

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.

SCHOOLS, HEALTH & LIBRARIES
BROADBAND COALITION, *et al.*,
Petitioners,

v.

CONSUMERS' RESEARCH, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF FOR AMICI CURIAE ASSOCIATIONS
IN SUPPORT OF PETITIONERS**

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INTERESTS OF AMICI CURIAE¹

The Amici Curiae are thirty state-level associations (“Associations”), representing 702 rural telecommunications and broadband providers (the “Rural Communications Providers”), virtually all of whom receive funds from programs provided by the Federal Universal Service Fund (the “FUSF”).² Building on prior Federal Communications Commission (“FCC”) support programs and modifying the contribution mechanism to fund those programs, Congress

1. No counsel for a party to this case authored this Brief in whole or in part. No such counsel or party to this case made a monetary contribution intended to fund the preparation or submission of the Brief. No person other than the Associations, their Rural Communications Provider members, or the Associations’ counsel made such a monetary contribution.

2. The following organizations constitute the Associations: Alaska Telecom Association, California Communications Association, Colorado Telecommunications Association, Georgia Rural Telephone and Broadband Association, Idaho Telecom Alliance, Illinois Rural Broadband Association, Illinois Broadband and Telecommunications Association, Indiana Broadband and Technology Association, Indiana Rural Broadband Association, Iowa Communications Alliance, Communications Coalition of Kansas, Kentucky Rural Broadband Association, Telecommunications Association of Maine, Broadband Association of Michigan, Minnesota Telecom Alliance, Broadband MT, Nebraska Telecommunications Association, New York Telecommunications Association, Broadband Association of North Dakota, Ohio Telecom Association, Oklahoma Rural Broadband Association, Oregon Telecommunications Association, Pennsylvania Telephone Association, South Dakota Telecommunications Association, Tennessee Broadband Association, Texas Telephone Association, Utah Rural Telecom Association, Washington Independent Telecommunications Association, Wisconsin State Telecommunications Association, Wyoming Telecommunications Association.

established the FUSF in the Telecommunications Act of 1996 by adding Section 254 to the Communications Act of 1934, as amended (the “Communications Act”). See 47 U.S.C. § 254 (“Section 254”). Section 254 contains a series of intertwined principles guiding the Federal Communications Commission (“FCC”) in collecting and distributing funds to preserve and advance universal service. The amounts to be collected depend on the amounts to be distributed to achieve Congress’s purposes; the amounts distributed depend on the amounts collected. The Court should assess both aspects of Congress’s intelligible principles in determining whether the statute is constitutional.

Since enactment of Section 254, the Rural Communications Providers have relied, and are relying, on funding from the FUSF to bring affordable telecommunications and broadband services to consumers and anchor institutions in rural communities across the country—consumers and communities that would otherwise not receive these vital services. The Associations and their Rural Communications Provider members, therefore, have a substantial interest in the outcome of this matter. As demonstrated herein by facts gathered in a recent survey of these members (the “FUSF Participant Report”),³ if Section 254 is deemed unconstitutional, they will no

3. The FUSF Participant Report was prepared by the Amici Associations based on a survey of their Rural Communications Provider members and several dozen interviews of Survey Respondents. See Communications Providers’ Report on Federal Universal Service Funds Programs Distributions and Contributions, January 9, 2025, https://drive.google.com/file/d/19ky1ZvR1a47Rxd6wU38Z-r6B_cLURW2k/view?usp=sharing. Approximately 28% of the Associations’ combined total Rural Communications Providers responded to the survey (the “Survey Respondents”). *Id.* at 1–2.

longer be able to achieve Congress's aims to preserve and advance universal service as Section 254 directs. As a result, millions of their customers and potential customers would pay significantly more for, or even lose access to, telecommunications and broadband services.

SUMMARY OF ARGUMENT

The Associations herein demonstrate, through a survey of Rural Communications Providers assessing the workings of the FUSF distribution programs and contribution mechanism, that Congress, in enacting Section 254, provided sufficient and specific intelligible principles that the FCC used, and is using, to implement, administer, and oversee intertwined distribution and contribution mechanisms to advance and achieve the provision of universal telecommunications and information (*i.e.*, broadband Internet access) services. Should the Court not agree with this conclusion and uphold the en banc Fifth Circuit opinion,⁴ it would negate Congress's objectives in enacting Section 254, stranding millions of Americans and schools, libraries, and health care institutions without affordable vital communications services. Accordingly, the Court should find Section 254 constitutional.

Section 254's principles include directives and guidance to the FCC to implement, administer, and oversee the FUSF. To ensure that universal service constitutes an evolving level of services, Congress directs the FCC to periodically review its universal service support programs to account for advances in telecommunications

4. *Consumers' Research v. FCC*, 109 F.4th 743 (5th Cir. 2024) (en banc).

and information technologies and services. Congress also requires all telecommunications carriers and other providers of telecommunications to contribute funds to support these programs through a specific, predictable, and sufficient mechanism established by the FCC.

Since enactment of Section 254, the FCC has used, and continues to use, the statute's guidance to implement Congress's objectives through FUSF programs and the contribution mechanism. The FUSF Participant Report demonstrates this conclusion: the Rural Telecommunications Providers are delivering vital communications services to economically challenging areas and financially challenged customers, neither of which would be served without FUSF funding.

