No. 23-____

IN THE
Supreme Court of the United States

CONSUMERS' RESEARCH, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners challenge the unprecedented revenue-raising mechanism for the Universal Service Fund, a nationwide social program aimed at expanding telecommunications services. Rather than appropriating funds, Congress has authorized the Federal Communications Commission to levy taxes for the USF without any statutory cap or formula, guided only by a list of "aspirational" principles. Congress even authorized the FCC to redefine "universal service" altogether and raise funds for that expanded scope. To top it off, the FCC then *redelegated* operation of the USF to a private company run by self-described industry "interest groups."

With no meaningful limits or accountability, the USF has ballooned, with Americans now paying nearly $10 billion every year—25 times the FCC's annual budget. The Sixth Circuit upheld this unique scheme below, but the Fifth Circuit recently granted *en banc* rehearing in a parallel suit, portending a split.

The questions presented are:

(1) Whether 47 U.S.C. § 254 violates the nondelegation doctrine by imposing no limit on the FCC's power to raise revenue for the USF.

(2) Whether the FCC violated the private nondelegation doctrine by transferring its revenue-raising power to a private company run by industry interest groups.

PARTIES TO THE PROCEEDING

Petitioners are Consumers' Research; Cause Based Commerce, Inc.; Joseph Bayly; Jeremy Roth; Deanna Roth; Lynn Gibbs; and Paul Gibbs.

Respondents are the Federal Communications Commission and the United States of America.

CORPORATE DISCLOSURE STATEMENT

Consumers' Research and Cause Based Commerce, Inc., have no parent corporations, and no publicly held company owns 10% or more of their stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Consumers' Rsch. v. FCC*, No. 23A88 (U.S.) (Aug. 1, 2023, order granting application extending time to file petition until Oct. 27, 2023).

- *Consumers' Rsch. v. FCC*, No. 21-3886 (6th Cir.) (opinion issued May 4, 2023; rehearing *en banc* denied May 30, 2023).

The same legal issues for different quarterly tax rates arise in the following related proceedings:

- *Consumers' Rsch. v. FCC*, Nos. 22-60008, 22-60195, 22-60363, 23-60359, 23-60525 (5th Cir.).

- *Consumers' Rsch. v. FCC*, No. 22-4069 (6th Cir.).

- *Consumers' Rsch. v. FCC*, No. 22-13315 (11th Cir.).

- *Consumers' Rsch. v. FCC*, No. 23-1091 (D.C. Cir.).

There are no additional proceedings in any court that are directly related to these cases within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's May 4, 2023, opinion (Pet.App.1a) is reported at 67 F.4th 773. The Sixth Circuit's May 30, 2023, order denying *en banc* review (Pet.App.56a) is unreported but available at 2023 WL 3807406.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Sixth Circuit entered its judgment on May 4, 2023, and denied *en banc* review on May 30, 2023. On August 1, 2023, Justice Kavanaugh extended the time to file a petition for a writ of certiorari to October 27, 2023. *See* No. 23A88.

STATUTORY PROVISION INVOLVED

The relevant portions of 47 U.S.C. § 254 are reproduced at Pet.App.58a.

INTRODUCTION

Petitioners raise core separation-of-powers challenges to the revenue-raising mechanism for the Federal Communications Commission's Universal Service Fund ("USF" or "Fund"), which now collects nearly $10 billion every year—25 times the FCC's annual budget—by imposing a tax on consumers' monthly phone bills and then redistributing the money with the purported goal of expanding telecommunications services.

"Perhaps the most telling indication of a severe constitutional problem with an executive entity is a lack of historical precedent to support it," *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2201 (2020) (cleaned up), and the USF statute undoubtedly hands the FCC a historically "unique revenue raising mechanism," *Consumers' Rsch. v. FCC*, 63 F.4th 441, 450 (5th Cir.), *reh'g en banc granted*, 72 F.4th 107 (5th Cir. 2023).

It is "unique" because the statute delegates Congress's revenue-raising and taxing powers to an unelected agency bureaucracy without clear and meaningful limitations. This delegation was accomplished through a combination of factors that track the regimes in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), which likewise featured statutes with lengthy lists of vague, precatory, and competing policies, but no directions on how to balance or limit them. If anything, the USF scheme is worse because it gives an executive agency the power to lay taxes.

First, there is an "absence of a limit on how much the FCC can raise for the USF." *Consumers' Rsch.*, 63 F.4th at 448. Unlike other programs, "Congress neither capped the amount that the FCC may raise in contributions for the Fund nor imposed a formula for how to calculate the contributions to the Fund." Pet.App.27a; *see* 47 U.S.C. § 254.

Nor are there meaningful *implied* limitations. The statute lists universal service "principles," but courts and the FCC have long insisted they are merely "aspirational," *Tex. Off. of Pub. Util. Couns. v. FCC* ("*TOPUC I*"), 183 F.3d 393, 421 (5th Cir. 1999), and "need not [be] implement[ed]," Br. for Resp't FCC,*Tex. Off. of Pub. Util. Couns. v. FCC*, 265 F.3d 313 (5th Cir. 2001), 2000 WL 34430695, at *26–27 (Nov. 30, 2000). As this Court has recognized in the nondelegation context, an agency constrained only by its own "voluntary self-denial" has no limit at all. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001).

Second, the USF statute features a rare "dual-layer" delegation, where Congress not only allowed the FCC to raise money for universal service, but also allowed the FCC itself to redefine "universal service" virtually at will and even add new universal service "principles." 47 U.S.C. § 254(c)(1), (b)(7). Letting an agency daisy-chain its own scope of power is "delegation running riot." *Schechter Poultry*, 295 U.S. at 553 (Cardozo, J., concurring).

Third, the USF charges are taxes. The taxing power is the most jealously guarded legislative prerogative. Even the label of these forced payments

as "contribution[s]" to the executive, 47 U.S.C. § 254(d), is reminiscent of English kings avoiding Parliament's purse strings by demanding payment from subjects under the euphemistic title of "loving contributions."[1]

In sum, Congress handed over its taxing power without statutory limits to an agency constrained only by its own precatory "aspirations," and then for good measure let the agency redefine its own scope of taxing authority, too.

No wonder scholars have explained that "[u]nlike the thousands of responsibilities carried out by governmental agencies on behalf of Congress, this delegation is unique because of the unfettered power given to the FCC in defining the scope of universal service, and because Congress delegated the power to levy a tax to pay for the service with no limits, knowing that the end user, the American public, would ultimately be saddled with the burden." Barbara A. Cherry & Donald D. Nystrom, *Universal Service Contributions: An Unconstitutional Delegation of Taxing Power*, 2000 L. Rev. Mich. St. U. Det. C.L. 107, 110.

The USF scheme violates the original understanding of nondelegation, which precludes Congress from "merely announc[ing] vague aspirations and then assign[ing] others the

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[1] *See Benevolence*, 3 ENCYCLOPEDIA BRITANNICA 728 (11th ed. 1911), https://en.wikisource.org/wiki/Page%3AEB1911_-_Volume_03.djvu/748.

responsibility of adopting legislation to realize its goals." *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

It also violates the intelligible-principle test. This Court has expressly warned—in a case involving the FCC, no less—that allowing an agency to raise money based only on vague statutory phrases like "'public policy or interest served, and other pertinent facts'" would raise the specter of "'forbidden delegation of legislative power'" by "carr[ying] [the] agency far from its customary orbit and put[ting] it in search of revenue in the manner of an Appropriations Committee of the House." *NCTA v. United States*, 415 U.S. 336, 341–42 (1974). And this Court has found an intelligible principle in delegations of revenue-raising *only* where there was an objective statutory limit—like a cap or formula—on the executive's ability to self-fund. There is no dispute that the USF statute lacks such a limit.

Accordingly, the USF scheme violates every formulation of the nondelegation doctrine.

But it gets worse. The FCC has subsequently delegated USF operations to a *private* corporation, the Universal Service Administrative Company ("USAC"), led by a group of self-described industry "interest groups." Each quarter, USAC proposes the new USF budget—typically several billion dollars—which is ministerially converted to a tax and *automatically* "deemed approved" if the FCC Commissioners do nothing during the next fourteen days. There is not even a pretense of review by the

Commissioners themselves, and the process is designed to occur so close to the start of a new quarter that the FCC has no choice but to accept USAC's underlying figures. Unsurprisingly, the FCC has never meaningfully changed USAC's proposals over the last 25 years.

The Sixth Circuit, however, wholeheartedly endorsed this entire scheme. It held that giving agencies a blank check to raise funds, limited only by their own "aspirations," is perfectly acceptable "'in our increasingly complex society.'" Pet.App.36a. The court then held that the FCC's authority to redefine its own scope of revenue-raising power "reflects the exact rationale that underpins the nondelegation doctrine," *id.*, even though the nondelegation doctrine exists precisely to *prevent* the executive from redefining its own power over the purse.

The Sixth Circuit also rejected Petitioners' private nondelegation challenge on the theory that the FCC's absolute deference to a private company was merely an exercise of the FCC's "policymaking discretion … '*not* to act.'" Pet.App.45a. Under that view, there can never be a nondelegation violation, as any transfer of power could be reframed as the transferor simply deciding "not to act" going forward.

* * *

The legality of this scheme is eminently worthy of this Court's review. *See* Parts I & II, *infra*. Although there is no circuit split yet on these issues, the Fifth Circuit is poised to create one. After a panel of that

court rejected Petitioners' nondelegation arguments in a parallel suit challenging a different quarterly USF tax rate, the Fifth Circuit granted Petitioners' request for rehearing *en banc*, *see Consumers' Rsch. v. FCC*, 72 F.4th at 108, and the full court heard oral argument in that case in September 2023. A decision is pending. The Eleventh Circuit heard oral argument for a different quarter, with a decision pending there, as well. *See Consumers' Rsch. v. FCC*, No. 22-13315 (11th Cir.).

Even without a circuit split, this case warrants this Court's review because the USF scheme is unprecedented and violates core constitutional principles. Congress has effectively handed its taxing power over to a federal agency, which not only can redefine that scope but has put a private entity in the driver's seat.

The stakes couldn't be higher. Americans already foot the USF's bill to the tune of nearly $10 billion every year. By comparison, the Consumer Financial Protection Bureau has a maximum annual budget of around $750 million—an amount the USF collects *every month*.

If Congress were to replicate this scheme, it would never again have to appropriate funds or pass a budget. Congress could replace the Internal Revenue Code with a single sentence authorizing the Internal Revenue Service to collect mandatory "contributions" that are "sufficient and equitable" to fund the entire federal government or pay off the national debt, even giving the IRS discretion to decide for itself which

agencies or programs to fund. And then the IRS could outsource this process to a private group.

