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P R O C E E D I N G S

(10:16 a.m.)

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

General Harris.

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

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

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

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

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

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
4 accounting tasks, not grounds for the Magna
5 Carta.

6 I welcome the Court's questions.

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

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

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

25 JUSTICE THOMAS: How does that

1 constrain the revenue raising?

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

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

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

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

1 against the backdrop of a statutory --

2 JUSTICE THOMAS: Can you -- do you
3 have any examples of fees that did not have a
4 monetary limit or taxes that did not have
5 monetary limits that were imposed either by
6 agencies or by Congress?

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

14 JUSTICE THOMAS: And those have no
15 limits and/or no rates?

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

24 And, again, I'll just point out it's a
25 little perverse in two senses to think that you

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

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

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

22 Section 254 obviously itself is a
23 reticulated scheme that prescribes all the
24 details and constraints that I described, but on
25 top of that, it is preserving and advancing the

1 concept of universal service that was set forth
2 in Section 151 of the Act that harks back to
3 1934.

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

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

21 Congress was enacting this statute in
22 1996 against that backdrop and against the way
23 the FCC had implemented this system.

24 CHIEF JUSTICE ROBERTS: Well, what if
25 the law said the level of service that the --

1 should be afforded is -- is service that is
2 fair? Would that present a constitutional
3 problem?

4 GENERAL HARRIS: It could but not
5 against this statutory scheme because I think
6 the level of service that could be fair would,
7 again in this particular context -- and
8 something this Court has recognized in other
9 non-delegation cases with rate setting or other
10 stuff, if you have a regulatory backdrop that
11 Congress is acting against, a term that's
12 otherwise amorphous like "fair" or "equitable"
13 or whatever it is gets meaning through the --
14 through the particular regulatory context in
15 which it exists.

16 And, again, I'll also just point out
17 Section 254 is a heck of a lot more specific
18 than just do what is fair. Section (b)(3), for
19 instance, is prescribing in like very specific
20 detail how exactly --

21 CHIEF JUSTICE ROBERTS: But your --
22 your answer, I guess, is that it could, that
23 could be sufficient?

24 GENERAL HARRIS: It could be a problem
25 --

1 CHIEF JUSTICE ROBERTS: In -- in --

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

3 CHIEF JUSTICE ROBERTS: You would look
4 -- in the -- in a particular context or
5 something, but --

6 GENERAL HARRIS: Absolutely. And
7 that's exactly what this Court has done in other
8 rate-setting contexts.

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

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

1 And again, that is very consistent
2 with the highly detailed nature of 254 in this
3 particular context, which is providing much more
4 than just abstract rates.

5 And again, looking back at the 19- --
6 pre-1996 scheme, the FCC did, for, you know, a
7 half century, use its power to impose just and
8 reasonable rates to provide universal service
9 through a system of implicit subsidies.
10 Respondents aren't challenging that, and I think
11 that history of what the FCC did just gives more
12 substance and more guidance to what's happening
13 here.

14 And --

15 JUSTICE JACKSON: Can you speak to the
16 combination theory or the combination argument?

17 GENERAL HARRIS: Yes. It's meritless.
18 And the reason is -- there's a couple of reasons
19 for this.

20 One is the idea that Congress can't
21 delegate legislative power is a basic
22 restriction on Congress -- on -- on what
23 Congress can do and the constitutional design.

24 Congress can't pass legislative power
25 to anyone. It doesn't matter if it's an agency

1 or a private party. And it doesn't matter if
2 someone then sort of passes it along. Like, you
3 just can't pass go. Congress can't do that.

4 So the idea that there's sort of an
5 aggravated constitutional offense just by having
6 a -- a -- a subdelegation, just really doesn't
7 track the nature of the Article I challenge.

8 The second issue is just the way in
9 which the combination theory has kind of morphed
10 in this Court.

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

21 And if it's the latter category, I'm
22 not sure what constraints Respondent is offering
23 here or, you know, the -- the presentation of
24 that particular argument. But what I can tell
25 you is it's -- it's definitely meritless,

1 because USAC is not exercising any kind of
2 problematic power. It is just making
3 recommendations --

4 JUSTICE JACKSON: Let me ask you.
5 Does the private non-delegation theory suffer
6 from the same lack of clarity in terms of its
7 origins? I mean, I -- I -- I'm trying to
8 understand its distinction with the traditional
9 non-delegation theory.

10 It seems as if, you know, if there's a
11 problem with Congress delegating this power,
12 this -- the status of the party that receives it
13 shouldn't matter. And if the party that
14 receives it, being private is the problem, that
15 seems more like an appropriations issue.

16 So I -- I guess I'm just trying to
17 understand what the source of that theory is as
18 well.

19 GENERAL HARRIS: Yes. So the --
20 the -- I think the source of the theory is in
21 question in this case. I will say, again, for
22 Article I, you can't delegate that power to
23 anyone. So it wouldn't matter if it's the
24 agency, if it's directly to a private party.
25 But, like, there's no additional offense from

1 subdelegating it.

2 JUSTICE ALITO: Ms. Harris --

3 GENERAL HARRIS: With respect to
4 Article II --

5 JUSTICE ALITO: -- well, why is --
6 why -- why is that true? You -- you want to
7 compartmentalize the delegation of authority
8 from Congress, the alleged delegation of
9 authority from Congress, to an executive branch
10 agency and -- and then separately look at the
11 delegation of authority from the agency to a
12 private party.

13 But when it is alleged that Congress
14 has delegated legislative authority to an
15 executive branch agency, we run into the problem
16 of drawing a line between the execution of
17 the -- the -- the formulation of the law and the
18 execution of the law.

19 But when the agency then goes ahead
20 and just passes that off to a private party,
21 then doesn't the argument in favor of the
22 position that all that the agency is doing is
23 exercising leg- -- executive authority in
24 enforcing the law disappear, or at least is --
25 is diminished?

1 GENERAL HARRIS: I don't think so.
2 And I think this scheme, I mean, just on the
3 merits would illustrate why. But just as a
4 conceptual matter, we're talking about two
5 different things.

6 One is Congress can't pass off its
7 power to anyone. And two is if Congress does
8 give the FCC something to execute in its
9 executive power, that's a separate category of
10 issues. The question in that case is, is there
11 too much executive power being delegated to
12 someone else?

13 Appointments clause might be a sort of
14 way of looking at it, but in this case I don't
15 even think you need to get there, because the
16 bottom line is I think the Fifth Circuit and
17 Respondents are misconceiving of exactly what
18 USAC does. It is doing math.

19 It is saying we are looking to exactly
20 how the projections for universal service, based
21 on historical numbers, work and making a
22 recommendation to the FCC on that score, 60 days
23 before the quarterly contribution fee is due.

24 And then on -- sort of for the
25 denominator for the fee, it is summing up

1 reports from telecommunications carriers as to
2 what their eligible revenues are for a quarter.

3 Both of those things get -- get passed
4 on to the FCC, the FCC reviews them, it has to
5 publish them in the Federal Register as its own,
6 and then it has 14 days in which to revise what
7 is essentially a proposed rate and make it its
8 zone.

9 JUSTICE ALITO: But when we're --
10 we're inquiring whether the agency is -- has
11 simply asked a private group to -- to perform
12 some ministerial functions, why shouldn't we
13 look at the record of what the FCC has actually
14 done?

15 And if you look at the record here,
16 isn't it really hard to say anything other than
17 the fact that they just have rubber-stamped
18 whatever the USAC has -- has told them? Except
19 -- there are a few exceptions, but basically
20 they just say okay, fine. Right?

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

23 With respect to the law, this Court
24 has in no context of sort of looking at
25 recommendations said: Who's really making the

1 recommendations? Is there a lot of sway?

2 So take Skinner, for instance. The
3 Secretary of Transportation in that case, which,
4 again, easy case, gave -- consulted the Private
5 Surface Pipeline Carriers Association about,
6 like, hey, what would be a good way of figuring
7 out the usage fee in that case? And a PS rep
8 just said great, you guys have a good idea. I'm
9 going to run with it.

10 This Court did not sort of peak behind
11 the hood and say was that, you know, too much
12 influence by a private group or not?

13 In Sunshine Anthracite, when there
14 were coal producers who were proposing prices
15 but -- that had to be -- that actually had to be
16 adopted by the federal agency, this Court didn't
17 sort of ask for record evidence, or assessments
18 of was that too much influence, how much
19 independent work was actually done by the
20 agency, should there be discovery?

21 There are tons of blue ribbon
22 commissions that do similar stuff like this, and
23 this Court never says: Who is actually the
24 driver -- in the driver's seat? Because it's a
25 very formal inquiry in the non-delegation

1 context.

2 The actor is an officer of the United
3 States who's adopting the actual form of policy.
4 And, again, this sort of happens every day.
5 But again --

6 JUSTICE ALITO: Well, I know -- I know
7 that's true as a formal matter, but isn't it a
8 fact that the GAO reports about what the USAC
9 has been done'ing or has been doing are pretty
10 damning?

11 I mean, they say that the -- the GAO
12 couldn't verify the eligibility of 36 percent of
13 those who receive USF benefits? Nearly
14 80 percent of the Lifeline Program users may --
15 may be legally ineligible for the benefits
16 they're receiving?

17 GENERAL HARRIS: So here's what I'll
18 say on this. One, with respect to whether
19 there's meaningful review of the contribution
20 factor, which is the question in this particular
21 case, there are four instances in which the FCC
22 has, in fact, said USAC is not doing it right.

23 Two of them, as Respondents point out,
24 have happened since this lawsuit, but others
25 happened in the third quarter of 2003. And in

1 2016 there was an award of relief when there was
2 a disagreement with how the administrator
3 calculated the contributions.

4 So there are empirical examples of
5 this not just being a rubber stamp.

6 And more broadly, to the extent that
7 GAO -- GAO report raises concerns with you with
8 respect to how exactly these programs are
9 administered, that sounds like the stuff of an
10 APA challenge, not a non-delegation challenge.

11 Again, there are limits on what the
12 FCC is supposed to be doing, the kinds of
13 programs it's supposed to be supporting and --

14 JUSTICE GORSUCH: Ms. -- Ms. Harris,
15 I -- I find it -- sorry, just to shift gears a
16 little bit -- notable that in your reply brief,
17 in terms of the legal task that you think we're
18 -- we're supposed to be engaged in, made a
19 couple of comments. And I would just like to
20 confirm this is your thoughts.

21 One is that in distinguishing between
22 lawful conferrals of discretion from unlawful
23 delegations, that that requires more than asking
24 in the abstract whether there is an intelligible
25 principle.

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

6 We think the -- to the extent the
7 Court is interested in looking to past
8 precedents to tighten their reins, the better
9 approach is not just say, you know, there is
10 kind of mush for the intelligible principle,
11 look to past cases, but to look at the
12 parameters I talked about.

13 Including one of the most important is
14 is there sufficiently definite and precise
15 language in the statute to enable Congress, the
16 courts, and the public to ascertain whether
17 Congress's rules are followed?

18 And, again, taking from Chief Justice
19 Marshall's opinion of Wayman, if -- when you
20 have a broad delegation, making sure there are
21 sufficient rules.

22 JUSTICE GORSUCH: And -- and I'm sorry
23 to prolong this, Chief --

24 CHIEF JUSTICE ROBERTS: Go ahead,
25 please.

1 JUSTICE GORSUCH: -- but -- but just
2 to finish up.

3 One -- one critical element you
4 indicated is there have to be
5 sufficiently-defined boundaries, that judicial
6 review is -- is possible?

7 GENERAL HARRIS: Absolutely. And we
8 think 254 passes that with flying colors in --
9 in numerous respects, just with respect to how
10 the fee has to be assessed.

11 JUSTICE GORSUCH: And then finally,
12 that it -- there not -- needs not just be a
13 general policy for the agency to pursue but
14 boundaries also clearly delineated; is that
15 right?

16 GENERAL HARRIS: Absolutely. And we
17 think --

18 JUSTICE GORSUCH: Okay.

19 GENERAL HARRIS: And we think that --

20 JUSTICE GORSUCH: All right.

21 GENERAL HARRIS: -- 254 satisfies it.

22 JUSTICE GORSUCH: No, I understand
23 that.

24 GENERAL HARRIS: Okay.

25 CHIEF JUSTICE ROBERTS: Justice

1 Thomas? Anything further?

2 JUSTICE THOMAS: Would you -- is there
3 any direct statutory constraint on the revenue
4 raising?

5 GENERAL HARRIS: The direct statutory
6 constraint is the sufficiency provision that
7 appears three times throughout the statute. It
8 is a qualitative limit. It is tied to -- you
9 cannot raise more funds than would be needed to
10 provide universal service to the standards that
11 are provided in the statute. So basic
12 telecommunications services have to be at that
13 level.

14 Again, it's also historically defined
15 by what the FCC has done. And I think this is
16 telling because the -- the -- while Respondents
17 are saying this is an out-of-control program,
18 where it's gone from 3 percent to 35 percent
19 contribution rate, the math is not -- is pretty
20 misleading on that. This program actual -- the
21 actual amounts for the revenues have stayed flat
22 for 10 years.

23 The complaint that they seem to have
24 with respect to their percentage actually deals
25 with -- is explainable because the -- it's

1 technical -- but the contribution base for the
2 telecommunications revenues has fallen from \$288
3 billion in 2014 to \$116 billion today. That has
4 to do with the fact that the carriers' revenues
5 for inter -- intrastate telecommunications has
6 fallen, not with respect to some out-of-control
7 program.

8 JUSTICE THOMAS: So if I understand
9 your argument, it is that indirect constraints
10 or at least constraints to the services being
11 offered are sufficient to constrain the
12 revenue-raising side as far as non-delegation is
13 -- is concerned?

14 GENERAL HARRIS: Absolutely. A couple
15 of reasons for that. One is because that is the
16 best reading of the statutory scheme. It would
17 prevent the FCC, again, from doing like the
18 rainy day fund or raising an indefinite amount
19 of money.

20 Two, it's consistent with upholding a
21 range of other statutory schemes that similarly
22 say that an agency or, again, this Court has the
23 discretion as to how much fees or analogous
24 devices to be charged. We think that that is
25 tethered to the statutory structure and that

1 there are real limits on what can be imposed.

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

5 GENERAL HARRIS: So the Court's
6 non-delegation cases don't really sort of map
7 onto this, other than, I guess, in the tariff
8 context. So if you want to accept the tariff
9 context as on all fours, the tariff context has
10 a number of examples in which the president was
11 not just empowered to set tariffs to a
12 particular rate but where the tariffs were
13 tethered to sort of qualitative judgments by the
14 president with respect to what would promote
15 trade or what would equalize production levels.

16 And I think that's not uncommon. It's
17 sort of if your teeing something to a level that
18 requires some sort of expertise or might change
19 over time, it kind of makes sense that that
20 would be true.

