Nos. 24-354 & 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 Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a bipartisan group of currently serving members of the United States Senate and United States House of Representatives who have deep knowledge about, and expertise in, the Telecommunications Act of 1996 and the Universal Service Fund. Congress created the Universal Service Fund to further the goal of making modern communications services available to all Americans, including in communities where market forces alone have not proven sufficient to build out the necessary infrastructure. The Universal Service Fund advances that goal by subsidizing access to these services for low-income households, high-cost areas, rural healthcare systems, and schools and libraries.

Amici are Senator Ben Ray Luján (D-NM), Senator Deb Fischer (R-NE), Senator Edward J. Markey (D-MA), Senator Dan Sullivan (R-AK), Senator Jacky Rosen (D-NV), Senator Shelley Moore Capito (R-WV), Senator Gary C. Peters (D-MI), Senator Mike Crapo (R-ID), Senator Amy Klobuchar (D-MN), Senator Lisa Murkowski (R-AK), Senator Peter Welch (D-VT), Senator Kevin Cramer (R-ND), Senator Tammy Baldwin (D-WI), Senator Pete Ricketts (R-NE), Senator Angus King (I-ME), Senator Roger Marshall (R-KS), Senator Chris Van Hollen (D-MD), Senator James E. Risch (R-ID), Senator Richard Blumenthal (D-CT), Senator Mike Rounds (R-SD), Senator Tammy Duckworth (D-IL), Representative

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, aside from *amici*'s counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

James E. Clyburn (D-SC), Representative Dusty Johnson (R-SD), Representative Doris Matsui (D-CA), Representative Nick Begich (R-AK), Representative Yvette D. Clarke (D-NY), Representative Pete Stauber (R-MN), Representative Debbie Dingell (D-MI), and Representative Brad Finstad (R-MN).

Some of the *amici* either actively serve on, or have previously served on, committees with oversight of the Federal Communications Commission. Others have sponsored or voted for legislation involving the Universal Service Fund. Some have advocated for other legislation to advance universal service or participated in caucuses that do so. All *amici* represent constituents who rely on the services the Universal Service Fund supports. *Amici* thus have a keen interest in this litigation involving challenges to the Universal Service Fund's constitutionality.

SUMMARY OF ARGUMENT

The world is more interconnected than ever, making consistent and reliable access to communications services a necessity for full participation in society. Recognizing this need, Congress established the Universal Service Fund to ensure that all Americans, including the communities we represent, are able to access these services. And since its establishment in 1996, the Universal Service Fund has facilitated that goal in myriad ways, furthering Americans' access to information, connections to family and friends, learning at school, and access to high-quality medical care regardless of where they live. The Federal Communications Commission has played an integral role in that success, implementing the flexible, yet clear, directives from Congress to address the constantly evolving roles these services play in modern society. If affirmed, the Fifth Circuit's judgment would upend this critical support system in ways that would be both legally unjustified and practically devastating. *See Consumers' Research v. FCC*, 109 F.4th 743 (5th Cir. 2024). *Amici* urge the Court to reverse that decision for three reasons.

First, the delegation of authority from Congress to the Commission does not transgress the constitutional bounds articulated by this Court. Congress established high-level universal service policy and provided guiding principles to direct the Commission's implementation. These guardrails not only ensure that the Commission stays within its delegated mandate, but they also allow the Commission to address ongoing changes in

telecommunications needs through mechanisms that are most likely to further universal service.

Second, the Fifth Circuit erred in concluding that the Universal Service Fund's implementation is devoid of political accountability. Congress has exercised, and continues to exercise, significant oversight of the Commission's implementation of this program through legislative amendments, reporting requirements, and recurring committee hearings. To say (as the Fifth Circuit did) that the Universal Service Fund's implementation lacks continued direction from Congress is simply untrue—indeed, many of the *amici* themselves have played an active role overseeing and further directing this program's implementation. *Amici* also disagree that the Commission has eroded accountability through its use of a private entity: The statute specifically contemplates the use of such entities to perform strictly ministerial tasks, and contrary to Respondents' characterization, the work performed by the Universal Service Administrative Company ("USAC") is limited to such tasks. This narrow role and the Commission's continued and complete control over policy determinations forecloses private delegation concerns.

Third, the Fifth Circuit's wholesale dismantling of the Universal Service Fund would have disastrous consequences for millions of Americans that have come to rely on this assistance. For decades, Universal Service Fund programs have provided critical support to telecommunications providers, schools, libraries, healthcare providers, and individuals. And as Members of Congress, *amici*

have seen the immense benefits that these programs have provided in the communities we represent—especially for those in low-income and rural areas who depend on this support as their only means of connecting to the Internet or maintaining phone service. The Fifth Circuit's decision, however, overlooks these reliance interests, threatening to leave millions of citizens on the wrong side of the digital divide.

For these reasons and those articulated below, *amici* urge the Court to reverse.

