Nos. 24-354 and 24-422

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,
Petitioners,

v.

CONSUMERS' RESEARCH, *ET AL.*,
Respondents,

SCHOOLS, HEALTH & LIBRARIES BROADBAND COALITION, *ET AL.*,
Petitioners,

v.

CONSUMERS' RESEARCH, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals For the Fifth Circuit

AMICUS CURIAE BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION IN SUPPORT OF RESPONDENTS CONSUMERS' RESEARCH, *ET AL.*

TYLER MARTINEZ
Counsel of Record
NATIONAL TAXPAYERS UNION FOUNDATION
122 C Street N.W., #700
Washington, D.C. 20001
tmartinez@ntu.org
(703) 683-5700

February 18, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in direct litigation and *amicus curiae* briefs upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce. Accordingly, *Amicus* has an institutional interest in this case.

SUMMARY OF THE ARGUMENT

This case has long been brewing: the structure of the Universal Service Fund (USF), paid for by anyone with a telecommunications line, is a tax levied unconstitutionally. Unelected Commissioners delegating further to a corporation run by industry insiders to tax almost every American flies in the face of the Founding era's lead complaint that led to the Revolution: no taxation without representation.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* represents that none of the parties or their counsel, nor any other person or entity other than *Amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Not only was this a rallying cry and a legal argument in support of the Revolution, the effect can be seen throughout the structure of the Constitution itself. The Founders demanded that only Congress have the power of federal taxation and restrained states' powers of taxation when they hit national policy. Furthermore, the Origination Clause assured that the body most accountable to the electorate—House members facing re-election every two years—would be the sole originator of new taxes.

The USF represents an unconstitutional double delegation of the taxing power: first to the FCC and then to the USAC. In the past, this Court has allowed Congress to cede much of its legislative power to the unelected bureaucracy. But now the bureaucracy further delegates these powers to industry insiders. It is a situation ripe for corruption and fundamental unfairness to taxpayers everywhere.

Finally, this is case is of vital importance and should not be sidelined by requiring the challenger first seek stays at every level of the litigation for a tax that has been (unconstitutionally) in effect for decades. This Court should not cabin Article III standing on a requirement for continual seeking of emergency relief. Creating a doctrine which requires preliminary relief, quick briefing schedules, and time-pressured decisions by the inferior courts will not serve to allow cases to develop when this Court needs to decide questions of national import.

ARGUMENT

Congress tasked the Federal Communications Commission with establishing "specific, predictable, and sufficient… mechanisms to preserve and advance universal service." 47 U.S.C. § 254(b)(5). To that end, the Universal Service Fund ("USF") is the pool of revenue generated by taxes levied against telecommunications carriers, 47 U.S.C. § 254(d), which are passed along to consumers by FCC rule, 47 C.F.R. § 54.712(a).

The FCC relies on the Universal Service Administrative Company ("USAC") to administer its four universal service programs and taxes. App. 5a–6a. The USAC is managed by special interest groups. App. 6a (citing website of the USAC).[2] Most importantly, here, the USAC determines the amount of the quarterly contribution of telecommunications companies to the USF. 47 C.F.R. § 54.709(a)(3). The FCC "rubber stamp[s]" the USAC's determination of contribution amount. App. 7a. Indeed, if the FCC fails to affirmatively object and modify the USAC mandate, the USAC's decision automatically takes effect. *See id.* (If "no action within fourteen (14) days of the date of release of the public notice announcing [USAC's] projections of demand and administrative expenses, the projections of demand and administrative expenses… shall be *deemed approved* by the Commission.") (emphasis and bracket in court opinion) (quoting 47 C.F.R. § 54.709(a)(3)).

The USF represents an unconstitutional double delegation of the taxing power: first to the FCC and

[2] *Available at*: https://www.usac.org/about/leadership/.

then to the USAC. In the past, this Court has allowed Congress to cede much of its legislative power to the unelected bureaucracy on the rationale "that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). But this delegation is not of some complex scientific question on the toxicity of a chemical in drinking water or the best bands of the electromagnetic spectrum for cell phone use. This case shows that the delegation—really a *double* delegation—is now on tax policy, which lies at the core of Congress' powers and responsibilities.