Contrary to the en banc Fifth Circuit opinion, there is no ambiguity in Section 254's guidance to the FCC. Were it otherwise, the Rural Communications Providers would not have been able to use FUSF support to achieve Congress's aims. If, however, the Court believes that Section 254 is ambiguous, the canon of constitutional avoidance dictates that the Court find the statute constitutional in light of the "fairly possible" interpretations of Courts of Appeals panels, including the Sixth and Eleventh Circuits. In rejecting those interpretations, the Fifth Circuit en banc opinion failed to address the canon of constitutional avoidance; as a result, its finding of unconstitutionality should be reversed.

Finally, the en banc Fifth Circuit opinion rests on a false narrative by mischaracterizing and overstating the growth in FUSF program distributions and the size of contributions. As the Associations demonstrate herein,

in implementing Section 254, the FCC has been guided by and acted consistent with Congressional requirements and purposes.

The Court should find in favor of the Petitioners and reverse the judgment of the Fifth Circuit, *Consumers' Research v. Federal Communications Commission*, 109 F.4th 743 (5th Cir. 2024).

GENERAL BACKGROUND

The communications business is characterized by very high fixed and low marginal costs. That presents a challenge to the Rural Communications Providers and others who operate in remote and low-density areas where networks cover vast areas with few customers. A recent analysis commissioned by the Fiber Broadband Association found that the cost to deploy aerial telecommunications facilities (*i.e.*, the “cost per home passed” or “CPHP”) ranged “from under \$700 to \$1500 for respondents in suburban and urban environments, and \$1.3K to \$2.7K in more rural areas.”⁵ The divergence of network construction costs between urban and sparsely-populated regions can

5. See The Fiber Broadband Ass'n, *Fiber Deployment Annual Report 2023*, 13 (2023), https://fiberbroadband.org/wp-content/uploads/2024/01/Fiber-Deployment-Annual-Report-2023_FBA-and-Cartesian.pdf. The National Telecommunications and Information Administration (“NTIA”) similarly reported in 2022 that costs to deploy networks in sparsely-populated areas are several times higher than in densely-populated ones. See U.S. Dep't of Commerce, NTIA, *Internet For All, Broadband 101*, 39 (2022), https://broadbandusa.ntia.doc.gov/sites/default/files/2022-12/IFA_Broadband_101.pdf.

be even more extreme in select areas.⁶ For instance, in a Tribal reservation in Osage County, Oklahoma, a provider reported having a CPHP of over \$42,000, and another provider in a Tribal reservation in Winnebago, Nebraska reported having a CPHP of nearly \$54,000.⁷

To provide service in sparsely-populated areas, the Rural Communications Providers rely on the financial support provided by the FUSF programs funded through the contribution mechanism mandated in Section 254 and implemented by the FCC. The Rural Communications Providers, and customers in areas they alone serve, access support from four FUSF programs:

- The **High-Cost programs** support deployment and operation of telecommunications and broadband services in rural, remote, and insular areas of the country. Virtually all of the Rural Communications Providers receive funds from the High-Cost programs.⁸
- The **Lifeline program** provides low-income customers with discounts to pay for service and connection charges. The Rural

6. See FUSF Participant Report at 7 n.28 (describing specific examples of the cost of network construction in rural areas); Montana Telecomm. Ass'n, *A Report on the State of Rural Broadband*, 6 (Oct. 2016), https://www.broadbandmt.com/assets/docs/MTA_Broadband_Report_2016.pdf.

7. See Dori Erann, *The True Costs of Fiber in the U.S.*, CERAGON (Jun. 22, 2023), <https://www.ceragon.com/blog/the-true-costs-of-fiber-in-the-u.s>.

8. See FUSF Participant Report at 7–8.

Communications Providers that participate in this program file with the Universal Service Administrative Company (“USAC”) to receive support for the discounts they provide qualifying customers.

- The Schools and Libraries program, *i.e.*, the “**E-Rate**” program, provides funds to qualifying schools and libraries, which use those funds to pay for telecommunications and broadband services from the Rural Communications Providers.
- The **Rural Health Care program** makes monies available to qualifying rural health care institutions, which use those funds to help pay for telecommunications and broadband services from the Rural Communications Providers at rates similar to those of their urban counterparts.

This FUSF funding bridges the economic chasm between the very high costs to deploy and operate networks and provide services in rural areas on one hand, and customers’ ability to pay for them on the other. FUSF funding also enables low-income and financially-strapped educational and health care institutions to afford telecommunications and broadband services. Further, the FUSF programs are not only a source of funding, but Rural Communications Providers leverage monies from the FUSF programs to obtain financing from other government programs and the private sector for network build-outs and upgrades in their service areas.

The Rural Communications Providers can only fully serve consumers and educational and health care institutions in these rural and low-density areas by accessing support directly and indirectly from the FUSF programs. Should the Rural Communications Providers no longer receive such support, they would be compelled to curtail network investment, reduce service, raise prices, or even exit the market. And millions of residents along with many schools, libraries, and health care institutions would be left without—or would have no hope of receiving—affordable telecommunications and broadband services.

