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.

SHLB 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 FOR AASA—THE SCHOOL SUPERINTENDENTS ASSOCIATION ET AL. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

This brief is submitted on behalf of 21 organizations that represent U.S. schools, school districts, state educational agencies, and libraries, as well as the educators, administrators, librarians, public servants, and others working for these institutions. These entities rely on the Schools and Libraries Universal Service Support Program ("the E-Rate Program") funded by the Universal Service Fund to achieve their educational missions. The E-Rate Program subsidizes telecommunications and information services, such as broadband WiFi, to schools and libraries, particularly in high-needs areas. The Fifth Circuit's decision would eliminate a critical funding source for these vital programs. Because these organizations have extensive experience with the E-Rate Program and a deep interest in its survival, they submit this brief to assist the Court with resolution of this case.

AASA, The School Superintendents Association is the professional organization for more than 13,000 educational leaders in the United States and beyond. AASA members range from chief executive officers, superintendents, and senior school administrators to cabinet members, professors, and aspiring school-system leaders. As school-system leaders, AASA members set the pace for academic achievement. They help shape policy, oversee its implementation, and represent school districts to the public at large.

The American Federation of School Administrators ("AFSA") is the exclusive national labor union for

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

administrators, professionals, and supervisors advocating for excellence and equity in schools, workplaces, and communities. AFSA members support educational reforms that put students first and include school administrators in the discussion and implementation.

The American Federation of Teachers ("AFT") is a union of over 1.8 million professionals that champions fairness; democracy; economic opportunity; and high-quality public education, healthcare and public services for students, families and communities. AFT is committed to advancing these principles through community engagement, organizing, collective bargaining, political activism, and the work of its members.

The American Library Association ("ALA") is a nonprofit educational association with over 49,000 members. ALA is the oldest and largest library association in the world, providing leadership for the development, promotion and improvement of library and information services and the profession of librarianship to enhance learning and ensure informational access. ALA advocates for policies that ensure access to electronic-information resources as a means of upholding the public's right to a free and open information society.

The Association of Educational Service Agencies ("AESA") strengthens regional education service agencies ("ESAs") nationwide by advocating for impactful policies, providing professional development, and fostering collaboration through networks and research. Committed to equity and innovation, AESA supports ESAs as indispensable partners in shaping an inclusive and dynamic education system.

The Association of School Business Officials International ("ASBO International") promotes the highest standards of school business management, professional

growth, and the effective use of educational resources. ASBO members are school finance decision-makers who manage budgeting, purchasing, facility maintenance, technology, transportation, and other areas of education administration and operations.

The Consortium for School Networking, a non-profit professional association for K-12 EdTech leaders, is driven to equip current and aspiring K-12 education technology leaders, their teams, and school districts with the community, knowledge, and professional development needed to cultivate engaging learning environments.

The Consortium of State School Boards Associations is a non-partisan, national alliance representing 25 state associations—compromised of 6,700 school boards that serve nearly 24 million students—and is dedicated to sharing resources and information to support and strengthen state school boards associations as they serve their local school districts and board members.

The Council of Chief State School Officers is the nonpartisan, nonprofit organization of public officials who head departments of elementary and secondary education in the states, the District of Columbia, the Department of Defense Education Activity, the Bureau of Indian Education, and five U.S. extra-state jurisdictions.

The Council of the Great City Schools is a coalition of 78 of the nation's largest urban public school systems and is the only national organization exclusively representing the needs of urban public schools. The Council promotes urban education through research, instruction, management, technology, legislation, communications, and other special projects.

The National Association for Pupil Transportation is the leading trade association in the student transportation industry. Its members include public and private student transportation service providers as well as the companies that provide valuable products and services to support safe school transportation.

The National Association of Elementary School Principals ("NAESP") is a professional organization serving elementary and middle school principals and other education leaders throughout the United States and abroad. NAESP's mission is to lead in the advocacy and support for elementary and middle-level principals and other education leaders in their commitment for all children.

The National Association of Federally Impacted Schools represents approximately 1,100 federally impacted public school districts that together educate more than eight million students. Federally impacted school districts are those located on or near nontaxable Federal property—including military installations; Indian Trust, Treaty and Alaska Native Claims Settlement Act lands; Federal low-income housing facilities; and national parks, national laboratories and other Federal buildings and property.

The National Association of Independent Schools ("NAIS") is a nonprofit membership association that provides services to more than 2,000 schools and associations of schools in the United States and abroad. NAIS is the largest association of independent schools—schools that are self-determining in mission and program and are governed by independent boards.

The National Association of Secondary School Principals ("NASSP") is the leading association for middle level and high school principals, assistant principals, and

other school leaders across the United States and beyond. NASSP includes more than 16,000 school leaders, 30,000 advisers, and 1 million students in our leadership programs.

The National Catholic Educational Association ("NCEA") is a private professional education association working with Catholic educators to support ongoing faith formation and the teaching mission of the Catholic Church. NCEA membership includes nearly 140,000 educators serving 1.6 million students in Catholic schools.

The National Education Association ("NEA"), the nation's largest professional employee organization, is committed to advancing the cause of public education at every level of education—from pre-school to university graduate programs. NEA has affiliate organizations in every state and in more than 14,000 communities across the United States.

The National School Attorneys Association ("NSAA") is a non-profit membership organization of attorneys who advocate on behalf of elementary and secondary public-school districts across the United States. NSAA's approximately 900 members in 37 states regularly advise public school districts on regulatory issues affecting their operations.

