Nos. 24-354 & 24-422

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

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

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

v.

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

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

BRIEF OF BIPARTISAN FORMER COMMISSIONERS OF THE FEDERAL COMMUNICATIONS COMMISSION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Administrative Decisions

Statutes, Rules, and Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici are the following bipartisan group of former chairs and commissioners of the Federal Communications Commission (FCC or Commission):

- Kathleen Q. Abernathy (Commissioner, 2001–2005)
- Jonathan S. Adelstein (Commissioner, 2002–2009)
- Rachelle B. Chong (Commissioner, 1994–1997)
- Mignon L. Clyburn (Acting Chairwoman, 2013; Commissioner, 2009–2018)
- Julius Genachowski (Chairman, 2009–2013)
- Reed E. Hundt (Chairman, 1993–1997)
- Tom Wheeler (Chairman, 2013–2017)
- Richard E. Wiley (Chairman, 1974–1977; Commissioner, 1972–1974)

While *Amici* have differing views on many regulatory issues, they share the view that the decision below misunderstands the FCC's role in discharging its statutory responsibilities to advance universal service. *Amici* also share the view that allowing the decision below to stand would undermine

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* or their counsel made a monetary contribution to its preparation or submission.

important universal-service programs that help rural and other under-served communities enjoy the benefits of ubiquitous advanced communications services.

During their combined tenures serving in the FCC's leadership, which span seven administrations, *Amici* have become intimately familiar with the workings of the Communications Act, the FCC's statutorily prescribed responsibility to advance universal service, and the agency's relationship with the Universal Service Administrative Company (Administrator or USAC). *Amici* are thus well-suited to provide the Court with insights and context concerning these issues, including highlighting the Fifth Circuit's misunderstandings of how the FCC exerts close supervision and control over the Administrator. *Amici* also have a strong interest in ensuring that the FCC's universal-service programs continue to serve Congress's objectives and that the Commission can continue to "preserve and advance universal service," as Congress has specifically directed it to do. 47 U.S.C. § 254(d).

SUMMARY OF ARGUMENT

The Fifth Circuit held that the mechanism that determines contributions to the federal Universal Service Fund (USF or Fund) is unconstitutional because "the combination of Congress's broad delegation" to the FCC and the FCC's "subdelegation" to the Administrator "amounts to a constitutional violation." *Consumers' Rsch. v. FCC*, 109 F.4th 743, 756 (5th Cir. 2024) (*en banc*). The Fifth Circuit's

analysis, however, (1) misconstrues the FCC's relationship with, and control of, the Administrator, (2) glosses over the existing statutory limitations on the FCC's authority to assess contributions and otherwise advance universal service, and (3) would deprive the federal government of the flexibility necessary to keep up with developments in the dynamic area of advanced communications technology.

I. Contrary to the Fifth Circuit's characterization, the FCC does not merely "rubber stamp" the Administrator's work. The FCC—not the Administrator—sets the "contribution factor" (*i.e.*, the percentage of revenues subject to USF contributions that communications service providers must remit to the Fund). 47 C.F.R. § 54.709(a)(3). In determining the proper contribution factor, the Commission considers data (including projections of demand for USF funding, revenues subject to contributions, and administrative expenses) collected by the Administrator based on filings by service providers. And the Commission carefully controls the Administrator's activity in three significant ways. First, the Commission creates the forms that the Administrator uses to collect its data. The Commission thereby sets the stage for the types of data the Administrator will receive and defines which categories of service provider must contribute to the Fund. Second, the Commission *independently* establishes the contribution factor after reviewing the Administrator's demand and expense projections, as well as its

calculations of total assessable revenues. At this stage, the Commission can, and sometimes does, adjust the numbers provided by the Administrator; but in either case, the Commission (not the Administrator) takes the affirmative step of determining and announcing the tentative contribution factor. The Commission also retains the authority to revise the contribution factor (sometimes in response to comments from interested parties) within fourteen days of its public notice. Third, the Commission acts as an appellate administrative tribunal that reviews *de novo*—and, in appropriate instances, reverses—decisions by the Administrator relating to the contribution factor or other issues.

The Fifth Circuit ignored the first and third levers of control, while misapprehending how the second one works. *See Consumers' Rsch.*, 109 F.4th at 771. In particular, the court conflated the public-notice period, during which the Commission solicits public comments on the contribution factor that it proposes, with the process by which the Commission determines the contribution factor. *Id.* at 750. In sum, the court's conclusions were based upon a misunderstanding of the regulatory framework.

