gets to the sort of
21 private delegation piece of this. That argument
22 which hasn't gotten a lot of play -- I mean, let
23 me first say I think --

24 JUSTICE GORSUCH: I'm not talking
25 about private delegation. I'm just saying maybe

1 this is an area that Congress might speak. How
2 about that? Congress could decide.

3 MR. CLEMENT: Congress can always do
4 more. I mean, that's -- that's got to be the
5 rule in every delegation issue, that Congress
6 could always do more. And as an aspirational
7 normative matter, wouldn't it be great --

8 JUSTICE GORSUCH: In an unprecedented
9 area where there's a yellow flag on the field,
10 how about that?

11 MR. CLEMENT: How about an
12 unprecedented area that's not that unprecedented
13 because universal service has been going on
14 pursuant to congressional sanction under the 1934
15 Act for 50, 60 years --

16 JUSTICE GORSUCH: Through --

17 MR. CLEMENT: -- and --

18 JUSTICE GORSUCH: Through rate making
19 and a -- and a regulated monopoly that it -- it
20 -- it -- it proceeded in the '96 Act to disavow
21 and blow up.

22 MR. CLEMENT: With all due respect,
23 this is where the 12-year interregnum is actually
24 quite important, because they -- Ma Bell gets
25 blown up by the courts in 1984 --

1 JUSTICE GORSUCH: Sort of.

2 MR. CLEMENT: So -- sort of. Sort of.

3 JUSTICE GORSUCH: Sort of.

4 MR. CLEMENT: I know you know this.

5 But sort of. And as soon as it's blown up --

6 JUSTICE GORSUCH: It created new
7 monopolies in the process, but that's a whole
8 'nother story.

9 MR. CLEMENT: And -- and -- and -- but
10 when they do it, they don't say the agency is
11 still operating under 150 -- 151, the '34 Act.
12 They don't say, all right, well, we can no longer
13 do any universal service subsidies through
14 long-distance rates.

15 Instead, they say, boy, this is really
16 important. As a regulatory matter, we've been
17 doing it this way for, at that point, 50 years,
18 so let's use the exchange fees and let's create a
19 universal service fund.

20 Now, they did all that out of -- in
21 the public interest. So if you're talking about
22 what's -- what's good for delegation principles,
23 boy, is it good that in 1996 Congress comes in
24 and says we expressly bless that, 254(j), we
25 expressly -- bless the exact program you were

1 doing for lifeline, and now we're going to put
2 some guardrails on it that address this kind of
3 unique phenomenon -- I don't know totally unique,
4 but --

5 JUSTICE GORSUCH: Okay.

6 MR. CLEMENT: But --

7 JUSTICE GORSUCH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh?

10 JUSTICE BARRETT: So, Mr. Clement, one
11 of the -- one of the questions that we ask in the
12 -- non-delegation context is whether the public
13 or the courts could judge whether a particular
14 policy adopted by the agency is unlawful.

15 So there's no objective limit on the
16 contribution, right, which is kind of what we've
17 been going round and round about. How, if you
18 had a client who wanted to challenge the
19 contribution rate, would you argue that it
20 exceeded the statutory authority?

21 MR. CLEMENT: So I think the
22 contribution rate is just a by-product of other
23 things in the statute that I would tell my client
24 to challenge. So, I mean, you know -- I mean,
25 look, one of the things that is really driving

1 the contribution rate is that the contribution
2 base has shrunk. So one of the things I might
3 well tell my -- my client to do is to go to the
4 agency and try to get the agency to expand the
5 contribution base.

6 And they might have the authority to
7 do that. If they did it, it would probably be
8 challenged by somebody under the arbitrary and
9 capricious or consistent with the -- the statute,
10 and we could sort that out. Or maybe the agency
11 would tell me: No, we can't do that. We don't
12 have enough statutory authority -- there's a
13 recognizable limit -- so go to Congress.

14 So if I really was concerned about the
15 rate qua rate, then I would probably have to go
16 at it that way. But I think most rational people
17 aren't concerned with the rate qua rate. They're
18 really concerned with that bottom line number --

19 JUSTICE BARRETT: Mm-hmm.

20 MR. CLEMENT: -- where you see a flat
21 line and you don't see much of a problem. But if
22 I thought that there was something --

23 JUSTICE BARRETT: If you thought
24 35 percent was too high or something like that?

25 MR. CLEMENT: Yeah, but, like, you

1 know, 35 percent of what?

2 JUSTICE BARRETT: Of what?

3 MR. CLEMENT: That's like -- you know,
4 like it's -- it's that bottom line number, is the
5 money that's actually being funded by universal
6 service. And that's been a flat line.

7 But if I wanted to try to get at that,
8 I would tell my clients: All right, let's look
9 at this. Over half of this is the rural carriers
10 program. So is there something the agency did in
11 implementing the rural carrier program that
12 created a lot of costs?

13 And maybe I can identify something
14 where they just funded a big project out in
15 Montana somewhere and it's adding a lot of cost
16 and it's not actually doing anything to lower
17 rural rates or improve rural services. Well,
18 then that gives me a statutorily enforceable
19 standard. And I go in and I make an arbitrary
20 and capricious standard, but I also make a "in
21 excess of statutory authority" question.

22 Or if the reason I perceive that the
23 fund had become too big is that they monkeyed
24 with the eligibility requirements for the
25 lifeline program, so now virtually everybody gets

1 \$9 off in this fee. Well, I could say that's
2 arbitrary and capricious. That's in excess of
3 the statutory authority. The statutory authority
4 is to make it affordable. I can read from the
5 context of this statute that that's supposed to
6 be for low-income people. That's consistent with
7 everything else in the statute. That's ultra
8 vires.

9 That's -- and -- and it's the way you
10 limit the size of this fund is to bring
11 challenges to the FCC action, and they're all FCC
12 action. None of it's USAC. It's FCC actions
13 that affect the scope and size of the program.

14 JUSTICE BARRETT: Okay. One last
15 question. Now, this is a little bit of an unfair
16 question, but you're pretty good, so we'll see.

17 (Laughter.)

18 JUSTICE BARRETT: Justice Kagan -- in
19 your colloquy with Justice Kagan, you were
20 identifying some of the judicially manageable
21 standards. And, you know, obviously your
22 position is that, applied here, the program
23 passes.

24 Do you think there are any programs,
25 any delegations of discretion in the U.S. Code

1 that would fail it?

2 MR. CLEMENT: I -- I think there
3 probably are. And I might, if I get the right
4 client, spend some time looking for them.

5 (Laughter.)

6 MR. CLEMENT: You know, I -- I'm not
7 here to tell you --

8 JUSTICE BARRETT: Yeah.

9 MR. BLEMENT: -- that there should be
10 no non-delegation test. I am here to concede, as
11 Justice Scalia, who didn't like -- flabby
12 statutes, but he still said, you know, this is
13 tough. And, you know, Chief Justice Marshall was
14 pretty smart and he said this was delicate.
15 Chief Justice Taft, in J.W. Hampton -- you know,
16 pretty good judge for separation of powers,
17 decided Myers like two years before -- he says,
18 boy, this is common sense. And, you know, when
19 judges try to just apply their common sense, that
20 is its own separation of powers problem.

21 So I'm not here to tell you it's easy,
22 but I'm not here to tell you it's impossible.
23 And I do think the Court's precedents provide a
24 -- a good guide. I mean, I -- I will say that I
25 think there's a lot in the Gundy dissent that

1 could say that certain things are out of bounds.

2 It's just not this one.

3 JUSTICE BARRETT: Okay.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 JUSTICE JACKSON: So I guess I'm --
7 I'm questioning your response to Justice Gorsuch
8 in the colloquy about whether or not Congress
9 could easily put a cap on this. I -- I -- I
10 mean, I take your point that Congress can --
11 always do more, but if Congress actually wanted a
12 -- a rational cap, if they wanted one that
13 reflected the amount of money that would be
14 sufficient to run this program, I would think
15 they would need to have a lot more than just
16 picking a number out of the air.

17 And that's really what the function of
18 giving it to an expert agency who's sort of
19 focused on this issue, that -- that's what is
20 happening in the delegation. Am I wrong about
21 that?

22 MR. CLEMENT: I -- I don't think
23 you're wrong about that at all. Now, I mean, one
24 way you could fix it in a trivial way that would
25 really sort of allied your question, I suppose,

1 is what I think the Solicitor General was getting
2 at, which is this idea that you just like make
3 the cap a trillion dollars. And then there, it's
4 your definitive cap and now we're done. Now --

5 JUSTICE JACKSON: And I guess we're
6 done with delegation, but, again, the whole point
7 is that we're in a policy system where Congress
8 is trying to do something in this statute. And
9 it would seem to me kind of at least weird to say
10 Congress solves this constitutional problem by
11 picking a number out of the air.

12 MR. CLEMENT: I mean, I agree with
13 that. And I think in a sense that does
14 distinguish this again from some of the tax
15 hypos. Because when you're talking principally
16 about raising revenue, you're really focused on
17 the number. How much are we going to raise?
18 Like we have a deficit, and we're going to cover
19 some of it and we're -- some of it with
20 borrowing. And like all we really care about is
21 how much we're going to raise. So for a statute
22 where that's all you care about to not address
23 that in Congress does seem like a problem.

24 But, on the other hand, with this
25 program, they clearly weren't that focused on is

1 this going to be a \$10 billion -- program or an
2 \$11 billion program? What they wanted to do is
3 provide reasonably comparable rates and services
4 for rural customers and -- versus urban
5 customers.

6 They had a rough sense of what that
7 was going to cost, but if it costs, like, you
8 know, a hundred million dollars more to actually
9 get universal service that worked for everybody
10 in the country, I think Congress would have been
11 fine with that because their principal judgment
12 here was not a how much money judgment, but a how
13 much universal service is going to survive in a
14 competitive environment.

15 JUSTICE JACKSON: And am I right that
16 that judgment and the program that was generated
17 was enacted on a bipartisan basis, it's been
18 wildly successful in terms of actually providing
19 the services that Congress wanted?