21 Again, you could also look to Skinner
22 where there is a lot of discretion with respect
23 to exactly what level the fee was going to be
24 set at for surface pipeline fee purposes. It
25 did have like an ultimate cap of 105 percent of,

1 like, what the programs were running at for
2 appropriations, but, like, within that, there's,
3 like, a wide range of discretion.

4 And I just think it just doesn't pan
5 out, the idea that you have to have some sort of
6 magic number inquiry. It's not consistent with
7 how this Court has treated the Tax Clause as
8 indistinguishable from other Article I powers.
9 And it just doesn't make a lot of sense. Like,
10 \$2 trillion is where a cap is constitutional
11 without any other guardrails? That can't be
12 right.

13 CHIEF JUSTICE ROBERTS: Justice Alito?

14 JUSTICE ALITO: Well, the amount to be
15 raised is tied to the provision of universal
16 services, so -- but universal services can
17 evolve. How far can it evolve?

18 GENERAL HARRIS: Not so far for two
19 reasons. One is that evolving technological
20 landscape is specifically tied to four different
21 things that define universal service under
22 254(c). So the most objective of those,
23 although there's a bunch of them, is one I
24 mentioned, that it's a substantial majority of
25 residential customers have chosen to subscribe.

1 So, again, that would throw out faxes. Most
2 people are not subscribing to faxes today as
3 their means of communicating with each other.
4 It's phones.

5 And the other constraint is 151. You
6 have to pick things that are similar to radio
7 and wires as they were in -- sort of envisioned
8 in 1934 and just this history of what universal
9 service has been.

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

13 GENERAL HARRIS: I don't think
14 so because --

15 JUSTICE ALITO: If enough people
16 subscribed to it?

17 GENERAL HARRIS: Well, it would have
18 to have a substantial majority of residential
19 customers have chosen to subscribe through
20 market forces. So, again, if the -- the entire
21 country is suddenly able to afford extremely
22 expensive telecommunications, that might be an
23 issue --

24 JUSTICE ALITO: Well, what's a
25 substantial --

1 GENERAL HARRIS: -- but then you'd
2 have a --

3 JUSTICE ALITO: What is a substantial
4 portion?

5 GENERAL HARRIS: A substantial
6 majority.

7 JUSTICE ALITO: Substantial.

8 GENERAL HARRIS: Substantial majority.
9 So more than a majority. Certainly, more than
10 50 percent. And I'll just also point out that
11 (b)(1) would be an additional constraint in your
12 hypothetical because the quality services have
13 to be available at just, reasonable, and
14 affordable rates.

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

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 JUSTICE SOTOMAYOR: To that point, the
21 Act has only subsidized two services, phone and
22 Internet, correct?

23 GENERAL HARRIS: So it's actually --
24 phone is the universal service --

25 JUSTICE SOTOMAYOR: Mm-hmm.

1 GENERAL HARRIS: -- and for the
2 Internet, it comes in under the express
3 directive under (h)(2) that the FCC shall
4 establish competitively neutral rules to
5 enhance, to the extent feasible [...]" --
6 advanced -- "access to advanced
7 telecommunications and information services."

8 JUSTICE SOTOMAYOR: So --

9 GENERAL HARRIS: Internet and advanced
10 information services.

11 JUSTICE SOTOMAYOR: So whatever, there
12 is a real constraint. There's only two services
13 have been identified?

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

16 JUSTICE SOTOMAYOR: All right.

17 GENERAL HARRIS: -- constrained
18 further.

19 JUSTICE SOTOMAYOR: Justice Thomas and
20 -- and the other side makes a great deal, and
21 you've been answering it, about the fact that
22 there has never been a tax-raising law that we
23 have addressed where Congress has not put an
24 upper limit on the tax.

25 I think your -- you say that may be

1 true, but we have a lot of tariff situations
2 where historically, from the beginning of the
3 country, Congress didn't set a limit, correct?

4 GENERAL HARRIS: There's that and also
5 just the -- the history on pages 8 to 9 of our
6 reply brief --

7 JUSTICE SOTOMAYOR: Right.

8 GENERAL HARRIS: -- where, like,
9 there's a lot of statutory examples. The Court
10 just hasn't addressed them.

11 JUSTICE SOTOMAYOR: Okay. So,
12 historically, we have a lot of examples of it?

13 GENERAL HARRIS: Yes, and the only
14 other thing on the history is the 1798 real
15 estate tax, if we want to get there. The extent
16 of the discretion there, while there was a cap,
17 is just -- was extremely broad.

18 JUSTICE SOTOMAYOR: Yeah. The federal
19 boards, the -- the boards there could set
20 different rates in different places and did a
21 lot of -- gave it extraordinarily broad power,
22 correct?

23 GENERAL HARRIS: Exactly right.
24 Allegheny County, Pennsylvania, for instance,
25 got a 50 percent downward departure on their

1 assessments because of the Whiskey Rebellion.

2 That's a policy judgment.

3 JUSTICE SOTOMAYOR: All right. I want
4 to -- so to -- now, I think why that's important
5 is twice we've said that the taxing power
6 shouldn't be looked at any differently than
7 tariffs or customs or duties.

8 And the reason for that is the
9 Constitution itself, right? The Tax Cause is
10 part of duties, it says, I think -- let me just
11 get the language -- it -- basically, it's the
12 same clause with -- talking about the same
13 power, correct?

14 GENERAL HARRIS: Exactly right.

15 JUSTICE SOTOMAYOR: All right. Now, I
16 want to go back to Justice Alito's questions
17 with respect to the contribution limit and the
18 -- the -- the complaints about whether some of
19 the people who have received the funds are
20 proper or not.

21 I think the point you were making is
22 that the delegation issue is the contribution
23 base?

24 GENERAL HARRIS: Yes.

25 JUSTICE SOTOMAYOR: Not whether or not

1 the agency itself or the person it's delegated
2 to is actually functioning properly and who it's
3 identifying to receive the funds, correct?

4 GENERAL HARRIS: Correct.

5 JUSTICE SOTOMAYOR: So the
6 contribution limit, he says the history is very
7 sparse that the agency has reviewed that
8 contribution base that was recommended.

9 The reason I see that's -- the reason
10 for that, I think, is because the FCC controls
11 every component of calculating that, correct?

12 GENERAL HARRIS: Yes. It sure does.

13 JUSTICE SOTOMAYOR: So it tells -- it
14 determines and tells USAC what information to
15 get from the people that it's surveying,
16 correct?

17 GENERAL HARRIS: Yes.

18 JUSTICE SOTOMAYOR: And then the FCC
19 says -- determines what the final contribution
20 base calculation should be, correct?

21 GENERAL HARRIS: Absolutely.

22 JUSTICE SOTOMAYOR: It determines what
23 expenses should be covered?

24 GENERAL HARRIS: Yes.

25 JUSTICE SOTOMAYOR: So what USAC is

1 doing is a mathematical calculation?

2 GENERAL HARRIS: That is correct.

3 JUSTICE SOTOMAYOR: So we would hope
4 that there's not much more than four examples of
5 them getting math wrong, correct?

6 GENERAL HARRIS: That is certainly the
7 hope.

8 JUSTICE SOTOMAYOR: If -- if there
9 were a lot more, I'd be much more worried, but
10 at the end, the number they're given is a number
11 where each component has been set by the -- by
12 the agency?

13 GENERAL HARRIS: By the parameters the
14 FCC sets, correct. Under the regulations.

15 JUSTICE SOTOMAYOR: All right. Now,
16 Justice Gorsuch asked you a list of principles.
17 And -- and you said -- I'm assuming he's asking
18 whether, I think -- and he can speak for himself
19 -- and he often does.

20 (Laughter.)

21 JUSTICE SOTOMAYOR: But those
22 principles are from our cases, correct?

23 GENERAL HARRIS: Absolutely.

24 JUSTICE SOTOMAYOR: And the best
25 example of what those principle mean --

1 principles mean is not us redefining them, but
2 us looking to how they've been applied in our
3 precedents, correct?

4 GENERAL HARRIS: I would just give one
5 caveat, which is I know members of the Court are
6 concerned that specific cases have not followed
7 the principles that the Court has actually laid
8 out in the cases. And there is arguably some
9 tension there.

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

12 JUSTICE SOTOMAYOR: Okay.

13 GENERAL HARRIS: One is the metrics of
14 the cases. Just, you know, is the delegation
15 worse or better? And two is what do the
16 principles mean?

17 JUSTICE SOTOMAYOR: But none of our
18 precedents have been rejected by the court
19 below?

20 GENERAL HARRIS: None -- none of --
21 correct. The court below and Respondents are
22 not asking you to overturn any of them.

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

1 GENERAL HARRIS: You certainly could.

2 JUSTICE SOTOMAYOR: Could. But we
3 should?

4 GENERAL HARRIS: Sure, yes.

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

9 GENERAL HARRIS: Stare decisis is
10 important. Again, I think we're not saying that
11 the Court cannot constrain or sort of revitalize
12 the principles in the cases by overturning
13 things, though.

14 JUSTICE SOTOMAYOR: Oh, sure. We're
15 always free to do that, but we should proceed
16 with caution when we're looking at overturning
17 precedent.

18 GENERAL HARRIS: Yes.

19 JUSTICE SOTOMAYOR: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?

21 JUSTICE KAGAN: The easiest parts of
22 an argument are where you just have to say yes
23 to everything.

24 (Laughter.)

25 JUSTICE SOTOMAYOR: Remember, I was a

1 prosecutor.

2 (Laughter.)

3 JUSTICE KAGAN: This is going to be
4 just a little bit harder. But just a little
5 bit.

6 (Laughter.)

7 JUSTICE KAGAN: You mentioned to
8 Justice Thomas when you were first talking to
9 him that there are other schemes that function
10 exactly like this one, in the sense of
11 revenue-raising provisions that don't have
12 specific numerical limits.

13 And you pointed to your list on page
14 8, which is like the Federal Reserve and the
15 FDIC and a bunch of others.

16 And I just want you to talk a little
17 bit more about that and to tell me: How close
18 are those? Or, you know, otherwise put, like,
19 are there distinctions -- if I looked at all of
20 these more carefully than I have, would I be
21 able to say no, these are distinguishable in
22 various ways? Or are these, like, really right
23 there?

24 GENERAL HARRIS: I think they are
25 right there, in the sense that especially the

1 ones that are the agencies using their
2 fee-raising power to cover the cost of the
3 agency's function -- the programs that the
4 agencies are doing, it's going to the regulated
5 party. So here, telecommunications carriers for
6 their OCC banks, and saying: Please support the
7 programs that we're doing.

8 Even though, oftentimes the programs
9 that are being supported are not things worthy
10 of benefit of the bank's, per se. It's like
11 enforcement proceedings, or here, it's not --
12 the telecommunication carriers that participate
13 in universal service are getting the money back
14 at the back end.

15 So I think it is on all fours in that
16 sense. The idea is you have a special
17 fee-raising provision to a specific subcomponent
18 of the industry that's used to sort of fund new
19 programs that affect that industry. So in that
20 sense, it's on all fours.

21 JUSTICE KAGAN: Thank you, General.

22 CHIEF JUSTICE ROBERTS: Justice
23 Gorsuch?

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

1 (Laughter.)

2 JUSTICE GORSUCH: Ms. Harris, let's
3 suppose that Congress passed a statute saying
4 that every American should pay an equitable and
5 non-discriminatory contribution to paying down
6 the national debt, sufficient to reduce the
7 national debt by 1 percent a year. Okay?

8 A lot of language sort of like what we
9 have here, but then left it up to the IRS to
10 figure out marginal tax rates, deductions, do
11 you get your charitable deduction, unrealized
12 income. You figure it out, IRS.

13 Good to go or not?

14 GENERAL HARRIS: Not good to go. Two
15 differences from this particular scheme.

16 JUSTICE GORSUCH: Okay.

17 GENERAL HARRIS: One is the breadth of
18 the delegation obviously matters. We talked
19 about that before. The --

20 JUSTICE GORSUCH: So it's okay if it
21 does it to a subset of citizens, but it can't do
22 it to all citizens?

23 GENERAL HARRIS: It's not just a
24 subset of citizens that's different for 254.
25 It's the specified nature and the details of the

1 programs.

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

6 JUSTICE GORSUCH: No, no, there would
7 be IRS regulate -- there have been IRS
8 regulations for some time.

9 GENERAL HARRIS: I take the premise of
10 the hypothetical to be --

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

16 GENERAL HARRIS: So I wouldn't say the
17 old soil argument here is they're great at this.
18 It is that Congress understood when enacting the
19 particular scheme that it was incorporating
20 those restraints and concepts --

21 JUSTICE GORSUCH: Don't you think --

22 GENERAL HARRIS: -- that go into those
23 parameters.

24 JUSTICE GORSUCH: -- you would
25 have the -- make -- be making the same argument

1 in the case that I just posited, that -- that
2 the IRS would?

3 Or -- or maybe if you want to make it
4 narrower. Same -- same delegation, but to
5 secure universal healthcare, for example,
6 sufficient to secure advanced universal
7 healthcare on a non-discriminatory basis.
8 That's a narrow one for you.

9 GENERAL HARRIS: Again, I think the
10 problem there is you are using the words of this
11 particular statutory scheme out of context in
12 ways that divorce it from the constraints in
13 this particular scheme.

14 JUSTICE GORSUCH: Okay.

15 GENERAL HARRIS: It's the idea that
16 universal healthcare is a goal that has not sort
17 of been a --

18 JUSTICE GORSUCH: In -- in this scheme
19 there is no cap on how much can be raised,
20 right?

21 GENERAL HARRIS: I disagree. I
22 think --

23 JUSTICE GORSUCH: No numerical cap.

24 GENERAL HARRIS: -- there is a --
25 there is a qualitative cap.

1 JUSTICE GORSUCH: There's no numerical
2 cap.

3 GENERAL HARRIS: There is absolutely
4 no numerical cap.

5 JUSTICE GORSUCH: There is no rate.

6 GENERAL HARRIS: There is no rate, but
7 the rate is something that is historically
8 defined in ways that your hypotheticals aren't.
9 And --

10 JUSTICE GORSUCH: Let's -- let's talk
11 about your -- the constraints you do mention.
12 What are advanced services?

13 GENERAL HARRIS: Advanced information
14 services or technical -- and -- or
15 telecommunications services are things that are,
16 again, above the baseline of what's been
17 considered universal service. So like existing
18 telecommunications and -- are, again, a more
19 novel technology.

20 JUSTICE GORSUCH: Those evolve over
21 time, right?

22 GENERAL HARRIS: It could evolve over
23 time --

24 JUSTICE GORSUCH: Sure.

25 GENERAL HARRIS: -- but the statutory

1 parameter for (h)(2) would be something that
2 someone could challenge. Again, an APA suit --
3 suit could be a great way to go if --

4 JUSTICE GORSUCH: Okay.

5 GENERAL HARRIS: -- you thought it was
6 misdefined.

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

12 GENERAL HARRIS: It has. And I would
13 also point you to (h)(1)(B), which is providing
14 yet more specificity with respect to the how the
15 school and library programs are supposed to go
16 and how the rates are charged.

