



FCC v. Consumers' Research: High Court Hears Challenge to Universal Service Fund

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In the [Communications Act of 1934](#), Congress directed the Federal Communications Commission (FCC) to [make](#) available, “so far as possible, to all the people of the United States,” wire and radio communications services “with adequate facilities at reasonable charges.” Pointing to this language, some courts have called universal service “a [basic goal](#) of” Congress’s “telecommunications regulation.”

Today, the FCC’s authority to promote “universal service” is governed in part by [47 U.S.C. § 254](#). Enacted as part of the [Telecommunications Act of 1996](#), Section 254 “[codified](#) the [FCC’s] long-standing commitment to ensuring universal service,” while requiring the FCC “to [restructure](#) [its] universal service support mechanisms.” Relying on Section 254, the FCC requires providers of telecommunications services to make [contributions](#) to a Universal Service Fund (USF). The USF then [subsidizes](#) a set of [programs](#) designed to make telecommunications services available and affordable throughout the country. The FCC has [appointed](#) a non-profit entity called the [Universal Service Administrative Company](#) (USAC) to administer the USF and its programs. Each quarter, USAC makes [projections](#) that [the FCC](#) uses to calculate a “[contribution factor](#)”—the percentage of telecommunications carriers’ projected revenues that the carriers must pay to the USF.

After the FCC and USAC finalized the USF contribution factor for the first quarter of 2022, several organizations and individuals—led by [Consumers’ Research](#), a non-profit organization that seeks “to increase understanding of issues of concern to consumers”—[challenged](#) the constitutionality of the procedure for funding the USF in court. In July 2024, the en banc U.S. Court of Appeals for the Fifth Circuit (U.S. Courts of Appeals will be referenced per their regional or jurisdictional short form hereafter) [held](#) that the funding procedure is unconstitutional on the ground that the “[combination](#) of delegations, subdelegations, and obfuscations” in the funding process “offends [Article I, § 1](#) of the Constitution.” The FCC appealed to the Supreme Court, [arguing](#) in part that the decision conflicts with cases [Consumers’ Research](#) brought in other circuits and lost. The Supreme Court [decided](#) to review the Fifth Circuit’s judgment and is expected to issue an opinion in the case this summer.

This Legal Sidebar describes the Fifth Circuit’s decision and the issues before the Supreme Court. It also raises some related considerations for Congress.

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The USF's Funding Mechanism

Under [Section 254\(d\)](#) of the Communications Act, “every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the [FCC] to preserve and advance universal service.” Other provisions in Section 254 direct the FCC to base its universal service support on certain [enumerated principles](#) and to provide specified support to eligible [schools, libraries, and rural health care providers](#).

To implement Section 254, the FCC issued [regulations](#) requiring telecommunications carriers to pay a quarterly USF contribution that is determined by applying the applicable contribution factor to the carriers’ projected revenues. The [regulations](#) provide that the contribution factor depends in part on USAC’s projections of the quarterly demand and administrative expenses for the USF programs.

Each quarter, USAC [submits](#) its projections to the FCC. USAC also [compiles](#) the covered carriers’ total projected revenues. The FCC publishes those numbers, and determines the quarterly contribution factor based on the ratio of projected program expenses to projected carrier revenues. The FCC [reserves](#) the right to change USAC’s projections, but if the agency takes no action within fourteen days of publication, the projections and associated contribution factor are “[deemed approved](#) by the Commission.” The contributing carriers are [permitted](#), but not required, to pass the cost of their USF contributions through to their customers, and most do.

The Legal Challenge to the Funding Mechanism

Consumers’ Research [petitioned](#) the Fifth Circuit to review the USF contribution factor for the first quarter of 2022. The group [argues](#) that the USF funding mechanism violates two limits on the extent to which Congress may delegate its constitutional powers.

First, Consumers’ Research [argues](#) that Section 254 is an unconstitutional delegation of Congress’s legislative power to the FCC. [Article I, Section 1](#) of the Constitution provides that “all legislative Powers . . . shall be vested in a Congress of the United States.” Courts interpreting this provision have developed a legal doctrine, known as the [nondelegation doctrine](#), that provides that Congress [may not](#) “transfer to another branch ‘powers which are strictly and exclusively legislative.’” The nondelegation doctrine does, however, permit Congress to “[confer substantial discretion](#) on executive agencies to implement and enforce the laws.” Accordingly, a delegation of authority from Congress to the executive branch is constitutional if Congress provides “an [intelligible principle](#)” that guides the use of the discretion Congress is delegating.

In its challenge to the USF funding mechanism, Consumers’ Research argues that [47 U.S.C. § 254](#) lacks any intelligible principle because the statute “[contains](#) no objective limits on the amounts raised, imposes aspirational-only principles, and lets the FCC redefine its subject matter and add new principles at will.” Consumers’ Research also challenges the intelligible principle test itself, [contending](#) that, under the original understanding of nondelegation, Congress may not merely announce vague aspirations and hand an agency power to adopt rules to effectuate them. In addition, Consumers’ Research argues that the delegation at issue raises “[special concerns](#)” because USF contributions are taxes, and taxation implicates a “[quintessentially](#) legislative power.”

