NOS. 24-354, 24-422 (consolidated)

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, 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* LOCAL GOVERNMENT LEGAL CENTER, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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In the Supreme Court of the United States

SCHOOLS, HEALTH & LIBRARIES BROADBAND COALITION, ET AL.,

Petitioners,

v.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

Federal Communications Commission Orders and Decisions

Congressional Materials

Other Authorities

INTERESTS OF *AMICI CURIAE*[1]

The Local Government Legal Center ("LGLC") is a coalition of national local government organizations formed in 2023 to advocate for local government positions before the Supreme Court in appropriate cases and to educate local governments regarding the Supreme Court and the impact of its decisions on local governments and local officials. The National Association of Counties, the National League of Cities, and the International Municipal Lawyers Association are the founding members of the LGLC.

The National Association of Counties ("NACo") is the only national association that represents county governments in the United States. Founded in 1935, NACo serves as an advocate for the nation's 3,069 county governments and works to ensure that counties have the resources, skills, and support they need to serve and lead their communities.

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with forty-nine state municipal leagues, NLC is the voice of over 19,000 American cities, towns, and villages, collectively representing more than 218 million Americans. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

The International Municipal Lawyers Association ("IMLA") is a non-profit organization of more than 2,500 members dedicated to advancing the interests and education of local government lawyers. It is the only national organization devoted exclusively to local government and law. For nearly 90 years, it has been an educator and advocate for its members, which include cities, towns, villages, townships, counties, water and sewer authorities, transit authorities, attorneys focused on local government law, and others. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

Amici curiae are national organizations representing a majority of America's local governments, which in turn represent the majority of Americans. *Amici* respectfully submit this brief to underscore the importance of the Universal Service Fund ("USF") programs to local governments. Those programs have played a critical role in improving the quality of local education, healthcare and economic opportunities for local residents, and promoting the growth of local businesses and economies. *Amici* also wish to emphasize that the USF funding collection and disbursement mechanism established by the Federal Communications Commission ("FCC" or "Commission") and under challenge in this case is in full accord with Congress's intent in enacting 47 U.S.C. § 254.

SUMMARY OF ARGUMENT

The USF programs at issue in this case are vital to local governments. Those programs have improved the quality of local education, healthcare and economic opportunities for local residents and promoted the growth of local businesses and economies. If allowed to stand, the decision below threatens those vital benefits and thus the wellbeing of local communities' residents and businesses. The High Cost program benefits rural counties, cities and towns by helping them attract new businesses, enable remote work, support and revive existing rural industries, and provide faster and more efficient emergency services. The Lifeline program empowers both urban and rural local governments to create connected communities where all residents, regardless of economic circumstance, can participate in the cyber economy and access emergency and other public services. The E-Rate program provides expanded learning and research opportunities for local governments' residents, which spurs local economic development and also leads to a better informed and educated community. The Rural Health Care program brings desperately needed health care to rural communities. Expanding healthcare services is essential to the sustainability of those communities.

The potential loss of USF program benefits posed by the decision below would severely harm the economies of local communities and decrease the overall quality of life for local governments' residents. A less connected community is a less educated, less employed, and less healthy community. Without the USF programs, local governments would be saddled with the fiscal and social damage to their residents, businesses, and educational and social institutions

that would arise from the resulting loss of connectivity.

By adding Section 254 to the Communications Act in 1996, Congress gave the Commission both express directions and flexibility regarding how the universal service program should be reformed in a telecommunications market rapidly transitioning from monopoly to competition. Yet absent from the majority's decision below is any consideration of the shortfalls of the universal service support system which, prior to the enactment of the 1996 Act, consisted of a patchwork of largely implicit subsidies implemented at the state level. That patchwork was ill-suited to a competitive market, and Congress intended Section 254 to replace it. The decision below therefore not only represents a departure from this Court's precedent and sister circuit rulings regarding the wide latitude afforded to legislative agencies to delegate authority. It also would erase the Commission's explicit and competitively neutral USF support system that was specifically designed to comply with Congress's directive.

ARGUMENT

I. By Making Access to Essential Communications Services More Widely Available and Affordable, the Current USF Program Is Vital to the Public Health, Safety, and Educational and Economic Welfare of Local Communities across the Nation.