17 And, again, I'll just do the refrain.
18 If you think that there is a problem, or people
19 think that there is a problem, with the way in
20 which the FCC's rules are interpreting the
21 parameters of the program, you can bring a
22 challenge to exceeding the scope of the
23 statutory authority.

24 JUSTICE GORSUCH: Could the FCC use
25 the program to give everybody a mobile hotspot?

1 GENERAL HARRIS: To give everyone a
2 mobile hotspot? I do not --

3 JUSTICE GORSUCH: Yeah, everybody
4 who's a library patron at least.

5 GENERAL HARRIS: Everyone who is a
6 library patron? I think the question there
7 would be whether it fits within (h)(2) to the
8 extent feasible to give access to tele --
9 advanced telecom and information services for
10 schools and libraries.

11 JUSTICE GORSUCH: Yeah.

12 GENERAL HARRIS: So, like --

13 JUSTICE GORSUCH: It's -- it's
14 feasible. It just costs a lot.

15 GENERAL HARRIS: Right. And then the
16 other constraints with respect to the costs
17 would be making sure that the ensuing -- any
18 sort of ensuing program for that would not
19 interfere with just reasonable and affordable
20 rates for universal services.

21 Again, I think when you see how the
22 system works --

23 JUSTICE GORSUCH: And then -- and then
24 with respect to (b)(7), it -- it allows FCC to
25 come up with new principles that aren't found

1 anywhere in the statutory text, right?

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

4 JUSTICE GORSUCH: Why -- why not?

5 GENERAL HARRIS: Because the
6 principles have to be consistent with the rest
7 of the chapter. And the proof is how FCC has
8 interpreted -- I think FCC's way of interpreting
9 this shows that it's more of a
10 belts-and-suspenders provision than a
11 do-whatever-you-feel-like provision.

12 The two things that FCC has done under
13 (b)(7) are, one, to require competitive
14 neutrality --

15 JUSTICE GORSUCH: Well, now, hold on.
16 You say we shouldn't look at what's actually
17 been done; we should look at the statute. So
18 let's --

19 GENERAL HARRIS: So --

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

24 GENERAL HARRIS: That's fine.

25 JUSTICE GORSUCH: It says the -- the

1 commission -- anything they determine is
2 necessary and appropriate for the protection of
3 the public interest, convenience, and necessity,
4 and are consistent with this chapter.

5 GENERAL HARRIS: Yeah, "and are
6 consistent with." And so --

7 JUSTICE GORSUCH: Well -- well, how
8 about everybody gets a Starlink account?

9 GENERAL HARRIS: Why would -- I'm not
10 sure why that would be sort of -- the idea that
11 it's consistent with the rest of the chapter,
12 they wouldn't need (b)(7) to do that. It would
13 be are you pursuing the (h)(2) advanced services
14 --

15 JUSTICE GORSUCH: All right.

16 GENERAL HARRIS: -- or something else
17 and --

18 JUSTICE GORSUCH: They could do it
19 under (7), too, right?

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

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

1 GENERAL HARRIS: I'm not saying
2 everyone in America is getting a
3 Starlink account. What I am saying --

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

6 And then what about (c)(3), which says
7 that, "in addition to the services included in
8 universal service, the Commission may designate
9 additional services for support mechanisms for
10 schools, libraries, and healthcare providers"?

11 At least -- at least one court has
12 pointed out that that's not even limited to
13 telecommunications services.

14 GENERAL HARRIS: Again, I would read
15 that alongside the many other provisions that
16 give content to exactly what the programs with
17 respect to schools and libraries and healthcare
18 providers are supposed to do, not only (b)(6)
19 but 254(h)(1)(A) with respect to rural
20 healthcare providers and exactly how their rates
21 are supposed to work and what the services are,
22 and (h)(1)(B), which is with respect to the
23 school and libraries, what the -- what the
24 services are supposed to be, what the rates are
25 supposed to look like.

1 Again, I think you read this -- this
2 scheme in context. And the goal in reading it
3 is not to look for ways of reading the language
4 in a -- one isolated provision in a way that
5 would create non-delegation problems.

6 JUSTICE GORSUCH: Yeah.

7 GENERAL HARRIS: But you're looking at
8 --

9 JUSTICE GORSUCH: No, for sure, of
10 course. I take that point.

11 It -- it's interesting to me, though,
12 that the cases that you cite on page 8 and 9 of
13 your reply brief are all fees, basically. And
14 fees have been historically understood, as, in
15 fact, we've said, this Court has said, and Judge
16 Cooley has said, right, way back when, to cover
17 the costs of the program in question or the
18 services rendered, things like that. They're --
19 they're pretty particularly tied. And, in fact,
20 many of the examples you cite, even the snippets
21 you take, point that out. And we don't have
22 that here with respect to this tax.

23 GENERAL HARRIS: I disagree because I
24 think this is a similar -- and, again, I think
25 whether you think this is a fee or a tax, you

1 would have the same problem with a lot of the
2 examples on pages 8 to 9. It's not so much that
3 there is sort of like you're paying for the
4 privilege of going to the OCC; it is that there
5 is a regulated industry that is being asked to
6 support the global costs of whatever the
7 regulatory agency is doing --

8 JUSTICE GORSUCH: Well, here's what we
9 said in National Cable, that fees are typically
10 based on either the value to the recipient or
11 the cost to the government. That's -- that's
12 what this Court -- that's how we've described
13 fees. That's how Cooley 100 years ago described
14 fees. That's how all your examples line up.

15 Now, I take the just and reasonable
16 rate argument with respect to rate setting, but
17 that's rate setting for monopolies and public
18 utilities. And their just and reasonable is a
19 long-embodied common law tradition of trying to
20 say, okay, you get your costs back and a
21 reasonable profit to try and approximate a
22 competitive market, acknowledging that we don't
23 have a competitive market; we have a monopolist,
24 a regulated utility.

25 And that's what -- that's -- that's

1 that body of law. So we've a fee body of law.
2 We've got a rate-setting body of law. This
3 isn't either one of those. This is -- this is
4 just a straight-up tax without any -- any -- any
5 numerical limit, any cap, any rate. And we --
6 we've never approved something like that before.

7 GENERAL HARRIS: So here's what I
8 would point you to. I think Skinner makes that
9 a much harder argument in terms of this is so
10 clearly a tax --

11 JUSTICE GORSUCH: It's --

12 GENERAL HARRIS: -- versus a fee.

13 JUSTICE GORSUCH: I -- I'm -- I'm not
14 saying -- I'm not saying taxes are special. I'm
15 just saying what's unique about this case is we
16 have a tax that's unlike any other tax that this
17 Court's ever approved. And -- and -- and -- and
18 it's not a fee related to costs, and it's not
19 rate setting of a monopolist.

20 In fact, the '96 Act blew up the
21 monopolies and said we're done with that. We're
22 setting up a new regime with explicit, explicit
23 subsidiaries. So --

24 GENERAL HARRIS: So we warn against
25 overemphasizing the novelty. And the part of

1 Skinner that I think is even more relevant than
2 just saying there's no special rule for taxes is
3 the fact that the Court thought it was actually
4 unclear whether the surface pipeline fee, which
5 was paid by the pipeline -- like, users of
6 pipelines to support -- to support various
7 things, including enforcement actions, it was
8 unclear whether that was a tax or a fee.

9 I'm not sure how that would fit within
10 the framework of thinking that there is this
11 sort of very neat distinction among them. And I
12 think it is a very good analogy to the way the
13 telecommunication carriers are doing this here.
14 It's not just that being they are being --
15 having things exacted from them for the benefit
16 of a general welfare program. The carriers then
17 themselves get the subsidiary if they opt to
18 support the universal service program. I just
19 don't think these -- these --

20 JUSTICE GORSUCH: And many of them are
21 recipients, too, and sit on the board, but
22 that's a whole 'nother set of issues.

23 GENERAL HARRIS: It is not a
24 constitutional issue, though.

25 JUSTICE GORSUCH: Okay. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh.

3 JUSTICE KAVANAUGH: How exactly would
4 you define tax versus fee, to the extent the
5 other side's position could, or at least one
6 version of the other side's position could,
7 depend on this being a tax?

8 GENERAL HARRIS: So for tax v. fee, I
9 think we would point you to Skinner and the --
10 the lines that the Court was struggling to draw
11 in that case. A tax is something that is to
12 raise general revenue. It can be on a specified
13 set -- sort of a subset of someone. And a fee
14 is often, but not always, conceived of as a -- a
15 payment for a particular service or license.

16 That could be a line that you draw.
17 Again, I think the problem with trying to draw
18 that line, as Skinner points out, is it's
19 unbelievably murky in practice, and the Court
20 has not sort of -- at least in Skinner, was not
21 even comfortable drawing it.

22 And the other thing with that line is,
23 if it's a murky line, it's going to be a pretty
24 hard non-delegation test in any case that
25 plausibly involves fees or taxes to -- to have

1 the threshold question be is this a tax or a fee
2 or something else, and then go on to which
3 non-delegation lens are you supposed to go on.

4 JUSTICE KAVANAUGH: Based on the
5 definition you just gave or the principles you
6 just gave, is this a tax or a fee?

7 GENERAL HARRIS: So the government is
8 assuming it could be classified as a tax.
9 Again, there -- like -- but I don't think you
10 have -- I think under Skinner, there's genuine
11 ambi- -- ambiguity on that score.

12 JUSTICE KAVANAUGH: But your position,
13 it's a tax?

14 GENERAL HARRIS: We are willing to
15 have it treated as a tax. We just don't think
16 it matters for constitutional purposes because
17 the non-delegation framework doesn't distinguish
18 on this basis. And this is also a Commerce
19 Clause power.

20 JUSTICE KAVANAUGH: Should it matter
21 in how we think about this that the delegation
22 is to an independent agency rather than to the
23 president or to an executive agency? Does that
24 heighten the concern about unaccountable power
25 to, in some of Justice Gorsuch's questions,

1 unaccountable power to raise money to determine
2 the rate, to determine the amount, that it's not
3 someone accountable to the president?

4 GENERAL HARRIS: I don't think so for
5 two reasons. One is that the FCC does not have
6 statutory for-cause removal protections. It is
7 something that's been read into the statutes.
8 And so --

9 JUSTICE KAVANAUGH: So you don't --
10 okay. Your answer is the FCC is not an
11 independent agency?

12 GENERAL HARRIS: Not in the sense of
13 having for-cause removal protection. It's
14 something -- it depends on what you mean. Is it
15 one that sort of --

16 JUSTICE KAVANAUGH: That's usually
17 what I mean about independent.

18 GENERAL HARRIS: Okay.

19 JUSTICE KAVANAUGH: So --

20 GENERAL HARRIS: So that is what I
21 would mean. There's no statutory for-cause
22 removal protections for the FCC. So in that
23 sense, that's less of a concern. But even if
24 you wanted to say, is there some sort of
25 additional heightened concern with respect to

1 accountability to the president, that's an
2 Article II problem that's sort of separate from
3 the broader non-delegation issues.

4 And even if you wanted to sort of say
5 it is a -- when executive power is being
6 delegated to an agency that's not controlled by
7 the president, that's the bigger problem, not is
8 there then a body that is not performing things
9 that are executive power that is then doing
10 something.

11 It's sort of like if you have the FTC
12 or other bodies accepting recommendations from
13 someone, that's not a problem, but the problem
14 may well be is the FTC accountable to the
15 president?

16 JUSTICE KAVANAUGH: If the other side
17 were correct that it's a tax, and you
18 acknowledge that it could be considered a tax,
19 and it was held that a tax has to have a -- a
20 tax that's delegated to an agency has to have a
21 cap or a rate, what other programs would be at
22 risk?

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

25 JUSTICE KAVANAUGH: If it's a -- so

1 tax, if it's a tax, it has to have a cap or
2 rate. Are there other programs that you think
3 -- and this picks up on Justice Kagan's
4 questions but I'm not sure those are taxes,
5 that's why I'm asking the question.

6 GENERAL HARRIS: Well, I think you
7 would have a heck of a lot of litigation over
8 whether they are taxes, and we think they would
9 probably qualify based on the nature of -- like,
10 just depending on how you define a tax, how it
11 would, would. So, yes, I think you would have a
12 panoply of issues of are -- like various other
13 measures that don't have a cap.

14 And on top of that, you would sort of
15 incentivize a system where Congress would think
16 it could do its work just by saying a trillion
17 dollars was a good cap and no other constraints
18 are necessary. So, again, a very perverse
19 separation of power scheme that would feel -- I
20 think also require you to overturn a couple of
21 cases, Skinner and J.W. Hampton to start.

22 JUSTICE KAVANAUGH: And then on
23 Justice Gorsuch's hypothetical about the IRS, I
24 just want to make sure I have this nailed down
25 exactly what your answer is for why that's

1 different.

2 GENERAL HARRIS: Why it's different?

3 JUSTICE KAVANAUGH: Yeah, the
4 delegation --

5 GENERAL HARRIS: One is the breadth of
6 the --

7 JUSTICE KAVANAUGH: -- to the IRS to
8 set tax rates.

9 GENERAL HARRIS: Yep. One is the
10 breadth of the delegation. So I took the
11 hypothetical to be it's sort of a tax rate for
12 the entire country. It is for the general --
13 it's supposed to be quote/unquote, "equitable"
14 but a different meaning from, obviously, 254,
15 which is a constraint on what you actually have
16 to be imposing, and that it's to accomplish
17 1 percent of reducing the national debt.

18 And so it gives the IRS plenary
19 discretion to figure out exactly how else to
20 operate the tax in ways that would be pretty --
21 that -- that I take it not to be drawing upon
22 the ways in which the IRS had historically done
23 so. And so if it's divorced from that context
24 and you can't use the IRS's regulatory history
25 because this is a novel type of tax, that would

1 be a problem.

2 Now, again, I think the outer limit of
3 Justice Gorsuch's hypothetical is going to have
4 to be the 1798 real estate tax. And that is
5 because that was not too far apart from the idea
6 of giving federal tax assessors the power to
7 reach a cap of \$2 million, a ton of money back
8 then, and figure out how to calibrate the
9 assessments in a very discretionary manner.

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett?

13 JUSTICE BARRETT: So, Ms. Harris, let
14 me just narrow the hypothetical then, a little
15 bit.

16 What about a law that gave the IRS the
17 authority to impose taxes on the sale of food in
18 interstate commerce to fund programs that would
19 provide food for the needy?

20 GENERAL HARRIS: Provide food for the
21 needy? So I think the deal there is you don't
22 have a sufficiency limit. So provide food for
23 the needy, two issues that would distinguish
24 that potentially.

25 One is what does provide food for the

1 needy mean? Is it something similar to you need
2 to provide a basic level of, you know, three --
3 like, two meals a day or something? Which is
4 sort of more similar to this system.

