No. 14-610

In the
Supreme Court of the United States

UNITED STATES CELLULAR CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF

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REPLY BRIEF

The question Petitioner presented is whether Congress authorized the FCC to regulate broadband Internet access service by prescribing rules to implement the broadband-deployment provisions of § 706 of the Telecommunications Act of 1996 ("1996 Act"). Congress limited the FCC's rulemaking authority to prescribing rules that are necessary to carry out the provisions of its enabling statute, the Communications Act of 1934 ("Act"). The FCC does not, and cannot, dispute the *fact* that the broadband-deployment provisions of § 706 of the 1996 Act are not among the provisions of the Act that it is authorized to administer.

Despite having obtained three extensions of the time within which to respond to Petitioner, the Government was unable to come up with a plausible argument that § 706 of the 1996 Act authorized the FCC to promulgate rules regulating broadband, when it was given no rulemaking authority to implement § 706. So the Government stood mute on the issue and hoped its silence would be less conspicuous in a brief in opposition to petitions in four cases that were filed over a two-month period. *See* Br. 2.

The extensions of time did afford the FCC time to issue its controversial decision to reclassify broadband Internet access service as a telecommunication service.[1] The FCC's *Net Neutrality Order* provided the pretext for the Government's claim that this case now "lacks

[1] *See Protecting and Promoting the Open Internet*, FCC 15-24, 2015 WL 1120110, at *85 (Mar. 12, 2015) ("*Net Neutrality Order*").

continuing legal or practical importance." Br. 14-15. The FCC's recent action had no such effect.

According to the FCC, the reclassification of broadband was intended to remove the "common carrier limitation" on the exercise of its "affirmative legal authority" under § 706 to adopt rules to regulate broadband. *Net Neutrality Order*, 2015 WL 1120110, at *76. The FCC rejected the argument pressed by its Commissioner Pai that it lacked rulemaking authority to implement § 706, because § 706 is not part of the Act.[2] *See id.* at *78. That very argument is one that Petitioner made to the Tenth Circuit[3] and that became its main argument in this case. *See* Pet. 18-21.

The question is not *whether* the Court should rule on the FCC's attempt to use § 706 to regulate the Internet, but *when*. It can do so now, thus avoiding harmful and unnecessary regulatory uncertainty. Or it can do so in three years, when the *Net Neutrality Order* is likely to reach the Court. That is how long the FCC's decision in 2002 to classify broadband as an information service took to find its way to the Court. *See National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967 (2005).

The Court will recall that the FCC "has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends." *Talk America,*

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[2] *See Net Neutrality Order*, 2015 WL 1120110, at *328 (Pai, Comm'r, dissenting) (§ 706 of the 1996 Act was not inserted into the Act; it was left as a "freestanding provision of federal law").

[3] *See* Wireless Carrier USF Reply Brief at 4-8, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014) (No. 11-9900).

Inc. v. Michigan Bell Telephone Co., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring). The Court should take this early opportunity to rebuke the FCC's latest attempt to regulate broadband by stretching its regulatory authority beyond the reach of its enabling statute.

I. PETITIONER HAS ARTICLE III STANDING

The Government contends that "Petitioners lack standing to challenge the funding condition on which they chiefly focus." Br. 15. But Petitioner did not challenge the FCC's so-called "funding condition." It argued that the FCC did not adopt conditions, *see* Pet. 32-33, and it devoted just a single paragraph of its petition to the FCC's *rule* that eligible telecommunications carriers ("ETCs") provide broadband upon "reasonable request." *See id*. 36.

Petitioner challenges the validity of the FCC's final order in the notice-and-comment rulemaking that promulgated new universal service fund ("USF") rules. *See* App. 163a-880a (*Connect America Fund*, 26 F.C.C.R. 17633 (2011) ("*CAF Order*")). And Petitioner has Article III standing to challenge the *CAF Order*.