The National Rural Education Association ("NREA") is a membership organization consisting of rural school administrators, teachers, district board members, State and Regional Educational Agencies, Educational Service Agencies, researchers, business and industry representatives, and others interested in maintaining the vitality of rural school systems across the country. NREA is committed to increasing educational equity and opportunity for rural students while highlighting the many strengths of rural schools and communities.

The National School Boards Association ("NSBA") is a nonprofit organization ensuring that each student everywhere has access to excellent and equitable public education governed by high-performing school board leaders and supported by the community. NSBA has resolved that Congress and the FCC should close the education technology gap, commonly called "The Homework Gap," for children in rural and low-income communities who lack access to or cannot afford out-of-school technology.

SETDA is the principal association representing U.S. state and territorial educational technology and digital learning leaders. Through a broad array of programs and advocacy, SETDA builds member capacity and engages partners to empower the education community in leveraging technology for learning, teaching, and school operations.

SUMMARY OF ARGUMENT

The Fifth Circuit's unprecedented decision invalidating the universal service fee would jeopardize Congress's longstanding mission to provide telecommunications services to all Americans. Rural, poor, and underserved communities across the United States have depended for decades on programs funded by the universal service fee for access to affordable, reliable telecommunication services, including high-speed internet services. The Fifth Circuit's decision would dismantle these vital programs.

Article I prohibits Congress from delegating the "legislative Powers" granted to it by the Constitution. U.S. Const. art. I, § 1. But Congress may authorize executive agencies to exercise substantial "discretion" in implementing and enforcing the laws that Congress enacts. *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S.

394, 406 (1928). In carrying out those laws, agencies may also rely on assistance from private actors, so long as the actors remain subordinate to and under the agencies' authority and supervision. *See Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 399 (1940).

The universal service fee comports with these principles. In the Telecommunications Act of 1996, Congress established multiple intelligible principles guiding the Federal Communications Commission ("FCC" or "the Commission") in assessing the fee and administering the Universal Service Fund ("the Fund"). The Act first defines what services should be universally provided, including those "essential to education, public health, or public safety" or "subscribed to by a … majority of residential customers." 47 U.S.C. § 254(c)(1). It then directs the Commission to focus on providing quality and affordable telecommunications for populations that lack reliable access—those in "rural, insular, and high cost areas." *Id.* § 254(b)(3). It provides a mechanism for reaching these areas by requiring that services be provided to central access points—schools, libraries, and healthcare facilities. *Id.* § 254(b)(6), (h). And it mandates that universal service contributions be "equitable and nondiscriminatory," *id.* § 254(d), and "sufficient to achieve the purposes" of Act, *id.* § 254(e). In short, the Act dictates the who, what, where, and how of universal service—more than enough to satisfy this Court's nondelegation precedent.

The FCC in turn created the Universal Service Administrative Company ("USAC") to help it calculate and collect universal service fees and distribute funds. USAC performs these routine, administrative tasks under the FCC's authority and supervision and without exercising any independent substantive power.

The universal service program is directly analogous to the scheme that this Court held constitutional in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940). The statute in that case authorized the National Bituminous Coal Commission to set minimum coal prices based on proposals from boards of private coal producers. The statute did not violate the public nondelegation doctrine because it specified "wholly adequate" "criteria" to guide the agency in setting prices. *Id.* at 398. And it did not violate the private nondelegation doctrine because the agency maintained "authority and surveillance" over the boards. The same is true here. *Id.* at 399.

Affirming the Fifth Circuit's contrary conclusion would devastate schools and libraries and the students and communities they serve. It would undermine Congress's purpose in enacting Section 254, which was, in part, to ensure that all schools and libraries have affordable access to broadband internet. In just the last two years, over one hundred thousand schools and libraries benefited from universal service programs, including many in rural, low-income and tribal communities throughout the country. A recent survey showed that over 90% of schools and libraries consider these programs a "vital" resource, without which schools and libraries would struggle to pay for essential broadband. *See* Funds for Learning, *E-Rate Trends Report*, at 12 (2024). Striking down the funding mechanism for these programs would deprive the tens of millions of students and adults who rely on these programs access to necessary internet services, unraveling the benefits Congress intended the program to provide.

BACKGROUND

A. The Universal Service Fund

The pursuit of universal service—that is, nationwide access to telecommunications services at affordable rates—has been a core tenet of telecommunications regulation for decades. The FCC was created in 1934 with the aim of enabling universal telephone, telegraph, and radio service. *See* Communications Act of 1934, Pub. L. No. 73-416, § 1, 48 Stat. 1064, 1064 (codified at 47 U.S.C. § 151). As technology evolved, so did the FCC's mandate. In 1996, Congress expanded the concept of universal service to include high-speed internet and other advanced communications technologies. *See* Telecommunications Act of 1996, Pub. L. 104-104 § 254, 110 Stat. 56, 71-75 (codified at 47 U.S.C. § 254).

The Telecommunications Act of 1996 tasks the FCC with ensuring that quality advanced telecommunications services are available at affordable rates throughout the country, particularly in low-income, rural, tribal, and high-cost areas. 47 U.S.C. § 254(b)(2)-(3). The Act further directs the FCC to make sure that schools, libraries, and rural healthcare facilities have access to advanced communications services at competitive rates. *Id.* § 254(b)(6), (h).