5 JUSTICE BARRETT: Sure. Make it two
6 males a day.

7 GENERAL HARRIS: Okay. So it's
8 sufficient to provide two meals a day, and there
9 is sort of -- I think then you'd be looking at
10 are there other constraints on the statutory
11 scheme on top.

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

16 GENERAL HARRIS: If it's --

17 JUSTICE BARRETT: So impose taxes on
18 the sales sufficient to fund programs that
19 provide two meal a day to the needy.

20 GENERAL HARRIS: I think the operative
21 question ends up being is there an ability to
22 figure out, as a qualitative matter, what that
23 -- what that would look like.

24 JUSTICE BARRETT: Is there?

25 GENERAL HARRIS: I think you can get

1 it closer --

2 JUSTICE BARRETT: That's the question.

3 GENERAL HARRIS: I know. I think you
4 can get it closer to being constitutional
5 because of the limit of if it is something that
6 you can measure that is sufficient to give two
7 meals a day, I -- I might give them that one,
8 but I think reasonable minds could disagree on
9 exactly what other constraints you would look
10 for, who -- who it's being assessed -- who is
11 being assessed for it, and what exactly the
12 mechanism for delivering this -- this sort of
13 food is.

14 JUSTICE BARRETT: Okay. Let me zoom
15 out for a minute.

16 In *Mistretta*, Justice Scalia said that
17 once you agree that you can confer discretion,
18 then we are just talking about matters of
19 degree. You know, and ever since the beginning,
20 founding error debates, or *Wayman* versus
21 *Southard*, Justice -- Chief Justice Marshall says
22 this is a delicate and difficult line-drawing
23 task. And so it's obviously been a long time
24 since we've held that something is
25 unconstitutional under the non-delegation

1 doctrine.

2 Do you think this is an area in just
3 which -- in which there are just not judicially
4 manageable standards?

5 GENERAL HARRIS: No. There are
6 judicially manageable standards. And the two
7 paths we've identified are both versions of
8 that.

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

12 And two is the standards that we are
13 offering that are drawn from the Court's cases
14 where obviously there is a judgment line on how
15 much discretion is too much, but at a minimum
16 Congress is obviously having to provide
17 parameters that you can tell, yes or no, did the
18 agency transgress the boundaries? And this
19 scheme is full of them.

20 JUSTICE BARRETT: So this doesn't have
21 a cap, as, you know, many people have pointed
22 out to you. And so you agree that there's a
23 broad range. I mean, what is it, about
24 \$9 billion right now?

25 GENERAL HARRIS: It's \$9 billion, but

1 it's dedicated to very specific programs. So it
2 is a qualitative cap, in our view.

3 JUSTICE BARRETT: But it could be
4 3 billion?

5 GENERAL HARRIS: It could be 3 billion
6 if that were sufficient to support the way the
7 programs operate.

8 JUSTICE BARRETT: Could be 30 billion?

9 GENERAL HARRIS: Again, tied to the
10 nature of the scheme. And that's no different
11 from other delegations that are tied to some
12 sort of qualitative number. The Court could
13 have fees at all sorts of rates. The OCC could
14 have fees at all sorts of rates depending on
15 what kind of functions it's performing and
16 exacting them.

17 And that has not been seen as
18 something that is a problem because there are
19 qualitative limits built into the scheme that
20 constrain sort of -- that -- again, we think it
21 is what's necessary to support the defined
22 programs that Congress has provided.

23 JUSTICE BARRETT: Let me ask you about
24 universal service. So Justice Gorsuch asked you
25 about Starlink, but I'm going to ask you just

1 about cell phone plans.

2 Could universal service include having
3 the FCC provide every American with a cell phone
4 and a cell phone plan?

5 GENERAL HARRIS: So the cell phone and
6 cell phone plan, the question would be does that
7 fit within the concept of the (h)(2) support for
8 advanced services and the parameters of the
9 specific programs that are supposed to be
10 tethered to providing advanced services.

11 JUSTICE BARRETT: So it could or
12 couldn't?

13 GENERAL HARRIS: I think it could, but
14 there would be questions with respect to whether
15 that's within bounds.

16 JUSTICE BARRETT: Okay.

17 GENERAL HARRIS: And again, whether
18 that would have collateral consequences for the
19 other parameters in the scheme of would it be
20 something that then imposed so many costs that
21 there would no longer be universal services
22 provided at -- at affordable charges, for
23 instance, because of like the pass-on by the
24 telephone -- by the telecom carriers.

25 Again, I think this is a scheme.

1 It -- it is hard to see how this scheme would be
2 the thing that crosses the line for
3 non-delegation purposes and yet much broader
4 delegations are okay.

5 JUSTICE BARRETT: Last question. Can
6 you think of any other statutory scheme that
7 gives the agency the authority to identify the
8 additional principles that constrain its power?

9 GENERAL HARRIS: Yes. The Securities
10 and Exchange Act gives the SEC -- there's --
11 there's -- I think there are a bunch of them
12 that give agencies the power to say are there
13 other consistent principles to consider in a
14 multi-factor test?

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

20 So that one is sort of the nature and
21 pattern of the abuse -- of the controlled
22 substance abuse, how -- how prevalent it is, how
23 much of a danger to public safety. Sort of
24 factors that -- each one of them might not be
25 particularly strong, but the AG could decide

1 would be enough, just in their judgment.

2 So I don't think that's anything
3 novel. And if you had a problem with (b)(7),
4 there is a severability provision in the statute
5 under 608, and so, again, you could sever that.
6 It would be sort of pointless, because the only
7 thing the FCC has ever done with this is hark it
8 to other principles in the statute.

9 JUSTICE BARRETT: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Jackson?

12 JUSTICE JACKSON: So I guess I'm
13 struggling with trying to understand what
14 difference it makes that we do the hard work of
15 trying to characterize this as a tax or a fee.

16 My understanding was that the
17 non-delegation doctrine, as you've said a few
18 times this morning, is that Congress is not
19 allowed to give away or delegate legislative
20 powers. And I don't hear any serious argument
21 that Congress doesn't have both the power to tax
22 and to levy fees.

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

1 GENERAL HARRIS: Yes. That's not only
2 right, but also perverse. Because the other
3 issue here is even if you go through the tax-fee
4 fee analysis, you have a separate inquiry. When
5 Congress is doing overlapping powers, as it is
6 here, using the commerce power and the tax
7 power, you have to figure out which one you're
8 picking.

9 There's no sort of, like, pick the
10 more restrictive power and impose a special test
11 rule. That's -- that's the exact opposite of
12 what the Court has done in all sorts of cases
13 that implicated both the tax power and the
14 commerce power or the tax power and the war
15 powers.

16 And so you're exactly right that the
17 tax-fee fee inquiry doesn't have any
18 constitutional rooting for which non-delegation
19 test you pick, and it -- above -- above and
20 beyond that, there is another layer -- layer of
21 complexity that I don't think Respondents have
22 dealt with on that.

23 JUSTICE JACKSON: And -- and you've
24 said many times that there is a cap. I mean,
25 there's sort of characterizations being made

1 that there's no cap in this statute. And you
2 say there's a qualitative cap.

3 Can you just say more about how you
4 see this as actually imposing a limit on the
5 amount that can be collected through this
6 program?

7 GENERAL HARRIS: Yes. So in three
8 different places of the statute, in 254(d) and
9 254(e) and also in -- in 254(b)(5), it is a
10 sufficient -- the -- the -- it has been to be a
11 sufficient mechanism to achieve the objectives
12 of the programs that Congress has set out.

13 The Fifth Circuit in Alenco
14 interpreted that -- as we agree with -- to mean
15 you can't charge excessive things for the
16 program. It can't be more than the programs
17 need to accomplish the specified objective that
18 Congress set out.

19 JUSTICE JACKSON: So this is not an
20 opportunity to just raise money for the FCC to
21 use for whatever reason or et cetera?

22 GENERAL HARRIS: Exactly. It can't be
23 used for whatever reason. There's also
24 constraints on once you have raised this -- once
25 -- once you essentially have the

1 telecommunication carriers' contributions, how
2 they are supposed to be allocated and how the
3 carriers that participate in these specified
4 programs are supposed to then not, themselves,
5 be able to get too much money from the program.
6 They only are able to get what they are spending
7 to support universal service.

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

12 GENERAL HARRIS: That's exactly right,
13 and why qualitative -- why sort of these
14 qualitative judgments are common. Again, think
15 of the tariff system, where there were sort of
16 judgments with respect to changing
17 circumstances.

18 There are programs where you can have
19 qualitative limits that are trying to accomplish
20 defined objectives that might change over time,
21 and Congress can give that flexibility to an
22 agency without violating the non-delegation --

23 JUSTICE JACKSON: And --

24 GENERAL HARRIS: -- factors.

25 JUSTICE JACKSON: And you say in your

1 page 8 here that there are a number of different
2 agencies that have similar kinds of revenue
3 generating -- I know some people call them fees
4 and not taxes. I've already established that in
5 my view that doesn't make a difference -- a
6 number of agencies that have these kinds of
7 general statements about raising revenue that
8 they determine is necessary or appropriate to
9 carry out responsibilities.

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

13 GENERAL HARRIS: Yes.

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Ms. Harris.

17 Mr. Clement.

18 ORAL ARGUMENT OF PAUL D. CLEMENT

19 ON BEHALF OF THE PETITIONERS IN CASE 24-422

20 MR. CLEMENT: Mr. Chief Justice and
21 may it please the Court:

22 There is no delegation problem here.
23 Congress did not decide out of the blue in 1996
24 that it wanted to impose a tax on certain
25 telecommunication carriers to subsidize other

1 carriers.

2 Instead, what Congress did in 1996 was
3 to make explicit the universal sub -- service
4 subsidiaries that had long been implicit in
5 rate -- monopoly rate regulation.

6 Now, that rate regulation was classic
7 Commerce Clause legislation that did no more to
8 guide the agency than tell them to regulate in
9 the public interest.

10 So when Congress in 1996 decides not
11 only to deregulate but to expressly embrace
12 these subsidiaries, and then specified who
13 should pay what, that is a victory both for
14 competition and for non-delegation principles.

15 The resulting statute is fully
16 consistent with all of this Court's precedents,
17 none of which my friends on the other side ask
18 this Court to overrule, nor do they confront the
19 massive reliance interests on this program or
20 many of the other programs that might be taken
21 out by overruling this Court's cases.

22 This is simply not the right vehicle
23 for this Court to revamp its non-delegation
24 doctrine.

25 I welcome the Court's questions.

1 JUSTICE THOMAS: Do you agree with the
2 government's argument as to the constraints on
3 the revenue raising?

4 MR. CLEMENT: I -- I do. We also
5 think that sufficiency can be construed to be
6 both a ceiling and a floor. But I guess the
7 only thing I would add to the government's
8 answer is I think where the real constraints
9 come from are in the parameters of the universal
10 service program itself.

11 It is not a charge to the agency to
12 just do anything it wants. With respect to
13 rural customers, for example, what it's supposed
14 to guarantee them is reasonably comparable
15 services at reasonably comparable rates.

16 So if the agency wants to say, you
17 know, actually, rural rates, it's -- it's hard
18 to be a farm, the rural rates should be lower,
19 that would violate the statute. It would also
20 in the process make the program more expensive.

21 And so one way to think about where
22 the -- where the real caps are coming from is
23 the fact that in the four major programs, rural,
24 low-income, rural health, and the schools, none
25 of those are things where the agency isn't

1 constrained and can't just add sort of things
2 willy-nilly to the program.

3 And that's why, if you look at the --
4 the graph on page 3 of the SHLB reply brief
5 where it shows you the total revenues of the
6 fund over time, it has been remarkably flat.
7 And I think that's a reflection of the basic
8 parameters of universal service in the four
9 major buckets that the agency has adopted have
10 all been relatively stable over time, and that's
11 why, though you might see that rate going up
12 because the contribution base is shrinking, the
13 total revenues raised are actually lower,
14 inflation-adjusted terms, over the last decade.

15 JUSTICE THOMAS: Now to take the flip
16 side of this, what would a -- a -- a program
17 look -- of this sort look like and -- in order
18 to violate the non-delegation clause?

19 MR. CLEMENT: So I think a program
20 like this -- I mean, you know, the first thing
21 you -- you would do is you would say, all right,
22 if you gave some agency that doesn't have --
23 hadn't had -- previously had rate regulation
24 authority, doesn't have jurisdiction over a
25 industry where there's network effects and a

1 reason to have some degree of regulation even
2 after you get rid of the -- the monopolies, if
3 in that kind of industry you just basically
4 said, you know, have at it, do fair competition
5 or do some kind of fund, I think that would be
6 problematic.

7 And, you know, I mean, I'd start with
8 this Court's cases. Obviously, there haven't
9 been a lot of cases striking things down on
10 delegation doctrine, but you do look to
11 Schechter Poultry, that says if you try to do
12 something that's economy-wide and you use a term
13 that, because it's economy-wide, doesn't have
14 any particular specialized meaning like fair
15 competition, okay, that's out of bounds.

16 If, Panama Refining, you try to
17 basically tell the executive branch, go -- go
18 deal with hot oil, that's a problem, but you
19 don't give them any direction --

20 JUSTICE GORSUCH: So --

21 MR. CLEMENT: -- and --

22 JUSTICE GORSUCH: So -- so -- I'm
23 sorry to interrupt there, but I think that's a
24 really interesting and a good point. So, for
25 example, when you say just and reasonable rates

1 and a regulated monopoly that's historically
2 been understood to mean cost plus some
3 reasonable profit approximating, what would
4 happen in a competitive environment, that's --
5 that's something.

6 But if you were to say go forth and
7 create a just and reasonable tax system, that
8 would be different, even -- even though you're
9 applying the same principle of -- intelligible
10 principles across the board because one has
11 historical content and the other doesn't. Is
12 that -- is that the gist of it?

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

14 JUSTICE GORSUCH: Okay.

15 MR. CLEMENT: And I also would think,
16 just to take -- you know, because -- because
17 this is I think all consistent --

18 JUSTICE GORSUCH: So -- so -- so if
19 that's true, just -- I'm sorry to interrupt --

20 MR. CLEMENT: Yeah.

21 JUSTICE GORSUCH: -- but so if that's
22 true, you'd agree that there are some judicially
23 manageable standards that we can apply when it
24 comes to delegations?

25 MR. CLEMENT: Absolutely. And, you

1 know, I -- I mean, I would add to my list, I
2 mean, just two other things. If you interpreted
3 the statute at issue in Gundy the way that the
4 dissenters interpreted the statute there, then
5 that's just Panama Refining II, right? That's
6 just the Attorney General can do whatever he
7 wants with the preexisting sex offenders. And I
8 think, as interpreted, that would plainly be a
9 non-delegation problem.

10 And then the other thing I would --
11 just to complete the cycle of this Court's
12 cases, and I know it's not a huge cycle, but
13 Carter Coal is also a situation where Congress
14 itself tried to delegate in part to private
15 entities. And that may be a distinct problem,
16 but that's not what happened here.

