

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner

v.

STATE OF TEXAS, *et al.*,

Respondents

On Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

AMICUS CURIAE BRIEF OF
BLANCA TELEPHONE COMPANY
IN SUPPORT OF NEITHER PARTY

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RULE 29.6 DISCLOSURE STATEMENT

Blanca Telephone Company (Blanca) is a nonpublic, closely held, Incumbent Local Exchange Carrier (ILEC), with no publicly owned subsidiaries, organized, and located in, Colorado. The sole owner is a citizen of the United States. Blanca is currently the Petitioner in *Blanca Telephone Company v. FCC et al.*, No. 21-472.

STATEMENT OF INTEREST

Blanca is a local exchange carrier located in rural Colorado and the Petitioner in *Blanca Telephone Company v. FCC, et al.*, No. 21-472, filed September 24, 2021. In No. 21-472 the United States is defending against various claims asserted by Blanca regarding the FCC's Universal Service Fund (USF) program.¹

SUMMARY OF ARGUMENT

Among the issues raised in No. 21-472 is whether the administration of the USF program by private parties has resulted in a violation of Blanca's property and procedural due process rights. In No. 21-588, the United States argues, *inter alia*, that the State of Texas impermissibly employs private parties to enforce State law for the purpose of avoiding judicial review of a regulatory program impinging upon the constitutional right to abortion. Given the similarity of the cases regarding governmental use of private parties to violate constitutionally protected interests, Blanca is submitting the instant amicus brief to ensure that the Federal Government fairly and equally uses its sovereign authority to protect the constitutional rights of all citizens of the United States.

¹ Undersigned counsel authored the instant brief in whole and no party, other than Blanca and undersigned counsel, made any monetary contribution intended to fund the preparation or submission of this brief. In No. 21-588 Petitioner and Respondent have filed blanket authorizations for amicus briefs and no motion is required. Rule 37.3(a). Blanca has no interest in No. 21-463, but will serve those parties.

ARGUMENT

On September 24, 2021 Blanca filed *Blanca Telephone Company v. FCC et al.*, No. 21-472. On October 18, 2021 the United States, Respondent in No. 21-472, filed as petitioner in *United States v. Texas, et al.*, No. 21-588; cert. granted October 22, 2021. Thereafter, on October 22, 2021 the United States filed a Waiver of its right to file a response in Blanca's case No. 21-472 ("Waiver"). With all due respect, the Waiver in No. 21-472 causes the United States to assert conflicting positions before this Court regarding governmental use of private parties authorized by law to infringe upon protected constitutional rights.

"Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *see also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1903 (2020) (the case examines "the equal protection guarantee of the Fifth Amendment's Due Process Clause" regarding the Trump Administration's rescission of the DACA policy). Accordingly, whatever rule regarding the legality of using private party enforcement of governmental policy to evade judicial review is ultimately applied in No. 21-588, or in No. 21-472 should the issue be reached there first, the resulting rule should be applied similarly to both cases.

In No. 21-588 the United States argues that the Constitution prohibits the State of Texas from using its sovereign law making power to avoid judicial review of a state law which impinges upon the constitutionally protected abortion right by authorizing private citizen,

rather than government official, law enforcement. Petition for a Writ of Cert. Before Judgment at 3, No. 21-588, filed 10/18/21; Reply in Support at 1, No. 21-588, filed 10/22/21.

In No. 21-472 the Government violated Blanca's procedural due process right by using private parties, the National Exchange Carrier Association (NECA) and the Universal Services Administrative Company (USAC), to enforce an industrial code and an interpretation of FCC rules. Blanca Petition 9-10, 13-14, 19, 23-24 ("The FCC-USF Conundrum"), 34, 40; *Slip Op.* App. 3. Moreover, the Government misuses the Debt Collection Improvement Act of 1996 (DCIA) to vindicate NECA/USAC's private interests by allowing them to use the DCIA to collect from Blanca a debt judgment, DCIA and other penalties, and interest. Blanca Petition 16, 34-35, 40-41.²

The Government's Waiver in No. 21-472 provides no rationale whereby:

² A basic problem in No. 21-472 is the lower court waffled on whether NECA and USAC are private parties or government agents; NECA and USAC were assigned public and private characteristics depending upon which characteristic facilitated deference to the FCC's decision. For instance, NECA provided the government function of rule notice, *Slip Op.* App. 37 n.17, but the lower court determined that the 2013 NECA settlement did not bind the United States because USF settlement and USF administration are "private" activities not subject to judicial review. *Slip Op.* App. 41. Blanca Petition at 31. On the other hand, the lower court determined that the debt adjudication was "pure debt collection" under the DCIA, *Slip Op.* App. 21, even though the "debt" does not involve any Federal funds and is payable to a private party rather than to the United States.