To fund this mandate, the Act requires the FCC to impose a fee on interstate telecommunications carriers "on an equitable and nondiscriminatory basis," 47 U.S.C. § 254(d), that is "sufficient to achieve" the statute's "purposes," *id.* § 254(e). To do so, each quarter, the FCC determines a "contribution factor" used to calculate each carrier's contribution. 47 C.F.R. § 54.709(a)(2). To arrive at this "contribution factor," FCC works with USAC, which prepares estimates of the expected demand for universal support programs and the costs of

administering those programs. *See id.* § 54.709(a)(3). The FCC uses these estimates to set the contribution factor. *Id.*

These contributions are paid into the Universal Service Fund and, in turn, fund four main programs: (1) the High Cost Program, which supports the cost of network deployment and maintenance in rural areas; (2) the Low-Income Program, which makes service affordable for low-income households; (3) the Rural Health Care Program, which supports communications service to rural healthcare providers; and (4) the E-Rate Program, which helps offset the cost of communications service to schools and libraries.

B. The E-Rate Program

The schools and libraries that amici represent rely heavily on the E-Rate Program, which subsidizes high-speed internet access and other telecommunications services in schools (including public, private, and charter schools), school districts, and libraries across the country.

Section 254(h)—the legislative anchor for the E-Rate Program—states that telecommunication carriers shall, upon request, "provide [universal] services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties." 47 U.S.C. § 254(h)(1)(B). The E-Rate Program implements this statutory requirement by providing schools and libraries discounts on eligible services and equipment upon successful completion of an application process. *See* 47 C.F.R. § 54.502. Educational institutions can reduce the cost of services by 20 to 90%, depending on the entity's "level of poverty" and whether it is in a rural or urban area. *See id.* § 54.505(b)(1)-(3), (c). Each year, the

program provides discounts up to an annual cap that the FCC establishes. The cap is currently set at $4.94 billion. *See* FCC, *Wireline Competition Bureau Announces E-Rate and RHC Programs' Inflation-Based Caps for Funding Year 2024*, Public Notice, DA 24-229, at 2 (Mar. 8, 2024).

The E-Rate Program has had great success in its twenty-seven years. Prior to E-Rate, only 28% of libraries had public internet access, while nearly 100% do today. *See* Becker, et al., , *Opportunity for All: How the American Public Benefits from Internet Access at U.S. Libraries*, Inst. of Museum & Library Servs., at 1 (Mar. 2010), https://www.imls.gov/sites/default/files/publications/documents/opportunityforall_0.pdf. Likewise, before the program was created, only 14% of public-school instructional classrooms were connected to the internet; as of 2024, 99% of school districts nationwide provide internet access at the connectivity level of 100 megabits per second per 1,000 students and staff. *See* 2024 Section 706 Report, FCC 24-27, ¶¶ 131-132 (Mar. 18, 2024), https://docs.fcc.gov/public/attachments/FCC-24-27A1.pdf.

ARGUMENT

I. THE UNIVERSAL SERVICE FUND PROGRAM DOES NOT VIOLATE NON-DELEGATION PRINCIPLES

A. Congress Set Forth Intelligible Principles In Section 254 That Guide The FCC In Administering The Universal Service Fund

Although Congress may not delegate legislative powers to the Executive Branch, it may authorize agencies to exercise substantial "discretion" in executing and enforcing the laws Congress enacts. *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928). A grant of agency discretion is lawful so long as Congress "'lay[s]

down by legislative act an intelligible principle'" to guide the agency. *Gundy* v. *United States*, 588 U.S. 128, 135 (2019).

"Only twice in this country's history … [has the Court] found a delegation excessive." *Gundy*, 588 U.S. at 146. And in those two cases, "'Congress had failed to articulate *any* policy or standard' to confine discretion." *Id.*; *see A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 541 (1935); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 430 (1935).

The Telecommunications Act of 1996 delineates clear and intelligible principles for how the universal service fee should be collected and how the programs it pays for are to be administered.

First, the Act prescribes how the FCC should set the fee that carriers contribute. Carriers must make "equitable and nondiscriminatory" contributions, 47 U.S.C. § 254(b)(4), that are "sufficient to achieve" the Act's "purposes," *id.* § 254(e). This sufficiency requirement restricts contributions to the amount necessary to achieve the statutorily listed universal service principles discussed below. *See Alenco Commc'ns, Inc.* v. *FCC*, 201 F.3d 608, 620 (5th Cir. 2000) ("[E]xcessive funding may itself violate the sufficiency requirements of the Act."). The affordability principle also constrains the contribution from becoming "so large it actually makes telecommunications services less 'affordable'" for other consumers who indirectly subsidize universal service. *Rural Cellular Ass'n* v. *FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) (citation omitted). Finally, the requirement that contributions be "'equitable and nondiscriminatory'" "prevents case-by-case contribution amounts and equalizes the obligation on carriers." *Consumers' Research* v. *FCC*, 67 F.4th 773, 794 (6th Cir. 2023).

Regarding administration of the universal service programs, the Act first requires the FCC to "base policies for the preservation and advancement of universal service" on six comprehensive principles. Quality telecommunication services should be: (1) "available at just, reasonable, and affordable rates"; (2) provided "in all regions of the Nation"; (3) accessible to consumers in all regions, including "low-income consumers and those in rural, insular, and high cost areas," at reasonably comparable rates and quality as those services "provided in urban areas"; (4) funded in "an equitable and nondiscriminatory" manner by telecommunication service carriers; (5) funded by "Federal and State mechanisms"; and (6) available to "[e]lementary and secondary schools and classrooms, health care providers, and libraries." 47 U.S.C. § 254(b)(1)-(6). The FCC must also consider "[s]uch other principles" it determines "are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter." *Id.* § 254(b)(7).

Second, the Act further specifies what services the FCC may fund. The FCC must consider the extent to which supported telecommunication services: (1) "are essential to education, public health, or public safety"; (2) have "been subscribed to by a substantial majority of residential customers"; (3) "are being deployed in public telecommunications networks by telecommunications carriers"; and (4) "are consistent with the public interest, convenience, and necessity." 47 U.S.C. § 254(c).