Finally, no vehicle issues preclude review of Petitioners' nondelegation challenges. *See* Part III, *infra*.

Courts "ought not to shy away from [their] judicial duty to invalidate unconstitutional delegations," and "these are surely the cases in which to do it." *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 686–87 (1980) (Rehnquist, J., concurring in the judgment).

The Court should grant the Petition.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background.

1. Telecommunications Act of 1996.

The Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.*, created an explicit funding system to facilitate universal service, i.e., the expansion of telecommunications services across the country at more affordable rates, and required the FCC to create and implement the USF.

But unlike other social programs, Congress did not appropriate funds, nor did it impose any statutory formula, rate, or cap on how much money the FCC could raise to support the USF. And although the money must be spent on "universal service," that term was defined generically as "an evolving level of

telecommunications services that the [FCC] shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services." *Id.* § 254(c)(1). In other words, the FCC could redefine universal service and then raise revenue based on that new, expanded scope.

Congress also announced several "universal service principles" to guide the FCC, *id.* § 254(b), but they are written in such grandiose and ephemeral language—and aren't binding anyway—that courts and the FCC itself have long labeled them as merely "aspirational." *Tex. Off. of Pub. Util. Couns. v. FCC* ("*TOPUC II*"), 265 F.3d 313, 321 (5th Cir. 2001). For good measure, Congress also handed over the power to create new universal service "principles" and then raise revenue for that expanded scope. 47 U.S.C. § 254(b)(7).

2. The FCC Redelegates Its Powers to a Private Company.

The FCC almost immediately redelegated operation of the USF to USAC, a private company registered in Delaware. 47 C.F.R. § 54.701(a); *In re Incomnet, Inc.*, 463 F.3d 1064, 1067 (9th Cir. 2006). USAC has a 19-member Board of Directors comprising individuals from various "interest groups affected by and interested in universal service programs" and who are nominated "by their respective interest groups." *Leadership*, USAC, https://www.usac.org/about/leadership/ (accessed Oct. 25, 2023); *see* 47 C.F.R. § 54.703(b).

USAC is charged with establishing the budget for the USF. *Id.* § 54.709(a). Each quarter, USAC announces a proposed budget—essentially how much money USAC wants for "universal service" for the next quarter for the entire country, an "'imprecise exercise'" inherently fraught with policy judgments. *TOPUC II*, 265 F.3d at 328. The FCC's Office of Managing Director then ministerially calculates what percentage of all telecommunication carriers' expected interstate and international end-user revenues would be necessary to reach that target. 47 C.F.R. §§ 54.706(a), 54.709(a). This number is published as the proposed quarterly "Contribution Factor."

A quarterly Contribution Factor is then automatically "deemed approved" by the FCC and becomes binding unless the Commissioners act within 14 days of publication. *Id.* § 54.709(a)(3). The FCC has never meaningfully modified USAC's proposed budget. The entire process is automated, as the rate is deemed approved only a few days before the start of the new quarter.

As a result, USAC sets the quarterly taxing rate paid by millions of Americans, without the FCC Commissioners ever affirmatively adopting or even substantively reviewing that rate.

3. Carriers Pass Section 254 Taxes Through to Consumers.

Although technically paid into the USF by telecommunications carriers, the USF charge is

"pass[ed] through to [the carriers'] subscribers," *Incomnet,* 463 F.3d at 1066, which the FCC's regulations expressly permit, *see, e.g.*, 47 C.F.R. §§ 54.407(c), 54.712(a). The "charge generally appears on phone bills as the 'Universal Service Fund Fee.'" *Incomnet*, 463 F.3d at 1066.

It was understood from the beginning that consumers would bear the costs of the USF through extra fees and increased telephone rates. *See In re Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776, 9199, ¶ 828–29 (1997); *id.* at 9211–12, ¶ 855.

In the end, the USF is—and was designed to be—financed by "virtually every American's money" because "at the end of the day, it is still the same taxpaying people who bear the cost." *The Lifeline Fund: Money Well Spent?*: *Hearing Before the H. Subcomm. on Commc'n and Tech., H. Comm. on Energy and Com.*, 113th Cong. 1–2 (2013) (statement of Chairman Greg Walden), https://www.govinfo.gov/content/pkg/CHRG-113hhrg82189/pdf/CHRG-113hhrg82189.pdf.

4. USAC Imposes Skyrocketing Rates, Raising Tens of Billions of Dollars.

The USF rate has skyrocketed since its inception. In 2000, the tax was around 5%,[2] but by the early

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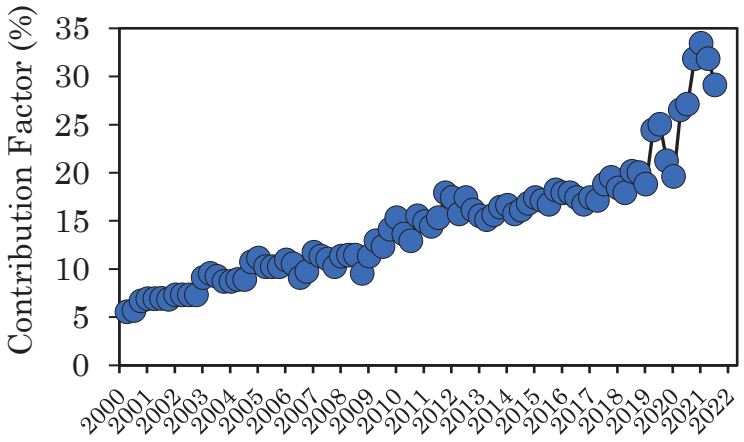
[2] *Proposed Second Quarter 2000 Universal Service Contribution Factor*, Public Notice, DA Docket No. 00-517, FCC 96-45 (rel.

2020s the rate had reached unprecedented levels. For the fourth quarter of 2021—at issue in this suit—USAC set the rate at 29.1%, representing a nearly 500% relative increase. Pet.App.14a. The rate climbed even higher in the fourth quarter 2023, setting a new record of 34.5%.[3]

Quarterly USF Contribution Factor
(2000 Q2 to 2021 Q4)



The scheme now yields nearly $10 billion annually, roughly 25 times the FCC's entire annual budget. *2022 Budget Estimates to Congress*, FCC (May 2021),

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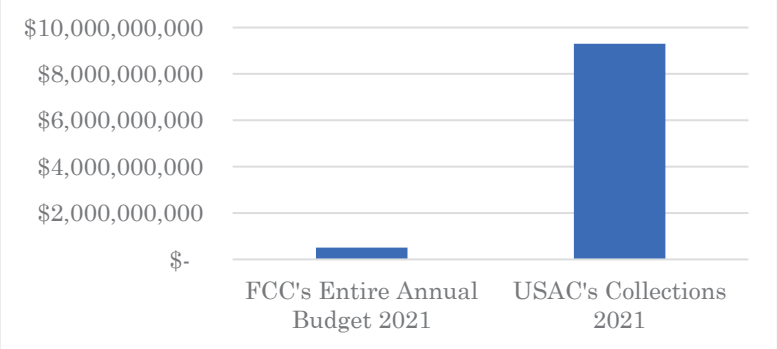
Mar. 7, 2000), https://docs.fcc.gov/public/attachments/DA-00-517A1.pdf.

[3] *See Proposed Fourth Quarter 2023 Universal Service Contribution Factor*, Public Notice, DA Docket No. 23-843, FCC 96-45 (rel. Sept. 13, 2023), https://docs.fcc.gov/public/attachments/DA-23-843A1.pdf.

https://docs.fcc.gov/public/attachments/DOC-372853A1.pdf.



USAC takes these contributions from carriers and deposits them into the USF, then disburses the funds with the purported goal of expanding telecommunication services for the masses. *Incomnet*, 463 F.3d at 1067, 1072.

5. Rampant Fraud, Waste, and Abuse in the USF.

Given the lack of accountability, the USF has predictably demonstrated—in the words of then-Senator Claire McCaskill—a "history of extensive waste and abuse." *The Lifeline Fund: Money Well Spent?*, *supra*, at 2 (quoting Sen. McCaskill).

The GAO and the FCC's internal watchdogs have issued a slew of reports on USF's waste and abuse over the past 15 years, cataloguing not just billions of dollars wasted but also a lack of responsiveness by the FCC and USAC to prior reports of waste and fraud. The FCC's Inspector General summed it up when he

agreed that "applicants view this program as a big candy jar, free money." Sam Dillon, *School Internet Program Lacks Oversight, Investigator Says*, N.Y. Times, June 18, 2004, at A22.

For example, the GAO has reported that the USF is not focused on providing the basic telephone services that low-income Americans actually use, but instead is expanding advanced telecommunications services for wealthier Americans. U.S. Gov't Accountability Off., GAO-21-24, *FCC Should Enhance Performance Goals and Measures for Its Program to Support Broadband Service in High-Cost Areas* 17 (2020), https://www.gao.gov/assets/gao-21-24.pdf.

A separate GAO report found that the FCC had not bothered to evaluate the USF's effectiveness. The low-income Lifeline Program, for example, may not have played *any* meaningful role in improving the "level of low-income households' subscribing to telephone service over the past 30 years," despite costing billions of dollars, footed by American consumers at the discretion of the FCC. U.S. Gov't Accountability Off., GAO-15-335, *FCC Should Evaluate the Efficiency and Effectiveness of the Lifeline Program* (2015), http://www.gao.gov/assets/670/669209.pdf.

Moreover, because the USF imposes a flat tax, customers pay the same rate regardless of their income or bill amount, making it among the "most regressive taxes in America." *Broadband Subsidies for Some, Broadband Taxes for Everyone,* TechFreedom (May 28, 2015), https://techfreedom.org/broadband-subsidies-for-some-broadband-taxes-for/.

"A single, low-income mother, living in the Bronx, with a cell phone for personal safety, pays 10% or more of her monthly wireless telephone bill to support universal service for wealthy Montana residents living on ranchettes." Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 Ind. L.J. 239, 314 (2005).

B. Proceedings Below and in Other Courts.

1. Proceedings at the FCC and Sixth Circuit.

Petitioners comprise several organizations and individuals adversely affected by USF charges. They range from the consumer awareness group Consumers' Research (which pays a monthly USF charge), to a reseller of telecommunications services Cause Based Commerce (which pays directly into the USF), to individual customers whose tight budgets are stretched thinner from having to pay the USF charge each month. For example, Petitioner Joseph Bayly is a pastor and editor who resides in Ohio with his wife and six children. He provides his family's sole income but has to pay into the USF every month via his phone bill.