17 JUSTICE GORSUCH: No, I understand.
18 And with respect to, like, fees, again we have a
19 classic understanding. We said it in National
20 Cable, and, you know, the GAO has repeatedly
21 said it. Those are designed to cover -- cover
22 the costs or the expenses, right? Generally?

23 MR. CLEMENT: That -- that's right.
24 And I would part company with the government on
25 their answer that you should conceive of this as

1 a tax. I would agree with them on the
2 front-line answer, which is, I mean -- you know,
3 I don't see how Skinner could have been much
4 clearer that you don't have to determine
5 definitively whether it's a tax or a fee.

6 And I would caution that, you know,
7 saying this is a tax could have some
8 implications for the Origination Clause. I
9 think the test is slightly different, but I
10 think there's a lot to be said for not calling
11 this either a tax or a fee.

12 But what I would say is in the
13 universe of things that are -- can be understood
14 like a fee like this, which I think it can
15 because part of the reason Congress specified in
16 254(d) that it's the telecommunication carriers
17 are the ones that are going to be -- make
18 contributions to this, is they had, both
19 historically and going forward, been ones that
20 benefited quite considerably from the idea that
21 there would be universal service --

22 JUSTICE GORSUCH: Well --

23 MR. CLEMENT: -- and a network that
24 overcame networking --

25 JUSTICE GORSUCH: -- that's a little

1 hard to understand, though, because we all
2 benefit from tax collection too, right? I
3 mean -- I mean, that's kind of circular. I'm
4 not sure that really helps very much.

5 MR. CLEMENT: So I -- I -- I -- I
6 actually think it does in the following sense,
7 which is I think --

8 JUSTICE GORSUCH: Well -- and let me
9 throw one more thing in --

10 MR. CLEMENT: Okay.

11 JUSTICE GORSUCH: -- before I forget
12 it.

13 MR. CLEMENT: Yeah.

14 JUSTICE GORSUCH: And that is, of
15 course, the '96 Act was new and -- and rejected
16 the whole monopoly rate-making regime and -- and
17 ignited competition and made these subsidies no
18 longer part of the rate-making process, but very
19 explicit.

20 MR. CLEMENT: I -- I mean, I agree,
21 but I think --

22 JUSTICE GORSUCH: Okay.

23 MR. CLEMENT: -- that's a feature and
24 not a bug of my position because it would have
25 been easy for Congress to say, all right, while

1 we're introducing competition, universal service
2 doesn't really work with competition.

3 And Congress here made the critical
4 policy judgment itself -- and I don't think it's
5 at all ambiguous -- that we are going to
6 continue to have universal service and universal
7 service fees even once we get -- we go into a
8 more deregulated environment. But just one --

9 JUSTICE GORSUCH: If we -- if we
10 reject your view that they're fees and accept
11 the government's willingness to characterize it
12 as a tax, what difference does that make, in
13 your mind?

14 MR. CLEMENT: Well, under this Court's
15 --

16 JUSTICE GORSUCH: You're -- you're
17 fighting it so hard. There -- must make a big
18 difference to you.

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

24 But to give you my other answer, which
25 is, look, I have the same instinct that I think

1 underlies many of your questions, that if you
2 just tried to delegate the tax power to the
3 Internal Revenue Service, that there's something
4 problematic about that.

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

9 JUSTICE GORSUCH: Really? Raising
10 revenues is an end in and of itself? I thought
11 it was to provide for the common good and
12 protection of this country and all that other
13 stuff.

14 MR. CLEMENT: Yeah, all that other
15 stuff is taken care of by other agencies. When
16 you're talking about the IRS --

17 (Laughter.)

18 MR. CLEMENT: No, seriously.

19 JUSTICE GORSUCH: So it depends on
20 which agency it is?

21 MR. CLEMENT: Well, if -- if you're
22 delegating --

23 JUSTICE GORSUCH: Really?

24 MR. CLEMENT: If you're delegating
25 something to the IRS --

1 JUSTICE GORSUCH: That's what it all
2 boils down to.

3 MR. CLEMENT: -- you must be
4 delegating to them revenue raising.

5 JUSTICE GORSUCH: So if the IRS is
6 spending the money, then it would be okay? So
7 if the IRS --

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

9 JUSTICE GORSUCH: So if we put the --
10 Department of Defense reported to the
11 Commissioner of the IRS, it would all be good?

12 MR. CLEMENT: No. I think there is a
13 material difference between a statute that says
14 IRS, as to all the citizenry, raise some
15 revenue, as opposed to a statute that says:
16 Look, we've been doing universal service for 50
17 years. We want to continue to do it. It's
18 always been implicitly that telecom carriers
19 that are paying for that, and we want to
20 continue to do that, and we're going to put a
21 fee -- I'd call it a fee -- on those carriers
22 for that purpose.

23 And I think it's also consistent with
24 the idea that I assume most of these
25 hypotheticals -- where it's the IRS that's

1 getting the delegation, Congress would be
2 explicit. This is our taxing power. We're
3 using Article I, Section 8, clause 1.

4 I don't think the '96 Act at all
5 conceptualized that what it was doing was using
6 the taxing power, just like the '34 Act was a
7 classic regulation of an instrumentality of
8 commerce. When Congress was trying to
9 deregulate that in 1996 --

10 JUSTICE KAVANAUGH: What do you think
11 the role of novelty is in assessing the
12 constitutional issue here? In other words,
13 we've said in other contexts that when Congress
14 does something that it's never done before, that
15 can be an indication of a problem. And that's
16 where the tax/fee issue comes into play, as I
17 see it, potentially, which is, yeah, there have
18 been lots of fees, but this seems somewhat
19 different from what has been done before in
20 terms of the nature of it and how it works and
21 operates. It falls, as the government says, on
22 the tax side of the line.

23 That seems different, novel, and
24 raises the IRS hypothetical, if we go down this
25 road. So how does -- should we think about

1 that?

2 MR. CLEMENT: Well, I mean, that is
3 part of the reason I take -- part -- part
4 company with the government because, I mean, I
5 do take it, you know, it's -- it's -- we've been
6 at this republic thing for quite a while, and
7 when something hasn't been done before, you
8 might think, well, that's at least something we
9 have to look at more carefully.

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

12 JUSTICE KAVANAUGH: And what -- and
13 what do you think are the best precedents in
14 terms of what Congress has done for this?

15 MR. CLEMENT: Well, I think all of
16 this stuff in Section 8 and Section 9 are
17 precedents for the idea that when you have
18 something that's not a pure revenue-raising
19 scheme, not a delegation to the IRS, but you
20 give some other agency some kind of
21 revenue-raising authority with respect to
22 covering their services or the programs they
23 provide, this fits comfortably within that
24 pretty long tradition that includes delegations
25 to this Court to have fees to cover the cost of

1 certain services.

2 And those -- you know, it -- it --
3 like this Court in Whitman, just to take a
4 precedent that nobody is asking to be overruled,
5 it looked at the statute there, and one of the
6 arguments was -- that the lower court has
7 accepted is: Uh, this isn't good enough. There
8 has to be -- the words that they used was "a
9 determinative criterion."

10 And I think, at least in a statute
11 like this where it's not pure revenue-raising, I
12 don't think that asking for a determinant cap
13 makes anymore sense here than asking for a
14 determinative criterion made in Whitman. And
15 the reason is it's not that this is
16 standardless; it's just that the criterion,
17 rather than being a determinative cap, is all
18 the different restrictions on this universal
19 service fund.

20 And there is so many ways -- and I
21 think this was the government's point as well.
22 There is so many ways that by changing a rule
23 here -- I mean, if they -- if the agency,
24 tomorrow, changed the eligibility requirements
25 for the Lifeline Program and substantially

1 loosened those eligibility requirements, that
2 would increase the -- the burdens on the
3 universal service fund. It would increase
4 the -- the rate; it would increase the base --
5 base.

6 But if they did that, that is an
7 agency action that could be challenged under the
8 APA. If they tried to loosen the eligibility so
9 that everybody who is making, you know, seven
10 figures, six figures, whatever it is, can get
11 the Lifeline Program, that would be invalidated
12 in the courts.

13 And so the restraints on this are not
14 a definitive cap, but they are from the
15 substantive limits of the scope of the program.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas?

19 Justice Alito?

20 JUSTICE ALITO: Well, just out of
21 curiosity, the Court has said, as the Appellees
22 note at the very beginning of their brief, an
23 indefinite power to tax is a power to destroy.

24 Do you think that can be said about
25 every power that is conferred on Congress in

1 Article I? The power to establish post -- post
2 offices and post roads is the power to destroy?
3 The power to establish uniform laws on the
4 subject of bankruptcies is the power to destroy?

5 MR. CLEMENT: I -- I'll give you
6 coining money too.

7 JUSTICE ALITO: All right.

8 (Laughter.)

9 MR. CLEMENT: So -- so -- so -- so I
10 don't think -- I don't think death by coining
11 money is a possibility. Or destruction by
12 coining money.

13 But -- but -- but what I will say is
14 there may be other ways in which you think of
15 the tax power as being slightly different or
16 slightly more dangerous, but I don't think
17 non-delegation is -- and this Court unanimously
18 rejected that twice.

19 But what I would say is there's a way
20 to apply your existing jurisprudence. This is
21 what I was trying to get at with my colloquy
22 with Justice Gorsuch -- maybe not
23 successfully -- is if you apply your basic
24 approach to these issues, which does ask at some
25 level has Congress made the basic policy

1 judgment, I think when you're talking about a
2 pure revenue-raising statute, I would say if
3 Congress hasn't given you a cap or a rate, maybe
4 Congress hasn't made the basic policy judgment.

5 But when you're talking about
6 something, whether you call it a fee or a tax,
7 that's directed at a particular industry and is
8 a judgment by Congress that we are going to
9 continue to have universal service even in a
10 deregulated environment, Congress has made the
11 important policy judgment there.

12 CHIEF JUSTICE ROBERTS: Justice
13 Sotomayor?

14 JUSTICE SOTOMAYOR: You started at the
15 beginning by talking about what -- invalidating
16 Section 254 would have disastrous effect for
17 your clients. In which ways?

18 And can you summarize why all of the
19 ideas that have been floated as to how to say
20 this is a tax that -- and that as such, it needs
21 some cap or something else, how -- what effects
22 would that have on our precedents?

23 MR. CLEMENT: So let me take them both
24 in turn.

25 I mean, the disastrous effects are not

1 just for my clients. They're for all the
2 various beneficiaries of this program. And so,
3 like, start in rural Alaska, which is very
4 dependent on this program.

5 Talk about Native American
6 reservations, where people are dependent on this
7 program, both because of the rule and because
8 they're low income. Talk about all the schools
9 and libraries that benefit from this program.

10 Talk about all the rural health
11 providers. And that's an area of the statute
12 where Congress has been very specific. The
13 rural healthcare providers get the same rates or
14 reasonably comparable rates to the urban health
15 providers in the same states.

16 So you have very definitive guardrails
17 on the system, and huge beneficiaries. And, of
18 course, we all benefit from having a
19 communication system that is truly universal. I
20 mean, I might not live in rural -- you know,
21 like, rural Alaska, but it's nice to be able to
22 place a call there.

23 And even beyond that, we all benefit
24 from the fact that we have a -- a service
25 network that everybody can use. And that

1 includes, you know, as -- as broadband gets
2 expanded, the fact that people all over the
3 country can access these services.

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

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

13 And typically in a -- in a universe
14 where, you know, there's two unanimous Supreme
15 Court cases that say we don't treat taxes
16 different from other legislation for
17 non-delegation purposes, typically if you're
18 going to go into the wall of that, you know,
19 bravely go forth, but say why the stare decisis
20 factors are satisfied in this particular
21 context.

22 And then we can have briefing that
23 really gets to the idea: All right. You know,
24 they have a theory that half those statutes on
25 page 8 are still going to be okay, but we have a

1 theory that other things are going to go.

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

6 The -- the fees are supposed to cover
7 the services that are provided. If you cut down
8 on the number of national parks, the fees are
9 going to go down. If you add a couple national
10 parks, the fees might go up because you have
11 more to cover.

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

16 So -- but, again, we just haven't had
17 the briefing that would allow me to definitely
18 tell you I know exactly what the damage and the
19 consequences are of overturning your precedents
20 in this case.

21 JUSTICE SOTOMAYOR: On the first part
22 of the answer, Respondents said at the end,
23 recognizing the rather dramatic effects of
24 invalidating this law would have on
25 communications, that we had two alternatives.

1 One, as we did in the bankruptcy
2 context, tell Congress: Figure it out in six
3 months before we made our judgment effective.

4 I'm covering all options in my
5 question. So I hope it's not a hypothetical
6 that's necessary. But I'm covering options
7 or -- I don't know what the second -- but do you
8 have a preferred manner to do this --

9 MR. CLEMENT: So --

10 JUSTICE SOTOMAYOR: -- to minimize the
11 disruption?

12 Long term, you can't, because we're
13 overruling precedent and putting a lot of
14 programs at risk, but --

15 MR. CLEMENT: Yeah. If the -- if the
16 question is: Do we have a preferred way to
17 lose --

18 JUSTICE SOTOMAYOR: Right.

19 (Laughter.)

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

22 But, you know, I mean, look, I don't
23 think the Northern Pipeline sort of six --
24 six-month interregnum was necessarily the height
25 of this Court's remedial jurisprudence. So I am

1 somewhat reluctant to recommend that to you as
2 an option.

3 I actually kind of think it works the
4 other way, which is if you really think you need
5 to do Northern Pipeline, then maybe you
6 shouldn't do what you were doing in the merits
7 part of your opinion.

8 JUSTICE SOTOMAYOR: There's a whole
9 lot of --

10 MR. CLEMENT: So I know that's --

11 JUSTICE SOTOMAYOR: There's a whole
12 lot of people in that area of law that agree
13 with you.

14 MR. CLEMENT: Yeah.

15 JUSTICE SOTOMAYOR: We shouldn't have
16 done it, but --

17 MR. CLEMENT: Yeah. No. And -- and,
18 you know, so -- so since I think that's
19 doctrinally -- I think the second thing they
20 suggested is you could make this relief only run
21 to the particular parties here at issue.

22 And since it's capable of repetition
23 yet evading review -- I'm not even sure what
24 that means -- and -- and -- and then you -- you
25 could try to fix it.

1 The other thing they suggest, of
2 course, is you could fix this whole thing with
3 half a sentence. Well, gee whiz, I mean --
4 like, I -- I -- I don't really think that that
5 sort of is right.

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

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

14 CHIEF JUSTICE ROBERTS: Justice Kagan?

15 JUSTICE KAGAN: Just on these eight to
16 nine programs again.

17 I mean, I -- I -- I take it that maybe
18 one argument is that, well, these are
19 fee-for-service programs; and this is not a
20 fee-for-service program, it's a -- it's a
21 revenue raiser. You want to call it a fee? You
22 want to call it a tax? Not sure, but it's a
23 revenue raising for a program, not for a
24 service.

