Nos. 24-354, 24-422

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.
Petitioners,

v.

CONSUMERS' RESEARCH, ET.AL.,
Respondents.

SHLB COALITION, ET AL.,.
Petitioners,

v.

CONSUMERS' RESEARCH, ET.AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN SUPPORT OF PETITIONERS

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January 16, 2025

QUESTIONS PRESENTED

In 47 U.S.C. 254, Congress required the Federal Communications Commission (Commission) to operate universal service subsidy programs using mandatory contributions from telecommunications carriers. The Commission has appointed a private company as the program's Administrator, authorizing that company to perform administrative tasks such as sending out bills, collecting contributions, and disbursing funds to beneficiaries. The questions presented are as follows:

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

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

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

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

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INTEREST OF AMICUS CURIAE[1]

The decision on review strikes at the heart of the congressionally mandated federal universal program. The Majority's novel ruling is out of step with every court that previously considered the issue. Respondent Consumers' Research sued the Federal Communications Commission (FCC) in several jurisdictions challenging:

> (1) the constitutionality of Congress's delegation of the administration of the Universal Service Fund (the "USF") to the Federal Communications Commission ("FCC") and (2) the FCC's subsequent reliance on a private entity for ministerial support.[2]

The Fifth Circuit's original three judge panel denied the petition because they, like their colleagues

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[1] In accordance with U.S. Sup. Ct. Rule 37.6, NARUC certifies that (1) NARUC counsel authored this brief, (2) no counsel for a party to the decision below, or other entity, authored this brief in whole or in part, and (3) no person or entity other than NARUC made a financial contribution to its preparation or submission.

[2] *Consumers' Research v. FCC*, 63 F.4th 441 at 445 (5th Cir. 2023) (*Consumers Research*), *reh'g en banc granted, opinion vacated,* 72 F.4th 107 (5th Cir. 2023), and *on reh'g en banc,* 109 F.4th 743 (5th Cir. 2024), *cert. granted sub nom. FCC v. Consumers' Research.* No. 24-354, 2024 WL 4864036 (U.S. Nov. 22, 2024), and *cert. granted sub nom. SHLB Coalition v. Consumers' Research*, No. 24-422, 2024 WL 4864037 (U.S. Nov. 22, 2024).

in the Sixth[3] and Eleventh Circuits,[4] could find "no nondelegation doctrine violations."[5] But on rehearing *en banc,* nine of the sixteen judges specified that they did not have to:

> definitively answer either delegation question because even if § 254 contains an intelligible principle, and even if FCC was permitted to enlist private entities to determine how much universal service tax revenue it should raise, the combination of Congress's broad delegation to FCC and FCC's sub-delegation to private entities certainly amounts to a constitutional violation.[6]

The National Association of Regulatory Utility Commissioners (NARUC) is a quasi-governmental nonprofit organization founded in 1889. Congress and

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[3] *Consumers' Research v. FCC,* 67 F.4th 773 (6th Cir. 2023), *cert. denied Consumers' Research v. FCC*, No. 23-456, 2024 WL 2883753 (U.S. June 10, 2024).

[4] *Consumers' Research v. FCC*, 88 F.4th 917, 923 (11th Cir. 2023), *cert. denied Consumers' Research v. FCC*, No. 23-743, 2024 WL 2883755 (U.S. June 10, 2024).

[5] *Consumers' Research*, 109 F.4th 743 at 756 (5th Cir. 2024). (*Consumer's*), *cert. granted sub nom. FCC v. Consumers' Research*, No. 24-354, 2024 WL 4864036 (U.S. Nov. 22, 2024), and *cert. granted sub nom. SHLB Coalition v. Consumers' Research*, No. 24-422, 2024 WL 4864037 (U.S. Nov. 22, 2024).

[6] *Consumers*, 109 F.4th at 756.

the Courts[7] have recognized NARUC as the proper party to represent government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with, *inter alia*, ensuring the provision of affordable and reliable communications services.