The primary purpose of a local government is to provide for the health, safety and welfare of its residents. *Bos. Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1877) ("[T]here seems to be no doubt that [local

governments' police powers] . . . extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals."). Since its inception, the USF program has provided billions of dollars in resources to local governments and their residents and businesses to help achieve this purpose.[2] That funding has brought essential telecommunications and broadband services to unserved areas, made those services more affordable to the economically disadvantaged, enabled students in schools and the public in libraries to access instantaneously and study information from around the world, facilitated the provision of healthcare to rural areas, and increased access to 9-1-1 and other emergency services. All of these developments have in turn strengthened the employment and customer base of local businesses and economies.

By disassembling the USF's administrative framework for collecting and disbursing USF fees, the decision below threatens the continued existence of the USF program, and thus would inflict substantial

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[2] In its first year, 1996-1997, the USF program dispersed approximately $1.4 billion. Federal-State Joint Board on Universal Service, *Universal Service Monitoring Reports*: 2005 (1996 to 2000 data), https://www.fcc.gov/general/federal-state-joint-board-monitoring-reports. By 2020-2021, that contribution amount had increased to nearly $8.3 billion, and has since increased to nearly $10 billion annually. Federal-State Joint Board on Universal Service. *Universal Service Monitoring Report* (2023). https://docs.fcc.gov/public/attachments/DOC-401168A1.pdf. ("*2023 Universal Service Monitoring Report*"); *see also* Federal Communications Commission, *Fact Sheet on the Impact of the Universal Service Fund*, (Aug. 8, 2024) https://www.fcc.gov/document/fact-sheet-impact-universal-service-fund.

harm on the thousands of communities and businesses, and the millions of Americans who rely on the program to connect and contribute to their local economies. While it is theoretically possible that some combination of Congress, the Commission, and the states could construct an alternative USF funding structure to replace the current Universal Service Administrative Company ("USAC")-based system, the vital services and facilities the USF program currently provides would at best fall by the wayside for an extended period, and more likely permanently.

The USF program consists of four sub-programs: the High-Cost program, the Lifeline program, the Schools and Libraries program, and the Rural Health Care program. Each serves a different and distinct purpose, and all are invaluable to local governments.[3] *Amici* wish to emphasize the vital role and the scope of the support these programs provide to local communities and to highlight the substantial and adverse impact the dismantling of the current USF structure would have—impacts that would be felt most acutely by communities that are most in need.

1. *High-Cost Program/Connect America Fund*. The High-Cost program enables the extension of telecommunications and broadband services to low density, rural, and high-cost areas across the nation.[4] It consists of tailor-made "sub-programs, created at

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[3] Federal Communications Commission, *Universal Service Program*, https://www.fcc.gov/general/universal-service (last visited Dec. 26, 2024).

[4] Federal Communications Commission, *Universal Service for High Cost Areas – Connect America Fund*, https://www.fcc.gov/general/universal-service-high-cost-areas-connect-america-fund (last visited Dec. 26, 2024).

varying times, to serve different geographic areas, to provide different types of service, or to accommodate specific types of Internet service providers." *Future of the Universal Serv. Fund Report*, 37 FCC Rcd. 10041, 10044, ¶ 7 (2022) ("*Future of USF Report*"). The program allows millions of rural Americans who reside in areas that would otherwise be too expensive for commercial providers to serve to connect with the rest of the nation and the world, thereby improving their lives and rural economies.

Local governments significantly benefit from the High-Cost program's expanded broadband infrastructure, particularly through increased economic development and enhanced support for public services. Improved connectivity allows rural localities to attract new businesses, enable remote work, and support and revive existing rural industries with new smart technology options. High-cost USF funding also expands the reach of communication networks needed for 9-1-1 and other public safety services, providing faster and more effective emergency responses in remote areas.