20 MR. CLEMENT: Yeah.

21 JUSTICE JACKSON: Am I right about
22 that?

23 MR. CLEMENT: Yes. And, you know, I'm
24 not 100 percent sure, but my recollection is it
25 started in the Senate too, which is why I really

1 think saying it's a tax is a mistake because it's
2 not a tax. It's Commerce Clause legislation.

3 And it's a program that was
4 overwhelmingly popular. And you see a
5 congressional amicus brief that I -- you know, I
6 have to say in this era is refreshingly
7 bipartisan.

8 JUSTICE JACKSON: And I guess I think
9 that that's kind of important because there is an
10 argument that some of the amici have raised that
11 the reason why we need to get into this as a
12 Court and have a more robust non-delegation
13 doctrine is to promote democratic accountability.

14 And I guess I'm just wondering whether
15 it is really democracy-enhancing to create a
16 doctrine that, at least in this case, would allow
17 judges to strike down this very popularly-enacted
18 law.

19 MR. CLEMENT: Well, and -- two
20 observations on that. One, there -- there's a
21 certain perversity that the other side is like so
22 confident that if you just said there needs to be
23 a cap, Congress would snap to it and put in a
24 cap. And the only reason they can be confident
25 is that this is a really popular law. And so, of

1 course, Congress would do it because they don't
2 want the sky to fall. So that's -- that's --
3 that's weird enough as it is.

4 And then the second thing I would say
5 is, like, on the one hand, I don't think that you
6 can have a jurisprudence that says: Well, this
7 -- this law passed unanimously and this one was
8 on a party line vote, so we're going to apply a
9 different test, but I do think where you -- and
10 this is the point I was trying to make with
11 Justice Barrett -- there is a problem that if you
12 sort of come up with a test that is kind of like
13 I know it when I see it, that is incredibly
14 judicially empowering to the expense of the
15 political branches.

16 And I think that's why somebody like
17 Justice Scalia, who was, you know, distressed at
18 some of what he saw, but nonetheless said, you
19 know, sort of too -- too big, too big, too much,
20 that's just not the right test. You need to come
21 at it from a different angle.

22 JUSTICE JACKSON: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. McCotter.

1 ORAL ARGUMENT OF R. TRENT McCOTTER
2 ON BEHALF OF THE RESPONDENTS

3 MR. McCOTTER: Mr. Chief Justice, and
4 may it please the Court:

5 At its heart, this case is about
6 taxation without representation. Every year
7 Americans pay billions for the universal service
8 fund. The rate has increased ten-fold. The
9 amount collected is now 20 times the size of the
10 FCC's entire annual budget.

11 The FCC -- the government and the FCC
12 now agree, or at least do not dispute, that USF
13 charges are, indeed, taxes; that the
14 non-delegation inquiry is stricter in this
15 domestic context; that the nature of the power is
16 at least relevant; that the USF statute sets no
17 objective rule to limit the amount raised; and
18 that Congress has set such rules for every other
19 domestic tax in American history.

20 Those concessions doom their case.
21 The amount of public revenue to raise is a
22 quintessential legislative determination, not
23 some minor detail to be filled in later.

24 But in deciding how much to raise, the
25 FCC is guided by aspirational-only principles in

1 254(b) and even gets to redefine universal
2 service itself in 254(c) based on an evolving
3 standard; the exact opposite of incorporating
4 some preexisting framework.

5 This broad delegation to the FCC was
6 entirely by design, and this is before we get to
7 USAC. Even now, the recent memorandum of
8 understanding between the FCC and USAC says that
9 it is USAC's projections, not the FCC's, that
10 will be deemed approved.

11 But passive acquiescence does not
12 comply with this Court's non-delegation case law.
13 To be clear, the Court can affirm without
14 overturning any prior decision because this is
15 the easy case. Neither the executive, nor
16 private parties gets to set tax rates.

17 But if Petitioners are right, then
18 Congress could use similarly-vague language to
19 let the executive decide any domestic legislative
20 issue, even, for example, setting the size of
21 lower federal courts. The Constitution prohibits
22 that transfer of power.

23 The en banc ruling below should be
24 affirmed, and I welcome the Court's questions.

25 JUSTICE THOMAS: The Petitioners make

1 the argument that this isn't a particularly new
2 program, it comes from the -- the old Bell system
3 before we had deregulation.

4 The other thing that they argue is
5 that the constraints that are on the service
6 delivery side are indirectly or at least
7 sufficient, they are sufficient to regulate or to
8 supply constraints on the revenue-raising side.

9 I think that puts some degree of
10 specificity on the argument, and I'd like to see
11 you address those.

12 MR. McCOTTER: Yes, Your Honor.

13 So on the pre-1996 regime, this
14 argument wasn't really developed below by the
15 Petitioners, but, remember, 254(c) says the FCC
16 gets to decide what universal service is, based
17 on an evolving standard.

18 The Petitioners themselves said in
19 1996 that there was a fundamental overhaul --
20 that's their opening brief -- fundamental
21 overhaul of the regime. And that's because they
22 are ditching whatever the prior understanding
23 was, even assuming there was one -- and we
24 dispute that -- but even if there were, in '96,
25 Congress said we're completely changing, not just

1 how the system operates, but what it covers.

2 It's dramatically larger.

3 And even if you see our brief at pages
4 69 to 70, we cite some of the government's own
5 briefs where they say we have no obligation. The
6 statute imposes no obligation to raise the same
7 amount of money that we did before the '96
8 regime.

9 So the idea that somehow the old
10 regime is incorporated, I think, is directly
11 dispelled by the text of the language -- by the
12 text of the statute itself.

13 On the second part of your question,
14 Your Honor, if I can make one point that you all
15 remember today, it's that the principles in
16 254(b) are ones that the FCC does not have to
17 substantively comply with. This is not some
18 extreme, unusual reading as they try to make it
19 sound. That's been their uniform interpretation
20 for 25 years.

21 They say each one of those, maybe we
22 have to consider them. We can't ignore them
23 altogether. But we only --

24 JUSTICE KAGAN: Well, Mr. McCotter, I
25 mean, there are some real standards in this

1 program. So what this program covers is things
2 that a substantial majority of residential
3 customers already have, all right? So it's not
4 like newfangled, go all get ourselves some
5 Starlink accounts, it's substantial majority of
6 residential customers already have that are
7 essential to living in our world, that are
8 essential to education, public health, and public
9 safety.

10 And those things have to be available
11 at affordable rates. So the FCC can't do
12 anything by way of this program that is not
13 basically geared towards getting those who live
14 in very rural areas or who are very low income,
15 getting those -- access -- getting those people
16 access to services that all the rest of us have.
17 That's the nature of the program, and that's the
18 limit of the program.

19 MR. McCOTTER: So the substantial
20 majority point, Your Honor, again, that's not
21 listed as something that the FCC has to
22 accomplish. It's listed only as something they
23 must consider the extent to which communications
24 are.

25 So it's not even saying universal

1 service is this level -- it's not even saying --

2 JUSTICE KAGAN: I -- I -- I think if
3 they -- if -- if the FCC walked into this Court
4 and said we don't -- we can do something that,
5 like, a tiny minority of residential customers
6 have, I think that they would lose that case. I
7 mean, there are constraints on this agency and on
8 this -- and on their operation of the program.

9 And if we're going to read the statute
10 just -- I mean, honestly, I think that that's an
11 -- a -- a not credible reading of this statute.
12 This statute clearly puts constraints on these
13 are the services that all the rest of us take for
14 granted, that you can't take for granted in rural
15 North Dakota.

16 And what this program says is that
17 rural North Dakota citizens should also get what
18 all the rest of us have long had. That's the
19 nature of this program, that the services that
20 the rest of us have that are essential to life in
21 a modern world, that are essential to education,
22 public health, and public safety, which are
23 providable at affordable rates.

24 So if it really takes a lot of money,
25 even then you can't get the program. You can't

1 get the service.

2 MR. McCOTTER: Well, so I'll address
3 the affordable point again because that came up a
4 -- a lot in the opening section.

5 Again, affordability under 254(b) is
6 something the FCC itself has said it does not
7 actually have to comply with. It can pick any
8 254(b) principle, including one that it comes up
9 with on its own, and say that's what we're going
10 for. That's the real limitation.

11 JUSTICE KAGAN: Mr. McCotter, I'm
12 going to tell you again that if the FCC -- and
13 -- and maybe the Solicitor General can -- can
14 respond to this -- but if the FCC came in and
15 said we don't have to worry about affordable
16 rates and, you know, they -- they can be
17 exorbitant rates and we're -- going to still go
18 ahead and fund things from this program, I -- I
19 mean, that's just not a reasonable reading of the
20 statute.

21 MR. McCOTTER: That's been their
22 position for 30 years, Your Honor.

23 JUSTICE KAGAN: Okay. I'm -- I'm --
24 I'm --

25 MR. McCOTTER: And they haven't

1 changed it.

2 JUSTICE KAGAN: I'm inclined to ask
3 the Solicitor General to say whether that is
4 their position.

5 MR. McCOTTER: I understand. And the
6 way to read the statute, as I said, is not some
7 extreme version that we're offering. It's the
8 version that they've proffered for 30 years.

9 JUSTICE KAGAN: It's the --

10 MR. McCOTTER: They've always said --

11 JUSTICE KAGAN: But you just look at
12 the text. The text, it leaps out at you,
13 "substantial majority of residential customers;"
14 "essential to education, public health, and
15 public safety;" "available at reasonable and
16 affordable rates."

17 MR. McCOTTER: Again, those are things
18 the FCC only must consider the extent to which.
19 They don't even have to consider whether those
20 are actually true. They have to say, do we think
21 that this is true and, if so, to what extent.
22 Okay, we've considered it. It's -- that's an
23 important factor. It is no substantive
24 limitation.

25 JUSTICE JACKSON: Why isn't that an

1 arbitrary and capricious challenge, though? I
2 mean, it -- it seems to me that if you're
3 complaining about the FCC and the way in which
4 they have exercised its authority, you should be
5 bringing that kind of case. That's not a
6 non-delegation problem.