1. Texas cannot shield from judicial review a state law which impinges upon the constitutionally protected abortion right by empowering private citizens, rather than state officials, to enforce a state health law.

2. But the FCC can shield from judicial review USF administration which impinges upon Blanca's constitutionally protected property right because "private" corporate entities, NECA and USAC, enforce Federal telecom law. *Slip Op.* App. 40-41; *FCC3* App. 54 ¶ 5, 76 ¶ 30 (USF settlement and day-to-day USF administration are unreviewable "private" activities which do not implicate governmental functions).³

There is no readily discernible constitutional principle which prohibits Texas from using private parties to shield from judicial review a state law which denies the constitutionally protected abortion right, but which permits the Federal Government to use private parties to shield from judicial review Federal telecommunications regulation which denies property and procedural due process rights.

The United States asserted its constitutional rights protection rule in No. 21-588, but then ignored that rule the very same week in No. 21-472 via the Waiver.⁴ Given

³ The FCC used the "private" settlement with NECA as an admission of wrongdoing by Blanca. Blanca Petition at 19.

⁴ In No. 21-588 the United States asserts that the Texas statute is an "unprecedented enforcement scheme." Petition for a Writ of Certiorari Before Judgment at 32. However, the FCC's USF program pioneered a similar "enforcement scheme" long ago.

the Government's position in No. 21-588 that States cannot authorize private party violation of constitutionally protected rights to shield the State's law from judicial review, and given the obviously inconsistent position the Waiver assumes in No. 21-472 by implicitly, but necessarily, asserting that the Federal Government can use private parties to avoid judicial review of action which denies Blanca's procedural due process and property rights, and given the various circuit conflicts which the Waiver in No. 21-472 fails to address, the only reasonable construction of the Waiver is as a confession of error *sub silentio*.⁵ See *Brown v. Barr*, 140 S. Ct. 2662 (2020) (upon Solicitor General's confession of error, petition for writ of certiorari granted, judgment vacated, and case remanded); *Hicks v. United States*, 137 S. Ct. 2000, 2001 (2017) (GVR appropriate where the Court is able "with ease determine the existence of an error of federal law") (Gorsuch, J. concurring). Ease of determination is not an issue in No. 21-472 given the fact that the United States filed No. 21-588 for the express purpose of asserting that government cannot use private parties to shield from judicial review action which impinges upon constitutionally protected rights.

⁵ For instance, the lower court affirmed the FCC's DCIA debt adjudication as "pure debt collection," *Slip Op. App. 21*, but *Agility Pub. Warehousing v. U.S.*, 969 F.3d 1355, 1364 (CAFC 2020) determined that the DCIA "does not give the United States a freestanding mechanism to create a debt." Blanca Petition at i, 13, 33-34. Moreover, the lower court in No. 21-472 failed to explain how the DCIA, a statute expressly limited to collection of delinquent debts owed to the United States, was used to adjudicate and collect a debt in favor of private parties (NECA & USAC). Blanca Petition 16, 34-35, 40-41.

In No. 21-588 the United States seeks constitutional uniformity and argues that judicial review guards against nullification of constitutional rights by private parties. Petition for a Writ of Certiorari Before Judgment at 31-32, No. 21-588, filed 10/18/21. Sauce for the goose is sauce for the gander. Blanca is entitled to consistent treatment and the same access to judicial review and protection from private enforcement which interferes with its constitutional rights. However, the Waiver, without any analysis whatsoever, unfairly and unequally delivers a constitutional rights hierarchy where judicial review is shielded by the FCC's use of private parties and the abortion right is protected and preferred over Blanca's property right, even though the property right is textually guaranteed.

CONCLUSION

The Federal Government must be required to apply its rules regarding constitutional rights protection fairly and equally from case to case.

Respectfully submitted,
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