ARGUMENT

I. The Universal Service Fund Is Constitutional—Both as Enacted and Implemented.

A. Congress Established, and Constitutionally Empowered the Commission to Implement, Policies to Address Critical Telecommunication Needs.

Congress has long sought to improve access to telecommunications for *all* Americans. As early as 1934 when creating the Commission, Congress underscored the need to "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide … communication service with adequate facilities at reasonable charges." Communications Act of 1934, Pub. L. No. 73-416, ch. 652, § 1, 48 Stat. 1064, 1064. Over the ensuing years, access to

communications technology grew, and the concept of "universal service"—i.e., integrated networks connecting as many citizens as possible—developed into a touchstone of U.S. telecommunications policy. *See* Milton L. Mueller, *Universal Service: Competition, Interconnection and Monopoly in the Making of the American Telephone System* 4 (2013). Initial interconnectivity largely resulted from the efforts of regulated monopoly providers. *Id.* Not only were these providers required to provide service to an entire area, but they also began cross-subsidizing local telephone services using interstate (i.e., long-distance) rates in a less-than-transparent way. *See id.* at 161; *see also* S. Rep. No. 104-23, at 28 (1995).

Just before the turn of the century, Congress fundamentally reformed this model through the Telecommunications Act of 1996, Pub. L. No. 104-104, § 101, 110 Stat. 56, 71–75 (codified at 47 U.S.C. § 251 *et seq.*). The Act not only deregulated monopolies and introduced competition into the telecommunications market, but it also aimed to "ensur[e]" that support for "universal service [is] explicit, equitable and nondiscriminatory to all telecommunications carriers." S. Rep. No. 104-23, at 25. This overhaul of U.S. telecommunications policy passed with overwhelming bipartisan support—91% in the Senate and 96% in the House. *See* S. 652, 104th Cong. (1996), https://www.congress.gov/bill/104th-congress/senate-bill/652.

Relevant here, Section 254 of the Act "articulate[s] the policy of Congress that universal service is a cornerstone of the Nation's communications system," and it "make[s] explicit the

current implicit authority of the [Commission] … to require common carriers to provide universal service." S. Rep. No. 104-23, at 25; *see also* 47 U.S.C. § 254. To that end, Section 254 serves three primary goals, which are accomplished through targeted delegations of authority to the Commission that fall within the constitutional bounds articulated by this Court.[2]

1. *Flexibility*. Section 254 created a flexible framework to account for "advances in telecommunications and information technologies and services." *Id.* § 254(c)(1). Congress recognized that "[u]niversal service is an evolving level of telecommunications services," and so it authorized the Commission to determine what would qualify as "universal service." *Id.*; *see also* S. Rep. No. 104-23, at 27 (section 254 "ensure[s] that the definition of universal service evolves over time to keep pace with modern life").

Congress did not, however, leave the Commission without intelligible principles to make this determination. Rather, it provided four clear principles and required the Commission to evaluate services accordingly: whether a service (1) is "essential to education, public health, or public safety"; (2) has "been subscribed to by a substantial majority of residential customers" under competitive market conditions; (3) is "deployed in public telecommunications networks by telecommunications

[2] While *Amici* have diverse views on the nondelegation doctrine more broadly, this brief represents their agreement that Section 254 satisfies the requirements this Court has established in prior cases.

carriers"; and (4) is "consistent with the public interest, convenience, and necessity." 47 U.S.C. § 254(c)(1); *see also* S. Rep. No. 104-230, at 131 (1996) ("The definition [of universal service] is to take into account advances in telecommunications and information technology, and should be based on a consideration of the four criteria set forth in the subsection."); H. Rep. No. 104-204, at 80 (1995) (definition of universal service "should evolve over time … taking into account the principles enumerated").

In short, this is a classic example of Congress employing "flexibility and practicality," *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 421 (1935), while still "clearly delineat[ing] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority," *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). Particularly in the "constantly evolving" telecommunications context, *Reno v. ACLU*, 521 U.S. 844, 851 (1997), opting for a bounded, yet flexible, approach was within Congress's prerogative, *see also Marshall Field & Co. v. Clark*, 143 U.S. 649, 693–94 (1892) (Congress may "confe[r] … discretion" regarding "execution" of a law, particularly where the law "relat[es] to a state of affairs not yet developed, or to things future and impossible to fully know" (cleaned up)).

This Court has acknowledged the need for such flexibility, observing that "common sense and the inherent necessities of the governmental co-ordination" play a key role in the analysis. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928); *see also Marshall Field*, 143 U.S. at 694

("[t]o deny" Congress the ability to delegate discretion to executive agencies "would be to stop the wheels of government"). As Justice Scalia observed, "Congress is no less endowed with common sense than [the courts] are," yet is "better equipped to inform itself of the 'necessities' of government." *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (dissenting opinion). Because "no statute can be entirely precise," "some judgments, even some judgments involving policy considerations, must be left to the officers executing the law." *Id.* at 415 Indeed, given the "many varieties of legislative action" in which Congress engages, it is "frequently necessary" to "ves[t] discretion in [Executive] officers to make public regulations interpreting a statute and directing the details of its execution." *Id.* at 419 (cleaned up; quoting *Hampton*, 276 U.S. at 406).