I. THE MAJOR PURPOSE OF THE CONSTITUTION IS TO LIMIT THE POWER OF THE GOVERNMENT TO TAX.

The *en banc* Fifth Circuit was correct in holding that the USF is a tax, not a mere fee, despite the exaction's name. App. 7a. This money is not an exchange for goods or services between the consumers (or even the telecommunications companies) and the government: instead, that tax money is used to provide for universal telecommunications services and aid government entities in acquiring telecommunications services like internet for schools. *See*, *e.g.* 47 U.S.C. § 254(h) (listing services paid for by the tax). It applies to almost everyone to pay for government services. It is a tax.

Taxes, this Court has held, may be created "arbitrarily and [with] disregard [to] benefits

bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income." *Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 340 (1974). But a fee is "bestows a benefit on the applicant, not shared by other members of society." *Id.* at 340–41; Joe Bishop-Henchman, TAXES AND FEES: HOW IS THE MONEY USED? FEDERAL AND STATE CASES DISTINGUISHING TAXES AND FEES (2013) (collecting cases).[3] When money is taken instead for "public policy or interest served, and other pertinent facts" then, "if read literally," the exaction "carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House." *Nat'l Cable*, 415 U.S. at 341.

The USF is quintessentially a tax. It applies to almost any phone number, including the ubiquitous cell phone. *See* 47 U.S.C. § 254(d); *cf. Carpenter v. United States*, 585 U.S. 296, 300 (2018) ("There are 396 million cell phone service accounts in the United States—for a Nation of 326 million people."). The exaction is created by loose "Universal service principles," 47 U.S.C. § 254(b), to serve in the public interest.

As a tax, the USF's current structure is an unconstitutional delegation of a core government activity to a corporation. The Founders, in contrast, designed a government where decisions on taxation are closely tied to electoral outcomes: tax too much, and the decision maker could be voted out of office. This Court needs to correct this error of the USF.

---

[3] *Available at*: https://taxfoundation.org/blog/how-money-used-federal-and-state-cases-distinguishing-taxes-and-fees.

A. Tax Policy Animated the American Revolution.

America was founded on limiting the power of the government to tax its citizens. The slogan "no taxation without representation" is "one piece of elementary school folklore that turns out to have been true." Judge Grant Dorfman, *The Founders' Legal Case: "No Taxation Without Representation" Versus Taxation No Tyranny*, 44 HOUS. L. REV. 1377, 1379 (2008). The major political science theory—and indeed *legal* argument—of the Revolution centered on the taxing authority resting with those most accountable to the people.

The phrase "no taxation without representation," for example, dates to the 1750s. *See id.* at 1378 (discussing sermon by Jonathan Mayhew, a Boston-based preacher). By May 1765, Patrick Henry wrote the Virginia Resolves, laying out arguments on why taxation without representation were unfair and unconstitutional under British law. *See*, *e.g.*, National Constitution Center, *On this day: "No taxation without representation!"* (Oct. 7, 2022).[4] James Otis would further take up the slogan in response to the Sugar Act and Stamp Act, which he claimed violated the British constitution. *See* Dorfman, *The Founders' Legal Case*, 44 HOUS. L. REV. at 1379 (discussing the "legal argument[s] brought under the unwritten British Constitution" against the taxes.). That same summer, Massachusetts called for a meeting of the Colonies—what would later be called the Stamp Act

[4] *Available at*: https://constitutioncenter.org/blog/no-taxation-without-representation.

Congress—to be held in New York in October that year, *id*.

The result was a set of resolutions from the Colonies appealing to Britain's unwritten constitutional principles. *See* RESOLUTIONS OF THE CONTINENTAL CONGRESS (Oct. 19, 1765).[5] The Colonists resolved that taxes could not be imposed on citizens "but with their own consent, given personally, or by their representatives" the latter of which must be chosen by the Colonists themselves, not Parliament. *Id*. (para. 4). The Resolutions further complained that the Stamp Act extended the jurisdiction of admiralty courts beyond what the English system of separation of powers allowed. *Id*. (para. 9). Therefore, because the taxes would "be extremely burthensome and grievous; and from the scarcity of specie, the payment of them absolutely impracticable," the Colonists asked for the repeal of the Stamp Act and related taxes. *Id*. (para. 10).