In the Communications Act,[8] Congress calls NARUC "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities.[9]

The 1996 amendments to the Act required the FCC to work hand-in-glove with NARUC's State Commission members to open and protect local retail

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[7] Both the United States Congress and federal courts have recognized that NARUC is a proper party to represent the collective interest of State regulatory commissions. *See e.g. USA v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), *aff.* 672 F.2d 469 (5th Cir. Unit "B" 1982); *aff. en banc*, 702 F.2d 532 (5th Cir. Unit "B" 1983, *rev'd*, 471 U.S. 48 (1985). *See also Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC,* 513 F.2d 1142 (9th Cir. 1976).

[8] *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. § 151 *et seq*., Pub.L.No. 101-104, 110 Stat. 56 (1996) (Act).

[9] *See* 47 U.S.C. § 410(c) (1971) (NARUC nominates members to Federal-State boards which consider universal service, separations, and other issues and provide recommendations the FCC must act upon; 47 U.S.C. § 254 (1996) (describing the universal service board's functions). *Cf. NARUC v. ICC,* 41 F.3d 721 (D.C. Cir 1994).

phone service markets to competition,[10] to "preserve and advance universal service," [11] to "ensure that universal service is available at rates that are just, reasonable, and affordable," [12] and to encourage deployment "of advanced telecommunications to all Americans."[13]

Promoting universal service has long been a key goal of coordinated federal and state regulatory policy.[14] In 1996, Congress assured that NARUC's state commission members played crucial roles with

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[10] *See, e.g.*, *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, *LLP*, 540 U.S. 398, 402 (2004); Weiser, Philip, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U.L. Rev. 1692, 1694 (2001) (describing the 1996 Act as "the most ambitious cooperative federalism regulatory program to date").

[11] *See* 47 U.S.C. § 254(f) (State universal service programs), § 214(e), (States designate *telecommunications carriers* to receive federal subsidies, § 251(f) (States can exempt rural *carriers* from certain Title II requirements.)

[12] *See* 47 U.S.C. § 254(i) (Consumer protection).

[13] *See* 47 U.S.C. § 1302(a) which specifies the FCC and each State Commission "with regulatory jurisdiction over telecommunications services" "shall encourage" the deployment of advanced telecommunications capability.

[14] *See* Huber, Peter W., Kellog, Michale K., and Thorne, John, *Federal Telecommunications Law (Third Edition, 2025-1 Supp.2020)* at Section 6.2 *Universal Service Prior to the 1996 Act.* ("Before the . . . 1996 Act, a number of subsidies had developed to support this system. These subsidies were largely implicit; implemented at the state level; and designed to shift costs from rural to urban areas, from residential to business customers, and from local to long-distance services.")

respect to both implementation and oversight of the federal universal service program.

By Congressional fiat, state commissioners constituted the majority of the so-called Federal State Joint boards[15] which provided a 446 page proposal to comply with the myriad "intelligible principles" Congress specified to limit FCC discretion with the newly enacted federal universal service programs in 1996.[16] The 1996 Act specified that the FCC must "institute and refer to a Federal-State Joint Board" a proceeding to recommend changes to the Commission's regulations to implement the detailed instructions to promote universal service in the Act.[17] *Id.* By the statutory deadline of November 8, 1996, the Joint Board provided the Recommended Decision on how to structure and implement the legislation.[18] Six months later, the commission adopted the bulk of the recommendations.[19]

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[15] 47 U.S.C. § 254 (a)(1). The duties and power of Federal-State Joint Board required in 47 U.S.C. § 254 are described in 47U.S.C. § 410(c). The Board has 3 FCC Commissioners, 1 consumer advocate, and 4 state commissioners.

[16] *In the Matter of the Federal State Joint Board on Universal Service*, Recommended Decision, 12 F.C.C. Rcd. 87 (1996).

[17] 47 U.S.C. § 254(a)(1)

[18] *In the Matter of the Federal State Joint Board on Universal Service*, Recommended Decision, 12 F.C.C. Rcd. 87 (1996).

[19] *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9218, ¶ 869 (1997).