7 MR. McCOTTER: I don't think it has to
8 be one or the other, though, Your Honor. I think
9 --

10 JUSTICE JACKSON: Well, there has
11 to --

12 MR. McCOTTER: -- if the agency --

13 JUSTICE JACKSON: -- be a distinction
14 between the two if you're asking us to strike a
15 -- a -- a statute down on a particular
16 constitutional basis.

17 MR. McCOTTER: But if the agency has
18 such a broad scope in the first place --

19 JUSTICE JACKSON: I mean, don't we
20 have constitutional avoidance as a principle? If
21 we could do it under arbitrary and capricious,
22 shouldn't we be doing that rather than striking
23 the statute down as unconstitutional?

24 Let me ask you another question. I --
25 I guess I'm confused about what you're asking us

1 to do. Your brief says that the Court should,
2 quote, "take this opportunity to realign its
3 non-delegation framework with its traditional
4 understanding of the Constitution," end quote.

5 But you also have said, both in your
6 brief, I guess, and here, that you're not asking
7 us to overrule any specific precedents. But I
8 would think that a realignment would mean
9 different outcomes from cases that we've decided
10 under the standard that you want us to displace.

11 So, I -- I mean, if the intelligible
12 principle test, in -- in your view, has been
13 yielding proper outcomes for the past century,
14 then why do we need to revisit it?

15 MR. McCOTTER: So we win even under
16 the current framework. And that's why we say
17 that the Court need not necessarily overturn any
18 precedent.

19 JUSTICE JACKSON: So why do we need to
20 revisit the framework? If you -- if you're -- if
21 you're right about all the past cases, if we got
22 them right, then what's the need for having a new
23 standard?

24 MR. McCOTTER: So the main reason is
25 that the intelligible principle test as some

1 judges have interpreted it -- now, again, we
2 don't quite agree with this view. In Judge
3 Newsom's words, it's a punch line. It
4 essentially allows transfers altogether of
5 exclusive and strict legislative powers to
6 agencies. And you could say --

7 JUSTICE JACKSON: But not apparently
8 in all the cases that you say got it right. So
9 --

10 JUSTICE KAVANAUGH: The solution --
11 oh, keep going. Sorry.

12 JUSTICE JACKSON: No, I just -- I
13 just -- I guess I'm really hyper focused on the
14 need for us to make any changes in terms of the
15 legal standard that applies here. And the reason
16 is, in part, because of what the Chief Justice
17 Marshall said -- we've quoted it a couple of
18 times -- this is delicate and difficult, this
19 inquiry, but -- he goes on to say it's an inquiry
20 into which a court will not enter unnecessarily,
21 precisely because it's so hard.

22 So I'm really trying to understand the
23 need for us to come up with a different test or
24 try to figure out something else, especially if
25 you appear to concede that the outcomes of all

1 these prior cases are correct.

2 MR. McCOTTER: I think the outcomes of
3 the cases are arguably correct under the original
4 understanding, but, again, part of that could
5 just be coincidence. This Court has addressed
6 certain statutes. We think a lot of them are
7 distinguishable in certain ways that make them
8 different from the statute here.

9 The -- but, again, I don't think we
10 should be slighted for saying that we win even
11 under the modern test, though, because there is
12 no clear boundary for the FCC's ability to set
13 the amount to be raised. This Court has said
14 that since American Power & Light, even under its
15 most watered-down modern case law.

16 JUSTICE KAVANAUGH: Your -- your
17 position would say, I think, that a solution to
18 the problem you identify could be a -- a trillion
19 dollar cap or \$100 billion cap. And that makes
20 the position seem -- what is -- what exactly are
21 you trying to accomplish?

22 MR. McCOTTER: And that's exactly what
23 Justice Thomas said in his Whitman concurrence.
24 He says, just because there is an intelligible
25 principle, assuming there is one -- and,

1 obviously, we don't -- but even assuming there is
2 one, it doesn't stop Congress from just handing
3 over wholesale its power. Just like Justice
4 Scalia said in his Mistretta dissent --

5 JUSTICE KAVANAUGH: Well -- maybe
6 that's not -- maybe I didn't phrase my question
7 correctly. I think your position is that it
8 needs -- needs a cap, correct?

9 MR. McCOTTER: There needs to be some
10 kind of objective limit.

11 JUSTICE KAVANAUGH: Okay.

12 MR. McCOTTER: Yeah.

13 JUSTICE KAVANAUGH: So cap. Yes.

14 MR. McCOTTER: It doesn't have to be a
15 number. Just -- there's another -- if I had to
16 make a second point --

17 JUSTICE KAVANAUGH: But even if it has
18 to be -- even if it has to be a number, you're
19 not taking the further position, I don't think,
20 that the number -- the number could be a cap. It
21 could be very high, and then the question is what
22 exactly are we accomplishing?

23 MR. McCOTTER: Well, so if Congress
24 did set a trillion-dollar cap, obviously it's
25 unlikely, but at least then we would know that

1 Congress itself has made that determination. It
2 says we think universal service is this
3 important; we want the agency to be able to raise
4 --

5 JUSTICE KAVANAUGH: And how -- how is
6 that then different from saying we're not going
7 to do a trillion-dollar cap, but we're uncertain
8 about -- we're uncertain about the amount that
9 will cover the costs of the program and so we're
10 going to use the term "sufficient"?

11 And so I think you need to zero in on
12 this -- the word "sufficient" and why that's not
13 enough of a constraint vis-à-vis the trillion
14 dollar. Like, we would be saying, I think, if we
15 agree with you, sufficient is not good enough but
16 trillion dollar is. And I think a lot of people
17 would say that doesn't make a lot of sense. So
18 what's the answer to that?

19 MR. McCOTTER: Well, so the answer
20 with the trillion-dollar example is then we can
21 say Congress has set the policy. Yes, the test
22 this Court had for 150 years, Congress sets the
23 policy. It can't use just vague aspirations, but
24 it sets the policy, leaves only details to be
25 filled in.

1 I think the -- in that case, they've
2 set the policy, essentially, right? The policy
3 that matters for this purpose, which is the
4 amount to be raised. But if they just say raise
5 a sufficient amount --

6 JUSTICE JACKSON: But -- but that's
7 just because --

8 MR. McCOTTER: -- first of all,
9 that's --

10 JUSTICE JACKSON: -- you say the
11 amount to be -- sorry. Go ahead.

12 JUSTICE BARRETT: That -- that seems
13 pretty empty, right? I mean, isn't that Justice
14 Kavanaugh's point, that if they say \$3 trillion
15 -- \$3 trillion or \$5 trillion, that's just kind
16 of throwing a number out there for the sake of
17 throwing a number. Why have they really set the
18 policy in a way that's meaningfully different
19 than they did in this statute?

20 MR. McCOTTER: But I still think if
21 they put a particular objective limit like that,
22 they have set the policy. They've said this is
23 how important universal service is to us. The
24 agency can raise --

25 JUSTICE BARRETT: You're talking about

1 if they -- you're still talking about just if
2 they raise money through the fund this way.
3 You're not talking about them appropriating the
4 money, right? You're just saying --

5 MR. McCOTTER: Right, yes.

6 JUSTICE BARRETT: -- this is the cap.
7 That just -- that seems a little bit hollow.
8 Kind of seems like a meaningless exercise.

9 MR. McCOTTER: Well, still there is
10 accountability. At least then we know. If you
11 think that's too much, if you think --

12 JUSTICE BARRETT: Counsel, let me
13 just --

14 MR. McCOTTER: -- that it's too low,
15 you know it's Congress.

16 JUSTICE BARRETT: Let me switch gears
17 for one minute and just ask you to respond to the
18 page 8 and 9 reply brief statutes. You know,
19 both Ms. Harris and Mr. Clement have said that
20 your position is going to jeopardize a lot of
21 laws.

22 MR. McCOTTER: So the list of statutes
23 there, they're kind of like the dog that didn't
24 bark. All they have are a few relatively modern
25 provisions, almost all of which are standard fee

1 provisions, like how much do you pay for a postal
2 stamp, that sort of thing, which this Court
3 addressed in National Cable, the 1974 case, and
4 said maybe that has its own built-in limiting
5 principle, because you're limited to the value to
6 the recipient.

7 JUSTICE BARRETT: Okay. So --

8 MR. McCOTTER: However --

9 JUSTICE BARRETT: -- you're saying
10 that page 8 and 9, they're all distinguishable.

11 MR. McCOTTER: Correct.

12 JUSTICE BARRETT: Okay. So do you
13 think that our deciding this case in your favor
14 would jeopardize other statutes that maybe aren't
15 on pages 8 and 9 of the briefs? I mean, do you
16 think it would be cataclysmic or do you think it
17 would be pretty modest, like a -- this -- this
18 statute only?

19 MR. McCOTTER: So the proof is in the
20 pudding here. The decision below has been
21 binding in the Fifth Circuit for eight months
22 now. They have repeatedly rejected
23 non-delegation challenges, including to some
24 relatively broad language. We cite these in our
25 brief. The Mayfield case, for example, involved

1 a statute that referred to DOL regulations being
2 detrimental to health, efficiency, general
3 well-being.

4 And the Court there unanimously said:
5 No, that gives enough meat on the bones. This is
6 not like what we saw with the universal service
7 fund.

8 JUSTICE BARRETT: Okay.

9 MR. McCOTTER: The government has
10 never cited another one like this.

11 JUSTICE BARRETT: All right. Then
12 last question. What about the consequences? You
13 know, Mr. Clement said that the consequences of
14 holding this statute unconstitutional would be
15 devastating for universal service. What about
16 that?

17 MR. McCOTTER: Well -- just as a
18 disclaimer, it's not relevant to the
19 constitutional question, of course --

20 JUSTICE BARRETT: I -- I understand.

21 MR. McCOTTER: -- but I will address
22 it anyway.

23 JUSTICE BARRETT: I -- I understand
24 that. But I think it's a fair question to
25 consider the consequences of your position.