Just last term, the Court recognized that "Congress has often enacted … statutes" that "leav[e] agencies with flexibility" "to exercise a degree of discretion" and "'fill up the details' of a statutory scheme." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394–95 (2024) (quoting *Michigan v. EPA*, 576 U.S. 743, 752 (2015), and *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)). Where, as here, the "best reading of a statute is that it delegates discretionary authority to an agency," courts are to "independently interpret the statute [to] effectuate the will of Congress," "fix the boundaries of the delegated authority," and "ensur[e] the agency" has acted "within those boundaries." *Id.* 395–96 (cleaned up).

These principles apply with full force here, given that Congress has "expressly … empower[ed]" the Commission to expand the availability of communications services based on clear statutory principles. *Id.* at 394–95; *see* 47 U.S.C. § 254(c)(1).

2. *Funding.* Section 254 also obligates "[e]very telecommunications carrier that provides interstate telecommunications services [to] contribute" to the "mechanisms established by the Commission to preserve and advance universal service." *Id.*§ 254(d). This obligation stemmed from Congress's policy determination that efficiency and the public interest would be best served if all "carriers contribute[d]" funds which then could then be used to further universal service throughout the country. *See* S. Rep. No. 104-23, at 28.

Funding universal service programs in this way also ensures that the Commission's efforts to "advance universal service" are both "sufficient" and "predictable." 47 U.S.C. § 254(d); *see also* Cong. Research Serv., R47621, *The Future of the Universal Service Fund and Related Broadband Programs* 17 (2024) ("*Future of the USF*") ("USF programs rely on stable suppor[t] because telecommunications carriers rely on that stability to make long-term investment decisions, and consumers rely on continuous assistance for uninterrupted connectivity."). Under this model, contributions are calculated based on anticipated quarterly costs associated with administration of Universal Service Fund programs. *See, e.g.*, *Proposed First Quarter 2025 Universal Contribution Factor*, CC Docket No. 96-45, DA 24-1245 (F.C.C. Dec. 12, 2024), https://perma.cc/B3GL-

SPD5. This dynamism not only accounts for projected needs, but also provides consistency and reliability for those who have come to rely on support from these programs. *See infra* Part II (describing beneficiaries of universal service programs).

Again, Congress delineated specific "policy decisions" in authorizing the Commission to "'fill up the[se] details.'" *Gundy v. United States*, 588 U.S. 128, 157 (2019) (Gorsuch, J., dissenting) (quoting *Wayman*, 23 U.S. (10 Wheat.) at 43); *see also Loper Bright*, 603 U.S. at 395. For example, contributions must ensure that the Commission's mechanisms for "preserv[ing] and advanc[ing] … universal service" are "specific, predictable, and sufficient." 47 U.S.C. § 254(d); *see also id.* § 254(b)(4). The Commission must further consider what "the public interest … requires" in evaluating contributions. *Id.* § 254(d). Contributions must be spread across all interstate telecommunications services, so that they contribute "on an equitable and nondiscriminatory basis," and other providers of "interstate telecommunications" (sometime referred to as "private carriers") may be required to contribute "to the preservation and advancement of universal service if the public interest so requires." *Id.*[3]

[3] Section 254 authorizes the Commission to exempt telecommunications carriers from this default requirement, but only after determining that a provider's contribution "would be de minimis" given the "limited … extent" of the provider's "telecommunications activities," 47 U.S.C. § 254(d)—another example of "Congress prescrib[ing] the rule governing private conduct" and "mak[ing] the application of that rule depend on (cont.)

3. *Support.* Section 254 also lays out the ways in which universal service funds should be used. Once more, Congress "delineate[d] the general policy" and established "boundaries" for the Commission to follow when implementing it. *Am. Power & Light*, 329 U.S. at 105.

To start, Section 254 guides the Commission on the types of "mechanisms" it can use to further universal service. As noted above, these "mechanisms" must be "specific, predictable and sufficient … to preserve and advance universal service." 47 U.S.C. § 254(d). These mechanisms must also ensure that "[q]uality services [are] available at just, reasonable, and affordable rates"; that "all regions of the Nation" have "[a]ccess to advanced telecommunications and information services"; that consumers in "low-income[,] … rural, insular, and high cost areas" have access to services at rates that are "reasonably comparable" to the services and rates in urban areas; that schools, health care providers, and libraries have "access to advanced telecommunications services"; and that rates are consistent with other principles that the Commission determines "are necessary and appropriate" to "protec[t] … the public interest, convenience, and necessity." *Id.* § 254(b)(1)–(7); *see also id.* § 254(i) ("[U]niversal service [must be] available at rates that are just, reasonable, and affordable.").