Third, the Act provides detailed guidance for funding services in places of acute need. In particular, Section 254(h), which serves as the statutory authorization to the E-Rate Program, states: "All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services …, 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." 47 U.S.C. § 254(h)(1)(B). The provision constrains the FCC's discretion by requiring that approved discounts be "appropriate and necessary to ensure affordable access to and use of such services by such entities." *Id.* Section 254 also requires funding telecommunication services to rural healthcare providers at "reasonably comparable … rates" to those located in urban areas when "necessary for the provision of health care services in a State." *Id.* § 254(h)(1)(A).

Together, these provisions establish comprehensive guidance about the who, what, where, and how of the FCC's universal service mandate. These are more than sufficient "standards guiding [the FCC's] actions such that a court could ascertain whether the will of Congress has been obeyed." *Skinner* v. *Mid-Am. Pipeline Co.*, 490 U.S. 212, 218 (1989). Indeed, Congress has defined the scope of the FCC's discretion with much greater specificity than other statutes the Court has found constitutional in the past. *See, e.g.*, *Lichter* v. *United States*, 334 U.S. 742, 778-786 (1948) (upholding delegation of authority of War Department to recover "excessive profits" earned on military contracts); *Yakus* v. *United States*, 321 U.S. 414, 420 (1944) (upholding delegation of authority to the Price Administrator to fix prices of commodities that "will be generally fair and equitable and will effectuate [Congress's] purposes"); *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600-601 (1944) (upholding delegation to Federal Power Commission to determine just and reasonable rates).

The Fifth Circuit nonetheless believed that Congress failed to "meaningfully limit" the FCC because the Act authorizes the FCC to also adopt "'other principles'"

beyond those listed. Pet. App. 28a (quoting 47 U.S.C. § 254(b)(7)). But the FCC adopted no such additional principles in the order at issue here. Moreover, the FCC's authority to adopt other principles is itself constrained: Additional principles must be "consistent with" the Act, 47 U.S.C. § 254(b)(7)—which means they must comport with the limits set forth above. And they must be "necessary and appropriate for the protection of the public interest, convenience, and necessity." *Id.* This Court found an identical statutory standard to be sufficiently intelligible to guide the FCC's discretion in licensing radio broadcasting in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 214-215 (1943) (upholding Section 303 of the Communications Act of 1934, which provided that "the Commission from time to time, as public convenience, interest, or necessity requires, shall … '[p]rescribe the nature of the services to be rendered by … licensed stations"). If that language alone satisfies non-delegation principles, then it necessarily does so here, where Congress further cabined the FCC's authority through a comprehensive set of other statutory principles and constraints.

The Fifth Circuit and Respondents are likewise wrong to suggest a more demanding non-delegation test applies here because the Act "implicates the taxing power." Pet. App. 41a n.13. In *Skinner*, the Court rejected the "application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power." 490 U.S. at 222-223. Respondents attempt to distinguish *Skinner* on the ground that Congress had capped the aggregate amount of fees the Secretary of Transportation could collect from pipeline operators, whereas Congress here set no cap. But the unanimous court in *Skinner* did not hinge its holding on the fee cap.

Rather, the Court "ha[d] no doubt that" Congress supplied intelligible principles because of the "multiple restrictions" placed on the Secretary's discretion. *Id.* at 220. Here too, Congress has placed analogous restrictions that constrain and guide the FCC's discretion in assessing fees and administering the Fund. Among other restrictions, the FCC must assess fees for the statutory purpose of attaining "universal service," 47 U.S.C. § 254(b); it must predictably assess fees in an "equitable and nondiscriminatory" manner from "[a]ll providers of telecommunications services," *id.* § 254(b)(4), prohibiting case-by-case assessments; it must use money from the Fund to provide access to telecommunications services to certain groups of consumers—in particular, "low-income consumers and those in rural, insular, and high cost areas," *id.* § 254(b)(3); and it must achieve this access by providing funding for such services to eligible schools, libraries, and healthcare providers, *id.* § 254(b)(6). This is all that the non-delegation doctrine requires.

B. The FCC Did Not Impermissibly Sub-Delegate Governmental Power To The USAC

A government agency may rely on private entities for assistance in carrying out its administrative functions without violating the private nondelegation doctrine provided that the entity "function[s] subordinately" to the agency, which retains ultimate "authority and surveillance over the activities" of the private entity. *Sunshine Anthracite*, 310 U.S. at 399. Because that is true of USAC, the FCC's reliance on it for administrative assistance does not constitute impermissible private delegation.

The FCC created and supervises USAC. The FCC dictates the USAC's form and function. FCC

regulations establish that USAC has a 20-member board of directors, which must represent a variety of stakeholders—including service providers, schools, libraries, low-income consumers, and tribal communities. 47 C.F.R. § 54.703(b). And the FCC chairperson selects each board director and USAC's chief executive officer. *Id.* §§ 54.703(c)(3), 54.704(b). FCC regulations also require that USAC carry out certain technical tasks for the administration of universal service programs. For example, USAC is "responsible for billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds," as well as "maintain[ing] books of account," and "create[ing] and maintain[ing] a website … on which applications for services will be posted." *Id.* § 54.702(b), (e), (f).

The FCC exercises ultimate authority over USAC. USAC "may not make policy," "interpret unclear provisions of the statute or rules," or otherwise "interpret the intent of Congress." 47 C.F.R. § 54.702(c). USAC must act in accordance with FCC regulations. When the Telecommunications Act or FCC rules are "unclear" or "do not address a particular situation," USAC cannot act independently but must instead "seek guidance from the [FCC]." *Id.* Any party aggrieved by USAC's actions can also challenge USAC proposals directly to the FCC, subject to its de novo review. *Id.* §§ 54.719, 54.723.

