Nos. 24-354 and 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 Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS COMPETITIVE CARRIERS ASSOCIATION, NTCA, AND USTELECOM – THE BROADBAND ASSOCIATION

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QUESTIONS PRESENTED

In the Telecommunications Act of 1996, Congress required the Federal Communications Commission ("FCC" or "Commission") to update existing mechanisms that promoted "universal service," supported by statutorily required contributions from carriers offering interstate telecommunications service. Congress defined universal service and adopted specific, detailed principles to guide and cabin the FCC's implementation.

Following Congress's directive in Section 254, the FCC has implemented the Universal Service Fund ("USF" or "the Fund") for decades, with support from the Universal Service Administrative Company ("USAC"). The FCC's rules limit USAC's role to administrative matters, prohibit USAC from making policy decisions, and provide for de novo FCC review of any USAC decision upon request by an aggrieved party.

The questions presented are:

1. Whether Congress violated the nondelegation doctrine by authorizing the Commission to determine, within the limits set forth in Section 254, the amount that providers must contribute to the Fund.

2. Whether the Commission violated the nondelegation doctrine by using USAC's financial projections in computing universal service contribution rates.

3. Whether the combination of Congress's conferral of authority on the Commission and the Commission's delegation of administrative responsibilities to USAC violates the nondelegation doctrine.

4. Whether this case is moot in light of the challengers' failure to seek preliminary relief before the Fifth Circuit.

PARTIES TO THE PROCEEDING

The instant Petitioners (intervenors below) are the Competitive Carriers Association ("CCA"), National Telecommunications Cooperative Association dba NTCA ("NTCA"), and USTelecom – The Broadband Association ("USTelecom") (together, "Telecom Petitioners").

Petitioners also include the Schools, Health & Libraries Broadband Coalition, Benton Institute for Broadband & Society, National Digital Inclusion Alliance, and Center for Media Justice dba MediaJustice (intervenors below) and the Commission and the United States (respondents below).

Respondents (petitioners below) are Consumers' Research; Cause Based Commerce, Inc.; Kersten Conway; Suzanne Bettac; Robert Kull; Kwang Ja Kerby; Tom Kirby; Joseph Bayly; Jeremy Roth; Deanna Roth; Lynn Gibbs; Paul Gibbs; and Rhonda Thomas.

CORPORATE DISCLOSURE STATEMENT

CCA has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

NTCA has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

USTelecom has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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The opinion of the en banc Fifth Circuit is available at 109 F.4th 743 and reproduced in Petition for a Writ of Certiorari, Pet. App. 1a., Case No. 24-422 (hereinafter "Pet. App."). The opinion of the Fifth Circuit panel is available at 63 F.4th 441 and reproduced at Pet. App. 125a.

JURISDICTIONAL STATEMENT

The en banc Fifth Circuit entered its judgment on July 24, 2024. Telecom Petitioners, along with the Schools, Health & Libraries Broadband Coalition, Benton Institute for Broadband & Society, National Digital Inclusion Alliance, and Center for Media Justice dba MediaJustice, timely filed a petition for writ of certiorari on October 11, 2024. The United States of America and the Commission timely filed a petition for writ of certiorari on September 30, 2024. This Court granted both petitions on November 22, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article I, Section 1 of the U.S. Constitution provides that: "All legislative Powers herein granted shall be vested in a Congress of the United States,

which shall consist of a Senate and House of Representatives."

Pertinent statutory provisions are reproduced at Pet. App. 162a. Pertinent regulatory provisions are reproduced at Petitioners SHLB Coalition et al. App. 47a.

STATEMENT OF THE CASE

A. STATUTORY SCHEME

Since the FCC's creation, Congress has charged it with promoting the availability of affordable, reliable communications service nationwide. *See* 47 U.S.C. § 151. Before the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "1996 Act"), the FCC "achieved universal service by authorizing rates to monopoly providers sufficient to enable revenue from easy-to-reach customers, such as city dwellers, to implicitly subsidize service to those in areas that were hard to reach." *AT&T, Inc. v. FCC*, 886 F.3d 1236, 1242 (D.C. Cir. 2018) (citation omitted). However, with the breakup of AT&T in 1984, *see United States v. AT&T*, 552 F. Supp. 131, 170 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), such implicit subsidies became harder to maintain. To begin to replace implicit subsidies, the FCC created the Fund to ensure universal service in rural, high-cost areas. *See Rural Tel. Coal. v. FCC*, 838 F.2d 1307, 1311–12 (D.C. Cir. 1988). As the D.C. Circuit explained, the USF "was proposed in order to further the objective of making communication service available to all Americans at reasonable charges." *Id.* at 1315.

The 1996 Act changed many aspects of telecommunications law to promote competition in the industry. Congress recognized that promoting competition could undermine the FCC's previous efforts to promote universal service. Because the policies of competition and implicit subsidies operated in tension with each other, Congress "required that the implicit subsidy system of rate manipulation be

replaced with explicit subsidies for universal service." *Tex. Off. of Pub. Util. Couns. v. FCC*, 265 F.3d 313, 318 (5th Cir. 2001). The provisions Congress adopted to create those explicit subsidies are codified at 47 U.S.C. § 254.

Section 254 defines universal service as "an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services." 47 U.S.C. § 254(c)(1). In doing so, the FCC must also "consider the extent to which such telecommunications services . . . are essential to education, public health, or public safety," alongside other factual considerations. *Id.*

Section 254 identifies several limiting "principles" upon which the FCC "shall base [its] policies for the preservation and advancement of universal service," including that quality services "should be available at just, reasonable, and affordable rates" and that "advanced telecommunications and information services" should be accessible "in all regions of the Nation." *Id.* § 254(b). Section 254 requires that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis," to mechanisms supporting universal service. *Id.* § 254(d). In addition, it includes additional specific rules governing universal service support to rural

healthcare providers, schools, and libraries. *See id.* § 254(h).

B. FCC REGULATORY IMPLEMENTATION

Beginning in 1997, the FCC adopted regulations to implement Congress's directions and create the programs necessary to promote universal service via explicit support. *See In the Matter of Fed.-State Joint Bd. on Universal Serv.*, Report and Order, 12 FCC Rcd. 8776, 8780 (1997). The USF is made up of four programs: (1) the "High Cost" program or "Connect America Fund," which supports service to rural and other high-cost areas; (2) the "Rural Health Care" program, which supports telecommunications and broadband for healthcare providers outside urban areas; (3) the "E-Rate" program, which supports affordable telecommunications and broadband for schools and libraries; and (4) the "Lifeline" program, which supports service for low-income consumers. *See generally Universal Service*, FCC, https://www.fcc.gov/general/universal-service (last visited Jan. 9, 2025).

As the FCC implemented these programs, appellate courts carefully reviewed whether its regulations adhered to Section 254 and when appropriate struck down orders that failed to do so. *See*, *e.g.*, *Texas Off. of Pub. Util. Couns. v. FCC*, 183 F.3d 393, 409 (5th Cir. 1999) (affirming, remanding, and reversing separate provisions of the FCC's first order implementing Section 254); *Qwest Corp. v. FCC*, 258 F.3d 1191, 1195 (10th Cir. 2001) ("*Qwest I*"); *Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1226 (10th Cir. 2005) ("*Qwest II*"); *see also Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 436 (5th Cir.

2021) (finding a lack of support for the argument that the FCC "may deploy the universal-service mechanism to accomplish any non-prohibited purpose in the Act").

The FCC created a mechanism to implement Congress's direction that telecommunications carriers providing interstate telecommunications services "contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." 47 U.S.C. § 254(d); *see*, *e.g.*, 47 C.F.R. §§ 54.706, 54.709. Specifically, each quarter the FCC adopts a "contribution factor" that specifies the percentage of telecommunications providers' "end-user interstate and international telecommunications revenues" that must be paid into the Fund. *Id.* § 54.709(a)(2). That factor "shall be determined by the Commission based on the ratio of total projected quarterly expenses of the universal service support mechanisms to the total projected collected end-user interstate and international telecommunications revenues, net of projected contributions." *Id.* To aid the Commission in projecting such revenues, contributors must submit a quarterly "Telecommunications Reporting Worksheet" estimating their own projected revenues, known as FCC Form 499-Q. 47 C.F.R. § 54.711; *see also Wireline Competition Bureau Releases the 2025 Telecommunications Reporting Worksheets and Accompanying Instructions*, Public Notice, DA 24-1095 (WCB Oct. 22, 2204), attach. C, https://docs.fcc.gov/public/attachments/DA-24-1095A4.pdf ("Form 499 Public Notice"). Contributors also must submit a detailed annual

Telecommunications Reporting Worksheet, known as FCC Form 499-A, in which they report their actual revenue billed during the prior calendar year in conformity with 55 pages of detailed FCC-issued filing instructions.[1] Further, contributors must retain for at least five years from the date of contribution "all records that may be required to demonstrate to auditors that the contributions made were in compliance with the Commission's universal service rules." 47 C.F.R. § 54.706(e).

