

# The COMPUTER & INTERNET *Lawyer*

Volume 42 ▲ Number 10 ▲ November-December 2025

Ronald L. Johnston, Arnold & Porter, Editor-in-Chief

## U.S. Supreme Court Declares Universal Service Fund Constitutional, Reversing Fifth Circuit Opinion

**By Edgar Class, Diane Holland, Thomas M. Johnson, Jr., Kevin G. Rupy, Joshua S. Turner and Stephanie Rigizadeh**

The U.S. Supreme Court has affirmed, in *FCC v. Consumers' Research* (*Consumers' Research*),<sup>1</sup> the constitutionality of the funding mechanism for the Federal Communications Commission's (FCC or Commission) Universal Service Fund (USF). Overturning a previous en banc decision<sup>2</sup> by the U.S. Circuit Court of Appeals for the Fifth Circuit, the 6-3 Supreme Court opinion held that the FCC's USF funding mechanism does not violate the Constitution's nondelegation doctrine.

The Supreme Court's finding also resolves a split among the circuit courts of appeals regarding nearly identical challenges brought by the same petitioners in 2023. The Supreme Court's *Consumers' Research* decision allows the Commission's \$9 billion annual USF mechanism to continue providing access to affordable telecommunications to consumers, including low-income

families and those in high-cost areas, as well as schools, libraries, and health care providers.

### BACKGROUND

The FCC's USF funding mechanism stems from the Telecommunications Act of 1996, when Congress replaced then-existing implicit cross-subsidies with "universal service" and explicit support mechanisms designed to be administered in a competitively neutral manner. The FCC previously implemented Section 254 of the Communications Act, as amended, to provide for every telecommunications carrier that provides interstate telecommunications services to contribute to the USF based on interstate and international end-user revenues, and for the Universal Service Administrative Company (USAC), an independent not-for-profit corporation created by the Commission, to administer the universal service programs.

The *Consumers' Research* Supreme Court ruling follows the Fifth Circuit's July 2024 decision, which found the USF funding mechanism violated the Legislative Vesting Clause of the Constitution.<sup>3</sup> Specifically, the

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The authors, attorneys with Wiley Rein LLP, may be contacted at [eclass@wiley.law](mailto:eclass@wiley.law), [dgholland@wiley.law](mailto:dgholland@wiley.law), [tmjohnson@wiley.law](mailto:tmjohnson@wiley.law), [krupy@wiley.law](mailto:krupy@wiley.law), [jturner@wiley.law](mailto:jturner@wiley.law) and [srigizadeh@wiley.law](mailto:srigizadeh@wiley.law), respectively.

# Universal Service Fund

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Fifth Circuit concluded that Section 254 impermissibly delegates legislative power to the FCC. Furthermore, the Fifth Circuit held that the FCC may have impermissibly delegated taxing power to USAC, a private entity.

The Fifth Circuit decision, reversing its prior three-judge panel decision, created a circuit split following similar challenges in the U.S. Courts of Appeals for the Sixth and Eleventh Circuits. On September 30, 2024, the FCC filed a writ of certiorari at the Supreme Court.

## THE SUPREME COURT CONSUMERS' RESEARCH DECISION

Writing for the majority, Justice Kagan explained that the USF funding mechanism, through Congress' delegation to the FCC or the Commission's delegation to USAC, does not violate the Constitution's nondelégation doctrine. Analyzing the specific circumstances of the USF funding mechanism under Supreme Court precedent, the Court held that "[n]othing in those arrangements, either separately or together, violates the Constitution."

First, the Court emphasized that Congress, via Section 254, properly delegated authority for the USF funding mechanism to the FCC. The Court stated that while the FCC exercises significant discretion in carrying out the USF contribution scheme, such discretion is "tethered to legislative judgments about the scope and content of the universal-service program." In making this determination, the Court explained that Congress "imposed ascertainable and meaningful guideposts for the FCC to follow when carrying out its delegated function of collecting and spending contributions from carriers." Specifically, the Court concluded that "when the FCC carries out Congress's century-old commitment to universal service, the statutory policy is clear and the statutory boundaries specific."

