

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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

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16 - - - - -
17 Washington, D.C.
18 Wednesday, March 26, 2025

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

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24
25

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8 Respondents.

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

2 (10:16 a.m.)

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

7 General Harris.

8 ORAL ARGUMENT OF SARAH M. HARRIS

9 ON BEHALF OF THE PETITIONERS IN CASE 24-354

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

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

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

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

25 Fourth, Congress prescribed how to

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

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

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

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

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

1 contribution fee. But FCC itself reviews,
2 publishes, and adopts the fee for it to take
3 effect. That is a basic delegation of
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 the FCC?

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

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

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

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

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

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

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

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

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

13 JUSTICE THOMAS: And those have no
14 limits and -- or no rates?

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

23 And, again, I'll just point out it's a
24 little perverse in two senses to think that you
25 can cure a non-delegation problem and give no

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

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

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

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

1 in Section 151 of the Act that harks back to
2 1934.

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

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

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

23 CHIEF JUSTICE ROBERTS: Well, what if
24 the law said the level of service that the --
25 should be afforded is -- is service that is

1 fair? Would that present a constitutional
2 problem?

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

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

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

23 GENERAL HARRIS: It could be a problem
24 or it could be --

25 CHIEF JUSTICE ROBERTS: And it -- you

1 would look -- in the -- in a particular context
2 or something, but --

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

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

23 And again, that is very consistent
24 with the highly detailed nature of 254 in this
25 particular context, which is providing much more

1 than just abstract rates.

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

11 And --

12 JUSTICE JACKSON: Can you speak to the
13 combination theory or the combination argument?

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

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

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

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

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

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

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

1 JUSTICE JACKSON: Let me ask you.

2 Does the private non-delegation theory suffer
3 from the same lack of clarity in terms of its
4 origins? I mean, I -- I -- I'm trying to
5 understand its distinction with the traditional
6 non-delegation theory.

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

13 So I -- I guess I'm just trying to
14 understand what the source of that theory is as
15 well.

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

24 JUSTICE GORSUCH: Ms. Harris --

25 GENERAL HARRIS: With respect to

1 Article II --

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

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

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

23 GENERAL HARRIS: I don't think so.
24 And I think this scheme, I mean, just on the
25 merits would illustrate why. But just as a

1 conceptual matter, we're talking about two
2 different things.

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

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

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

22 And then on -- sort of for the
23 denominator for the fee, it is summing up
24 reports from telecommunications carriers as to
25 what their eligible revenues are for a quarter.

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

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

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

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

21 With respect to the law, this Court
22 has in no context of sort of looking at
23 recommendations said: Who's really making the
24 recommendations? Is there a lot of sway?

25 So take Skinner, for instance. The

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

8 This Court did not sort of peak behind
9 the hood and say: Was that, you know, too much
10 influence by a private group or not?

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

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

25 The actor is an officer of the United

1 States who's adopting the actual form of policy.
2 And, again, this sort of happens every day.
3 But again --

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

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

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

21 Two of them, as Respondents point out,
22 have happened since this lawsuit, but others
23 happened in the third quarter of 2003. And in
24 2016 there was an award of relief when there was
25 a disagreement with how the administrator

1 calculated the contributions.

2 So there are empirical examples of
3 this not just being a rubber stamp.

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

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

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

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

24 GENERAL HARRIS: Yes, Justice Gorsuch,
25 we think there are two paths for this Court to

1 do. And one path could be just to sort of stay
2 the course and say is this delegation any worse
3 than ones the Court has approved?

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

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

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

19 JUSTICE GORSUCH: And -- and I'm sorry
20 to prolong this, Chief --

21 CHIEF JUSTICE ROBERTS: Go ahead,
22 please.

23 JUSTICE GORSUCH: -- but just to
24 finish up.

25 One -- one critical element you

1 indicated is there have to be
2 sufficiently-defined boundaries, that judicial
3 review is -- is possible?

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

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

13 GENERAL HARRIS: Absolutely. And we
14 think --

15 JUSTICE GORSUCH: Okay.

16 GENERAL HARRIS: And we think that --

17 JUSTICE GORSUCH: All right.

18 GENERAL HARRIS: -- 254 satisfies --

19 JUSTICE GORSUCH: No, I understand
20 that.

21 GENERAL HARRIS: Okay.

22 CHIEF JUSTICE ROBERTS: Justice
23 Thomas? Anything further?

24 JUSTICE THOMAS: Would you -- is there
25 any direct statutory constraint on the revenue

1 raising?

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

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

20 The complaint that they seem to have
21 with respect to their percentage actually deals
22 with is explainable because the -- it's
23 technical -- but the contribution base for the
24 telecommunications revenues has fallen from \$288
25 billion in 2014 to \$116 billion today. That has

1 to do with the fact that the carriers' revenues
2 for intrastate telecommunications has fallen,
3 not with respect to some out-of-control program.

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

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

16 Two, it's consistent with upholding a
17 range of other statutory schemes that similarly
18 say that an agency or, again, this Court has the
19 discretion as to how much fees or analogous
20 devices to be charged. We think that that is
21 tethered to the statutory structure and that
22 there are real limits on what can be imposed.

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

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

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

17 Again, you could also look to Skinner
18 where there is a lot of discretion with respect
19 to exactly what level the fee was going to be
20 set at for surface pipeline fee purposes. It
21 did have like an ultimate cap of 105 percent of,
22 like, what the programs were running at for
23 appropriations, but, like, within that, there's,
24 like, a wide range of discretion.

25 And I just think it just doesn't pan

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

9 CHIEF JUSTICE ROBERTS: Justice Alito?

10 JUSTICE ALITO: Well, the amount to be
11 raised is tied to the provision of universal
12 services, so -- but universal services can
13 evolve. How far can it evolve?

14 GENERAL HARRIS: Not so far for two
15 reasons. One is that evolving technological
16 landscape is specifically tied to four different
17 things that define universal service under
18 254(c). So the most objective of those,
19 although there's a bunch of them, is one I
20 mentioned, that it's a substantial majority of
21 residential customers have chosen to subscribe.
22 So, again, that would throw out faxes. Most
23 people are not subscribing to faxes today as
24 their means of communicating with each other.
25 It's phones.

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

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

9 GENERAL HARRIS: I don't think
10 so because --

11 JUSTICE ALITO: If enough people
12 subscribed to it?

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

20 JUSTICE ALITO: Well, what's a
21 substantial --

22 GENERAL HARRIS: -- but then you'd
23 have a --

24 JUSTICE ALITO: What is a substantial
25 portion?

1 GENERAL HARRIS: A substantial
2 majority.

3 JUSTICE ALITO: Substantial.

4 GENERAL HARRIS: Substantial majority.
5 So more than a majority. Certainly, more than
6 50 percent. And I'll just also point out that
7 (b)(1) would be an additional constraint in your
8 hypothetical because the quality services have
9 to be available at just, reasonable, and
10 affordable rates.

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

14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor?

16 JUSTICE SOTOMAYOR: To that point, the
17 Act has only subsidized two services, phone and
18 Internet, correct?

19 GENERAL HARRIS: So it's actually --
20 phone is the universal service --

21 JUSTICE SOTOMAYOR: Mm-hmm.

22 GENERAL HARRIS: -- and for the
23 Internet, it comes in under the express
24 directive under (h)(2) that the FCC shall
25 establish competitively neutral rules to

1 enhance, to the extent feasible -- dot, dot, dot
2 -- advanced -- access to advanced
3 telecommunications and information services.

4 JUSTICE SOTOMAYOR: So --

5 GENERAL HARRIS: Internet and advanced
6 information services.

7 JUSTICE SOTOMAYOR: So whatever, there
8 is a real constraint. There's only two services
9 have been identified?

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

12 JUSTICE SOTOMAYOR: All right.

13 GENERAL HARRIS: -- constrained
14 further.

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

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

25 GENERAL HARRIS: There's that and also

1 just the -- the history on pages 8 to 9 of our
2 reply brief --

3 JUSTICE SOTOMAYOR: Right.

4 GENERAL HARRIS: -- where, like,
5 there's a lot of statutory examples. The Court
6 just hasn't addressed them.

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

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

14 JUSTICE SOTOMAYOR: Yeah. The federal
15 boards, the -- the boards there could set
16 different rates in different places and did a
17 lot of -- gave it extraordinarily broad power,
18 correct?

19 GENERAL HARRIS: Exactly right.
20 Allegheny County, Pennsylvania, for instance,
21 got a 50 percent downward departure on their
22 assessments because of the Whiskey Rebellion.
23 That's a policy judgment.

24 JUSTICE SOTOMAYOR: All right. I want
25 to -- so to -- now, I think why that's important

1 is twice we've said that the taxing power
2 shouldn't be looked at any differently than
3 tariffs or customs or duties.

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

10 GENERAL HARRIS: Exactly right.

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

17 I think the point you were making is
18 that the delegation issue is the contribution
19 base?

20 GENERAL HARRIS: Yes.

21 JUSTICE SOTOMAYOR: Not whether or not
22 the agency itself or the person it's delegated
23 to is actually functioning properly and who it's
24 identifying to receive the funds, correct?

25 GENERAL HARRIS: Correct.

1 JUSTICE SOTOMAYOR: So the
2 contribution limit, he says the history is very
3 sparse that the agency has reviewed that
4 contribution base that was recommended.

5 The reason I see that's -- the reason
6 for that, I think, is because the FCC controls
7 every component of calculating that, correct?

8 GENERAL HARRIS: Yes. It sure does.

9 JUSTICE SOTOMAYOR: So it tells -- it
10 determines and tells USAC what information to
11 get from the people that it's surveying,
12 correct?

13 GENERAL HARRIS: Yes.

14 JUSTICE SOTOMAYOR: And then the FCC
15 says -- determines what the final contribution
16 base calculation should be, correct?

17 GENERAL HARRIS: Absolutely.

18 JUSTICE SOTOMAYOR: It determines what
19 expenses should be covered?

20 GENERAL HARRIS: Yes.

21 JUSTICE SOTOMAYOR: So what USAC is
22 doing is a mathematical calculation?

23 GENERAL HARRIS: That is correct.

24 JUSTICE SOTOMAYOR: So we would hope
25 that there's not much more than four examples of

1 them getting math wrong, correct?

2 GENERAL HARRIS: That is certainly the
3 hope.

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

9 GENERAL HARRIS: By the parameters the
10 FCC sets, correct. Under the regulations.

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

16 (Laughter.)

17 JUSTICE SOTOMAYOR: But those
18 principles are from our cases, correct?

19 GENERAL HARRIS: Absolutely.

20 JUSTICE SOTOMAYOR: And the best
21 example of what those principle mean --
22 principles mean is not us redefining them, but
23 us looking to how they've been applied in our
24 precedents, correct?

25 GENERAL HARRIS: I would just give one

1 caveat, which is I know members of the Court are
2 concerned that specific cases have not followed
3 the principles that the Court has actually laid
4 out in the cases. And there is arguably some
5 tension there.

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

8 JUSTICE SOTOMAYOR: Okay.

9 GENERAL HARRIS: One is the metrics of
10 the cases. Just, you know, is the delegation
11 worse or better? And two is what do the
12 principles mean?

13 JUSTICE SOTOMAYOR: But none of our
14 precedents have been rejected by the court
15 below?

16 GENERAL HARRIS: None -- none of --
17 correct. The court below and Respondents are
18 not asking you to overturn any of them.

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

22 GENERAL HARRIS: You certainly could.

23 JUSTICE SOTOMAYOR: Could. But we
24 should?

25 GENERAL HARRIS: Sure, yes.

1 JUSTICE SOTOMAYOR: Okay. It's a
2 better practice, isn't it, if we're going to
3 overturn precedent, to find out what all the
4 stare decisis factors are?

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

10 JUSTICE SOTOMAYOR: Oh, sure. We're
11 always free to do that, but we should proceed
12 with caution when we're looking at overturning
13 precedent.

14 GENERAL HARRIS: Yes.

15 JUSTICE SOTOMAYOR: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

17 JUSTICE KAGAN: The easiest parts of
18 an argument are where you just have to say yes
19 to everything.

20 (Laughter.)

21 JUSTICE SOTOMAYOR: Remember, I was a
22 prosecutor.

23 (Laughter.)

24 JUSTICE KAGAN: This is going to be
25 just a little bit harder. But just a little

1 bit.

2 (Laughter.)