The High-Cost program plays a critical role in closing the digital divide in rural, insular, and high-cost areas across the country by ensuring universal access to essential and affordable voice and broadband services. In both 2022 and 2023, the program distributed over $4 billion to various communications providers, including telephone companies, cable and satellite providers, and electric cooperatives to support the deployment of advanced network infrastructure and the delivery of affordable, reliable voice and broadband connections.[5] In 2022 alone, the

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[5] *2023 Universal Service Monitoring Report*, at 42.

largest five components of the High-Cost program accounted for roughly $3 billion in annual funding.[6]

Although the High-Cost program continues to subsidize basic telecommunications services through legacy funds based on carrier costs, it has expanded the program to subsidize broadband access service deployment through the Connect America Fund ("CAF"), which uses modernized funding mechanisms such as incentive-based models and competitive bidding.[7] These mechanisms ensure that carriers deploy and maintain robust networks in eligible areas within defined timelines and meet specific milestones for broadband expansion.[8] As of September 30, 2023, carriers reported deployment to nearly 8.2 million locations, including 1.5 million with gigabit-speed connections.[9]

In 2024, the High-Cost program began disbursing funds under a new initiative, the Enhanced Alternative Connect America Cost Model ("Enhanced ACAM"), which is set to provide $18.3 billion over 15 years to subsidize networks capable of delivering speeds of at least 100 megabits per second downstream and 20 megabits per second upstream to more than 700,000 locations in 44 states.[10] This ongoing support is crucial to closing the gap between

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[6] *Future of the USF Report*, 37 FCC Rcd. at 10044 ¶7 n.21.

[7] Universal Service Administrative Company, *Annual Report* (2023), at 9, https://www.usac.org/wp-content/uploads/about/documents/annual-reports/2023/2023_USAC_Annual_Report.pdf ("*2023 USAC Annual Report*").

[8] *Id.*

[9] *Id.* at 9.

[10] *Id.*

broadband service speeds available in rural communities and those available in non-rural communities.

2. *Lifeline Program*. The Lifeline program has made telecommunications and broadband services affordable for millions of economically disadvantaged households across the nation. The Lifeline program offers a monthly subsidy of up to $9.25 toward telephone or internet services and up to $34.25 per month for those eligible customers living on Tribal lands.[11] These discounts help to bridge the digital divide, bringing economically disadvantaged households into today's cyber economy and linking them to vital public services.

The Lifeline program empowers local governments, in both rural and urban areas, to create connected communities, where all residents—regardless of their income level or economic circumstance—can participate in the cyber economy, access public services, and improve their quality of life. The Lifeline program aids local workforce development by providing connectivity for online learning and job searches, while improving community engagement through reliable communication channels for emergency alerts and public notifications.

In 2021 and 2022, the Lifeline program assisted over six million low-income households.[12] At the end of 2023, approximately 7.37 million telephone and

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[11] 47 C.F.R. § 54.403; *Future of USF Report*, 37 FCC Rcd. at 10068-69 ¶ 55 ("Presently, Lifeline offers a monthly discount of up to $5.25 for voice and up to $9.25 for broadband that meet the relevant minimum standards.").

[12] *2023 Universal Service Monitoring Report*, at 30.

internet subscribers were enrolled and receiving benefits under the program.[13] During the first three quarters of 2024, the Lifeline program's National Eligibility Verifier (a centralized system that determines whether consumers are eligible for Lifeline) received over 18 million applications for the program's benefits.[14]

The Lifeline program also supports our nation's most vulnerable communities in times of natural disasters. In 2023 and 2024, the Commission temporarily waived the Lifeline program's de-enrollment triggers for non-usage and failure to comply with annual recertification and reverification requirements for Lifeline program subscribers in: (1) Guam and the Northern Mariana Islands in light of Typhoon Mawar;[15] (2) Hawaii in light of the Hawaiian wildfires;[16] (3) southeastern United States (Florida, Georgia, North Carolina, South Carolina, Virginia, and Tennessee) in light of Hurricane Helene;[17] (4) Florida in light of Hurricane Milton;[18] and (5) Florida in light of Hurricane Idalia.[19]

In addition to those affected by natural disasters, the Lifeline program allows survivors of

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[13] *2023 USAC Annual Report*, at 11.

[14] Universal Service Administrative Company, *USAC Program Data - National Verifier Data* (2024), https://www.usac.org/lifeline/resources/program-data/.

[15] *Petition of TeleGuam Holdings, LLC for Waiver and Certain Other Relief*, 38 FCC Rcd. 6027 (2023).

[16] *2023 USAC Annual Report,* at 11.

[17] *Lifeline and Link Up Reform and Modernization*, Order, WC Docket No. 11-42, FCC 24-107 (Oct. 2, 2024).