II. The statutory scheme provides meaningful limitations on the Commission's actions to preserve and advance universal service, including its management of the Fund. Sections 254(b)–(e) of the Communications Act provide concrete limitations that courts have used to review the Commission's universal-service decisions. The Commission addresses the statutory bounds of its authority in its

decisions, and, on the rare occasions when it has exceeded those limitations, it has been reversed on judicial review.

Moreover, as *Amici* are well aware, the Commission has declined to pursue various proposed reforms to its USF programs and rules when it has concluded that those reforms would conflict with the universal-service principles enumerated in Section 254 of the Communications Act or otherwise exceed the FCC's statutory authority. This restraint, as well as the substantial body of federal case law elaborating on the statutory limits of the FCC's authority, demonstrate at a minimum an intelligible principle guiding the Commission's conduct. The Fifth Circuit's contrary conclusion was mistaken.

III. Finally, the Fifth Circuit's decision endangers the federal government's ability to support expanded access to communications services—an important and longstanding federal policy. Rather than rely on *ad hoc* and piecemeal appropriations to expand the availability of communications services, Congress deliberately chose to vest the Commission with authority to respond nimbly to new developments in technology—as exemplified by the growth of the internet and high-speed broadband services. The Fifth Circuit's decision would eliminate that flexibility and throw federal efforts to support access to vital communications services into disarray.

ARGUMENT

I. The FCC Is the Ultimate Decisionmaker When Implementing Universal-Service Programs, and It Controls the Administrator Through Three Distinct Levers.

In *Amici*'s experience, the Commission does not simply "rubber stamp" the Administrator's work. The Fifth Circuit's contrary characterization rested on a misunderstanding of the regulatory framework. First, the court overlooked multiple layers of the Commission's control over the contribution factor—instead focusing exclusively on the Commission's review of the Administrator's demand and expense projections. *See Consumers' Rsch.*, 109 F.4th at 771. ("That [the] FCC retains discretion to revise the proposed contribution amount is insufficient." (citation omitted)). Second, the court overlooked that the FCC *always* affirmatively approves or rejects (rather than passively acquiescing to) the Administrator's demand and expense projections. *Id.* ("The first problem is that FCC regulations provide that [the Administrator's] projections take legal effect without formal FCC approval.").

The Commission's control over the contribution-factor determination begins long before the Administrator presents its projections, and it continues even after the Commission approves those numbers (if it approves them at all). The Commission's levers of control include (1) establishing the inputs for calculating the contribution factor; (2) reviewing the data that the Administrator collects, revising the data as needed, and then independently establishing the

contribution factor; and (3) handling administrative appeals of the Administrator's actions (including its actions concerning the contribution factor). Individually and collectively, these measures ensure that the FCC retains close supervision and control over the Administrator. This regime is a far cry from a mere rubber stamp—much less an unconstitutional subdelegation of regulatory authority.

The Commission's comprehensive control is not only apparent from the Commission's rules, which specify that the Administrator "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress," and instead must "seek guidance from the Commission" if the statute or rules "are unclear" or "do not address a particular situation." 47 C.F.R. § 54.702(c). It is also apparent from how the Commission and the Administrator actually operate in practice when the FCC establishes the quarterly contribution factor—a subject on which *Amici* have substantial experience.

Step 1: The FCC Determines the Data to Collect and Controls the Contribution-Factor Process.

First, the FCC closely regulates what data, or inputs, the Administrator collects. The Administrator receives data from communications providers through two forms: the 499-A and the 499-Q. *See Federal Universal Service Support Mechanisms Quarterly Contribution Base for the First Quarter 2025*, Universal Serv. Admin. Co., 3 (Dec. 2, 2024), https://www.usac.org/fcc-filings/2025/first-quarter/financials/USAC%201Q2025%20Universal%

20Service%20Contribution%20Base%20Filing.pdf. The Form 499-A is used to report a service provider's actual revenues billed during the prior calendar year, while the Form 499-Q forecasts the provider's revenues for the next calendar quarter. By determining which providers must fill out these forms and what the forms require, the FCC exercises control from the outset of the process.