FCC regulations also dictate USAC's limited role in calculating the contribution amount. Contributions to the Fund are based on a contributor's projected "end-user telecommunications revenues, and on a contribution factor." 47 C.F.R. § 54.709(a). The contribution factor is "determined by the [FCC]." *Id.* § 54.709(a)(2). USAC merely provides the FCC with cost and demand projections used as inputs in FCC's determination.

USAC "must submit its projections" and "the basis for those projections" each quarter to the FCC. *Id.* § 54.709(a)(3). And the projections "must be approved by the [FCC] before they are used to calculate the quarterly contribution factor and individual contributions." *Id.* § 54.709(a)(3). Thus, any discretion the USAC exercises in helping set the contribution amount must ultimately be reviewed and approved by the FCC.

The FCC also has interim checks to oversee USAC's day-to-day operations. Among other things, FCC regulations require USAC to submit quarterly reports to the FCC on the disbursement of money from the Universal Service Fund, 47 C.F.R. § 54.702(h), and provide the FCC with "full access to the data collected pursuant to the administration of the universal service support programs," *id.* § 54.702(j). Additionally, USAC must file an annual report with the FCC and Congress detailing its "operations, activities, and accomplishments" and its "administrative action intended to prevent waste, fraud, and abuse," *id.* § 54.702(g).

The FCC's reliance on USAC for technical assistance in administering the Fund is not impermissible private delegation because the FCC exercises ultimate "authority and surveillance" over it. *Sunshine Anthracite*, 310 U.S. at 399. "Since law-making is not entrusted to the [USAC], the statutory scheme is unquestionably valid." *Id.*

C. The Fifth Circuit's Combination Theory Of Delegation Is Wrong

The Fifth Circuit did not hold that Congress impermissibly "delegated legislative power to [the] FCC" or that FCC impermissibly "delegate[ed] government power to private entities." Pet. App. 19a, 43a. It expressly declined to "resolve either question." *Id.* at 64a.

Nevertheless, the Fifth Circuit concluded that "the combination" of the FCC's and USAC's constitutional authorizations "violates the Legislative Vesting Clause in Article I, § 1." *Id.* It reasoned that the Telecommunications Act's "double delegation" was unprecedented in history and incompatible with our constitutional structure. But it is the Fifth Circuit's novel "combination" theory of delegation that is unprecedented and inconsistent with decades of this Court's precedent and the principles underlying the nondelegation doctrine.

First, the Fifth Circuit's novel framework contradicts Supreme Court precedent. *See* Pet. App. 116a (Higginson, J., dissenting). In *Sunshine Anthracite*, the Court evaluated the constitutionality of the Bituminous Coal Conservation Act of 1935, which involved Congress's authorization of the National Bituminous Coal Commission to set minimum coal prices. 310 U.S. at 387-388. As specified by the Act, the Commission relied on "boards" of private coal producers to "propose minimum prices." *Id.* at 388. These proposals could be "approved, disapproved, or modified by the Commission" as a basis for setting the minimum price. *Id.* Challengers in that case argued that the statutory scheme violated both the public and private non-delegation doctrines. The Court rejected both challenges. First, it held that Congress had established an intelligible standard that was "wholly adequate for carrying out the general policy and purpose of the Act." *Id.* at 398. Next, it held that Congress had not impermissibly delegated its authority to private industry because the private boards "function subordinately to the Commission" and are under its "authority and surveillance." *Id.* at 399. In rejecting these challenges, the Court applied familiar standards for analyzing the Act's public and private delegation. The Court did not instruct that a different framework should apply

to analyze this so-called "double delegation"—which the Fifth Circuit claims to be a historical anomaly.

The Fifth Circuit attempted to distinguish *Sunshine Anthracite* on spurious grounds. It claimed that unlike the private boards, which had only the power to *recommend* minimum coal prices, USAC *de facto* decides the USF contribution amount independent of FCC approval. *See Consumer's Research*, 109 F.4th at 780. That ignores FCC regulations dictating that the "*the Commission*" determines the contribution factor, 47 C.F.R. § 54.709(a)(2) (emphasis added), and requiring the FCC to approve USAC's projections before using them to calculate contributions, *id.* § 54.709(a)(3). The statutory scheme in *Sunshine Anthracite* is thus identical to the one in this case, involving the same purported "double delegation" the Fifth Circuit erroneously held to be unconstitutional.

Second, the Fifth Circuit's new test is not needed to address the concern that "double delegation" undermines democratic accountability; that concern is already policed (as it was in *Sunshine Anthracite*) by evaluating whether Congress violated the public and private non-delegation doctrines—questions the Fifth Circuit refused to resolve. Here, under the private non-delegation doctrine, the FCC exercises ultimate control over USAC and has final say over the universal service fee. Pursuant to the public non-delegation doctrine, the FCC, in turn, is required to implement Congress's policy agenda through the clear and straightforward standards Congress supplies by statute. Thus, regardless of whether the public is interacting with USAC or the FCC, the buck ultimately stops with a politically accountable actor.

Relatedly, the Fifth Circuit was concerned with double-layered delegation because "governmental responsibilities are carried out by private entities with a legal obligation not to serve the public but rather to reap profits from it." Pet. App. 77a. With respect to USAC, this contention is flat out wrong. USAC is a non-profit corporation whose sole function is to help administer universal service programs. Thus, USAC cannot reap any financial benefit from its administrative responsibilities. Moreover, as discussed, USAC is at all times subordinate to the FCC, subject to its surveillance and final review. As such, the FCC—not USAC—is the body that carries out governmental responsibilities.