[18] *Id.*

[19] *2023 USAC Annual Report*, at 11.

domestic violence to receive emergency communications support under the Lifeline program pursuant to the Safe Connections Act of 2022.[20] As of September 4, 2024, survivors can qualify for the "Lifeline Survivor Benefit" and receive a monthly discount of up to $9.25 off the cost of phone, internet, or bundled services for up to six months.[21]

The Commission's management of the Lifeline program and its willingness to waive certain Lifeline program requirements to provide critical communications assistance to those in emergency circumstances demonstrate the irreplaceable nature of the Lifeline program's role in connecting economically disadvantaged households to needed communications resources and services.

3. *E-Rate Program*. The Schools and Libraries ("E-Rate") program has brought broadband to over 130,000 schools and public libraries across the nation.[22] The E-Rate program provides an invaluable service to our nation's schools and libraries, and the millions of students and other members of the public they serve.

The E-Rate program offers discounts ranging from 20 to 90 percent of the cost of certain telecommunications and broadband services.[23]

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[20] *Supporting Survivors of Domestic and Sexual Violence*, 38 FCC Rcd. 11280 (2023).

[21] Universal Service Administrative Company, Lifeline Announcements, *Request for Contact Information: Lifeline Survivor Benefit Outreach* (Dec. 9, 2024), https://www.usac.org/lifeline/resources/announcements/.

[22] *2023 USAC Annual Report*, at 5.

[23] *E-Rate – Schools & Libraries USF Program*, Federal Communications Commission, https://www.fcc.gov/general/e-rate-schools-libraries-usf-

Lowering the cost of broadband in schools allows school systems to offer greater educational opportunities to their students and to better equip them to succeed in a digital world. Decreasing the cost of broadband to public libraries enables local governments to provide expanded learning and research opportunities for their residents, as well as ubiquitous online access to employment and housing applications. More generally, improving students' and the public's access to broadband services will spur economic growth, providing a more vibrant economy where no American is left behind.[24]

Prior to the E-Rate program's inception, only 8 percent of classrooms in public schools had access to the internet.[25] Within the first eight years of the E-Rate program's existence, that percentage increased to 93 percent.[26] Between 2022-2024, the E-Rate program dispersed over $7 billion to approximately 106,000 schools and 12,597 libraries for broadband connectivity and internet access, benefitting over 54 million students.[27] In 2023, over

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program#:~:text=The%20schools%20and%20libraries%20universal,an%20urban%20or%20rural%20area.

[24] *Broadband for all: charting a path to economic growth*, Deloitte (2021), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/process-and-operations/us-charting-a-path-to-economic-growth.pdf.

[25] John Wells, Laurie Lewis, Bernard Greene, *Internet Access in U.S. Public Schools and Classrooms: 1994-2005*, Highlights. NCES 2007-020 National Center for Education Statistics (2006), https://nces.ed.gov/pubs2007/2007020.pdf.

[26] *Id.* at 4.

[27] *The Universal Service Fund: How It Impacts the United States*, Federal Communications Commission Office of the Chairwoman

35,000 applications were received, requesting over $3 billion in funding.[28] In 2024, the amount of requested E-Rate program funding increased to approximately $3.2 billion.[29] These statistics highlight the ongoing need for the program and underscore our nation's schools' and libraries' reliance on it.

Local governments are deeply committed to bridging the digital divide.[30] Studies show that without reliable access to the internet, students fall behind.[31] Without internet access, students cannot

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(Aug. 8, 2024), https://docs.fcc.gov/public/attachments/DOC-404602A1.pdf.

[28] *2023 USAC Annual Report*, at 7.

[29] Anna Merod, *What is E-Rate and how does it affect schools?*, K-12 Dive (Dec. 6, 2024), https://www.k12dive.com/news/what-is-e-rate-schools-fcc/733679/.

[30] The digital divide refers to the gap between those who have reliable and readily available access to, and sufficient knowledge of technology and the internet. In education, the digital divide is known as the "homework gap" because of the challenges that students without said access and knowledge face while trying to do their schoolwork. Raeal Moore, Dan Vitale, & Nycole Stawinoga, *The Digital Divide and Educational Equity*, Insights in Education and Work (Aug. 2018), https://www.act.org/content/dam/act/unsecured/documents/R1698-digital-divide-2018-08.pdf.