In Fall 2021, Petitioners filed a comment at the FCC challenging the proposed fourth quarter 2021 Contribution Factor of 29.1%, which was swiftly "deemed approved by the Commission" even though the Commissioners themselves took no action. *See* 47 C.F.R. § 54.709(a)(3). This occurred just a few days

before the rate became effective on October 1, 2021. Pet.App.15a.

Petitioners sued in the Sixth Circuit, and the panel issued its opinion on May 4, 2023. It correctly concluded the suit was timely, Pet.App.17a–23a, but then upheld the USF's revenue-raising mechanism against Petitioners' nondelegation challenges.

The court relied extensively on a recent Fifth Circuit decision—which was subsequently vacated by the *en banc* Fifth Circuit—that acknowledged the USF utilizes "a unique revenue raising mechanism," *Consumers' Rsch.*, 63 F.4th at 450, where "Congress neither capped the amount that the FCC may raise in contributions for the Fund nor imposed a formula for how to calculate the contributions to the Fund," Pet.App.27a.

Despite the admitted historical novelty of this scheme, the Sixth Circuit rejected Petitioners' nondelegation challenge, concluding that "'in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.'" Pet.App.36a.

The court also found that the FCC's ability to change the definition of "universal service" presented no nondelegation concerns, on the theory that letting an agency daisy-chain its own revenue power "reflects the exact rationale that underpins the nondelegation doctrine." *Id.*

The court also found no private nondelegation violation, concluding that "rubber stamp[ing]" a private entity's proposals is an exercise of the FCC's "policymaking discretion … '*not* to act.'" Pet.App.45a.

2. Proceedings at Other Courts.

Petitioners have challenged subsequent USF quarterly tax rates in several other circuits.

As noted, a panel of the Fifth Circuit rejected Petitioners' nondelegation challenges to the first quarter 2022 rate, *Consumers' Rsch.*, 63 F.4th 441, but the *en banc* Fifth Circuit granted rehearing *en banc* in that case, 72 F.4th at 108, and held oral argument in September 2023. Challenges to numerous other quarterly rates are stayed in that circuit, pending a decision by the *en banc* court. *See* Statement of Related Proceedings, *supra*.

Petitioners challenged other quarterly USF taxes at the Eleventh Circuit, which held oral argument in June 2023, *Consumers' Rsch. v. FCC*, No. 22-13315 (11th Cir.), and at the D.C. Circuit, where briefing will soon conclude, *Consumers' Rsch. v. FCC*, No. 23-1091 (D.C. Cir.).

REASONS FOR GRANTING THE PETITION

Congress has delegated to an executive agency the power to raise billions of dollars in taxes from the general public, without objective limits and constrained only by the agency's own "aspirations." The agency can even redefine the scope of its own taxing power at will. The agency has handed off this awesome power to a private company full of industry interest groups, which make the policy judgment of how much money to raise, a process that plays out every quarter without meaningful governmental oversight.

The novel delegation to an agency of a broad and perpetual taxing power should have sounded a blaring alarm. But the decision below wholeheartedly endorsed this scheme from start to finish.

This Court should grant review and reverse. The USF is the poster child for the problems that result from the delegation of constitutionally vested authority. Nobody takes responsibility for a program vacuuming nearly $10 billion a year out of Americans' pockets, with rates that climb ever higher.

This scheme violates both the original understanding of nondelegation, which prohibits Congress from delegating difficult revenue-raising policy judgments to an executive agency, and also the intelligible-principle test, which requires Congress itself to impose clear limits on agency power, most of all in the context of revenue-raising.

The Court should grant the Petition and reverse.

I. THE COURT SHOULD REVIEW PETITIONERS' NONDELEGATION CHALLENGE TO 47 U.S.C. § 254.

The Court should review the constitutionality of the USF statute's "unique revenue raising mechanism," 63 F.4th at 450, which now generates 25 times the FCC's annual budget. Several aspects demonstrate why this scheme is so problematic from a nondelegation perspective:

- Congress allows the FCC to raise money directly, with the general public footing the bill, but "Congress neither capped the amount that the FCC may raise in contributions for the Fund nor imposed a formula for how to calculate the contributions to the Fund." Pet.App.27a.

- The statutory "universal service principles" that ostensibly might limit the FCC are in fact "aspirational only." *TOPUC II*, 265 F.3d at 321. Accordingly, Congress imposed no "policy of limitation" on the FCC. *Panama Refining*, 293 U.S. at 418.

- The FCC can *redefine* "universal service" and then raise money to cover that expanded scope, 47 U.S.C. § 254(c)(1), making it even broader than the dual-layer delegation this Court found problematic in *Schechter Poultry*, 295 U.S. at 538–39.

- USF charges are not just any revenue but are *taxes*, and delegation of Congress's power of the purse is especially troubling.

The Court should grant review of this historical anomaly, which violates both the original understanding of nondelegation and also the intelligible-principle test.

A. Section 254 Violates the Original Understanding of Nondelegation.

The amorphous grant of extensive revenue-raising powers to an executive agency violates the original understanding of nondelegation. *See Consumers' Rsch.*, 63 F.4th at 449 n.4.

Article I of the Constitution begins: "*All* legislative Powers herein granted *shall* be vested in a Congress." The Constitution vests legislative power nowhere else. This means that Congress must "make[] the policy decisions when regulating private conduct" and can only "authorize another branch to 'fill up the details'" or "make the application of that rule depend on executive fact-finding." *Gundy*, 139 S. Ct. at 2135–37 (Gorsuch, J., dissenting); *see also Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari).

James Madison explained during the ratification debates that "[i]f nothing more were required, in exercising a legislative trust, than a general conveyance of authority—without laying down any precise rules by which the authority conveyed should

be carried into effect—it would follow that the whole power of legislation might be transferred by the legislature from itself, and proclamations might become substitutes for law." 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 560 (Jonathan Elliot ed., 2d ed. 1836).

Accordingly, under the Constitution, certain "important subjects … must be entirely regulated by the legislature itself." *Wayman v. Southard*, 23 U.S. 1, 43 (1825). "[T]here are cases in which … the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'" *Whitman*, 531 U.S. at 487 (Thomas, J., concurring).

Chief among those important subjects is raising revenue. The "power over the purse was one of the most important authorities allocated to Congress in the Constitution's 'necessary partition of power among the several departments.'" *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1346–47 (D.C. Cir. 2012) (Kavanaugh, J.). Congress's powers over taxing and spending are "a bulwark of the Constitution's separation of powers among the three branches of the National Government. It is particularly important as a restraint on Executive Branch officers." *Id.* at 1347.

Deciding how much money can be raised for an enormous welfare fund is therefore a quintessentially legislative choice that is "heavily laden (or ought to be) with value judgments and policy assessments" that

only Congress can make. *Mistretta v. United States*, 488 U.S. 361, 414 (1989) (Scalia, J., dissenting).

Section 254 violates the requirement that Congress itself "make[] the policy decisions when regulating private conduct." *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting). Indeed, § 254 purposefully "'*delegate[d] difficult policy choices* to the Commission's discretion,'" including how much revenue to raise for universal service. *TOPUC II*, 265 F.3d at 321 (emphasis added). That alone violates the original nondelegation doctrine.

Stated another way, "it would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce *vague aspirations* and then assign others the responsibility of adopting legislation to realize its goals," *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (emphasis added), but that is exactly what § 254 does: it imposes merely "aspirational" limits on the FCC's revenue-raising powers, *TOPUC II*, 265 F.3d at 321 (emphasis added).

For these reasons, the USF revenue-raising scheme violates the original understanding of nondelegation.

B. Section 254 Violates the Intelligible-Principle Test.

The FCC's power to raise revenue under § 254 runs afoul even of the intelligible-principle test. *See J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). The Sixth Circuit concluded that test is

satisfied unless the FCC has "'absolute[]' discretion" to raise money. Pet.App.35a. But that is not the framework this Court has established. Rather, Congress still must "clearly delineate[] … the boundaries of th[e] delegated authority." *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 219 (1989).

This Court has held that what suffices as an "intelligible principle" varies based on "'the extent and character'" of the power delegated, *Mistretta*, 488 U.S. at 372, and "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred," *Whitman*, 531 U.S. at 475. In other words, there must be an intelligible principle, but what suffices will vary depending on context.

The Sixth Circuit claimed, however, that "we apply one universal intelligible-principle test regardless of the type of statute at issue." Pet.App.26a. That oversimplification led the court to rely on distinguishable cases upholding vague delegations in cases involving complex scientific matters, while simultaneously ignoring or discounting cases that involved core government revenue-raising, as here. Pet.App.24a–30a.

That matters because this Court has held there is a difference between revenue-raising and other types of statutes when it comes to nondelegation. In *NCTA*, for example, this Court held that giving an agency the power to raise money based only on vague statutory phrases like "'public policy or interest served, and other pertinent facts'" would raise the specter of "'forbidden delegation of legislative power'" and

"carr[y] [the] agency far from its customary orbit and put[] it in search of revenue in the manner of an Appropriations Committee of the House." *NCTA*, 415 U.S. at 341–42. Those vague statutory phrases may be sufficiently intelligible in scientific contexts, but not when it comes to deciding how much money to raise from the general public, where Congress itself is—and, under the Constitution, *must be*—the expert.

Yet the Sixth Circuit's decision below did not cite *NCTA*—the most analogous case—even once. That led the court to conclude it was a mere coincidence that *every* Supreme Court decision approving a revenue-raising delegation to the executive branch featured a statute with objective limits on the executive's ability to self-fund. Pet.App.27a–30a.

For example, the statute in *J.W. Hampton* allowed the executive to raise import duties but prohibited any charge that deviated more than 50% from the statutory figures Congress provided. 276 U.S. at 401. And in *Skinner*, the agency was statutorily barred from raising more than 105% of the amount already appropriated by Congress, a fact to which this Court expressly pointed when upholding the delegation. 490 U.S. at 215.

There is no dispute that § 254 lacks any kind of objective limit. Pet.App.27a. That alone renders it unconstitutional because there is no "clearly delineate[d]" limit. *Skinner*, 490 U.S. at 219.

The Sixth Circuit instead claimed to have identified sufficient *implied* limits in § 254, but the

court did so only by adopting interpretations of the statute that other courts and the FCC itself have long rejected. For example, the Sixth Circuit said § 254(b)'s list of universal service "principles" imposes substantive "'require[ments]'" "'to ensure that telecommunications services are: (1) of decent quality and reasonably priced; (2) equally available in rural and urban areas; (3) supported by state and federal mechanisms; (4) funded in an equitable and nondiscriminatory manner; (5) established in important public spaces (schools, healthcare providers, and libraries); and (6) available broadly across all regions in the nation." Pet.App.32a. The court labeled those principles as "provid[ing] comprehensive and substantial guidance and limitations." Pet.App.33a.