As relations with the King and Parliament worsened, Thomas Jefferson and John Dickinson penned a exhortation for the Empire to act on the Colonists concerns. *See* A DECLARATION BY THE REPRESENTATIVES OF THE UNITED COLONIES OF NORTH-AMERICA, NOW MET IN CONGRESS AT PHILADELPHIA, SETTING FORTH THE CAUSES AND NECESSITY OF THEIR TAKING UP ARMS (July 6, 1775).[6] Jefferson and Dickinson made the argument that "Parliament adopted an insidious manoeuvre

---

[5] *Available at*: https://avalon.law.yale.edu/18th_century/resolu65.asp.

[6] *Available at*: https://avalon.law.yale.edu/18th_century/arms.asp.

calculated to divide us," via "a perpetual auction of taxations." *Id*. Of particular import was that the taxes were "unknown sums that should be sufficient to gratify" the Crown. *Id.* In other words, clear communication of how much taxes and when the Colonists were expected to pay were a significant driver of the push toward the American Revolution. Of course, on July 4, 1776, the Declaration of Independence listed among its grievances the "imposing Taxes on us without our Consent." The founders used tax speech as a major vehicle for political change. *See* THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776).[7]

The Founders cared deeply about taxes and sought to tie the taxing power to those who could be held accountable at the ballot box. The entire legal and political theories for the Revolution were based on "taxation with representation." It would be strange to a Founder to have an unrepresentative entity in charge of setting a tax touching the lives of almost every American.

B. The Constitution's Multiple Provisions Delineating Taxing Authority Preclude the USF.

The Founders put into place multiple provisions in the proposed Constitution concerning taxes: who had the power to tax, what limits the states as dual sovereigns, and who generated tax policy. All of it was aimed at keeping taxation questions limited to the

---

[7] *Available at*: National Archives, "America's Founding Documents" Website https://www.archives.gov/founding-docs/declaration-transcript.

elected representatives most sensitive to the electorate.

How taxes are levied mattered greatly to the Founders. As Alexandar Hamilton explained, defending the creation of the new Constitution, "the AMOUNT of taxes to be laid" is a matter for "the legislature," THE FEDERALIST No. 83 (Hamilton) (capitalization in original). Separately, Madison wrote that "the legislative department alone has access to the pockets of the people." THE FEDERALIST No. 48 (Madison).

The Constitution they championed details how taxes can be levied on the people. First, Congress has the "Power To lay and collect Taxes, Duties, Imposts and Excises." U.S. CONST. art. I, § 8 cl. 1. But that is cabined with a requirement that "all Duties, Imposts and Excises shall be uniform throughout the United States." *Id.*[8] The Origination Clause requires that bills raising revenue must start in the House of Representatives. *See* U.S. CONST. art. I, § 7 cl. 1. Thus, those who stand for reelection (and thus accountable to the people) are the originators of new taxes and tax hikes.

---

[8] Expanding the taxing power is a major undertaking. For example, this Court held that income taxes are direct taxes, subject to apportionment (and thus unworkable in practicality under the original Constitutional limits). *See*, *e.g.*, *Pollock v. Farmers' Loan & Tr. Co.*, 157 U.S. 429 (1895) (*Pollock I*) & *Pollock v. Farmers' Loan & Tr. Co.*, 158 U.S. 601 (1895) (*Pollock II*). In response, Congress proposed and the states ratified the Sixteenth Amendment to allow Congress "to lay and collect taxes on incomes, from whatever source derived, without apportionment." U.S. Const. amend. XVI.