Finally, the FCC created USAC to help administer these universal service support mechanisms. *See generally* 47 C.F.R. §§ 54.701–.717. By rule, the FCC designates USAC to perform only administrative and ministerial functions and specifically forbids USAC from "mak[ing] policy" or "interpret[ing] unclear provisions" of the Communications Act of 1934, as amended, or FCC rules. *Id.* § 54.702(c).[2] All USAC actions in connection with universal service administration are subject to FCC de novo review. *See id.* §§ 54.719, 54.722–.723.

Based on the FCC's rules and policies, USAC performs the mechanical exercise of calculating and submitting to the FCC "projections of demand" for

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[1] Form 499 Public Notice at attach. A, https://docs.fcc.gov/public/attachments/DA-24-1095A2.pdf; *see also id.* at attach. B, https://docs.fcc.gov/public/attachments/DA-24-1095A3.pdf.

[2] In the event "contributions received by [USAC] in a quarter are inadequate to meet the amount of universal service support program payments and administrative costs for that quarter," USAC must "request authority from the Commission to borrow funds commercially." 47 C.F.R. § 54.709(c).

each universal service program, as well as "the basis for those projections" so the FCC can verify their accuracy, "at least sixty (60) calendar days prior to the start of that quarter." *Id.* § 54.709(a)(3).[3] "Projections of demand" is a term of art, meaning the amount of support that is authorized to be disbursed pursuant to the Commission's rules for each of the Commission's universal service programs. For example, for the Commission's High Cost mechanisms, USAC calculates projections of demand based on the amount of support that the Commission has specifically authorized each provider to receive for deploying and providing telecommunications and broadband service in a particular high-cost geographic area (e.g., through a winning bid in an FCC-conducted competitive bidding process), less any reductions required by Commission rules (e.g., in the event a provider is behind on reaching deployment milestones). *See, e.g.*, 47 C.F.R. §§ 54.801–.802, 54.805–.806 (high-cost support in the Rural Digital Opportunity Fund). Similarly, USAC calculates the projection of demand for the Lifeline program based on the number of eligible, verified low-income subscribers that are enrolled in USAC's Lifeline subscriber database, multiplied by the Commission-authorized Lifeline support amount per household. *See* 47 C.F.R. §§ 54.403–.404, 54.407, 54.409–.410. USAC also mechanically calculates and submits to the FCC the "total contribution base" based on Form 499 data at least thirty days before the start of each quarter. *Id.* § 54.709(a)(3). These calculations

[3] For each quarter, USAC also must submit a projection of its administrative expenses and the basis for those projections. *Id.* § 54.709(a)(3).

inform the quarterly contribution factor set by the FCC. *Id.* § 54.709(a)(2)–(3).

C. THIS LITIGATION

In 2021, Respondents began challenging each of the FCC's quarterly contribution factors in the federal courts of appeals. In addition to this challenge to the first quarter 2022 contribution factor in the Fifth Circuit, they filed challenges to other quarters' contribution factors in the Sixth Circuit, Eleventh Circuit, and D.C. Circuit.

Respondents made substantively identical arguments before these courts of appeals. They contended that: (1) Congress violated the nondelegation doctrine in granting the FCC authority regarding the collection of contributions in support of universal service in Section 254 and (2) the FCC violated the private nondelegation doctrine in relying on USAC to calculate the projected demand and contribution base that inform the FCC's quarterly contribution factor. *See* Pet. App. 127a; *Consumers' Rsch. v. FCC*, 67 F.4th 773, 778 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2628 (2024); *Consumers' Rsch. v. FCC*, 88 F.4th 917, 920–21 (11th Cir. 2023), *cert. denied*, 144 S. Ct. 2629 (2024). Panels in the Sixth and Eleventh Circuits unanimously rejected those arguments; the Sixth Circuit also denied a petition for en banc rehearing (Respondents did not seek rehearing in the Eleventh Circuit). *Consumers' Rsch. v. FCC*, No. 21-3886, 2023 WL 3807406, at *1 (6th Cir. May 30, 2023) (denying rehearing en banc). Respondents voluntarily dismissed their D.C. Circuit challenge, No. 23-1091, on June 17, 2024, subsequent to oral argument in that case. Stipulation of

Voluntary Dismissal, *Consumers' Rsch. v. FCC*, No. 23-1091 (D.C. Cir. June 17, 2024).

A panel of the Fifth Circuit unanimously reached the same conclusion in this case as the Sixth and Eleventh Circuits. The court denied the petition for review, concluding that, as to Section 254, "there are no nondelegation doctrine violations." Pet. App. 126a. The panel concluded that Respondents' argument that Section 254(b)'s principles "offer no guidance to the FCC" was "untenable." *Id.* at 133a. Rather, Section 254(b) "expressly requires" the FCC to ensure compliance with the enumerated principles, and Congress therefore "provided ample direction" to the FCC and created "numerous intelligible principles" for it to apply. *Id.* at 133a, 137a. The panel also concluded that Section 254 adequately limits the FCC's authority to compel private contributions only as necessary "to satisfy its primary function," both by limiting the recipients and services eligible for USF support (through Sections 254(c) and (e)) and by mandating that any programs be "predictable and sufficient . . . to preserve and advance universal service" (through Section 254(b)). *See id.* at 135a–36a.

As to Respondents' private nondelegation arguments, the Fifth Circuit panel concluded that there was no violation for four reasons. First, the FCC's regulations "expressly subordinate[] USAC to the FCC" by barring USAC from making policy or engaging in statutory or regulatory interpretation. *See* Pet. App. 139a–140a. Second, USAC lacks rulemaking power and is authorized to provide the FCC only nonbinding proposals for approval. *Id.* at 140a. Third, USAC tabulations are subject to direct

challenge before the FCC, and the record demonstrated that such relief is in fact available. *Id.* Fourth, the FCC determines by regulation the method by which USAC calculates the inputs the FCC uses in its contribution factor determination. *Id.*

Rehearing the case en banc, the full Fifth Circuit, by a 9-7 vote, held the first quarter 2022 contribution factor unconstitutional, and remanded to the FCC for further proceedings.[4] The court concluded first that USF contributions were a tax, not a fee, and that Congress therefore delegated its power to tax—a "core legislative power"—to the FCC. Pet. App. 24a. The court nevertheless recognized that delegations by Congress to agencies are permissible so long as Congress provides an intelligible principle to guide the exercise of delegated authority. *Id.* at 24a–25a. It further recognized that this Court "has not in the past several decades held that Congress failed to provide a requisite intelligible principle." *Id.* at 25a–26a. The Fifth Circuit did not conclude that Section 254 violated the nondelegation doctrine under this Court's precedents, though it expressed "grave concerns about § 254's constitutionality under the Supreme Court's nondelegation precedents." *Id.* at 42a.

The Fifth Circuit stated that the FCC's reliance on USAC was problematic for two reasons. First, it concluded, FCC regulations permit USAC's projections to take effect without "formal FCC approval." Pet. App. 49a. Second, it concluded, the

[4] The Fifth Circuit stayed the issuance of its mandate pending this Court's disposition of a petition for a writ of certiorari from the FCC and the United States. *See* Order*, Consumers' Rsch. v. FCC*, No. 22-60008 (5th Cir. Aug. 26, 2024).

FCC has "de facto abdicat[ed]" its duty to supervise USAC's work. *Id.* at 50a. As with its analysis of the public nondelegation doctrine, however, the Fifth Circuit stopped short of concluding that the FCC's reliance on USAC was unconstitutional standing alone. *See id.* at 55a.

Instead, the court determined that it "need not resolve either question in this case . . . because the combination of Congress's sweeping delegation to FCC and FCC's unauthorized subdelegation to USAC violates the Legislative Vesting Clause in Article I, § 1." Pet. App. 64a. The Fifth Circuit read this Court's opinions in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), and *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197 (2020) to stand for "a general principle that . . . two constitutional parts do not necessarily add up to a constitutional whole." *Id.* at 67a. Reviewing Congress's delegation to the FCC and USAC's role through this lens, the court concluded that the "combination of delegations, subdelegations, and obfuscations of the USF Tax mechanism offends Article I, § 1 of the Constitution." *Id.* at 81a.

Judge Elrod, joined by Judges Ho and Engelhardt, concurred, writing separately to note that they would "go one step further and address the lawfulness of each individual delegation." Pet. App. 82a. Judge Ho issued a separate concurrence, arguing in addition for overruling a prior Fifth Circuit decision related to the private nondelegation doctrine. *See id.* at 85a–87a.

