No. 23-60641

In the United States Court of Appeals for the Fifth Circuit

MAURINE MOLAK;
MATTHEW MOLAK,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,

Respondents.

Petition for Review of an Order
of the Federal Communications Commission
FCC 23-84; WC Docket No. 13-184

AMICUS BRIEF OF THE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PETITIONERS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel hereby certifies that no parent corporation, and no publicly held corporation has a 10% or greater ownership interest in the Competitive Enterprise Institute.

Dated: April 9, 2024

Respectfully submitted,

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IDENTITY AND INTEREST OF *AMICUS CURIÆ*[1]

The Competitive Enterprise Institute is a nonprofit organization headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, the institute has focused on raising public understanding of the problems of overregulation. It has done so through policy analysis, commentary, and litigation.

All parties have consented to the filing of this brief, which is filed under the authority of Rule 29(a)(2) of the Federal Rules of Appellate Procedure.

[1] *Amicus* affirms that no counsel for a party authored this brief in whole or in part, that no person other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief, and that all parties consented to the submission of this *amicus* brief.

ARGUMENT

I. Introduction

The petitioners have requested this Court's review of a declaratory ruling ("Ruling") of the Federal Communications Commission ("Commission"). This *amicus* brief argues that the Ruling is contrary to law because it improperly expands one of the programs established by the Telecommunications Act of 1996, namely, the schools and libraries universal service program, also known as E-Rate.

The Ruling held "that the use of Wi-Fi, or other similar technologies that act as an access point, on school buses is an educational purpose as defined by E-Rate program rules and, therefore, the provision of such service is eligible for E-Rate funding." Ruling ¶ 1 (*see also id.* ¶¶ 2, 9, 12).

That Ruling is an exercise by the Commission of congressional power under Article I, Section 8, Clause 1 of the Constitution.[2] Although it is not the focus of this brief, there is a strong argument that this delegation to the Commission is unconstitutional. Barbara A. Cherry & Donald D. Nystrom, *Universal Service Contributions: An Unconstitutional Delegation of Taxing Power*, 2000 L. Rev. of Mich. St. U. Detroit C.L. 107 (2000). In the Ruling, the Commission made a determination pursuant to 47 U.S.C. §254(c)(3) and (h), which authorizes the Commission to decide what services taxpayers will be compelled to subsidize through a tax assessed by the Commission. In 47 U.S.C. §254(c)(3) and (h), "there is no definite standard by which the courts can ascertain whether or not the FCC's

[2] "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States[.]"

inclusion, or even exclusion, of any specific services in the definition of universal service is in conformity. This alone mandates that the provision fails the test established in *Yakus* [*v. United States*] that the statute must be specific enough for the courts to be able 'to ascertain whether the will of Congress has been obeyed.'" Cherry & Nystrom, *supra*, at 126 (quoting *Yakus v. United States*, 321 U.S. 414, 425(1944)). *But see Consumers' Research, Caused Based Commerce, Inc. v. FCC*, 88 F.4th 917 (11th Cir. 2023) (holding that there are no unconstitutional delegations under 47 U.S.C. § 254), *petition for cert. filed*, (U.S. Jan. 9, 2024) (No. 23-743).

Whether or not the case for the unconstitutionality of Congress's delegation of authority to the Commission is persuasive, the Court need not address the unconstitutionality of that delegation in order to decide this case because "the canon of constitutional avoidance indicates that if relief on statutory grounds is possible courts should avoid granting relief on constitutional grounds." *Braidwood Mgt., Inc. v. EEOC*, 70 F.4th 914, 940 n.60 (5th Cir. 2023).

Relief on statutory grounds is possible because the Commission has not established a statutory basis for its Ruling. The Commission asserts that its authority for the Ruling is subsection (h)(1)(B) of section 254, stating that "section 254(h)(1)(B) of the Communications Act authorizes the Commission to support the provision of communications services, including broadband, to schools and libraries for educational purposes, and this Declaratory Ruling fits squarely within that authority." Ruling ¶ 9. In a footnote appended to that statement, the Commission asserted that the Ruling is independently permitted by subsection (h)(2)(A) of section 254. *Id.* ¶ 9 n.32. However, neither subsection supports the Ruling.

II. Subsection (h)(2)(A) Is Inapposite.

The Ruling identifies subsection (h)(1)(B), not subsection (h)(2)(A), as the authority for the program. Ruling ¶¶ 4, 9. The Ruling's only factual finding is that Wi-Fi on school buses serves an educational purpose. An educational purpose is an element of subsection (h)(1)(B), not subsection (h)(2)(A). The Ruling discusses subsection (h)(2)(A) only in footnote 32.

Subsection (h)(2)(A) does not even belong in a footnote. Subsection (h)(2)(A), entitled "Advanced services," establishes a different program than the one the Ruling seeks to expand. It provides:

> The Commission shall establish competitively neutral rules-
>
> (A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries[.]