1 MR. McCOTTER: So the more important
2 that my friends on the other side make out this
3 program to be, all it does is make my case
4 stronger that it should have been Congress itself
5 to set meaningful limits in it.

6 In terms of how this would play out --
7 again, we offer options in our brief. They've
8 never -- my friends on the other side don't
9 respond to them; I think maybe they accept
10 them -- the Court could limit relief to the named
11 Respondents.

12 This does challenge just one court
13 order, remember. I realize there are others in
14 the --

15 JUSTICE KAVANAUGH: And the -- well,
16 on -- on your answer to Justice Barrett on the
17 Fifth Circuit, and the proof is in the pudding, I
18 guess I question that, because they relied on the
19 combination theory.

20 MR. McCOTTER: True, but the first
21 part --

22 JUSTICE KAVANAUGH: So proof's not in
23 the pudding.

24 (Laughter.)

25 MR. McCOTTER: True, but the first

1 part of their opinion goes right up to the line
2 on the statutory delegation aspect --

3 JUSTICE KAVANAUGH: Well --

4 MR. McCOTTER: -- as well.

5 JUSTICE KAVANAUGH: Well, they rely on
6 the combination theory. You're barely defending
7 that theory, right?

8 MR. McCOTTER: We're not running away
9 from it at all. We think it's correct. We think
10 it flows directly from Free Enterprise Fund.

11 Judge Newsom himself, in his
12 concurrence, made the same argument, right, that
13 with each delegation we run into -- or we move
14 away from the locus of democratic accountability.
15 And so that's --

16 CHIEF JUSTICE ROBERTS: Well --

17 JUSTICE KAVANAUGH: That's a --

18 CHIEF JUSTICE ROBERTS: Free
19 Enterprise Fund was quite a different -- I mean,
20 they had -- they both had two, but I don't think
21 that's -- that's where the similarity ends.

22 (Laughter.)

23 CHIEF JUSTICE ROBERTS: Because it was
24 a question of direct control by the -- by the
25 president. And if -- if he can't control both of

1 them, then he's got no control at all.

2 So I -- I think it was --

3 MR. McCOTTER: Sure.

4 CHIEF JUSTICE ROBERTS: -- quite a
5 different case.

6 MR. McCOTTER: Sure. But even then,
7 the -- the concern, as you said, was the
8 president's control. Here, the concern is
9 democratic accountability. And the private
10 non-delegation and the -- what I'll call the
11 statutory --

12 JUSTICE SOTOMAYOR: Counsel --

13 CHIEF JUSTICE ROBERTS: Well, but it's
14 a much more --

15 MR. McCOTTER: -- stack.

16 CHIEF JUSTICE ROBERTS: -- I'll let it
17 go in a second. But it's a much more precise
18 straight line, direct, as opposed to a broad
19 concept like democratic accountability --

20 MR. McCOTTER: I understand. And if
21 the Court doesn't want to go down the route of
22 the combination theory, then I think the
23 Petitioners agree that the Court could just
24 aggress -- address QP 1 and 2 and resolve the
25 statutory.

1 JUSTICE KAVANAUGH: And on the -- on
2 your main position, not the combination theory,
3 does it depend on drawing a distinction between
4 tax and fee? I think it may, particularly when
5 you answer the way you have on the examples on
6 pages 8 and 9.

7 And if so, can you tell us what the
8 definition of tax and fee is? And then the
9 follow-up question will be: The other side, the
10 government, says that'll be a complete morass and
11 just basically a jurisprudential disaster to try
12 to figure out the difference between tax and fee.
13 I'm characterizing what they say.

14 MR. McCOTTER: So I'll say this:
15 We're not saying taxing is in a category of one
16 for non-delegation purposes. As we said, the
17 test is the same for every strictly and
18 exclusively legislative power. So whether you
19 think it's a tax or a fee doesn't change the
20 initial framework. We're not asking for some
21 one-off special test for taxing.

22 But it's true that applying that test
23 is easier in the context of a tax, for two
24 reasons.

25 First, we all know that taxing is

1 strictly and exclusively legislative. That's
2 been established for centuries.

3 And second, we know what that required
4 policy is. What is the sine qua non of a tax?
5 Federalist 83 told us. It needs to be an amount.
6 And we also have 250 years of tradition following
7 that rule -- for those who look to kind of
8 post-founding evidence -- 250-year unbroken
9 history following that.

10 That's not to say that if the Court
11 for some reason thinks that it's not a tax, that
12 we must lose.

13 This Court said just last year in the
14 CFPB case raising public money is a legislative
15 task. Professor McConnell referred to it as
16 raising domestic revenue. These are terms that I
17 think would include fees.

18 And so the reason why I think, if you
19 go down that road, we are still different than
20 the -- the statutes that the government cites on
21 pages 8 to 9 of its reply is that those, either
22 on their face or under the limiting construction
23 that this Court required in National Cable in
24 1974, those would be construed as fees. They
25 have a limiting principle of, you can only charge

1 the value of the benefit to the recipient.

2 And maybe there's one statute, like
3 the OCC one, that's kind of on the line. And
4 that's tough. It's a more modern statute. You
5 know, maybe that one is questionable.

6 JUSTICE JACKSON: I'm sorry, why isn't
7 sufficiency a limit that is similar?

8 MR. McCOTTER: Well, so sufficient --
9 well, as you said, sufficiency is not --

10 JUSTICE JACKSON: Sufficient to run
11 this program?

12 MR. McCOTTER: Sufficiency is not a
13 mandate, first of all. They don't have to
14 actually do that.

15 In 254(b) it's listed as a principle,
16 they've already said it for 30 years. They don't
17 have to follow any particular principle. And
18 254(e), there's also a reference to sufficiency.
19 It says "should." Again --

20 JUSTICE JACKSON: In -- in a
21 hypothetical --

22 JUSTICE KAGAN: Again, you -- again,
23 you -- you're saying that we should interpret
24 this statute to say that that word, "sufficient,"
25 is not imposing a requirement, meaning

1 sufficient, what is required to do these
2 services, but not more than that?

3 MR. McCOTTER: Yes, because that's
4 what the FCC itself has said for 30 years.

5 JUSTICE KAGAN: Okay. I'll add that
6 to my list of things that I think would be an
7 unreasonable statutory interpretation.

8 Sufficiency means -- like when I call
9 the pizza operator and say: I want you to send
10 me pizza sufficient for 10 people, and then an 18
11 wheeler shows up --

12 (Laughter.)

13 JUSTICE KAGAN: -- that is not an
14 accurate understanding of what I asked for.

15 (Laughter.)

16 MR. McCOTTER: Well, I think the key
17 distinction there is at least you have an
18 objective limitation on the end, right?
19 Sufficient pizza for 10 people. Okay. We'll
20 give -- give them the benefit of the doubt and
21 assume sufficient to be --

22 JUSTICE KAGAN: Yeah, so I take that
23 point. So it is sufficient for what. And then
24 we go back to my earlier thing.

25 MR. McCOTTER: So then --

1 JUSTICE KAGAN: It's sufficient to get
2 the people in these rural and low-income people,
3 these -- these -- these populations, it's to --
4 it's to get them the -- services that the rest of
5 us have, that a majority of other -- that the
6 majority of us have that are necessary for
7 education, public health, and safety, and -- and
8 that can be accomplished at reasonable and
9 affordable rates.

10 That's -- that's -- that's the
11 nature -- that's the substantive mandate.
12 Sufficient is -- that's how much you have to
13 raise, is to do that and nothing else.

14 MR. McCOTTER: And again, I return to
15 254(c)(1), principles are not mandatory, except
16 that the FCC must consider them. And even that
17 --

18 JUSTICE SOTOMAYOR: I'm sorry, I --

19 MR. McCOTTER: -- honestly, is too
20 much.

21 JUSTICE SOTOMAYOR: The word --
22 statute says that the FCC -- uses the word "shall
23 base its policies on the six universal service
24 principles."

25 You keep saying that for 30 years the

1 FCC has said it doesn't.

2 I find two cases where briefs were
3 submitted where it said that, but I don't see
4 that anywhere in the SG's brief here. And I
5 certainly don't see it controlling the outcome of
6 at least two circuits, the Fifth and I think it
7 was the Tenth, who -- who invalidated certain
8 regulation -- certain things by the FCC because
9 they ignored the principles.

10 So you can't have it both ways.

11 MR. McCOTTER: Well, so on your
12 first --

13 JUSTICE SOTOMAYOR: So if we say
14 they're just plain wrong, these principles are
15 binding on their decision-making, which I don't
16 think they're going to dispute, it may well be
17 that they come in conflict at some point or
18 they're not pertinent to another issue. That
19 always happens.

20 But you're sort of saying the
21 principles set no limits.

22 MR. McCOTTER: Well, so on the first
23 part of your question, Your Honor, they do say --
24 in their reply brief, they say I quoted out of
25 context one of their briefs saying that the 254

1 principles don't have to be complied with.

2 JUSTICE SOTOMAYOR: Exactly.

3 MR. McCOTTER: And they say: If you
4 read the rest of what we said, we said was in
5 light of other statutory obligations.

6 And so what they are saying, as they
7 have said for 30 years, is at most, we can --
8 have to consider the 254(b) principles. At most,
9 we have to follow one of them.

10 We can say one is more important than
11 the other -- it could be one we came up with --
12 but we don't actually have to follow
13 substantively any of them.

14 JUSTICE GORSUCH: And don't they have
15 to sometimes make choices between them? I mean,
16 (1), for example, talks about reasonable and
17 affordable. But then (2) says advanced
18 telecommunications services should be provided in
19 all regions of the nation.

20 And that doesn't have a reasonable or
21 financial limitation at all. And -- and I -- I
22 -- I just -- I'm not sure I understand why you're
23 fighting the notion that if -- if they were bound
24 by them somehow, they would still provide
25 guidance.

1 MR. McCOTTER: Sure. So we obviously
2 make that argument, that even if 254(b)
3 principles are all mandatory in every way you
4 could think of, as Justice -- or, excuse me, as
5 Judge Newsom said in his concurrence, they are
6 -- are all -- they are all mealy-mouthed
7 shibboleths; they're just generic terms.