Section 254 also identifies the specific entities and individuals that are entitled to universal service.

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executive fact-finding," *Gundy*, 588 U.S. at 158 (Gorsuch, J., dissenting).

For example, an eligible "health care provider that serves persons who reside in rural areas" can access services that are "necessary for the provision of health care services" at rates that are "reasonably comparable" to rates charged in urban areas. *Id.* § 254(h)(1)(A). Similarly, eligible elementary schools, secondary schools, and libraries can access universal services "for educational purposes" at discounted rates determined by the Commission based on what is "appropriate and necessary to ensure affordable access to and use of such services." *Id.* § 254(h)(1)(B). Section 254 also outlines the reimbursement that providers can receive when delivering these services to eligible recipients. *See, e.g.*, *id.* § 254(h)(1)(A)–(B). Eligible telecommunications providers can also receive funds "for the provision, maintenance, and upgrading of facilities and services" to further universal service. *Id.* § 254(e).

This litany of guiding principles belies the Fifth Circuit's suggestion that Section 254 provides "*no guidance* whatsoever" and leaves "reviewing courts … utterly at sea." *Consumers' Research*, 109 F.4th at 762. To be sure, some of these legislative policies are "general directives." *Mistretta*, 488 U.S. at 372. But that is both permissible and necessary in contexts "replete with ever changing and more technical problems," like the telecommunications industry. *Id.*; *see also, e.g.*, *Marshall Field*, 143 U.S. at 693–94; *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943) (upholding authority to regulate based on "public interest, convenience, or necessity" in the radio licensing context). Indeed, modern communications services have changed dramatically since the Telecommunications Act was passed in

1996—a time when "rotary party line services" were still being "used in some areas," and a "substantial majority of residential customers" were using "touch tone telephone service … to access services like voice mail, telephone banking, and mail order shopping services." S. Rep. No. 104-23, at 27.

At a minimum, Section 254 looks nothing like impermissible past delegations where Congress "failed to articulate *any* policy or standard … to confine" the implementing agency's "discretion." *Gundy*, 588 U.S. at 146 (plurality opinion) (quoting *Mistretta*, 488 U.S. at 373 n.7). Rather, Section 254 makes clear that Congress has imposed "multiple restrictions" on the Commission's exercise of authority—indeed, "with much greater specificity than in delegations … upheld in the past." *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 219–20 (1989) (collecting cases); *see also Mistretta*, 488 U.S. at 373–74 (same); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940) ("The standards which Congress has provided here far exceed in specificity others which have been sustained."). For decades, Section 254's principles have been "adequate for carrying out the general policy and purpose" of universal service, *id.*, notwithstanding the objections raised by Respondents.[4]

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[4] The Fifth Circuit's application of the nondelegation doctrine also conflicts with well-established constitutional-avoidance principles. When a "statutory delegatio[n] … might otherwise be thought to be unconstitutional," the appropriate response is to construe the statute "narrow[ly]" where possible. *Mistretta*, 488 U.S. at 373 n.7; *see also, e.g.*, *Nat'l Cable Television Ass'n v.* (cont.)

B. The Universal Service Fund's Implementation Has Remained Subject to Political Accountability.

Much of the Fifth Circuit's "double-layered delegation" analysis turned on what it considered to be a lack of political accountability "twice over": "[b]road congressional delegatio[n] to the executive" that "undermines" and "obscures" congressional accountability, and "[d]elegatio[n] to private entities," which undermines executive accountability. *Consumers' Research*, 109 F.4th at 783–84. The reality, however, is that political accountability remains a mainstay of Section 254's implementation.

1. Implementation of the Universal Service Fund Is Continuously Subject to Congressional Oversight.

Congressional oversight of federal agencies has always been "one of the central pillars of the constitutional schemes of checks and balances," "often used to signal congressional preferences on agency policy issues and to extract policy commitments from

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United States, 415 U.S. 336, 342 (1974) (similar); *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) ("A construction of the statute that avoids this kind of open-ended grant should certainly be favored."). The Court need not resort to such narrowing constructions here, for the reasons given in this brief. But at a minimum, the Fifth Circuit's decision to invalidate the *entire* statute based on a *handful* of purportedly vague principles sweeps beyond the more circumspect approach this Court has taken when reviewing action taken by a coequal branch of government. *Cf. United States v. Nixon*, 418 U.S. 683, 703 (1974) ("[T]he interpretation of its powers by any branch is due great respect from the others.").

agency officials." Peter H. Schuck, *Delegation and Democracy*, 20 Cardozo L. Rev. 775, 785 (1999); *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 518 ("If Congress is to delegate broadly, … continuing political accountability [should] be assured, through direct political pressures upon the Executive and through the indirect political pressure of congressional oversight."). Such has been the case with the Commission's Section 254 authority.