Judge Stewart, writing for seven judges, dissented. In their view, Section 254 provides sufficient guidance to the FCC, and the FCC maintains appropriate

control over USAC's actions. Pet. App. 88a. The dissent took issue with the majority's "amorphous new standard to analyze delegations" and its deviation from "established administrative law principles and all evidence to the contrary to create a private nondelegation doctrine violation." *Id.*

The dissent explained that Congress, through Section 254(b), "la[id] out the principles that the FCC must adhere to," Pet. App. 90a, and imposed on the FCC "a duty to weigh the enumerated universal service principles," *id.* at 92a. The dissent agreed with the Sixth Circuit that Section 254(b) "require[s] that the FCC base its efforts to preserve and advance universal service on the enumerated principles while allowing the FCC to then 'balance [each] principle[] against one another when they conflict.'" *Id.* (quoting *Consumers' Rsch.*, 67 F.4th at 791). It further noted that Section 254(c) and (e) limit the FCC's discretion as to the recipients and services eligible for USF support. *See id.* at 93a–96a. These factors "satisfie[d] the intelligible principle test as articulated by the Supreme Court." *Id.* at 96a.

As to the private nondelegation doctrine, the dissent explained that the majority's conclusion lacked support, failed to consider "well-established principles of administrative law[,] . . . [and] follow[ed] from misstatements of record facts." Pet. App. 97a. The dissent noted that USAC's authority is limited to billing, collection, and distribution of contributions, as well as collecting information from contributors to undertake the mathematical function of calculating inputs for the FCC's contribution factor determination, applying formulas that the FCC

provides. *See id.* at 99a. Finally, the dissent highlighted that the FCC's control over USAC is evident in regulations that bar the latter from making policy, interpreting rules, or issuing anything that has the force of law. *Id.* at 100a. In short, contrary to the majority, the dissent concluded that "the FCC maintains complete control over USAC and holds final decision-making authority regarding the USF and its programs." *Id.* at 101a–102a.

In a second dissent, Judge Higginson, writing for five judges, disagreed with the majority's "novel theory" of nondelegation. Pet. App. 115a. In addition to agreeing with Judge Stewart's dissent on the merits of the public and private nondelegation issues, Judge Higginson's dissent explained that this Court had previously considered cases that raised both public and private nondelegation challenges but "never instructed . . . that a different standard applies" in cases involving both issues. *Id.* at 116a; *see also id.* (explaining that if a different standard applied to "combination" cases, this Court in *Sunshine Anthracite* "would have . . . asked whether, despite constituting neither a delegation of legislative power nor a delegation of government power to a private entity, there was still a constitutional problem. It did not.") (citing *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940)).

Petitioners submitted a petition for writ of certiorari on October 11, 2024. This Court granted certiorari on November 22, 2024.

SUMMARY OF ARGUMENT

Article I of the U.S. Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST. ART. I, § 1. This separation of powers principle was crucial to our Nation's founders, who worried that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47 (James Madison). But the founders also recognized that the legislative, executive, and judiciary should not "be wholly unconnected with each other," and that the legislature, in particular, is "less susceptible of precise limits." THE FEDERALIST NO. 48 (James Madison). By their design, they sought to promote "[a]n enlightened zeal for the energy and efficiency of government," as they found that "the vigor of government is essential to the security of liberty." THE FEDERALIST NO. 1 (Alexander Hamilton).

Against this backdrop, this Court has recognized that the Constitution does not "deny[] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s]." *Yakus v. United States*, 321 U.S. 414, 425 (1944) (quoting *Currin v. Wallace*, 306 U.S. 1, 15 (1939)). Instead, Congress may "obtain[] the assistance of its coordinate Branches" of government in achieving its legislative vision. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). At the same time, this Court has articulated long relied-upon nondelegation safeguards to prevent Congress from delegating the "virtually unfettered" discretion that only it possesses

to the Executive Branch. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935). To this end, the Court has required Congress to provide an "intelligible principle" when delegating authority to agencies. *See Gundy v. United States*, 588 U.S. 128, 135 (2019) (plurality op.) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

Section 254 of the Communications Act of 1934, as amended, epitomizes the balance envisioned by the founders and this Court. Congress announces its directive in Section 254 that the FCC assess and collect contributions to preserve and advance universal service and lays out express guidance for the FCC to follow as it executes on this vision. The statute constrains and directs the FCC at each step of the way in constructing universal service programs and in collecting the contributions from the service providers that fund them.

Section 254 prescribes far more detailed directions than other statutes that have been upheld repeatedly by this Court in response to nondelegation challenges. And this case is wholly distinguishable from the only two cases in which this Court has struck down statutes on nondelegation grounds, both of which involved an *absence* of legislative guidance.

This Court should continue to apply the "intelligible principle" test when evaluating congressional delegations of authority. The test appropriately balances separation of power concerns with Congress's need for flexibility in its direction to the Executive branch. However, if this Court revises or replaces the "intelligible principle" test, even under a more searching standard akin to that articulated by

the dissenting opinion in *Gundy*, Section 254 is constitutional.

Further, USAC's ministerial role readily passes constitutional muster. USAC makes no policy, but rather it performs mechanical calculations according to detailed FCC specifications. The FCC supervises USAC's work closely. The FCC sets detailed parameters for, and both the FCC and (at its direction) USAC closely control, the private data that informs USAC's calculations. While any for-profit enterprise would welcome the "blank check" that the Fifth Circuit majority imagines, Telecom Petitioners can confirm that there simply is none to be found here. Pet. App. 53a.

Additionally, this Court should not adopt the Fifth Circuit's novel "combination" theory, which has no basis in the Constitution or case law. Under this theory, even if Congress's direction to an agency and the agency's use of support from a private actor are constitutional, when combined the two may nonetheless be unconstitutional. In the past 90 years of nondelegation jurisprudence, this Court has never instructed lower courts to analyze public and private nondelegation questions in combination. It should not do so now. The Court's decisions in the cases on which the Fifth Circuit relies—*Seila Law* and *Free Enterprise Fund*—did not involve the nondelegation doctrine and did not suggest that courts should review actions by multiple branches of the government as an undistinguished whole. Ironically, the Fifth Circuit did not articulate a test for application of its novel approach. Insofar as one can be discerned, both Section 254 and USAC's role are permissible.

Telecom Petitioners have a unique perspective on Congress's primacy in establishing and constraining universal service from their members' experience building and operating the networks that are the connective tissue of our Nation. Through Section 254 and other directives, Congress has helped to encourage small rural carriers and large companies alike to invest tens of billions of dollars in private capital annually to connect Americans across the country to jobs, education, health care, and more. Telecom Petitioners' members' reliance interests strongly counsel against overturning nondelegation precedent here. Their extensive, long-term investment depends not only on direct USF support but also on economies of scale and the network effects that arise from more Americans connecting.

Finding Section 254 unconstitutional or establishing a new nondelegation standard that imperils it would put small rural businesses at risk of defaulting on loans, damage a key segment of our economy, and undercut businesses' efforts to connect Americans. Indeed, consumers, schools, libraries, health care providers, and telecommunications providers all would be harmed by the loss of USF support. Such loss of support could raise the prices of communications services, put at risk the viability of services and providers in some places, and undermine current and future investments in network infrastructure.

Critically, this case is not moot because it is capable of repetition, yet evading review. Respondents have demonstrated that they will persist

in challenging contribution factors, so the Court should resolve this issue now.

ARGUMENT

I. SECTION 254 IS CONSTITUTIONAL.

A. Section 254 Satisfies the Intelligible Principle Test.

Under this Court's nondelegation cases, "a statutory delegation is constitutional as long as Congress 'lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.'" *Gundy*, 588 U.S. at 135 (alterations omitted) (quoting *J.W. Hampton, Jr. & Co.*, 276 U.S. at 409). Recognizing that "a nondelegation inquiry always begins (and often almost ends) with statutory interpretation," *Gundy*, 588 U.S. at 135, this Court has repeatedly affirmed directives from Congress to administrative agencies that are brief and standard-based—it has not required directives that are lengthy or rule-like. *See Mistretta*, 488 U.S. at 372 (citation omitted). In doing so, this Court has found it "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

Section 254 easily satisfies this standard in myriad ways. "The general policy of § 254 is clear: it exists to make sure '[a]ccess to advanced telecommunications and information services [are] provided in all regions of the Nation,'" and "the FCC must act to carry out

this general policy." *Consumers' Rsch.*, 88 F.4th at 924 n.2 (quoting 47 U.S.C. § 254(b)(2)).

Section 254 imposes several "boundaries" that "provide an intelligible principle and restrict the FCC's discretion in implementing the USF." *Consumers' Rsch.*, 67 F.4th at 790. First, Section 254(d) answers the question of who is required to contribute to the USF: "[e]very telecommunications carrier that provides interstate telecommunications services."[5] And Section 254(e) answers the questions of who can receive such funds ("eligible telecommunications carrier[s]" ("ETCs"))[6] and what they can use the funds for ("only for the provision, maintenance, and upgrading of facilities and services" intended for universal service support).

Second, Congress set forth in Section 254(b) six universal service principles that the FCC must follow. These include that "[q]uality services should be available at just, reasonable, and affordable rates"; that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation"; that "[a]ll providers of telecommunications services should make an

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[5] Section 254(d) also provides that "if the public interest so requires," the FCC may require "[a]ny other provider of interstate telecommunications . . . to contribute to the preservation and advancement of universal service." 47 U.S.C. § 254(d).