Each year, the FCC releases a public notice announcing any intended alterations to its Forms 499-A and 499-Q and invites interested stakeholders to comment on the changes. *See, e.g.*, *Wireline Competition Bureau Seeks Comment on Proposed Changes to the 2025 FCC Form 499-A, FCC Form 499-Q, and Accompanying Instructions*, DA 24-622, 2024 WL 3249293, at *1 (June 28, 2024). Sometimes these proposed changes are minor. But other times they reflect policy decisions made by the Commission during the previous year and significantly alter both the data that the Administrator receives and the categories of communications providers that are required to contribute to the Fund.

For example, the FCC frequently adjusts the forms to reflect its interpretations of the Communications Act. *See, e.g.*, *Wireline Competition Bureau Releases the 2021 Telecommunications Reporting Worksheets and Accompanying Instructions*, 35 FCC Rcd. 13671, 13672 & n.7 (2020) (updating Form 499-A to categorize SMS and MMS messaging services as "information services" in line with its decision in *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, 33 FCC Rcd. 12075 (2018)); *Wireline Competition Bureau Seeks Comment*

on Proposed Changes to the 2016 FCC Form 499-A, FCC Form 499-Q, and Accompanying Instructions, 30 FCC Rcd. 13510, 13511 & n.4 (2015) (adjusting Form 499-A to require non-interconnected voice over internet protocol services to register per *Contributions to the Telecommunications Relay Services Fund*, 26 FCC Rcd. 14532, 14542 (2011)). In this way, the Commission exerts comprehensive control over the contribution-factor process not only through its actions directed primarily at the Administrator, but also through its other decisions directly affecting the service providers that must contribute to the Fund.

The FCC also engages in policymaking with real-world effects when it determines which providers are exempt from contributing to the Fund because their revenues are "*de minimis*." *See* 47 C.F.R. § 54.708 (defining *de minimis* contributors as those whose total contribution would be less than $10,000). The Commission adjusts this *de minimis* threshold periodically and incorporates those changes into its forms. *See, e.g.*, *Wireline Competition Bureau Announces Release of the Revised 2010 FCC Forms 499-A and 499-Q and Accompanying Instructions*, 25 FCC Rcd. 1778, 1778 (2010) (adjusting the *de minimis* "estimation factor"); *Proposed Change to FCC Form 499-A, FCC Form 499-Q, and Accompanying Instructions*, 77 Fed. Reg. 74010, 74011 (Dec. 12, 2012) (similar).

Step 2: The Administrator Collects and Compiles the Data, Which the FCC Reviews, Revises as Necessary, and Uses to Determine the Contribution Factor.

After the Commission decides what data to collect, the Administrator performs the purely ministerial task of collecting that data and performing mechanical calculations using the data. *See, e.g.*, *Federal Universal Service Support Mechanisms Quarterly Contribution Base for the First Quarter 2025*, Universal Serv. Admin. Co., 4-5 (Dec. 2, 2024), https://www.usac.org/fcc-filings/2025/first-quarter/financials/USAC%201Q2025%20Universal%20Service%20Contribution%20Base%20Filing.pdf (providing, "[f]or the FCC's review," the total projected revenue base for the first quarter of 2025). The Administrator calculates and reports to the FCC projected demand and expenses incurred in administering the various universal-service programs, as well as the "total contribution base" (*i.e.*, the revenues assessable for contributions purposes, based on the information that service providers report to the Administrator on their Form 499 filings). *See* 47 C.F.R. § 54.709(a)(3).[2] As described in a

[2] The Fifth Circuit expressed concern that the Commission lacks adequate time to review the Administrator's numbers because the proposals "play[ ] out just days before the new quarter begins." *Consumers' Rsch.*, 109 F.4th at 771 n.17. The regulations, however, require the Administrator to give the Commission its projection for the total contribution base about a month before the quarter ends. 47 C.F.R. § 54.709(a)(3). In *Amici*'s experience, this allows plenty of time to review the Administrator's proposal.

Memorandum of Understanding between the FCC and the Administrator (and reflecting longstanding practice), the Commission's Office of the Managing Director (OMD) then reviews the Administrator's projections on two separate occasions. First, the Administrator informally shares its projections with OMD, before it formally submits the projections to the Commission. *Memorandum of Understanding Between the Federal Communications Commission and the Universal Service Administrative Company,* 7 (Oct. 17, 2024), www.fcc.gov/sites/default/files/usac-mou.pdf. OMD then provides "any necessary feedback" to the Administrator on its projections. *Id.* After this informal process, the Administrator publicly submits its numbers to the Commission. *See* 47 C.F.R. § 54.709(a)(3).