25 Is that a distinction that's worth

1 making?

2 MR. CLEMENT: So I don't know that
3 that maps up to all of the different things on
4 pages 8 or 9. But what I guess I would say is
5 what -- what I think distinguishes this from
6 almost everything else, in a good way, is that
7 here you are continuing a tradition that
8 predated the statute.

9 In the way the statute worked
10 before -- I mean, the way things worked before
11 1996, it was the same basic, you know, carriers
12 that are covered by 254(d), roughly speaking,
13 that were implicitly subsidizing, or their
14 customers were implicitly subsidizing, some
15 rural service and some low-income service.

16 And it's not -- you know -- and -- and
17 just -- this is a historical point that I think
18 is actually relevant, because there was about a
19 10-year gap between when Ma Bell was broken up
20 in the '96 Act. And during those 12 years, or
21 whatever it was, there was something like a
22 universal service fund already being developed
23 through interchange fees and things like that.

24 And Congress was clearly trying to
25 preserve that. One place it's most clear is

1 254(j), little provision nobody looks at. But
2 that says that Congress specifically looked at
3 the Lifeline Program the agency was operating
4 before 1996 and wanted to preserve it.

5 And so this is a situation where there
6 is a program that has always been understood to
7 benefit particular classes because of the most
8 obvious beneficiaries of having a truly
9 universal network. And we're going to put a fee
10 on those people.

11 And then when you move from
12 deregulation to the new system, you impose what
13 I think is a fee, call it whatever you want, on
14 those people for a very specific purpose,
15 subject to very specific constraints.

16 I think that probably does look like
17 some of the things on pages 8 and 9, but in some
18 ways it looks better because of all that
19 pre-history that you can borrow.

20 JUSTICE KAGAN: And -- and,
21 Mr. Clement, you were asked to name some of what
22 you thought were the manageable standards in
23 this area, and you came up with a few. And you
24 said, well, it hasn't often been done, but it's
25 totally possible.

1 And I just wanted to give you the
2 opportunity to sort of do the flip half of that.
3 I mean, you obviously don't think that in terms
4 of the manageable standards that you, yourself,
5 laid out, that this falls on the inappropriate
6 side of the line.

7 So why not?

8 MR. CLEMENT: So I think that if you
9 --

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

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

18 And then the second thing is Panama
19 Refining: Go solve a problem for me, hot oil,
20 whatever that is. That's a problem. You go
21 solve it. I'm not going to give you any
22 standards.

23 Or if you accepted the dissenters'
24 view of the statute in Gundy, and I know you
25 don't, but if you accepted their view where it's

1 just --

2 JUSTICE KAGAN: Totally. And --

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

16 Like, that is so much better than so
17 many of the statutes that this Court has
18 overruled. But lest you think, to paraphrase
19 Judge Newsom in the Eleventh Circuit, that all
20 of the jurisprudence is a punch line, like, you
21 know, where this Court has approved the broadest
22 language is typically in regulated industries or
23 regulated circumstances. I suppose Yakus is an
24 exception. That's wartime. You could do with
25 that what you will.

1 But for the most part when -- when --
2 when Congress used broad language and this Court
3 has approved it, it has been in the context of
4 regulated industries where there actually are a
5 lot of principles to draw from.

6 JUSTICE KAGAN: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Gorsuch?

9 JUSTICE GORSUCH: Just back to page 8
10 and 9. It does seem to me that they're --
11 they're all pretty easily distinguishable on the
12 basis that it's an agency collecting fees from a
13 regulated party in order to offset its own
14 operating expenses or providing a service to
15 offset the expenses of the service. Thoughts?

16 MR. CLEMENT: So, I mean, if -- if
17 that had to be the paradigm, I could put this in
18 that paradigm in --

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

22 MR. CLEMENT: It's still okay.

23 JUSTICE GORSUCH: Yeah.

24 (Laughter.)

25 JUSTICE GORSUCH: Okay.

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

5 JUSTICE GORSUCH: Yeah.

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

9 JUSTICE GORSUCH: Okay.

10 MR. CLEMENT: There's no unprecedented
11 clause in the Constitution.

12 JUSTICE GORSUCH: Okay. Okay. And --

13 MR. CLEMENT: And --

14 JUSTICE GORSUCH: And -- and this is
15 something you think Congress could -- could
16 easily fix. Now, you think that's an argument
17 in your favor, but they could easily put in a
18 cap or a rate or something tomorrow?

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

23 JUSTICE GORSUCH: Well, maybe because
24 otherwise it's regulated parties who are
25 self-interested in a program making the

1 decisions for themselves.

2 MR. CLEMENT: But they're not.

3 JUSTICE GORSUCH: It's sort of like
4 Schechter Poultry, right? I mean, it's the
5 same -- it was a regulated industry there that
6 was making those decisions for its own benefit.
7 And one -- I'm not -- one can dispute that
8 characterization, but -- but maybe, huh?

9 MR. CLEMENT: No. Give me half a
10 chance to -- to dispute that characterization.

11 JUSTICE GORSUCH: By all means.

12 MR. CLEMENT: Because this is miles
13 away. And this really gets to the sort of
14 private delegation piece of this. That argument
15 which hasn't gotten a lot of play -- I mean, let
16 me first say I think --

17 JUSTICE GORSUCH: I'm not talking
18 about private delegation. I'm just saying maybe
19 this is an area that Congress might speak. How
20 about that? Congress could decide.

21 MR. CLEMENT: Congress can always do
22 more. I mean, that -- that's got to be the rule
23 in every delegation issue, that Congress could
24 always do more. And as an aspirational
25 normative matter, wouldn't it be --

1 JUSTICE GORSUCH: In an unprecedented
2 area where there's a yellow flag on the field,
3 how about that?

4 MR. CLEMENT: How about an
5 unprecedented area that's not that unprecedented
6 because universal service has been going on
7 pursuant to congressional sanction under the
8 1934 Act for 50, 60 years --

9 JUSTICE GORSUCH: Through --

10 MR. CLEMENT: -- and --

11 JUSTICE GORSUCH: Through rate making
12 and a -- and a regulated monopoly that it -- it
13 -- it -- it proceeded in the '96 Act to disavow
14 and blow up.

15 MR. CLEMENT: With all due respect,
16 this is where the 12-year interregnum is
17 actually quite important, because they blew up
18 -- Ma Bell gets blown up by the courts in 1984
19 --

20 JUSTICE GORSUCH: Sort of.

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

22 JUSTICE GORSUCH: Sort of.

23 MR. CLEMENT: I know you know this.
24 But sort of. And as soon as it's blown up --

25 JUSTICE GORSUCH: It created new

1 monopolies in the process, but that's a whole
2 'nother story.

3 MR. CLEMENT: And -- and -- and -- but
4 when they do it, they don't say the agency is
5 still operating under 151, the '34 Act. They
6 don't say, all right, well, we can no longer do
7 any universal service subsidies through
8 long-distance rates.

9 Instead, they say, boy, this is really
10 important. As a regulatory matter, we've been
11 doing it this way for, at that point, 50 years,
12 so let's use the exchange fees and let's create
13 a universal service fund.

14 Now, they did all that out of -- in
15 the public interest. So if you're talking about
16 what's -- what's good for delegation principles,
17 boy, is it good that in 1996 Congress comes in
18 and says we expressly bless that, 254(j), we
19 expressly -- bless the exact program you were
20 doing for lifeline, and now we're going to put
21 guardrails on it that address this kind of
22 unique phenomenon -- I don't know if totally
23 unique, but --

24 JUSTICE GORSUCH: Okay.

25 MR. CLEMENT: But --

1 JUSTICE GORSUCH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh?

4 JUSTICE BARRETT: So, Mr. Clement, one
5 of the -- one of the questions that we ask in
6 the non- -- non-delegation context is whether
7 the public or the courts could judge whether a
8 particular policy adopted by the agency is
9 unlawful.

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

16 MR. CLEMENT: So I think the
17 contribution rate is just a by-product of other
18 things in the statute that I would tell my
19 client to challenge. So, I mean, you know -- I
20 mean, look, one of the things that is really
21 driving the contribution rate is that the
22 contribution base has shrunk. So one of the
23 things I might well tell my -- my client to do
24 is to go to the agency and try to get the agency
25 to expand the contribution base.

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

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

16 JUSTICE BARRETT: Mm-hmm.

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

20 JUSTICE BARRETT: If I thought
21 35 percent was too high or something like that?

22 MR. CLEMENT: Yeah, but, like, you
23 know, 35 percent of what?

24 JUSTICE BARRETT: Of what?

25 MR. CLEMENT: That's like -- you know,

1 like it's -- it's that bottom line number, is
2 the money that's actually being funded by
3 universal service. And that's been a flat line.

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

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

19 Or if the reason I perceive that the
20 fund had become too big is that they monkeyed
21 with the eligibility requirements for the
22 lifeline program, so now virtually everybody
23 gets \$9 off in this fee. Well, I could say
24 that's arbitrary and capricious. That's in
25 excess of the statutory authority. The

1 statutory authority is to make it affordable. I
2 can read from the context of this statute that
3 that's supposed to be for low-income people.
4 That's consistent with everything else in the
5 statute. That's ultra vires.

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

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

16 (Laughter.)

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

23 Do you think there are any programs,
24 any delegations of discretion in the U.S. Code
25 that would fail it?

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

4 (Laughter.)

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

18 So I'm not here to tell you it's easy,
19 but I'm not here to tell you it's impossible.
20 And I do think the Court's precedents provide a
21 -- a good guide. I mean, I -- I will say that I
22 think there's a lot in the Gundy dissent that
23 could say that certain things are out of bounds.
24 It's just not this one.

25 JUSTICE BARRETT: Okay.

1 CHIEF JUSTICE ROBERTS: Justice
2 Jackson?

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

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

19 MR. CLEMENT: I -- I don't think
20 you're wrong about that at all. Now, I mean,
21 one way you could fix it in a trivial way that
22 would really sort of allied your question, I
23 suppose, is what I think the Solicitor General
24 was getting at, which is this idea that you just
25 like make the cap a trillion dollars. And then

1 there, it's your definitive cap and now we're
2 done. Now --

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

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

23 But, on the other hand, with this
24 program, they clearly weren't that focused on is
25 this going to be a \$10 billion program or an \$11

1 billion program? What they wanted to do is
2 provide reasonably comparable rates and services
3 for rural customers and -- versus urban
4 customers.

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

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

20 MR. CLEMENT: Yes. And, you know, I'm
21 not 100 percent sure, but my recollection is it
22 started in the Senate too, which is why I really
23 think saying it's a tax is a mistake because
24 it's not a tax. It's Commerce Clause
25 legislation.

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

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

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

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

1 don't want the sky to fall. So that's -- that's
2 -- that's weird enough as it is.

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

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

21 JUSTICE JACKSON: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Mr. McCotter.

25

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
16 is at least relevant; that the USF statute sets
17 no objective rule to limit the amount raised;
18 and that Congress has set such rules for every
19 other 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
13 law. 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
20 legislative issue, even, for example, setting
21 the size of lower federal courts. The
22 Constitution prohibits that, the transfer of
23 power.

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

1 JUSTICE THOMAS: The Petitioners make
2 the argument that this isn't a particularly new
3 program, it comes from the -- the old Bell
4 system before we had deregulation.

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

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

14 MR. McCOTTER: Yes, Your Honor.

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

20 The Petitioners themselves said in
21 1996 that there was a fundamental overhaul --
22 that's their opening brief -- fundamental
23 overhaul of the regime. And that's because they
24 are ditching whatever the prior understanding
25 was, even assuming there was one -- and we

1 dispute that -- but even if there were, in '96,
2 Congress said we're completely changing, not
3 just how the system operates, but what it
4 covers. It's dramatically larger.

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

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

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

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

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

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

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

1 are.

2 So it's not even saying universal
3 service is this level --

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

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

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

1 So if it really takes a lot of money,
2 even then you can't get the program. You can't
3 get the service.

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

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

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

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

25 JUSTICE KAGAN: Okay. I'm -- I'm --

1 MR. McCOTTER: And they haven't
2 changed it.

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

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

10 JUSTICE KAGAN: It's the --

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

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

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

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

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

11 JUSTICE JACKSON: Well, there has to
12 --

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

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

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

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

1 Let me ask you another question. I --
2 I guess I'm confused about what you're asking us
3 to do. Your brief says that the Court should,
4 quote, "take this opportunity to realign its
5 non-delegation framework with its traditional
6 understanding of the Constitution," end quote.

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

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

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

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

1 MR. McCOTTER: So the main reason is
2 that the intelligible principle test as some
3 judges have interpreted it -- now, again, we
4 don't quite agree with this view. In Judge
5 Newsom's words, it's a punch line. It
6 essentially allows transfers altogether of
7 exclusive and strict legislative powers to
8 agencies. And you could say --

9 JUSTICE JACKSON: But not apparently
10 in all the cases that you say got it right. So
11 --

12 JUSTICE KAVANAUGH: The solution --
13 oh, keep going. Sorry.

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

24 So I'm really trying to understand the
25 need for us to come up with a different test or

1 try to figure out something else, especially if
2 you appear to concede that the outcomes of all
3 these prior cases are correct.

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

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

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

24 MR. McCOTTER: And that's exactly what
25 Justice Thomas said in his Whitman concurrence.

1 He says, just because there is an intelligible
2 principle, assuming there is one -- and,
3 obviously, we don't -- but even assuming there
4 is one, it doesn't stop Congress from just
5 handing wholesale its power. Just like Justice
6 Scalia said in his *Mistretta* dissent --

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

11 MR. McCOTTER: There needs to be some
12 kind of objective limit.

13 JUSTICE KAVANAUGH: Okay.

14 MR. McCOTTER: Yeah.

15 JUSTICE KAVANAUGH: So cap. Yes.

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

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

25 MR. McCOTTER: Well, so if Congress

1 did set a trillion-dollar cap, obviously it's
2 unlikely, but at least then we would know that
3 Congress itself has made that determination. It
4 says we think universal service is this
5 important; we want the agency to be able to
6 raise --

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

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

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

1 but it sets the policy, leaves only details to
2 be filled in.

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

8 JUSTICE JACKSON: But that's just
9 because --

10 MR. McCOTTER: -- first of all, that's
11 --

12 JUSTICE JACKSON: -- you say the
13 amount to be -- sorry. Go ahead.

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

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

1 agency can raise --

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

7 MR. McCOTTER: Right, yes.

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

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

14 JUSTICE BARRETT: Counsel, let me just
15 --

16 MR. McCOTTER: -- that it's too low,
17 you know it's Congress.

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

24 MR. McCOTTER: So the list of statutes
25 there, they're kind of like the dog that didn't

1 bark. All they have are a few relatively modern
2 provisions, almost all of which are standard fee
3 provisions, like how much do you pay for a
4 postal stamp, that sort of thing, which this
5 Court addressed in National Cable, the 1974
6 case, and said maybe that has its own built-in
7 limiting principle, because you're limited to
8 the value to the recipient.