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

9 And you pointed to your list on page
10 8, which is like the Federal Reserve and the
11 FDIC and a bunch of others.

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

20 GENERAL HARRIS: I think they are
21 right there, in the sense that especially the
22 ones that are the agencies using their
23 fee-raising power to cover the cost of the
24 agency's function -- the programs that the
25 agencies are doing, it's going to the regulated

1 party. So here, telecommunications carriers for
2 their OCC banks, and saying: Please support the
3 programs that we're doing.

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

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

17 JUSTICE KAGAN: Thank you, General.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch?

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

22 (Laughter.)

23 JUSTICE GORSUCH: Ms. Harris, let's
24 suppose that Congress passed a statute saying
25 that every American should pay an equitable and

1 non-discriminatory contribution to paying down
2 the national debt, sufficient to reduce the
3 national debt by 1 percent a year. Okay?

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

9 Good to go or not?

10 GENERAL HARRIS: Not good to go. Two
11 differences from this particular scheme.

12 JUSTICE GORSUCH: Okay.

13 GENERAL HARRIS: One is the breadth of
14 the delegation obviously matters. We talked
15 about that before. The --

16 JUSTICE GORSUCH: So it's okay if it
17 does it to a subset of citizens, but it can't do
18 it to all citizens?

19 GENERAL HARRIS: It's not just a
20 subset of citizens that's different for 254.
21 It's the specified nature and the details of the
22 programs.

23 You are talking about a tax for the
24 entire country that has no other parameters and
25 wouldn't sort of be building on the history of

1 IRS regulation. And we are talking here --

2 JUSTICE GORSUCH: No, no, there would
3 be IRS regulate -- there have been IRS
4 regulations for some time.

5 GENERAL HARRIS: I take the premise of
6 the hypothetical --

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

12 GENERAL HARRIS: So I wouldn't say the
13 old soil argument here is they are great at
14 this. It is that Congress understood when
15 enacting the particular scheme that it was
16 incorporating those restraints and concepts that
17 go into those concepts.

18 JUSTICE GORSUCH: Don't you think you
19 would have the -- make -- be making the same
20 argument in the case that I just posited,
21 that -- that the IRS would?

22 Or -- or maybe if you want to make it
23 narrower. Same -- same delegation, but to
24 secure universal healthcare, for example,
25 sufficient to secure advanced universal

1 healthcare on a non-discriminatory basis.

2 That's a narrow one for you.

3 GENERAL HARRIS: Again, I think the
4 problem there is you are using the words of this
5 particular statutory scheme out of context in
6 ways that divorce it from the constraints in
7 this particular scheme.

8 JUSTICE GORSUCH: Okay.

9 GENERAL HARRIS: It's the idea that
10 universal healthcare is a goal that has not sort
11 of been a --

12 JUSTICE GORSUCH: In -- in this scheme
13 there is no cap on how much can be raised,
14 right?

15 GENERAL HARRIS: I disagree. I
16 think --

17 JUSTICE GORSUCH: No numerical cap.

18 GENERAL HARRIS: -- there is a --
19 there is a qualitative cap.

20 JUSTICE GORSUCH: There's no numerical
21 cap.

22 GENERAL HARRIS: There is absolutely
23 no numerical cap.

24 JUSTICE GORSUCH: There is no rate?

25 GENERAL HARRIS: There is no rate, but

1 the rate is something that is historically
2 defined in ways that your hypotheticals aren't.
3 And --

4 JUSTICE GORSUCH: Let's -- let's talk
5 about your -- the constraints you do mention.
6 What are advanced services?

7 GENERAL HARRIS: Advanced information
8 services or technical -- and -- or
9 telecommunications services are things that are,
10 again, above the baseline of what's been
11 considered universal service. So like existing
12 telecommunications and -- are, again, a more
13 novel technology.

14 JUSTICE GORSUCH: Those evolve over
15 time, right?

16 GENERAL HARRIS: It could evolve over
17 time --

18 JUSTICE GORSUCH: Sure.

19 GENERAL HARRIS: -- but the statutory
20 parameter for (h)(2) would be something that
21 someone could challenge. Again, an APA suit
22 could be a great way to go if you thought it was
23 misdefined.

24 JUSTICE GORSUCH: Okay. Let's talk
25 about (b)(6) in schools, for example, as well.

1 The FCC's interpreted that to mean that it can
2 provide mobile WiFi hotspots for off-premises
3 use and in school buses, right?

4 GENERAL HARRIS: It has. And I would
5 also point you to (h)(1)(B), which is providing
6 yet more specificity with respect to the -- how
7 the school and library programs are supposed to
8 go and how the rates are charged.

9 And, again, I'll just do the refrain.
10 If you think that there is a problem, or people
11 think that there is a problem, with the way in
12 which the FCC's rules are interpreting the
13 parameters of the program, you can bring a
14 challenge to exceeding the scope of the
15 statutory authority.

16 JUSTICE GORSUCH: Could the FCC use
17 the program to give everybody a mobile hotspot?

18 GENERAL HARRIS: To give everyone a
19 mobile hotspot?

20 JUSTICE GORSUCH: Yeah, everybody
21 who's a library patron at least.

22 GENERAL HARRIS: Everyone who is a
23 library patron? I think the question there
24 would be whether it fits within (h)(2) to the
25 extent feasible to give access to tele --

1 advanced telecom and information services for
2 schools and libraries.

3 JUSTICE GORSUCH: Yeah.

4 GENERAL HARRIS: So --

5 JUSTICE GORSUCH: It's -- it's
6 feasible. It just costs a lot.

7 GENERAL HARRIS: Right. And then the
8 other constraints with respect to the costs
9 would be making sure that the ensuing -- any
10 sort of ensuing program for that would not
11 interfere with just reasonable and affordable
12 rates for universal services.

13 Again, I think when you see how the
14 system works --

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

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

21 JUSTICE GORSUCH: Why -- why not?

22 GENERAL HARRIS: Because the
23 principles have to be consistent with the rest
24 of the chapter. And the proof is how FCC has
25 interpreted -- I think FCC's way of interpreting

1 this shows that it's more of a
2 belts-and-suspenders provision than a
3 do-whatever-you-feel-like provision.

4 The two things that FCC has done under
5 (b)(7) are, one, to require competitive
6 neutrality --

7 JUSTICE GORSUCH: Well, now, hold on.
8 You say we shouldn't look at what's actually
9 been done; we should look at the statute. So
10 let's --

11 GENERAL HARRIS: So --

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

16 GENERAL HARRIS: That's fine.

17 JUSTICE GORSUCH: It says the
18 commission -- anything they determine is
19 necessary and appropriate for the protection of
20 the public interest, convenience, and necessity,
21 and are consistent with this chapter.

22 GENERAL HARRIS: Yeah, "and are
23 consistent with." And so --

24 JUSTICE GORSUCH: Well -- well, how
25 about everybody gets a Starlink account?

1 GENERAL HARRIS: Why would -- I'm not
2 sure why that would be sort of -- the idea that
3 it's consistent with the rest of the chapter,
4 they wouldn't need (b)(7) to do that. It would
5 be are you pursuing the (h)(2) advanced services
6 --

7 JUSTICE GORSUCH: All right.

8 GENERAL HARRIS: -- or something else
9 and --

10 JUSTICE GORSUCH: They could do it
11 under (7), too, right?

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

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

18 GENERAL HARRIS: I'm not saying
19 everyone in America is getting a
20 Starlink account. What I am saying --

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

23 And then what about (c)(3), which says
24 that "in addition to the services included in
25 universal service, the Commission may designate

1 additional services for support mechanisms for
2 schools, libraries, and healthcare providers"?

3 At least -- at least one court has
4 pointed out that that's not even limited to
5 telecommunications services.

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

18 Again, I think you read this -- this
19 scheme in context. And the goal in reading it
20 is not to look for ways of reading the language
21 in a -- one isolated provision in a way that
22 would create non-delegation problems. But
23 you're looking at --

24 JUSTICE GORSUCH: No, for sure, of
25 course. I take that point.

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

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

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

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

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

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

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

1 JUSTICE GORSUCH: It's --

2 GENERAL HARRIS: -- versus a fee.

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

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

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

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

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

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

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

15 JUSTICE GORSUCH: Okay. Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh.

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

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

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

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

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

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

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

1 ambi- -- ambiguity on that score.

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

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

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

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

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

1 independent agency?

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

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

8 GENERAL HARRIS: Okay.

9 JUSTICE KAVANAUGH: So --

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

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

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

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

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

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

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

1 would, would. So, yes, I think you would have a
2 panoply of issues of are -- like various other
3 measures that don't have a cap.

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

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

17 GENERAL HARRIS: Why it's different?

18 JUSTICE KAVANAUGH: Yeah, the
19 delegation --

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

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

24 GENERAL HARRIS: Yep. One is the
25 breadth of the delegation. So I took the

1 hypothetical to be it's sort of a tax rate for
2 the entire country. It is for the general --
3 it's supposed to be quote/unquote, "equitable"
4 but a different meaning from, obviously, 254,
5 which is a constraint on what you actually have
6 to be imposing, and that it's to accomplish
7 1 percent of reducing the national debt.

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

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

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?

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

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

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

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

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

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

1 scheme on top.

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

6 GENERAL HARRIS: If it's --

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

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

14 JUSTICE BARRETT: Is there.

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

17 JUSTICE BARRETT: That's the question.

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

1 being assessed for it, and what exactly the
2 mechanism for delivering this -- this sort of
3 food is.

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

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

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

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

24 One is your manageable standard is
25 like a common law system, where you look to

1 previous delegations and see how they stack up.

2 And two is the standards that we are
3 offering that are drawn from the Court's cases
4 where obviously there is a judgment line on how
5 much discretion is too much, but at a minimum
6 Congress is obviously having to provide
7 parameters that you can tell, yes or no, did the
8 agency transgress the boundaries? And this
9 scheme is full of them.

10 JUSTICE BARRETT: So this doesn't have
11 a cap, as, you know, many people have pointed
12 out to you. And so you agree that there's a
13 broad range. I mean, what is it, about
14 \$9 billion right now?

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

18 JUSTICE BARRETT: But it could be
19 3 billion?

20 GENERAL HARRIS: It could be 3 billion
21 if that were sufficient to support the way the
22 programs operate.

23 JUSTICE BARRETT: Could be 30 billion?

24 GENERAL HARRIS: Again, tied to the
25 nature of the scheme. And that's no different

1 from other delegations that are tied to some
2 sort of qualitative number. The Court could
3 have fees at all sorts of rates. The OCC could
4 have fees at all sorts of rates depending on
5 what kind of functions it's performing and
6 exacting them.

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

13 JUSTICE BARRETT: Let me ask you about
14 universal service. So Justice Gorsuch asked you
15 about Starlink, but I'm going to ask you just
16 about cell phone plans.

17 Could universal service include having
18 the FCC provide every American with a cell phone
19 and a cell phone plan?

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

1 JUSTICE BARRETT: So it could or
2 couldn't?

3 GENERAL HARRIS: I think it could, but
4 there would be questions with respect to whether
5 that's within bounds.

6 JUSTICE BARRETT: Okay.

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

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

20 JUSTICE BARRETT: Last question. Can
21 you think of any other statutory scheme that
22 gives the agency the authority to identify the
23 additional principles that constrain its power?

24 GENERAL HARRIS: Yes. The Securities
25 and Exchange Act gives the SEC -- there's --

1 there's -- I think -- there are a bunch of them
2 that give agencies the power to say are there
3 other consistent principles to consider in a
4 multi-factor test?

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

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

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

24 JUSTICE BARRETT: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

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

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

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

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

24 There's no sort of, like, pick the
25 more restrictive power and impose a special test

1 rule. That's -- that's the exact opposite of
2 what the Court has done in all sorts of cases
3 that implicated both the tax power and the
4 commerce power or the tax power and the war
5 powers.

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

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

18 Can you just say more about how you
19 see this as actually imposing a limit on the
20 amount that can be collected through this
21 program?

22 GENERAL HARRIS: Yes. So in three
23 different places of the statute, in 254(d) and
24 254(e) and also in -- in 254(b)(5), it is a
25 sufficient -- the -- the -- it has been to be a

1 sufficient mechanism to achieve the objectives
2 of the programs that Congress has set out.

3 The Fifth Circuit in Alenco
4 interpreted that -- as we agree with -- to mean
5 you can't charge excessive things for the
6 program. It can't be more than the programs
7 need to accomplish the specified objective that
8 Congress set out.