8 And so even if the Court says: The
9 position the FCC has provided for 30 years is
10 wrong, no, you must try to meet every single one
11 of these, we think we still win.

12 And I think, to get back to Justice
13 Kagan's question, it's because we still have the
14 object. It's sufficient for what? Sufficient
15 for universal service. And the FCC gets to
16 redefine universal service based on an evolving
17 standard.

18 JUSTICE KAGAN: Well, you know, there
19 is something that says to the FCC, yes, you get
20 to keep thinking about this. And, you know,
21 Justice Jackson suggested that that's exactly
22 when you want delegations. It's you get to keep
23 thinking about this because we recognize that
24 tech -- that the technology is going to change.
25 And these very clear principles are going to be

1 in -- in a -- in -- in -- in 2025 different from
2 what they were in 2010, which is different from
3 what they were in 2000.

4 So -- but the -- the -- the -- the --
5 the guidelines are quite clear. You know, a
6 substantial majority of people already have to
7 have them. They have to be at affordable and
8 reasonable rates. And what's the one I'm
9 missing? They -- and they have to be essential
10 to, essentially, you know, live in our modern
11 society for education and health and safety.

12 I mean, if you go through what this
13 program is providing, what -- what would you cut
14 out?

15 MR. McCOTTER: I'm sorry. What would
16 I cut from this?

17 JUSTICE KAGAN: Yeah, because, you
18 know --

19 MR. McCOTTER: I would add things to
20 the statute.

21 JUSTICE KAGAN: -- like, for -- to me,
22 it's like, okay, you know, what it's providing is
23 landline connections and now broadband in very
24 rural areas, about a \$9 per month subsidy for
25 people who live just -- who live below the

1 poverty line, rural health -- to make -- to
2 ensure that we facilitate telehealth services and
3 allow rural clinics to operate.

4 I mean, this is all basic stuff.
5 These are not exorbitant things. These are not
6 gratuitous things. This is just like -- the way
7 the FCC has operated that program is consistent
8 with the standards that have been set in this
9 program, which is these -- these are providing
10 basic services for people who live in North
11 Dakota and for people who live below the poverty
12 line.

13 And, by the way, as Mr. Clement said,
14 those basic services benefit all of us because we
15 should all be able to talk to people in North
16 Dakota.

17 MR. McCOTTER: So on that point, I'd
18 respectfully direct you to our opening brief,
19 search for where we use the phrase "wealthy
20 Montanans on ranchettes." It's a phrase used by
21 a scholar saying this money gets used for things
22 like that. They're taking money from people who
23 are just above the line to receive, say, lifeline
24 assistance, and it goes to help people who are
25 rural but who are already wealthy and that sort

1 of thing. So the idea that this is just
2 unalloyed good, we would respectfully disagree
3 with.

4 JUSTICE GORSUCH: On --

5 MR. McCOTTER: GAO reports say that
6 for 20 years --

7 JUSTICE KAGAN: I -- I think you can't
8 have a government program that doesn't have a
9 couple of instances, a few instances, some
10 instances of -- you know, where somebody could
11 come in and say this goes too far. Probably so.

12 MR. McCOTTER: On the -- if I could --

13 JUSTICE KAGAN: Trying to make an
14 arbitrary and capricious stand --

15 MR. McCOTTER: If -- if I could --

16 JUSTICE KAGAN: -- challenge.

17 MR. McCOTTER: Sorry. If I could
18 address your prior point about the changing
19 technology, so we're not challenging -- we made
20 this very clear -- we're not challenging the
21 spending on the back end. And the FCC can
22 address changing technology on the back end by
23 saying here's the new equipment that we think
24 people should have. We've already -- in that
25 case, if they've constitutionally raised the

1 money, have much broader leeway. You should see
2 footnote 11 in our opening brief that explains
3 the distinction.

4 But the point is there are other
5 programs like this, think like -- in the sense
6 that they have changing technology, I mean, think
7 of Medicare. They are obviously -- the -- the
8 medical treatments are changing every day, but
9 yet Congress has set objective rules on the
10 Medicare tax.

11 JUSTICE GORSUCH: I -- I would have
12 understood your argument not to be that they're
13 spending too much and subsidizing wealthy
14 Montanans, which does happen, in rural areas, and
15 -- and -- and Colorado too, but maybe that
16 they're also spending too little and maybe --
17 maybe we should have cell phones for everyone
18 under this standard. I mean, it -- wouldn't that
19 be advanced telecommunications services for
20 everybody? And don't most people have them?
21 And, therefore, shouldn't everybody have them?

22 And I -- I -- I had understood your
23 argument to be not that they're spending too
24 little or too much, but that nobody can tell what
25 the right answer is.

1 MR. McCOTTER: That's certainly right.
2 There's nothing to stop the agency from doing
3 that. And to respond on this point about
4 advanced telecommunications services, the idea
5 that's somehow limited only to schools and
6 libraries, if we're going to make 254(b)
7 mandatory, I'll point you to 254(b)(2), which
8 says, "access to advanced telecommunications and
9 information services should be provided in all
10 regions of the nation."

11 So there we go. Starlink for the
12 whole nation. Maybe they're not spending enough.
13 Who knows?

14 And this kind of gets to one of the
15 questions -- I think it was from Justice
16 Barrett -- about whether there are kind of
17 judicially manageable standards and that sort of
18 thing. And, again, that's why I strongly push
19 back on the idea that this in -- incorporated
20 some preexisting framework. Congress made clear
21 it was not. It fundamentally overhauled it by
22 letting the FCC, on an evolving basis, redefine
23 this. It's the exact opposite of a judicially
24 manageable standard.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas?

3 Justice Alito?

4 JUSTICE ALITO: I -- I am quite
5 concerned about the effects of a decision in your
6 favor on the grounds that you have been pressing
7 this morning. In the end, that may not matter,
8 but I would like to know where -- what such a
9 decision would mean.

10 So to start out, what would be the
11 effect on people in rural areas if this is held
12 to be unconstitutional and Congress does not act?
13 Where should I look to get an accurate picture of
14 the answer to that question?

15 MR. McCOTTER: So I would look to our
16 response brief first, where we say the Court
17 could limit relief to the named Respondents. I
18 think that's one at least potential answer there.
19 I think you could also --

20 JUSTICE ALITO: On -- no, go ahead.

21 MR. McCOTTER: Sorry. And so you
22 could also look to the Fifth Circuit en -- excuse
23 me -- en banc opinion, which did not even vacate
24 the quarterly contribution factor at issue here.
25 It simply remand it to the agency.

1 And so I realize that that may turn in
2 part on how the Court actually rules on the
3 merits, but that's another possible remedy here,
4 which is that the FCC decision isn't even vacated
5 in the meantime.

6 JUSTICE ALITO: Well, the Fifth
7 Circuit based its decision on the combination
8 theory. And if we were to affirm on the basis of
9 the combination theory, the problem could be
10 fixed rather readily, I would think, by the FCC
11 itself. Isn't that right?

12 MR. McCOTTER: It could. And I -- I
13 find it telling that in the eight months since
14 the opinion came out, they haven't actually tried
15 to do so for subsequent orders.

16 JUSTICE ALITO: So, again, where
17 should I look to get a -- an -- an accurate
18 picture of the empirical situation? Are there
19 studies?

20 MR. McCOTTER: I'm not sure the -- the
21 best source I could give you, Your Honor, on
22 that. I think the answer is that Congress would
23 have an opportunity to take the reins and decide
24 what do we really want universal service to be.
25 It's so important. As I say, the friend -- my

1 friends on the other side insist this is the most
2 important program in the country, but yet they
3 think that perhaps it's not one where Congress
4 itself needed to impose any real limits.

5 And I think if it's that important,
6 then Congress will step up. I think even
7 Mr. Clement admitted essentially, of course
8 Congress would step up here.

9 JUSTICE ALITO: Another concern is the
10 effect on other statutes. And I -- I -- I sort
11 of throw up my hands at dealing with this. This
12 has come up before. This sort of argument made
13 by the Solicitor General has come up before. It
14 was made in the -- CFPB case last term. I don't
15 blame the government at all for making it, but
16 the argument is made that if you decide a case in
17 a particular way, it is going to result in
18 imperiling, dooming a whole list of statutes.

19 And maybe that's true; maybe that's
20 not true. But each one of those would require
21 individual determination, and we don't have
22 briefing on all of those, on all of those
23 statutes. So maybe that's some -- something that
24 the Solicitor General could -- could address.
25 Maybe that's directed more to her than to you,

1 but do you have thoughts on that?

2 MR. McCOTTER: Well, sure. So I think
3 it's telling, again, that the best examples they
4 could have, after almost four years of
5 litigation, are the ones at pages 8 to 9 of their
6 reply, which are distinguishable for all the
7 reasons Justice Gorsuch has given. I think --

8 JUSTICE ALITO: They -- they're
9 distinguishable on the grounds that those are
10 fees and this is a tax; is that right?

11 MR. McCOTTER: That's an easy
12 distinction, yes. And even if you were to say
13 this isn't a tax, again, as we say, we still win
14 because there's no clear boundary. There's no
15 clear principle. There's no clear rule for the
16 statute.

17 I think also the Court in its opinion,
18 if it were to rule in our favor, would explain so
19 why is this statute different than, say, ones
20 like in NBC? And I think the Court would go
21 through the fact that this did not bring the
22 common law soil with it. It did the opposite.

23 There are no other provisions around
24 it that give it meaning like this Court has
25 sometimes done to fill in vague terms. If

1 anything, every time you look at a different
2 provision, it's just broader than the one before
3 it. And so I think that would naturally limit
4 the follow-on cases.

5 JUSTICE ALITO: Okay. And then,
6 finally, maybe, potential ways of limiting the
7 practical impact of the decision in this case, if
8 the decision is in your favor along the lines
9 that you're advancing this morning.

10 One is Northern Pipeline. Some
11 skepticism about whether that's a precedent that
12 should be followed has been expressed. Another
13 is limiting the relief to just the parties here.
14 If we were to do that, how long would it be, do
15 you think, before enough parties would bring suit
16 and bring this whole thing down?