But that description would come as a surprise to other courts and the FCC itself, which have long agreed those § 254(b) principles are so grandiose, vague, and precatory that they are "merely aspirational," *TOPUC II*, 265 F.3d at 321, and "need not [be] implement[ed]," Br. for Resp't FCC, 2000 WL 34430695, at *26–27 (Nov. 30, 2000). Beyond their lofty tautological language, the principles are all expressly couched as "should," rather than "shall" or "must."

That means these principles apply (or not) based only on the FCC's discretion and self-restraint. This Court has held that "an agency's voluntary self-denial has no bearing upon" "[w]hether the statute delegates legislative power." *Whitman*, 531 U.S. at 473. We must therefore assume an agency will exercise the full

and outer limit of its statutory power, and the non-binding principles here impose no limits in the first place.

Section 254(b)'s vague list is eerily similar to the statute in *Panama Refining*, which likewise featured a list of "policies," such as "eliminat[ing] unfair competitive practices," "promot[ing] the fullest possible utilization of the present productive capacity of industries," and "avoid[ing] undue restriction of production (except as may be temporarily required)." 293 U.S. at 417. That list, like the one in § 254(b), certainly announced "policies" in the general sense, but this Court held that there was no meaningful "policy *of limitation*" on the President's discretion. *Id.* at 418 (emphasis added). The President was still "free to select as he chooses from the many and various objects generally described," *id.* at 431–32, just like the FCC.

The Sixth Circuit also invoked § 254's requirement that USF funding be "equitable and nondiscriminatory," Pet.App.38a, but the statute in *Schechter Poultry* likewise prohibited policies that imposed "inequitable restrictions on admission" or "discriminate[d] against" small companies, 295 U.S. at 522–23. If aphorisms about equity and nondiscrimination couldn't save the statute in *Schechter Poultry*—even under the intelligible-principle test—they can't save § 254, either. *See* 295 U.S. at 541 (considering *J.W. Hampton*); *see also Panama Refining*, 293 U.S. at 429 (same).

The Sixth Circuit also believed that § 254 requires the FCC to raise only just enough money to "'achieve the purposes of' universal service," in effect setting a "soft cap," analogizing to this Court's rejection of a nondelegation challenge in *Whitman*. Pet.App.39a; *see also* Pet.App.29a. That is wrong for multiple reasons. *First*, *Whitman* involved a statute that set both a floor and a ceiling, *see Whitman*, 531 U.S. at 473, whereas § 254 establishes *neither*, as the FCC has insisted that "nothing in the statute" requires that "universal service support must equal the actual costs incurred," *TOPUC I*, 183 F.3d at 412. *Second*, even if the FCC were required to raise exactly enough money for universal service, the scope of "universal service" is itself so vaguely defined, and can be re-defined by the FCC, that there still is no clearly delineated boundary.

Congress, not an executive agency, is the expert at making the policy judgment of how much money can be raised for the USF. It was Congress's constitutional obligation to clearly delineate a limit on the FCC's power. Congress failed to do so.

C. Multi-Layer Delegation.

Independently warranting review is § 254's unique multi-layer delegation, which allows the FCC not just to raise money for universal service but also to *redefine* the already-vague definition of "universal service" and add *new* "universal service principles"—and then raise money for those expanded concepts. 47 U.S.C. § 254(b)(7), (c)(1)(D).

Even if the statute were otherwise constitutional, this unprecedented second layer would warrant its invalidation. This Court has emphasized in analogous contexts that "[t]he added layer … makes a difference" from a constitutional perspective. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 495 (2010) (multiple layers of removal protection). And this Court labeled a narrower multi-layer delegation in *Schechter Poultry* as especially egregious. *See* 295 U.S. at 538–39 (statute allowed President to "impose his own conditions, adding to or taking from what is proposed, as 'in his discretion' he thinks necessary 'to effectuate the policy' declared by the act'").

The Sixth Circuit turned the nondelegation doctrine on its head by claiming that this dual-layer power "reflects the exact rationale that underpins the nondelegation doctrine." Pet.App.36a. But the nondelegation doctrine exists precisely to *prevent* the executive from daisy-chaining its own scope of power.

The Court should review this unique statutory authorization.

D. The USF Collects Taxes.

Review is also warranted because Congress offboarded the power to raise *taxes*. Hard-fought tradition dating back to England established that "[t]axation is a legislative function," and thus the legislature "is the sole organ for levying taxes." *NCTA*, 415 U.S. at 340; *see* Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? 63 (2014). Allowing

an executive agency to raise taxes is therefore the most egregious form of delegation.

A tax for constitutional purposes is typically a charge where "some of the administrative costs at issue 'inure[] to the benefit of the public.'" *Skinner*, 490 U.S. at 223. But nearly all, if not *all* of the universal service charges "inure to the benefit of the public." Indeed, that is the entire purpose of the program, to provide *Universal* Service at the expense of the general public.

These are not mere "fees," which represent "a 'value-for-value' transaction, in which a feepayer pays the fee to receive a service or benefit in return, and is thus better off as a result of the transaction." *Trafigura Trading LLC v. United States*, 29 F.4th 286, 294 (5th Cir. 2022) (collecting authorities). For the USF, most contributors receive nothing in return—and certainly no proportional "value-for-value."

Whatever the precise line between a fee and a tax, the USF crosses it. That makes the delegation of that power to an executive agency all the more dangerous.

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Congress handed over its taxing power to an agency without objective limits, hemmed in only by the agency's own "aspirations," and then for good measure let the agency expand its own scope of authority at will. The Court should review the constitutionality of this unprecedented revenue-raising mechanism.

II. THE COURT SHOULD REVIEW PETITIONERS' PRIVATE NON-DELEGATION CHALLENGE.

The Sixth Circuit's rejection of Petitioners' private nondelegation challenge also warrants review.

Delegation to "private persons" is "delegation in its most obnoxious form" because "it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). "Private entities are not vested with 'legislative Powers.' Nor are they vested with the 'executive Power,' which belongs to the President." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 62 (2015) (Alito, J., concurring).

Each quarter, USAC—a purely private corporation run by self-described industry "interest groups"—undertakes the "'imprecise exercise'" of deciding how much money will cover universal service over the next quarter. *TOPUC II*, 265 F.3d at 328. That proposed amount is converted to a Contribution Factor and automatically "deemed approved" by the FCC after a mere fourteen days, without the FCC substantively reviewing the figures or the Commissioners themselves even lifting a finger, right before the new quarter begins.

The Sixth Circuit defended the FCC's decision to let USAC act with near-absolute deference when

setting the quarterly taxing figure, labeling it an exercise of the FCC's "policymaking discretion … '*not* to act.'" Pet.App.45a. But letting private proposals automatically become binding under penalty of law—"not acting"—is the very definition of a private nondelegation violation.

Under the Sixth Circuit's view, there can never be a nondelegation violation, as any transfer of authority could be reframed as merely deciding "not to act" going forward. Congress could simply "vote all power to the President and adjourn *sine die*," *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting), and any resulting actions by the President would be Congress deciding "not to act" to stop it. That view is just as wrong in the context of private delegations. To ensure accountability, agencies must "independently perform [their] reviewing, analytical and judgmental functions" when presented with a private proposal, rather than rubber-stamping it. *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974).

The Sixth Circuit also claimed the FCC "'only uses USAC's proposals after independent consideration of the collected data and other relevant information.'" Pet.App.45a. There is zero evidence of this, and the Sixth Circuit cited none. The FCC does not even engage in the *pretense* of review. It never issues a separate approval document each quarter, nor responds to comments filed by the public. In fact, the FCC criticizes public comments like Petitioners' as being "uninvited" and "unrelated to the matter at

hand"[4]—as if the constitutionality of agency action could ever be "unrelated" to that action. And because the FCC designed this "approval" process to play out on the eve of each new quarter, the FCC conveniently has no choice but to accept whatever figures USAC proposes.

Given all this, it's no surprise that the FCC has never meaningfully changed USAC's proposals over 25 years, amounting to over 100 quarters "deemed approved."

This is a far cry from cases where courts have allowed agencies to "employ private entities for *ministerial* or *advisory* roles." *Pittston Co. v. United States*, 368 F.3d 385, 395 (4th Cir. 2004) (citing *United States v. Frame*, 885 F.2d 1119, 1129 (3d Cir. 1989)). There is not some objectively ideal amount needed for "universal service" each quarter (especially because the term is so vague), and thus the determination of that figure inherently requires considerable policy and judgment calls. *See TOPUC II*, 265 F.3d at 328.

To be sure, the FCC could revoke the power it has handed over to USAC, but "[i]f all it reserves for itself is 'the extreme remedy of totally terminating the [delegation agreement],' an agency abdicates its 'final reviewing authority.'" *Fund for Animals v. Kempthorne*, 538 F.3d 124, 133 (2d Cir. 2008) (citation omitted); *see Texas v. Rettig*, 993 F.3d 408, 416–17 (5th Cir. 2021) (Ho, J., dissenting from denial of

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[4] Br. for Resp't 28, *Consumers' Rsch. v. FCC*, No. 22-13315 (11th Cir. Dec. 22, 2022).

rehearing *en banc*). There is an ongoing constitutional violation unless and until the agency actually does rescind that power.

The Sixth Circuit cited the arrangement upheld by the Fifth Circuit in *Texas v. Rettig*, 987 F.3d 518 (5th Cir. 2021), Pet.App.42a, albeit over substantial dissent at the Fifth Circuit, *Rettig*, 993 F.3d at 409 (Ho, J., joined by Jones, Smith, Elrod, and Duncan, JJ., dissenting from denial of rehearing *en banc*), and with several members of this Court subsequently raising serious nondelegation concerns, *see Texas v. Comm'r of Internal Revenue*, 142 S. Ct. 1308, 1309 (2022) (Alito, J., joined by Thomas & Gorsuch, JJ., respecting the denial of certiorari).

But USAC's role here puts to shame the private delegation in *Rettig*, which required private actuaries to approve certain figures. This is no "small part of the approval process," *Rettig*, 987 F.3d at 533, but instead a private company effectively setting the taxing rate that now yields 25 times the FCC's annual budget. It is the FCC—not USAC—that performs the "ministerial" functions here. Pet.App.43a.