Second, the Court explained that "the Commission's transfer of accounting functions to the Administrator [USAC] offers no reason for holding the universal-service contribution scheme invalid." Throughout the USF funding mechanism, the Court noted, the Commission remains "the final authority." Subsequently, "[t]he Administrator, following the FCC's rules, makes recommendations." Nevertheless, "[i]n every way that matters to the constitutional inquiry, the Commission, not the Administrator, is in control."

Ultimately, the Court found that "the work of Congress and the Commission in establishing universal-service programs has led to a more fully connected country . . . while leaving fully intact the separation of powers integral to our Constitution."

Justice Gorsuch's dissent, joined by Justices Thomas and Alito, argued that the USF contribution scheme amounts to an unconstitutional transfer of legislative (taxing) power to the FCC – and even further, to a private entity (USAC). The dissent stressed that these "contributions" function like a tax because they are compulsory payments used to fund broad social programs (e.g., rural broadband, schools, and hospitals) and that, under the Constitution, only Congress has the authority to impose taxes. The dissent argued that because Section 254 impermissibly delegates Congress's taxing power to the FCC, that should have been sufficient to affirm the Fifth Circuit's opinion.

## FCC AND CAPITOL HILL REACTION

In the hours following the *Consumers' Research* release, all three FCC Commissioners issued supportive statements on the Supreme Court decision. FCC Chair Brendan Carr noted<sup>4</sup> that "the FCC's universal service program has played a key role in expanding connectivity and Internet service to Americans in communities across the country." Chairman Carr added that the decision presents "an opportunity to turn the FCC's focus towards the types of reforms necessary to ensure that all Americans have a fair shot at next-generation connectivity." Commissioner Anna M. Gomez opined<sup>5</sup> that the decision provides Congress "with the clarity and confidence it needs to continue to pursue a bipartisan, bicameral solution to protect this vital program." Newly confirmed Commissioner Olivia Trusty described<sup>6</sup> universal service as "the cornerstone of the FCC's mission."

On Capitol Hill, lawmakers on both sides of the aisle echoed those perspectives. Senators Deb Fischer (R-NE) and Ben Ray Lujan (D-NM), leaders of the USF Working Group, said<sup>7</sup> in a joint statement that they are "encouraged by the Supreme Court's ruling" and "look forward to working together to focus on long-term solutions for the USF, evaluate broadband programs, and help connect unserved and underserved communities across America."

Additionally, Representatives Richard Hudson (R-NC) and Brett Guthrie (R-KY), House Committee on Energy and Commerce leaders, noted<sup>8</sup> that the decision allows the Committee "turn its attention to reforming the USF so it can continue to provide every American with access to the connectivity they need to participate in the 21st century economy."

## Notes

1. [https://www.supremecourt.gov/opinions/24pdf/24-354\\_0861.pdf](https://www.supremecourt.gov/opinions/24pdf/24-354_0861.pdf).
2. <https://www.ca5.uscourts.gov/opinions/pub/22/22-60008-CV2.pdf>.

3. U.S. Const. art. I, § 1.
4. <https://docs.fcc.gov/public/attachments/DOC-412494A1.pdf>.
5. <https://docs.fcc.gov/public/attachments/DOC-412481A1.pdf>.
6. <https://docs.fcc.gov/public/attachments/DOC-412504A1.pdf>.
7. <https://www.fischer.senate.gov/public/index.cfm/news?ID=C5D1E2F1-25E3-4C47-8044-38C50918120C>.
8. <https://energycommerce.house.gov/posts/chairmen-guthrie-and-hudson-issue-statement-after-the-supreme-court-upheld-the-constitutionality-of-the-universal-service-fund>.

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