[6] Section 214(e) of the Communications Act provides specific criteria for how a provider may be designated an ETC. *See* 47 U.S.C. § 214(e)(2)–(3) (authorizing State commissions and the FCC to designate common carriers that meet certain conditions as ETCs).

equitable and nondiscriminatory contribution to the preservation and advancement of universal service"; and that "[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." While Section 254(b) permits the FCC to create additional principles, this permission is bounded, as such principles must be "necessary and appropriate for the protection of the public interest, convenience, and necessity and [be] consistent with this [chapter]." *Id.* § 254(b)(7). "Together, these principles provide comprehensive and substantial guidance and limitations on how to implement Congress's universal-service policy, and in turn, how the FCC funds the USF." *Consumers' Research*, 67 F.4th at 791. Thus, the FCC only may identify and apply universal service principles consistent with Congress's guidance, and it only may collect contributions in support of those principles consistent with Congress's guidance.

Courts of appeals have invalidated (and affirmed) FCC actions based on Section 254(b)'s principles, demonstrating that those principles create administrative standards that constrain and guide the FCC. For example, in *Qwest I*, the Tenth Circuit remanded to the FCC its determination that universal service funding would be available in areas where the average cost of providing service exceeded 135% of the national average because the FCC had "failed to explain how its 135% benchmark will help achieve the goal of reasonable comparability or sufficiency" as set forth in Section 254(b)(3) and (5), respectively. *Qwest I*, 258 F.3d at 1194, 1198, 1202. The court found that the FCC also failed to adequately define the terms "reasonable comparability" and "sufficient" "in a way

that can be reasonably related to the statutory principles." *Id.* The court further determined that the FCC did not follow Section 254(b)(5)'s directive that "[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service" because the FCC did not "develop mechanisms to induce adequate state action." *Id.* at 1199, 1203–04.

In *Qwest II*, the Tenth Circuit evaluated the remedial measures that the FCC took in response to the court's opinion in *Qwest I*. It found that the FCC met its obligation to enact an adequate state inducement by threatening to withhold federal funds if states do not "certify that rural rates within their boundaries are reasonably comparable," or, if rural rates are not reasonably comparable, if states do not "develop and present an action plan to the FCC indicating the state's response." *Qwest II*, 398 F.3d at 1238. In contrast, the Tenth Circuit struck down the FCC's revised definitions of "sufficient" and "reasonably comparable"—the former because it failed to "appropriately consider[] the range of principles identified in the text of the statute," *id.* at 1233–34, and the latter because the FCC's definition "rest[ed] on a faulty, and indeed largely unsupported, construction of" Section 254. *Id.* at 1235–36. The court likewise remanded the FCC's revised cost benchmark because the benchmark rested on the invalid definition of "reasonably comparable," and the FCC did not provide adequate supporting data. *Id.* at 1237. The Tenth Circuit's review of FCC orders exemplifies that Section 254 provides an intelligible principle to pass constitutional muster.

Third, given the rapid pace of innovation in telecommunications and technology, Congress recognized that "[u]niversal service is an evolving level of telecommunications services" and provided the FCC with four mandatory principles to guide the agency's understanding of what telecommunications services are supported. 47 U.S.C. § 254(c). The FCC must consider the extent to which such services are: (1) "essential to education, public health, or public safety"; (2) "subscribed to by a substantial majority of residential customers"; (3) "deployed in public telecommunications networks by telecommunications carriers"; and (4) "consistent with the public interest, convenience, and necessity." *Id.* § 254(c).

Indeed, Section 254 includes far more guidance and direction from Congress to the FCC than statutes that this Court has held satisfy the intelligible principle test. For example, in *National Broadcasting Co. v. United States*, this Court upheld a legislative delegation to the FCC, the "touchstone" of which was the "'public interest, convenience, or necessity', a criterion which 'is as concrete as the complicated factors for judgment in such a field of delegated authority permit.'" *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943) (citation omitted). More recently, this Court upheld direction in the Clean Air Act from Congress to the Environmental Protection Agency to set national ambient air quality standards at a level "requisite to protect the public health." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001). Similar statutes have survived a nondelegation challenge when Congress assigned the Securities and Exchange Commission ("SEC") the authority to prevent "unfair[] or inequitabl[e]"

distribution of voting power among security holders, *American Power & Light Co.*, 329 U.S. at 104, when Congress directed the Interstate Commerce Commission to approve railroad consolidations that are in the "public interest," *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24–25 (1932), and when Congress gave to the Federal Power Commission the authority to ensure "just and reasonable" rates, *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 600–01 (1944).

Only twice has this Court overturned a statute based on a violation of the nondelegation doctrine, and those cases are easily distinguishable. *Cf. Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry*, 295 U.S. at 495. Both cases involved the National Industrial Recovery Act, a statute that "conferred authority to regulate the entire economy." *Whitman*, 531 U.S. at 474. *Panama Refining* rejected the statutory delegation to the President authorizing him to prohibit transportation in interstate and foreign commerce of petroleum produced in excess of an amount permitted by the state, while *Schechter Poultry* invalidated a provision authorizing the President to approve "codes of fair competition" for a particular trade or industry.

In *Panama Refining*, the Court "look[ed] to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; [and] whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition." *Panama Refin.*, 293 U.S. at 415. The Court answered all three

questions in the negative: the statute "does not qualify the President's authority," it does not state "whether or in what circumstances or under what conditions the President" can act, and the statute "does not require any finding by the President as a condition of his action." *Id.* The statute provided "literally no guidance for the exercise of discretion." *Whitman*, 531 U.S. at 474.

Section 254, in contrast, delineates Congress's clear and unequivocal policy with respect to the provision of universal service. The "standard" for the FCC's action is governed by the principles set forth in Section 254(b), which Congress directed that the FCC "shall" consider in preserving and advancing universal service. The FCC is required to make a "finding" under Section 254(d) before expanding the universe of "other provider[s] of interstate telecommunications" required to contribute to the Fund. *See Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1239–41 (D.C. Cir. 2007) (analyzing statutory definitions and voice over Internet Protocol service to conclude that the FCC "has section 254(d) authority to require interconnected VoIP providers to make" universal service contributions). It also must make a "finding" of "public interest, convenience, and necessity" before developing additional universal service principles. *See, e.g., Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1098 (D.C. Cir. 2009) (affirming the FCC's consideration of whether universal service mechanisms and rules neither unfairly advantage or disadvantage one provider over another under Section 254(b)(7)). The three questions asked by the *Panama Refining* court would all be answered in the

affirmative were it reviewing the delegation in Section 254.

Schechter Poultry is equally distinguishable. The Court again looked to the statute to ascertain the intelligible principle to guide the exercise of legislative authority, and specifically "whether Congress in authorizing 'codes of fair competition' has itself established the standards of legal obligation, thus performing its essential legislative function." *A.L.A. Schechter Poultry*, 295 U.S. at 530. The Court found none: no "standards for any trade, industry, or activity"; no "prescribe[d] rules of conduct to be applied to particular states of fact"; and "virtually unfettered" discretion to enact laws in the hands of the President. *Id.* at 541–42.

In contrast to the provision of law in *Schecter Poultry*, Section 254(b) lays out explicit standards and prescribed rules for the FCC to consider as it develops policies to comply with Congress's legislative directive to preserve and advance universal service. The FCC's discretion is not unfettered, virtually or otherwise; in fact, specific agency decisions related to universal service have been overturned by courts of appeal a number of times over the past several decades for failing to comport with the statutory principles, demonstrating that Section 254 includes clear limitations on the discretion of the agency that courts have been able to apply. *See, e.g.*, *Qwest I*, 258 F.3d at 1205; *Qwest II*, 398 F.3d at 1234; *Texas Off. of Pub. Util. Couns.*, 183 F.3d at 435 (reversing FCC decision after concluding that "[t]he agency has offered no reasonable explanation of how this outcome, which will require companies . . . to incur a loss to participate

in interstate service, satisfies [Section 254(d)'s] 'equitable and nondiscriminatory' language"). This is hardly the "unfettered discretion" the *Schechter Poultry* court found to be a delegation problem.

B. The Intelligible Principle Test Remains the Correct Standard.

This Court should not overrule the intelligible principle test for evaluating whether a statute violates the nondelegation doctrine. Article I of the Constitution vests "[a]ll legislative Powers" in Congress. Accordingly, Congress may not delegate "strictly and exclusively legislative" powers. *Wayman v. Southard*, 23 U.S. 1, 42–43 (1825). The intelligible principle test safeguards this without hindering Congress's efforts to accomplish its goals, as a more stringent test might.