Upon receiving the Administrator's formal submission, OMD reviews these projections for a second time and, *if it agrees*, the Commission uses them to calculate a tentative contribution factor, which it announces in a public notice. *Id.*; *see, e.g.*, *Proposed Fourth Quarter 2024 Universal Service Contribution Factor*, DA 24-924, 2024 WL 4185702, at *1 (FCC Sept. 11, 2024). The release of the public notice announcing a tentative contribution factor triggers a fourteen-day period within which the Commission may adjust its contribution-factor calculation to reflect any changes to the projections of demand and/or administrative expenses it determines "will serve the public interest." 47 C.F.R. § 54.709(a)(3). If—after receiving any comments from interested parties—the Commission remains satisfied with the contribution factor it calculated and

proposed, the contribution factor and underlying projections are "deemed approved." *Id.*

It is therefore not true, as the Fifth Circuit believed, that the Administrator proposes a contribution factor that "take[s] legal effect without formal [Commission] approval." *Consumers' Rsch.*, 109 F.4th at 771; *see also id.* (suggesting that the Commission does not "affirmatively act to give legal effect" to the contribution factor). The Fifth Circuit got it wrong because it conflated the process by which the FCC establishes the contribution factor with the subsequent fourteen-day public-notice period. *See Consumers' Rsch.*, 109 F.4th at 750 (suggesting, incorrectly, that because the FCC's public notice is deemed approved within fourteen days if no action is taken, the FCC does not substantively review the Administrator's projections).

The FCC—not the Administrator—establishes the tentative contribution factor in the initial public notice, as explained above. 47 C.F.R. § 54.709(a)(3) ("Total projected expenses for the federal universal service support mechanisms for each quarter *must be approved by the Commission* before they are used to calculate the quarterly contribution factor and individual contributions . . . . [T]he . . . *contribution factor shall be announced by the Commission* in a public notice and shall be made available on the Commission's website." (emphasis added)). The Administrator does not propose a contribution factor. *Id.* It provides projections, which the Commission reviews and then the Commission publishes the

public notice, which includes the contribution factor that the Commission deems appropriate. The Commission retains plenary control over this process and can, and does, adjust the Administrator's projections as needed in the initial public notice. *See, e.g.*, *Proposed First Quarter 2025 Universal Service Contribution Factor*, DA 24-1245, 2024 WL 5105635, at *2 (FCC OMD Dec. 12, 2024) (explaining that FCC bureaus had "instructed [the Administrator] . . . to apply $48 million in unused funds to offset the $168.83 million projected Rural Health Care program demand" and that "[t]his offset reduces the first quarter 2025 contribution factor to a level below what the contribution factor would be based on USAC's filings."); *Proposed Fourth Quarter 2024 Universal Service Contribution Factor*, DA 24-924, 2024 WL 4185702, at *2 (FCC OMD Sept. 11, 2024) (similar); *Proposed Third Quarter 2024 Universal Service Contribution Factor*, DA 24-557, 2024 WL 3010573, at *1 (FCC OMD June 12, 2024) (similar); *Proposed Fourth Quarter 2023 Universal Service Contribution Factor*, 38 FCC Rcd. 8362, 8364 (FCC OMD 2023) (similar); *Proposed Third Quarter 2023 Universal Serv. Contribution Factor*, 38 FCC Rcd. 5670, 5672 (FCC OMD 2023) (similar).[3]

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[3] It should come as no surprise that the Commission often agrees with the Administrator's projections at this stage. After all, this is the second round of review. By the time the Administrator formally submits its projections to the Commission, OMD has already informally reviewed and

The Fifth Circuit overlooked this review process and instead focused on the following fourteen-day public-notice period, *Consumers' Rsch.*, 109 F.4th at 750, which affords the Commission a further opportunity to determine the final contribution factor. *After* the Commission has reviewed the Administrator's projections and *after* the Commission has already determined a contribution factor, the Commission can, and at times does, revise the contribution factor, sometimes in response to comments from interested stakeholders. *See, e.g.*, *Revised Second Quarter 2003 Universal Service Contribution Factor*, 18 FCC Rcd. 5097, 5097 & n.2 (2003) (reconsidering the contribution factor proposed in a previous public notice). In this context, it makes sense that the contribution factor—developed by the Commission itself based on data from the Administrator that the Commission has reviewed and sometimes adjusted—is "deemed approved" unless the Commission takes an affirmative step to revise it. 47 C.F.R. § 54.709(a)(3). But that does not mean that the contribution factor "take[s] legal effect without formal [Commission] approval," as the Fifth Circuit contended. *Consumers' Rsch.*, 109 F.4th at 771.