Since 1996, Congress has used legislative amendments to further refine universal service policy. *See generally* 47 U.S.C. § 254 notes. In 2001, for example, Congress enacted an amendment requiring schools and libraries to adopt Internet safety policies as a condition of receiving universal service discounts. Children's Internet Protection Act, Pub. L. No. 106-554, appx. D § 1711, 144 Stat. 2763, 2763A-337 (2000). As another example, Congress in 2016 expanded the definition of eligible health care providers to include skilled nursing facilities. *See* Rural Healthcare Connectivity Act of 2016, Pub. L. No. 114-182, § 202, 130 Stat. 448, 512–13 (2016) (amending 47 U.S.C. § 254(h)(7)(B)). In 2018, Congress directed the Commission to establish a methodology to ensure that the collection of coverage data is consistent, robust, valid, and reliable. *See* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, tit. V, § 505, 132 Stat. 348, 1094 (2018).

Legislative bills have also been, and continue to be, introduced, proposing amendments to Section 254 and universal service policies generally. *See, e.g.*,

Future of the USF, *supra*, at 9–11 (detailing bills introduced during the 118th Congress).

In addition to legislative amendments, Congress also regularly requires the Commission to submit reports and participate in oversight hearings. In 1997, for example, Congress required the Commission to submit a report evaluating its interpretations and implementation of Section 254. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 623, 111 Stat. 2440, 2521 (1997). More recently, Congress required the Commission to evaluate and report on the future of the Universal Service Fund in the broadband context. *See* Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 60104, 135 Stat. 429, 1205–06 (2021); *see also In re Report on the Future of the Universal Service Fund*, 37 F.C.C.R. 10041 (Aug. 15, 2022). Congressional committees and subcommittees also frequently hold hearings to discuss and investigate issues related to universal service.[5]

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[5] *See, e.g.*, *The State of Universal Service, Hearing Before the Subcomm. on Communications, Media and Broadband of the S. Comm. on Commerce, Science, & Transportation*, 118th Cong. (2023); *Universal Service Fund Reform: Ensuring a Sustainable and Connected Future for Native Communities, Hearing Before the S. Comm. on Indian Affairs, 112th Cong.* (2012); *The Future of Universal Service: To Whom, By Whom, For What, and How Much?, Hearing Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 110th Cong. (2008); *The Universal Service Fund: Assessing the Recommendations of the Federal-State Joint Board: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, (cont.)

To say the least, Congress has always been—and remains—closely attuned to the Commission's implementation of Section 254 in ways that continue to promote, rather than "obscure" or "shirk," political accountability. *Consumers' Research*, 109 F.4th at 759.[6]

110th Cong. (2007); *The Future of Rural Telecommunications: Is Universal Service Reform Needed?, Hearing Before the Subcomm. on Rural Enterprises, Agriculture & Technology of the H. Comm. on Small Business*, 109th Cong. (2006); *The Universal Service E-Rate Program, Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (2004); *The Future of Universal Service, Hearing Before the Subcomm. on Communications of the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (2003); *The Future of Rural Communications: Is the Universal Service Fund Sustainable?, Hearing Before the Subcomm. on Rural Enterprise, Agriculture, & Technology of the H. Comm. on Small Business*, 108th Cong. (2003).

[6] The Fifth Circuit also expressed concern that "Congress cannot exercise control" because the Universal Service Fund operates "outside the regular appropriations process." *Consumers' Research*, 109 F.4th at 762 (cleaned up). Aside from there being many other ways for Congress to influence implementation of legislation as already discussed, the Fifth Circuit ignored the fact that Congress *has* used appropriations to further shape policy in this space. *See, e.g.*, American Rescue Plan of 2021, Pub. L. No. 117-2, § 7402, 135 Stat. 4, 109–10 (creating a separately appropriated Emergency Connectivity Fund for reimbursement of eligible equipment during the COVID-19 pandemic); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 903, 134 Stat. 1182, 2128–29 (2020) (appropriating funds for related COVID-19 Telehealth Program); Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, § 511, 138 Stat. 460, 550 (precluding Commission from using appropriated funds "to modify, amend, or change its rules or regulations for universal service support payments to implement [specific] (cont.)

2. The Commission Has Not Insulated Contribution Rate Determinations from Political Accountability.

The Fifth Circuit also faulted the Commission for allowing "private entities" to "formulat[e]" telecommunication providers' contribution rates as another way of undermining political accountability. *Id.* at 767, 783–84. Petitioners have already explained how USAC performs ministerial and non-binding accounting tasks, with no discretion to deviate from the Commission's directives. *See* Commission Br. 41–44; SHLB Coalition Br. 40–47; Telecom Petrs. Br. 35–43; *see also Gundy*, 588 U.S. at 158 (Gorsuch, J., dissenting) (engaging in "executive fact-finding" does not give rise to delegation concerns). *Amici* need not reiterate those points here.