The Act also specifies that State Commissions designate, in the first instance, [20] eligible telecommunications carriers (ETCs). [21] This ETC designation process is required for any carrier to access subsidies from the federal universal service high cost and lifeline programs.

Moreover, pursuant to section 54.314(a) of the FCC rules, State commissions are required to certify annually that federal high-cost support awarded to ETCs within that state has been used and will be used "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."[22] For a carrier to be eligible for high-cost universal service support for all of a calendar year, a section 54.314 certification must be submitted to the FCC by the previous October 1.[23]

States rely in part on data filed annually by ETCs in the FCC Form 481 pursuant to section 54.313 in developing their section 54.314 certifications. [24] Indeed, the FCC specified in 2011 that

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[20] *See* 47 U.S.C. § 214(e)(2).

[21] 47 U.S.C. § 214(e)(1) states that only *common carriers* designated as ETCs can receive federal universal service subsidies.

[22] 47 CFR § 54.314(a). ETCs not subject to the jurisdiction of a state must file the same certification. 47 CFR § 54.314(b). See also 47 U.S.C. § 254(e).

[23] *See* 47 CFR § 54.314(d)(1).

[24] *See In the Matter of the Connect America Fund et al.*,

footnote cont. on next page

> if a state commission determines, after reviewing the annual section 54.313 report, that an ETC did not meet its speed or build-out requirements for the prior year, a state commission should refuse to certify that support is being used for the intended purposes. In conjunction with such review, to the extent the state has a concern about ETC performance, we welcome a recommendation from the state regarding prospective support adjustments or whether to recover past support amounts.[25]

In further recognition of the historical coordination with state commissions on universal service policy, the 1996 amendments also specifically preserved State authority to impose requirements:

> to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.[26]

This included allowing the continuation of old, and the creation of new and varied State universal service mechanisms that complement the federal

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Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17861, para. 612 (2011), *aff'd sub nom., In re: FCC 11-161,* 753 F.3d 1015 (10th Cir. 2014). 47 C.F.R. § 54.313.

[25] *Id.*

[26] 47 U.S.C. § 253(b).

programs.[27] By 2018, forty-two States and the District of Columbia provided some form of state universal service support.[28]

If this Court upholds the Majority's holding that the federal funding mechanism is unconstitutional, it will have a substantial impact on infrastructure deployment along with cascading impacts on both federal and complementary state programs.

The *Brief for Petitioners Competitive Carriers Association, NTCA, and USTelecom-The Broadband Association's* [29] explanation of these impacts, if anything, understates the disruption and impact on consumers and infrastructure that could occur.

That is why on November 13, 2024, at its 2024 Annual Meeting and Education Conference in Anaheim, California, NARUC's Board of Directors unanimously passed a *Resolution to File an Amicus Brief with the Supreme Court of the United States in Consumers'*

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[27] 47 U.S.C. § 254(f).

[28] Lichtenberg, Sherry, *State Universal Service Fund 2018: Updating the Numbers* (NRRI April 2019) at ii https://pubs.naruc.org/pub/3EA33142-00AE-EBB0-0F97-C5B0A24F755A (Last accessed January 10, 2025)

[29] *See Brief for Petitioners Competitive Carriers Association, NTCA, and USTelecom - The Broadband Association,* filed January 9, 2025 in this proceeding, at pages 49 – 53, and at page 52 citing, *inter alia,* a September 4th, 2024 NTCA Survey that highlights significant risks of skyrocketing consumer bills, plummeting broadband investment and imperiled loans if USF Support is eliminated.

Research v. FCC.[30] As its title indicates, the resolution, citing the inevitable impact on the development and maintenance of infrastructure and, in particular, on the federal Lifeline and E-Rate programs, directed its counsel to file this amicus brief supporting the petitioners.

ARGUMENT SUMMARY

As Judge Higginson pointed out, the Majority contends that when Congress provides an intelligible principle to cabin agency discretion (constitutional) and a private entity performs calculations under agency supervision (also constitutional), it becomes—pursuant to an undefined and unprecedented test—unconstitutional.[31] Judge Higginson's framing highlights the Majority's flawed reasoning. The two cases cited to support this new text are facially distinguishable as they narrowly focus on Congressional enactments that directly infringe on the President's plenary removal authority. No unconstitutional infringement on Executive authority is either alleged or found to have occurred in the case at bar. Moreover, even the reasoning in those two cases do not support use of - or follow - the Majority's syllogism.