ARGUMENT

I. Section 254 Sets Out Clear Congressional Objectives through Intelligible Principles and Specific Guidance

The concept of universal service is embedded in Section 1 of the Communications Act, 47 U.S.C. § 151, adopted in 1934. The statute created the FCC “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges. . . .” *Id.*

The FCC implemented this directive prior to Congress’s adoption of Section 254 by maintaining affordable rates for basic telephone service through subsidies of local rates by long distance rates, residential

rates by business rates, and rural rates by urban rates. In 1985, following the divestiture of AT&T's local telephone operations and adoption of pro-competition policies for long distance services, the FCC began to displace these implicit subsidies as the means of preserving and advancing universal service by establishing an initial High-Cost program and Lifeline program, pursuant to the general authority of Sections 1, 4(i), 201, and 205 of the Communications Act. 47 U.S.C. §§ 151, 154(i), 201, and 205. These programs were funded through fees on interstate long-distance telecommunications carriers.⁹ Then, in 1996, building on these FCC support programs and modifying the nature and scope of the contribution mechanism to fund those programs, Congress enacted Section 254 to authorize the FUSF.

In Section 254, Congress provides the framework—intelligible principles—for the FCC's implementation, administration, and oversight of the FUSF programs and contribution mechanism.¹⁰ The statute sets forth the Congressional objectives for universal service (accessible, quality, and affordable telecommunications and information services, such as broadband Internet access), 47 U.S.C. §§ 254(b)(1)-(6), the programs to be implemented (defined by the beneficiaries of each program), *id.* §§ 254(b)(3), (b)(6), (h)(1)-(2), and (j), the conditions imposed on each of the programs, *id.*

9. *In re Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8782 ¶ 6 (1997) (hereinafter "1997 USF Order") (subsequent history omitted).

10. *1997 USF Order* at 8799–806 ¶¶ 43–55 (discussing the principles of Sections 254(b)(1)-(7) and the Joint Board recommendations based thereon).

§§ 254(c)(1), (c)(3), (e), (g), and (h)(3)-(5), and the means by which the programs are to be funded, *id.* §§ 254(b)(4), (d), and (j). Importantly for purposes of this matter, in Section 254 Congress directs the FCC to mandate that providers of telecommunications services contribute to the FUSF on an equal and non-discriminatory basis. *Id.* §§ 254(b)(4) and 254(d).¹¹ Congress also directs the FCC, by giving it the authority to exempt carriers whose contributions would be de minimis to the overall goal of “preservation and advancement of universal service,” and by empowering it, “as the public interest so requires,” to collect contributions to support universal service from other providers of interstate telecommunications (a broader class of providers than telecommunications carriers since some providers offer telecommunications that are not telecommunications services). 47 U.S.C. § 254(d). Compare *id.* § 153(50) with *id.* § 153(52) (definitions of “telecommunications” and “telecommunications services”).

In developing the FUSF programs and distributing the funds collected from providers, the FCC is guided by additional intelligible principles set forth in Section 254. Congress requires the FCC to ensure that “[q]uality services [are made] available at just, reasonable, and affordable rates,” *id.* § 254(b)(1), and that “[a]ccess to advanced telecommunications and information services should be

11. In the *1997 USF Order*, its first Report and Order implementing Section 254, the FCC explained that “we modify the funding methods for the existing federal universal service support mechanisms [*e.g.*, the pre-existing High Cost and Lifeline programs] so that such support is not generated, as at present, entirely through charges imposed on long distance carriers. Instead, as the statute requires, we will require equitable and non-discriminatory contributions from all providers of interstate telecommunications service.” *1997 USF Order* at 8782 ¶ 6.

provided in all regions of the Nation,” *id.* § 254(b)(2). Section 254(b)(3) explains that consumers throughout the country, “including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services . . . that are reasonably comparable to those services provided in urban areas” and “at rates that are reasonably comparable to rates charged for similar services in urban areas.” *Id.* § 254(b)(3).¹² Section 254(b)(6) specifies that “[e]lementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection [254](h).” 47 U.S.C. § 254(b)(6).

The many parts of Section 254(h) spell out in detail the terms applicable to the E-Rate program and the Rural Health Care program. See generally *id.* § 254(h). Placing guardrails on the FCC in addition to specific mandates, Congress intends that providers and consumers benefitting from the FUSF programs find them “specific, predictable and sufficient . . . to preserve and advance universal service.” *Id.* § 254(b)(5).

II. The Real-World Impact of the FUSF Programs Demonstrates the FCC Is Carrying out Congress’s Objectives

There is no doubt that the FCC, in implementing, administering, and overseeing Section 254, has pursued and achieved, and is pursuing and achieving, Congress’s aims. Because of the FUSF programs, the Rural Communications Providers have deployed and operated, and are deploying and operating, high-quality networks

12. Section 254(j) preserved the FCC’s Lifeline program that was in place to support low-income consumers. See 47 U.S.C. § 254(j).

that provide affordable telecommunications and broadband services in high-cost areas and to low-income consumers, schools, libraries, and rural health care institutions, which these areas and customers otherwise would not receive. In implementing the principles embedded in Section 254 to administer the FUSF programs, the FCC thus has preserved and advanced, and continues to preserve and advance, the objective that Congress articulated in Section 254 (and in Section 1 of the Communications Act)—to provide access to quality services, including advanced telecommunications and information services, at just, reasonable, and affordable rates within all regions of the Nation. See *id.* §§ 254(b)(1)-(2).

The FUSF Participant Report reveals that funding from the FUSF programs is essential to the provision of affordable services to customers covered by those programs and makes clear that the FCC has administered, and is administering, the FUSF programs in a “specific, predictable and sufficient” manner that allows them to achieve Congress’s aim: providing services to customers that align with the objectives and principles of Section 254(b). See *id.* §§ 254(b)(1)-(3), (6).