9 JUSTICE JACKSON: So this is not an
10 opportunity to just raise money for the FCC to
11 use for whatever reason or et cetera?

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

23 JUSTICE JACKSON: And so the call for
24 a particular number, it's sort of hard to even
25 figure out how Congress would do that in this

1 situation, right?

2 GENERAL HARRIS: That's exactly right,
3 and why qualitative -- why sort of these
4 qualitative judgments are common. Again, think
5 of the tariff system, where there were sort of
6 judgments with respect to changing
7 circumstances.

8 There are programs where you can have
9 qualitative limits that are trying to accomplish
10 defined objectives that might change over time,
11 and Congress can give that flexibility to an
12 agency without violating the non-delegation
13 factors.

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

24 So let me just say that if we find
25 that this one is unconstitutional, are all of

1 these programs in jeopardy, in your view?

2 GENERAL HARRIS: Yes.

3 JUSTICE JACKSON: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 Ms. Harris.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONERS IN CASE 24-422

9 MR. CLEMENT: Mr. Chief Justice and
10 may it please the Court:

11 There is no delegation problem here.
12 Congress did not decide out of the blue in 1996
13 that it wanted to impose a tax on certain
14 telecommunication carriers to subsidize other
15 carriers.

16 Instead, what Congress did in 1996 was
17 to make explicit the universal sub -- service
18 subsidiaries that had long been implicit in
19 rate -- monopoly rate regulation.

20 Now, that rate regulation was classic
21 commerce clause legislation that did no more to
22 guide the agency than tell them to regulate in
23 the public interest.

24 So when Congress in 1996 decides not
25 only to deregulate but to expressly embrace

1 these subsidiaries, and then specified who
2 should pay what, that is a victory both for
3 competition and for non-delegation principles.

4 The resulting statute is fully
5 consistent with all of this Court's precedents,
6 none of which my friends on the other side ask
7 this Court to overrule, nor do they confront the
8 massive reliance interests on this program or
9 many of the other programs that might be taken
10 out by overruling this Court's cases.

11 This is simply not the right vehicle
12 for this Court to revamp its non-delegation
13 doctrine.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: Do you agree with the
16 government's argument as to the constraints on
17 the revenue raising?

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

25 It is not a charge to the agency to

1 just do anything it wants. With respect to
2 rural customers, for example, what it's supposed
3 to guarantee them is reasonably comparable
4 services at reasonably comparable rates.

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

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

17 And that's why, if you look at the --
18 the graph on page 3 of the SHLB reply brief
19 where it shows you the total revenues of the
20 fund over time, it has been remarkably flat.
21 And I think that's a reflection of the basic
22 parameters of universal service in the four
23 major buckets that the agency has adopted have
24 all been relatively stable over time, and that's
25 why, though you might see that rate going up

1 because the contribution base is shrinking, the
2 total revenues raised are actually lower,
3 inflation-adjusted terms, over the last decade.

4 JUSTICE THOMAS: Now to take the flip
5 side of this, what would a -- a -- a program
6 look -- of this sort look like and -- in order
7 to violate the non-delegation clause?

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

21 And, you know, I mean, I'd start with
22 this Court's cases. Obviously, there haven't
23 been a lot of cases striking things down on
24 delegation doctrine, but you do look to
25 Schechter Poultry, that says if you try to do

1 something that's economy-wide and you use a term
2 that, because it's economy-wide, doesn't have
3 any particular specialized meaning like fair
4 competition, okay, that's out of bounds.

5 If, Panama Refining, you try to
6 basically tell the executive branch, go -- go
7 deal with hot oil, that's a problem, but you
8 don't give them any direction --

9 JUSTICE GORSUCH: So --

10 MR. CLEMENT: -- and --

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

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

1 that -- is that the gist of it?

2 MR. CLEMENT: That's the gist of it --

3 JUSTICE GORSUCH: Okay.

4 MR. CLEMENT: -- and I also would
5 think, just to take -- you know, because --
6 because this is I think all consistent --

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

9 MR. CLEMENT: Yeah.

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

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

24 And then the other thing I would --
25 just to complete the cycle of this Court's

1 cases, and I know it's not a huge cycle, but
2 Carter Coal is also a situation where Congress
3 itself tried to delegate in part to private
4 entities. And that may be a distinct problem,
5 but that's not what happened here.

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

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

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

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

11 JUSTICE GORSUCH: Well --

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

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

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

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

24 MR. CLEMENT: Okay.

25 JUSTICE GORSUCH: -- before I forget

1 it.

2 MR. CLEMENT: Yeah.

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

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

11 JUSTICE GORSUCH: Okay.

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

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

23 JUSTICE GORSUCH: If we -- if we
24 reject your view that they're fees and accept
25 the government's willingness to characterize it

1 as a tax, what difference does that make, in
2 your mind?

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

5 JUSTICE GORSUCH: You're -- you're
6 fighting it so hard. There -- must make a
7 billing difference to you.

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

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

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

23 JUSTICE GORSUCH: Really? Raising
24 revenues, an end in and of itself? I thought it
25 was to provide for the common good and

1 protection of this country and all that other
2 stuff.

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

6 (Laughter.)

7 MR. CLEMENT: No, seriously.

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

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

12 JUSTICE GORSUCH: Really?

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

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

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

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

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

23 JUSTICE GORSUCH: So if we put the
24 Department of Defense reported to the
25 Commissioner of the IRS, it would all be good?

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

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

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

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

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

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

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

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

1 JUSTICE KAVANAUGH: And what -- and
2 what do you think are the best precedents in
3 terms of what Congress has done for this?

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

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

24 And I think, at least in a statute
25 like this where it's not pure revenue-raising, I

1 don't think that asking for a determinant cap
2 makes anymore sense here than asking for a
3 determinative criterion made in Whitman. And
4 the reason is it's not that this is
5 standardless; it's just that the criterion,
6 rather than being a determinative cap, is all
7 the different restrictions on this universal
8 service fund.

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

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

1 in the courts.

2 And so the restraints on this are not
3 a definitive cap, but they are from the
4 substantive limits of the scope of the program.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 Justice Alito?

9 JUSTICE ALITO: Well, just out of
10 curiosity, the Court has said, as the Appellees
11 note at the very beginning of their brief, an
12 indefinite power to tax is a power to destroy.

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

19 MR. CLEMENT: I'll give you coining
20 money too.

21 JUSTICE ALITO: All right.

22 (Laughter.)

23 MR. CLEMENT: So -- so -- so -- so I
24 don't think -- I don't think death by coining
25 money is a possibility. Or destruction by

1 coining money.

2 But -- but -- but what I will say is
3 there may be other ways in which you think of
4 the tax power as being slightly different or
5 slightly more dangerous, but I don't think
6 non-delegation is -- and this Court unanimously
7 rejected that twice.

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

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

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

3 JUSTICE SOTOMAYOR: You started at the
4 beginning by talking about what -- invalidating
5 Section 254 would have disastrous effect for
6 your clients. In which ways?

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

12 MR. CLEMENT: So let me take them both
13 in turn.

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

19 Talk about Native American
20 reservations, where people are dependent on this
21 program, both because of the rule and because
22 they're low income. Talk about all the schools
23 and libraries that benefit from this program.

24 Talk about all the rural health
25 providers. And that's an area of the statute

1 where Congress has been very specific. The
2 rural healthcare providers get the same rates or
3 reasonably comparable rates to the urban health
4 providers in the same states.

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

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

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

23 But I go further and say I don't know
24 what else is at issue here. Because, as you
25 pointed out, that's just not the way this case

1 has been briefed.

2 And typically in a -- in a universe
3 where, you know, there's two unanimous Supreme
4 Court cases that say we don't treat taxes
5 different from other legislation for
6 non-delegation purposes, typically if you're
7 going to go into the wall of that, you know,
8 bravely go forth, but say why the stare decisis
9 factors are satisfied in this particular
10 context.

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

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

20 The -- the fees are supposed to cover
21 the services that are provided. If you cut down
22 on the number of national parks, the fees are
23 going to go down. If you add a couple national
24 parks, the fees might go up because you have
25 more to cover.

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

5 So -- but, again, we just haven't had
6 the briefing that would allow me to definitely
7 tell you I know exactly what the damage and the
8 consequences are of overturning your precedents
9 in this case.

10 JUSTICE SOTOMAYOR: On the first part
11 of the answer, Respondents said at the end,
12 recognizing the rather dramatic effects of
13 invalidating this law would have on
14 communications, that we had two alternatives.

15 One, as we did in the bankruptcy
16 context, tell Congress: Figure it out in six
17 months before we made our judgment effective.

18 I'm covering all options in my
19 question. So I hope it's not a hypothetical
20 that's necessary. But I'm covering options
21 or -- I don't know what the second -- but do you
22 have a preferred manner to do this --

23 MR. CLEMENT: So --

24 JUSTICE SOTOMAYOR: -- to minimize the
25 disruption?

1 Long term, you can't, because we're
2 overruling precedent and putting a lot of
3 programs at risk, but --

4 MR. CLEMENT: Yeah. If the -- if the
5 question is: Do we have a preferred way to
6 lose --

7 JUSTICE SOTOMAYOR: Right.
8 (Laughter.)

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

11 But, you know, I mean, look, I don't
12 think the Northern Pipeline sort of six-month
13 interregnum was necessarily the height of this
14 Court's remedial jurisprudence. So I am
15 somewhat reluctant to recommend that to you as
16 an option.

17 I actually kind of think it works the
18 other way, which is if you really think you need
19 to do Northern Pipeline, then maybe you
20 shouldn't do what you were doing in the merits
21 part of your opinion.

22 JUSTICE SOTOMAYOR: There's a whole
23 lot of --

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

25 JUSTICE SOTOMAYOR: There's a whole

1 lot of people in that area of law that agree
2 with you --

3 MR. CLEMENT: Yeah.

4 JUSTICE SOTOMAYOR: -- we shouldn't
5 have done it, but --

6 MR. CLEMENT: Yeah. No. And -- and,
7 you know, so -- so since I think that's
8 doctrinally -- I think the second thing they
9 suggested is you could make this relief only run
10 to the particular parties here at issue.

11 And since it's capable of repetition
12 yet evading review -- I'm not even sure what
13 that means -- and -- and -- and then you -- YOU
14 could try to fix it.

15 The other thing they suggest, of
16 course, is you could fix this whole thing with
17 half a sentence. Well, gee whiz, I mean --
18 like, I -- I -- I don't really think that that
19 sort of is right.

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

25 And if this were delegation run riot,

1 I just don't think you'd see that flat line in
2 terms of the size of the fund.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

4 JUSTICE KAGAN: Just on these eight to
5 nine programs again.

6 I mean, I -- I -- I take it that maybe
7 one argument is that, well, these are
8 fee-for-service programs; and this is not a
9 fee-for-service program, it's a -- it's a
10 revenue raiser. You want to call it a fee? You
11 want to call it a tax? Not sure, but it's a
12 revenue raising for a program, not for a
13 service.

14 Is that a distinction that's worth
15 making?

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

23 In the way the statute worked
24 before -- I mean the way things worked before
25 1996, it was the same basic, you know, carriers

1 that are covered by 254(d), roughly speaking,
2 that were implicitly subsidizing, or their
3 customers were implicitly subsidizing, some
4 rural service and some low-income service.

5 And it's not -- you know -- and -- and
6 just -- this is a historical point that I think
7 is actually relevant, because there was about a
8 10-year gap between when Ma Bell was broken up
9 in the '96 act. And during those 12 years, or
10 whatever it was, there was something like a
11 Universal Service Fund already being developed
12 through interchange fees and things like that.

13 And Congress was clearly trying to
14 preserve that. One place it's most clear is
15 254(j), little provision nobody looks at. But
16 that says that Congress specifically looked at
17 the Lifeline Program the agency was operating
18 before 1996 and wanted to preserve it.

19 And so this is a situation where there
20 is a program that has always been understood to
21 benefit particular classes because of the most
22 obvious beneficiaries of having a truly
23 universal network. And we're going to put a fee
24 on those people.

25 And then when you move from

1 deregulation to the new system, you impose what
2 I think is a fee, call it whatever you want, on
3 those people for a very specific purpose,
4 subject to very specific constraints.

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

9 JUSTICE KAGAN: And -- and,
10 Mr. Clement, you were asked to name some of what
11 you thought were the manageable standards in
12 this area, and you came up with a few. And you
13 said, well, it hasn't often been done, but it's
14 totally possible.