17 MR. McCOTTER: Well, it's taken 25
18 years for someone to kind of get the gumption to
19 challenge it in the first place. So I have some
20 doubts, actually, that others would mount such
21 challenges. But even if so, I think it would be
22 past the time --

23 JUSTICE ALITO: Well, it -- it takes
24 maybe -- it take -- it takes gumption to take the
25 lead, but maybe it doesn't take very much

1 gumption to try to -- to -- to get the benefit of
2 something that somebody else has done the work to
3 enable you to get.

4 MR. McCOTTER: True enough. I think
5 however much time that would take, especially
6 given that this is a quarterly process that
7 doesn't play out on a daily basis in that sense,
8 I think by that time, we would have had
9 congressional action either saying we are going
10 to say that this program is important as the
11 Petitioners say and we're going to put some
12 limits on it, or they'll say this thing is out of
13 control, it's in a death spiral, we need to come
14 up with something else altogether. There would
15 be more than enough time to do that.

16 JUSTICE ALITO: It's not easy to get
17 legislate -- it's never easy to get legislation
18 enacted by Congress.

19 MR. McCOTTER: True. Congress could
20 also --

21 JUSTICE ALITO: Even more difficult
22 right now than it has been at times in the past.
23 Isn't that right?

24 MR. McCOTTER: That's true. And I
25 should also add, Congress could simply

1 appropriate money here. They could say: Here's
2 8 billion. You don't need to charge the fee in
3 the meantime. It's kind of -- it's a bit like
4 the with the Affordable Care Act tax where they
5 zeroed it out, that sort of thing, where they
6 went through some of their kind of Senate
7 trickery and they figured out how to do this with
8 a lesser number of votes or something and just
9 say here's an amount of money, 8 billion, 9
10 billion, 20 billion, 5 billion, whatever,
11 Congress is the one that gets to choose, right,
12 and they should choose, they have to choose. And
13 they could do that and you don't even have to
14 change the statute.

15 JUSTICE ALITO: Do you think that
16 would be a better solution to have the taxpayers
17 pay for this rather than the -- the providers?

18 MR. McCOTTER: Well, remember, this
19 fee is already paid by the taxpayers.

20 JUSTICE ALITO: More -- let me not ask
21 whether it's a better -- a better approach but
22 one this Congress is more likely to be
23 enthusiastic about?

24 MR. McCOTTER: Well, as of now, it's
25 already paid by the taxpayers because Americans

1 are really the ones who pay for it, but also on
2 -- on the idea -- this -- I'll be brief -- but
3 just on the idea that because it's, you know, a
4 popular program or something, that that should
5 somehow -- somehow matter, I think --

6 JUSTICE ALITO: It's not overt. But,
7 anyway, go ahead.

8 MR. McCOTTER: Right. I -- I -- I
9 think it's right, it shouldn't matter. And the
10 main reason for that, for this purpose is, of
11 course, members of Congress love handing off
12 taxing to someone else and say: Don't blame me,
13 blame the FCC.

14 JUSTICE ALITO: Thank you.

15 MR. McCOTTER: Blame USAC.

16 JUSTICE ALITO: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Sotomayor?

19 JUSTICE SOTOMAYOR: Most taxpayers
20 complain that when they're taxed, they don't know
21 what the government is spending the money on.
22 And certainly most of the time they don't like
23 what the government's spending money on.

24 But in terms of accountability, your
25 monthly phone charge -- bill tells you that

1 you're paying for universal service charge
2 because it has a line that says -- your bill,
3 this is the amount of the federal universal
4 service charge.

5 What you're saying to Justice Alito is
6 in a time in which the federal budget is being
7 slashed dramatically, that Congress will now
8 appropriate, we should ask Congress to
9 appropriate something that taxpayers know they
10 are already paying and have agreed to?

11 MR. McCOTTER: Right, but that's what
12 the Constitution requires. And the -- the thing
13 is that --

14 JUSTICE SOTOMAYOR: Now Let me ask you
15 another --

16 MR. McCOTTER: -- if people don't like
17 it, they can vote out Congress --

18 JUSTICE SOTOMAYOR: -- question. You
19 told Justice Alito that every other law that
20 might be affected could be distinguished. What
21 can't be distinguished is that all of these are
22 levying fees or assessments or charges based on
23 agency determinations, the Office of the
24 Comptroller, quote, "determines what is necessary
25 or appropriate to carry out its

1 responsibilities."

2 The FDI -- I -- IC, none of these are
3 with limits, any fee which the corporation may be
4 by regulation proscribed, after giving due
5 consideration to the need to establish and
6 maintain the -- reserve ratio of the Deposit
7 Insurance Fund. The Federal Housing Finance
8 Agency can levy upon regulated entities an
9 assessment sufficient to pay its reasonable costs
10 and expenses. I can go on and on, where agencies
11 are being told levy fees, duties, tariffs.

12 Tariffs are not even tied to a
13 particular activity. Tariffs just say: Pay this
14 tariff on this good and agencies have been
15 permitted to assess -- the president has been
16 permitted to assess tariffs to raise revenues for
17 no reason or whatever reason he deems
18 appropriate. That, I think, is much less
19 guidance than this law.

20 So I am not sure how you could answer
21 that we can distinguish each one of them. Each
22 one of them does not have a numerical cap. And
23 yet we've said that they are sufficiently precise
24 as to what the activities are being spent on, as
25 to not be a non-delegation violation.

1 MR. McCOTTER: So a few responses. On
2 the statutes, on pages 8 to 9, none of those are
3 being used to fund the multi-billion dollar
4 social welfare program, which was the entire
5 purpose of this statutory regime. I don't think
6 my friends on the other side dispute that point.

7 On --

8 JUSTICE SOTOMAYOR: You don't think
9 that these programs are funding the banking
10 system, funding the bank -- banking system? The
11 housing system? They're all being used to fund
12 programs that assist various groups in one form
13 or another.

14 So, yes, they are funding industries.

15 MR. McCOTTER: Well, so the way that
16 this Court described them in Skinner when it
17 talked about National Cable was to say that those
18 sorts of statutes refer to the administrative
19 costs to -- internal to the agency. I think --

20 JUSTICE SOTOMAYOR: But the --

21 MR. McCOTTER: -- if they are using --

22 JUSTICE SOTOMAYOR: -- administrative
23 costs, they are all related to the programs. And
24 this is related directly to specified programs.

25 MR. McCOTTER: Right, but that

1 would --

2 JUSTICE SOTOMAYOR: So it's doing
3 exactly the same thing.

4 MR. McCOTTER: But that wouldn't be
5 the administrative cost, Your Honor. That would
6 be the actual program itself, funding --

7 JUSTICE SOTOMAYOR: But that's --

8 MR. McCOTTER: -- the whole separate
9 welfare or social welfare program.

10 JUSTICE SOTOMAYOR: But that's exactly
11 what these other agencies are doing.

12 MR. McCOTTER: Well --

13 JUSTICE SOTOMAYOR: They are running
14 programs and services that are being funded in
15 their determination of what's going to meet their
16 obligations.

17 MR. McCOTTER: I think, respectfully,
18 Your Honor, that's just not how they actually
19 work. That's not really what the text says.

20 Some of them may seem a little
21 broader. I think under this Court's National
22 Cable decision, they would need to be limited.
23 This Court already said in that case, 50 years
24 ago, there's a major distinction from delegation
25 purposes from letting an agency set a true fee

1 and letting an agency raise money in the public
2 interest.

3 I think that's a very important point
4 here under current doctrine, as the phrases like
5 "in the public interest" --

6 JUSTICE SOTOMAYOR: Thank you,
7 counsel.

8 MR. McCOTTER: -- just won't work
9 here.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE KAGAN: So one of the things
12 that strikes me, Mr. McCotter, about this case is
13 that when we typically interpret regulatory
14 statutes, sometimes we just interpret them
15 straight up, but to the extent we don't, what we
16 usually do is that we interpret the statutes to
17 limit agency authority.

18 In other words, you know, like we
19 narrowly construe the statute, as in Benzene, or
20 the major questions doctrine is all about doing
21 this. These look like very broad delegations.
22 We can't really believe that's what Congress
23 meant, so we're going to sort of impose some
24 limits.

25 And -- and what you're asking us to

1 do, I think, is kind of the opposite, is like
2 instead of doing that or reading the statute
3 straight up, what you're saying is that we should
4 read this statute as expansively as possible to
5 give the agency as much power as it could
6 possibly be viewed as giving, and all in order
7 to, in the end, blow the statute up.

8 And I think that that's just not a
9 right way to think about the interpretation of
10 regulatory statutes. So, again, this sort of
11 goes back to my -- this statute has plenty in it
12 that imposes limits on what the FCC is doing.
13 And why shouldn't we interpret the statute,
14 which, you know, I think both sides in Gundy
15 thought that -- the one thing that they agreed on
16 was the first thing you do in a -- in a
17 delegation case is interpret the statute.

18 We interpret the statute. There's a
19 lot of limits here. The agency can raise the
20 money that's good enough, but no more to satisfy
21 a pretty -- a pretty clear mandate, which is to
22 provide basic services, those services necessary
23 for public health and safety and education, basic
24 services, for people of low-income and -- and
25 rural areas who don't have what a substantial

1 majority of us do have. That's a pretty clear
2 directive to the agency.

3 And that seems to me consistent with
4 the way we should interpret statutes in this
5 context.

6 MR. McCOTTER: So as the en banc
7 decision below said, there are a lot of words
8 here, but there are not a lot of limits,
9 especially when it comes to raising the amount.

10 JUSTICE KAGAN: See, I think I -- can
11 I just --

12 MR. McCOTTER: And I realize we can
13 disagree --

14 JUSTICE KAGAN: I'm just going to
15 interrupt. I'm going to give you time to answer
16 but I'm just going to interrupt. I actually
17 think that the "lot of words" here makes it seem
18 as though it's a little bit more loose than it,
19 in fact, is; like the fact that there are six
20 factors and stuff like that.