9 JUSTICE BARRETT: Okay. So --

10 MR. McCOTTER: However --

11 JUSTICE BARRETT: -- you're saying
12 that page 8 and 9, they're all distinguishable?

13 MR. McCOTTER: Correct.

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

21 MR. McCOTTER: So the proof is in the
22 pudding here. The decision below has been
23 binding in the Fifth Circuit for eight months
24 now. They have repeatedly rejected
25 non-delegation challenges, including to some

1 relatively broad language. We cite these in our
2 brief. The Mayfield case, for example, involved
3 a statute that referred to DOL regulations being
4 detrimental to health, efficiency, general
5 well-being.

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

10 JUSTICE BARRETT: Okay.

11 MR. McCOTTER: The government has
12 never cited another one like this.

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

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

22 JUSTICE BARRETT: I -- I understand.

23 MR. McCOTTER: -- but I will address
24 it anyway.

25 JUSTICE BARRETT: I -- I understand

1 that. But I think it's a fair question to
2 consider the consequences of your position.

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

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

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

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

22 MR. McCOTTER: True, but --

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

25 (Laughter.)

1 MR. McCOTTER: True, but the first
2 part of their opinion goes right up to the line
3 on the statutory delegation aspect --

4 JUSTICE KAVANAUGH: Well --

5 MR. McCOTTER: -- as well.

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

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

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

18 CHIEF JUSTICE ROBERTS: Well --

19 JUSTICE KAVANAUGH: That's a --

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

24 (Laughter.)

25 CHIEF JUSTICE ROBERTS: Because it was

1 a question of direct control by the -- by the
2 president. And if he can't control both of
3 them, then he's got no control at all.

4 So I -- I think it was --

5 MR. McCOTTER: Sure.

6 CHIEF JUSTICE ROBERTS: -- quite a
7 different case.

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

14 JUSTICE SOTOMAYOR: Counsel --

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

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 address QP 1 and 2 and resolve the statutory.

25 JUSTICE KAVANAUGH: And on the -- on

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

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

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

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

24 First, we all know that taxing is
25 strictly and exclusively legislative. That's

1 been established for centuries.

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

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

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

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

1 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 do
14 that.

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

20 JUSTICE JACKSON: In a hypothetical --

21 JUSTICE KAGAN: Again, you -- you --
22 you're saying that we should interpret this
23 statute to say that that word, "sufficient," is
24 not imposing a requirement, meaning sufficient,
25 what is required to do these services, but not

1 more than that?

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

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

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

11 (Laughter.)

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

14 (Laughter.)

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

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

24 MR. McCOTTER: So then --

25 JUSTICE KAGAN: It's sufficient to get

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

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

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

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

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

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

24 You keep saying that for 30 years the
25 FCC has said it doesn't.

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

9 So you can't have it both ways.

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

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

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

21 MR. McCOTTER: Well, so on the first
22 part of your question, Your Honor, they do
23 say -- in their reply brief, they say I quoted
24 out of context one of their briefs saying that
25 the 254 principles don't have to be complied

1 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
9 most, 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
19 in all regions of the nation.

20 And that doesn't have a reasonable or
21 financial limitation at all. And -- and I -- I
22 just -- I'm not sure I understand why you're
23 fighting the notion that if -- if they were
24 bound 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 all -- they are all mealy-mouthed shibboleths;
7 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 the -- 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 it 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
23 is landline connections and now broadband in
24 very rural areas, about a \$9 per month subsidy
25 for people who live just -- who live below the

1 poverty line, rural health to make -- to ensure
2 that we facilitate telehealth services and allow
3 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
15 we 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,
24 lifeline assistance, and it goes to help people
25 who are rural but who already wealthy and that

1 sort 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 spending 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,
7 think of Medicare. They are obviously -- the --
8 the medical treatments are changing every day,
9 but 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,
15 and -- and Colorado too, but maybe that they're
16 also spending too little and maybe -- maybe we
17 should have cell phones for everyone under this
18 standard. I mean, it -- wouldn't that be
19 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
25 what 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
13 enough. 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 incorporated some
20 preexisting framework. Congress made clear it
21 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
6 your favor on the grounds that you have been
7 pressing this morning. In the end, that may not
8 matter, but I would like to know where -- what
9 such a 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
13 act? Where should I look to get an accurate
14 picture of 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
19 there. 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 -- 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
5 vacated 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
9 of 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
15 tried to do so for subsequent orders.

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

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

1 most important program in the country, but yet
2 they think that perhaps it's not one where
3 Congress itself needed to impose any real
4 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 -- the CFPB case last term. I
15 don't blame the government at all for making it,
16 but the argument is made that if you decide a
17 case in a particular way, it is going to result
18 in 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
24 that the Solicitor General could -- could
25 address. Maybe that's directed more to her than

1 to you, 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
6 their reply, which are distinguishable for all
7 the reasons Justice Gorsuch has given. I think
8 --

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

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

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

24 There are no other provisions around
25 it that give it meaning like this Court has

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

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

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

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

24 JUSTICE ALITO: Well, it -- it takes
25 maybe -- it takes gumption to take the lead, but

1 maybe it doesn't take very much gumption to try
2 to -- to -- to get the benefit of something that
3 somebody else has done the work to enable you to
4 get.

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

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

20 MR. McCOTTER: True.

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
8 with a lesser number of votes or something and
9 just 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.
13 And they could do that and you don't even have
14 to 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 providers?

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

20 JUSTICE ALITO: Let me not ask whether
21 it's a better -- a better approach but one that
22 Congress is more likely to be enthusiastic
23 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 -- I'll be brief -- but just on
3 the idea that because it's a popular program or
4 something, that that should somehow matter, I
5 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
21 know what the government is spending the money
22 on. And certainly most of the time they don't
23 like 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, this
3 is the amount of the federal universal service
4 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 the --

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
25 necessary or appropriate to carry out its

1 responsibilities."

2 The FDIC, none of these are with
3 limits, any fee which the corporation may be by
4 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
10 costs and expenses. I can go on and on, where
11 agencies are being told levy fees, duties,
12 tariffs.

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

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

1 spent on, as to not be a non-delegation
2 violation.

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

9 On --

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

16 So, yes, they are funding industries.

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

22 JUSTICE SOTOMAYOR: But the --

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

24 JUSTICE SOTOMAYOR: -- administrative
25 costs, they are all related to the programs.

1 And this is related directly to specified
2 programs.

3 MR. McCOTTER: Right, but that would
4 --

5 JUSTICE SOTOMAYOR: So it's doing
6 exactly the same thing.

7 MR. McCOTTER: But that wouldn't be
8 the administrative cost, Your Honor. That would
9 be the actual program itself, funding --

10 JUSTICE SOTOMAYOR: But that's --

11 MR. McCOTTER: -- the whole separate
12 welfare or social welfare program.

13 JUSTICE SOTOMAYOR: But that's exactly
14 what these other agencies are doing.

15 MR. McCOTTER: Well --

16 JUSTICE SOTOMAYOR: They are running
17 programs and services that are being funded in
18 their determination of what's going to meet
19 their obligations.

20 MR. McCOTTER: I think, respectfully,
21 Your Honor, that's just not how they actually
22 work. That's not really what the text says.

23 Some of them may seem a little
24 broader. I think under this Court's National
25 Cable decision, they would need to be limited.

1 This Court already said in that case, 50 years
2 ago, there's a major distinction from delegation
3 purposes from letting an agency set a true fee
4 and letting an agency raise money in the public
5 interest.

6 I think that's a very important point
7 here under current doctrine, as the phrases like
8 "in the public interest" --

9 JUSTICE SOTOMAYOR: Thank you,
10 counsel.

11 MR. McCOTTER: -- just won't work
12 here.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?

14 JUSTICE KAGAN: So one of the things
15 that strikes me, Mr. McCotter, about this case
16 is that when we typically interpret regulatory
17 statutes, sometimes we just interpret them
18 straight up, but to the extent we don't, what we
19 usually do is that we interpret the statutes to
20 limit agency authority.

21 In other words, you know, like we
22 narrowly construe the statute, as in Benzene, or
23 the major questions doctrine is all about doing
24 this. These look like very broad delegations.
25 We can't really believe that's what Congress

1 meant, so we're going to sort of impose some
2 limits.

3 And -- and what you're asking us to
4 do, I think, is kind of the opposite, is like
5 instead of doing that or reading the statute
6 straight up, what you're saying is that we
7 should read this statute as expansively as
8 possible to give the agency as much power as it
9 could possibly be viewed as giving, and all in
10 order to, in the end, blow the statute up.

11 And I think that that's just not a
12 right way to think about the interpretation of
13 regulatory statutes. So, again, this sort of
14 goes back to my -- this statute has plenty in it
15 that imposes limits on what the FCC is doing.
16 And why shouldn't we interpret the statute,
17 which, you know, I think both sides in Gundy
18 thought that -- the one thing that they agreed
19 on was the first thing you do in a -- in a
20 delegation case is interpret the statute.

21 We interpret the statute. There's a
22 lot of limits here. The agency can raise the
23 money that's good enough, but no more to satisfy
24 a pretty -- a pretty clear mandate, which is to
25 provide basic services, those services necessary

1 for health and safety and education, basic
2 services, for people of low-income and -- and
3 rural areas who don't have what a substantial
4 majority of us do have. That's a pretty clear
5 directive to the agency.

6 And that seems to me consistent with
7 the way we should interpret statutes in this
8 context.

9 MR. McCOTTER: So as the en banc
10 decision below said, there are a lot of words
11 here, but there are not a lot of limits,
12 especially when it comes to raising the amount.

13 JUSTICE KAGAN: So I think --

14 MR. McCOTTER: And so I realize we can
15 disagree --

16 JUSTICE KAGAN: I'm just going to
17 interrupt. I'm going to give you time to answer
18 but I'm just going to interrupt. I actually
19 think that the lot -- the "lot of words" here
20 makes it seem as though it's a little bit more
21 loose than it, in fact, is; like the fact that
22 there are six factors and stuff like that.

23 The -- the lot of words are actually
24 masking an extremely clear mandate to the
25 agency. This -- this agency knows what it's

1 supposed to do under this statute, which is
2 exactly what this agency has been doing. This
3 goes back to Mr. Clement's historical point.
4 It's basically what this agency has been doing
5 since the 1930s.

6 MR. McCOTTER: Well, again --

7 JUSTICE KAGAN: Sorry.

8 MR. McCOTTER: Well, sorry. I was
9 going to say, again, remember, the key inquiry
10 here, what is the fundamental object, right,
11 universal service. The FCC gets to define it on
12 an evolving standard.

13 And it's not an extraordinary
14 interpretation to read it as it says, which is
15 that in 254(c) the FCC need only consider the
16 extent to which -- and then it lists some of
17 these factors.

18 And so we read it just straight up.
19 Again, this is not -- respectfully, it's just
20 not an unusual interpretation to say the FCC,
21 sure, they must are consider it. And if they
22 don't, that could be an APA challenge, but we're
23 going to assume they did consider it. And
24 they're not actually substantively limited by
25 these sorts of things.

1 On the list of policies, in Schechter
2 Poultry, there was a similar list of poultry --
3 list of principles -- excuse me, list of
4 policies, including, you know, non- --
5 non-discriminatory provisions. There -- the
6 codes adopted needed to be equitable, things
7 like that, words that may in other contexts have
8 provided enough, but because they're added on
9 with all these other provisions that make clear,
10 Agency, you can go ahead and kind of do what you
11 want here.

12 And just to be clear, we're completely
13 freeing you from the preexisting doctrine. So
14 Mr. Clement said this isn't one of those cases
15 where Congress said, hey, Agency, figure it out.
16 Respectfully, we just disagree. I think that's
17 exactly what happened here.

18 JUSTICE KAGAN: Thank you.

19 CHIEF JUSTICE ROBERTS: Counsel.

20 Justice Gorsuch?

21 Justice Kavanaugh?

22 JUSTICE KAVANAUGH: I did have a few.
23 On accountability, I assume because I haven't
24 heard from you, you don't have any separate
25 problem here with the fact that it's the FCC and

1 that's commonly thought of to be independent,
2 either it's not independent as the government
3 says, or you don't think that's an additional
4 problem; is that correct?

5 MR. McCOTTER: It's perhaps a minor
6 plus factor. We're not raising a separate
7 challenge on that basis, no.

8 JUSTICE KAVANAUGH: Okay. Second, are
9 you asking us to do anything with Skinner?

10 MR. McCOTTER: So the way we interpret
11 Skinner -- I think this is the fair reading of
12 it, given all the cases before and after -- is
13 that the nature of the power at issue does
14 matter. The Court's said that since Wayman.
15 And to the extent the Court went further, all it
16 said was something that we're willing to agree
17 with, although we win either way, which is that
18 taxing is not in a category of one, essentially.
19 It's not some unique specific thing, although
20 historically we think it is, we think that's
21 important, but we don't want to tie the whole
22 case to that point.

23 And so, in our view, at most that's
24 what Skinner said. And so whether you view it
25 as a tax or a fee, we win either way. Skinner

1 doesn't control beyond that.

2 JUSTICE KAVANAUGH: Is your argument
3 that the word "sufficient" is too loose or the
4 back-end objects are too loose or both?

5 MR. McCOTTER: It's not just
6 "sufficient" is too loose. There are many
7 principles in here that are too loose because
8 even if you think they might have some meat on
9 the bones, again, the FCC doesn't have to comply
10 with any particular 254(b) principle.

11 JUSTICE KAVANAUGH: You are arguing
12 "sufficient," the word "sufficient," even if the
13 back-end objects were more specific -- you
14 understand the question?

15 MR. McCOTTER: I think I do.

16 JUSTICE KAVANAUGH: Yeah.

17 MR. McCOTTER: And I -- what I would
18 say is it's not as if we have a statute where
19 Congress said, FCC, please raise money and you
20 can spend up to 8 billion. I think then the
21 reasonable interpretation, as Justice Kagan
22 would say, is, okay, let's kind of tie those two
23 together there and put them, and let's try to
24 avoid a constitutional problem.

25 But here on the back-end spending,

1 it's not like they suddenly have some real
2 objective limits there either.

3 JUSTICE KAVANAUGH: Yeah. And then on
4 your point about limiting relief to the named
5 parties, I guess I'm not understanding that at
6 all because, you know, would not be -- it's not
7 a district court ruling. This ruling would be
8 binding through vertical stare decisis
9 throughout the country.

10 And I assume -- and you want to react
11 to that? I -- I -- I -- I think the named
12 relief thing is -- doesn't help you at all.

13 MR. McCOTTER: Well, so two responses.
14 First, the government's always asking this Court
15 to limit relief to the named parties. For once,
16 they found someone who was willing to agree to
17 it. So it must make some distinction.