15 And I just wanted to give you the
16 opportunity to sort of do the flip half of that.
17 I mean, you obviously don't think that in terms
18 of the manageable standards that you, yourself,
19 laid out, that this falls on the inappropriate
20 side of the line.

21 So why not?

22 MR. CLEMENT: So I think that if you
23 --

24 JUSTICE KAGAN: As to each of those
25 things you said. I just wanted to peg it to

1 your own sense of what the standards are here.

2 MR. CLEMENT: Yeah. So one of the
3 things I said was if it's economy-wide and it's
4 a made-up new term, that's probably a problem.
5 Well, this isn't economy-wide and it's an old --
6 old soil term. So we do really well on that.

7 And then the second thing is Panama
8 Refining: Go solve a problem for me, hot oil,
9 whatever that is. That's a problem. You go
10 solve it. I'm not going to give you any
11 standards.

12 Or if you accepted the dissenters'
13 view of the statute in Gundy, and I know you
14 don't, but if you accepted their view where it's
15 just --

16 JUSTICE KAGAN: Totally.

17 MR. CLEMENT: -- past -- past
18 offenders are a problem, go solve it, like --
19 you know, that -- that's a problem. But, of
20 course, this is the opposite of that because
21 there are all these different constraints,
22 reasonably comparable rates and services for
23 rural customers and urban customers, affordable
24 for schools, it's got to be cheaper than other
25 rates, and the discount has to be enough to make

1 people take advantage of the program; for rural
2 healthcare providers, it has to be the same
3 rates as the urban healthcare providers in the
4 same state.

5 Like, that is so much better than so
6 many of the statutes that this Court has
7 overruled. But lest you think, to paraphrase
8 Judge Newsom in the Eleventh Circuit, that all
9 of the jurisprudence is a punch line, like, you
10 know, where this Court has approved the broadest
11 language is typically in regulated industries,
12 regulated circumstances. I suppose Yakus is an
13 exception. That's wartime. You could do with
14 that what you will.

15 But for the most part when -- when --
16 when Congress used broad language and this Court
17 has approved it, it has been in the context of
18 regulated industries where there actually are a
19 lot of principles to draw from.

20 JUSTICE KAGAN: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch?

23 JUSTICE GORSUCH: Just back to page 8
24 and 9. It does seem to me that they're --
25 they're all pretty easily distinguishable on the

1 basis that it's an agency collecting fees from a
2 regulated party in order to offset its own
3 operating expenses or providing a service to
4 offset the expenses of the service. Thoughts?

5 MR. CLEMENT: So, I mean, if -- if
6 that had to be the paradigm, I could put this in
7 that paradigm in --

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

11 MR. CLEMENT: It's still okay.

12 JUSTICE GORSUCH: Yeah.

13 (Laughter.)

14 JUSTICE GORSUCH: Okay.

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

19 JUSTICE GORSUCH: Yeah.

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

23 JUSTICE GORSUCH: Okay.

24 MR. CLEMENT: There's no unprecedented
25 clause in the Constitution.

1 JUSTICE GORSUCH: Okay. Okay. And --

2 MR. CLEMENT: And --

3 JUSTICE GORSUCH: And -- and this is
4 something you think Congress could -- could
5 easily fix. Now, you think that's an argument
6 in your favor, but they could easily put in a
7 cap or a rate or something tomorrow?

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

12 JUSTICE GORSUCH: Well, maybe because
13 otherwise it's regulated parties who are
14 self-interested in a program making the
15 decisions for themselves.

16 MR. CLEMENT: But they're not.

17 JUSTICE GORSUCH: It's sort of like
18 Schechter Poultry, right? I mean, it's the
19 same -- it was a regulated industry there that
20 was making those decisions for its own benefit.
21 And one -- I'm not -- one can dispute that
22 characterization, but -- but maybe, huh?

23 MR. CLEMENT: No. Give me half a
24 chance to -- to dispute that characterization.

25 JUSTICE GORSUCH: By all means.

1 MR. CLEMENT: Because this is miles
2 away. And this really gets to the sort of
3 private delegation piece of this. That argument
4 which hasn't gotten a lot of play -- I mean, let
5 me first say I think --

6 JUSTICE GORSUCH: I'm not talking
7 about private delegation. I'm just saying maybe
8 this is an area that Congress might speak. How
9 about that? Congress could decide.

10 MR. CLEMENT: Congress can always do
11 more. I mean, that -- that's got to be the rule
12 in every delegation issue, that Congress could
13 always do more. And as an aspirational
14 normative matter, wouldn't it be --

15 JUSTICE GORSUCH: In an unprecedented
16 area where there's a yellow flag on the field,
17 how about that?

18 MR. CLEMENT: How about an
19 unprecedented area that's not that unprecedented
20 because universal service has been going on
21 pursuant to congressional sanction under the
22 1934 Act for 50, 60 years --

23 JUSTICE GORSUCH: Through --

24 MR. CLEMENT: -- and --

25 JUSTICE GORSUCH: Through rate making

1 and a -- and a regulated monopoly that it -- it
2 -- it proceeded in the '96 Act to disavow and
3 blow up.

4 MR. CLEMENT: With all due respect,
5 this is where the 12-year interregnum is
6 actually quite important, because they blew up
7 -- Ma Bell gets blown up by the courts in 1984
8 --

9 JUSTICE GORSUCH: Sort of.

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

11 JUSTICE GORSUCH: Sort of.

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

14 JUSTICE GORSUCH: Created new
15 monopolies in the process, but that's a whole
16 'nother story.

17 MR. CLEMENT: And -- and -- and -- but
18 when they do it, they don't say the agency is
19 still operating under 151, the '34 Act. They
20 don't say, all right, well, we can no longer do
21 any universal service subsidies through
22 long-distance rates.

23 Instead, they say, boy, this is really
24 important. As a regulatory matter, we've been
25 doing it this way for, at that point, 50 years,

1 so let's use the exchange fees and let's create
2 a universal service fund.

3 Now, they did all that out of -- in
4 the public interest. So if you're talking about
5 what's -- what's good for delegation principles,
6 boy, is it good that in 1996 Congress comes in
7 and says we expressly bless that, 254(j), we
8 expressly bless the exact program you were doing
9 for lifeline, and now we're going to put
10 guardrails on it that address this kind of
11 unique phenomenon -- I don't know, totally
12 unique, but --

13 JUSTICE GORSUCH: Okay.

14 MR. CLEMENT: But --

15 JUSTICE GORSUCH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh?

18 JUSTICE BARRETT: So, Mr. Clement, one
19 of the -- one of the questions that we ask in
20 the non- -- non-delegation context is whether
21 the public or the courts could judge whether a
22 particular policy adopted by the agency is
23 unlawful.

24 So there's no objective limit on the
25 contribution, right, which is kind of what we've

1 been going round and round about. How, if you
2 had a client who wanted to challenge the
3 contribution rate, would you argue that it
4 exceeded the statutory authority?

5 MR. CLEMENT: So I think the
6 contribution rate is just a by-product of other
7 things in the statute that I would tell my
8 client to challenge. So, I mean, you know -- I
9 mean, look, one of the things that is really
10 driving the contribution rate is that the
11 contribution base has shrunk. So one of the
12 things I might well tell my client to do is to
13 go to the agency and try to get the agency to
14 expand the contribution base.

15 And they might have the authority to
16 do that. If they did it, it would probably be
17 challenged by somebody under the arbitrary and
18 capricious or consistent with the -- the
19 statute, and we could sort that out. Or maybe
20 the agency would tell me: No, we can't do that.
21 We don't have enough statutory authority --
22 there's a recognizable limit -- so go to
23 Congress.

24 So if I really was concerned about the
25 rate qua rate, then I would probably have to go

1 at it that way. But I think most rational
2 people aren't concerned with the rate qua rate.
3 They're really concerned with that bottom line
4 number --

5 JUSTICE BARRETT: Mm-hmm.

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

9 JUSTICE BARRETT: If I thought
10 35 percent was too high or something like that?

11 MR. CLEMENT: Yeah, but, like, you
12 know, 35 percent of what?

13 JUSTICE BARRETT: Of what.

14 MR. CLEMENT: That's like -- you know,
15 like it's -- it's that bottom line number, is
16 the money that's actually being funded by
17 universal service. And that's been a flat line.

18 But if I wanted to try to get at that,
19 I would tell my clients: All right, let's look
20 at this. Over half of this is the rural
21 carriers program. So is there something the
22 agency did in implementing the rural carrier
23 program that created a lot of costs?

24 And maybe I can identify something
25 where they just funded a big project out in

1 Montana somewhere and it's adding a lot of cost
2 and it's not actually doing anything to lower
3 rural rates or improve rural services. Well,
4 then that gives me a statutorily enforceable
5 standard. And I go in and I make an arbitrary
6 and capricious standard, but I also make a "in
7 excess of statutory authority" question.

8 Or if the reason I perceive that the
9 fund had become too big is that they monkeyed
10 with the eligibility requirements for the
11 lifeline program, so now virtually everybody
12 gets \$9 off in this fee. Well, I could say
13 that's arbitrary and capricious. That's in
14 excess of the statutory authority. The
15 statutory authority is to make it affordable. I
16 can read from the context of this statute that
17 that's supposed to be for low-income people.
18 That's consistent with everything else in the
19 statute. That's ultra vires.

20 That's -- and -- and it's the way you
21 limit the size of this fund is to bring
22 challenges to the FCC action, and they're all
23 FCC action. None of it's USAC. It's FCC
24 actions that affect the scope and size of the
25 program.

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

5 (Laughter.)

6 JUSTICE BARRETT: Justice Kagan -- in
7 your colloquy with Justice Kagan, you were
8 identifying some of the judicially manageable
9 standards. And, you know, obviously your
10 position is that, applied here, the program
11 passes.

12 Do you think there are any programs,
13 any delegations of discretion in the U.S. Code
14 that would fail it?

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

18 (Laughter.)

19 MR. CLEMENT: You know, I -- I'm not
20 here to tell you that there should be no
21 non-delegation test. I am here to concede, as
22 Justice Scalia, who didn't like flob -- flabby
23 statutes, but he still said, you know, this is
24 tough. And, you know, Chief Justice Marshall
25 was pretty smart and he said this was delicate.

1 Chief Justice Taft, in J.W. Hampton -- you know,
2 pretty good judge for separation of powers,
3 decided Myers like two years before -- he says,
4 boy, this is common sense. And, you know, when
5 judges try to just apply their common sense,
6 that is its own separation of powers problem.

7 So I'm not here to tell you it's easy,
8 but I'm not here to tell you it's impossible.
9 And I do think the Court's precedents provide a
10 -- a good guide. I mean, I -- I will say that I
11 think there's a lot in the Gundy dissent that
12 could say that certain things are out of bounds.
13 It's just not this one.

14 JUSTICE BARRETT: Okay.

15 CHIEF JUSTICE ROBERTS: Justice
16 Jackson?

17 JUSTICE JACKSON: So I guess I'm --
18 I'm questioning your response to Justice Gorsuch
19 in the colloquy about whether or not Congress
20 could easily put a cap on this. I -- I -- I
21 mean, I take your point that Congress can always
22 do more, but if Congress actually wanted a
23 rational cap, if they wanted one that reflected
24 the amount of money that would be sufficient to
25 run this program, I would think they would need

1 to have a lot more than just picking a number
2 out of the air.

3 And that's really what the function of
4 giving it to an expert agency who's sort of
5 focused on this issue, that -- that's what is
6 happening in the delegation. Am I wrong about
7 that?

8 MR. CLEMENT: I don't think you're
9 wrong about that at all. Now, I mean, one way
10 you could fix it in a trivial way that would
11 really sort of allied your question, I suppose,
12 is what I think the Solicitor General was
13 getting at, which is this idea that you just
14 like make the cap a trillion dollars. And then
15 there, it's your definitive cap and now we're
16 done. Now --

17 JUSTICE JACKSON: And I guess we're
18 done with delegation, but, again, the whole
19 point is that we're in a policy system where
20 Congress is trying to do something in this
21 statute. And it would seem to me kind of at
22 least weird to say Congress solves this
23 constitutional problem by picking a number out
24 of the air.