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[30] *Resolution to File an Amicus Brief with the Supreme Court of the United States in Consumers' Research v. FCC* (NARUC November 13, 2024), at 15, available online at *https://pubs.naruc.org/pub/812873F4-E348-B77F-4D75-E513FF13A86D*.

[31] *Consumers*, 109 F.4th at 801.

In all but two easily distinguishable cases, this Court has consistently upheld Congress' ability to delegate power to agencies under broad standards - at widely varying levels of detail - as long as they delineated clear policy, the responsible agency, and boundaries of authority. Section 254 easily meets that standard. The detailed statutory scheme in that section bears no relation to the overbroad and unprecedented delegations to the President successfully challenged in those two cases.

The majority's analysis of private delegation equates administrative delegation with abdication of authority. Whatever else the FCC has done through an extensive series of notice-and-comment rulemakings to set up the USAC and the budget, parameters, and regulations for the four separate universal service programs, it has not delegated the authority Congress provided it in Section 254 to that entity. Whatever the USAC does, the FCC always has the final word. The USAC operates only within the framework set forth by the FCC and with the FCC's approval. The FCC can review *sua sponte,* or on application, any of USAC's decisions.[32] Anyone that understands the FCC's detailed oversight, control over inputs, and the reviews required before publication, is far more likely to be surprised if the FCC actually had to frequently reject the USAC contribution factor. If anything, the regular acceptance of USAC's contribution factor determinations speaks to the high level of FCC supervision and control.

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[32] See, e.g., 47 C.F.R. § 54.719 et. seq. (establishing FCC review of the USAC's decisions).

ARGUMENT

The En Banc Majority explains that "Congress through [§ 254] *may* have delegated legislative power to FCC because it purported to confer upon FCC the power to tax without supplying an intelligible principle to guide FCC's discretion." [33] Second, they explain that FCC *may* have impermissibly delegated the taxing power to private entities. [34] Finally they decide there is no need to definitively answer either delegation question because "the combination of Congress's broad delegation to FCC and FCC's sub-delegation to private entities certainly amounts to a constitutional violation." [35]

The Majority is wrong on all counts. Section 254 provides intelligible principles constraining FCC implementation of the universal service program. The FCC maintains control over the Universal Service Administrative Company (USAC) and makes the final decision over whether the USAC proposed contribution factors are approved. The USAC funding mechanism is constitutional.

I. The Majority's novel "combination" theory should be rejected.

The En Banc Majority is "highly skeptical that the contribution factor. . . comports with the bar on

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[33] *Consumers*, 109 F.4th at 756. {Emphasis added}

[34] *Id.*

[35] *Id.*

congressional delegations of legislative power"[36] They are "similarly skeptical that it comports with the general rule that private entities may not wield governmental power." [37] However, they break new ground by claiming they do not need to (and actually concede that they did not) definitively resolve either question. Why? Because "the combination of Congress's sweeping delegation to FCC and FCC's unauthorized sub-delegation to the USAC violates the Legislative Vesting Clause in Article I, § 1."[38]

Judge Higginson, in his dissent, provides an excellent framing of the Majority's new and unusual analysis:

> [A]ccording to the majority, when Congress provides an intelligible principle to channel agency discretion (constitutional) and a private entity performs calculations under the agency's supervision (also constitutional), it becomes—pursuant to an undefined, unannounced, and unprecedented test—unconstitutional.[39]

This framing highlights the flawed reasoning that demonstrates that this test is, at best, impractical and, at worst, irrational.

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[36] *Consumers*, 109 F.4th at 778.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 801

As support for its novel construction, the Majority cites to two Supreme Court cases: *Seila Law, LLC v. Consumer Financial Protection Bureau, 591 U.S. 197, 224 (2020). (Seila)* and *Free Enterprise Fund v. Public Company Accounting Oversight Board,* 561 U.S. 477 (2010) (*Free Enterprise*).