18 Second, I think that it's more
19 applicable to the quarters that are kind of
20 already in the hopper. So for all the ones that
21 have already gone, already been approved, as it
22 were, for those, limiting relief to the named
23 parties, especially given that the time limit to
24 bring --

25 JUSTICE KAVANAUGH: Well --

1 MR. McCOTTER: -- FCC challenges --

2 JUSTICE KAVANAUGH: -- let's play this
3 out. We've had this discussion before in past
4 years, the past few years, but if this Court
5 were to say that it's unconstitutional for the
6 FCC to continue in this way, even though the
7 named parties are here before us, my
8 understanding of what the government has said
9 before is we would comply with what the Supreme
10 Court said.

11 MR. McCOTTER: Sure. And I think it's
12 important that -- that they say that, but this
13 is really important --

14 JUSTICE KAVANAUGH: You don't think
15 they would do that?

16 (Laughter.)

17 MR. McCOTTER: I don't think they
18 necessarily have a legal obligation --

19 JUSTICE KAVANAUGH: Really?

20 MR. McCOTTER: -- to do so.

21 JUSTICE KAVANAUGH: What's -- what's
22 your case for that?

23 MR. McCOTTER: Well, the -- the case
24 is that the judgment applies to the parties
25 only, specifically if the Court has already said

1 so, which again --

2 JUSTICE KAVANAUGH: What's your --
3 what's your response to vertical stare decisis
4 and how that's traditionally been understood in
5 the country?

6 MR. McCOTTER: So that's why I say I
7 think the limiting it to the named parties is
8 really most relevant for all the challenges that
9 are already in the hopper, to say we're not
10 going to unscramble all these statutes in the
11 past, except for maybe these few named parties.
12 Going forward, as people might bring new
13 challenges -- and as I said in response to
14 Justice Alito, I'm not convinced they will --
15 but even if they did, then, okay, well, that
16 plays out well into the future. By then we
17 think if the Court has actually reached this
18 point, Congress would have done something --

19 JUSTICE KAVANAUGH: The --

20 MR. McCOTTER: -- text forwardly.

21 JUSTICE KAVANAUGH: Sorry to prolong
22 it. The premise of what you're saying right
23 there is the FCC is going to say we don't care
24 what the Supreme Court said about the program.
25 And I'm not sure that premise is -- is -- is

1 accurate.

2 MR. McCOTTER: I think what they --
3 sorry if I'm not being clear. I'm saying for
4 the -- for the quarters that have already been
5 challenged, the past ones --

6 JUSTICE KAVANAUGH: Right.

7 MR. McCOTTER: -- I think they would
8 say, look, the Supreme Court has ruled in your
9 favor, Respondents, and we will address that as
10 necessary, as to you. Going forward, though, I
11 do think that limiting it to the named parties
12 is less effective. That's why we list other
13 options, though.

14 I'm not saying that that's like a
15 cure-all, just to be clear. I think it is an
16 important limitation, especially for the suits
17 already filed.

18 JUSTICE KAVANAUGH: Thank you very
19 much.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 JUSTICE BARRETT: Mr. McCotter, I just
23 want to clear something up about the 254(b)
24 universal service principles. We've been going
25 round and round and round about whether these

1 are mandatory factors or not. So I just want to
2 be sure that I understand your position.

3 So it begins under (b) by saying that
4 the joint board and the Commission shall base
5 policies for the preservation and advancement of
6 universal service on the following principles.
7 And then each one of those principles has a
8 "should."

9 Is that your problem, that they say
10 "should"? And would you feel differently if the
11 principles were worded that quality services be
12 available at just, reasonable, and affordable
13 rates?

14 MR. McCOTTER: That's one of the
15 problems, is that it says "should." But I
16 think, more fundamentally, the problem is, as
17 the FCC itself has said for 30 years now almost,
18 that any one of these --

19 JUSTICE BARRETT: Okay, but --

20 MR. McCOTTER: -- problems --

21 JUSTICE BARRETT: -- put aside --

22 MR. McCOTTER: All right.

23 JUSTICE BARRETT: This is a legal
24 question. This is a statutory interpretation
25 question. So the FCC can say that all it wants,

1 but we still have to interpret the statute,
2 right? So we're not bound by what the FCC says
3 about its own authority.

4 So, return to the question.

5 MR. McCOTTER: True, although I think
6 the fact that they've interpreted it the same
7 way for 30 years --

8 JUSTICE BARRETT: Okay. Okay.

9 MR. McCOTTER: -- is an indication.

10 JUSTICE BARRETT: Okay, I said, but
11 don't -- don't fight the premise.

12 MR. McCOTTER: All right. And so even
13 then, let's say that they all are mandatory. We
14 still run into the problem that I think Justice
15 Gorsuch was getting at, which is that these
16 terms, especially when you have them fighting
17 against each other with no rules for how to
18 balance them or pick and choose between them,
19 it's just like Schechter Poultry. It's a lot of
20 policies, some of which of which may actually
21 have some meaning in some sense, but they're all
22 fighting against each other, and the FCC gets to
23 kind of pick and choose which ones are more --
24 more important.

25 JUSTICE BARRETT: Okay. And then

1 second question. We've talked about the
2 difficulty of having judicially manageable
3 standards in this area. And when you and I
4 talked before, we were talking about a cap, and
5 you said a cap would solve the problem.

6 So is that a manageable principle,
7 that you would be happy -- you said, well, then
8 at least Congress would have decided the policy
9 for itself and put a limit on it, so we know if
10 it said 3 trillion, 3 billion, whatever, I
11 understood you to tell me before that would
12 solve the problem.

13 MR. McCOTTER: Absolutely.

14 JUSTICE BARRETT: And so that would be
15 the intelligible principle?

16 MR. McCOTTER: If we're under the
17 intelligible principle, yes --

18 JUSTICE BARRETT: Yeah.

19 MR. McCOTTER: -- that's -- that's
20 more than sufficient. And I think it's
21 noteworthy that --

22 JUSTICE BARRETT: And we wouldn't have
23 to worry about anything else in the statute, not
24 this 254(b) list or anything like that? Just
25 the money would do it?

1 MR. McCOTTER: Correct. Although we
2 win even if you don't think that's the
3 requirement.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 JUSTICE JACKSON: So you've said
7 several times that you're not asking for a
8 special rule for taxes versus fees, but you
9 began today by saying that this case is about
10 taxation without representation. And you say
11 there has to be a cap because the amount of
12 public revenue that is to be raised via, the --
13 you know, a mechanism is a legislative
14 prerogative and can't be delegated.

15 So it seems to me that you are relying
16 to some extent on the characterization of this
17 as a tax.

18 MR. McCOTTER: So to be clear, we're
19 making alternative arguments. We think it is a
20 tax. We think that --

21 JUSTICE JACKSON: Does that matter?

22 MR. McCOTTER: -- it should matter.
23 But even --

24 JUSTICE JACKSON: Does it matter?

25 MR. McCOTTER: But if even if you

1 disagree --

2 JUSTICE JACKSON: No, I understand. I
3 just understand whether your delegation argument
4 in substantial part is hinging on your point
5 that the legislature has the power to tax and it
6 can't be handed off, and unless the legislature
7 has a cap that it says this is the amount that
8 you can raise, it is doing something
9 unconstitutional because of that structure?

10 MR. McCOTTER: It matters in the sense
11 that we know taxing is a strictly and
12 exclusively legislative power. So we know that
13 this is something Congress itself has to set the
14 objective rule on.

15 It's not necessarily that they have a
16 cap in the numerical sense. In footnote 7 of
17 our opening --

18 JUSTICE JACKSON: No, I understand --

19 MR. McCOTTER: -- of our brief there's
20 an example.

21 JUSTICE JACKSON: -- but you -- but --
22 but the thought is that -- that to the extent
23 that you believe this is a tax, there has to be
24 a cap set by Congress, is your basic point.

25 Now, let me just ask you this:

1 Mr. Clement says, okay, this statute is really
2 not about raising public revenue. It is about
3 providing universal services. So if we
4 disagree, if this comes down to how we're
5 characterizing this statute, and we disagree
6 with your view that this is a public
7 revenue-raising vehicle and, therefore, Congress
8 has to put a cap on it, do you lose? I mean --

9 MR. McCOTTER: No.

10 JUSTICE JACKSON: -- why must there be
11 a cap if this is not a tax?

12 MR. McCOTTER: So, there -- again,
13 there doesn't need to be a cap in the numerical
14 sense.

15 JUSTICE JACKSON: No, I understand.

16 MR. McCOTTER: There needs to be a
17 rule.

18 JUSTICE JACKSON: Well, why if this is
19 not a tax? Why can't Congress develop a policy
20 that says we would like to have the following
21 thing happen? We would like to have everybody
22 in rural places throughout the country,
23 everywhere, have this kind of service?

24 And as Mr. Clement said, we don't
25 really care about how much it costs to do that.

1 We are trying to get to this objective. And you
2 would come back and say: Ah, but you have to
3 tell us, you know, there has to be a cap on the
4 amount of money that you have to raise for this.
5 And Congress says: But that's not our
6 objective. This is not about raising money.
7 It's about providing a service; however much
8 that costs.

9 What's unconstitutional about that?

10 MR. McCOTTER: It's still domestic
11 revenue raising, as Professor McConnell
12 describes it or as this Court last year in CFPB
13 described it. It's raising public moneys. And
14 when you have that sort of exclusive legislative
15 power, there needs to be a policy set by
16 Congress.

17 JUSTICE JACKSON: All right.

18 MR. McCOTTER: The policy can't be
19 vague.

20 JUSTICE JACKSON: Let me just ask one
21 more question. I know we're running out of time
22 here.

23 Is it your first-line position that we
24 should not be using the intelligible principle
25 standard? Are you saying -- are you encouraging

1 us -- I know you say you win under that
2 standard, but is your first point that we should
3 be doing something else?

4 MR. McCOTTER: Yes. The Court should
5 at the very least return to the intelligible
6 principle that I think J.W. Hampton itself laid
7 out, which says that Congress must set the rule
8 that shall prevail. And as our argument is,
9 there is no rule that shall prevail when it
10 comes to the amount of money.

11 JUSTICE JACKSON: So you're not doing
12 important subjects or something like that, is --
13 is that what you mean? Is that the test that
14 you're -- I -- I'm just trying to understand
15 what it is that you would have us do if we don't
16 do intelligible principle?

17 MR. McCOTTER: So we would say that
18 the proper framework is what this Court applied
19 for 150 years, if it's a strictly and
20 exclusively legislative power, then Congress
21 itself must set the policy. It can leave only
22 fact-finding and details to the executive.

23 And as I started off today saying, the
24 amount of money to raise for an enormous social
25 welfare program is not a minor detail to be left

1 to someone else.

2 JUSTICE JACKSON: And -- and you don't
3 see the risk that we judges would be overriding
4 popular -- and I -- I know you don't care that
5 it's popular -- but popular in the sense that
6 Congress has enacted it, programs?

7 I mean, Mr. -- Mr. Clement says that
8 this could be the aggrandizement power by the
9 courts if we don't have a really clear standard
10 for determining when we come in and say this is
11 unconstitutional versus not?

12 MR. McCOTTER: Well, I think -- he
13 apparently prefers an aggrandizement by Article
14 II executive. And Congress was more than happy
15 to let that happen when it comes to taxes
16 because nobody wants to take responsibility for
17 that.

18 So I think if we care about kind of
19 democratic accountability I'll return to what
20 Judge Newsom said in his concurrence, with each
21 delegation here, each new layer, we move further
22 and further away from that democratic
23 accountability.

24 JUSTICE JACKSON: Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 General Harris, rebuttal?

3 REBUTTAL ARGUMENT OF SARAH M. HARRIS

4 ON BEHALF OF THE PETITIONERS IN CASE 24-354

5 GENERAL HARRIS: Thank you. Just want
6 to go over three problems for Respondents.

7 One, I candidly don't know what the
8 rule is at this point. On the one hand, there
9 is an anomalous rule that is foreign to the
10 non-delegation precedents apparently for taxes,
11 fees, and other revenue-raising actions, and I
12 don't know how it can possibly be squared as
13 something that preserves a separation of powers.

14 When saying that an agency can raise
15 up to 1 -- \$1 trillion with no further
16 restrictions is somehow not a non-delegation
17 problem, but tying what an agency can extract
18 from a particular set of people, tied to the
19 specific needs of a program is somehow
20 constitutionally unconscionable.

21 I think there is a grave risk that if
22 the Court went down that path, the Court would
23 not be revitalizing the non-delegation doctrine
24 or giving it meaningful teeth. It will just
25 crop up case by case new, exclusively

1 legislative powers, what is the new sort of
2 limit that is going to be reverse-engineered for
3 that one? That is chaos.

4 Second, Respondent is ignoring the
5 very real constraints in Section 254. This is a
6 little bit of an odd case in which the
7 government is fervently insisting that the terms
8 of the statute are mandatory, and yet
9 Respondents won't take yes for an answer, that
10 it is really, really a constraint.

11 And you know that 254 is mandatory for
12 a couple of reasons, not just the fact that 254
13 starts with "shall," as Justice Barrett and
14 others have pointed out, but the fact that this
15 is a highly repetitive statutory scheme. So all
16 of the things in Section 254(b) actually recur
17 elsewhere in the statute. 254(d) is a "shall"
18 with respect to the equitable and
19 non-discriminatory rates.

20 Other parts of the program in 254(h)
21 with respect to how the rural program is
22 supposed to work or how the libraries are
23 supposed to be funded. Those are shall's.

24 And so there is no doubt that this is
25 a mandatory system. The FCC has treated it as

1 such, but the question is what the statute
2 means. It is mandatory.

3 Third of all, just the consequences of
4 Respondents' position are really troubling. The
5 -- the reply brief 8 to 9 examples are truly the
6 tip of the iceberg. It is a little bit strange
7 that Respondents think that it is perfectly fine
8 if there is some sort of fee system for the
9 agency to decide how much its own costs or
10 expenses are going to be, that that is not sort
11 of the -- that is not sort of inviting the
12 agency to raise whatever it sort of feels like,
13 but that there is a problem when Congress is
14 tethering the costs or fees or rates not to what
15 the agency feels like doing to fund its own
16 enforcement priorities and other things that
17 it's doing, but instead to meet defined,
18 external goals that Congress has required the
19 program to meet against a historical backdrop.
20 That is a very, very strange position to be in.

21 Now, on top of that, that's just the
22 problem with a different rule for fees or taxes
23 or just looking at statutory analogs for revenue
24 raising. That really is the tip of the iceberg
25 because Respondents' position also seems to have

1 other built-in features that jeopardize, sort of
2 create a mindfield for the U.S. code, one of
3 which is if the idea is you can't ever have
4 balancing of factors in a statute without
5 running into a non-delegation problem, guess
6 what? Agencies are delegated with a lot of
7 balancing of factors. It doesn't mean they have
8 no constraints at all. It means they have to do
9 both.

10 So this Court should not stray from
11 the path. Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel. The case is submitted.

14 (Whereupon, at 12:50 p.m., the case
15 was submitted.)

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