The Constitution also prevents states from exceeding their taxing and regulatory powers over interstate goods and services. The Articles of Confederation had failed, creating "occasions of dissatisfaction between the States" as each state regulated and taxed the other's goods. THE FEDERALIST No. 22 (Hamilton). Hamilton recognized that commerce was paramount: "It is indeed evident, on the most superficial view, that there is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendence." *Id*. The solution was to set up a new constitution to ensure "[a]n unrestrained intercourse between the States." THE FEDERALIST No. 11 (Hamilton). What was needed was not a confederacy, but a federalist union where "[a] unity of commercial, as well as political, interests, can… result from a unity of government." *Id*. The resulting Constitutional provisions were subject to quite a lot of debate on how to best protect interstate commerce from state interference and taxation. *See*, *e.g.*, James Madison, "Journal" (Sept. 15, 1787), in THE JOURNAL OF THE DEBATES IN THE CONVENTION WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES MAY–SEPTEMBER, 1787, 378-81 (Gaillard Hunt ed.) (1908).[9]

The Constitution placed limits on states' power of states to tax where it otherwise would threaten the free flow of commerce across the new nation. There is an express denial of states to tax imports and exports between the states (save for very limited inspection fees). U.S. CONST. art. I, § 10, cl. 2 (Import/Export

[9] *Available at*: https://www.gutenberg.org/files/40861/40861-h/40861-h.htm.

Clause). The Constitution further placed a limit on states from taxing tonnage of shipping. U.S. CONST. art. I, § 10, cl. 3 (Tonnage Clause). And the Founders placed a general protection of the privileges and immunities of citizenship as well as an express grant for the federal government to regulate commerce. U.S. CONST. art. IV, § 2 (Privileges and Immunities Clause); U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause).

Taken together, the Constitution designed a taxing power to be exercised by the federal and state governments with various limits on each. At no point did they envisage the taxing power to be exercised by private entity.

C. The Founders Refused to Grant to Private Corporations Powers of Tax Policy.

As this Court has long recognized, "Taxation is a legislative function, and Congress… is the sole organ for levying taxes." *Nat'l Cable*, 415 U.S. at 340 (footnote omitted). Congress alone can exercise the Federal Government's legislative power that strikes at the heart of liberty. *See Gundy v. United States*, 588 U.S. 128, 149 (2019) (Gorsuch, J., dissenting) ("The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty."). Thus, the foundational question in nondelegation cases is whether the Executive is exercising legislative power or merely executive discretion.

Thus, because Congress can only direct the Executive's exercise of executive power, not grant it

legislative power, the USF is an unconstitutional delegation of legislative power to the FCC, and then a doubly unconstitutional delegation of legislating to a private entity. *See Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529, 551 (1935) (invalidating a statute empowering private trade and industrial groups to draft codes of fair competition); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (describing granting coercive power to two-thirds of coal producers in certain districts as "legislative delegation in its most obnoxious form"); *INS v. Chadha*, 462 U.S. 919, 957, 959 (1983) ("The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps" and must be followed even if "clumsy, inefficient, even unworkable"); *Mistretta*, 488 U.S. at 373 n.7 (describing it as forbidden to "delegate regulatory power to private individuals"); *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 57 (2015) (Alito, J., concurring) ("Liberty requires accountability. When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences.") (paragraph break omitted).

Corporations were well-known to the Founders. Such corporations during the Colonial Era and at the Founding often had wide-ranging powers of self government. *See* Ian Speir, *Corporations, the Original Understanding, and the Problem of Power*, 10 GEO. J.L. & PUB. POL'Y 115, 123 (2012) (discussing life and quasi-self government in English towns and later the

Colonies). Indeed, "[t]he American colonies of Virginia, Massachusetts, Connecticut, Rhode Island, and Georgia existed initially as corporations, with corporate charters granted by the king." *Id*. at 123 n.35. Of course, these corporations became the colonies, all the while retaining self-government in some form. Likewise famous English corporations, such as the East India Company and the Hudson's Bay Company, controlled vast areas of land all around the world.

If the Founders had thought a corporation should wield such revenue-raising power in the new Republic, the Constitution could have reserved such a power amongst its various taxing provisions. But it is telling that the nation's first foray into organizing new territory did not do so by delegating to any corporation. *See*, *e.g.*, Ordinance of 1787 (1787). The Northwest Ordinance created a district run by a governor appointed by Congress, *id*. § 3, and a secretary and judges—again accountable and appointed by Congress, *id*. § 4. Setting up a corporation in the style of the Hudson Bay Company or the Massachusetts Bay Company was a ready example for the Founders, but none thought that the Articles of Confederation (and later the Constitution) allowed for such delegation of core governmental powers.