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provided "any necessary feedback" on the Administrator's projections. *Memorandum of Understanding Between the Federal Communications Commission and the Universal Service Administrative Company,* 7 (Oct. 17, 2024), www.fcc.gov/sites/default/files/usac-mou.pdf.

Step 3: The FCC Conducts* De Novo *Appellate Review of the Administrator's Decisions.

The FCC's comprehensive control over the Administrator is also clear from its role in reviewing, *de novo*, the Administrator's actions (including those concerning the contribution factor) as an appellate administrative tribunal. Under the FCC's rules, "[a]ny party aggrieved by an action taken by the Administrator, after seeking review from the Administrator, may then seek review from the Federal Communications Commission." 47 C.F.R. § 54.719(b); *see also id.* § 54.723 (specifying "*de novo*" review of Administrator's decisions). In this context, too, the Commission not only supervises the Administrator's work, but also it can—and often does—reverse the Administrator's decisions. *See, e.g.*, *Universal Service Contribution Methodology, Request for Review of Decision of the Universal Service Administrator by BT Americas Inc.*, 37 FCC Rcd. 9216, 9216 (2022) (reversing the Administrator's decision requiring a company to report overcharges on Form 499-A); *Universal Service Fund Contribution Methodology, Request for Review of Decision of the Universal Service Administrator by Network Enhanced Telecom, LLP*, 25 FCC Rcd. 14533 (2010) (reversing the Administrator's decision classifying petitioner's services and remanding for further proceedings); *Universal Service Contribution Methodology, Requests for Review of Decisions of Universal Service Administrator by Curry IP Solutions*, 23 FCC Rcd. 14661, 14661 (2008) (granting all six requests seeking reversal of the Administrator's assessment of late fees).

The FCC also provides guidance that the Administrator must implement. In 2012, for example, the FCC confronted the question of when a wholesaler must pay contributions. *Universal Service Contribution Methodology, Application for Review of Decision of the Wireline Competition Bureau filed by Global Crossing Bandwidth, Inc.*, 27 FCC Rcd. 13780, 13781 (2012). Under FCC rules, wholesalers are exempt from paying contributions so long as resellers—the entities that buy from the wholesalers—are contributing to the Fund. *Id.* But a wholesaler may not always know if its reseller is paying contributions, so the FCC exempts the wholesaler if it has a "reasonable expectation" that its customer would contribute. *Id.* at 13782. The exemption standard had created significant confusion, so the FCC "provide[d] guidance" to the Administrator on how to assess that standard. *Id.* After issuing this decision, the FCC updated Form 499-A to reflect its decision. *Wireline Competition Bureau Releases 2014 Telecommunications Reporting Worksheet and Accompanying Instructions*, 29 FCC Rcd. 939, 940 (2014).

* * *

Through the three levers discussed above, the FCC maintains pervasive control over the Administrator and the data it collects. And these direct controls over the Administrator's functions are not the only way that the Commission exercises its control over the contribution factor. The Commission's regulations also provide significant parameters for the ultimate contribution factor, such as setting forth caps for the total funds attributable to specific universal-service programs. *See, e.g.*, 47 C.F.R. § 54.423 (Lifeline

Program); *id.* § 54.507 (School and Libraries Program); *id.* § 54.619 (Rural Health Care Program). These budget-capping regulations constitute direct Commission action that shapes the ultimate contribution factor even before the Administrator sends its projections. For all these reasons, the Fifth Circuit erred in concluding that the FCC's "subdelegation" to the Administrator raises constitutional concerns.

II. The FCC Is Well Aware of Statutory Limitations on Its Authority and Case Law that Applies and Defines Those Limitations.

While the Commission exercises control over the Administrator, Congress controls the Commission through the statutory framework it enacted. The statute, and the body of case law interpreting it, limit the Commission's discretion and provide an intelligible principle to guide that discretion.