21 The -- the lot of words are actually
22 masking an extremely clear mandate to the agency.
23 This -- this agency knows what it's supposed to
24 do under this statute, which is exactly what this
25 agency has been doing. This goes back to

1 Mr. Clement's historical point. It's basically
2 what this agency has been doing since the 1930s.

3 MR. McCOTTER: Well, again --

4 JUSTICE KAGAN: Okay. Sorry.

5 MR. McCOTTER: Well, sorry. I was
6 going to say, again, remember, the key inquiry
7 here, what is the fundamental object, right,
8 universal service. The FCC gets to define it on
9 an evolving standard.

10 And it's not an extraordinary
11 interpretation to read it as it says, which is
12 that in 254(c) the FCC need only consider the
13 extent to which -- and then it lists some of
14 these factors.

15 And so we read it just straight up.
16 Again, this is not -- respectfully, it's just not
17 an unusual interpretation to say the FCC, sure,
18 they must consider it. And if they don't, that
19 could be an APA challenge, but we're going to
20 assume they did consider it. And they're not
21 actually substantively limited by these sorts of
22 things.

23 On the list of policies, in Schechter
24 Poultry, there was a similar list of poultry --
25 list of principles -- excuse me, list of

1 policies, including, you know, non- --
2 non-discriminatory provisions. There -- the
3 codes adopted needed to be equitable, things like
4 that, words that may in other contexts have
5 provided enough, but because they're added on
6 with all these other provisions that make clear,
7 Agency, you can go ahead and kind of do what you
8 want here.

9 And just to be clear, we're --
10 completely freeing you from the preexisting
11 doctrine. So Mr. Clement said this isn't one of
12 those cases where Congress said, hey, Agency,
13 figure it out. Respectfully, we just disagree.
14 I think that's exactly what happened here.

15 JUSTICE KAGAN: Thank you.

16 CHIEF JUSTICE ROBERTS: Counsel.

17 Justice Gorsuch?

18 Justice Kavanaugh?

19 JUSTICE KAVANAUGH: I did have a few.

20 On accountability, I assume because I haven't
21 heard from you, you don't have any separate
22 problem here with the fact that it's the FCC and
23 that's commonly thought of to be independent,
24 either it's not independent as the government
25 says, or you don't think that's an additional

1 problem; is that correct?

2 MR. McCOTTER: It's perhaps a minor
3 plus factor. We're not raising a separate
4 challenge on that basis, no.

5 JUSTICE KAVANAUGH: Okay. Second, are
6 you asking us to do anything with Skinner?

7 MR. McCOTTER: So the way we interpret
8 Skinner -- I think this is the fair reading of
9 it, given all the cases before and after -- is
10 that the nature of the power at issue does
11 matter. The Court's said that since Wayman. And
12 to the extent the Court went further, all it said
13 was something that we're willing to agree with,
14 although we win either way, which is that taxing
15 is not in a category of one, essentially. It's
16 not some unique specific thing, although
17 historically we think it is, we think that's
18 important, but we don't want to tie the whole
19 case to that point.

20 And so, in our view, at most that's
21 what Skinner said. And so whether you view it as
22 a tax or a fee, we win either way. Skinner
23 doesn't control beyond that.

24 JUSTICE KAVANAUGH: Is your argument
25 that the word "sufficient" is too loose or the

1 back-end objects are too loose or both?

2 MR. McCOTTER: It's not just
3 "sufficient" is too loose. There are many
4 principles in here that are too loose because
5 even if you think they might have some meat on
6 the bones, again, the FCC doesn't have to comply
7 with any particular 254(b) principle.

8 JUSTICE KAVANAUGH: But you are
9 arguing "sufficient," the word "sufficient," even
10 if the back-end objects were more specific -- you
11 understand the question?

12 MR. McCOTTER: I think I do.

13 JUSTICE KAVANAUGH: Yeah.

14 MR. McCOTTER: And I -- what I would
15 say is it's not as if we have a statute where
16 Congress said, FCC, please raise money and you
17 can spend up to 8 billion. I think then the
18 reasonable interpretation, as Justice Kagan would
19 say, is, okay, let's kind of tie those two
20 together there and put them, and let's try to
21 avoid a constitutional problem.

22 But here on the back-end spending,
23 it's not like they suddenly have some real
24 objective limits there either.

25 JUSTICE KAVANAUGH: Yeah. And then on

1 your point about limiting relief to the named
2 parties, I guess I'm not understanding that at
3 all because, you know, would not be a -- it's not
4 a district court ruling. This ruling would be
5 binding through vertical stare decisis throughout
6 the country.

7 And I assume -- and you want to react
8 to that? I -- I -- I -- I think the named relief
9 thing is -- doesn't help you at all.

10 MR. McCOTTER: Well, so two responses.
11 First, the government's always asking this Court
12 to limit relief to the named parties. For once,
13 they found someone who was willing to agree to
14 it. So it must make some distinction.

15 Second, I think that it's more
16 applicable to the quarters that are kind of
17 already in the hopper. So for all the ones that
18 have already gone, already been approved, as it
19 were, for those, limiting relief to the named
20 parties, especially given that the time limit to
21 bring --

22 JUSTICE KAVANAUGH: Well --

23 MR. McCOTTER: -- FCC challenges --

24 JUSTICE KAVANAUGH: -- let's play this
25 out. We've had this discussion before in past

1 years, the past few years, but if this Court were
2 to say that it's unconstitutional for the FCC to
3 continue in this way, even though the named
4 parties are here before us, my understanding of
5 what the government has said before is we would
6 comply with what the Supreme Court said.

7 MR. McCOTTER: Sure. And I think it's
8 important that -- that they say that, but this is
9 really important --

10 JUSTICE KAVANAUGH: You don't think
11 they would do that?

12 (Laughter.)

13 MR. McCOTTER: I don't think they
14 necessarily have a legal obligation --

15 JUSTICE KAVANAUGH: Really?

16 MR. McCOTTER: -- to do so.

17 JUSTICE KAVANAUGH: What's -- what's
18 your case for that?

19 MR. McCOTTER: Well, the -- the case
20 is that the judgment applies to the parties only,
21 specifically if the Court has already said so,
22 which again --

23 JUSTICE KAVANAUGH: What's your --
24 what's your response to vertical stare decisis
25 and how that's traditionally been understood in

1 the country?

2 MR. McCOTTER: So that's why I say I
3 think the limiting it to the named parties is
4 really most relevant for all the challenges that
5 are already in the hopper, to say we're not going
6 to unscramble all these statutes in the past,
7 except for maybe these few named parties. Going
8 forward, as people might bring new challenges --
9 and as I said in response to Justice Alito, I'm
10 not convinced they will -- but even if they did,
11 then, okay, well, that plays out well into the
12 future. By then we think if the Court has
13 actually reached this point, Congress would have
14 done something --

15 JUSTICE KAVANAUGH: The --

16 MR. McCOTTER: -- text forwardly.

17 JUSTICE KAVANAUGH: Sorry to prolong
18 it. The premise of what you're saying right
19 there is the FCC is just going to say we don't
20 care what the Supreme Court said about the
21 program. And I'm not sure that premise is -- is
22 -- is accurate.

23 MR. McCOTTER: I think what they --
24 sorry to -- if I'm not being clear. I'm saying
25 for the program -- for the quarters that have

1 already been challenged, the past ones --

2 JUSTICE KAVANAUGH: Right.

3 MR. McCOTTER: -- I think they would
4 say, look, the Supreme Court has ruled in your
5 favor, Respondents, and we will address that as
6 necessary, as to you. Going forward, though, I
7 do think that limiting it to the named parties is
8 less effective. That's why we list other
9 options, though.

10 I'm not saying that that's like a
11 cure-all, just to be clear. I think it is an
12 important limitation, especially for the suits
13 already filed.

14 JUSTICE KAVANAUGH: Thank you very
15 much.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

18 JUSTICE BARRETT: Mr. McCotter, I just
19 want to clear something up about the 254(b) --
20 universal service principles. We've been kind of
21 going round and round and round about whether
22 these are mandatory factors or not. So I just
23 want to be sure that I understand your position.

24 So it begins under (b) by saying that
25 the joint board and the Commission shall base

1 policies for the preservation and advancement of
2 universal service on the following principles.
3 And then each one of those principles has a
4 "should."

5 Is that your problem, that they say
6 "should"? And would you feel differently if the
7 principles were worded that quality services be
8 available at just, reasonable, and affordable
9 rates?

10 MR. McCOTTER: That's one of the
11 problems, is that it says "should." But I think,
12 more fundamentally, the problem is, as the FCC
13 itself has said for 30 years now almost, that any
14 one of these --

15 JUSTICE BARRETT: Okay, but --

16 MR. McCOTTER: -- problems --

17 JUSTICE BARRETT: -- put aside --

18 MR. McCOTTER: All right.

19 JUSTICE BARRETT: This is a legal
20 question. This is a statutory interpretation
21 question. So the FCC can say that all it wants,
22 but we still have to interpret the statute,
23 right? So we're not bound by what the FCC says
24 about its own authority.

25 So, return to the question.

1 MR. McCOTTER: True, although I think
2 the fact that they've interpreted it the same way
3 for 30 years --

4 JUSTICE BARRETT: Okay. Okay.

5 MR. McCOTTER: -- is an indication.

6 JUSTICE BARRETT: Okay, I said, but
7 don't -- don't fight the premise.

8 MR. McCOTTER: All right. And so even
9 then, let's say that they all are mandatory. We
10 still run into the problem that I think Justice
11 Gorsuch was getting at, which is that these
12 terms, especially when you have them fighting
13 against each other with no rules for how to
14 balance them or pick and choose between them,
15 it's just like Schechter Poultry. It's a lot of
16 policies, some of which of which may actually
17 have some meaning in some sense, but they're all
18 fighting against each other, and the FCC gets to
19 kind of pick and choose which ones are more --
20 more important.