Both cases are distinguishable on their face. They narrowly focus on Congressional enactments that directly infringe on the President's plenary removal authority under Article 2 of the US Constitution.[40]

In contrast, no unconstitutional infringement on the President's or Executive authority is either alleged or found to have occurred in the case at bar. Instead, the Majority claims the opposite. Rather than restrict Executive Branch authority, Congress *may have* delegated *too much* authority to the FCC. Allegedly, this allows the FCC to collect fees and utilize the ministerial resources of the USAC without adequate constraints.

The Majority described this Court's reasoning in *Selia* this way:

> The Supreme Court . . . granted that some for-cause removal restrictions are not problematic. . .[and] that for-cause removal restrictions applied to single-member directorships are sometimes constitutionally permissible. But it held the combination of (1) for-cause removal, (2) a one-member CFPB Director, and (3)

[40] U.S.C.A. Const. Art. II § 2

> the capacious powers of the CFPB created a constitutional problem.[41]

But this description neither provides support for the Majority's new "combination" test nor accurately reflects the reasoning of the *Seila* Court.

Seila involved two exceptions to the President's constitutional authority to keep executive "officers accountable—by removing them from office, if necessary."[42] The first exception was approved in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). It allowed Congress to give for-cause removal protections to a multimember body of experts, with partisan balance, that "performed legislative and judicial functions."[43] The second, provided in *Morrison v. Olson*, 487 U.S. 654 (1988), permitted Congress to provide similar for-cause protections for "inferior officers with limited duties and no policy making or administrative authority."[44]

In *Selia,* Justice Robert's analysis did not follow the syllogism suggested by the Majority, *supra.* Instead, the decision takes each exception up in turn. First, it carefully explained why the *Humphrey's Executor's* exception for a multimember agency was not applicable (because, *inter alia*, there was only one

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[41] *Consumers*, 109 F.4th at 778–79.

[42] *Seila,* 591 U.S. at 215, quoting *Free Enterprise*, 561 US at 493.

[43] *Seila,* 591 U.S. at 216.

[44] *Id.* at 217.

CFPB head).[45] Then it explained why the *Morris* exception was also not applicable (because the Consumer Financial Protection Bureau (CFPB) director was not an inferior officer with no policymaking authority.)[46] Finally, after excluding those two cases as a basis for a decision, it explained exactly why infringing on the President's authority to remove the CFPB Director violated separations of power.[47] Similarly, Justice Thomas's separate opinion, joined by Justice Gorsuch, also conducted a more traditional analysis explaining in detail why *Humphrey's Executor* should be overturned.[48]

Contrast that with the Majority's analysis in the case at bar. Instead of citing case law explaining why this Court's nondelegation doctrine cases could <u>not</u> apply, the Majority opines at length about the possibility that they might.[49] And then, instead of explaining why this Court's precedent on private delegations <u>could not</u> apply, the Majority again alleges the USAC's ministerial role *might be* an unconstitutional private delegation.[50]

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[45] *Id.* at 218 -219.

[46] *Id.* at 219.

[47] *Id.* at 220-231.

[48] *Id.* at 238-252.

[49] *Consumers*, 109 F.4th at 756–768.

[50] *Id.* at 768–774.

Judge Elrod, in her *concurring opinion*, joined by Judges Ho and Engelhardt, indicated that she would have gone "one step further and address the lawfulness of each individual delegation." [51] With respect, the most logical way for the Majority to have proceeded would have been to take one step back and address the lawfulness of each individual delegation before making a "combined" constitutional determination based on a flawed comparison to unrelated cases.

II. Congress, through 47 U.S.C. § 254, provided an intelligible principle to constrain FCC discretion.

In *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) the Supreme Court established that delegations are constitutional as long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized . . . is directed to conform." This Court did not strike a challenged statute for unconstrained delegations to the Executive branch until 1935.[52] That year the Court "found the requisite "intelligible principle" lacking in two statutes, one provided literally no guidance for the exercise of discretion, and the other granted authority to regulate the entire economy based on a vague

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[51] *Id.* at 786.