25 MR. CLEMENT: I mean, I agree with

1 that. And I think in a sense that does
2 distinguish this again from some of the tax
3 hypos. Because when you're talking principally
4 about raising revenue, you're really focused on
5 the number. How much are we going to raise?
6 Like we have a deficit, and we're going to cover
7 some of it and we're -- some of it with
8 bothering. And like all we really care about is
9 how much we're going to raise. So for a statute
10 where that's all you care about to not address
11 that in Congress does seem like a problem.

12 But, on the other hand, with this
13 program, they clearly weren't that focused on is
14 this going to be a \$10 billion program or an \$11
15 billion program? What they wanted to do is
16 provide reasonably comparable rates and services
17 for rural customers and -- versus urban
18 customers.

19 They had a rough sense of what that
20 was going to cost, but if it cost, like, you
21 know, a hundred million dollars more to actually
22 get universal service that worked for everybody
23 in the country, I think Congress would have been
24 fine with that because their principal judgment
25 here was not a how much money judgment, but a

1 how much universal service is going to survive
2 in a competitive environment.

3 JUSTICE JACKSON: And am I right that
4 that judgment and the program that was generated
5 was enacted on a bipartisan basis, it's been
6 wildly successful in terms of actually providing
7 the services that Congress wanted; am I right
8 about that?

9 MR. CLEMENT: Yes. And, you know, I'm
10 not 100 percent sure, but my recollection is it
11 started in the Senate too, which is why I really
12 think saying it's a tax is a mistake because
13 it's not a tax. It's Commerce Clause
14 legislation.

15 And it's a program that was
16 overwhelmingly popular. And you see a
17 congressional amicus brief that, you know, I
18 have to say in this era is refreshingly
19 bipartisan.

20 JUSTICE JACKSON: And I guess I think
21 that that's kind of important because there is
22 an argument that some of the amici have raised
23 that the reason why we need to get into this as
24 a Court and have a more robust non-delegation
25 doctrine is to promote democratic

1 accountability.

2 And I guess I'm just wondering whether
3 it is really democracy-enhancing to create a
4 doctrine that, at least in this case, would
5 allow judges to strike down this very
6 popularly-enacted law.

7 MR. CLEMENT: Well, I -- two
8 observations on that. One, there's a certain
9 perversity that the other side is like so
10 confident that if you just said there needs to
11 be a cap, Congress would snap to it and put in a
12 cap. And the only reason they can be confident
13 is that this is a really popular law. And so,
14 of course, Congress would do it because they
15 don't want the sky to fall. So that's -- that's
16 -- that's weird enough as it is.

17 And then the second thing I would say
18 is, like, on the one hand, I don't think that
19 you can have a jurisprudence that says: Well,
20 this -- this law passed unanimously and this one
21 was on a party line vote, so we're going to
22 apply a different test, but I do think where --
23 and this is the point I was trying to make with
24 Justice Barrett -- there is a problem that if
25 you sort of come up with a test that is kind of

1 like I know it when I see it, that is incredibly
2 judicially empowering to the expense of the
3 political branches.

4 And I think that's why somebody like
5 Justice Scalia, who was, you know, distressed at
6 some of what he saw, but nonetheless said, you
7 know, sort of too -- too big, too big, too much,
8 that's just not the right test. You need to
9 come at it from a different angle.

10 JUSTICE JACKSON: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. McCotter.

14 ORAL ARGUMENT OF R. TRENT McCOTTER
15 ON BEHALF OF THE RESPONDENTS

16 MR. McCOTTER: Mr. Chief Justice and
17 may it please the Court:

18 At its heart, this case is about
19 taxation without representation. Every year
20 Americans pay billions for the Universal Service
21 Fund. The rate has increased ten-fold. The
22 amount collected is now 20 times the size of the
23 FCC's entire annual budget.

24 The FCC -- the government and the FCC
25 now agree, or at least do not dispute, that USF

1 charges are, indeed, taxes; that the
2 non-delegation inquiry is stricter in this
3 domestic context; that the nature of the power
4 is at least relevant; that the USF statute sets
5 no objective rule to limit the amount raised;
6 and that Congress has set such rules for every
7 other domestic tax in American history.

8 Those concessions doom their case.

9 The amount of public revenue to raise is a
10 quintessential legislative determination, not
11 some minor detail to be filled in later.

12 But in deciding how much to raise, the
13 FCC is guided by aspirational-only principles in
14 254(b) and even gets to redefine universal
15 service itself in 254(c) based on an evolving
16 standard; the exact opposite of incorporating
17 some preexisting framework.

18 This broad delegation to the FCC was
19 entirely by design, and this is before we get to
20 USAC. Even now, the recent memorandum of
21 understanding between the FCC and USAC says that
22 it is USAC's projections, not the FCC's, that
23 will be deemed approved.

24 But passive acquiescence does not
25 comply with this Court's non-delegation case

1 law. To be clear, the Court can affirm without
2 overturning any prior decision because this is
3 the easy case. Neither the executive, nor
4 private parties gets to set tax rates.

5 But if Petitioners are right, then
6 Congress could use similarly-vague language to
7 let the executive decide any domestic
8 legislative issue, even, for example, setting
9 the size of lower federal courts. The
10 Constitution prohibits that, the transfer of
11 power.

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

14 JUSTICE THOMAS: The Petitioners make
15 the argument that this isn't a particularly new
16 program, it comes from the -- the old Bell
17 system before we had deregulation.

18 The other thing that they argue is
19 that the constraints that are on the service
20 delivery side are indirectly or at least
21 sufficient, they are sufficient to regulate or
22 to supply constraints on the revenue-raising
23 side.

24 I think that puts some degree of
25 specificity on the argument, and I'd like to see

1 you address those.

2 MR. McCOTTER: Yes, Your Honor.

3 So on the pre-1996 regime, this
4 argument wasn't really developed below by the
5 Petitioners, but, remember, 254(c) says the FCC
6 gets to decide what universal service is, based
7 on an evolving standard.

8 The Petitioners themselves said in
9 1996 that there was a fundamental overhaul --
10 that's their opening brief -- fundamental
11 overhaul of the regime. And that's because they
12 are ditching whatever the prior understanding
13 was, even assuming there was one -- and we
14 dispute that -- but even if there were, in '96,
15 Congress said we're completely changing, not
16 just how the system operates, but what it
17 covers. It's dramatically larger.

18 And even if you see our brief at pages
19 69 to 70, we cite some of the government's own
20 briefs where they say we have no obligation.
21 The statute imposes no obligation to raise the
22 same amount of money that we did before the '96
23 regime.

24 So the idea that somehow the old
25 regime is incorporated, I think, is directly

1 dispelled by the text of the language -- by the
2 text of the statute itself.

3 On the second part of your question,
4 Your Honor, if I can make one point that you all
5 remember today, it's that the -- the principles
6 in 254(b) are ones that the FCC does not have to
7 substantively comply with. This is not some
8 extreme, unusual reading as they try to make it
9 sound. That's been their uniform interpretation
10 for 25 years.

11 They say each one of those, maybe we
12 have to consider them. We can't ignore them
13 altogether. But we only --

14 JUSTICE KAGAN: Mr. McCotter, I mean,
15 there are some real standards in this program.
16 So what this program covers is things that a
17 substantial majority of residential customers
18 already have, all right? So it's not like
19 newfangled, go all get ourselves some Starlink
20 accounts, it's substantial majority of
21 residential customers already have that are
22 essential to living in our world, that are
23 essential to education, public health, and
24 public safety.

25 And those things have to be available

1 at affordable rates. The FCC can't do anything
2 by way of this program that is not basically
3 geared towards getting those who live in very
4 rural areas or who are very low income, getting
5 those -- getting those people access to services
6 that all the rest of us have. That's the nature
7 of the program, and that's the limit of the
8 program.

9 MR. McCOTTER: So the substantial
10 majority point, Your Honor, again, that's not
11 listed as something that the FCC has to
12 accomplish. It's listed only as something they
13 must consider the extent to which communications
14 are.

15 So it's not even saying universal
16 service is this level --

17 JUSTICE KAGAN: I -- I think if they
18 -- if -- if the FCC walked into this Court and
19 said we don't -- we can do something that, like,
20 a tiny minority of residential customers have, I
21 think that they would lose that case. I mean,
22 there are constraints on this agency and on this
23 -- and on their operation of the program.

24 And if we're going to read the statute
25 just -- I mean, honestly, I think that that's a

1 -- a not credible reading of this statute. This
2 statute clearly puts constraints on these are
3 the services that all the rest of us take for
4 granted, that you can't take for granted in
5 rural North Dakota.

6 And what this program says is that
7 rural North Dakota citizens should also get what
8 all the rest of us have long had. That's the
9 nature of this program, that the services that
10 the rest of us have that are essential to life
11 in a modern world, that are essential to
12 education, public health, and public safety,
13 which are providable at affordable rates.

14 So if it really takes a lot of money,
15 even then you can't get the program. You can't
16 get the service.

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

20 Again, affordability under 254(b) is
21 something the FCC itself has said it does not
22 actually have to comply with. It can pick any
23 254(b) principle, including one that it comes up
24 with on its own, and say that's what we're going
25 for. That's the real limitation.

1 JUSTICE KAGAN: Mr. McCotter, I'm
 2 going to tell you again that if the FCC -- and
 3 -- and maybe the Solicitor General can -- can
 4 respond to this -- but if the FCC came in and
 5 said we don't have to worry about affordable
 6 rates and, you know, they -- they can be
 7 exorbitant rates and we're going to still go
 8 ahead and fund things from this program, I -- I
 9 mean, that's just not a reasonable reading of
 10 the statute.

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

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

14 MR. McCOTTER: And they haven't
 15 changed it.

16 JUSTICE KAGAN: I'm inclined to ask
 17 the Solicitor General to say whether that is
 18 their position.

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

23 JUSTICE KAGAN: It's the --

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

25 JUSTICE KAGAN: But you just look at

1 the text. The text, it leaps out at you,
2 substantial majority of residential customers;
3 essential to education, public health, and
4 public safety; available at reasonable and
5 affordable rates.

6 MR. McCOTTER: Again, those are things
7 the FCC only must consider the extent to which.
8 They don't even have to consider whether those
9 are actually true. They have to say, do we
10 think that this is true and, if so, to what
11 extent. Okay, we've considered it. It's --
12 that's an important factor. It is not
13 substantive limitation.

14 JUSTICE JACKSON: Why isn't that an
15 arbitrary and capricious challenge, though? I
16 mean, it -- it seems to me that if you're
17 complaining about the FCC and the way in which
18 they have exercised its authority, you should be
19 bringing that kind of case. That's not a
20 non-delegation problem.

21 MR. McCOTTER: I don't think it has to
22 be one or the other, though, Your Honor. I
23 think if the agency --

24 JUSTICE JACKSON: Well, there has to
25 be a distinction between the two if you're

1 asking us to strike a -- a statute down on a
2 particular constitutional basis.

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

5 JUSTICE JACKSON: I mean, don't we
6 have constitute avoidance as a principle? If we
7 could do it under arbitrary and capricious,
8 shouldn't we be doing that rather than striking
9 the statute down as unconstitutional?

10 Let me ask you another question. I
11 guess I'm confused about what you're asking us
12 to do. Your brief says that the Court should,
13 quote, "take this opportunity to realign its
14 non-delegation framework with its traditional
15 understanding of the Constitution," end quote.

16 But you also have said, both in your
17 brief, I guess, and here, that you're not asking
18 us to overrule any specific precedents. But I
19 would think that a realignment would mean
20 different outcomes from cases that we've decided
21 under the standard that you want us to displace.

22 So, I -- I mean, if the intelligible
23 principle test, in your view, has been yielding
24 proper outcomes for the past century, then why
25 do we need to revisit it?

1 MR. McCOTTER: So we win even under
2 the current framework. And that's why we say
3 that the Court need not necessarily overturn any
4 precedent.

5 JUSTICE JACKSON: So why do we need to
6 revisit the framework? If you -- if you're --
7 if you're right about all the past cases, if we
8 got them right, then what's the need for having
9 a new standard?

10 MR. McCOTTER: So the main reason is
11 that the intelligible principle test as some
12 judges have interpreted it -- now, again, we
13 don't quite agree with this view. In Judge
14 Newsom's words, it's a punch line. It
15 essentially allows transfers altogether of
16 exclusive and strict legislative powers to
17 agencies. And you could say --

18 JUSTICE JACKSON: But not apparently
19 in all the cases that you say got it right. So
20 --

21 JUSTICE KAVANAUGH: The -- oh, keep
22 going. Sorry.

23 JUSTICE JACKSON: No, I just -- I just
24 -- I guess I'm really hyper focused on the need
25 for us to make any changes in terms of the legal

1 standard that applies here. And the reason is,
2 in part, because of what the Chief Justice
3 Marshall said -- we've quoted it a couple of
4 times -- this is delicate and difficult, this
5 inquiry, but he goes on to say it's an inquiry
6 into which a court will not enter unnecessarily,
7 precisely because it's so hard.