A. Section 254 Provides Intelligible Principles to Guide the USF's Contribution Factor.

Section 254 provides four limiting principles regarding the USF—located in Subsections (b), (c), (d), and (e)—and Article III courts rely on those principles when reviewing the Commission's decisions.[4]

First, Section 254(b) sets forth a list of guiding principles, which the Commission must use for its

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[4] The Fifth Circuit's *en banc* decision addressed only three of these statutory provisions: Section 254(b)–(d). *Consumers' Rsch*, 109 F.4th at 760.

universal-service policies. 47 U.S.C. § 254(b) ("[T]he Commission *shall* base policies for the preservation and advancement of universal service on the following principles . . . ." (emphasis added)). These principles include ensuring "[q]uality services . . . at just, reasonable, and affordable rates," *id.* § 254(b)(1), and providing "low-income consumers and those in rural, insular, and high cost areas" with services "that are reasonably comparable to those services provided in urban areas . . . ." *Id.* § 254(b)(3). Reviewing courts have evaluated the Commission's decisions against these principles. *See Tri-Cnty. Tel. Ass'n v. FCC*, 999 F.3d 714, 722 (D.C. Cir. 2021) (*per curiam*) (construing Sections 254(b)(3) and 254(b)(4) and holding that the Commission's orders complied with them); *AT&T, Inc. v. FCC*, 886 F.3d 1236, 1249–1253 (D.C. Cir. 2018) (considering challenges that the Commission failed to adhere to two of Section 254(b)'s principles); *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001) (describing the Commission's duty to consider the principles enumerated in Section 254(b) as "mandatory"). On the rare occasions when the Commission's orders failed to adhere to these mandatory principles, Article III courts have stepped in. *See Quest Comm'cns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005) (concluding that the Commission incorrectly applied the principles in Section 254(b) because it could not "ignore[ ] all but one principle enumerated in [the statute]"); *see also Tex. Off. of Pub. Util. Couns. v. FCC*, 183 F.3d 393, 434 (5th Cir. 1999) ("*TOPUC*") (observing that the FCC's discretion under Section 254 "is not absolute").

Second, Section 254(c) confines the types of communication services that universal-service funds may support to "telecommunication services." 47 U.S.C. § 254(c)(1). In deciding which telecommunication services to support, the Commission "shall consider the extent to which" they "are essential to education, public health, or public safety"; have "been subscribed to by a substantial majority of residential customers"; "are being deployed in public telecommunications networks by telecommunications carriers"; and "are consistent with the public interest, convenience, and necessity." *Id.* The statute therefore limits the types of services the Fund may cover. Reviewing courts may consider, and indeed have considered, these statutory limitations when assessing whether a decision by the Commission to fund certain services has contravened the statute's requirements. *See, e.g.*, *Direct Comm'cns Cedar Valley, LLC v. FCC*, 753 F.3d 1015, 1044–1045 (10th Cir. 2014) (considering whether the Commission's decision to cover voice-over-internet-protocol services exceeded its statutory authority).

Third, Section 254(d) requires, among other things, that the Commission use "specific, predictable, and sufficient mechanisms" to determine contributions from service providers. 47 U.S.C. § 254(d). This provides, at the very least, an "intelligible principle" with which to evaluate expansions of the contributor base. *See Rural Cellular Ass'n & Universal Serv. v. FCC*, 685 F.3d 1083, 1091–1092 (D.C. Cir. 2012) (holding that the Commission's order assessing contributions for the Fund satisfied Section 254(d) and that the statute does not "grant to the

agency a *carte blanche*"); *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1240–1241 (D.C. Cir. 2007) (analyzing the language of Section 254(d) and, based on that analysis, approving the Commission's decision to include voice-over-internet-protocol providers within the USF contribution base).

Finally, Section 254(e) requires that federal support provided by the Fund "be explicit and sufficient to achieve the purposes of this section." 47 U.S.C. § 254(e). The requirements of "explicit" and "sufficient" support provide an additional lens through which courts evaluate whether the Commission's decisions follow Congress's command, in particular with respect to the size of the Fund. *See Alenco Comm'cns, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) (observing that "excessive funding may itself violate the sufficiency requirements of" Section 254(e)); *TOPUC*, 183 F.3d at 425 ("Because the agency continues to require implicit subsidies . . . in violation of a plain, direct statutory command, we reverse its decision . . . .").