Congress conferred jurisdiction on the courts of appeals to "determine the validity" of all final FCC orders made reviewable by § 402(a) of the Act. 28 U.S.C. § 2342(1). Section 402(a) authorizes any proceeding to set aside an FCC order to be brought in accordance with the Hobbs Act. *See* 47 U.S.C. § 402(a). Under the Hobbs Act, "[a]ny party aggrieved" by a final FCC order is entitled to file a petition for review of that order in the court of appeals wherein venue lies. 28 U.S.C. § 2344.

Petitioner is a wireless ETC that was a party to the FCC's notice-and-comment proceeding below, *see CAF Order*, 26 F.C.C.R. at 18305, and was aggrieved by the FCC's action adopting USF rules that were not competitively neutral and disadvantaged wireless ETCs. As an aggrieved party to the FCC's rulemaking, Petitioner has statutory standing to seek review of the *CAF Order*.

The FCC correctly did not question Petitioner's Article III standing before the Tenth Circuit. Had it done so, Petitioner easily could have demonstrated its constitutional standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Petitioner is losing revenue competing with incumbent LECs that receive a disproportionate share of USF support under the rules promulgated by the *CAF Order*. That actual injury suffices for the purpose of establishing standing, because financial injury is cognizable under the Act, *see FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940), and is considered to be "concrete and particularized." *Lujan*, 504 U.S. at 560. *See* Kenneth Culp Davis & Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 16.4 at 13 (3rd ed. 1994) ("The Court routinely recognizes probable economic injury resulting from agency actions that alter competitive conditions as sufficient to satisfy the first part of the standing test").

When a party is an "object" of the government's action, *Lujan* teaches that "there is ordinarily little question that the action … has caused [the party] injury, and that a judgment preventing … the action will redress it." 504 U.S. at 561-62. Thus, the Government had little cause to question Petitioner's standing under *Lujan*. *See* Br. 15-16. Petitioner is

an ETC that provides broadband service at 4G LTE speeds in rural, high-cost areas. Consequently, Petitioner's broadband service is subject to the FCC's unlawfully-adopted USF rules.

As an object of the FCC's rulemaking, Petitioner has Article III standing to challenge the *CAF Order* and to seek the vacatur of the rules the FCC promulgated. Petitioner's standing to appeal the *CAF Order* affords it standing to raise "any relevant question of law" with respect to that order. *Sanders Bros.*, 309 U.S. at 477.

II. THE BROADBAND-DEPLOYMENT RULES ARE INVALID

A. The FCC Adopted Rules, Not "Conditions"

Beyond recognizing that the five petitioners "assert various challenges to the universal-service and intercarrier-compensation rules," Br. 14, the Government refuses to even acknowledge that the FCC engaged in a *rulemaking* or promulgated USF *rules*.[4] Instead, it claims that the FCC imposed "funding conditions," "broadband conditions," or "broadband-related conditions." Examination of those claims under the Administrative Procedure Act ("APA") shows that the Government is playing word games.

The entire APA is based on the "dichotomy between rulemaking and adjudication." *Bowen v.*

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[4] The Government only used the word "rulemaking" in connection with the *Net Neutrality Order* and the decision in *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999). *See* Br. 16, 29. It only referred to the USF "rules" generally in a single footnote. *See id*. 18 n.6.

Georgetown University Hospital, 488 U.S. 204, 223 (1988) (Scalia, J., concurring). Under the APA, rulemaking means an "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). The term "rule" is defined to include "an agency statement of … particular applicability and future effect designed to implement, interpret, or prescribe law or policy." *Id.* § 551(4). Thus, the requirements that the FCC adopted in its rulemaking were rules under the APA, even though they applied particularly to carriers in the future event that they "voluntarily seek to participate" in the USF program. Br. 18.

In contrast, an "adjudication" is an "agency process for the formulation of an order," 5 U.S.C. § 551(7), "in a matter other than rulemaking but including licensing." *Id.* § 551(6). Under the APA, "licensing" includes an "agency process respecting the … conditioning of a license." *Id.* § 551(9). And a "license" includes "an agency permit, certificate, approval … or other form of permission." *Id.* § 551(8).