8 So I'm really trying to understand the
9 need for us to come up with a different test or
10 try to figure out something else, especially if
11 you appear to concede that the outcomes of all
12 these prior cases are correct.

13 MR. McCOTTER: I think the outcomes of
14 the cases are arguably correct under the
15 original understanding, but, again, part of that
16 could just be coincidence. This Court has
17 addressed certain statutes. We think a lot of
18 them are distinguishable in certain ways that
19 make them different from the statute here.

20 But, again, I don't think we should be
21 slighted for saying that we win even under the
22 modern test, though, because there is no clear
23 boundary for the FCC's ability to set the amount
24 to be raised. This Court has said that since
25 American Power & Light, even under its most

1 watered-down modern case law.

2 JUSTICE KAVANAUGH: Your -- your
3 position would say, I think, that a solution to
4 the problem you identify could be a trillion
5 dollar cap or \$100 billion cap. And that makes
6 the position seem -- what is -- what exactly are
7 you trying to accomplish?

8 MR. McCOTTER: And that's exactly what
9 Justice Thomas said in his Whitman concurrence.
10 He says, just because there is an intelligible
11 principle, assuming there is one -- and,
12 obviously, we don't -- but even assuming there
13 is one, it doesn't stop Congress from just
14 handing wholesale its power. Just like Justice
15 Scalia said in his Mistretta dissent.

16 JUSTICE KAVANAUGH: Well, maybe that's
17 not -- maybe I didn't phrase my question
18 correctly. I think your position is that it
19 needs -- needs a cap, correct?

20 MR. McCOTTER: There needs to be some
21 kind of objective limit.

22 JUSTICE KAVANAUGH: Okay.

23 MR. McCOTTER: Yeah.

24 JUSTICE KAVANAUGH: So cap. Yes.

25 MR. McCOTTER: It doesn't have to be a

1 number. Just -- there's another -- if I had to
2 make a second point --

3 JUSTICE KAVANAUGH: But even if it has
4 to be -- even if it has to be a number, you're
5 not taking the further position, I don't think,
6 that the number -- the number could be a cap.
7 It could be very high, and then the question is
8 what exactly are we accomplishing?

9 MR. McCOTTER: Well, so if Congress
10 did set a trillion-dollar cap, obviously it's
11 unlikely, but at least then we would know that
12 Congress itself has made that determination. It
13 says we think universal service is this
14 important; we want the agency to be able to
15 raise --

16 JUSTICE KAVANAUGH: And how -- how is
17 that then different from saying we're not going
18 to do a trillion-dollar cap, but we're uncertain
19 about -- we're uncertain about the amount that
20 will cover the costs of the program and so we're
21 going to use the term "sufficient"?

22 And so I think you need to zero in on
23 this -- the word "sufficient" and why that's not
24 enough of a constraint vis-à-vis the trillion
25 dollar. Like, we would be saying, I think, if

1 we agree with you, sufficient is not good enough
2 but trillion dollar is. And I think a lot of
3 people would say that doesn't make a lot of
4 sense. So what's the answer to that?

5 MR. McCOTTER: Well, so the answer
6 with the trillion-dollar example is then we can
7 say Congress has set the policy. Yes, the test
8 this Court had for 150 years, Congress sets the
9 policy. It can't use just vague aspirations,
10 but it sets the policy, leaves only details to
11 be filled in.

12 I think the -- in that case, they've
13 set the policy, essentially, right? The policy
14 that matters for this purpose, which is the
15 amount to be raised. But if they just say raise
16 a sufficient amount --

17 JUSTICE JACKSON: But that's just
18 because --

19 MR. McCOTTER: -- first of all, that's
20 --

21 JUSTICE JACKSON: -- you say the
22 amount to be -- sorry. Go ahead.

23 JUSTICE BARRETT: That -- that seems
24 pretty empty, right? I mean, isn't that Justice
25 Kavanaugh's point, that if they say \$3 trillion

1 -- \$3 trillion or \$5 trillion, that's just kind
2 of throwing a number out there for the sake of
3 throwing a number. Why have they really set the
4 policy in a way that's meaningfully different
5 than they did in this statute?

6 MR. McCOTTER: But I still think if
7 they put a particular objective limit like that,
8 they have set the policy. They've said this is
9 how important universal service is to us. The
10 agency can --

11 JUSTICE BARRETT: You're talking about
12 if they -- you're still talking about just if
13 they raise money through the fund this way.
14 You're not talking about them appropriating the
15 money, right? You're just saying --

16 MR. McCOTTER: Correct, yes.

17 JUSTICE BARRETT: -- this is the cap.
18 That just -- that seems a little bit hollow.
19 Kind of seems like a meaningless exercise.

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

23 JUSTICE BARRETT: Counsel, let me just
24 --

25 MR. McCOTTER: -- that it's too low,

1 you know it's Congress.

2 JUSTICE BARRETT: Let me switch gears
3 for one minute and just ask you to respond to
4 the page 8 and 9 reply brief statutes. You
5 know, both Ms. Harris and Mr. Clement have said
6 that your position is going to jeopardize a lot
7 of laws.

8 MR. McCOTTER: So the list of statutes
9 there, they're kind of like the dog that didn't
10 bark. All they have are a few relatively modern
11 provisions, almost all of which are standard fee
12 provisions, like how much do you pay for a
13 postal stamp, that sort of thing, which this
14 Court addressed in National Cable, the 1974
15 case, and said maybe that has its own built-in
16 limiting principle, because you're limited to
17 the value to the recipient.

18 JUSTICE BARRETT: Okay. So --

19 MR. McCOTTER: However --

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

22 MR. McCOTTER: Correct.

23 JUSTICE BARRETT: Okay. So do you
24 think that our deciding this case in your favor
25 would jeopardize other statutes that maybe

1 aren't on pages 8 and 9 of the briefs? I mean,
2 do you think it would be cataclysmic or do you
3 think it would be pretty modest, like a -- this
4 -- this statute only?

5 MR. McCOTTER: So the proof is in the
6 pudding here. The decision below has been
7 binding in the Fifth Circuit for eight months
8 now. They have repeatedly rejected
9 non-delegation challenges, including to some
10 relatively broad language. We cite these in our
11 brief. The Mayfield case, for example, involved
12 a statute that referred to DOL regulations being
13 detrimental to health, deficiency, general
14 well-being.

15 And the court there unanimously said:
16 No, that gives enough meat on the bones. This
17 is not like what we saw with the Universal
18 Service Fund.

19 JUSTICE BARRETT: Okay.

20 MR. McCOTTER: The government has
21 never cited another one like this.

22 JUSTICE BARRETT: All right. Then
23 last question. What about the consequences?
24 You know, Mr. Clement said the consequences of
25 holding this statute unconstitutional would be

1 devastating for universal service. What about
2 that?

3 MR. McCOTTER: Well, just as a
4 disclaimer, it's not relevant to the
5 constitutional question, of course, but I will
6 address it anyway.

7 JUSTICE BARRETT: I -- I understand.
8 I -- I understand that. But I think it's a fair
9 question to consider the consequences of your
10 position.

11 MR. McCOTTER: So the more important
12 that my friends on the other side make out this
13 program to be, all it does is make my case
14 stronger that it should have been Congress
15 itself to set meaningful limits in it.

16 In terms of how this would play out --
17 again, we offer options in our brief. They've
18 never -- my friends on the other side don't
19 respond to them; I think maybe they accept
20 them -- the Court could limit relief to the
21 named Respondents.

22 This does challenge just one court
23 order, remember. I realize there are others in
24 the --

25 JUSTICE KAVANAUGH: And the -- well,

1 on your answer to Justice Barrett on the Fifth
2 Circuit, and the proof is in the pudding, I
3 guess I question that, because they relied on
4 the combination theory.

5 MR. McCOTTER: True, but --

6 JUSTICE KAVANAUGH: So proof is not in
7 the pudding.

8 (Laughter.)

9 MR. McCOTTER: True, but the first
10 part of their opinion goes right up to the line
11 on the statutory delegation aspect.

12 JUSTICE KAVANAUGH: Well -- well, they
13 rely on the combination theory. You're barely
14 defending that theory, right?

15 MR. McCOTTER: We're not running away
16 from it at all. We think it's correct. We
17 think it flows directly from Free Enterprise
18 Fund.

19 Judge Newsom himself, in his
20 concurrence, made the same argument, right, that
21 with each delegation we run into -- or we move
22 away from the locus of democratic
23 accountability. And so that's --

24 CHIEF JUSTICE ROBERTS: Well --

25 JUSTICE KAVANAUGH: That's a --

1 CHIEF JUSTICE ROBERTS: Free
2 Enterprise Fund was quite a different -- I mean,
3 they had -- they both had two, but I don't think
4 that's -- that's where the similarity ends.

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: Because it was
7 a question of direct control by the -- by the
8 President. And if he can't control both of
9 them, then he's got no control at all.

10 So I -- I think it was --

11 MR. McCOTTER: Sure.

12 CHIEF JUSTICE ROBERTS: -- quite a
13 different case.

14 MR. McCOTTER: Sure. But even then,
15 the -- the concern, as you said, was the
16 President's control. Here, the concern is
17 democratic accountability. And the private
18 non-delegation and the -- what I'll call the
19 statutory --

20 JUSTICE SOTOMAYOR: Counsel --

21 CHIEF JUSTICE ROBERTS: Well, but it's
22 a much more -- I'll let it go in a second. But
23 it's a much more precise straight line, direct,
24 as opposed to a broad concept like democratic
25 accountability. Thank you.

1 MR. McCOTTER: I understand. And if
2 the Court doesn't want to go down the road of
3 the combination theory, then I think the
4 Petitioners agree that the Court could just
5 address QP 1 and 2 and resolve the statutory.

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

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

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

1 one-off special test for taxing.

2 But it's true that applying that test
3 is easier in the context of a tax, for two
4 reasons.

5 First, we all know that taxing is
6 strictly and exclusively legislative. That has
7 been established for centuries.

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

15 That's not to say that if the Court
16 for some reason thinks that it's not a tax, that
17 we must lose.

18 This Court said just last year in the
19 CFPB case raising public money is a legislative
20 task. Professor McConnell's referred to it as
21 raising domestic revenue. These are terms that
22 I think would include fees.

23 And so the reason why I think, if you
24 go down that road, we are still different than
25 the statutes that the government cites on pages

1 8 to 9 of its reply is that those, either on
2 their face or under the limiting construction
3 that this Court required in National Cable in
4 1974, those would be construed as fees. They
5 have a limiting principle of, you can only
6 charge the value of the benefit to the
7 recipient.

8 And maybe there's one statute, like
9 the OCC one, that is kind of on the line. And
10 that's tough. It's a more modern statute. You
11 know, maybe that one is questionable.

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

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

16 JUSTICE JACKSON: Sufficient to run
17 this program?

18 MR. McCOTTER: Sufficiency is not a
19 mandate, first of all. They don't have to do
20 that.

21 In 254(b) it is listed as a principle,
22 they have already said, for 30 years. They
23 don't have to follow any particular principle.
24 And 254(e), there's also a reference to
25 sufficiency. It says should. Again --

1 JUSTICE JACKSON: In a hypothetical --

2 JUSTICE KAGAN: Again, you -- you --
3 you're saying that we should interpret this
4 statute to say that that word, "sufficient," is
5 not imposing a requirement, meaning sufficient,
6 what is required to do these services, but not
7 more than that?

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

10 JUSTICE KAGAN: Okay. I'll add that
11 to my list to things that I think would be an
12 unreasonable statutory interpretation.

13 Sufficiency means -- like when I call
14 the pizza operator and say: I want you to send
15 me pizza sufficient for 10 people, and then an
16 18 wheeler shows up --

17 (Laughter.)

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

20 (Laughter.)

21 MR. McCOTTER: Well, I think the key
22 distinction there is at least you have an
23 objective limitation on the end, right?
24 Sufficient pizza for 10 people. Okay. We'll
25 give -- give them the benefit of the doubt and

1 assume sufficient --

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

5 MR. McCOTTER: So then --

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

15 That's -- that's -- that's the
16 nature -- that's the substantive mandate.
17 Sufficient is -- that's how much you have to
18 raise, is to do that and nothing else.