A. The High-Cost Programs

The High-Cost programs¹³ make it possible for Rural Communications Providers to provide telecommunications

13. The High-Cost programs include the Broadband Loop Support and High-Cost Loop Support programs for the smallest providers, the Alternative Connect America Cost Model (“ACAM”) and Enhanced ACAM programs for somewhat larger providers, and the Connect America Fund II program and the Rural Digital Opportunity Fund to deploy facilities and services in rural areas once served by the largest providers, and other such targeted programs. See FUSF Participant Report at 6–7.

and broadband services in high-cost and rural or insular areas and to low-income customers within their authorized operating territories. See 47 U.S.C. §§ 254(b)(2)-(3). Survey Respondents largely serve low-density areas (fewer than ten homes per mile and often fewer than five homes per mile) where the cost to connect a customer's premises and provide telecommunications and broadband services is many times more expensive than in urban and suburban areas. See FUSF Participant Report at 2–3 nn.6–8.

Due to the availability of the High-Cost programs, 99% of Survey Respondents are providing—or are on a path to provide—telecommunications and broadband services to consumers in rural, insular, and high-cost areas that are reasonably comparable in quality and at rates of similar services provided in urban areas. *Id.* at 7–8. The Survey Respondents also report that they would be unable to serve the mostly residential customers in these areas without High-Cost support. *Id.* at 7 n.28, and 8 n.30. The High-Cost programs thus achieve a key Congressional objective embodied in Section 254. See 47 U.S.C. § 254(b)(3) (stating telecommunications and information services should be provided to consumers in all regions of the Nation that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas) and *id.* § 254(c)(1)(B) (requiring the FCC to consider the extent to which telecommunications services “have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers.”).

B. The Lifeline Program

The Lifeline program enables low-income consumers to access the Rural Communications Providers' telecommunications and broadband services that reasonably compare to services provided in urban areas at rates reasonably comparable to those that subscribers pay for similar services in urban areas. See 47 U.S.C. § 254(b)(3) (stating telecommunications and information services should be provided to consumers—including low-income consumers—in all regions of the Nation that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas). Virtually all Survey Respondents have customers qualifying for Lifeline discounts, and they expect nearly all of these customers will stop subscribing when their rates increase should the Lifeline program end. FUSF Participant Report at 10.

C. The E-Rate Program and Rural Health Care Program

Through the FCC's administration and oversight of the E-Rate and the Rural Health Care programs, the Rural Communications Providers are able to bring affordable telecommunications and broadband services to schools and libraries and rural health care institutions. As a result of the discounts the E-Rate program makes available to qualifying schools and libraries, many such institutions are able to afford the telecommunications and broadband services offered by the Survey Respondents, satisfying a directive of Congress in Section 254.¹⁴ See 47

14. See FUSF Participant Report at 11 (stating that almost 90% of the Survey Respondents make services available under the

U.S.C. § 254(b)(6) (stating that elementary and secondary schools, health care providers, and libraries should have access to advanced telecommunications services) and *id.* § 254(h)(1)(B) (telecommunications carriers shall provide, at a discount, “services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties . . . to ensure affordable access to and use of such services by such entities.”).

In addition, because of the Rural Health Care program, Survey Respondents are serving a significant number of qualifying rural health care providers that would otherwise be unable to take telecommunications and broadband services necessary for the provision of health care. See *id.* § 254(b)(6) (elementary and secondary schools, health care providers, and libraries should have access to advanced telecommunications services) and *id.* § 254(h)(1)(A) (telecommunications carriers shall provide, at a discount, “services which are necessary for the provision of health care services . . . at rates that are reasonably comparable to rates charged for similar services in urban areas in that State.”).¹⁵

As the Survey Respondents explain, the E-Rate program and the Rural Health Care program enable

E-rate program to schools and libraries, which receive monies giving them an effective 20-90% discount off of their services taken from Rural Communications Providers; the exact discount depends upon the proportion of students enrolled in free/reduced lunch Federal programs and whether the schools and libraries are located in urban or rural areas).

15. FUSF Participant Report at 13 (rural health care provider customers of over three-quarters of Survey Respondents participate in the Rural Health Care program); see also *id.* at 13 n.47.

the Rural Communications Providers to serve anchor institutions that are essential for vibrant and healthy rural and underprivileged communities. FUSF Participant Report at 12 n.43, and 13 n.48. Should these programs end, Survey Respondents expect many schools, libraries, and rural health care institutions would reduce, or cease subscribing to, the level of service they take today.¹⁶

III. The FUSF Programs Have Generated Substantial Reliance Interests and the Rural Communications Providers and their Customers Will Suffer Dire Consequences Should Section 254 Be Declared Unconstitutional

The Rural Communications Providers have relied and continue to rely on the FUSF programs on the premise that Congress enacted Section 254 in a constitutional manner. Their reliance is borne out by the FUSF Participant Report, which also reveals dire consequences should Section 254 be declared unconstitutional. Given the principles and guidance Congress provided in Section 254 and their implementation over many decades by the FCC, the Rural Communications Providers' reliance is well-founded, and the Court should take that reliance into account, as well as account for the harms that would ensue.

16. *Id.* at 11–12 (“Respondents expect, on average, about 48% of their school and library subscribers would limit or cease subscribing to their current suite of services because of the increased rates if E-rate program funding ends.”) and *id.* at 13 (“Respondents expect, on average, about 40% of their qualifying rural health care institution subscribers would limit or cease subscribing to their current suite of services.”).