The FCC engages in an APA adjudication or licensing when it exercises its authority to attach a condition to the grant of a license under § 301 of the Act, *see* 47 U.S.C. § 303(r), or to the issuance of a certificate of public convenience pursuant to § 214. *See id.* § 214(c). The same would be true if the FCC attached conditions to its designation of an ETC under § 214. *See* 47 U.S.C. § 214(e)(6). *But it cannot impose conditions on ETCs in an APA rulemaking.*

To be clear, Petitioner never acknowledged that the FCC may impose funding conditions. *But see* Br. 19 ("Petitioners correctly acknowledge that the FCC

may 'impose funding conditions which promote the purposes identified by Congress in the Act'"). To the contrary, Petitioner asserted that "[w]hat the court characterized as 'conditions' are rules … adopted in a notice-and-comment rulemaking … and published in the Federal Register … and in the Code of Federal Regulations." Pet 32-33 (citations omitted). It would do violence to the entire structure of the APA to treat the *CAF Order* as adopting anything other than rules.

B. The Rules Regulate Broadband

Like the Tenth Circuit before it, the Government sidesteps Petitioner's argument that the FCC used its authority to administer the USF program "as a bootstrap to regulate broadband." Pet. 32. The Government argues that the FCC's requirements do not amount to common-carrier regulation. *See* Br. 17-19. But it does not dispute that the FCC is regulating broadband under its USF rules. Otherwise, the Government would have to admit that the rules do not serve their intended purpose.

The *CAF Order* was the final order in an APA rulemaking that promulgated rules that were specifically designed to implement the broadband-deployment provisions of § 706. *See* Br. 21. The FCC proclaimed that the rules "comprehensively" refocused the USF "to make affordable broadband available to all Americans." App. 164a, 172a. The enforcement of those rules necessarily entails the regulation of the ETCs that are making affordable broadband service available to all Americans.

C. The Broadband Rules Are Invalid

The Government also does not dispute that the

FCC's rulemaking authority is limited to prescribing "such rules … as may be necessary … to carry out the provisions of the [Act]." Br. 12, 25 (quoting 47 U.S.C. § 201(b)). It suggests that one of the FCC's intercarrier compensation rules was necessary to carry out the provisions of § 251(b)(5) of the Act. *See* Br. 25. However, it does not contend that any of the FCC's broadband-deployment rules are necessary to carry out a provision of the Act.

The Government does not even maintain that the USF rules are *necessary* to carry out the broadband-deployment provisions of § 706, but it does suggest that § 706 independently authorized the FCC to "impose the broadband conditions on universal-service support." Br. 21. However, the Government stopped short of claiming that the FCC was authorized to prescribe rules to carry out the provisions of § 706. That is because it is bound by the FCC's order in *Preserving the Open Internet*, 25 F.C.C.R. 17905 (2010) ("*Open Internet Order*"), in which the FCC held:

> In adopting the rule against unreasonable discrimination, we rely, in part, on our authority under [§] 706, which is not part of the … Act. Congress enacted [§] 706 as part of the [1996 Act] and more recently codified the provision in Chapter 12 of Title 47, at 47 U.S.C. § 1302. The seven titles that comprise the … Act appear in Chapter 5 of Title 47. Consequently, even if the rule … were interpreted to require common carriage in a particular case, that result would not run afoul of [§ 15]3(51) because a network operator would be treated as a common carrier pursuant to [§] 706, not "under" the

… Act.[5]

The FCC has recognized that § 706 is not among the provisions of the statute it is authorized to administer "through rulemaking and adjudication." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013). Because Congress expressly limited the FCC's rulemaking authority to adopting rules necessary to implement the Act, the FCC exceeded the bounds of its statutory authority when it promulgated USF rules to carry out the broadband-deployment provisions of § 706. Consequently, the enactment of those rules was *ultra vires*. *See id*. at 1869.

III. IT IS IMPORTANT THAT THE COURT REVERSE THE TENTH CIRCUIT

Petitioner anticipated that the FCC would follow the blueprint supplied by *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) and exercise its § 706 "authority" to adopt its controversial net neutrality rules. *See* Pet. 16-17. It saw this case as affording the Court the opportunity to "test" the FCC's claim that § 706 authorized it to adopt rules to regulate the Internet. *Id.* With the issuance of the FCC's *Net Neutrality Order*, this case has taken on added importance. If the Court agrees that the FCC was without authority to adopt rules to implement § 706, both the USF rules and the net neutrality rules will have lost the "strong legal foundation" that the FCC found necessary for their survival. *Net Neutrality Order*, 2015 WL 1120110, at *3. The validity of both sets of rules will have to be addressed in further rulemakings.