"In republican government, the legislative authority necessarily predominates." THE FEDERALIST NO. 51 (James Madison). The intelligible principle test ensures this by requiring Congress to dictate the policy the Executive is to implement. It also ensures that voters can hold Congress responsible as the ultimate font of lawmaking. Further, it prevents the "excess of law-making" that the founders feared by forcing overarching policy through the lengthy, multi-step legislative process set forth in the Constitution. THE FEDERALIST No. 62 (James Madison). As such, Congress has adopted broad delegations in a variety of contexts, including soon after ratification of the Constitution. *See, e.g.*, Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private*

Real Estate in the 1790s, 130 YALE L.J. 1288 (2021) (providing an example of a broad delegation using a "just and equitable" standard in the context of valuation of real estate for domestic taxation).[7]

At the same time, the intelligible principle test gives Congress the practical ability to accomplish its legislative goals. This Court has recognized repeatedly that the Constitution does not bar all delegations of authority by Congress. For instance, the Constitution allows Congress the "necessary resources of flexibility and practicality . . . to perform its function[s]." *Yakus*, 321 U.S. at 425. Congress may "seek assistance from another branch . . . according to common sense and the inherent necessities of the governmental co-ordination." *J.W. Hampton, Jr. & Co.*, 276 U.S. at 406. Congress's authority to delegate is particularly important "in our increasingly complex society, replete with ever changing and more technical problems." *Mistretta*, 488 U.S. at 372. Indeed, without the power to delegate certain authorities, Congress would be an "anomaly of a legislative power which in many

[7] The Fifth Circuit majority attempts to distinguish Section 254 from the statute subject to Parrillo's research. *See* Pet. App. 69a–73a. Regardless of whether the statutes are precise analogues, immediately post-Constitution, Congress enacted legislation directing real estate valuation that "depended on the decisionmaker's selection among divergent possible definitions of value and methods for determining it (on which Congress in 1798 deliberately gave no direction), was recognized by contemporaries as uncertain and contested, and was the object of intense conflict." Nicholas R. Parrillo, *Nondelegation, Original Meaning, and Early Federal Taxation: A Dialogue with My Critics*, 71 DRAKE L. REV. 367, 376 (2024).

circumstances calling for its exertion would be but a futility." *Panama Refin.*, 293 U.S. at 421.

The intelligible principle test has imposed and continues to impose a meaningful constraint. Since formulating the intelligible principle test, this Court has "giv[en] narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional" under the nondelegation doctrine, *Mistretta*, 488 U.S. at 373, n.7, and "favored" constructions of statutes that avoid "open-ended grant[s]" of "legislative power," *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980). Indeed, this Court has done so in the context of fees assessed by the FCC. *Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 342 (1974) (interpreting the Independent Offices Appropriation Act "narrowly to avoid constitutional problems" with the intelligible principle test).

Additionally, lower courts have shown the intelligible principle test can be applied faithfully, either to strike down or narrowly construe statutes. *See Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446, 459 (5th Cir. 2022) (finding that Congress "unconstitutionally delegated legislative power to the SEC when . . . failing to provide it with an intelligible principle to guide its use of the delegated power"); *L.D.G. v. Holder*, 744 F.3d 1022, 1029 (7th Cir. 2014) ("Any attempt to read such a delegation [of authority to promulgate particular regulations] into Congress's silence would fail for want of an intelligible principle to guide the agency's discretion."). That this Court has not struck a statute down based on the intelligible principle test recently merely reflects that the test is

well-understood and implemented by Congress and lower courts. Further, the nondelegation doctrine is not the only constraint that prevents Congress from giving excessive authority to agencies. Importantly, the void for vagueness doctrine prevents Congress from *de facto* delegating its authority to the other branches through failing to provide "explicit standards" to actors charged with applying the laws. *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

A more stringent nondelegation test would hinder, not ensure, Congress's legislative authority. Agencies use their resources and technical expertise to carry out Congress's directives. This is particularly important in areas subject to rapid technological change, such as the communications sector. Under the current framework, Congress sets key policies and definitions, and then the FCC applies those policies and definitions in emerging contexts. For example, the FCC has used its Section 254(c) authority to adapt the USF to the growing prevalence of broadband and mobile networks. *See*, *e.g.*, *In the Matter of Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 4040 ¶¶ 61–65 (2011). At the same time, an agency's duty to apply the statute that Congress actually enacted, as reenforced by cases such as *West Virginia* and *Loper Bright*, ensures agency fidelity to Congress's vision. *West Virginia v. Env't Prot. Agency*, 597 U.S. 697, 723 (2022) ("Agencies have only those powers given to them by Congress . . . ."); *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 411 (2024) (observing that the overturned *Chevron* doctrine "allow[ed] agencies to change course even when Congress has given them

no power to do so"). Thus, the status quo best ensures that Congress directs federal policy.

C. Section 254 Is Constitutional Under the *Gundy* Dissent.

To the extent this Court disagrees and adopts the test articulated in Justice Gorsuch's dissenting opinion in *Gundy*, Section 254 survives constitutional scrutiny under that standard as well.

At issue in *Gundy* was a delegation from Congress to the Attorney General under the Sex Offender Registration and Notification Act ("SORNA") to specify the applicability of the law's registration requirements to sex offenders convicted before the law was enacted and to prescribe rules for their registration. The entirety of the provision in question is as follows:

> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) [the initial registration requirements].

34 U.S.C. § 20913(d). A plurality of the Court found that this language did not give the Attorney General "unguided" or "unchecked" authority. *Gundy*, 588 U.S. at 136.

The *Gundy* dissent made clear that Congress must make the policy decisions, but Congress still may direct agencies to "fill in even a large number of details" and to "find facts that trigger the generally applicable rule of conduct specified in a statute." *Gundy*, 588 U.S. at 173 (Gorsuch, J., dissenting). Similarly, the *Gundy* dissent explained in evaluating cases from before the era of the intelligible principle:

> Through all these cases, small or large, runs the theme that Congress must set forth standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed.

Id. at 158 (Gorsuch, J., dissenting) (quoting *Yakus*, 321 U.S. at 426). Reflecting on past cases, Justice Gorsuch stated that this Court must ask "the right questions." *Id.* at 166 (Gorsuch, J., dissenting). Those questions include:

> Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And . . . did Congress, and not the Executive Branch, make the policy judgments?

Id. at 166 (Gorsuch, J., dissenting). The *Gundy* dissent described SORNA as "giving the nation's chief prosecutor the power to write a criminal code," giving "the discretion to apply or not apply any or all of [the act]'s requirements," and "allow[ing] the nation's chief law enforcement officer to write the criminal laws he

is charged with enforcing." *Gundy*, 588 U.S. at 171–72 (Gorsuch, J., dissenting). Importantly, Justice Gorsuch contrasted this approach with what Congress could have done for the law to be permissible in his view: it could have "required all pre-Act offenders to register, but then given the Attorney General the authority to make case-by-case exceptions," and it could have "set criteria to inform that determination." *Id*. at 170 (Gorsuch, J., dissenting).

Section 254 comports with the *Gundy* dissent's view of delegation, as it reflects Congress's policy decisions with the FCC left only to fill in the details. Section 254(a) directs that the FCC "shall" implement a universal service program; the FCC has no discretion to determine whether such program should exist. 47 U.S.C. § 254(a). Section 254(d) requires that every telecommunications carrier that provides interstate telecommunications services "shall" contribute; the FCC does not have discretion to pick and choose among carriers that must contribute. *Id.* § 254(d). Section 254(d) also sets forth that if the FCC seeks to extend contribution obligations beyond carriers, it may apply such obligations only to providers of interstate telecommunications, and it must show that "the public interest so requires" before extending requirements to any such entities. *Id.* The FCC can exempt a carrier or class of carriers if the carrier's contributions would be de minimis, which is the very type of "factual finding[]" and "case-by-case exception[]" the *Gundy* dissent wanted to see in SORNA. The important policy judgments have all been made by Congress.

Other parts of Section 254 bind the discretion of the agency, again reflecting the considered policy judgments of Congress. Sections 254(b)(5), (d), and (e) direct the FCC to provide "sufficient" support to "preserve and advance universal service," establishing outer bounds for universal service support.[8] Section 254(c)'s universal service definition provides the factors the FCC "shall" consider in determining what constitutes universal service, and simply allows the FCC to fill in the details as it determines what constitutes universal service in the ever-evolving telecommunications marketplace. In sum,

> Section 254's strictures set out from whom funds are exacted, 47 U.S.C. § 254(d), who receives the benefit of the funds, 47 U.S.C. § 254(e), and what minimum standards of service must be provided in order to satisfy the longstanding goal of providing universal service.

Pet. App. 93a. Thus, "Congress, . . . not the Executive Branch, ma[d]e the policy judgments." *Id.* at 34a (quoting *Gundy*, 588 U.S. at 166 (Gorsuch, J., dissenting).

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[8] "Sufficiency" "proscribes support in excess of that necessary to achieve the [Communications] Act's universal service goals." *In the Matter of High-Cost Universal Service Support*, Order, 23 FCC Rcd. 8834, 8839 (2008); *see also Qwest II*, 398 F.3d at 1234 (finding no issue with the FCC's proposed definition of "sufficient" to "includ[e] language intended to cap federal support at levels 'only as large as necessary' to meet the statutory goal").