In sum, this Court should hold that the that the USF is outside what can be delegated by Congress. In doing so this Court need only look to the textbook history of the legal arguments for the Revolution as well as the statements of the Founders in supporting the ratification of the Constitution. And the structure of the Constitution's careful delineation of both the

federal and state taxing powers show that the USF is abhorrent to the Constitution.

II. THE CASES AT BAR ARE CLASSIC EXAMPLES OF "CAPABLE OF REPETITION, YET EVADING REVIEW."

In granting certiorari review of these challenges, this Court directed the answering of "whether this case is moot in light of the challengers' failure to seek preliminary relief before the Fifth Circuit." Order, *FCC v. Consumers' Research*, 604 U.S. ___, (U.S. No. 24-354, Nov. 22, 2024). Since the tax is levied every three months, this case fits under the "capable of repetition, yet evading review" doctrine commonly applied to political law cases. Furthermore, seeking extraordinary relief compounds litigation and slows development of facts necessary for complete appellate review—either at the Fifth Circuit or this Court. Therefore, this Court should find the case is not moot.

In this case, the USAC sets the rates quarterly. 47 C.F.R. § 54.709(a)(3); *see also* App. 6a. The FCC then uses the USAC number to impose a tax on telecommunications companies, again quarterly. *See* App. 7a. The question this court supposes is that should challengers to the scheme need to reapply for preliminary relief each quarter in order to keep the overall challenge alive.

These challenges fit comfortably in the "established exception to mootness for disputes capable of repetition, yet evading review" set by challenge to election-related laws. *Federal Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) ("*WRTL II*") (collecting cases). That is because

it is "'entirely unreasonable… to expect… complete judicial review of… claims in time" for the next round of taxation. *Id.* (internal citations omitted). To invoke the exception from the mootness doctrine, the challenger needs to show a "reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." *Id.* at 463 (internal quotation marks and citations omitted). Indeed, because "the laws in question remain on the books" the litigant had "standing to challenge them as a member of the class of people affected by the presently written statute." *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972).

To satisfy this requirement, this Court has accepted a well-pled allegation in the Verified Complaint that materially similar harm will occur. *See*, *WRTL II*, 551 U.S. at 463 ("Here, WRTL credibly claimed that it planned on running 'materially similar' future targeted broadcast ads mentioning a candidate within the blackout period") (citation omitted). Generally, two years of litigation is too short a time frame for complete judicial resolution. *See*, *e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 334 (2010) ("Today, Citizens United finally learns, two years after the fact, whether it could have spoken during the 2008 Presidential primary—long after the opportunity to persuade primary voters has passed").

This action arose as a petition for review of an agency action, not the typical complaint initiating a challenge in federal court. *See*, *e.g.*, App. 11a ("On December 13, 2021, FCC issued a public notice of its Proposed Q1 2022 USF Tax, which was derived directly from USAC's proposed contribution amount. Petitioners re-filed their comment on December 22….

Petitioners then filed a timely petition for review in our court.").[10]

In any event, from the earliest stages the litigants here claim the harm is ongoing. Their opening brief in the Fifth Circuit noted that the challengers "have paid that extra cost in the past (including in First Quarter 2022) and, because they intend to maintain phone service, will continue paying that tax on a monthly basis." Opening Brief 27 *Consumers' Research v. FCC* (5th Cir. No. 22-60008, Apr. 11, 2022) (citing declarations of Consumers' Research and each of the individual challengers in this case). And Cause Based Commerce, as a virtual network operator, is compelled to remit the tax. *Id.*

But this Court has also taken judicial notice of press discussions of a litigant's possible future plans. In *Davis v. Federal Election Commission*, 554 U.S. 724, 735 (2008), this Court applied the "capable of repetition but evading review" exception to mootness, citing *WRTL II*, 551 U.S. at 462. The *Davis* Court held:

> As to the second prong of the exception… the FEC conceded in its brief that Davis' [Millionaire's Amendment] claim would be

[10] The litigants here filed regulatory comments before the FCC on the proposed USF Tax Factor focused on their claims the scheme was illegal in whole, not just for a specific quarter. *See*, *Consumers' Research et al. v. FCC*, Petion for Review 2 (5th Cir. No. 22-60008, Jan. 5, 2022) (referencing comments). The Petition itself highlighted the ongoing nature of the harm because "[t]o date, no court has addressed the validity of the Approval or the Proposed USF Tax Factor." *Id.* at 3. Therefore, the petition sought review of the "Approval and Proposed USF Tax Factor on the grounds they exceed the FCC's statutory authority and violate the Constitution and other federal laws." *Id.* at 4.