The FCC contends that Section 254 satisfies the intelligible principle test because the statute [requires](#) that universal service support be based on six enumerated principles, [specifies](#) who must pay universal service contributions, and [identifies](#) the purposes for which the FCC must use the contributions. In the agency’s view, the intelligible principle test is the [proper](#) standard and is [consistent](#) with the Constitution’s original meaning. The FCC also [argues](#) that the Supreme Court has [held](#) that the intelligible principle test applies to challenges to delegations of the taxing power the same way it applies to any other delegation challenge.

The second limit on delegations [relied on](#) by Consumers’ Research—the private nondelegation doctrine—restricts *private* actors’ ability to exercise congressional power. The private nondelegation doctrine stems from the Supreme Court’s decision in *Carter v. Carter Coal Company*, in which the Court held a statutory provision unconstitutional because it allowed the majority of private coal producers in a region to impose wage and hour regulations on all coal producers in that region. The challenged statute, the Court explained, [delegated power](#) “not . . . to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.” In the Court’s view, this delegation to private actors [effected](#) “a denial of rights safeguarded by the due process clause of the Fifth Amendment.” In a later case, however, the Supreme Court [clarified](#) that the private nondelegation doctrine does not prohibit private actors from merely providing input to government actors. After *Carter Coal*, Congress enacted a new law that gave a [commission](#) power to impose price regulations, with coal producers “[operat\[ing\]](#) as an aid to the Commission.” The Supreme Court [rejected](#) a constitutional challenge to the updated statutory scheme, [holding](#) that there was no unconstitutional delegation to industry members because the commission was ultimately responsible for imposing the regulations.

Consumers’ Research [argues](#) that the USF funding mechanism violates the private nondelegation doctrine because the FCC delegated the government’s power to USAC, a private entity. In Consumers’ Research’s [view](#), USAC makes the determinations that dictate the amount of USF contributions, and the FCC merely performs ministerial [arithmetic](#) before approving a contribution factor.

The FCC [disagrees](#). It [argues](#) that USAC provides only non-binding projections of universal service program expenses and carrier revenues, and that the projections [must be made](#) in accordance with the FCC’s regulations. The FCC contends that such non-binding advice is [constitutionally permissible](#).

A [previous legal sidebar](#) provides additional analysis of the parties’ arguments.

The Fifth Circuit’s Decision

In March 2023, a three-judge panel of the Fifth Circuit [disagreed](#) with Consumers’ Research’s arguments and denied its petition for review. Rejecting both nondelegation arguments, the panel concluded that “Congress provided the FCC with numerous [intelligible principles](#) for its administration of the USF” and that the FCC [has not violated](#) the private nondelegation doctrine because USAC makes only nonbinding proposals, subject to the FCC’s rules and ultimate review. After the panel issued its decision, however, the Fifth Circuit [granted](#) Consumers’ Research’s request to hear the case [en banc](#). As a result, the original panel’s decision was withdrawn and the case was reheard by [all of the active Fifth Circuit judges](#).

The en banc court reversed the panel’s decision and [concluded](#) that the USF funding mechanism “offends Article I, § 1 of the Constitution.” The court based its conclusion on four underlying legal determinations.

First, the en banc Fifth Circuit [determined](#) that the power to require payment of USF contributions is an exercise of the taxing power. In reaching this determination, the court [rejected](#) the FCC’s contention that USF contributions are fees. Agencies [can exact](#) fees from regulated entities in exchange for providing a benefit. The Fifth Circuit [held](#), however, that USF contributions are not a fair approximation of the benefits conferred by the USF; are often passed on to customers, rather than borne by the parties the FCC regulates; and provide benefits to a different [group of entities](#) than the telecommunications carriers and consumers paying the contribution.

Second, the Fifth Circuit [concluded](#) that 47 U.S.C. § 254 “may” be an unconstitutional delegation of Congress’s legislative power to the FCC because the statute “purport[s] to confer upon FCC the power to tax without supplying an intelligible principle to guide FCC’s discretion.” The court [acknowledged](#) that Section 254 provides that USF funding should be [sufficient](#) to preserve and advance universal service and that USF policies should be aimed at making telecommunications services [available](#) at affordable rates.

The court, however, [viewed](#) these directions as “aspirational” and found the statutory definition of “universal service” to be “amorphous.” It therefore [doubted](#) that Section 254 supplies an intelligible principle guiding how much money the FCC may exact to fund the USF.

Third, the court [concluded](#) that the FCC “may” have unconstitutionally delegated “government power to private entities without express congressional authorization.” Here, the court [determined](#) that the USAC had final say over the contribution amount because “FCC regulations provide that USAC’s projections take legal effect without formal FCC approval.” The court [rejected](#) contentions that the FCC independently reviews the contribution amount and that USAC merely aggregates information pursuant to the FCC’s regulations—deciding that the record [showed](#) the FCC merely rubber stamps USAC’s work.