Under the Sixth Circuit's framing, there is nothing stopping agencies from handing over vast powers to private companies run by industry interest groups. "[T]here is not even a fig leaf of constitutional justification" for such a scheme, yet the decision below wholeheartedly endorsed it. *Ass'n of Am. R.Rs.*, 575 U.S. at 62 (Alito, J., concurring).

The Court should review this private delegation.

III. THE QUESTIONS PRESENTED ARE IMPORTANT, AND THIS IS AN EXCELLENT VEHICLE TO ADDRESS THEM.

The questions presented are eminently worthy of review. As explained above, the USF statute is historically unique both in terms of the authority delegated to the executive branch to raise taxes itself, and also the subsequent transfer of that power to a private company. This scheme surpasses even those in *Schechter Poultry* and *Panama Refining*.

The Fifth Circuit's recent decision to grant rehearing *en banc* to consider Petitioners' arguments confirms their importance and merit. *Consumers' Rsch.*, 72 F.4th at 108. Although there is no circuit split yet, the *en banc* Fifth Circuit is poised to create one, at which point the FCC itself would likely agree certiorari is warranted.

But even without a split, this Court should grant review because of the importance of the issues. In addition to the historical novelty of the USF scheme, the consequences of upholding it are profound. The FCC has never disputed that if Congress replicated this mechanism elsewhere, there would be no need to pass budgets or make appropriations ever again. The entire federal government could be funded with a single sentence telling the IRS to raise sufficient revenue for the entirety of federal operations or to pay off the national debt, and the IRS could even be given wide-ranging discretion to redefine what agencies and programs are included or excluded. If such a scheme

can legally raise $10 billion a year, why not $10 trillion? And if the FCC can let a private company run the show, then the IRS could, too.

This case also presents an ideal vehicle. The USF funding mechanism violates both the original understanding of nondelegation and the modern nondelegation test, and has a clear historical analog considered by this Court in *Schechter Poultry* and *Panama Refining*. This Court's decision in *NCTA* further emphasizes that revenue-raising—and especially *taxation*—requires Congress itself to impose real limitations on executive agencies' fundraising. The Court could also separately address the private nondelegation violation arising from the FCC's near-absolute deference to a private company's quarterly taxing demands.

There are no procedural hurdles to review. Petitioners have raised their nondelegation challenges at every step. Pet.App.15a. And although the FCC argued below that this challenge was untimely, the FCC has since expressly abandoned that view,[5] which had been unanimously rejected even by those judges who sided with the FCC on other issues. Pet.App.17a–23a; *Consumers' Rsch.*, 63 F.4th at 446–47.

This case also lacks the vehicle flaws present in the petition arising out of *Rettig*, where the statute had

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[5] En Banc Br. for Resp't 1 n.1, *Consumers' Rsch. v. FCC*, No. 22-60008 (5th Cir. Aug. 30, 2023) ("[R]espondents no longer press the argument.").

been changed in the interim and the government still pressed untimeliness arguments. *See Texas*, 142 S. Ct. at 1309 (Alito, J., respecting the denial of certiorari). Three Justices noted that, absent those flaws, they would have voted to review the private-nondelegation challenge in that case, which "present[ed] an important separation-of-powers question." *Id.* Petitioners' case presents an even greater constitutional question. The "hundreds of millions of dollars" at issue in *Rettig* pale in comparison to the nearly $10 billion raised for the USF every year. *Id.* That amount is almost fourteen times bigger than the CFPB's annual budget, the constitutionality of which this Court has granted review to consider. *See Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F.4th 616, 638 n.12 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 978 (2023).

The government has suggested that a ruling in Petitioners' favor would somehow cause practical difficulties. But that is wrong for numerous reasons.

First, the magnitude of a constitutional violation should not be a reason to let it persist. It's a reason to grant review.

Second, in any event, Petitioners have made clear that any relief granted here could be limited to the named Petitioners, i.e., a handful of private citizens,

a consumer protection organization, and a small telecommunications reseller.[6]

Third, Congress is well aware of the constitutional flaws with the USF statute. The Congressional Research Service warned Congress in January 2023 that it should consider "limit[ing] the FCC's discretion over the program by placing a cap on the total revenue the FCC may collect from interstate carriers" or by "articulat[ing] a formula for how the contribution factor should be calculated." Cong. Rsch. Srv., LSB10904, *Fifth Circuit Considers Constitutionality of the Universal Service Fund* 4 (2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10904. A bipartisan group of Members of Congress even submitted an amicus brief in support of the FCC in Petitioners' lead Fifth Circuit case.[7]

The high level of congressional interest in § 254, combined with Congress's recent prompt statutory response to the Fifth Circuit's invalidation of another statute on nondelegation grounds, provides strong reason to believe Congress would take similar action here if it considered it necessary. *See Oklahoma v. United States*, 62 F.4th 221, 225 (6th Cir. 2023) (recognizing Congress's statutory response to

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[6] *See* Reply Br. of Pet'rs. 7 n.2, *Consumers' Rsch. v. FCC*, No. 21-3886 (6th Cir. Dec. 23, 2022).

[7] Br. of Amici Curiae Members of Congress in Support of Resp't, *Consumers' Rsch. v. FCC*, No. 22-60008 (5th Cir. June 17, 2022).

National Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869 (5th Cir. 2022)).

That would ensure that Congress remains accountable to the public for raising revenue for the USF, in accordance with the Constitution's separation of powers.

* * *

This case presents an excellent vehicle for addressing the contours of nondelegation in the context of a program whose abuses highlight the dangers of delegated and politically unaccountable power. The Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX A

United States Court of Appeals for the Sixth Circuit

CONSUMERS' RESEARCH; CAUSE BASED COMMERCE, INC.; JOSEPH BAYLY; JEREMY ROTH; DEANNA ROTH; LYNN GIBBS; PAUL GIBBS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,

Respondents,

BENTON INSTITUTE FOR BROADBAND AND SOCIETY; CENTER FOR MEDIA JUSTICE dba MediaJustice; COMPETITIVE CARRIERS ASSOCIATION; NATIONAL DIGITAL INCLUSION ALLIANCE; NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION dba NTCA; SCHOOLS, HEALTH & LIBRARIES BROADBAND COALITION; USTELECOM,

Intervenors.

No. 21-3886

Petition for Review of an Order of the Federal Communications Commission; No. DA21-1134.

Argued: March 17, 2023
Decided and Filed: May 4, 2023

Before: MOORE, CLAY and STRANCH, Circuit Judges

OPINION

KAREN NELSON MOORE, Circuit Judge.

For nearly a century, Congress has aimed to provide all Americans with universal access to telecommunications services. Congress issued this universal-service mandate in the Communications Act of 1934 and elaborated upon it in the Telecommunications Act of 1996. The Federal Communications Commission ("FCC") implemented the universal-service mandate by establishing the Universal Service Fund ("USF" or "the Fund"), which now consists of four different program mechanisms to "help[] compensate telephone companies or other communications entities for providing access to telecommunications services at reasonable and affordable rates throughout the country, including rural, insular and high costs areas, and to public institutions." Fed. Commc'ns Comm'n, *Glossary of Telecommunications Terms: Universal Service*, https://www.fcc.gov/general/glossary-telecommunications-terms; *see also* 47 U.S.C. § 254. To pay for these universal-service pursuits, Congress requires that certain telecommunications carriers fund these efforts. 47 U.S.C. § 254(d). Thus, on a quarterly basis, the FCC publishes the percentage of "interstate

and international end-user telecommunications revenue" that covered telecommunications carriers must contribute to the Universal Service Fund's programs, known as the quarterly contribution factor. 47 C.F.R. § 54.709(a)(3). Petitioners—a group of consumers, a nonprofit organization, and a carrier—challenge this statutory arrangement as violating the nondelegation doctrine. They further allege that the role of a private entity in administering the Universal Service Fund violates the private-nondelegation doctrine. We disagree and **DENY** the petition for review.

I. BACKGROUND

A. Congress's Goal of Universal Service

1. The Creation of the FCC, the Universal-Service Mandate, the Origins of the Universal Service Fund, and the Telecommunications Act of 1996

Congress created the FCC in 1934 and directed it to make available "communication by wire and radio . . . 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, [through] a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151 (as amended). Congress charged the FCC with "securing a more effective execution of this policy." *Id*. The FCC's creation reflected Congress's desire to make these services universal and its universal-service mandate.

Since 1934, "[u]niversal service has been a fundamental goal of federal telecommunications regulation." *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 614 (5th Cir. 2000); *see also* FCC Br. at 4–5.

The FCC initially pursued the universal-service mandate by providing explicit and implicit subsidies. *Tex. Off. of Pub. Util. Couns. v. FCC (TOPUC I)*, 183 F.3d 393, 406 (5th Cir. 1999). "Explicit subsidies provide carriers or individuals with specific grants that can be used to pay for or reduce the charges for telephone service." *Id*. The FCC provided implicit subsidies by adjusting some customers' rates to subsidize the rates of other customers. *Id*.; *see also* FCC Br. at 5; Pet'rs Br. at 10–11. These implicit subsidies worked in the monopoly environments that made up the industry at the time because carriers could offer above-cost and below-cost rates only if other carriers were not offering at-cost rates. *TOPUC I*, 183 F.3d at 406; FCC Br. at 5; Pet'rs Br. at 10–11. Opening the market to competition in the 1980s and 1990s necessitated a new approach for promoting universal service. *See TOPUC I*, 183 F.3d at 406; FCC Br. at 5; Pet'rs Br. at 10–11.

The FCC created the Universal Service Fund to ease the transition to a competitive market and address universal service in high-cost areas. *See In re Amend. of Part 67 of the Comm'n's Rules & Establishment of a Joint Bd.*, 96 F.C.C.2d 781, 795–800 (1983); Brief for USTelecom et al. as Intervenors Supporting Respondents, No. 21-3886, at 3; *Rural Tel. Coal. v. FCC*, 838 F.2d 1307, 1311 (D.C. Cir. 1988) ("The Commission . . . proposes to create a federal 'Universal

Service Fund' ('Fund') to 'ensure that telephone rates are within the means of the average subscriber in all areas of the country, thus providing a foundation on which the states can build to develop programs tailored to their individual needs.'" (quoting 96 F.C.C.2d at 795)). *Rural Telephone Coalition* explained that "the [USF] was proposed in order to further the objective of making communication service available to all Americans at reasonable charges" and upheld the creation of the USF as "within the Commission's statutory authority." 838 F.2d at 1315. The FCC also established other programs to assist low-income communities, known as Link Up and Lifeline. Congressional Research Service, *Universal Service Fund: Background and Options for Reform*, at 2–3 (updated Oct. 25, 2011) [hereinafter *CRS USF Report*]. These programs operated in connection with the Fund. *See* Fed. Commc'ns Comm'n, *Universal Service Fund*, https://www.fcc.gov/general/universal-service-fund (last visited May 4, 2023) [hereinafter *FCC: Universal Service Fund*].