19 MR. McCOTTER: And again, I return to
20 254(c)(1), principles are not mandatory, except
21 that the FCC must consider them. And even that,
22 honestly, is too much.

23 JUSTICE SOTOMAYOR: I'm sorry, I --
24 the word -- statute says that the FCC -- uses
25 the word "shall base its policies on the six

1 universal service principles."

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

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

12 So you can't have it both ways.

13 MR. McCOTTER: Well, so on your
14 first --

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

22 But you're sort of saying the
23 principles set no limits.

24 MR. McCOTTER: Well, so on the first
25 part of your question, Your Honor, they do

1 say -- in their reply brief, they say I quoted
2 out of context one of their briefs saying that
3 the 254 principles don't have to be complied
4 with.

5 JUSTICE SOTOMAYOR: Exactly.

6 MR. McCOTTER: And they say: If you
7 read the rest of what we said, we said was in
8 light of other statutory obligations.

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

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

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

23 And that doesn't have a reasonable or
24 financial limitation at all. And -- and I -- I
25 just -- I'm not sure I understand why you're

1 fighting the notion that if -- if they were
2 bound by them somehow, they would still provide
3 guidance.

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

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

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

21 JUSTICE KAGAN: Well, you know, there
22 is something that says to the FCC, yes, you get
23 to keep thinking about this. And, you know,
24 Justice Jackson suggested that that's exactly
25 when you want delegations. It's you get to keep

1 thinking about this because we recognize that
2 the -- that the technology is going to change.
3 And these very clear principles are going to be
4 in -- in a -- in -- in 2025 different from what
5 they were in 2010, which is different from what
6 they were in 2000.

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

15 I mean, if you go through what this
16 program is providing, what -- what would you cut
17 out?

18 MR. McCOTTER: I'm sorry. What would
19 I cut from this?

20 JUSTICE KAGAN: Yeah, because, you
21 know --

22 MR. McCOTTER: I would add things to
23 the statute.

24 JUSTICE KAGAN: -- like, for -- to me,
25 it's like, okay, you know, what it's providing

1 is landline connections and now broadband in
2 very rural areas, about a \$9 per month subsidy
3 for people who live just -- who live below the
4 poverty line, rural health to make -- to ensure
5 that we facilitate telehealth services and allow
6 rural clinics to operate.

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

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

20 MR. McCOTTER: So on that point, I'd
21 respectfully direct you to our opening brief,
22 search for where we use the phrase "wealthy
23 Montanans on ranchettes." It's a phrase used by
24 a scholar saying this money gets used for things
25 like that. They're taking money from people who

1 are just above the line to receive, say,
2 lifeline assistance, and it goes to help people
3 who are rural but who already wealthy and that
4 sort of thing. So the idea that this is just
5 unalloyed good, we would respectfully disagree
6 with.

7 JUSTICE GORSUCH: On --

8 MR. McCOTTER: GAO reports say that
9 for 20 years --

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

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

16 JUSTICE KAGAN: Trying to make an
17 arbitrary and capricious stand --

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

19 JUSTICE KAGAN: -- challenge.

20 MR. McCOTTER: Sorry. If I could
21 address your prior point about the changing
22 technology, so we're not challenging -- we made
23 this very clear -- we're not spending the
24 spending on the back end. And the FCC can
25 address changing technology on the back end by

1 saying here's the new equipment that we think
2 people should have. We've already -- in that
3 case, if they've constitutionally raised the
4 money, have much broader leeway. You should see
5 footnote 11 in our opening brief that explains
6 the distinction.

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

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

25 And I -- I -- I had understood your

1 argument to be not that they're spending too
2 little or too much, but that nobody can tell
3 what the right answer is.

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

14 So there we go. Starlink for the
15 whole nation. Maybe they're not spending
16 enough. Who knows?

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

1 this. It's the exact opposite of a judicially
2 manageable standard.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas?

6 Justice Alito?

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

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

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

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

24 MR. McCOTTER: Sorry. And so you
25 could also look to the Fifth Circuit -- excuse

1 me -- en banc opinion, which did not even vacate
2 the quarterly contribution factor at issue here.
3 It simply remand it to the agency.

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

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

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

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

22 MR. McCOTTER: I'm not sure of the --
23 the best source I could give you, Your Honor, on
24 that. I think the answer is that Congress would
25 have an opportunity to take the reins and decide

1 what do we really want universal service to be.
2 It's so important. As I say, the friend -- my
3 friends on the other side insist this is the
4 most important program in the country, but yet
5 they think that perhaps it's not one where
6 Congress itself needed to impose any real
7 limits.

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

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

22 And maybe that's true; maybe that's
23 not true. But each one of those would require
24 individual determination, and we don't have
25 briefing on all of those, on all of those

1 statutes. So maybe that's some -- something
2 that the Solicitor General could -- could
3 address. Maybe that's directed more to her than
4 to you, but do you have thoughts on that?

5 MR. McCOTTER: Well, sure. So I think
6 it's telling, again, that the best examples they
7 could have, after almost four years of
8 litigation, are the ones at pages 8 to 9 of
9 their reply, which are distinguishable for all
10 the reasons Justice Gorsuch has given. I think
11 --

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

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

21 I think also the Court in its opinion,
22 if it were to rule in our favor, would explain
23 so why is this statute different than, say, ones
24 like in NBC? And I think the Court would go
25 through the fact that this did not bring the

1 common law soil with it. It did the opposite.

2 There are no other provisions around
3 it that give it meaning like this Court has
4 sometimes done to fill in vague terms. If
5 anything, every time you look at a different
6 provision, it's just broader than the one before
7 it. And so I think that would naturally limit
8 the follow-on cases.

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

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

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

1 half the time --

2 JUSTICE ALITO: Well, it -- it takes
3 maybe -- it takes gumption to take the lead, but
4 maybe it doesn't take very much gumption to try
5 to -- to -- to get the benefit of something that
6 somebody else has done the work to enable you to
7 get.

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

20 JUSTICE ALITO: It's not easy to get
21 legislate -- it's never easy to get legislation
22 enacted by Congress.

23 MR. McCOTTER: True.

24 JUSTICE ALITO: Even more difficult
25 right now than it has been at times in the past.

1 Isn't that right?

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

18 JUSTICE ALITO: Do you think that
19 would be a better solution to have the taxpayers
20 pay for this rather than the providers?

21 MR. McCOTTER: Well, remember, this
22 fee is already paid by the taxpayers.

23 JUSTICE ALITO: Let me not ask whether
24 it's a better -- a better approach but one that
25 Congress is more likely to be enthusiastic

1 about?

2 MR. McCOTTER: Well, as of now, it's
3 already paid by the taxpayers because Americans
4 are really the ones who pay for it, but also on
5 -- on the idea -- I'll be brief -- but just on
6 the idea that because it's a popular program or
7 something, that that should somehow matter, I
8 think --

9 JUSTICE ALITO: It's not overt. But,
10 anyway, go ahead.

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

17 JUSTICE ALITO: Thank you.

18 MR. McCOTTER: Blame USAC.

19 JUSTICE ALITO: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Sotomayor?

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

1 like what the government's spending money on.

2 But in terms of accountability, your
3 monthly phone charge -- bill tells you that
4 you're paying for universal service charge
5 because it has a line that says, your bill, this
6 is the amount of the federal universal service
7 charge.

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

14 MR. McCOTTER: Right, but that's what
15 the Constitution requires. And the -- the thing
16 is if people don't like it, they can vote out --

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

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

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

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

1 violation.

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

8 On --

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

15 So, yes, they are funding industries.

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

21 JUSTICE SOTOMAYOR: But the --

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

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

1 programs.

2 MR. McCOTTER: Right, but that would

3 --

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

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

9 JUSTICE SOTOMAYOR: But that's --

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

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

14 MR. McCOTTER: Well --

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

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

22 Some of them may seem a little
23 broader. I think under this Court's National
24 Cable decision, they would need to be limited.
25 This Court already said in that case, 50 years

1 ago, there's a major distinction from delegation
2 purposes from letting an agency set a true fee
3 and letting an agency raise money in the public
4 interest.

5 I think that's a very important point
6 here under current doctrine, as the phrases like
7 "in the public interest" just won't work here.

8 JUSTICE SOTOMAYOR: Thank you,
9 counsel.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

18 In other words, you know, like we
19 narrowly construe the statute, as in Benzene, or
20 the major questions doctrine is all about doing
21 this. These look like very broad delegations.
22 We can't really believe that's what Congress
23 meant, so we're going to sort of impose some
24 limits.

25 And -- and what you're asking us to

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

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

18 We interpret the statute. There's a
19 lot of limits here. The agency can raise the
20 money that's good enough, but no more to satisfy
21 a pretty -- a pretty clear mandate, which is to
22 provide basic services, those services necessary
23 for health and safety and education, basic
24 services, for people of low-income and -- and
25 rural areas who don't have what a substantial

1 majority of us do have. That's a pretty clear
2 directive to the agency.

3 And that seems to me consistent with
4 the way we should interpret statutes in this
5 context.

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

10 JUSTICE KAGAN: So I think --

11 MR. McCOTTER: And so I realize we can
12 disagree --

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

20 The -- the lot of words are actually
21 masking an extremely clear mandate to the
22 agency. This -- this agency knows what it's
23 supposed to do under this statute, which is
24 exactly what this agency has been doing. This
25 goes back to Mr. Clement's historical point.

1 It's basically what this agency has been doing
2 since the 1930s.

3 MR. McCOTTER: Well, again --

4 JUSTICE KAGAN: Sorry.

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

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

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

23 On the list of policies, in Schechter
24 Poultry, there was a similar list of poultry --
25 list of principles -- excuse me, list of

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

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

15 JUSTICE KAGAN: Thank you.

16 CHIEF JUSTICE ROBERTS: Counsel.

17 Justice Gorsuch?

18 Justice Kavanaugh?

19 JUSTICE KAVANAUGH: I did have a few.

20 On accountability, I assume because I haven't
21 heard from you, you don't have any separate
22 problem here with the fact that it's the FCC and
23 that's commonly thought of to be independent,
24 either it's not independent as the government
25 says, or you don't think that's an additional

1 problem; is that correct?

2 MR. McCOTTER: It's perhaps a minor
3 plus factor. We're not raising a separate
4 challenge on that basis, no.

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

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

20 And so, in our view, at most that's
21 what Skinner said. And so whether you view it
22 as a tax or a fee, we win either way. Skinner
23 doesn't control beyond that.

24 JUSTICE KAVANAUGH: Is your argument
25 that the word "sufficient" is too loose or the

1 back-end objects are too loose or both?

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

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

12 MR. McCOTTER: I think I do.

13 JUSTICE KAVANAUGH: Yeah.

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

22 But here on the back-end spending,
23 it's not like they suddenly have some real
24 objective limits there either.

25 JUSTICE KAVANAUGH: Yeah. And then,

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

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

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

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

22 JUSTICE KAVANAUGH: Well, let's play
23 this out. We've had this discussion before in
24 past years, the past few years, but if this
25 Court were to say that it's unconstitutional for

1 the FCC to continue in this way, even though the
2 named parties are here before us, my
3 understanding of what the government has said
4 before is we would comply with what the Supreme
5 Court said.

6 MR. McCOTTER: Sure. And I think it's
7 important that -- that they say that, but this
8 is really important --

9 JUSTICE KAVANAUGH: You don't think
10 they would do that?

11 (Laughter.)

12 MR. McCOTTER: I don't think they
13 necessarily have a legal obligation to do so.

14 JUSTICE KAVANAUGH: Really? What's --
15 what's your case for that?

16 MR. McCOTTER: Well, the -- the case
17 is that the judgment applies to the parties
18 only, specifically if the Court has already said
19 so, which again --

20 JUSTICE KAVANAUGH: What's your --
21 what's your response to vertical stare decisis
22 and how that's traditionally been understood in
23 the country?