Taken together, these provisions guide (1) the overall policy of the Fund, 47 U.S.C. § 254(b); (2) which communication services that Fund may subsidize, *id.* § 254(c); (3) the mechanism through which telecommunications carriers must contribute to the Fund, *id.* § 254(d); and (4) even the size and budget of the Fund, *id.* § 254(e) (requiring that all support must be "sufficient").

B. In *Amici*'s Experience, the Commission Has Declined to Adopt Proposals Beyond Its Statutorily Delegated Authority.

Since the creation of the Fund in 1997, the Commission has expressly considered and rejected regulatory proposals that would exceed the statutory authority Congress granted it under the Communications Act. Indeed, in the very first order establishing rules for the various USF programs, the Commission declined to adopt additional universal-service principles, explaining that it would "address the issue of access to affordable telecommunications services by only the particular groups *identified by Congress in section 254*." *Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776, 8804, ¶ 54 (1997) ("*1997 USF Order*") (emphasis added), *aff'd in part, rev'd in part, and remanded in part on other grounds*, *TOPUC*, 183 F.3d 393. The Commission also rejected proposals to provide subsidies under the Lifeline Program to communications providers that were not designated as "eligible telecommunications carriers," explaining that doing so would be inconsistent with Section 254(e) of the Act. *1997 USF Order*, at 8971–8972, ¶¶ 369–370. The Commission even limited the use of universal-service support to a single connection for primary residences and businesses, reasoning that providing support to "second residential connections, second residences, and businesses with multiple connections may be inconsistent with the goals of universal service." *Id.* at 8829, ¶ 95.

More recently, the Commission has been mindful of the limits of its authority in considering proposals

to reform certain USF programs. In its 2011 *Connect America Fund* order, the Commission reformed the High Cost Program to "promot[e] ubiquitous deployment of, and consumer access to, both traditional voice calling capabilities and modern broadband services over fixed and mobile networks." *See Connect Am. Fund*, 26 FCC Rcd. 17663, 17683, ¶ 60 (2011). In doing so, the Commission recognized that it had "a 'mandatory duty' to adopt universal service policies that advance the principles outlined in section 254(b), and [it has] the authority to 'create some inducement' to ensure that those principles are achieved." *Id.* at 17686, ¶ 65 (quoting *Qwest Corp.*, 258 F.3d at 1200, 1204). To that end, the Commission required service providers to offer broadband service as a condition of receiving federal universal-service support (while declining to add broadband to the list of services expressly supported by universal-service funding). *Id.* at 17686–17687, ¶ 65. The Tenth Circuit later denied petitions for review challenging the Commission's decision. *See Direct Comm'cns Cedar Valley*, 753 F.3d at 1033.

As for the current USF contribution system, on multiple occasions, the Commission has considered potential changes to the established assessment methodology. In 2008, for example, the then-FCC Chair proposed "a telephone numbers-based methodology under which contributors [would] pay a constant, flat-rate assessment" of $1.00 per residential number per month "based on the number of telephone numbers they [had] assigned to residential end users." *High-Cost Universal Service Support*, 24 FCC Rcd. 6475, 6536, ¶ 92 (Appx. A: Chairman's

Draft Proposal) (2008). Though the proposal to move from a revenues-based contribution mechanism to a connections-based contribution mechanism was circulated to the Commissioners and placed on the Commission's monthly meeting agenda for a vote, it was ultimately scrapped. *See id.* at 6493, ¶ 40. And when the FCC revisited the issue four years later, it demonstrated its acute awareness of the bounds of its authority under the Communications Act by asking interested parties to comment on "whether a connections-based methodology is consistent with the Fifth Circuit's *TOPUC* decision," which interpreted Sections 2(b), 254(b), and 254(d) of the Communications Act to bar the Commission from assessing USF contributions on *intrastate* (as opposed to *interstate*) service revenues. *Universal Serv. Contribution Methodology A Nat'l Broadband Plan for Our Future*, 27 FCC Rcd. 5357, 5439, ¶ 225 (2012) (citing *TOPUC*, 183 F.3d at 446–448); *cf.* 47 U.S.C. § 254(d) ("Every telecommunications carrier that provides *interstate* telecommunications services shall contribute[.]" (emphasis added)). To date, the Commission has declined to change the contribution methodology established more than twenty-five years ago, in part because of concerns over the bounds of its statutory authority.