[31] Students without reliable access to home internet were six to eight percent less likely to graduate from high school. Robert W. Fairlie, Daniel O. Beltran, Kuntal K. Das, *Home Computers and Educational Outcomes: Evidence From the NLSY97 and CPS**, Economic Inquiry 48, no. 3 (2010) 771-792, https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1465-7295.2009.00218.x. Furthermore, the Federal Reserve has found that students with reliable internet access out-earned those without by over $2 million over the course of their lives. Daniel O. Beltran, Kuntal K. Das, Robert W. Fairlie, *Home Computers and Educational Outcomes: Evidence from the NLSY97 and CPS,*

participate in digital learning, which has become an integral function of education since the COVID-19 pandemic. Internet access is essential in college preparation: registering for and taking standardized tests such as the PSAT, SAT, and ACT, as well as Advanced Placement tests, are primarily accomplished through digital platforms. Those students with adequate internet access achieve higher standardized test scores.[32]

Thanks in large part to the E-Rate program, 46.3 million students were reported connected to the internet by 2019, with over 99 percent of schools in the country developing a "clear path to delivering enough bandwidth for digital learning in every classroom."[33]

Board of Governors of the Federal Reserve System International Finance Discussion Papers Number 958 (2008), https://www.federalreserve.gov/pubs/ifdp/2008/958/ifdp958.pdf.

[32] A Michigan State University study, and follow-up study performed by the Benton Institute for Broadband and Society, found that students with "even modestly below average digital skills" rank nearly 7 percentiles lower than students with more developed digital skills. Furthermore, it was found that students with reliably fast internet access have an average grade point average of 3.18, as compared to an average of 2.81 for students with no internet access. Melissa Priebe, *Gaps in Broadband Access: Lagging Internet Contributes to Lagging Test Scores, Leaving Rural Students Behind*, Michigan State University, (2020), https://comartsci.msu.edu/about/newsroom/news/gaps-broadband-access-lagging-internet-contributes-lagging-test-scores-leaving; *Lack of Broadband Leaves Students Behind*, Kevin Taglang, Benton Institute for Broadband and Society (2020), https://www.benton.org/blog/lack-broadband-leaves-students-behind.

[33] *2019 State of the States*, Education Superhighway (2019), https://www.educationsuperhighway.org/wp-content/uploads/2019-State-of-the-States-Full-Report-EducationSuperHighway.pdf; *Part I: How Children Learn*,

Today, the number of students who have been positively affected by the E-Rate program has risen to over 54 million.[34] The economic and public health benefits of a better educated and more knowledgeable public, as clearly demonstrated by the data behind the E-Rate program, are irreplaceable.

4. *Rural Health Care Program*. The Rural Health Care ("RHC") program brings desperately needed healthcare to rural communities. For local governments in rural areas, ensuring access to affordable, quality healthcare is a growing challenge. With roughly 60 million Americans living in rural regions, many communities face the strain of geographic isolation, low population density, and limited resources, making it difficult to maintain sustainable healthcare services.[35] The closure of local healthcare facilities, along with challenges in recruiting and retaining medical professionals, have compounded the problem. Rural residents are often forced to travel long distances for medical care, creating significant time and financial burdens. This lack of access can lead to untreated health conditions, placing additional strain on local government resources and increasing the risk of public health crises. Expanding healthcare services and addressing these barriers is critical for the health and sustainability of rural communities.

America Forward, https://www.americaforward.org/part-1-how-children-learn/.

[34] *The Universal Service Fund: How It Impacts the United States*, Federal Communications Commission Office of the Chairwoman (Aug. 8, 2024), https://docs.fcc.gov/public/attachments/DOC-404602A1.pdf.

[35] *Promoting Telehealth in Rural Am.*, 34 FCC Rcd. 7335, ¶ 2 (2019).