24 MR. McCOTTER: So that's why I say I
25 think the limiting it to the named parties is

1 really most relevant for all the challenges that
2 are already in the hopper, to say we're not
3 going to unscramble all these statutes in the
4 past, except for maybe these few named parties.
5 Going forward, as people might bring new
6 challenges -- and as I said in response to
7 Justice Alito, I'm not convinced they will --
8 but even if they did, then, okay, well, that
9 plays out well into the future. By then we
10 think if the Court has actually reached this
11 point, Congress would have done something --

12 JUSTICE KAVANAUGH: The --

13 MR. McCOTTER: -- hence forwardly.

14 JUSTICE KAVANAUGH: Sorry to prolong
15 it. The premise of what you're saying right
16 there is the FCC is going to say we don't care
17 what the Supreme Court said about the program.
18 And I'm not sure that premise is -- is -- is
19 accurate.

20 MR. McCOTTER: I think what they --
21 sorry if I'm not being clear. I'm saying for
22 the -- for the quarters that have already been
23 challenged, the past ones --

24 JUSTICE KAVANAUGH: Right.

25 MR. McCOTTER: -- I think they would

1 say, look, the Supreme Court has ruled in your
2 favor, Respondents, and we will address that as
3 necessary, as to you. Going forward, though, I
4 do think that limiting it to the named parties
5 is less effective. That's why we list other
6 options, though.

7 I'm not saying that that's like a
8 cure-all, just to be clear. I think it is an
9 important limitation, especially for the suits
10 already filed.

11 JUSTICE KAVANAUGH: Thank you very
12 much.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett?

15 JUSTICE BARRETT: Mr. McCotter, I just
16 want to clear something up about the 254(b)
17 universal service principles. We've been going
18 round and round and round about whether these
19 are mandatory factors or not. So I just want to
20 be sure that I understand your position.

21 So it begins under (b) by saying that
22 the joint board and the Commission shall base
23 policies for the preservation and advancement of
24 universal service on the following principles.
25 And then each one of those principles has a

1 "should."

2 Is that your problem, that they say
3 "should"? And would you feel differently if the
4 principles were worded that quality services be
5 available at just, reasonable, and affordable
6 rates?

7 MR. McCOTTER: That's one of the
8 problems, is that it says "should." But I
9 think, more fundamentally, the problem is, as
10 the FCC itself has said for 30 years now almost,
11 that any one of these --

12 JUSTICE BARRETT: Okay, but put aside
13 --

14 MR. McCOTTER: All right.

15 JUSTICE BARRETT: This is a legal
16 question. This is a statutory interpretation
17 question. So the FCC can say that all it wants,
18 but we still have to interpret the statute,
19 right? So we're not bound by what the FCC says
20 about its own authority.

21 So return to the question.

22 MR. McCOTTER: True, although I think
23 the fact that they've interpreted it the same
24 way for 30 years --

25 JUSTICE BARRETT: Okay. Okay.

1 MR. McCOTTER: -- is an indication.

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

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

17 JUSTICE BARRETT: Okay. And then
18 second question. We've talked about the
19 difficulty of having judicially manageable
20 standards in this area. And when you and I
21 talked before, we were talking about a cap, and
22 you said a cap would solve the problem.

23 So is that a manageable principle,
24 that you would be happy -- you said, well, then
25 at least Congress would have decided the policy

1 for itself and put a limit on it, so we know if
2 it said 3 trillion, 3 billion, whatever, I
3 understood you to tell me before that would
4 solve the problem.

5 MR. McCOTTER: Absolutely.

6 JUSTICE BARRETT: And so that would be
7 the intelligible principle?

8 MR. McCOTTER: If we're under the
9 intelligible principle, yes --

10 JUSTICE BARRETT: Yeah.

11 MR. McCOTTER: -- that's -- that's
12 more than sufficient. And I think it's
13 noteworthy that --

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

18 MR. McCOTTER: Correct. Although we
19 win even if you don't think that's the
20 requirement.

21 CHIEF JUSTICE ROBERTS: Justice
22 Jackson?

23 JUSTICE JACKSON: So you've said
24 several times that you're not asking for a
25 special rule for taxes versus fees, but you

1 began today by saying that this case is about
2 taxation without representation. And you say
3 there has to be a cap because the amount of
4 public revenue that is to be raised via, you
5 know, a mechanism is a legislative prerogative
6 and can't be delegated.

7 So it seems to me that you are relying
8 to some extent on the characterization of this
9 as a tax.

10 MR. McCOTTER: So to be clear, we're
11 making alternative arguments. We think it is a
12 tax. We think that --

13 JUSTICE JACKSON: Does that matter?

14 MR. McCOTTER: -- it should matter.

15 But even --

16 JUSTICE JACKSON: Does it matter?

17 MR. McCOTTER: But if even if you
18 disagree --

19 JUSTICE JACKSON: No, I understand. I
20 just understand whether your delegation argument
21 in substantial part is hinging on your point
22 that the legislature has the power to tax and it
23 can't be handed off, and unless the legislature
24 has a cap that it says this is the amount that
25 you can raise, it is doing something

1 unconstitutional because of that structure?

2 MR. McCOTTER: It matters in the sense
3 that we know taxing is a strictly and
4 exclusively legislative power. So we know that
5 this is something Congress itself has to set the
6 objective rule on.

7 It's not necessarily that they have a
8 cap in the numerical sense. In footnote 7 of
9 our opening -- of our brief there's an example.

10 JUSTICE JACKSON: No, I understand,
11 but you -- but -- but the thought is that --
12 that to the extent that you believe this is a
13 tax, there has to be a cap set by Congress, is
14 your basic point.

15 Now, let me just ask you this:
16 Mr. Clement says, okay, this statute is really
17 not about raising public revenue. It is about
18 providing universal services. So if we
19 disagree, if this comes down to how we're
20 characterizing this statute, and we disagree
21 with your view that this is a public
22 revenue-raising vehicle and, therefore, Congress
23 has to put a cap on it, do you lose? I mean --

24 MR. McCOTTER: No.

25 JUSTICE JACKSON: -- why must there be

1 a cap if this is not a tax?

2 MR. McCOTTER: So, there -- again,
3 there doesn't need to be a cap in the numerical
4 sense.

5 JUSTICE JACKSON: No, I understand.

6 MR. McCOTTER: There needs to be a
7 rule.

8 JUSTICE JACKSON: Well, why if this is
9 not a tax? Why can't Congress develop a policy
10 that says we would like to have the following
11 thing happen? We would like to have everybody
12 in rural places throughout the country,
13 everywhere, have this kind of service?

14 And as Mr. Clement said, we don't
15 really care about how much it costs to do that.
16 We are trying to get to this objective. And you
17 would come back and say: Ah, but you have to
18 tell us, you know, there has to be a cap on the
19 amount of money that you have to raise for this.
20 And Congress says: But that's not our
21 objective. This is not about raising money.
22 It's about providing a service; however much
23 that costs.

24 What's unconstitutional about that?

25 MR. McCOTTER: It's still domestic

1 revenue raising, as Professor McConnell
2 describes it or as this Court last year in CFPB
3 described it. It's raising public moneys. And
4 when you have that sort of exclusive legislative
5 power, there needs to be a policy set by
6 Congress.

7 JUSTICE JACKSON: All right.

8 MR. McCOTTER: The policy can't be
9 vague.

10 JUSTICE JACKSON: Let me just ask one
11 more question. I know we're running out of time
12 here.

13 Is it your first-line position that we
14 should not be using the intelligible principle
15 standard? Are you saying -- are you encouraging
16 us -- I know you say you win under that
17 standard, but is your first point that we should
18 be doing something else?

19 MR. McCOTTER: Yes. The Court should
20 at the very least return to the intelligible
21 principle that I think J.W. Hampton itself laid
22 out, which says that Congress must set the rule
23 that shall prevail. And as our argument is,
24 there is no rule that shall prevail when it
25 comes to the amount of money.

1 JUSTICE JACKSON: So you're not doing
2 important subjects or something like that, is --
3 is that what you mean? Is that the test that
4 you're -- I'm just trying to understand what it
5 is that you would have us do if we don't do
6 intelligible principle?

7 MR. McCOTTER: So we would say that
8 the proper framework is what this Court applied
9 for 150 years, if it is a strictly and
10 exclusively legislative power, then Congress
11 itself must set the policy. It can leave only
12 fact-finding and details to the executive.

13 And as I started off today saying, the
14 amount of money to raise for an enormous social
15 welfare program is not a minor detail to be left
16 to someone else.

17 JUSTICE JACKSON: And -- and you don't
18 see the risk that we judges would be overriding
19 popular -- and I -- I know you don't care that
20 it's popular -- but popular in the sense that
21 Congress has enacted it, programs?

22 I mean, Mr. -- Mr. Clement says that
23 this could be the aggrandizement power by the
24 courts if we don't have a really clear standard
25 for determining when we come in and say this is

1 unconstitutional versus not?

2 MR. McCOTTER: Well, I think he
3 apparently prefers an aggrandizement by Article
4 II executive. And Congress was more than happy
5 to let that happen when it comes to taxes
6 because nobody wants to take responsibility for
7 that.

8 So I think if we care about kind of
9 democratic accountability I will return to what
10 Judge Newsom said in his concurrence, with each
11 delegation here, each new layer, we move further
12 and further away from that democratic
13 accountability.

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 General Harris, rebuttal?

18 REBUTTAL ARGUMENT OF SARAH M. HARRIS
19 ON BEHALF OF THE PETITIONERS IN CASE 24-354

20 GENERAL HARRIS: Thank you. Just want
21 to go over three problems for Respondents.

22 One, I candidly don't know what the
23 rule is at this point. On the one hand, there
24 is an anomalous rule that is foreign to the
25 non-delegation precedents apparently for taxes,

1 fees, and other revenue-raising actions, and I
2 don't know how it can possibly be squared as
3 something that preserves a separation of powers.

4 When saying that an agency can raise
5 up to \$1 trillion with no further restrictions
6 is somehow not a non-delegation problem, but
7 tying what an agency can extract from a
8 particular set of people, tied to the specific
9 needs of a program is somehow constitutionally
10 unconscionable.

11 I think there is a grave risk that if
12 the Court went down that path, the Court would
13 not be revitalizing the non-delegation doctrine
14 or giving it meaningful teeth. It will just
15 crop up case by case new, exclusively
16 legislative powers, what is the new sort of
17 limit that is going to be reverse-engineered for
18 that one? That is chaos.

19 Second, Respondent is ignoring the
20 very real constraints in Section 254. This is a
21 little bit of an odd case in which the
22 government is fervently insisting that the terms
23 of the statute are mandatory, and yet
24 Respondents won't take yes for an answer, that
25 it is really, really a constraint.

1 And you know that 254 is mandatory for
2 a couple of reasons, not just the fact that 254
3 starts with "shall," as Justice Barrett and
4 others have pointed out, but the fact that this
5 is a highly repetitive statutory scheme. So all
6 of the things in Section 254(b) actually recur
7 elsewhere in the statute. 254(d) is a "shall"
8 with respect to the equitable and
9 non-discriminatory rates.

10 Other parts of the program in 254(h)
11 with respect to how the rural program is
12 supposed to work or how the libraries are
13 supposed to be funded. Those are shall's.

14 And so there is no doubt that this is
15 a mandatory system. The FCC has treated it as
16 such, but the question is what the statute
17 means. It is mandatory.

18 Third of all, just the consequences of
19 Respondents' position are really troubling. The
20 reply brief 8 to 9 examples are truly the tip of
21 the iceberg. It is a little bit strange that
22 Respondents think that it is perfectly fine if
23 there is some sort of fee system for the agency
24 to decide how much its own costs or expenses are
25 going to be, that that is not sort of the --

1 that is not sort of inviting the agency to raise
2 whatever it sort of feels like, but that there
3 is a problem when Congress is tethering the
4 costs or fees or rates not to what the agency
5 feels like doing to fund its own enforcement
6 priorities and other things that it's doing, but
7 instead to meet defined, external goals that
8 Congress has required the program to meet
9 against a historical backdrop. That is a very,
10 very strange position to be in.

11 Now, on top of that, that's just the
12 problem with a different rule for fees or taxes
13 or just looking at statutory analogs for revenue
14 raising. That really is the tip of the iceberg
15 because Respondents' position also seems to have
16 other built-in features that jeopardize, sort of
17 create a mindfield for the U.S. code, one of
18 which is if the idea is you can't ever have
19 balancing of factors in a statute without
20 running into a non-delegation problem, guess
21 what? Agencies are delegated with a lot of
22 balancing of factors. It doesn't mean they have
23 no constraints at all. It means they have to do
24 both.

25 So this Court should not stray from

1 the path. Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel. The case is submitted.

4 (Whereupon, at 12:50 p.m., the case
5 was submitted.)

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