In 1996, in the wake of the Bell Telephone System's breakup when subsidies were no longer possible in a competitive market, Congress elaborated upon its universal-service mandate and enacted the Telecommunications Act of 1996, which amended the Communications Act of 1934. Telecommunications Act of 1996, Pub. L. 104–104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.); *see also* FCC Br. at 6; *TOPUC I*, 183 F.3d at 406. Among other things, § 254 of the Telecommunications Act (codified in 47 U.S.C. § 254) recognized preexisting and

additional priorities of universal service and called for "specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." *Id*. § 254(b)(5); *see also id*. § 254(b)(3), (6). This gave rise to today's Universal Service Fund and its four specific mechanisms, which are also referred to as programs or funds. *See In re Fed.- State Joint Bd. on Universal Serv.,* 12 F.C.C. Rcd. 8776, 8780 (1997); *Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 56–57 (D.C. Cir. 2011); *Tex. Off. of Pub. Util. Couns. v. FCC*, 265 F.3d 313, 318–19 (*TOPUC II*) (5th Cir. 2001) (explaining "[t]he 1996 Act . . . required that the implicit subsidy system of rate manipulation be replaced with explicit subsidies for universal service" and the FCC responded by "replac[ing implicit subsidies] with an explicit universal service fund"); *CRS USF Report*, *supra*, at 2 ("A new federal Universal Service Fund (USF or Fund) was established in 1997 to meet the specific objectives and principles contained in the 1996 act."); *FCC: Universal Service Fund*, *supra*.

"Congress passed § 254 to ensure the facilitation of broad access to telecommunications services across the country." *Consumers' Rsch. v. FCC*, 63 F.4th 441, 445 (5th Cir. 2023); *see also* 47 U.S.C. § 254. "The USF accomplishes this goal by raising funds which are later distributed to people, entities, and projects to expand and advance telecommunications services in the nation." *Consumers' Rsch*., 63 F.4th at 445. The USF consists of four mechanisms: (1) the Connect America Fund servicing rural areas (previously named "High-Cost Support"), 47 C.F.R. §§ 54.302–54:322, 54.801–54.1515; (2) the Lifeline Program servicing

low-income consumers, *id*. §§ 54.400–54.423; (3) the Schools and Libraries Support program ("E-Rate"), *id*. §§ 54.500–54.523; and (4) the Rural Health Care Support program, *id*. §§ 54.600–54.633.[1] Fed. Commc'ns Comm'n, *Universal Service*, https://www.fcc.gov/general/universal-service (last visited May 4, 2023) [hereinafter *FCC: Universal Service*]; *Vt. Pub. Serv. Bd.*, 661 F.3d at 56–57 ("Pursuant to [§ 254's] statutory directives, the Commission established the Universal Service Program, which consists of four separate funds[.]"); FCC Br. at 10.

Additionally, § 254 established how to fund "the[se] specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." 47 U.S.C. § 254(d). Congress also required a means for federal-state engagement through a Federal-State Joint Board, identified the principles that should guide the task of providing universal

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[1] The Connect America Fund addresses rural service access by offering support to "certain qualifying telephone companies that serve high-cost areas, thereby ensuring that the residents of these regions have access to reasonably comparable service at rates reasonably comparable to urban areas." *FCC: Universal Service, supra*. The Lifeline Program "assists low-income customers by helping to pay for monthly telephone charges so that telephone service is more affordable." *Id*. The Schools and Libraries Support program provides various "telecommunications services[,] . . . [i]nternet access, and" equipment "to eligible schools and libraries." *Id*. Finally, the "Rural Health Care Support [program] allows rural health care providers to pay rates for telecommunications services similar to those of their urban counterparts, making telehealth services affordable, and also subsidizes Internet access." *Id*.

service, instructed how to determine which services fall therein, and provided the funding mechanism. We begin below with an overview of § 254.

2. Section 254 of the Telecommunications Act of 1996

Directing the Use of a Federal-State Joint Board

Subsection 254(a)(1) requires the use of a Federal-State Joint Board ("the Joint Board")[2] "to coordinate federal and state regulatory interests." *TOPUC I*, 183 F.3d at 406. As part of the initial implementation of the 1996 Act, Congress required that, after a period of notice and comment, the Joint Board make recommendations initially to the FCC regarding how to achieve the Act's universal-service provisions by the provided statutory deadlines. *Id.*; 47 U.S.C. § 254(a)(1). Section 254 specifically required that the Joint Board issue recommendations on "the definition of the services that are supported by Federal universal service support mechanisms" by the statutory deadline. 47 U.S.C. § 254(a)(1).

After the initial implementation, Congress directed the Joint Board to remain involved in making recommendations pertaining to universal service. Section 254 states that the Joint Board may make "subsequent recommendations . . .on universal service" to the FCC. *Id*. § 254(a)(2). As detailed below, Congress

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[2] The Joint Board is comprised of three FCC Commissioners, four State Utility Commissioners, and "a State-appointed utility consumer advocate" representative. 47 U.S.C. §§ 254(a)(1), 410(c).

identifies the principles that must guide both the Joint Board when making recommendations regarding and the FCC in making "policies for the preservation and advancement of universal service." *Id*. § 254(b). After identifying six principles for universal service, § 254(b) empowers the Joint Board and the FCC to determine other "necessary and appropriate" principles. *Id*. § 254(b)(7). Congress also permits the Joint Board to recommend to the FCC "modifications in the definition of the services that are supported by Federal universal service support mechanisms." *Id*. § 254(c)(2).

Identifying Seven Principles to Guide Universal-Service Policies

In § 254(b), Congress identified "[u]niversal service principles" and required that "[t]he Joint Board and the Commission *shall* base policies for the preservation and advancement of universal service on the following principles." *Id*. (emphasis added). Subsection 254(b) lists the following principles:

(1) **Quality and rates**[:] Quality services should be available at just, reasonable, and affordable rates.

(2) **Access to advanced services**[:] Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) **Access in rural and high cost areas**[:] Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have

access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, 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.

(4) **Equitable and nondiscriminatory contributions**[:] All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) **Specific and predictable support mechanisms**[:] There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) **Access to advanced telecommunications services for schools, health care, and libraries**[:] Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).

(7) **Additional principles**[:] Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public

> interest, convenience, and necessity and are consistent with this chapter.

Id.

Defining Which Services Are Included in "Universal Service"

Congress instructed the FCC to anticipate and address evolving technologies when effectuating universal service. Section 254 of the Act states that "[u]niversal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section." *Id*. § 254(c)(1) (emphasis added). It therefore instructs that when the Joint Board makes recommendations and the FCC establishes and modifies the definition of which "services . . . are supported by Federal universal service support mechanisms," they "shall consider the extent to which such telecommunications services":

> (A) are essential to education, public health, or public safety;
>
> (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;
>
> (C) are being deployed in public telecommunications networks by telecommunications carriers; and
>
> (D) are consistent with the public interest, convenience, and necessity.

47 U.S.C. § 254(c)(1); *see also id*. § 254(c)(2) (discussing "[a]lterations and modifications" to the definition of

services). Further, the FCC "may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h)," *id*. § 254(c)(3), which refers to the FCC's "Schools and Libraries Support" and "Rural Health Care Support" programs. *See FCC: Universal Service, supra*; *CRS USF Report, supra*, at 3–4.

Funding the USF's Mechanisms Through Telecommunications Carriers' Contributions

To fund the USF's mechanisms, Congress required in § 254(d) that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." Subsection 254(d) thus requires that certain telecommunication carriers contribute to the USF.

B. Funding and Administering the USF

The FCC addresses § 254(d)'s funding requirement on a quarterly basis by, in essence, establishing a percentage to be applied to each covered carrier's "interstate and international end-user telecommunications revenues" in order "to calculate the amount of individual contributions" that each carrier must pay to the USF. 47 C.F.R. § 54.709(a)(3); *see also id*. § 54.709(a)(2). That percentage is known as the quarterly contribution factor. It arises from a ratio of various projections and data that the USF's administrator, Universal Service Administrative Company ("USAC"), submits to the FCC for the FCC's

approval. *See id*. § 54.709(a); *Rural Cellular Ass'n v. FCC*, 685 F.3d 1083, 1085–86 (D.C. Cir. 2012). USAC is a not-for-profit private organization that is structured pursuant to the FCC's regulations. *See, e.g.*, 47 C.F.R. §§ 54.701, 54.703.

USAC submits to the FCC (1) projections of the Fund's quarterly expenses (the projected demands for each mechanism and the administrative expenses) and (2) the "contribution base," which is "the total projected collected end-user interstate and international telecommunications revenues" of the covered carriers that is derived from their self-reported revenue. *See* 47 C.F.R. § 54.709(a)(2)–(3). The first projection—the Fund's demand and administrative expense projections—must be submitted by USAC to the FCC sixty days before the start of each quarter. 47 C.F.R. § 54.709(a)(3).[3] The second figure—the total contribution base—must be submitted to the FCC thirty days before the start of each quarter. *Id*.[4] The FCC then issues a

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[3] USAC provides the projections in a report to the FCC. *See, e.g.*, USAC, *Federal Universal Service Support Mechanisms Fund Size Projections for Fourth Quarter 2021* (Aug. 2,2021),https://www.usac.org/wp-content/uploads/about/ documents /fcc-filings/2021/fourth-quarter/financials/USAC-4Q2021-Federal -Universal-Service-Mechanism-Quarterly-Demand-Filing_ Final.pdf [hereinafter *USAC Q4 2021 Projected Fund Size*].

[4] USAC provides the data in a report to the FCC. *See, e.g.*, USAC, *Federal Universal Service Support Mechanisms Quarterly Contribution Base for the Fourth Quarter 2021* (Sept. 1, 2021), https://www.usac.org/wp-content/uploads/about /documents/fcc-filings/2021/fourth-quarter/financials/USAC-4Q2 021-Universal-Service- Contribution-Base-Filing.pdf [hereinafter

Public Notice of the projections and data and includes therein its *proposed* contribution factor. *Id*. The FCC may revise USAC's projections of the Fund's quarterly expenses within this fourteen-day period. *Id*. "If the [FCC] take[s] no action within fourteen (14) days of the date of release of the public notice . . .the contribution factor shall be deemed approved by the" FCC. *Id*. Once the contribution factor is approved by the FCC, USAC applies the contribution factor to each carrier's applicable revenue, *id*., and issues each carrier a monthly invoice, *see id.* § 54.713(b).