Currently, the RHC program is divided into two main components: the Healthcare Connect Fund ("HCF"), which provides a flat 65 percent discount on an array of communications services to both individual rural healthcare providers and consortia, and the Telecom program, which provides funding to rural healthcare providers to subsidize the difference between urban and rural rates for telecommunications services.[36] Since 2012, the RHC program has committed over $4.6 billion to rural healthcare providers nationwide.[37]

The Commission, through the RHC program, also provided emergency rural healthcare support during the COVID-19 pandemic by waiving its gift rules between telecommunications service providers and rural healthcare providers.[38] Specifically, during the coronavirus outbreak, the FCC allowed service providers to offer, and eligible RHC program providers to solicit and accept, improved broadband capacity, Wi-Fi hotspots, networking gear, and other things of value to increase the availability and efficiency of rural telehealth services.[39] This kind of support from the RHC program is vital because "rural health care providers must often rely on telemedicine to provide their patients with a comparable level of

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[36] *2023 Universal Service Monitoring Report*, at 53.

[37] Universal Service Administrative Company, *RHC Commitments and Disbursements Tool*, https://opendata.usac.org/Rural-Health-Care/RHC-Commitments-and-Disbursements-Tool/sm8n-gg82 (last visited Dec. 23, 2024).

[38] *Rural Health Care Universal Serv. Support Mechanism*, 35 FCC Rcd. 2741, ¶ 7 (2020).

[39] *Id.*

healthcare coverage to that offered by their urban counterparts."[40]

According to the *2023 USAC Annual Report*, the RHC program received a record number of applications by the close of the Funding Year (FY) 2023 filing window. The RHC program received more than 13,000 HCF program applications and more than 2,000 Telecom program applications, representing a gross demand amount of nearly $740 million.[41] In 2023 alone, approximately 11,000 rural health care providers received funding commitments.[42] Among those providers are hundreds of local health departments or agencies that rely on these funds to provide essential healthcare services to their residents.[43] The program's total disbursements for 2023 were $468 million.[44] For FY 2024, the RHC program's funding cap was set at nearly $707 million, with a commitment amount of approximately $493 million.[45]

The potential loss of USF program benefits posed by the decision below would severely harm the economies of local communities and decrease the overall quality of life for their residents. It is difficult

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[40] *Id.* at ¶ 5.

[41] *2023 USAC Annual Report*, at 13-14.

[42] *2023 USAC Annual Report*, at 3.

[43] Universal Service Administrative Company, *RHC Commitments and Disbursements Tool*, https://opendata.usac.org/Rural-Health-Care/RHC-Commitments-and-Disbursements-Tool/sm8n-gg82 (last visited Dec. 23, 2024).

[44] *2023 USAC Annual Report*, at 5.

[45] *Wireline Competition Bureau Announces E-Rate and RHC Programs' Inflation-Based Caps For Funding Year 2024*, Public Notice, 39 FCC Rcd. 2206 (2024).

to overstate the importance of the USF programs to the economic, educational and medical health of local communities, particularly those that are most in need.[46] A less connected community is a less educated, less employed, and less healthy community. Without the USF program, local governments would be saddled with the fiscal and social damage to their residents, businesses, and educational and social institutions that would arise from the resulting loss of connectivity.

II. The Current USAC-Based USF Funding and Disbursement Structure Is Uniquely Tailored to Satisfy the 1996 Act's Dual Goals of Enhancing Universal Service While Promoting a Competitive Telecommunications Market.

The Commission's delegation of authority over the administration of the USF collection and disbursement to USAC is supported by Section 254's legislative history and the long history of the FCC's rulemakings and orders implementing Section 254 by creating and appointing USAC to administer the USF programs.

1. Universal service has been a fundamental tenet of federal telecommunications policy since the passage of the Communications Act of 1934. *See*

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[46] *See* 141 CONG. REC. S15144-05, (daily ed. October 13, 1995) (statement of Sen. Dorgan) ("[I]s the telephone in Grenora, ND, or Regent, ND, any less important than the telephone in New York City? No. One is used to call the other. The absence of one makes the other less valuable. Universal service in telephone service is important. It has been a concept in this country we have understood and protected for a long, long time.").