[52] *Mistretta v. United States*, 488 U.S. 361, 373–74 (1989) (*Mistretta*)

standard: stimulate the economy by assuring "fair competition."[53]

Since 1935, this Court has upheld "without deviation Congress' ability to delegate power under broad standards"[54] to agencies - at widely varying levels of detail - as long as they delineated clear policy, the responsible agency, and boundaries of authority.[55]

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[53] *See Whitman v. Am. Trucking Associations*, 531 U.S. 457, 474, 121 S. Ct. 903, 913 (2001), *citing to A.L.A. Schechter Poultry v. U.S.,* 295 U.S. 495. 529-542 (1935) *(Schechter) and Panama Refining Co. v. Ryan,* 293 U.S. 388, 421, 413-420 (1935) *(Panama Refining).*

[54] *Mistretta*, 488 U.S. at 373–74.

[55] *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). *Compare:, Lichter v. U.S.,* 334 U.S. 742, 785-786 (1948) (upholding delegation to determine excessive profits); *Yakus v. U.S.,* 321 U.S. 414, 426 (1944) (upholding delegation to fix fair and equitable commodity prices); *FPC v. Hope Natural Gas Co.,* 320 U.S. 591, 600 (1944) (upholding delegation to Federal Power Commission to determine just and reasonable rates); *National Broadcasting Co. v. U.S.,* 319 U.S. 190, 225-226 (1943) (upholding delegation to FCC to regulate broadcast licensing "as public interest, convenience, or necessity" require).

As the 11th Circuit,[56] 6th Circuit,[57] 5th Circuit's original panel,[58] and the seven dissenters to the order on review[59] all found, Section 254 easily meets that standard.

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[56] *See Consumers' Research,* 88 F.4th at 924 ("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 . . . (3) The method by which the FCC must effectuate the goals of accessible, sound-quality, and affordable service: by creating specific mechanisms . .

Consumers' Research., 67 F.4th at 791 (emphases omitted). Thus, we hold that 47 U.S.C. § 254 is permissible under the nondelegation doctrine.")

[57] *Id.*

[58] *See Consumers' Research*, 63 F.4th at 450 ("Because Congress provided the FCC with numerous intelligible principles . . .and those principles sufficiently limit the FCC's revenue-raising activity, we hold that § 254 does not violate the nondelegation doctrine.")

[59] *See Consumers,* 109 F.4th at 788–89. ("Section 254 . . . provides an intelligible principle and the [FCC] maintains control over the . . . the private entity entrusted to aid its administration of the USF. The majority's exhaustive exegesis about policy, history, and assorted doctrines does not eclipse the consistent holding of three sister circuits that have addressed constitutional challenges to Section 254. All have held it constitutional under the intelligible principle test. The majority has created a split in a sweeping opinion that (1) crafts an amorphous new standard to analyze delegations, (2) overturns—without much fanfare—circuit precedent holding that this program collects

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In tandem with 47 U.S.C. § 214 and other provisions, Congress delineated clear principles to ensure universal nationwide access to telecommunications services. It specified the responsible agency, and it set restrictive boundaries on the FCC's authority. This detailed statutory scheme bears no relation to the overbroad and unprecedented delegations to the President successfully challenged in *Panama Refining* and *Schechter*.

In *Panama Refining,* Congress delegated to the President authority to prohibit interstate transportation of petroleum produced above quotas set by state law.[60] The Court held the Act provided no guidance to the President to determine whether or when to exercise that authority and required no Presidential finding as a pre-requisite for action.[61] Congress "declared no policy . . . established no standard, [and] laid down no rule" with respect to this oil law, but instead "left the matter to the President without standard or rule, to be dealt with as he pleased."[62] The Court also noted the targeted

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administrative fees and not taxes, (3) blurs the distinction between taxes and fees, and (4) rejects established administrative law principles and all evidence to the contrary to create a private nondelegation doctrine violation.")