II. USAC'S MINISTERIAL FUNCTIONS ARE CONSISTENT WITH THE CONSTITUTION.

The FCC's use of USAC to perform mechanical calculations in accordance with detailed, statutorily-constrained FCC rules and orders and subject to close FCC oversight complies fully with the private nondelegation doctrine.

The private nondelegation doctrine prevents "governments from delegating too much power to private persons and entities." *Boerschig v. Trans-Pecos Pipeline, LLC*, 872 F.3d 701, 707 (5th Cir. 2017); *see also Sunshine Anthracite*, 310 U.S. at 399; *Carter v. Carter Coal Co.*, 298 U.S. 238, 310–11 (1936); *Currin*, 306 U.S. at 15–16. As the Eleventh Circuit explained, "[f]rom the Supreme Court's guidance, [lower courts] have held that there is no violation of the private nondelegation doctrine where the private entity functions subordinate to an agency, and the agency has authority and surveillance over the entity." *Consumers' Rsch.*, 88 F.4th at 925 (collecting cases).

The FCC's limited employment of USAC for ministerial functions plainly satisfies these standards, as the Sixth and Eleventh Circuits correctly found, and contrary to the "skeptic[ism]" of the Fifth Circuit en banc majority. *See id.* at 925–28; *Consumers' Rsch. v. FCC*, 67 F.4th at 795–97. *But see* Pet. App. 64a. FCC regulations provide that "[c]ontributions to [universal service] mechanisms . . . shall be based on contributors' projected collected end-user telecommunications revenues, and on a contribution factor determined quarterly *by the Commission*." 47 C.F.R. § 54.709(a) (emphasis

added). The FCC has adopted regulations, in accordance with Section 254, stating that such contributions shall be "based on the ratio of total projected quarterly expenses of the universal service support mechanisms to the total projected collected end-user interstate and international telecommunications revenues, net of projected contributions." *Id.* § 54.709(a)(2). USAC's role is merely to gather data and make the quarterly projections based upon FCC rules and orders from which the FCC performs the relevant calculation. *See id.* § 54.709(a)(2)–(3). The Public Notice that Petitioners challenge bears out USAC's subordinate, narrow role. *See* Pet. App. 141a–142a, 147a (stating that the quarterly contribution factor is "calculated by the Federal Communications Commission," which USAC "shall use" to then determine the amount of individual contributions).

Not only is USAC's role in helping the FCC set the contribution factor limited to a ministerial data gathering and projecting function, but the FCC's regulations expressly exclude USAC from policy-making functions and responsibilities. USAC "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress," and "[w]here the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission." 47 C.F.R. § 54.702(c). To the extent that collections yield more than is needed to fund the FCC-authorized programs in one quarter, USAC *must* report the overage to the FCC so that the agency can reduce the contribution factor accordingly in the next quarter or take other actions. *Id.* § 54.709(b).

Telecom Petitioners routinely interact with USAC on administrative matters, such as by reporting revenue, submitting contributions, and disbursement of support—and they interact with the FCC where policy and interpretive matters within the scope of the agency's Section 254 authority are at issue. In sum, "there is no private-nondelegation doctrine violation because USAC is subordinate to the FCC and performs ministerial and fact-gathering functions" in helping the FCC set the contribution factor. *Consumers' Rsch. v. FCC*, 67 F.4th at 795–96; *see also Consumers' Rsch.*, 88 F.4th at 926.

The en banc Fifth Circuit majority's not-quite-conclusion to the contrary relies on a misunderstanding of the nature of "demand projections" in the USF context. *Cf.* Pet. App. 52a–53a (asserting that "a carrier could (intentionally or unintentionally) project and then supply USF-subsidized service costing [more than] if it strictly complied with FCC rules," leading to a "blank check"). USAC has no ability to determine or expand the size of any USF program, nor does any other private entity. Projections of demand, in the context of the USF, mean expected universal service program disbursements calculated in accordance with strict program rules and requirements established by the FCC pursuant to Section 254. *See* Government Accountability Office, GAO-24-106967, *Administration of Universal Service Programs Is Consistent with Selected FCC Requirements*, at 22 (July 2024), https://www.gao.gov/assets/880/870109.pdf ("GAO USAC Report"). *See generally* 47 C.F.R. Pt. 54; Memorandum of Understanding Between the Federal

Communications Commission and the Universal Service Administrative Company (Oct. 17, 2024), https://www.fcc.gov/sites/default/files/usac-mou.pdf ("MOU"). USAC simply applies these rules and requirements to form its projections in the context of each FCC program. For example:

- For the Lifeline program, USAC multiplies the FCC-authorized Lifeline support amount per household by the number of eligible, verified low-income subscribers enrolled in USAC's Lifeline subscriber database. *See* 47 C.F.R. §§ 54.403–.404, 54.407, 54.409–.410.
- For High-Cost support mechanisms based on auctions, such as the Rural Digital Opportunity Fund, USAC calculates the amount of support that the FCC has specifically authorized each service provider to receive for deployment in a particular high-cost geographic area, minus any reductions required by FCC rules (such as if a provider has not met FCC network deployment milestones). *See* 47 C.F.R.§§ 54.801–.802, 54.805–.806.
- For High-Cost support mechanisms based on a rural carrier's costs, USAC performs calculations prescribed by the FCC based on carrier costs eligible pursuant to FCC rules. *See, e.g.*, 47 C.F.R. §§ 54.901–.903.

As a further "belt-and-suspenders" constraint on USAC, most programs are subject to overall budgetary caps set by the FCC pursuant to its statutory authority. *See, e.g.*, *id.* § 54.507(a) ($3.9

billion annual funding cap for schools and libraries support, adjusted for inflation); *id.* § 54.619 ($571 million annual funding cap for health care providers support, adjusted for inflation); *Rural Digital Opportunity Fund et al.*, Report and Order, 35 FCC Rcd. 686, 687 ¶¶ 2, 4 (2020) (maximum of $20.4 billion over ten years for Rural Digital Opportunity Fund auctions). Finally, USAC only may disburse support (and therefore include such support in its calculation of "demand" to calculate the necessary contribution factor) to the extent that the FCC specifically authorizes it to do so. *See, e.g.*, *Wireline Competition Bureau Directs USAC to Fully Fund Eligible Category One and Category Two E-Rate Requests*, Public Notice, DA 24-457 (WCB rel. May 14, 2024); *Rural Digital Opportunity Fund Support Authorized for 469 Winning Bids*, Public Notice, 36 FCC Rcd. 14528 (WCB 2021).

Adding misunderstanding upon misunderstanding, the Fifth Circuit creates a bleak portrait of rampant noncompliance that is inaccurate and seems to imply the FCC may be willfully ignoring fraud.[9] Pet. App. 51a ("FCC would have us believe its

[9] The specific Government Accountability Office ("GAO") reports that the Fifth Circuit cites regarding waste, fraud, and abuse in the USF are, variously, years or well more than a decade old. Pet. App. 8a–10a, 51a–52a. The FCC has implemented significant reforms to improve program efficiency and tighten USAC's operations, and the GAO's July 2024 analysis finds its processes sound. *See* GAO USAC Report at 8–10, 13–14 (finding that USAC annually develops goals to meet FCC requirements to administer USF programs; USAC developed tracking plans with FCC input and reported monthly to the FCC to monitor progress; USAC manages its operating budget in accordance

universal service policy necessarily dictates the size of the contribution amount . . . But that cannot be right because USF disbursements often do not comply with FCC policy."). However, the FCC, and at its direction USAC, police compliance closely: among other things, the FCC conducts annual audits of improper payments and directs USAC to take corrective action to recover improperly disbursed amounts and improve processes, and USAC conducts random and for-cause audits.[10] The FCC also evaluates recipients of USF support for compliance with FCC rules and takes enforcement action based on noncompliance.[11] This Court has consistently found that the Constitution

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with FCC requirements; and independent auditors routinely examine USAC processes and USAC develops corrective action plans to address audit findings); *see also id.* at 19 (stating that "[i]n the last 6 years, the [FCC] took action to address 17 recommendations [GAO] made related to [USF] programs and 110 such recommendations made by FCC's Office of Inspector General").

[10] *See, e.g.*, Letter from Mark Stephens, Managing Dir., FCC, to Radha Sekar, CEO, USAC (July 11, 2024), https://www.fcc.gov/sites/default/files/FY24-PIIA-Audit-Oversight-Letter-USAC-FY23-Improper-Payments.pdf; *Beneficiary and Contributor Audit Program*, USAC, https://www.usac.org/about/appeals-audits/beneficiary-and-contributor-audit-program-bcap/ (last visited Jan. 9, 2025); *see also* MOU § IV(G).