The Fifth Circuit's refusal to adhere to precedent and to apply existing private and public non-delegation doctrines led it astray. Congress is permitted to authorize the FCC to implement statutory directives within the bounds of discernable principles. The FCC is also permitted to use USAC, an entity under its ultimate control and surveillance, to help administer universal service programs. Combining these two constitutional authorizations does not render the universal service fee unconstitutional.

II. SCHOOLS AND LIBRARIES AROUND THE COUNTRY RELY ON THE CONSTITUTIONAL E-RATE PROGRAM

A. The FCC Has Implemented The E-Rate Program To Put Congress's Intelligible Principles Into Practice

The E-Rate Program's success in bringing affordable internet access to schools and libraries around the country shows that the principles articulated in Section 254 are not only intelligible but have been put into practice. Consistent with Section 254's instructions, the E-Rate Program provides advanced telecommunications

services (1) at a discount to schools and libraries (2) for educational purposes (3) in a way that has particularly benefited low-income, rural, and tribal communities. The fact that the FCC has administered the program to achieve precisely the objectives set forth by Congress shows that Section 254 is not "a hollow shell" that the FCC can arbitrarily fill, Pet. App. 40a, but instead articulates a coherent set of priorities for the agency to implement in the name of universal service.

1. E-Rate provides discounted internet services to schools and libraries

Section 254 instructs that "policies for the preservation and advancement of universal service" should ensure that "[e]lementary and secondary schools and classrooms … and libraries" "have access to advanced telecommunications services" "at rates less than the amounts charged for similar services to other parties." 47 U.S.C. § 254(b)(6), (h)(1)(B). The E-Rate Program does just that. The program provides a mechanism by which schools and libraries can acquire the equipment necessary for high-speed internet access at a reduced price.

For many public schools around the country, the discounted rates available through the E-Rate Program have become the primary means through which the schools can upgrade their IT infrastructure to provide advanced services. This year, the E-Rate Program provided approximately $3.26 billion in discounts, with schools paying only $970 million on services acquired through the program. *See* Funds for Learning, *E-rate Trends Report*, at 8-9 (2024). Approximately 106,000 schools and 12,597 libraries received over $7 billion in support from the E-Rate Program over the last two years, and over 50 million students benefited from

subsidized broadband services. *See* FCC, *The Universal Service Fund: How It Impacts the United States* (Aug. 8, 2024), https://docs.fcc.gov/public/attachments/DOC-404602A1.pdf. In a survey conducted by the Education & Libraries Networks Coalition ("EdLiNC") following the Fifth Circuit's decision, hundreds of schools from all parts of the country explained how E-Rate's discounts were essential to their provision of high-speed internet, and how high-speed internet is essential to their ability to provide a modern-day education.[2]

Lawrence Public Schools in eastern Kansas is one school district that has benefited from E-Rate's discounts.[3] The district previously paid roughly $200,000 per year for broadband access, which was unsustainable. Through E-Rate, the district was able to build a private fiber network at an 80% discount that was faster and more affordable. [4]

The E-Rate Program has proved particularly important to smaller and parochial schools, which often lack the scale needed to afford the technology that supports e-learning today. For example, in New Jersey, the Associate Superintendent for the Archdiocese of Newark has stated that "most of the inner-city schools in the Catholic Urban Schools Partnership basically did not have internet access until we were able to leverage E-

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[2] EdLiNC E-Rate Success Stories & Anecdotes, K12 *Insight* (Dec. 2024) ("2024 EdLiNC survey"). Available from the author upon request.

[3] *See* Westrope, *Kansas District's Private Fiber Network Serves Budget, Equity*, Government Technology (Apr. 8, 2024), https://www.govtech.com/education/k-12/nsba-2024-kansas-districts-private-fiber-network-serves-budget-equity.

[4] *Id.*

Rate funds to build out their infrastructure with new wiring and new routers."[5] With that internet access, students were able to benefit from in-class technology, including Chromebooks received from a foundation unusable before the E-Rate-funded improvements.[6]

2. E-Rate subsidizes educational services

Section 254 instructs that the FCC, in determining what services to provide "universally," "shall consider the extent to which such telecommunications services … are essential to education, public health, or public safety." 47 U.S.C. § 254(c)(1)(A). Consistent with this command, the E-Rate Program has increased access to high-speed, broadband internet, which has become essential to all aspects of a functioning school.

Most classes today have some classroom component that occurs online. Mathematics and reading units employ online tools for assessing student progress and needs. Many classes use online textbooks that are less expensive and more up to date. And some classes are entirely online. In Stanton County school district in rural Kansas, for example, math and science classes are taught online due to a shortage of teachers.[7] In order for any of these online tools or resources to be used in the classroom, students need to be able to access reliable, high-speed internet, which E-Rate facilitates.

Testing, as well, has largely moved online. But to administer such testing schools need to have a 1:1

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[5] Education & Libraries Networks Coalition ("EdLiNC"), Comment Letter on Proposed Rule for Universal Service Contribution Methodology, at 5 (2019) ("EdLiNC 2019 Comment Letter").

[6] *Id.*

[7] 2024 EdLiNC survey.

network that can support a device for every student. In many school systems, such as the Lafayette Parish School System in Louisiana, the development of such a network has become possible only because of the discounts available through the E-Rate Program. That school district used E-Rate to upgrade its network so that all students could use it at once, without which the school could not reliably administer online testing.[8]

The broadband networks that E-Rate subsidizes also form the backbone of school security systems. Badging access systems, security cameras, visitor management systems, weapons detection systems, and VoIP systems (which allow calls to be placed from anywhere where there is an internet connection) require internet access.