21 JUSTICE BARRETT: Okay. And then
22 second question. We've talked about the
23 difficulty of having judicially manageable
24 standards in this area. And when you and I
25 talked before, we were talking about a cap, and

1 you said a cap would solve the problem.

2 So is that a manageable principle,
3 that you would be happy -- you said, well, then
4 at least Congress would have decided the policy
5 for itself and put a limit on it, so we know if
6 it said 3 trillion, 3 billion, whatever, I
7 understood you to tell me before that would solve
8 the problem.

9 MR. McCOTTER: Absolutely.

10 JUSTICE BARRETT: And so that would be
11 the intelligible principle?

12 MR. McCOTTER: If we're under the
13 intelligible principle, yes --

14 JUSTICE BARRETT: Yeah.

15 MR. McCOTTER: -- that's -- that's
16 more than sufficient. And I think it's
17 noteworthy that --

18 JUSTICE BARRETT: And we wouldn't have
19 to worry about anything else in the statute, not
20 this 350 -- 254(b) list or anything like that?
21 Just the money would do it?

22 MR. McCOTTER: Correct. Although we
23 win even if you don't think that's the
24 requirement.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: So you've said
3 several times that you're not asking for a
4 special rule for taxes versus fees, but you began
5 today by saying that this case is about taxation
6 without representation. And you say there has to
7 be a cap because the amount of public revenue
8 that is to be raised via, the -- you know, a
9 mechanism is a legislative prerogative and can't
10 be delegated.

11 So it seems to me that you are relying
12 to some extent on the characterization of this as
13 a tax.

14 MR. McCOTTER: So to be clear, we're
15 making alternative arguments. We think it is a
16 tax. We think that --

17 JUSTICE JACKSON: But does that
18 matter?

19 MR. McCOTTER: -- that should matter.
20 But even --

21 JUSTICE JACKSON: Does it matter?

22 MR. McCOTTER: But if even if you
23 disagree --

24 JUSTICE JACKSON: No, I understand. I
25 just want to understand whether your delegation

1 argument in substantial part is hinging on your
2 point that the legislature has the power to tax
3 and it can't be handed off, and unless the
4 legislature has a cap that it says this is the
5 amount that you can raise, it is doing something
6 unconstitutional because of that structure?

7 MR. McCOTTER: It matters in the sense
8 that we know taxing is a strictly and exclusively
9 legislative power. So we know that this is
10 something Congress itself has to set the
11 objective rule on.

12 It's not necessarily that they have a
13 cap in the numerical sense. In footnote 7 of our
14 opening --

15 JUSTICE JACKSON: No, I understand --

16 MR. McCOTTER: -- of our brief there
17 are examples.

18 JUSTICE JACKSON: -- but you -- but --
19 but the thought is that -- that to the extent
20 that you believe this is a tax, there has to be a
21 cap set by Congress, is your basic point.

22 Now, let me just ask you this:

23 Mr. Clement says, okay, this statute is really
24 not about raising public revenue. It is about
25 providing universal services. So if we disagree,

1 if this comes down to how we're characterizing
2 this statute, and we disagree with your view that
3 this is a public revenue-raising vehicle and,
4 therefore, Congress has to put a cap on it, do
5 you lose? I mean --

6 MR. McCOTTER: No.

7 JUSTICE JACKSON: -- why must there be
8 a cap if this is not a tax?

9 MR. McCOTTER: So, there -- again,
10 there doesn't need to be a cap in the numerical
11 sense.

12 JUSTICE JACKSON: No, I understand.

13 MR. McCOTTER: There needs to be a
14 rule.

15 JUSTICE JACKSON: Well, why if this is
16 not a tax? Why can't Congress develop a policy
17 that says we would like to have the following
18 thing happen? We would like to have everybody in
19 rural places throughout the country, everywhere,
20 have this kind of service?

21 And as Mr. Clement said, we don't
22 really care about how much it costs to do that.
23 We are trying to get to this objective. And you
24 would come back and say: Ah, but you have to
25 tell us, you know, there has to be a cap on the

1 amount of money that you have to raise for this.
2 And Congress says: But that's not our objective.
3 This is not about raising money. It's about
4 providing a service; however much that costs.

5 What's unconstitutional about that?

6 MR. McCOTTER: It's still domestic
7 revenue raising, as Professor McConnell describes
8 it or as this Court last year in C -- CFPB
9 described it. It's raising public moneys. And
10 when you have that sort of exclusive legislative
11 power, there needs to be a policy set by
12 Congress.

13 JUSTICE JACKSON: All right.

14 MR. McCOTTER: The policy can't be
15 vague.

16 JUSTICE JACKSON: Let me just ask one
17 more question. I know we're running a -- out of
18 time here.

19 Is it your first-line position that we
20 should not be using the intelligible principle
21 standard? Are you saying -- are you encouraging
22 us -- I know you say you win under that standard,
23 but is your first point that we should be doing
24 something else?

25 MR. McCOTTER: Yes. The Court should

1 at the very least -- return to the intelligible
2 principle that I think J.W. Hampton itself laid
3 out, which says that Congress must set the rule
4 that shall prevail. And of -- as our argument
5 is, there is no rule that shall prevail when it
6 comes to the amount of money.

7 JUSTICE JACKSON: So you're not doing
8 important subjects or something like that, is --
9 is that what you mean? Is that the test that
10 you're -- I -- I'm just trying to understand what
11 it is that you would have us do if we don't do
12 intelligible principle?

13 MR. McCOTTER: So we would say that
14 the proper framework is what this Court applied
15 for 150 years, if it's a strictly and exclusively
16 legislative power, then Congress itself must set
17 the policy. It can leave only fact-finding and
18 details to the executive.

19 And as I started off today saying, the
20 amount of money to raise for an enormous social
21 welfare program is not a minor detail to be left
22 to someone else.

23 JUSTICE JACKSON: And -- and you don't
24 see the risk that we judges would be overriding
25 popular -- and I -- I know you don't care that

1 it's popular -- but popular in the sense that
2 Congress has enacted it -- programs?

3 I mean, Mr. -- Mr. Clement says that
4 this could be -- the aggrandizement of power by
5 the courts if we don't have a really clear
6 standard for determining when we come in and say
7 this is unconstitutional versus not?

8 MR. McCOTTER: Well, I think -- he
9 apparently prefers an aggrandizement by Article
10 II executive. And Congress was more than happy
11 to let that happen when it comes to taxes because
12 nobody wants to take responsibility for that.

13 So I think if we care about kind of
14 democratic accountability I'll return to what
15 Judge Newsom said in his concurrence, with each
16 delegation here, each new layer, we move further
17 and further away from that democratic
18 accountability.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 General Harris, rebuttal?

23 REBUTTAL ARGUMENT OF SARAH M. HARRIS
24 ON BEHALF OF THE PETITIONERS IN CASE 24-354

25 GENERAL HARRIS: Thank you. Just want

1 to go over three problems for Respondents.

2 One, I candidly don't know what the
3 rule is at this point. On the one hand, there is
4 an anomalous rule that is foreign to the
5 non-delegation precedents apparently for taxes,
6 fees, and other revenue-raising actions, and I
7 don't know how it can possibly be squared as
8 something that preserves a separation of powers.

9 When saying that an agency can raise
10 up to 1 -- \$1 trillion with no further
11 restrictions is somehow not a non-delegation
12 problem, but tying what an agency can extract
13 from a particular set of people, tied to the
14 specific needs of a program is somehow
15 constitutionally unconscionable.

16 I think there is a grave risk that if
17 the Court went down that path, the Court would
18 not be revitalizing the non-delegation doctrine
19 or giving it meaningful teeth. It will just crop
20 up case by case new, exclusively legislative
21 powers, what is the new sort of limit that is
22 going to be reverse-engineered for that one?
23 That is chaos.

24 Second, Respondent is ignoring the
25 very real constraints in Section 254. This is a

1 little bit of an odd case in which the government
2 is fervently insisting that the terms of the
3 statute are mandatory, and yet Respondents won't
4 take yes for an answer, that it is really, really
5 a constraint.

6 And you know that 254 is mandatory for
7 a couple of reasons, not just the fact that 254
8 starts with "shall," as Justice Barrett and
9 others have pointed out, but the fact that this
10 is a highly repetitive statutory scheme. So all
11 of the things in Section 254(b) actually recur
12 elsewhere in the statute. 254(d) is a "shall"
13 with respect to the equitable and
14 non-discriminatory rates.

15 Other parts of the program in 254(h)
16 with respect to how the rural program is supposed
17 to work or how the libraries are supposed to be
18 funded. Those are shall's.

19 And so there is no doubt that this is
20 a mandatory system. The FCC has treated it as
21 such, but the question is what the statute means.
22 It is mandatory.

23 Third of all, just the consequences of
24 Respondents' position are really troubling -- the
25 reply brief 8 to 9 examples are truly the tip of

1 the iceberg. It is a little bit strange that
2 Respondents think that it is perfectly fine if
3 there is some sort of fee system for the agency
4 to decide how much its own costs or expenses are
5 going to be, that that is not sort of the -- that
6 is not sort of inviting the agency to raise
7 whatever it sort of feels like, but that there is
8 a problem when Congress is tethering the costs or
9 fees or rates not to what the agency feels like
10 doing to fund its own enforcement priorities and
11 other things that it's doing, but instead to meet
12 defined, external goals that Congress has
13 required the program to meet a -- against a
14 historical backdrop. That is a very, very
15 strange position to be in.

16 Now, on top of that, that's just the
17 problem with a different rule for fees or taxes
18 or just looking at statutory analogs for revenue
19 raising. That really is the tip of the iceberg
20 because Respondents' position also seems to have
21 other built-in features that jeopardize, sort of
22 create a mindfield for the U.S. code, one of
23 which is if the idea is you can't ever have
24 balancing of factors in a statute without running
25 into a non-delegation problem, guess what?

1 Agencies are delegated with a lot of balancing of
2 factors. It doesn't mean they have no
3 constraints at all. It means they have to do
4 both.

5 So this Court should not stray from
6 the path. Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 The case is submitted.

10 (Whereupon, at 12:50 p.m., the case
11 was submitted.)

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