[11] *See*, *e.g.*, *In the Matter of American Broadband & Telecommunications Company, Jeffrey S. Ansted*, Order, 37 FCC Rcd. 6332 (2022); *In the Matter of Sandwich Isles Communications, Inc. et al.*, Forfeiture Order, 35 FCC Rcd. 10831 (2020); *In the Matter of TeleQuality Communications, LLC*, Order, 35 FCC Rcd. 503 (EB 2020).

does not demand perfection.[12] Here, the Constitution is satisfied because the FCC has the superordinate role to USAC and in fact exercises extensive authority and surveillance. *Cf. FCC v. Prometheus Radio Project*, 592 U.S. 414, 427 (2021) ("To be sure, . . . the FCC did not have perfect empirical or statistical data. . . . But that is not unusual in day-to-day agency decisionmaking within the Executive Branch.").

The Fifth Circuit also errs in identifying a private nondelegation doctrine problem because "USAC's projections take legal effect without formal FCC approval." Pet. App. 49a. As discussed above, USAC merely reports data to the FCC; it is the FCC's Office of Managing Director ("OMD") that sets the contribution factor each quarter, releasing a public notice explaining any adjustments to USAC's data and announcing the resulting contribution factor. Even if the FCC actually adopted the contribution factor through inaction, "an agency exercises its policymaking discretion with equal force when it makes policy by either deciding to act or deciding *not*

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[12] *See, e.g.*, *Samia v. United States*, 599 U.S. 635, 648 (2023) ("[A] defendant is entitled to a fair trial but not a perfect one") (citation and internal quotation marks omitted); *Harris v. Arizona Indep. Redistricting Comm'n*, 578 U.S. 253, 258 (2016) (stating, in the context of the Fourteenth Amendment's Equal Protection Clause, "the Constitution, . . . does not demand mathematical perfection"); *Heien v. North Carolina*, 574 U.S. 54, 60–62 (2014) ("To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials . . . ."); *Burt v. Titlow*, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel"); *Ward v. Rock Against Racism,* 491 U.S. 781, 794 (1989) ("[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.").

to act." *Consumers' Rsch.*, 67 F.4th at 796 (internal quotations and alterations omitted). Indeed, the Administrative Procedure Act ("APA") defines "agency action" to include a "failure to act." 5 U.S.C. § 551(13). Regardless, this Court has held that "administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *FCC v. Schreiber*, 381 U.S. 279, 290 (1965) (citation and internal quotation marks omitted); *see also Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653 (1990) (stating that "when the Due Process Clause is not implicated and an agency's governing statute contains no specific procedural mandates, the APA establishes the maximum procedural requirements a reviewing court may impose on agencies").

Nor is it correct that the FCC "does not . . . 'independently perform[] its reviewing, analytical and judgmental functions.'" Pet. App. 50a (quoting *State v. Rettig*, 987 F.3d 518, 532 (5th Cir. 2021)). The extensive rulemaking, authorization, and audit processes discussed above all disprove this notion. The FCC's "deemed approved" process simply permits the contribution factor set by the FCC's own OMD, after FCC review, to go into effect without *further* formal action. And the fact that the FCC has never publicly reversed USAC's projections of demand is only a manifestation of the ministerial data-gathering and projecting role that USAC plays and the FCC's close ongoing review. Notwithstanding the Fifth Circuit's blithe dismissal, Pet. App. 7a n.8, the FCC's revision of one quarter's contribution factor from 9.0044% to 9.1% demonstrates that USAC's role is

ministerial, that USAC is subservient to FCC policy and directives, and that the FCC has taken action to make changes where it deems them warranted. *Revised Second Quarter 2003 Universal Service Contribution Factor*, Public Notice, 18 FCC Rcd. 5097 (WCB 2003); *see also First Quarter 1998 Universal Service Contribution Factors Revised and Approved*, Public Notice, 12 FCC Rcd. 21881, 21886 (CCB 1997) (setting "the approved contribution factors").

III. THE COURT SHOULD NOT ADOPT THE FIFTH CIRCUIT'S NOVEL "COMBINATION" THEORY.

A. The Fifth Circuit's "Combination" Theory Is Unsupported by the Constitution or Supreme Court Precedent.

After spending dozens of pages reviewing the law and facts concerning the key questions in this case—whether Congress's provision of limited authority to the FCC through Section 254 and the FCC's assignment of certain ministerial tasks to USAC are constitutional—the Fifth Circuit declines to answer them. The Fifth Circuit merely expresses its "skeptic[ism]" but makes clear that the court is steadfastly not deciding either way. *See* Pet. App. 64a. ("[W]e need not resolve either question in this case."). Instead, the Fifth Circuit relies on a novel "combination" theory to find the USF contribution factor unconstitutional. Under this theory, even if Congress's direction to an agency is constitutional and the agency's use of support from a private actor is constitutional, when combined the two may be unconstitutional. *See* Pet. App. 64a. The Fifth

Circuit's approach has no basis in the Constitution or case law.

The Fifth Circuit's approach ignores the Constitution's structure, ironic in a decision purporting to reenforce it. The Constitution creates three separate branches of the federal government, each with its own duty to comply with the Constitution. Executive Branch action may illuminate an unconstitutional application of a statute or may itself be unconstitutional, but it does not render a permissible statute wholly unconstitutional. *Cf. City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015) ("A facial challenge is an attack on a statute itself as opposed to a particular application."). Neither does Congress's lawful statutory direction to an agency answer the question of whether the agency has carried out that task in a constitutionally permissible manner. *See Sunshine Anthracite*, 310 U.S. at 399 (analyzing private nondelegation question after upholding statute against various constitutional challenges); *cf., e.g.*, *Kirk v. Comm'r of Soc. Sec. Admin.*, 987 F.3d 314 (4th Cir. 2021) (finding that the Social Security Administration violated due process by denying the opportunity to contest fraud allegations). But the Fifth Circuit's test erroneously evaluates Congress and agency alike as an amorphous whole.

Further, the cases on which the Fifth Circuit relies —*Seila Law* and *Free Enterprise Fund*—do not support its novel "combination" doctrine. Both cases concern not the nondelegation doctrine but whether specific exceptions to the President's authority under Article II of the Constitution "to keep [executive]

officers accountable—by removing them from office, if necessary," i.e., the removal power, applied to instances where Congress restricted such authority through novel regulatory frameworks. *Free Enterprise Fund*, 561 U.S. at 483. If this Court wanted lower courts to analyze public and private nondelegation questions in combination, it readily could have said so over the past 90 years of nondelegation jurisprudence. It has not, so the Fifth Circuit has exceeded its appropriate role.

Even if it were reasonable to look to *Seila Law* and *Free Enterprise Fund* in the context of the nondelegation doctrine, they do not support the Fifth Circuit's novel "combination" approach. In *Free Enterprise Fund*, this Court considered a "dual for-cause" framework. *Id.* at 492. By statute, members of the Public Company Accounting Oversight Board could be removed only by the SEC for "good cause shown," and the President could not remove SEC commissioners except for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 486–87 (citation and internal quotation marks omitted). The Court found that this structure violated the separation of powers by impermissibly restricting the President's removal power and impairing the President's "ability to execute the laws—by holding his subordinates accountable for their conduct." *Id.* at 496.

Seila Law involved an unusual framework in which the President only could remove for cause the single leader of a government agency (the Director of the Consumer Financial Protection Bureau) who served for term longer than the President. *Seila Law*, 591 U.S. at 202. This Court determined that

exceptions to the bar against Congress restricting the President's removal power did not apply to "to the novel context of an independent agency led by a single Director" because "[s]uch an agency lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control." *Id.* at 204.

There are several important differences between *Seila Law* and *Free Enterprise Fund*, on the one hand, and the instant matter, on the other, that the Fifth Circuit failed to consider. Significantly, the Court's aim in *Seila Law* and *Free Enterprise Fund* was to ensure that Congress did not violate the Constitution by aggregating multiple apparently distinct statutory features into, functionally, a much larger restriction on the President. *See Seila Law*, 591 U.S. at 225; *Free Enterprise Fund*, 561 U.S. at 495. Here, the distinct actions of Congress and the FCC do not aggregate into the same "whole." *Contra* Pet. App. 67a. Congress must follow the Constitution in the role it gives to the FCC via Section 254, and the FCC must follow the Constitution in the role it gives to USAC via its rules, orders, and oversight. Thus, because there are two distinct actors, each with their own compliance duty, those duties must be analyzed distinctly.

Further, both *Seila Law* and *Free Enterprise Fund* concern statutes where Congress sought to *limit* the President's executive authority. Both cases emphasize that "[t]he entire 'executive Power' belongs to the President alone," including the "power to remove—and thus supervise" executive branch officers. *Seila Law*, 591 U.S. at 204, 213; *see also Free*

Enterprise Fund, 561 U.S. at 483. And both cases considered how restrictions by Congress on the Presidential removal power impair the President's ability to ensure "the laws [are] faithfully executed." *Seila Law*, 591 U.S. at 214; *Free Enterprise Fund*, 561 U.S. at 498 (internal citation and quotation marks omitted). Here, by contrast, the nondelegation doctrine concerns not one branch's *encroachment* on the other, but one branch's bolstering itself by obtaining the aid of the other. This distinction is important, as the Constitution is premised on the notion that each branch is motivated to protect its own authority. *See* THE FEDERALIST NO. 51 (James Madison) ("Ambition must be made to counteract ambition.").