A. The Rural Communications Providers Rely on the High-Cost Programs to Deploy and Operate Their Networks

The Report reveals that Survey Respondents use High-Cost program funds to deploy and operate their networks, including by leveraging these funds to obtain financing from private and other public sources. Such financing, in turn, enables them to bring telecommunications and broadband services to customers that otherwise would not be served or would be underserved—the prime directive of Section 254 and Section 1 of the Communications Act.

Almost 60% of Survey Respondents reported that they have obtained network construction loans based, at least in part, on continued receipt of High-Cost programs support. FUSF Participant Report at 8. Of these Survey Respondents, over 77% stated that they would risk default on these construction loans if High-Cost programs support was withdrawn. *Id.* Often, the Rural Communications Providers leverage High-Cost programs funding to obtain funding from other Federal government programs.¹⁷ For example, one Survey Respondent, Wheat State Technologies, explained that it obtained a Rural Utilities Service (“RUS”) loan to construct network facilities in its operating territory predicated upon receipt of High-Cost programs money. *Id.* at 8 n.30.

Survey Respondents also reported that a loss of High-Cost programs funding will cause them to scrap

17. *E.g., id.* at 7 n.28 (explaining that rural providers obtain loans or grants through federal rural development programs premised on receiving funds from the High-Cost programs).

or scale back plans for network investments they need to upgrade telecommunications and broadband information services and reach currently unserved and underserved consumers.¹⁸ One Survey Respondent, Mud Lake Telephone, observed that without the High-Cost programs support it would “stop all future construction projects” and be forced to “leave approximately 30% of our customers without access to high-speed fiber broadband.” *Id.* at 9 n.33. More than 90% of Survey Respondents reported that if High-Cost programs funding is terminated, they would cancel or limit network deployment projects, which could result in aggregate foregone investments of three-quarters of a billion dollars affecting almost two million customers. *Id.* at 9.

B. Survey Respondents Rely on the High-Cost and Lifeline Programs to Offer Service at Affordable Rates

Apart from the harm to network deployments and operations, Survey Respondents reported that termination of High-Cost programs funding would result in substantial rate increases for their customers. 80% of Survey Respondents expect rates would be increased by 25% or more to make up for lost funding. *Id.* Survey Respondents expect, on average, almost 50% of their customers to cease taking service as a result of the price increases, and seven percent of the Survey Respondents expect that all of their customers would cease taking service as a result of the rate increases. *Id.*

18. *Id.* at 9 (“Over 90% (178 of the 192 High-Cost program Respondents) state that if HCP funding is terminated, they would cancel or limit future network deployment projects.”).

Similarly, were the Lifeline program to cease providing support, the Survey Respondents anticipate that virtually all customers participating in this program could no longer afford to subscribe,¹⁹ undermining the FCC’s achievements and contrary to the statute’s directives.

C. Schools, Libraries, and Rural Health Care Institutions Rely on the E-Rate and Rural Health Care Programs for Affordable Services

Survey Respondents reported that the termination of E-Rate and Rural Health Care programs funding would harm rural schools, libraries, and health care institutions that rely on support from these programs to operate. From 2022-2024, 106,000 schools and 12,597 libraries received over \$7 billion in E-Rate funding, benefitting many millions of students and library patrons.²⁰ Students and library patrons in rural communities especially benefit because they have fewer service options. FUSF Participant Report at 3 n.10. Should funding through the

19. *Id.* at 10–11 (“These Communications Providers expect about 98% of their qualifying low-income customers will terminate service due to the end of their Lifeline program discount.”); see also Benton Institute for Broadband & Society, *The Importance and Effectiveness of the Lifeline Program* (Aug. 28, 2023), <https://www.benton.org/blog/importance-and-effectiveness-lifeline-program> (finding in survey results that “78 percent of Lifeline customers say they cannot afford any co-pay more than \$10 per month.”).

20. *E.g.*, Robert F. Smith, *The Digital Divide in Education: Navigating Learning Inequities* (Aug. 29, 2023), <https://robertsmith.com/blog/digital-divide-in-education/>; American Library Association, *National survey finds libraries play expanded role in digital equity, bridging gaps in access to technology* (Aug. 31, 2021), <https://www.ala.org/news/press-releases/2021/08/national-survey-finds-libraries-play-expanded-role-digital-equity-bridging>.

E-Rate program become unavailable, Survey Respondents expect, on average, about 48% of their school and library customers would limit or stop subscribing to services they receive because of the resulting increased rates. *Id.* at 11–12. As one Survey Respondent, Ligonier Telephone Company, explained, “should FUSF be terminated, those school systems [that benefit today] would need to scale back their telecommunications and broadband services as their budgets cannot accommodate the costs for what they currently have without E-Rate support.” *Id.* at 12 n.43.

Similarly, the Rural Health Care program is much needed because rates for service in less-populated areas are much higher than in urban areas.²¹ From 2021–2023, approximately 16,000 rural health care institutions received over \$1.6 billion for connections.²² Should Rural Health Care program funding end, Survey Respondents expect, on average, about 40% of their qualifying rural health care institution customers would limit or terminate subscribing to services, due to increased rates. FUSF Participant Report at 13.

21. See Katrina Torng, *Digital Divide: Broadband Pricing by State, Zip Code, and Income Level*, BROADBANDNOW (May 6, 2022) <https://broadbandnow.com/research/digital-divide-broadband-pricing-state-zip-income-2019> (“Rural communities have less access to wired broadband internet. Even when an option is available, prices are higher.”).