[60] *Panama Refining*, 293 U.S. at 417-19.

[61] *Id.* at 415-18.

[62] *Id.* at 418, 430.

executive order contained no finding or other explanation by which the legality of the action could be tested.[63]

In *Schechter*, the Court reviewed a delegation to the President of authority to promulgate codes of fair competition that industry groups or the President could propose and adopt.[64] The Court determined that the codes were required to implement the National Industrial Recovery Act, but the President's authority to approve, condition, or adopt codes was "without precedent," wanting meaningful standards and "virtually unfettered." [65] The Act supplied no standards for any industry association proposing codes and did not set policies an agency could implement by following administrative procedure.[66]

Unlike either of those cases, Congress, in Section 254, provided a detailed set of standards to cabin the FCC's authority. For example, Section 254(b) mandates standards that restrict the FCC's authority to modify the definition of services supported by the federal universal service fund.[67] That section also mandates that the FCC, in consultation with a Federal-State Joint Board on Universal Service,

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[63] *Id.* at 431-433.

[64] *Schechter,* 295 U.S. at 521-527.

[65] *Id.* at 541-542.

[66] *Id.* at 541.

[67] 47 U.S.C. § 254(b).

consider several principles and factors when formulating its universal service policies. Those include (1) ensuring quality service is available at just, reasonable, and affordable rates; (2) ensuring service is available in all regions of the country, including rural, insular, and high-cost areas that are reasonably comparable to services, and at rates for similar services, in urban areas; [68] along with (3) other principles that the FCC and the Joint Board deem necessary and appropriate for protection of the public interest, convenience, and necessity and are consistent with this chapter. [69]

Section 254(c) further states that the FCC must determine which services are supported by the USF by considering the extent to which the services are (1) essential to education, public health, or safety; (2) subscribed to by a substantial majority of residential customers; (3) being deployed in public networks by

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[68] Each year, the FCC conducts a survey of the fixed voice and broadband service rates offered to consumers in urban areas. The FCC uses the survey data to determine the reasonable comparability benchmarks for fixed voice and broadband rates for universal service purposes. *See Wireline Competition Bureau & Office of Economics and Analytics Announce Results of 2025 Urban Rates Survey. for Fixed Voice & Broadband Services, Posting of Survey Data and Explanatory Notes, and Required Minimum Usage Allowance for Eligible Telecommunications Carriers*, No. DA24-1250, WC Docket No. 10-90 2024 WL 5134393, at *1 (OHMSV Dec. 13, 2024), available online at: https://docs.fcc.gov/public/attachments/DA-24-1250A1.pdf (last visited January 12, 2025).

[69] 47 U.S.C. § 254(b).

telecommunications carriers; and (4) are consistent with "public interest, convenience, and necessity."

In Section 254(e), Congress placed strict limits on permissible uses of the funds by designated ETCs that can only use the support "for the provision, maintenance, and upgrading of facilities and services for which the support is intended." That section also places limits on who can qualify for the subsidies, i.e., only carriers that file for and get approved as Eligible Telecommunications carriers under 47 U.S.C. § 214(e).[70] Either of those two provisions provide more clarity and constraints than the statutory instructions provided in either *Panama Refining* or *Schechter*. This Court invalidated those statutes because they delegated broad, unchecked powers to the executive branch while providing little or nothing in the way of guidance or standards. The contrast with Section 254 could not be greater.

Section 254 specifies clear goals for affordable universal access, numerous criteria for what constitutes universal service, how support should be collected, who can access those subsidies, the requirement for certification to qualify for those subsidies, and what those subsidies can be expended upon. It provides considerably more detailed guidance that this Court has upheld in numerous other statutes.[71]

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[70] 47 U.S.C. § 254(e).

[71] *See* n, *supra*.

Congress provided the FCC with an "intelligible principle" to cabin its authority. The Majority's decision should be vacated.