Coordination between the branches, however, is necessary. "Separation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes." *Loving v. United States*, 517 U.S. 748, 773 (1996). Further, Congress may change the law and take back the authority it has granted to an agency, an option not available to the President when his removal power is restricted by Congress. These differences justify a distinct doctrinal approach.

B. The Fifth Circuit Did Not Articulate Its Standard, But as Far as Can Be Determined, Section 254 Satisfies It.

Although the Fifth Circuit strains to impose requirements beyond the intelligible principle standard, it cannot provide an intelligible principle

itself. The threshold of when permissible acts combine to become unconstitutional in the Fifth Circuit majority's view remains a mystery, as the court sets forth an "undefined, unannounced, and unprecedented test." Pet. App. 115a. As near as can be discerned, the standard is that "reviewing courts must consider a government program holistically, with an eye toward its compatibility with our constitutional history and structure." *See* Pet. App. 67a. "Holistically" might identify the scope of *what* should be considered—potentially everything—but it does not say *how* this information should be considered. The opinion does not set forth whether "compatibility" is the only question, what other questions might be, or how one might identify additional questions. It also does not explain how to evaluate compatibility with constitutional history and structure without measuring based on specific provisions of the Constitution and tests for application of those provisions articulated by this Court. Under the Fifth Circuit's approach, judges are left to "know it when [they] see it." *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). And legislators, the President, and agencies are left in the dark without any principle to guide them in evaluating whether their conduct complies with the law. This lack of standard harms businesses, such as Telecom Petitioner members, which depend on reasonable predictability in the surrounding legal environment.

Even under the Fifth Circuit's malleable, murky approach, both Section 254 and USAC's role are permissible, as far as is possible to tell. First, the USF is compatible with "our constitutional structure." Pet.

App. 73a. As discussed above, Congress and the FCC both remain accountable for the USF contribution—Congress because Section 254 establishes the USF and provides guidelines for the FCC to implement the Fund, and the FCC because its regulations clearly ensure it has policy control and oversight over the USF. Second, there is historical precedent for multi-tiered implementation of congressional mandates dating back to the earliest days of our Constitution. *See, e.g.*, Parrillo, *Critical Assessment*, *supra*, at 1327–39. Thus, if this Court elects to apply the Fifth Circuit's framework, it should find Section 254 constitutional.

IV. INVALIDATION OF SECTION 254 WOULD BE DISRUPTIVE AND UPSET INVESTMENT-BACKED RELIANCE INTERESTS.

Across four circuits, Respondents have spent pages upon pages criticizing universal service. Their repeated one-sided story ignores the many benefits the USF provides and the disruption that would be caused by holding any portion of Section 254 unconstitutional or establishing a new nondelegation standard that may result in the same outcome.

The universal service program includes the High-Cost Support Program, the Lifeline Program, the Schools and Libraries Program, and the Rural Healthcare Program. Through these programs, telecommunications providers across the country receive substantial funding to ensure connectivity for millions of Americans. Consumers, schools, libraries, health care providers, and telecommunications providers all would be harmed by the loss of USF

support. Rural consumers would be forced to pay more for service and may lose access to planned deployments that would allow them to get the same fast connectivity as their urban peers. In some parts of rural America, residents could suffer disruptions in service should smaller providers based in these communities fail in the face of a loss of essential USF support. Lifeline support enables over seven million low-income consumers to obtain service they may otherwise be unable to afford.[13] Students may lose the connectivity they need for modern education, and rural patients may lose access to essential healthcare services.

Telecom Petitioners' members, ranging from Fortune 500 companies to small businesses operating in their local communities, can confirm firsthand that in certain areas and circumstances universal service support helps to make the business case for the investment of private capital to deploy networks and deliver services that satisfy the universal service principles articulated by Section 254. For example, high-cost support pursuant to Section 254 enables rural carriers to deploy high-speed broadband networks and provide service at affordable rates to especially high-cost areas in the country, where population densities tend to average a handful of

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[13] *See 2023 Annual Report*, USAC, at 5 (2023), https://www.usac.org/wp-content/uploads/about/documents/annual-reports/2023/2023_USAC_Annual_Report.pdf.

serviceable locations per square mile.[14] USF support also helps cover the higher operating and equipment costs that rural carriers face because they lack the economies of scale characteristic of networks in more-heavily populated areas.[15] Further, by increasing the availability of communications services, USF support helps "all consumers, not just low-income consumers, receive value from the network effects of widespread voice and broadband subscribership." *In the Matter of Lifeline & Link Up Reform & Modernization, et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 6656, 6665 (2012). By increasing demand for services (including via network effects) and facilitating economies of scale, USF further increases Telecom Petitioners' members' incentives to invest in and connect all Americans.

These benefits would be lost or significantly diminished if universal service support were cut off or curtailed, to the ultimate detriment of consumers,

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[14] *See, e.g.*, *Broadband/Internet Availability Survey Report*, NTCA, at 1 (Dec. 2021), https://www.ntca.org/sites/default/files/documents/2021-12/2021-broadband-survey-report-final-12-15-21.pdf (showing average serviceable area locations for respondents is 7,581, and average service area is 1,906 square miles).

[15] *See*, *e.g.*, *Fed.-State Joint Bd. on Universal Serv.*, 12 FCC Rcd. at 8918 (observing the "higher operating and equipment costs attributable to lower subscriber density, small exchanges, and *lack of economies of scale* that characterize rural areas") (emphasis added); *In the Matter of Promoting Telehealth in Rural Am.*, Report and Order, 34 FCC Rcd. 7335, 7348 (2019) ("[C]ities with populations of 50,000 [people] or more are large enough so the rates for telecommunications services in these areas reflect cost reductions associated with high-volume, high-density factors.").

enterprises, and anchor institutions that rely on network deployments, including in hard-to-serve areas. For instance, a recent survey of rural carriers indicated that, without USF support, these businesses—which are just a subset of the entities that receive such support—could be compelled to cancel almost two billion dollars' worth of rural broadband deployment projects in 2025 and 2026 alone.[16] Further, abruptly disrupting USF support would imperil current network buildouts, which take long periods of time from start to finish and rely on future revenues to complete. Telecom Petitioners' members have invested and hope to continue to invest tens of billions in private capital each year in network infrastructure across the country,[17] but this case threatens the certainty, network effects, and economies of scale necessary for long-term infrastructure investment.

Although Respondents' policy claims are not relevant to the legality of Section 254, Telecom Petitioners' members' reliance interests are. To find Section 254 unconstitutional or create a new

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[16] Press Release, NTCA, NTCA Survey Highlights Significant Risks of Skyrocketing Consumer Bills, Plummeting Broadband Investment & Loans in Peril if USF Support were Eliminated (Sept. 4, 2024), https://www.ntca.org/ruraliscool/newsroom/press-releases/2024/4/ntca-survey-highlights-significant-risks-skyrocketing ("*Rural Survey Key Findings*").

[17] America's broadband industry invested $94.7 billion in private capital in U.S. communications infrastructure in 2023. *2023 Broadband Capex Report*, USTelecom (Oct. 18, 2024), https://ustelecom.org/research/2023-ustelecom-broadband-capex-report/.

nondelegation standard, this Court would have to overrule the cases employing the intelligible principle test. A significant factor in the *stare decisis* analysis is whether overturning existing precedent would upset reliance interests. *See Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (citation omitted) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved."). Here, many of Telecom Petitioners' members have invested in network infrastructure, made business plans, and offered service plans to American consumers in reliance on future universal service payments. The consequences of disrupting those expectations could be devastating, particularly for small businesses operating in rural areas; for example, 67% of rural carriers surveyed indicated that they have outstanding debt for prior broadband network deployments, and 61% of those respondents indicated they would likely default on those loans within the next three years if USF support were eliminated, *Rural Survey Key Findings*, potentially due to the inability of those providers to recover the loss of revenue from other sources. These sorts of investment-backed expectations should caution against overruling precedent here.

V. THE COURT SHOULD RESOLVE THIS CASE TO PREVENT REPETITIVE LITIGATION.

Telecom Petitioners agree with the Fifth Circuit's conclusion that this case is not moot. *See* Pet. App. 13a–14a. Even if Respondents' purported injuries are no longer redressable, this case remains justiciable

because the agency action at issue is "capable of repetition, yet evading review." *See, e.g., S. Pac. Terminal Co. v. Interstate Com. Comm'n*, 219 U.S. 498, 515 (1911).

Respondents have demonstrated that they will persist in challenging the FCC's quarterly contribution factor over and over. If the Court holds that this case is moot, there is every reason to expect that they will try again. "Kicking the can down the road" harms Telecom Petitioners by prolonging the uncertainty that hinders their members' investment in essential broadband services. Accordingly, we urge the Court to resolve the issue now.

CONCLUSION

For these reasons, this Court should find that Section 254 and USAC's role in the FCC's assessment of the USF contribution factor are constitutional.

Respectfully submitted,

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