22. *Infra*, n.27.

D. Rural Communications Providers and Their Customers Have No Recourse Should the Court Find Section 254 Unconstitutional

The FUSF is essential to ensuring that affordable telecommunications and broadband services are available in high-cost areas, to low-income consumers, and to schools, libraries, and rural health care institutions, as Congress intended. See 47 U.S.C. § 254(h). The Court should not be under any illusion that the Rural Communications Providers, who alone provide service where they receive High-Cost programs funding, have access to other sources of funding to enable them to serve their customers to the extent they do today. Thus, not reversing the en banc Fifth Circuit’s judgment would cause immediate, substantial harm.

The Associations acknowledge that the Broadband Equity, Access, and Development (“BEAD”) program enacted in the 2021 Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429, 449 (2021) (“Infrastructure Act”) allocates \$42 billion for expanding broadband infrastructure to unserved and underserved locations. But the BEAD funding is not redundant with the FUSF programs, and thus it will not offset the harm that will ensue should the Court not reverse the judgment of the Fifth Circuit. For instance, the BEAD program will not cover costs to maintain, upgrade, and operate networks that are already deployed and are now supported by the FUSF High-Cost programs.²³

23. U.S. Dep’t of Commerce, NTIA, *Notice of Funding Opportunity, Broadband Equity, Access, and Deployment Program*, 36 (2022), <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf> (“In identifying an Unserved

Further, it is well-recognized that BEAD funding alone will not ensure universal service to all unserved and underserved locations.²⁴ Indeed, Congress, when passing the Infrastructure Act, confirmed this reality, by not supplanting, limiting, or curtailing the FCC’s administration and oversight of Section 254’s High-Cost programs.

IV. Should the Court Find That Section 254 Is Ambiguous in the Guidance Congress Gave the FCC, the Court Should Invoke the Canon of Constitutional Avoidance to Find Section 254 Constitutional

The foregoing discussion demonstrates that Congress provided the FCC with clear and unambiguous, and “specific, predictable, and sufficient” principles and guidance under Section 254. Yet, even if this Court finds ambiguity in Section 254 as the Fifth Circuit en banc opinion did, see *Consumers’ Research*, 109 F.4th at 749, given that there are contrary, competing interpretations of the statute by the Sixth and Eleventh Circuits, this Court should apply the canon of constitutional avoidance

Service Project or Underserved Service Project, an Eligible Entity may not treat as “unserved” or “underserved” any location that is already subject to an enforceable federal, state, or local commitment to deploy qualifying broadband as of the date that the challenge process described in Section IV.B.6 of this NOFO is concluded.”).

24. See Kelly Huh, *\$42B in Broadband Funding: See Where That Money Is Going in Each State*, REVIEWS.ORG (Sept. 24, 2024), <https://www.reviews.org/internet-service/bead-internet-funding-across-states/> (even with this funding, rural states are still not receiving enough to cover the cost of installing fiber in high-cost areas. For example, Nebraska received \$206.62 per resident, when installing in the most rural areas can cost over \$50,000).

to uphold Section 254 by adopting the interpretation that does not create a constitutional infirmity.²⁵

The nondelegation analysis “always begins with statutory interpretation.” *Consumers’ Research*, 109 F.4th at 759-60. In interpreting statutes, where there are competing interpretations revealing an ambiguity, this Court has repeatedly invoked the doctrine of constitutional avoidance, which is a “tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.” *Clark v. Martinez*, 543 US 371, 381 (2005) (“[O]ne of the canon’s chief justifications is that it allows courts to *avoid* the decision of constitutional questions.”) (emphasis in original); see also *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.) (“[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.”).

25. The Associations recognize that the Fifth Circuit’s en banc opinion does not rest on the alleged ambiguity of Section 254 alone, but also on what the court below perceived as the “unprecedented nature of delegation combined with other factors”. See *Consumers’ Research*, 109 F.4th at 767. It is this flawed combination-of-factors analysis of the Fifth Circuit that this Court should reject, as the Government argues persuasively. See Brief for the Federal Petitioners, *Federal Communications Commission, et al. v. Consumers’ Research, et al.*, 48-49 (Jan. 9, 2025) (Nos. 24-354 and 24-422). Once the Fifth Circuit’s “combination of factors” theory is rejected, the Court still will need to address whether there is an ambiguity in Section 254. As discussed below, even if the Court finds an ambiguity, it should rule in favor of the FCC based on the canon of constitutional avoidance.

The assumption is that “Congress, no less than the Judicial Branch, seeks to act within constitutional bounds, and thereby diminishes the friction between the branches that judicial holdings of unconstitutionality might otherwise generate.” *Federal Communications Commission v. Fox TV Stations, Inc.*, 556 U.S. 502, 565–66 (2009), citing *Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998) (additional citations omitted). As Justice Barrett recently put it, if an interpretation of a statute is at least “fairly possible,” it should be accepted to avoid a constitutional issue. *United States v. Hansen*, 599 U.S. 762, 781 (2023) (“It bears emphasis that even if the Government’s reading were not the best one, the interpretation is at least ‘fairly possible’—so the canon of constitutional avoidance would still counsel [the Court] to adopt it.”) (citation omitted).