> capable of repetition if Davis planned to self-finance another bid for a House seat.… *Davis subsequently made a public statement expressing his intent to do so.* See Reply Brief 16 (citing Terreri, Democrat Davis Confirms He'll Run Again for Congress, Rochester Democrat and Chronicle, Mar. 27, 2008, p 5B). As a result, we are satisfied that Davis' facial challenge is not moot.

Id. at 736 (emphasis added). Thus, in *Davis*, the candidate only needed to express his intent to repeat the activity—namely, running for office—for this Court to be satisfied of its Article III jurisdiction.

The circuit courts agree statements of intent are enough to keep a challenge alive. In *Branch v. Federal Communications Commission*, 824 F.2d 37, 39 (D.C. Cir. 1987), a TV reporter who wished to run for public office challenged an FCC order that his station that his station must provide equal time to his opponents. Branch "immediately sought judicial and administrative determination of his rights, but was unable to get a ruling before the 1984 election." *Id*. The D.C. Circuit rejected any mootness concerns "even though the 1984 town council election has long passed," because Branch sought "to preserve his right to run in a future election by preventing a recurrence of these events." *Id*. at 41 n.2. *See also Merle v. United States*, 351 F.3d 92, 95 (3d Cir. 2003) (allowing arguments in briefing to preserve future claims under "capable of repetition yet, evading review").

Here, Consumers' Research has made public statements it intends to challenge the USF "until it's struck down for good." Consumers' Research, X Post

(Sept. 26, 2022).[11] Indeed, even without a public statement, the exception for challenges "capable of repetition but evading review" allows for even one-time challenges. In *Dunn*, 405 U.S. 330, this Court allowed a challenge to a state requirement that a voter live in the state for one year before registering, even though the challenger met the requirement by the time the case was heard. The case was not moot because "[a]lthough appellee now can vote, the problem to voters posed by the Tennessee residence requirements is capable of repetition, yet evading review. *Id*. 333 n.2.

As Respondents Consumers' Research point out, a request for emergency stay is not a requirement for a "capable of repetition yet evading review" inquiry. Br. of Resp. at 92. Nor should this Court insist upon parties seeking emergency stays either before this Court or the appellate courts. This Court has held repeatedly that it is "'a court of review, not of first view.'" *Moody v. NetChoice, LLC*, 603 U.S. 707, 726 (2024) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005)). As Justices Barrett and Kavanagh warned just a few years ago standards should not be set that encourage "applicants [to] use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument." *Does 1–3 v. Mills*, 595 U.S. ___, 142 S.Ct. 17, 18 (2021) (Barrett, J. concurring); *cf Merrill v. Milligan*, 595 U.S. ___, 142 S. Ct. 879, 887 (2022) (Kagan, J., dissenting) (criticizing use of emergency

---

[11] *Available at*: https://x.com/ConsumersFirst/status/1574510598616141826.

procedures because "[s]ubstantial questions merit substantial thought").

Finally, while this case is important and the issues the parties raise are significant, the practical reality is that the USF has been in effect for decades, including its current iteration since 1996. That hardly warrants an emergency stay. Extraordinary relief should remain extraordinary, but this Court should hold the USF tax unconstitutional.

CONCLUSION

For the foregoing reasons, *Amicus* requests that this Court rule for Respondents and affirm the *en banc* Fifth Circuit's decision below.

Respectfully submitted,

TYLER MARTINEZ
Counsel of Record
NATIONAL TAXPAYERS
UNION FOUNDATION
122 C Street N.W., #700
Washington, D.C. 20001
tmartinez@ntu.org
(703) 683-5700

February 18, 2025