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[5] *Open Internet Order*, 25 F.C.C.R. at 17950 n.248.

It is especially important for the Court to reverse the Tenth Circuit, because the appeals court did not discharge its *Arlington* obligation to apply, and seriously consider, the limitation that Congress placed on the FCC's rulemaking authority. *See* 133 S. Ct. at 1874 (reviewing courts must ensure that agencies stay within their statutory authority "by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority"). The Tenth Circuit inexplicably ignored the fact that § 706 is not part of the Act, and thus allowed the FCC to go beyond the bounds of its statutory rulemaking authority. *See* App. 129a-134a.

Finally, the Court should reverse the Tenth Circuit to clarify the holding of *Iowa Utilities*. Both the Tenth Circuit and the D.C. Circuit in *Verizon* held that § 706(b) is an "independent grant of authority" for the FCC's rulemaking. *See* Br. 21. Each court relied implicitly on *Iowa Utilities* and disregarded the FCC's *Open Internet Order*.

In *Iowa Utilities*, the Court held that the FCC's rulemaking authority under § 201(b) of the Act extended to the "local competition provisions" of the 1996 Act, because Congress "expressly directed" that those provisions be "inserted" into the Act. 525 U.S. at 377. The Court relied upon:

> [T]he clear fact that the 1996 Act was adopted, not as a freestanding enactment to, but as an amendment to, and hence *part of*, an Act which said that "[t]he Commission may prescribe such rules and regulations as may be necessary … to carry out the

provisions of this Act."[6]

In fact, Congress directed that most, but not all, of the provisions of the 1996 Act be inserted into the Act. *See* Pet. 7. One freestanding enactment was § 706. Thus, the FCC was able to make the following argument to the *Verizon* Court:

> Even if the Open Internet Rules could be construed as imposing a common-carriage obligation, they still would not violate [§§] 153(51) and 332(c)(2) of the … Act. Those provisions prohibit common-carriage treatment of information service providers only "under this [Act]." ... [T]he Commission has sufficient authority to adopt the rules under [§] 706 alone, without relying on any other authority. Section 706 is not part of the … Act … and thus not subject to the statutory limitation on common-carrier treatment.[7]

The D.C. Circuit rejected what it felt was a "rather half-hearted" FCC argument. *Verizon*, 740 F.3d at 650. Rather than examining the text of the 1996 Act, the court relied on the *Iowa Utilities* finding that "Congress expressly directed that the 1996 Act … be inserted into the … Act." *Id.* (quoting 525 U.S. at 377).

The FCC cited the Tenth Circuit and D.C. Circuit decisions as upholding its § 706 authority to adopt its net neutrality rules. *See Net Neutrality*

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[6] *Iowa Utilities*, 525 U.S. at 377 n.5 (quoting 47 U.S.C. § 201(b)).

[7] Brief for Appellee/Respondents at 68, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (No. 11-1355) (citations omitted).

Order, 2015 WL 1120110 at *77. It relied on *Verizon* to reject Commissioner Pai's argument, but it did so in halting terms. The FCC rationalized that the *Verizon* Court "suggested" that § 706 was part of the Act and, under "such a reading, the Commission would have all its standard rulemaking authority … to adopt rules implementing that provision." *Id.*

The FCC's Internet regulatory regime consists of rules it adopted under the legal authority it claims under § 706. But it knew full well that it lacked the authority to adopt those rules. It has been allowed to proceed because two courts failed to see that § 706 has been inserted into Chapter 12 of Title 47 while the FCC's rulemaking authority is confined to Chapter 5. The Court should clarify *Iowa Utilities*, delineate the statutory boundary of the FCC's rulemaking authority, and rein the FCC back within the bounds of that authority.

Respectfully submitted,

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