But it bears reemphasizing that because the Commission retains complete control of the Universal Service Fund's implementation and does not allow USAC to exercise *any* discretion, *see* 47 C.F.R. pt. 54, subpt. H, USAC does not wield "independent regulatory muscle" that would undercut political accountability, *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 896 F.3d 539, 545 (D.C. Cir. 2018). Rather, the fact that "law-making is *not* entrusted to the industry" shows that the Commission's implementation of Section 254 has not transgressed constitutional lines. *Sunshine Anthracite Coal*, 310 U.S. at 399 (emphasis added). Contrary to the Fifth Circuit's assertions, this is not a case where

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recommendations of the Federal-State Joint Board on Universal Service").

"government officials are immunized from public oversight by this Matryoshka doll of delegations and subdelegations." *Consumers' Research*, 109 F.4th at 784 (cleaned up).[7]

More broadly, Section 254 contemplates the very kind of public-private enterprise that the Fifth Circuit deemed impermissible. *See id.* at 776–77. Congress made clear that Section 254 did not affect the way in which the Commission was administering the Lifeline Assistance Program. *See* 47 U.S.C. § 254(j). And at the time of Section 254's enactment, that Program was administered in the same way USAC operates today: a private entity (the National Exchange Carrier Association) would collect Commission-required data from certain carriers, compute how much to charge those carriers following a Commission-determined formula, collect those charges, and disburse funds based on Commission-set eligibility requirements. *See* 47 C.F.R. §§ 69.117, 69.603(d) (1995). Indeed, this same private entity performed the *exact same role* in computing, collecting, and disbursing funds associated with the Commission's universal service fund regulations that served as an administrative precursor to Section 254. *See id.* § 69.116. Moreover, Congress explicitly acknowledged these preexisting regulations, tasking

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[7] Indeed, federal agencies frequently enter into "public-private contractual relationships where private entities provide … services for the government." Cong. Research Serv., R44965, *Privatization and the Constitution* 1 (2017). Yet there is little difference (if any) between the frequent work private entities do pursuant to contracts with federal agencies and the ministerial work USAC does pursuant to the Commission's regulations.

the Commission with reviewing *whether* to make adjustments, without expressing any disapproval or directing the Commission to do away with these practices. *See* 47 U.S.C. § 254(a); *see also* S. Rep. No. 104-23, at 4 (explaining that Section 254's purpose was to "mak[e] *explicit* the FCC's *current implicit* authority … to provide universal service" (emphases added)).

In short, reading Section 254 in historical context shows that Congress was aware of, and declined to foreclose, the Commission's nearly decade-long practice of working with a private entity to administer universal service programs. *See United Steelworkers v. Weber*, 443 U.S. 193, 201 (1979) (statutes must be "read against … the historical context from which the Act arose"); *cf. Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."). Thus, the Commission's authority to determine the "mechanisms" to further universal service, *see* 47 U.S.C. § 254(a)–(b), is "best" read to include the option of continuing to use a private entity to perform ministerial support functions, *Loper Bright Enters.*, 603 U.S. at 400.

II. Affirmance Would Create Significant Negative Consequences.

Using this delegated authority, the Commission has assisted millions of Americans, schools, libraries, and health care providers through

Universal Service Fund programs. Yet the Fifth Circuit's decision stands to arrest this forward momentum, hinder support for outstanding and future telecommunication needs, and upset the reliance interests of those who have come to depend on this important assistance. *See Future of the USF*, *supra*, at 17 ("USF programs rely on stable suppor[t] because telecommunications carriers rely on that stability to make long-term investment decisions, and consumers rely on continuous assistance for uninterrupted connectivity.").

This is true for each of the Universal Service Fund's four primary programs.

1. *High Cost Program*. This is the largest Universal Service Fund program, also known as the Connect America Fund. *See* USAC, *High Cost Program Overview*, https://www.usac.org/high-cost/program-overview/ (accessed Jan. 15, 2025). This program provides funding to providers "to deliver service in rural areas where the market alone cannot support the substantial cost of deploying network infrastructure and providing connectivity." *Id*. The program allows consumers in "rural, insular, and high-cost areas" to access services "at rates that are reasonably comparable to those in urban areas." Cong. Research Serv., R46780, *Overview of the Universal Service Fund and Selected Federal Broadband Programs* 2 (2021) ("*Overview*"); *see also* 47 U.S.C. § 254(b)(3), (g). The High Cost Program also includes the Rural Digital Opportunity Fund (which focuses on "bring[ing] high-speed fixed broadband service to rural homes and small businesses") and the 5G Fund for Rural America (which focuses on

"bring[ing] voice and broadband services to areas of the country that are unlikely to see unsubsidized deployment of 5G networks"). *See Overview*, *supra*, at 2–3.

Basic economies of scale illustrate why the High Cost Program plays such a critical role in providing further access to communications services. The cost of providing broadband networks (and thus consumer affordability) is dramatically affected by population density. *See* Steven G. Parsons & James Stegeman, *Rural Broadband Economics: A Review of Rural Subsidies* 5 (July 11, 2018), https://perma.cc/4464-J896. The more densely populated an area, the more cost-effective it is for providers to lay fiber optic cables or build cell towers as the cost to serve each new user becomes less expensive.