C. The Fourth Quarter 2021 Universal-Service Contribution Factor

On August 2, 2021, USAC submitted to the FCC its projections for the Fund's demand and administrative expenses. *USAC Q4 2021 Projected Fund Size*. On September 1, 2021, USAC provided the FCC with the contribution base (the industry revenue projections based on the carriers' self-report data). *USAC Q4 2021 Projected Contribution Base*. On September 10, 2021, the FCC published a Public Notice regarding the Fourth Quarter 2021 Contribution Factor, which presented USAC's projections and data and the FCC's proposed contribution factor of 29.1%. Fed. Commc'ns Comm'n, *Proposed Fourth Quarter 2021 Universal Service Contribution Factor*, (Sept. 10, 2021) https://www.fcc.gov/document/usf-proposed-4th-quarter-contribution-factor-291-percent [hereinafter *Q4 USAC Q4 2021 Projected Contribution Base*].

2021 Contribution Factor]. The public had until September 24, 2021 to submit comment and objections.

Petitioners filed a comment on September 23, 2021. *Comments and Objections of Consumers' Rsch. et al.*, CC Docket No. 96-45 (Sept. 23, 2021), https://www.fcc.gov/ecfs/document/109231271512688/1. Petitioners requested that the FCC set the contribution factor at 0%. *Id*. at 5. Petitioners' comment listed numerous reasons why they believed that the USF violates the law, including arguments that it violates the nondelegation doctrine, the private-nondelegation doctrine, the Appointments Clause, and the Administrative Procedure Act's ("APA") requirements for rule promulgations. *Id*. at 2–5.

The FCC approved the fourth quarter 2021 contribution factor on September 24, 2021. On September 30, 2021, Petitioners filed a Petition for Review in this court seeking review of whether the FCC's approval of the *Q4 2021 Contribution Factor* "exceeds the FCC's statutory authority and violates the Constitution and other federal laws." D. 1-2 (Pet. at 3). Petitioners raised many of the same challenges made in their comment. *Id*. at 3–5. In their brief filed with this court, Petitioners narrowed their challenge and addressed their nondelegation-doctrine and private-nondelegation-doctrine arguments.

II. STANDARD OF REVIEW

We review de novo constitutional claims raised in a petition for review. *Consumers' Rsch.*, 63 F.4th at 445; *see also United States v. Bowers*, 594 F.3d 522, 527 (6th

Cir. 2010); *Gutierrez v. Sessions*, 887 F.3d 770, 774 (6th Cir. 2018). We also review de novo questions of statutory interpretation and questions of law. *Boler v. Earley*, 865 F.3d 391, 401 (6th Cir. 2017).

III. DISCUSSION

A. JURISDICTION

We conclude that Petitioners have Article III standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Petitioner Cause Based Commerce, Inc. ("CBC") has Article III standing because, as a carrier, it "is a regulated entity required to contribute directly to the Universal Service Fund, with the amount likewise based on the Contribution Factor." Pet'rs Br. at 30. According to CBC's President David Condit, CBC "contributes directly to the Universal Service Fund and has done so during all relevant times for this suit, including the fourth quarter of 2021," and "plans to continue" doing so and remains subject to the contribution requirement. D. 46-2, Ex. 1 (Decl. of David W. Condit) ¶ 4; *see also id*. ¶¶ 2, 5. When the party is "an object of the action . . . at issue . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561–62. Here, CBC's President's testimony demonstrates an actual, concrete, and particularized injury of fact that is fairly traceable to the FCC's conduct and is redressable by a favorable judicial ruling. *See id*. at 560–61. CBC has established Article IIII standing. We can review a petition for review when one petitioner has standing. *See Massachusetts v. EPA*, 549

U.S. 497, 518 (2007); *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 52 n.2 (2006). Thus, Petitioners have satisfied *Lujan*'s standing requirements.

The parties contest, however, whether Petitioners have jurisdiction to file their Petition in this court pursuant to the Administrative Orders Review Act, also referred to as the Hobbs Act, 28 U.S.C. § 2342. Under § 2342, "federal courts of appeals have 'exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of' certain 'final orders of the Federal Communication[s] Commission.'" *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2053 (2019) (quoting 28 U.S.C. § 2342(1)). "Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. § 2344.

The Hobbs Act imposes a jurisdictional limit. *Leyse v. Clear Channel Broad., Inc.*, 545 F. App'x 444, 447, 454 (6th Cir. 2013); *Consumers' Rsch.*, 63 F.4th at 446; *see also Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 437 (2011) (considering another jurisdictional question but stating that "[t]he Government also notes that lower court decisions have uniformly held that the Hobbs Act's 60–day time limit for filing a petition for review of certain final agency decisions, 28 U.S.C. § 2344, is jurisdictional"); *United States v. Marshall*, 954 F.3d 823, 829 (6th Cir. 2020) (same).

"Generally, administrative orders are final and appealable if they impose an obligation, deny a right, or

fix some legal relationship as a consummation of the administrative process." *Leyse*, 545 F. App'x at 455 n.5 (quoting *Multistar Indus., Inc. v. Dep't of Transp.*, 707 F.3d 1045, 1052 (9th Cir. 2013)). But the Hobbs Act is complicated, and the answer to the jurisdiction inquiry varies depending on the agency, the type of agency decision at issue, and the facts of the case. A one-size-fits-all approach does not work.

The FCC argues that it did not issue a reviewable final order within sixty days of Petitioners' challenge. First, the FCC asserts that Petitioners' challenge is many years too late given that their Petition actually challenges the FCC's regulations and orders from the 1990s and 2011 regarding the contribution method and USAC rather than the *Q4 2021 Contribution Factor* itself. Second, the FCC contends that the challenge is simultaneously unripe because the final order is USAC's invoice applying the quarterly contribution factor to a carrier's covered revenue, rather than the FCC's approval of the quarterly contribution factor. FCC Br. at 24–27. We disagree and hold that Petitioners have carried their burden of establishing jurisdiction under the Hobbs Act. *See Lujan*, 504 U.S. at 561 (placing burden of establishing jurisdiction on party opposing dismissal); *Hautzenroeder v. DeWine*, 887 F.3d 737, 740 (6th Cir. 2018) (same).

First, the FCC's regulations indicate that the *Q4 2021 Contribution Factor* is a final order consistent with the Hobbs Act. The FCC's regulations state that an FCC "action shall be deemed *final*, for purposes of . . . judicial review, on the date of public notice as defined in [47 C.F.R.] § 1.4(b)." 47 C.F.R. § 1.103(b)

(emphasis added); *see also Cal. Ass'n of the Physically Handicapped, Inc. v. FCC*, 833 F.2d 1333, 1334 (9th Cir. 1988). *The Q4 2021 Contribution Factor* is a "Public Notice" that the FCC released and issued on September 10, 2021, and approved on September 24, 2021. *Q4 2021 Contribution Factor* at 1; Fed. Commc'ns Comm'n, *USF Proposed 4th Quarter Contribution Factor* is 29.1 Percent, https://www.fcc.gov/document/usf-proposed-4th-quarter-contribution-factor-291-percent. Though "[t]he particular label placed upon" the type of agency decision "is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive," *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416 (1942), the fact that the FCC prescribes that an order becomes final for the purposes of judicial review based "on the date of public notice," 47 C.F.R. § 1.103(b), constitutes support for jurisdiction in this instance. Thus, Petitioners filed their Petition for Review well within sixty days of both dates.[5]

Nonetheless, even if the *Q4 2021 Contribution Factor* is not a final order, we agree with Petitioners that the *Q4 2021 Contribution Factor* reapplies prior final FCC actions that restart the sixty-day clock. Reply Br. at 8–9. *See ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 278 (1987) (noting in the context of agency's

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[5] Because the Petition is timely regardless of whether the FCC's September 10, 2021 release and issuance or the FCC's September 24, 2021 approval triggers the final order date, we need not decide which date controls.

reopening of a proceeding and reissuing of an order that reaffirmed legal obligations in a prior agency order that an agency's subsequent order "is reviewable on its merits" under the Hobbs Act "even if it merely reaffirms the rights and obligations set forth in the original order"). When considering how the reapplication of regulations implicates Hobbs Act jurisdiction, the D.C. Circuit stated that the "statutory time limit restricting judicial review of [an FCC] action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further Commission action applying it." *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958). *Functional Music* explained that "administrative rules and regulations," unlike some other types of final agency action, "are capable of continuing application," and "limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *Id*. Thus, *Functional Music* found that Hobbs Act jurisdiction exists when a petitioner files a challenge within sixty days of a reapplication of the underlying rule. *See id*. Our circuit has addressed when the clock restarts in a slightly different context. *See Ohio Pub. Int. Rsch. Grp., Inc. v. Whitman*, 386 F.3d 792, 799–800 (6th Cir. 2004) (considering analogous jurisdictional requirements). We explained that when an agency is "merely s[eeking] public comment on whether . . . programs were acting in accordance with [underlying] regulations" without demonstrating an "indication that the [agency] was reconsidering any underlying

regulations," the agency is not republishing the rule and it "d[oes] not reopen the sixty-day notice and comment period." *See id*. at 800. *Ohio Public Interest Research Group* did not consider instances in which the new agency action reapplied the underlying rule. *See id*. at 799–800.

In this specific circumstance, to the extent the *Q4 2021 Contribution Factor* itself is not a final order, Petitioners' challenge to the FCC's constitutional authority to implement § 254, reapply its prior regulations, and issue the *Q4 2021 Contribution Factor* restarts the sixty-day clock. *See Functional Music*, 274 F.2d at 546. Every quarter, the FCC reapplies 47 C.F.R. § 54.709 to determine a new contribution factor for the next quarter and impose a new legal obligation. The *Q4 2021 Contribution Factor* itself states that upon its approval, "[c]ontribution payments are due on the dates shown on the invoice" issued by USAC, and also details the sanctions that carriers will face if they fail to pay the contribution or pay the contribution late. *Q4 2021 Contribution Factor* at 4 ("Contributors will pay interest for each day for which the payments are late. Contributors failing to pay contributions in a timely fashion may be subject to the enforcement provisions of the Communications Act of 1934, as amended, and any other applicable law."). It is only because the FCC approves the contribution factor each quarter that USAC can then issue the invoice,[6] indicating that the

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[6] The FCC's argument that a legal obligation arises only when USAC issues an invoice is unavailing as only one petitioner is a carrier who may receive an invoice. The other consumer

legal obligation to pay the contribution arises when the FCC approves the contribution factor.[7] We see this particular instance as distinct from an agency's "mere[] [solicitation of] public comment[s] on whether . . . [a] program[] . . . act[s] in accordance with [underlying] regulations," *see Ohio Public Interest Research Group*, 386 F.3d at 800. And we do not "normally . . . require plaintiffs to bet the farm . . . by taking the violative action before testing the validity of the law." *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 822 (6th Cir. 2015) (second alteration in original) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.,* 561 U.S. 477, 490–91 (2010)) (considering different statutory time limitation); *see also Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145 (D.C. Cir. 2014) (noting that challenges after sixty days of the original agency action may be permitted "when an agency seeks to apply the rule" and "those affected may challenge that

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petitioners ultimately pay a specific fee on their regular service bill because of the contribution factor that the FCC approves for that quarter without ever receiving an invoice. Reply Br. at 15; Oral Arg. at 29:28–30:05.