School administration also requires broadband internet. Many of the day-to-day back-office processes, like enrollment, attendance, paying bills and payroll, all depend on online platforms. And schools rely on digital tools to communicate with parents and students and to provide teacher performance reviews. Teacher training and professional development have increasingly moved online to save on travel costs and to avoid having to hire increasingly hard-to-find substitute teachers. Finally, in the event of emergencies and severe weather, schools depend on internet access to communicate with the community and use virtual learning to avoid loss of instructional time.

In the 2024 EdLiNC survey, hundreds of schools and school districts from every area of the country

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[8] Walker, *Louisiana District illustrates Power of E-Rate in Education*, EdScoop (Oct. 13, 2017), https://edscoop.com/louisiana-district-illustrates-power-of-e-rate-in-education/.

emphasized that without broadband internet, their schools would cease to function as they do today. Put simply, reliable and affordable broadband access is "essential to education," and for many schools, school districts, and libraries, it is accessible only because of the E-Rate Program.

3. E-Rate benefits rural, low-income, and tribal communities

Section 254 specifies that universal service programs should benefit "[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas," such that all consumers "have access to telecommunications and information services … that are reasonably comparable to those services provided in urban areas." 47 U.S.C. § 254(b)(3). Consistent with that direction, the FCC has administered the E-Rate Program to deliver much-needed, affordable high-speed internet services to low-income, rural, and tribal communities.

a. *Low-Income Communities*: The E-Rate Program tailors the discounts it provides based on schools' and libraries' level of need. E-Rate discounts range from 20 to 90% depending on the applicant's poverty level (based on the share of students eligible for free or reduced-price lunch). For these communities, the E-Rate Program plays an important role in providing discounts to cash-strapped schools to make investments in connectivity that would otherwise be out of reach.

For example, Mississippi's Columbus Municipal School District, a high poverty district, was able to build a district-wide wireless network that its Director of IT Systems said the district "could never have afforded otherwise." The Director of IT Systems further remarked that "[i]t would have been impossible to provide

sufficient network infrastructure to support 21st Century learning for [our] students without the funding that E-Rate has provided."[9]

b. *Rural Communities:* Rural schools and libraries face compounding challenges. Not only do these schools and libraries lack the same concentrated funding base as their urban counterparts, but advanced telecommunications services are more expensive, or unavailable, in rural areas. The average cost of wholesale internet access in major U.S. metropolitan markets is less than $0.09 per megabit. *See* Connect K-12, *Report on School Connectivity: Funding Year 2021*, at 9 (2022). But 746 school districts in rural areas nationwide pay more than $10.00 per megabit for internet access. *Id.* The Texas panhandle, Michigan's Upper Peninsula, and certain pockets of the Upper Great Plains and Mountain West are among the most costly areas for connectivity today. *See* Connect K-12, *2023 Report on School Connectivity*, at 10 (2023). Moreover, approximately 30% of Americans live in rural areas where high-speed, fixed internet services are unavailable. *See* Bryne & Visser, *Keeping Communities Connected: Library Broadband Services During the COVID-19 Pandemic*, at 3, American Library Ass'n (Mar. 2022).

For these high-cost and rural areas, the E-Rate Program provides crucial discounts. In Nebraska's Johnson-Brock Public Schools, the E-Rate Program enabled the district to upgrade the school's fiber-optic backbone to create a 1:1 system in its fourth- to twelfth-grade classrooms.[10] Similarly, the rural Triton School Corporation in Bourbon, Indiana, over half of whose students

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[9] EdLiNC 2019 Comment Letter, at 3.

[10] EdLiNC 2019 Comment Letter, at 4-5.

are eligible for a free or reduced-price lunch, has used E-Rate discounts to equip all classrooms with the technological infrastructure necessary to support overhead projectors, smart boards, and laptop computers.[11] The school now has a network capable of supporting a laptop for every student in its middle and high school grades. According to its Superintendent, these E-Rate funds are crucial because "[i]n some areas of our district, families cannot access the Internet because it's not available where their homes are located."

Libraries also use E-Rate discounts to provide crucial access to the internet for students and families in high-cost, rural areas. In Gregory, South Dakota, many students lack WiFi at home and thus rely on the library's broadband to complete homework assignments.[12] And in times of crisis or emergency, libraries' E-Rate-subsidized broadband networks are crucial resources for rural communities where internet access is not affordable or universally available.

c. *Tribal Communities*: Tribal schools, which often suffer from the same challenges facing low-income and rural schools, have benefited substantially from the E-Rate Program. In New Mexico, for example, pueblos used E-Rate discounts to build fiber optic networks that provide essential broadband to tribal schools and

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[11] EdLiNC, Comment Letter on Proposed Rule Modernizing the E-Rate Program for Schools and Libraries, at 8 (2013).

[12] *Libraries and E-Rate*, American Library Ass'n, at 1 (2018), https://www.ala.org/sites/default/files/advocacy/content/telecom/erate/Libraries%20and%20E-rate%20-%20January%202018%20Brief.pdf.

libraries. It was "a game changer" according to the Chief Technology Director of one of the benefitting schools.[13]

Tribal libraries also recently have benefitted from the E-Rate Program, following a 2018 amendment to Section 254(h)(4) making them eligible for Program discounts. Already, their inclusion in the program has helped close significant connectivity disparities. In 2021, 10% of tribal libraries reported being unable to provide access to the internet, while virtually all non-tribal, public libraries have offered internet access since the mid-2000s. *See* Association of Tribal Archives, Libraries, and Museums, *2022 Sustaining and Advancing Indigenous Cultures Report, Digital Inclusion in Tribal Libraries*, at 22. Now, to take one example, the Navajo Nation is using E-Rate discounts to expand access to broadband in its over one hundred "chapter houses" that function like libraries.[14] With $53 million in E-Rate subsidies, the Navajo Nation is installing over 600 miles of fiber optic lines, providing broadband to over 100 educational entities.[15]

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[13] DeDios, *Santa Fe Indian School is Connecting Tribal Communities to Broadband Access to Improve Native Education*, KUNM (Aug. 25, 2022), https://www.kunm.org/local-news/2022-08-19/santa-fe-indian-school-is-connecting-tribal-communities-to-broadband-access-to-improve-native-education.