Consumers' Rsch. v. FCC, 67 F.4th 773, 795 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2628 (2024); *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 614 (5th Cir. 2000). Indeed, the Commission's prime directive is "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151 (as amended); *see also id.* § 307(b) ("[T]he Commission shall make such distribution of licenses . . . among the several States and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same."). Even the court below recognized that Congress has long "pursued a policy of providing 'universal' [telecommunications] service to all residents and businesses in the United States." *Consumers' Rsch. v. FCC*, 109 F.4th 743, 748 (5th Cir. 2024)[47] (quoting Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239, 279 (2005)). Further, this Court has held that delegations are constitutional so long as Congress "'lay[s] down by legislative act an intelligible principle to which the person or body authorized [to exercise the delegated authority] is

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[47] Referred to herein as "*Fifth Circuit Consumers' Rsch.*," given the prior rulings of the Sixth and Eleventh Circuits denying identical challenges by Respondents. *See Consumers' Rsch., Cause Based Commerce, Inc. v. FCC*, 88 F.4th 917 (11th Cir. 2023), *cert. denied sub nom. Consumers' Rsch. v. Fed. Commc'ns Comm'n*, 144 S. Ct. 2629 (2024) ("*Eleventh Circuit Consumers' Rsch.*"); *Consumers' Rsch. v. FCC*, 67 F.4th 773 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2628 (2024) ("*Sixth Circuit Consumers' Rsch.*").

directed to conform.'" *Gundy v. United States*, 588 U.S. 128, 135 (2019) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).[48]

By adding Section 254 to the Communications Act in the Telecommunications Act of 1996, Congress gave the Commission both express directions and flexibility regarding how the universal service program should be reformed in a telecommunications market transitioning from monopoly to competition. It assigned the Commission the task of conducting, in collaboration with a new Federal State Joint Board on Universal Service ("Joint Board"), a thorough review and restructuring of the existing federal universal service guarantees. 47 U.S.C. § 254(a).[49] Section 254 sets forth detailed guidelines that the Commission was required to consider in reforming and preserving universal service. Specifically, the statute requires that universal service support be "explicit and sufficient," 47 U.S.C. § 254(e), and it articulates several guiding principles to govern the Commission's implementation of universal service—including that "access . . . be provided in all regions of the Nation . . . including low-income consumers and those in rural, insular, and high cost areas," that services and rates be "reasonably comparable" to those offered

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[48] As Petitioner SHLB highlights, "'[o]nly twice in this country's history' has the Court 'found a delegation excessive' [and t]he Court has 'over and over upheld even very broad delegations.'" SHLB Pet. at 18 (quoting *Gundy*, 588 U.S. at 130).

[49] This was a result of the House Committee's expressed intention that a new Joint Board "should evaluate universal service in the context of a local market changing from one characterized by monopoly to one of competition." Communications Act of 1995, Report on H.R. 1555, H.R. REP. 104-204, at 68, 80 (1995).

"in urban areas," that "[a]ll providers of telecommunications services . . . make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service," and that universal service support be "specific" and "predictable." *Id.* § 254(b)(2)-(5). That Congress directed the Commission to balance these guiding principles reflects its clear intent to delegate difficult policy choices to the Commission's expert discretion. *See Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 411-12 (5th Cir. 1999).[50]

The 1996 Act's legislative history also supports the conclusion that Congress granted the Commission flexibility in deciding how to accomplish these goals, including via delegation of purely administrative tasks to a private entity. In crafting Section 254's USF provisions, Congress surmised that the Joint Board's decision might ultimately be to delegate the administration of collection and disbursement of universal service funds to a private entity, with the Congressional Budget Office envisioning that "[e]ven if the funds are collected and disbursed *by a nonfederal entity*, the amounts collected and paid out would be determined by a federal agency under procedures specified in federal law." Communications Act of 1995, Report on H.R. 1555, H.R. REP. 104-204 at 69 (1995) (emphasis added). "A nonfederal entity handling these transactions would thus be acting as

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[50] The dissenting opinion below of Judge Stewart, joined by Chief Judge Richman, and Judges Southwick, Haynes, Graves, Higginson, and Douglas, highlights that all other Circuits addressing challenges to Section 254 "have held it constitutional under the intelligible principle test," and found no merit in the majority's "assertions that § 254(b) and its limits are insufficient or vague." *Fifth Circuit Consumers' Rsch.*, 109 F.4th at 788, 791.

agent of the federal government." *Id.* Allowing this flexibility is in keeping with Congress's recognition in Section 254 that universal service "is an evolving concept." *Telecommunications Competition and Deregulation Act of 1995*, 141 CONG. REC. S7972-03, S7977 (1995) (statement of Sen. Snowe).