III. The power lawfully delegated to the FCC in Section 254 has not been subdelegated to the USAC.

The majority's analysis of private delegation incorrectly equates administrative delegation with abdication of authority. Whatever else the FCC has done through an extensive series of notice-and-comment rulemakings to set up the USAC and the budget, parameters, and regulations for the four separate universal service programs, [72] it has not delegated the authority Congress provided it in Section 254 to that entity.

The Majority claims that the FCC has "de facto if not de jure" abdicated authority to the USAC, because the agency seldom rejects the contribution

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[72] The FCC organizes substantive work on the four universal service programs in separate dockets. A chronology of decisions for each program is available on the following FCC's webpages, all last visited January 14, 2025: (1)E-Rate – Schools & Library USF Program at https://www.fcc.gov/general/e-rate-schools-libraries-usf-program, (2) Lifeline Program for Low Income Consumers at https://www.fcc.gov/general/lifeline-program-low-income-consumers, (3) Rural Health Care Program at https://www.fcc.gov/general/rural-health-care-program, and Universal Service for High Cost Areas – Connect American Fund at https://www.fcc.gov/general/universal-service-high-cost-areas-connect-america-fund.

factor the USAC calculates.[73] This should not be a big surprise, given the FCC's extensive oversight which even specifies the inputs the inputs the calculations are based upon.[74]

The USAC operates under a comprehensive regulatory framework established by the Commission. That framework explicitly limits its authority to administrative tasks, such as "billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds."[75] USAC has no authority to make policy, interpret ambiguous rule or statutory provisions, or determine congressional intent.[76] Instead, "[w]here the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission."[77] By definition, the USAC cannot exercise regulatory or policymaking power.

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[73] *Consumers*,109 F.4th at 750-751.

[74] Even the data the USAC collects is based FCC developed and adopted forms approved by the Office of Management and Budget. See, e.g., FCC Forms 499-A Telecommunications Reporting Worksheet, at https://www.usac.org/service-providers/contributing-to-the-usf/forms-to-file/ (last accessed Jan. 12, 2025.)

[75] 47 C.F.R. § 54.702(b).

[76] 47 C.F.R. § 54.702(c).

[77] *Id.* Indeed, the USAC cannot even *lobby* on *substantive* policy choices. Instead, they are limited to "advocat[ing] positions

footnote cont. on next page

With respect to the contribution factor, USAC is required to submit quarterly projections of demand and the basis for those projections to the FCC and its Office of Managing Director at least sixty calendar days" before the start of each quarter, and the "total contribution base" thirty days before.[78] The FCC Office of Managing Director is required to review both submissions and provide "any necessary feedback" before either is publicly filed.[79] Once noticed, the FCC has 14 days to revise the projected demand and administrative expense amounts if it is necessary to "serve the public interest."[80]

But whatever the USAC does, the FCC always has the final word. The USAC operates only within the framework set forth by the FCC and with the FCC's approval. The FCC can review *sua sponte* or on application any of USAC's decisions.[81] Anyone that understands the FCC's detailed oversight, control over inputs, and the reviews required before publication, is far more likely to be surprised if the FCC actually has

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before the Commission and its staff only on administrative matters relating to the universal support mechanism." {emphasis added} 47 C.F.R. § 54.702(d).

[78] 47 C.F.R. § 54.709(a)(3).

[79] *Memorandum of Understanding Between the FCC and the USAC,* at page 7, ¶ 13, at https://www.fcc.gov/sites/default/files/usac-mou.pdf.

[80] 47 C.F.R. § 54.709(a)(3).

[81] See, e.g., 47 C.F.R. § 54.719 et. seq. (establishing FCC review of the USAC's decisions).

to frequently reject the USAC contribution factor. If anything, the regular acceptance of USAC's contribution factor determinations speaks to the high level of FCC supervision and control.

CONCLUSION

The Fifth Circuit's decision undermines Congressional and state efforts to assure universal service. Section 254 provides "intelligible principles" The FCC exerts tight control over the ministerial undertaken by the USAC. For the reasons set forth, *supra*, NARUC urges the Court to reverse the Fifth Circuit's *Decision* and confirm that that Congressional delegation is constitutional.

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January 16, 2025