[14] *See* Peters, *FCC Proposes Rule Change to Help Tribal Libraries With Broadband, Marketplace* (Oct. 21, 2021), https://www.marketplace.org/2021/10/25/fcc-proposes-rule-change-to-help-tribal-libraries-with-broadband/.

[15] *Navajo Nation Awarded $53 Million Through E-Rate Program to Increase Internet Capacity for Chapter Houses and Head Start Facilities*, Division of Community Development Newsletter, at 8 (Feb. 2021), https://www.nndcd.org/wp-content/uploads/2021/03/DCD-Newsletter-Feb-2021.pdf.

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For the countless schools and libraries around the country that benefit from the E-Rate Program, the concept of universal service is not amorphous; it is a concrete objective that these communities strive to achieve with help from programs like E-Rate. Because of the discounted rates the E-Rate Program provides, *see* 47 U.S.C. § 254(b)(6), (h)(1)(B), elementary and secondary schools and libraries, especially those in rural and low-income areas, *see id.* § 254(b)(3), have provided advanced telecommunications technologies that are essential for a modern education, *see id.* § 254(c)(1)(A), and done so without unduly straining their limited budgets, *see id.* § 254(b)(1).

B. Schools And Libraries Across The Country Rely On The FCC's Successful Implementation Of The E-Rate Program

"A reliance interest is created when an individual justifiably acts under the assumption that an existing legal condition will persist;" reliance interests are "implicated when the government provides some benefit and then acts to eliminate the benefit." *Nordlinger* v. *Hahn*, 505 U.S. 1, 38 (1992) (Stevens, J., dissenting) (citing *New Orleans* v. *Dukes*, 427 U.S. 297 (1976)). Here, schools and libraries have a bona fide reliance interest on the Universal Service Fund, and the E-Rate Program in particular.

For over a quarter century, the E-Rate Program has helped schools and libraries around the country provide high-speed internet. In the past two years alone, the E-Rate Program provided over one hundred thousand schools and libraries with over $7 billion in subsidies, benefiting millions of students and adults. *See* FCC, *The Universal Service Fund: How It Impacts the*

United States, *supra*. The 2024 EdLiNC survey illustrates the breadth and depth of this reliance: hundreds of schools and school districts from every part of the country rely in some way on E-Rate's subsidies, and those schools and districts expressed concern that without that support, the educational services they provide to students would deteriorate.

In finding the Universal Service Fund unconstitutional, the Fifth Circuit upset centuries-old Supreme Court precedent establishing that far less specific and tailored statutory schemes satisfy the non-delegation doctrine. Based on this status quo, no court—including the Sixth, Eleventh, and D.C. Circuits—has ever held that the Universal Service Fund is unconstitutional. *See Consumers' Research* v. *FCC*, 88 F.4th 917, 928 (11th Cir. 2023); *Consumers' Research*, 67 F.4th at 787; *Rural Cellular Ass'n* v. *FCC*, 685 F.3d 1083, 1091 (D.C. Cir. 2012). In fact, until the past couple years, the constitutionality of the universal service fee was not seriously challenged. Schools and libraries have thus relied on the E-Rate Program for decades—investing in infrastructure on the assumption that the program would not abruptly disappear.

When considering whether to upset this established legal landscape—and the telecommunications services it has enabled—the Court should consider the legitimate reliance interests that tens of thousands of schools and libraries have in the continuation of the E-Rate Program. *See Janus* v. *American Fed'n of State, Cnty., & Mun. Emps.*, 585 U.S. 878, 926 (2018) ("[R]eliance provides a strong reason for adhering to established law."). In particular, the Court should consider the budgetary effects that invalidating the program would have on the very communities Congress clearly intended to benefit in the Telecommunications Act.

In EdLiNC's 2024 survey, numerous respondents noted that the cloud-based computing systems that the E-Rate Program supports are crucial to every aspect of a modern-day school: teaching classes, administering testing, efficiently managing schools, and training teachers and staff. Without E-Rate discounts to support cloud-based computing, schools will be forced to make difficult cuts. As the Director of Technology for the Bullhead City School District in Arizona put it: "Without E-Rate funding," "[w]e would need to choose between hiring teachers or providing internet to our schools."[16] The Director of Technology for General George Patton School District 133 in Riverdale, Illinois poignantly warned in the same survey that if the E-Rate Program were to disappear, "[t]he district would cut costs across the board in order to keep up the network …, limiting the futures of our students in unpredictable ways."[17]

Before eliminating the benefit that millions of students, thousands of libraries, and countless communities receive from the programs funded by the universal service fee, the Court should consider the harm that such a decision would have across the country and the expectations it would upset. Communities have come to rely on the availability of discounts from the E-Rate Program to ensure that all have access to affordable and reliable internet. The Court should consider the harm that would follow from eliminating that funding before breaking with its own non-delegation precedent to hold the universal service fee unconstitutional.

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[16] 2024 EdLiNC survey, at 192.

[17] *Id.* at 196.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted.

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