To illustrate, one recent study of West Virginia residents surveyed thirteen communities across the state and discovered that Internet speeds were consistently several times faster in urban areas, with Internet plans often offering "higher download speeds for lower prices than plans offered in rural areas." Claire Park, New America, *The Cost of Connectivity in West Virginia* (Apr. 1, 2020), https://www.newamerica.org/oti/reports/cost-connectivity-west-virginia/. A 2023 survey of Nebraska similarly found that Internet speeds and dependability can vary greatly from one part of the state to another: Urban residents were more likely to report having dependable Internet at home (50%) than participants who lived either on a farm or in open country (26%), and they were more likely to report very fast Internet

(37%) than farm residents (16%) and those in open country (17%). *See* Zhenji Zhou et al., UNL Bureau of Socio. Research, *Nebraska Annual Social Survey Snapshot: Is Home Internet in Nebraska Fast and Dependable?* 1–2 (May 23, 2024), https://perma.cc/TP7B-9BUF.

Without funding from this program, carriers would have less of an incentive to supply needed communications services in sparsely populated areas. South Dakota provides a helpful example. The average per-resident cost of installing fiber-optic broadband lines in the urban Sioux Falls market is $25.54, whereas that same per-resident cost in rural South Dakota is $3,571—almost 140 times higher. *See* South Dakota Telecommunications Association, *Connecting South Dakota's Future: A Report on the Deployment & Impact of Rural Broadband* 9 (2018), https://perma.cc/RP4Y-N7VL. The High Cost Program fills that gap: In 2024, telecommunications companies in South Dakota were projected to receive over $120 million through this program to support infrastructure projects that bring broadband to rural areas. *See* USAC, *High Cost Support Projected by State 1Q2024* (Sept. 30, 2023), https://perma.cc/9CZP-FY5F. As with South Dakota, the High Cost Program brings broadband services to all corners of America, disbursing more than $4.3 billion in 2023 and 2022, and over $5 billion in 2021, for infrastructure projects in communities that might otherwise go unserved. *See* USAC, *2023 Annual Report* 3 (2024), https://perma.cc/8HLR-7FJE.

There is, of course, still work to be done. According to U.S. Census Bureau estimates, nearly

seven million households still have no Internet access. *See* U.S. Census Bureau, B28002, *Presence and Types of Internet Subscriptions in Household: 2023 ACS 1-Year Estimates*, https://perma.cc/F9GH-EXD9. Likewise, there remain vast geographic and socioeconomic disparities in the speed and reliability of Internet service available to Americans. *See id.*

2. *E-Rate Program*. The Commission also created the E-Rate program, which provides discounts for telecommunications services and Internet access to low-income and rural schools and libraries. FCC, *E-Rate: Universal Service Program for Schools and Libraries* (Feb. 27, 2024), https://perma.cc/V5YL-UUQ6. Through the E-Rate program, discounts can range from 20 to 90 percent depending on the poverty level and population density of the surrounding community. *Id.*

E-Rate discounts have dramatically changed connectivity in K-12 classrooms. When the program was created, only 14 percent of these classrooms could access the Internet. *Id.* Today, however, nearly three-quarters of all school districts either meet or exceed the Commission's recommended Internet bandwidth goal of 1 Mbps per student. *See* Connect K-12, 2023 Report on School Connectivity, https://perma.cc/8XE4-B3TD. By providing discounts to eligible schools, the E-Rate program creates meaningful opportunities for students to participate in immersive digital learning within the classroom.

The E-Rate program has also helped transform the role libraries play in communities that still experience connectivity gaps in homes. For adults,

libraries have served as a critical tool in rural and tribal communities. *See* American Library Association, *Libraries and E-Rate* 2 (2018), https://perma.cc/UWU8-P69F. For example, in Nenana, Alaska, community members are able to use the library's Internet to apply for jobs located in Fairbanks 55 miles away. *Id.* Residents of Cherryfield, Maine, use library broadband to assist with many of their employment needs, such as applying for unemployment benefits, submitting job applications, filing taxes, and seeking state licenses. *Id.* Similarly in Oklahoma, the Quapaw Tribal Library now partners with the Oklahoma A&M College to make online classes available to residents, who then can earn college credit. *Id.* at 3. By furthering the broadband capabilities of libraries, the E-Rate program not only allows individuals to access the Internet on a more consistent basis, but also helps individuals overcome connectivity barriers that previously impeded their lives and careers.

The COVID-19 pandemic in particular underscored the E-Rate Program's importance "when most educational activities were unexpectedly forced to shift online over night." *Addressing the Homework Gap through the E-Rate Program*, 89 Fed. Reg. 67,303, 67,304 (Aug. 20, 2024). Thanks to the E-Rate Program's ongoing assistance, schools and libraries can further ensure that students are not "caught on the wrong side of the digital divide." *Id.*

In all, between 2022 and 2024, through the E-Rate Program, 106,000 schools and 12,597 libraries received a total of over $7 billion for broadband connectivity and internal connections. *See* USAC, *The*

Universal Service Fund: How It Impacts the United States 1 (Aug. 8, 2024), https://perma.cc/CH2M-YS39.