These examples demonstrate the Commission's commitment to ensuring that its actions in overseeing the Fund and the associated contributions system comport with Congress's commands.

III. The Fifth Circuit's Decision Hinders Regulatory Flexibility and Jeopardizes Important Federal Programs.

"Universal service has been a fundamental goal of federal telecommunications regulation since the passage of the Communications Act of 1934." *Alenco Comm'cns*, 201 F.3d at 614 (citing 47 U.S.C. § 151). Consistent with that goal, Congress determined that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation." 47 U.S.C. § 254(b)(2). In tasking the Commission with "preserv[ing] and advanc[ing] universal service," *id.* § 254(d), Congress vested the agency with some flexibility to adopt universal-service rules and policies that keep pace with developments in this ever-changing industry. If allowed to stand, however, the Fifth Circuit's decision would both undermine that flexibility and jeopardize important universal-service programs on which tens of millions of individuals rely.

As the Fifth Circuit recognized more than fifty years ago, "[t]he Communications Act was designed to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications." *Gen. Tel. Co. of the Sw. v. United States*, 449 F.2d 846, 853 (5th Cir. 1971); *see also Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024) ("In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes."). That is particularly true for universal service. When enacting

Section 254 of the Communications Act, Congress expressly delegated to the Commission authority over universal service because of the inherently fast-changing nature of communications services and related technologies. This is clear from the plain text of the statute, which 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) (emphasis added). Congress thus recognized that services and technologies that advance universal service "evolv[e]," that their definition must be updated "periodically," and that such updates must account for rapid change and advancement. *Id.* The need for flexibility is clear from the legislative history of that definition as well: Congress authorized the Commission to define universal service based on the realities of "modern life" and market conditions, so that the definition "include[s], at a minimum, any telecommunications service that is subscribed to by a substantial majority of residential customers." SENATE REP. NO. 104-23, at 27.

By delegating this authority to the Commission, rather than simply undertaking *ad hoc* and piecemeal appropriations to advance universal service, *cf. Consumers' Rsch.* 109 F.4th at 762–763 (expressing concern that Section 254 differs from the ordinary congressional appropriations process), Congress recognized that the FCC should have an appropriate degree of flexibility to respond to new developments in technology—as exemplified by the growth of the

internet and broadband services. A contrary approach that deprived the FCC of this flexibility would result in "extensive ossification of our regulatory system—the signal virtue of which is its flexibility." *Philip Morris USA, Inc. v. Vilsack*, 736 F.3d 284, 294 (4th Cir. 2013). "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function." *Panama Refin. Co. v. Ryan,* 293 U.S. 388, 421 (1935).

The statutory provisions establishing the Fund—and the funding mechanisms underlying it—reflect these practical considerations. And the discretion that Congress expressly delegated to the Commission—subject always to the statutory guardrails specified in Section 254—would be eviscerated if this Court endorsed the Fifth Circuit's view that the FCC's existing mechanisms for funding universal service are unconstitutional.

The existing USF programs—including the High Cost Program, the E-Rate Program, the Rural Healthcare Program, and the Lifeline Program—are consistent with the Commission's statutory mandate to advance universal service by (i) facilitating the deployment of communications infrastructure in rural areas, (ii) ensuring that schools, libraries, and rural healthcare providers have access to affordable internet and telecommunications services, and (iii) enabling low-income households to afford telecommunications services. *Amici* have seen the substantial benefits that USF programs have provided to rural areas, low-income households, and

schools and libraries. Indeed, the Fund has expanded access to services for tens of millions of people, providing a crucial lifeline that enables them to connect to the internet and maintain affordable telephone services. The continued viability of these programs—and the ability of program participants to continue receiving these benefits—are the real-world implications of this case.

And that is not all. The decision below undermines long-term planning decisions by service providers that have relied on the continuing availability of universal-service support to invest billions of dollars to expand their communications networks to reach under-served communities (often in hard-to-reach and high-cost areas). The resulting financial losses experienced by these service providers would impede their ability to serve both individuals who directly benefit from the Fund and other customers as well. *Amici* respectfully urge the Court to preserve these vital universal-service programs, and both the consumer benefits and economic growth that they sustain, by reversing the Fifth Circuit's decision here.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

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