Here, the Fifth Circuit reasoned that Section 254 provided no intelligible principles governing the delegation of power to the FCC because, according to that court, the statute is “so ambiguous that it is unclear whether Americans should contribute \$1.37 billion, \$9 billion, or any other sum to pay for universal service.” *Consumers’ Research*, 109 F.4th at 752. The court concluded that the definition of “universal service” was not “sufficiently intelligible” but instead was “so amorphous” that the FCC could “exact as much tax revenue for universal service projects as FCC thinks is good.” *Id.* This despite the statute setting forth in detail the features of “universal service” that Congress sought to “preserve and advance” (*e.g.*, those services that are “essential to education, public health, or public safety,” among other things) and the beneficiaries of the FUSF programs. See Section I, *supra*. Yet, nowhere in its decision interpreting Section

254 did the Fifth Circuit recognize, much less apply, the doctrine of constitutional avoidance or the presumption that the statutes passed by Congress are constitutional.

The Fifth Circuit’s interpretation of Section 254, however, is not the only “fairly possible” interpretation of the sufficiency of the principles Congress provided to guide the FCC’s administration of the FUSF programs. See *Hansen*, 599 U.S. at 781. Other courts of appeals facing the very same challenge by Respondents adopted a contrary interpretation of Section 254, holding that, under a fair reading and analysis, it *does* provide an intelligible standard for the FCC to carry out its delegated powers to implement, fund, and administer the FUSF programs. The Sixth Circuit in *Consumers’ Research, v. Federal Communications Commission*, 67 F.4th 773, 778 (6th Cir. 2023), for example, explained that “[l]ooking to § 254 to analyze ‘what task it delegates and what instructions it provides’ and determining whether Congress ‘sufficiently guide[d]’ the FCC’s discretion, we hold that Congress provided an intelligible principle and its delegation does not violate the separation of powers.” (citation omitted). The Eleventh Circuit is in accord: “We agree with the Sixth Circuit that the principles in § 254 collectively ‘direct the FCC on (1) what it must pursue: accessible, quality, and affordable service. (2) How the FCC must fund these efforts: by imposing carrier contributions. (3) The method by which the FCC must effectuate the goals of accessible, sound-quality, and affordable service: by creating specific mechanisms for the Fund. And (4) to whom to direct the programs: by identifying the USF’s mechanisms’ beneficiaries.” *Consumers’ Research v. Federal Communications Commission*, 88 F.4th 917, 924 (11th Cir. 2023).

Thus, even if the Court concludes that Section 254 is ambiguous (as the en banc Fifth Circuit concluded), there is a “fairly possible” competing interpretation of Section 254 adopted by other federal appeals courts (including the original panel decision of the Fifth Circuit), which all found that Section 254 expresses an intelligible principle and passes constitutional muster. This Court should invoke the doctrine of constitutional avoidance and adopt the interpretation advanced by the FCC, the original and dissenting Fifth Circuit opinions in *Consumers’ Research*, and the Sixth and Eleventh Circuits to uphold the constitutionality of the law.

V. The En Banc Fifth Circuit Mischaracterizes the FUSF Program; FUSF Contributions Have Not Sky-Rocketed Since 1996

The en banc Fifth Circuit mischaracterizes the FCC’s implementation of the contribution mechanism Congress mandated in Section 254. By no means has the FCC ventured outside Congress’s vision and direction in implementing, administering, and overseeing the contribution mechanism as the FUSF programs have evolved.

The en banc Fifth Circuit observes that the dollar size of the FUSF programs increased severalfold from 1995, the year before Section 254 was adopted, to 2021. *Consumers’ Research*, 109 F.4th at 750–51 (internal citation omitted). However, in 1995, universal service was composed of both implicit and explicit High-Cost support. From 1995 to 2005, the FCC eliminated most implicit support for high-cost areas and added explicit support to the High-Cost program from contributions by providers of telecommunications, which resulted in the amount of

High-Cost program funding increasing. Since 2005, the amount of annual High-Cost funding has declined in inflation adjusted dollars.²⁶

In addition, in 1995 the E-Rate or Rural Health Care programs did not exist. Per the FCC, the E-Rate program funding for funding year 2022 was above \$2 billion and Rural Health Care funding was \$0.5 billion.²⁷ These two programs constituted 35% of the total annual FUSF funding disbursements in 2022.²⁸ Moreover, disbursements for the High Cost programs in 2022 were a billion dollars less than in 2021, the Fifth Circuit’s benchmark year for characterizing the growth of the FUSF programs.²⁹

The en banc Fifth Circuit also ignores the evolving need for universal service support, which Congress mandated the FCC take into account. See 47 U.S.C. § 254(c)(1) (“Universal service is an evolving level of

26. Federal-State Joint Board on Universal Service, *Universal Service Monitoring Report*, 23, Table 1.10 (2023) (providing data through 2022), <https://docs.fcc.gov/public/attachments/DOC-401168A1.pdf>.

27. *Id.*

28. *Id.*

29. *Id.* (\$5,128 million in 2021 and \$4,131 million in 2022). As the FCC explained in its 2022 FCC Report to Congress on the FUSF that “USF program disbursements and demand, however, have remained relatively stable . . . ; in 2012, USF disbursements were \$8.71 billion, and in 2020 disbursements were \$8.27 billion.” *In the Matter of Report on the Future of the Universal Service Fund*, 37 FCC Rcd 10041, 10087 ¶ 92 (2022) (hereinafter “2022 FCC Report to Congress”). Indeed, in 2022, the total distributions in the FUSF Programs had declined to approximately \$7.3 billion, just above 2009 levels.

telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services.”). Thus, while in 1995 the FCC’s universal service mechanism focused solely on voice telecommunications services, the FCC shortly thereafter determined that broadband had become a vital information service and that the FUSF programs should provide support to bring such service to unserved areas and consumers and anchor institutions in need. This reflected Congress’s direction that “low-income consumers and those in rural, insular, and high-cost areas, should have access to telecommunications and information services” at affordable rates comparable to urban areas. 47 U.S.C. § 254(b)(3).