Last, despite its skepticism about the constitutionality of both delegations, the court [declined](#) to decide whether either Congress’s delegation to the FCC or the FCC’s delegation to USAC would, standing alone, be unconstitutional. Instead, the Fifth Circuit [held](#) that the combination of Congress’s delegation of taxing authority to the FCC and the FCC’s subdelegation to a private entity found no support in [history or tradition](#), and concluded that the “[double-layered](#)” delegation at issue in the case is unconstitutional.

Seven Fifth Circuit judges [dissented](#). The dissenting judges [argued](#) that the decision creates a split with the [Sixth](#), [Eleventh](#), and [D.C.](#) Circuits, each of which has rejected a constitutional challenge to the USF funding mechanism. All seven dissenting judges joined an [opinion](#) concluding that 47 U.S.C. § 254 provides an intelligible principle, that USAC performs only permissible ministerial functions, and that USF contributions are fees, rather than taxes. Five of the dissenting judges also joined a separate [opinion](#) arguing that the majority’s “combination theory”—the reasoning that two constitutional delegations, when combined, can violate the constitution—is novel and is not supported by the Supreme Court’s nondelegation doctrine cases.

The Appeal to the Supreme Court

The FCC [petitioned](#) the Supreme Court to review the Fifth Circuit’s decision. Its petition raised three questions for the Court to consider: (1) whether 47 U.S.C. § 254 violates the nondelegation doctrine; (2) whether the FCC’s use of USAC violates the private nondelegation doctrine; and (3) whether the combination of Congress’s delegation in 47 U.S.C. § 254 and the FCC’s delegation to USAC violates the nondelegation doctrine. Several private entities and associations that had previously intervened in the litigation filed their own [petitions](#) raising the same three questions.

Although Consumers’ Research won at the Fifth Circuit, it [did not oppose](#) the [petitions](#) requesting the Supreme Court’s review. Consumers’ Research had brought similar challenges to the USF funding mechanism in the [Sixth](#) and [Eleventh](#) Circuits and had lost both cases. The group [agreed](#) that the Supreme Court should review the Fifth Circuit’s decision to resolve the circuit split. Fifteen state attorneys general and the Arizona legislature also filed a [brief](#) supporting the en banc Fifth Circuit’s view of the merits but nevertheless asking the Supreme Court to take the case.

In November 2024, the Supreme Court [agreed](#) to hear the appeal. In its order granting review, the Court [added](#) a fourth question for consideration: “whether this case is moot in light of the challengers’ failure to seek preliminary relief before the Fifth Circuit.” A case becomes [moot](#)—and federal courts lose jurisdiction to decide it—if at any point during the proceedings the parties lack an “[actual and concrete](#)” dispute that has “direct consequences” for the parties to the case.

Here, Consumers’ Research challenged the USF contribution factor for the [first quarter of 2022](#) and did not request any preliminary order barring collection of the required payments. The Fifth Circuit [briefly considered](#) whether money paid as a USF contribution can be recovered through litigation and, if not, whether Consumers’ Research’s challenge is moot. The Fifth Circuit concluded that a challenge to the

FCC’s system for determining contributions is “capable of repetition, yet evading review”—an exception to the mootness doctrine—but the Supreme Court reraised the mootness question.

The FCC, all of the private petitioners, and Consumers’ Research responded to the Court’s question by arguing that this case remains live. All of those parties agree that Consumers’ Research’s challenge is capable of repetition, yet evading review. If the Court disagrees with the parties and determines the case is moot, the Court may vacate the Fifth Circuit’s opinion based on the mootness determination and likely will not address the merits of the parties’ constitutional arguments.

The Court heard oral argument on March 26, 2025. No Justice raised mootness during the argument. The Court will likely issue a decision this summer.

Congressional Considerations

Several parties—including some Members of Congress—submitted briefs to the Supreme Court arguing that the programs funded by the USF mechanism that Consumers’ Research is challenging serve important functions, particularly by promoting broadband access in schools, libraries, and rural areas, including rural healthcare providers. If the Supreme Court were to hold that the current system for funding the USF is unconstitutional, Congress could continue the fund’s operation by amending Section 254 to create a new funding mechanism that is less vulnerable to nondelegation challenges. For example, Congress could limit the FCC’s discretion over USF contributions by enacting a formula dictating how contributions must be calculated. Congress could address the private nondelegation doctrine issue by requiring the FCC to play a more active role in contribution calculations. The Fifth Circuit proposed that “Congress could obviate the constitutional problem by simply ratifying USAC’s decisions.” Alternatively, Congress could create new or different programs to promote universal service or direct the FCC to reform or cease universal service support.

The consequences of the Supreme Court’s decision in this case could also sweep beyond Section 254 and the USF. Some Supreme Court Justices have argued that the intelligible principle test permits excessive delegations of power and is not grounded in the original meaning of the Constitution. Amici, including the Chamber of Commerce of the United States of America, have contended that Consumers’ Research’s case presents an opportunity for the Court to reconsider that test. Some commentators have argued that if the Court decides to change the test governing the nondelegation doctrine, challenges to congressional directives to executive and judicial actors could proliferate. In that event, Congress could consider whether to amend laws that could be subject to such challenges. For example, another CRS report discusses recent challenges to certain statutes delegating authority to the President to set tariffs.

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