In *Texas Office of Public Utility Counsel v. FCC*, this Court explained the difference between the program established by subsection (h)(2)(A) and the program established by (h)(1)(B): "[S]ubsection (h)(2)(A) provides the agency only with authority to 'establish competitively neutral rules to enhance access' to information services. It does not contain specific language supporting provision of such services

'at rates less than the amounts charged for similar services to other parties,' as in subsection (h)(1)(B)." 183 F.3d 393, 442 (5th Cir. 1999). Further, subsection (h)(2)(A) does not contain a mechanism to subsidize the lower rates (the E-Rates), as does subsection (h)(1)(B)(i) and (ii).

While subsection (h)(2)(A) provides the Commission with authority only to "establish competitively neutral rules to enhance access to" information services in "elementary and secondary school classrooms," the Ruling does not identify any competitively neutral rules that it is establishing or implementing. And it does not enhance access to information services in classrooms. The Commission's argument in that regard (Ruling ¶ 9 n.32) is merely a variation of the bromide that "the world is your classroom" and would deprive subsection (h)(2)(A) of any limitation to its coverage.

Because the Ruling does not correspond to any of the terms of subsection (h)(2)(A), that subsection is inapposite. It does not provide independent authority for the Ruling.

III. The Ruling Fails to Establish the Statutory Elements Required for its Holding.

Subsection (h)(1)(B), in contrast, is not inapposite to a declaratory ruling on eligibility for E-Rate funding. However, the Ruling in question fails to satisfy the elements of that subsection necessary for its ruling on eligibility. Subsection (h)(1)(B), entitled "Educational providers and libraries," provides as follows:

> All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3), provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall-
>
> (i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or
>
> (ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

This subsection creates a mechanism to discount the rates at which "services that are within the definition of universal service under subsection (c)(3)" are provided to schools and libraries. Pursuant to subsection (c)(3), the Commission has designated that all commercially available telecommunications services may receive support under section 254(h). This Court upheld that designation as a reasonable interpretation of subsection (c)(3). *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d at 444-45.

Subsection (h)(1)(B) imposes a duty on telecommunications carriers when they receive a bona fide request for such telecommunications services from an

elementary school, secondary school, or library. That duty has three elements. The telecommunications carrier must:

1. provide such services to the elementary school, secondary school, or library
2. for educational purposes
3. at a discount set by the Commission.[3]

The Ruling found that the second of those three elements was present. It stated, "[W]e clarify that the use of Wi-Fi, or other similar access point technologies, on school buses serves an educational purpose and, therefore, the service and equipment that enable it are eligible for E-Rate funding." Ruling ¶ 9. That statement is a non sequitur because the first element is missing. The Commission cannot "clarify" that W-Fi on school buses is eligible for E-Rate funding without a finding that in that situation a telecommunications carrier would be providing the services to a school or library.

The Ruling does not discuss to whom a telecommunications carrier would be providing services in that situation. Clearly, the Wi-Fi services would not be provided to a library. There is no finding that the Wi-Fi services would be provided to a school either. The request presumably would come from a school, but the Wi-Fi services would actually be provided to passengers on school buses. The passengers are not schools. They might be doing schoolwork, but the statute does

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[3] As noted, subsection (h)(1)(B)(i) and (ii) provides for the funding of this discount.

not say "provide such services to elementary and secondary schools and to their students doing homework assigned by such schools." Nor does it say "provide such services at the request of an elementary or secondary school for use elsewhere."

When Congress wishes to create such a subsidy, it has the ability to say so, as it did in the American Rescue Plan Act of 2021 (ARPA), which instructed the Commission to

> promulgate regulations providing for the provision . . . to an eligible school or library, for the purchase during a COVID-19 emergency period of eligible equipment or advanced telecommunications and information services (or both), for use by—
>
> > (1) in the case of a school, students and staff of the school at locations that include locations other than the school; and
> > (2) in the case of a library, patrons of the library at locations that include locations other than the library.

Pub. L. No. 117-2, 135 Stat. 109, tit. VII, § 7402(a). The COVID-19 emergency period the ARPA refers to is due to expire and with it the ARPA's authorization of rules for the provision of telecommunication services at "locations other than the school." In expiring, this authorization does not bequeath its authority to an earlier statute.

Further, the Ruling does not find that school buses are schools or parts of schools. On the contrary, it acknowledges that they are not. The Ruling stresses the time students spend "on school buses traveling to and from school." Ruling ¶ 10.

IV. Conclusion

There is no finding in the Ruling that telecommunication carriers would provide telecommunications services to elementary or secondary schools or libraries through the provision of Wi-Fi or other similar technologies on school buses. In the absence of such a finding, the Ruling does not establish the eligibility of the provision of Wi-Fi or other similar technologies on school buses for E-Rate funding. Consequently, the Court should reverse and remand the Ruling to the Commission pursuant to 47 U.S.C. § 402(h).

Dated: April 9, 2024

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CERTIFICATE OF SERVICE

I certify that on April 9, 2024, the foregoing brief was electronically filed with the United States Court of Appeals for the Fifth Circuit using the CM/ECF system. I certify that all parties in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Dated: April 9, 2024

CERTIFICATE OF COMPLIANCE

In compliance with Rule 29(a)(5) of the Federal Rules of Appellate Procedure, this brief is less than one-half the maximum length of 30 pages authorized by Rule 32(a)(7)(A) for a party's principal brief.

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