The en banc Fifth Circuit additionally disregards inflationary effects. For example, 1995 dollars were worth substantially more than 2021 dollars. \$1.37 billion in 1995 equates to \$2.26 billion in 2021 based on annual Gross Domestic Product Chain-type Price Index (“GDPCTPI”) changes.³⁰

The en banc Fifth Circuit further contends that because the quarterly contribution factor assessed on the end user telecommunications revenues has gone from just over 5% to as high as 34.5% (proposed),³¹ Congress has not

30. See U.S. Bureau of Economic Analysis, Gross Domestic Product: Chain-type Price Index [GDPCTPI], retrieved from FRED, Federal Reserve Bank of St. Louis, <https://fred.stlouisfed.org/series/GDPCTPI>. See also 47 C.F.R. §§ 54.507(a)(1)–(2), §§ 54.619(a)(1)–(2) (explaining that GDPCTPI is used to calculate annual increases in the E-Rate and Rural Health Care programs).

31. *Consumers’ Research*, 109 F.4th at 751.

provided the FCC with an intelligible principle in Section 254. But a “look under the hood” at changes in the volume of the contribution base demonstrates otherwise. In Section 254, Congress limited contributions to providers of telecommunications, excluding providers of non-telecommunications, such as those providing information services. 47 U.S.C. § 254(d). In the past 25 years, the share of revenues of communications service purchased by subscribers that qualify as telecommunications subject to FUSF contributions relative to revenues from services not subject to FUSF contributions (*e.g.*, broadband) has shrunk dramatically. The FCC observed in its *2022 FCC Report to Congress* that, “given that the size of the Fund has been relatively stable, it is apparent that the eroding contribution base is the primary driver of the increased contribution factor.”³² The typical mix of services taken by customers today includes a much higher share of broadband services than telecommunications, and the overall spend on services (even accounting for surcharges to recover FUSF contributions) has not changed materially.³³

32. *2022 FCC Report to Congress*, 37 FCC Rcd at 10087 ¶¶ 91–92 (where the FCC noted that “contribution burden on households has been relatively stable in recent years” referencing 2017 through 2022 statistics, but that “[t]he contribution factor, however, has increased . . . [P]roviders are reporting a declining share of telecommunications revenues and an increasing share of non-telecommunications revenues. Specifically, in 2011, total revenues were \$475.6 billion, with telecommunications revenues amounting to \$261.0 billion and non-telecommunications revenues amounting to \$214.5 billion. In 2020, total revenues increased to \$512.5 billion, with telecommunications revenues dropping to \$133.0 billion and non-telecommunications revenue increasing to \$379.5 billion.”) (footnotes omitted).

33. FUSF Participant Report at 14 (nearly two-thirds of the interviewees providing estimates report that their overall

At the same time, the infrastructure and services supported by FUSF Program mechanisms have expanded to include broadband infrastructure and services, as noted above. The combined result of these various factors is an increase in the contribution factor assessed on telecommunications revenues alone. But such services, on average, are an increasingly smaller amount of the customers' total spend.³⁴ This suggests, perhaps, that the framework established by Congress has failed to keep up with marketplace developments, and that as a policy matter it may be time to change how contributions are assessed. But any policy debate on these grounds is not germane to the issues before the Court and the ultimate question in this case of Section 254's constitutionality.

CONCLUSION

The FCC has implemented, administered, and overseen, and continues to implement, administer, and oversee, Section 254's distribution programs and contribution mechanism pursuant to sufficient and specific

contribution remittance into the program has remained about the same or decreased over the last 10 or 15 years); *2022 FCC Report to Congress*, 37 FCC Rcd at 10087 ¶ 91 (“providers are reporting a declining share of telecommunications revenues and an increasing share of non-telecommunications revenues”).

34. *2022 FCC Report to Congress*, 37 FCC Rcd at 10087 ¶ 91 (“USF program disbursements and demand, however, have remained relatively stable over the past decade; in 2012, USF disbursements were \$ 8.71 billion, and in 2020 disbursements were \$ 8.27 billion”); Michael A. Williams, PhD and Wei Zhao, PhD, *NTCA-USF Study, Universal Service Contribution Methodology*, BERKLEY RESEARCH GROUP, LLC, 13–14 ¶¶ 19–20 (Dec. 13, 2022), <https://www.fcc.gov/ecfs/document/12130687900947/2>.

Congressional mandates and guidance—clear intelligible principles. Proof positive is found in the FUSF Participant Report, which confirms that the Rural Communications Providers, through the FUSF programs, have brought and are bringing affordable telecommunications and information services to millions of individuals and institutions who would not otherwise receive them. Yet, even if the Court were to find that there is an ambiguity in Section 254, the canon of constitutional avoidance dictates that the Court find the statute constitutional in light of the “fairly possible” interpretations by the other several U.S. Courts of Appeals panels. This Court should rule in favor of the FCC by reversing the judgment of the Fifth Circuit.

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