As with the High Cost Program, however, there is also work to be done. In a recent survey of funding applicants, 74 percent agreed that a "significant issue in [their] communit[ies]" is that many students or library patrons still have "[i]nsufficient Internet access" in their homes. Funds for Learning, E-Rate Trends Report 21 (2023), https://perma.cc/H2F7-SBMZ. That same survey revealed that nearly 90 percent of funding applicants have come to depend on E-Rate funding for their organizations each year. *Id.* at 12. Improving cybersecurity measures also continues to be a key area of focus for E-Rate recipients to "secure digital learning environment[s]." *Id.* at 11.

3. *Rural Health Care Program.* The Commission's Rural Health Care program pays for high-capacity broadband connectivity for rural health care providers. This allows providers to charge rates on par with their urban counterparts while also improving the quality of health care available to patients in rural communities. *See* USAC, *Rural Health Care*, https://perma.cc/YF2F-7UM5. This program helps Americans in rural communities improve their access to services like telemedicine, facilitates the exchange of electronic health records between facilities, improves physicians' ability to disseminate medical and technical expertise, and creates the opportunity to experience significant savings due to reduction of patient, physician, and family travel. *See In re Rural Health Care Support*

Mechanism, 27 F.C.C.R. 16678, 16688–92 ¶ 21–27 (Dec. 21, 2012).

The Rural Health Care program has also provided funding to improve the infrastructure and development of many communities. In Alaska, for example, rural health care providers received more than $342 million between 1998 and 2013—the highest funding per capita from this program when compared to other states. *See* Heather E. Hudson, *Response to Notice of Inquiry: Telecommunications Assessment of the Arctic Region* 1 (Dec. 2, 2014), https://perma.cc/U7CK-XBS3.

4. *Lifeline Assistance Program*. The last major Universal Service Fund program, the Lifeline Assistance Program, provides direct assistance to consumers by lowering the cost of basic local telephone and broadband services. FCC, *Lifeline Program for Low-Income Consumers* (Jan. 4, 2025), https://perma.cc/28QS-DVTX. Eligible low-income consumers can receive up to a $9.25 monthly discount on their eligible phone and Internet access service (or, if located on tribal land, up to a $34.25 monthly discount). FCC, *Lifeline Support for Affordable Communications* (Oct. 29, 2024), https://perma.cc/6FUH-49UZ. Consumers are generally eligible for the Lifeline Program if they qualify for other government benefit programs (e.g., Medicaid, Supplemental Nutrition Assistance Program) or participate in a Tribal-specific federal assistance program. *Id.* In 2023, the Lifeline program spent more than $860 million to ensure that all Americans have the opportunities and security that telephone and broadband access provide, including

being able to connect to jobs, family, and emergency services. *See 2023 Annual Report*, *supra*, at 3.

The Lifeline Program has also provided funding for low-income individuals during times of natural disaster. In 2024, following Hurricane Milton, the Commission extended the benefits of the Lifeline Program for the next six months to individuals affected by the hurricane and other similar storms, but who were not already enrolled in a qualifying program such as Medicaid. *See In re Lifeline and Link Up Reform Modernization*, WC Docket No. 11-42 FCC 24-108 (Oct. 11, 2024), https://perma.cc/CC5C-66QD.

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For decades, the Universal Service Fund has created immense benefits for our country—both for those directly receiving support and those experiencing the positive network effects of increased connectivity. *See* Steven G. Parsons & James Bixby, *Universal Service in the United States: A Focus on Mobile Communications*, 62 Fed. Comm. L.J. 119, 135–36 (2010). These results are the product of ongoing interbranch cooperation to further universal service and effect meaningful improvements in Americans' access to essential communications services.

Amici recognize that the Universal Service Fund is not perfect or without its criticisms. *See Consumers' Research*, 109 F.4th at 751. To that end, *amici* and others are working to evaluate potential reforms to further improve the Universal Service Fund. *See* Press Release, Sen. Ben Ray Luján, *Luján,*

Thune Announce Bipartisan Working Group on the Universal Service Fund and Broadband Access (May 11, 2023), https://perma.cc/WJ8M-Z4MX. But these concerns do not erase the Commission's extensive record of faithfully (and successfully) exercising its delegated authority within the bounds Congress has established. Nor do they justify upending telecommunication access for millions of Americans, schools, libraries, and health care providers. Rather, the Court should uphold this flexible, yet constitutional, system of helping this country's citizens keep pace in our ever-growing digital world.

CONCLUSION

For the foregoing reasons, and those expressed by Petitioners, this Court should reverse the judgment below.

Respectfully submitted,

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January 16, 2025

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