2. Promptly following the passage of the 1996 Act, the Commission acted to implement Congress's directions in Section 254. In March 1996, it initiated proceedings establishing the Joint Board to make recommendations to the Commission on the design of universal service support mechanisms in line with the new statutory framework. *Federal-State Joint Bd. on Universal Serv.*, 11 FCC Rcd. 18092, 18094 (1996). The Commission also adopted companion orders, taking steps to implement Section 254's universal service provisions by defining the services to be supported by the USF program and by addressing the needed reforms of the subsidy mechanisms used in its pre-existing access-charge regime.[51]

The Joint Board's initial recommendations called for the establishment of a neutral, third-party administrator to manage the USF. The Commission adopted those recommendations in its 1997 *Universal Serv. Order*, designating the National Exchange Carrier Association ("NECA") as the temporary administrator of the universal service support mechanisms and, consistent with the Joint Board's guidance, created a Federal Advisory Committee to propose a neutral third-party permanent administrator. 12 FCC Rcd. at 8798 ¶42, 9171 ¶774,

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[51] *Federal-State Joint Bd. on Universal Serv.* 12 FCC Rcd. 8776 (1997) ("*Universal Serv. Order*"); *Access Charge Reform*, 12 FCC Rcd. 15982 (1997).

9216-17 ¶866.[52] The FCC subsequently instructed NECA to establish USAC as an independent, not-for-profit subsidiary. *See Changes to the Bd. of Directors of the National Exchange Carrier Association, Inc.*, 12 FCC Rcd. 18400, 18401 ¶ 1, 18415 ¶ 25, 18420-28 ¶¶ 33-51, 18438 ¶ 71 (1997). In line with Congress's intent, the Commission made USAC the permanent administrator of the USF, effective January 1, 1999, dispelling the need for further searches for a permanent administrator and solidifying the structure for ongoing management of the USF. *Changes to the Bd. of Directors of the Nat'l Exch. Carrier Ass'n, Inc.*, 13 FCC Rcd. 25058, 25062 (1998).

The 1996 Act specifically directed the FCC to restructure universal service support such that "any support mechanism continued or created under the new [47 U.S.C. § 254 will] . . . be explicit, rather than implicit." H.R. REP. No. 458 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 10, 142. Yet absent from the Fifth Circuit's decision below is any consideration of the shortcoming of the universal service support system prior to the enactment of the 1996 Act, which consisted of a patchwork of largely implicit subsidies implemented at the state level – a patchwork ill-suited to a competitive market and which, for that reason, Section 254 was intended to replace. *See Universal Serv. Order*, 12 FCC Rec. at 8784 ¶ 10.[53] The decision below therefore not only

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[52] This was consistent with Congress's intent. *See* S. REP. 104-23 at 25 (1995) ("The Committee intends that the FCC shall give substantial weight to the Joint Board recommendations.").

[53] *See also* 141 CONG. REC. S8957-01, (daily ed. June 22, 1995) (statement of Sen. Abraham in support of changes to the 1996 Act that "would jettison our current crazy-quilt of universal-service subsidies").

represents a departure from this Court's precedent and sister circuit rulings regarding the wide latitude afforded to legislative agencies to delegate authority; it also would erase an explicit and competitively neutral USF support system that was specifically designed to comply with Congress's directive.[54]

The USF framework established by Congress in Section 254 and implemented by the Commission was explicitly intended to establish, and no one disputes that it did establish, an effective USF program that is compatible with a competitive telecommunications market. The decision below risks destabilizing a system that has functioned in accordance with Congress's objectives, threatening the provision of telecommunications and broadband services to underserved communities, schools, libraries, and healthcare facilities across the nation.

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[54] *Eleventh Cir. Consumers' Rsch.*, 88 F.4th at 924 (upholding USAC's authority under an identical challenge "[b]ecause Congress is afforded wide latitude to delegate authority to executive agencies, these limits suffice" (citing *Gundy*, 588 U.S., at 145; *United States v. Brown*, 364 F.3d 1266, 1271 (11th Cir. 2004)); *Sixth Cir. Consumers' Rsch.*, 67 F.4th at 795 ("Congress's history of pursuing universal service clearly articulate an intelligible principle and sufficiently limit the FCC's discretion").

CONCLUSION

The Court should reverse the Fifth Circuit's decision and remand with instructions to deny the petition for review.

Respectfully submitted,

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January 15, 2025