[7] Though certainly not dispositive, we find further support that the *Q4 2021 Contribution Factor* is an application of prior authority given that the FCC's Public Notices publishing the contribution factors are listed as one proceeding on the FCC's docket, Proceeding CC 96-45, created on March 20, 1996. *See* Fed. Commc'ns Comm'n, Proceeding Docket No. 96-45, https://www.fcc.gov/ecfs/search/search-filings/results?q=(proceedings.name:(%2296-45%22)) (last visited May 4, 2023); Fed. Commc'ns Comm'n, *Filing Detail DA-21-1134A1*, https://www fcc.gov/ecfs/search/search-filings/filing/0910088680112 (last visited May 4, 2023).

application" without awaiting "formal 'enforcement actions'"). Finally, we find significant that Petitioner CBC became a covered carrier only in 2006, *see* D. 46-2, Ex. 1 (Decl. of David W. Condit) ¶ 3, and Petitioner Jeremy Roth first paid a universal-service fee on his phone bill around 2016, see D. 46-2, Ex. 3 (Decl. of Jeremy Roth) ¶ 3,—years after the FCC adopted the rules it now reapplies in the *Q4 2021 Contribution Factor*. *See PDR*, 139 S. Ct. at 2062 (Kavanaugh, J., concurring). We therefore hold that this Petition for Review is timely.

B. NONDELEGATION DOCTRINE

Petitioners argue that § 254 of the Telecommunications Act of 1996 violates the nondelegation doctrine. We, like our colleagues in the Fifth and D.C. Circuits, disagree. *Consumers' Rsch*., 63 F.4th at 450 ("[Section] 254 does not violate the nondelegation doctrine."); *Rural Cellular*, 685 F.3d at 1091 ("[S]ection 254 of the Act clearly provides an intelligible principle.").

The Constitution vests all legislative power in Congress and, under the nondelegation doctrine, bars Congress from "transfer[ring] to another branch 'powers which are strictly and exclusively legislative.'" *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825)). The Constitution, however, allows "Congress [to] obtain[] the assistance of its coordinate Branches," *Mistretta v. United States*, 488 U.S. 361, 372 (1989), and to "confer substantial discretion on executive agencies to implement and

enforce the laws." *Gundy*, 139 S. Ct. at 2123. "The nondelegation doctrine is rooted in the principle of separation of powers." *Mistretta*, 488 U.S. at 371.

Under the nondelegation doctrine, we look for an intelligible principle. "So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id*. at 372 (alterations in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)); *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 218 (1989) (explaining no constitutional violation exists "so long as Congress provides an administrative agency with standards guiding its actions such that a court could 'ascertain whether the will of Congress has been obeyed'" (quoting *Mistretta*, 488 U.S. at 379)); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001). The intelligible-principle test tells us that "Congress . . . may delegate no more than the authority to make policies and rules that implement its statutes." *Loving v. United States*, 517 U.S. 748, 771 (1996). It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). Even when these delegations are "broad," the Court has upheld Congress's power to delegate. *Mistretta*, 488 U.S. at 373–74.

The intelligible-principle test has long recognized "that in our increasingly complex society, replete with ever changing and more technical problems, Congress

simply cannot do its job absent an ability to delegate power under broad general directives." *Id*. at 372; *Gundy*, 139 S. Ct. at 2123 (explaining that the Court's holdings recognize these considerations "time and again"). The Supreme Court has struck down a statute for lacking an intelligible principle on only two occasions: *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), struck down a statute that "provided literally no guidance for the exercise of discretion," *Whitman*, 531 U.S. at 474, and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), struck down a statute that "conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition,'" *Whitman*, 531 U.S. at 474.

Gundy describes the methodology for analyzing a Congressional delegation. We employ statutory interpretation to answer "[t]he constitutional question [of] whether Congress has supplied an intelligible principle to guide the delegee's use of discretion." 139 S. Ct. at 2123. We construe the "challenged statute's meaning" by analyzing "what task it delegates and what instructions it provides." *Id*. (noting that prior precedents have evaluated a statute's purpose, factual background, and context); *see also Consumers' Rsch*., 63 F.4th at 447. If necessary, we next consider whether the statute "sufficiently guides" the agency's discretion. *Gundy*, 139 S. Ct. at 2123.

"[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475 (explaining that the specifics of each statute affect the

inquiry but noting the broad leeway Congress has, *id*. at 474–75). Our inquiry therefore homes in on the statute's specific features, *see id.*, but we apply one universal intelligible-principle test regardless of the type of statute at issue. *See Skinner*, 490 U.S. at 220, 222–23 (rejecting an alternative nondelegation standard for purported delegations of Congress's taxing power) ("[Neither] the text of the Constitution [n]or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power." *Id*. at 222–23); *J.W. Hampton*, 276 U.S. at 409 (rejecting the argument that precedent treats differently delegations regarding "levy[ing] taxes and fix[ing] customs duties" and explaining that "[t]he authorities make no such distinction").[8]

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[8] Because no alternative intelligible-principle standard applies, it is unnecessary to classify the contributions as a "tax" or a "fee." *Skinner*, 490 U.S. at 222–23. We note, however, that in other contexts, courts have determined that contributions to the Universal Service Fund are fees, not taxes. *E.g., Rural Cellular*, 685 F.3d at 1091 ("Nor is the Act as interpreted by the Commission an unconstitutional delegation of the Congress's authority under the Taxing Clause to 'lay and collect Taxes' because the assessment of contributions from carriers is not a tax."); *see also TOPUC I*, 183 F.3d at 427 & n.52 (dismissing tax argument and stating "the universal service contribution qualifies as a fee because it is a payment in support of a service (managing and regulating the public telecommunications network) that confers special benefits on the payees.").

Like with all nondelegation challenges, we consider the at-issue statute's specific features, including the very features Petitioners believe render § 254 a "revenue-raising" statute.

Petitioners argue that § 254 violates the nondelegation doctrine because Congress neither capped the amount that the FCC may raise in contributions for the Fund nor imposed a formula for how to calculate the contributions to the Fund. They argue that the delegations scrutinized in *Skinner* and *J.W. Hampton* survived constitutional muster because, there, Congress capped the fee amounts to be collected and provided a formula for calculating the fee or the customs duty. Petitioners misconstrue *Skinner* and *J.W. Hampton*.

In *Skinner*, a unanimous Supreme Court analyzed a statutory scheme similar to 47 U.S.C. § 254 in what the Court referred to as a non-serious nondelegation-doctrine challenge. 490 U.S. at 219 (recognizing the appellant's only serious challenge concerned whether a heightened nondelegation doctrine applied when Congress delegates its taxing power before rejecting that challenge, *id*. at 220). *Skinner* considered Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985, which "directs the Secretary of Transportation . . . to 'establish a schedule of fees based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines.'" *Id*. at 214 (quoting Pub. L. 99–272, 100 Stat. 82, § 7005(a)(1)). The Court explained that § 7005 was "one of a number of recent congressional enactments designed to make various federal regulatory programs partially or entirely self-financing." *Id*. at 215.

The Court in *Skinner* "ha[d] no doubt that" § 7005 contained sufficient Congressional "restrictions . . . on the Secretary's discretion" and supplied an intelligible principle given that "Congress delimited the scope of [the agency's] discretion with much greater specificity than in [other constitutional] delegations." *Id*. at 219–20. It provided examples that highlighted this "delimited" discretion. *Id*. at 219. For instance, Congress limited the Department of Transportation's discretion by restricting from whom the agency could collect fees and the activities on which the agency could spend the fees. *Id*. Congress further limited the agency's discretion by requiring that the agency apply a uniform approach to setting fees rather than permitting the "set[ting of] fees on a case-by-case basis." *Id*. As in 47 U.S.C. § 254, Congress provided a principle by which to guide the Department of Transportation in setting fees, requiring that the fees "bear a 'reasonable relationship' to" an enumerated list of criteria the agency used to set the fee. *Id*. Unlike 47 U.S.C. § 254, § 7005 stated that "at no time shall the aggregate of fees received for any fiscal year . . . exceed 105 percent of the aggregate of appropriations made for such fiscal year for activities to be funded by such fees." *Id*. at 215 (quoting Pub. L. 99–272, 100 Stat. 82, § 7005(d)). Petitioners argue that the omission of § 7005's last feature dooms 47 U.S.C. § 254. Pet'rs Br. at 40–41. But *Skinner* determined—without "[any] doubt"—that the statute *easily* "satisfied" the intelligible-principle test; the Court did not hold, or even imply, that an intelligible principle required a price cap. *See Skinner*, 490 U.S. at 220; *see also id*. at 218–19. Justice Scalia repeated this very point in

Whitman when he explained that the Supreme Court "ha[s] never demanded . . . that statutes provide a 'determinate criterion'" identifying "how much . . . is too much." 531 U.S. at 475 (quoting *Am. Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir.), *aff'd in part, rev'd in part sub nom. Whitman*, 531 U.S. 457 (2001)).

J.W. Hampton, 276 U.S. 394, similarly did not imply that absent "a precise formula," Pet'rs Br. at 39, a statute lacks an intelligible principle. The statute at issue in *J.W. Hampton* addressed customs duties and allowed the President, upon an investigation, to adjust Congressionally set duty rates to equalize the difference between the production costs in the United States and foreign production costs through a proclamation. 276 U.S. at 401. The statute's purpose in seeking rate equalization was to "secure revenue" and "enable domestic producers to compete on terms of equality with foreign producers in the markets of the United States." *Id*. at 404. Because Congress "doubted" its ability "to fix with exactness this difference" and faced "difficulty in practically determining what that difference is," it turned to the Executive. *Id*. at 404–05. Of course, because the statute sought a mathematical goal of rate equalization (adjustments stemming from the difference between two numbers), it included general mathematics. *Id*. at 401–02, 411. In addition to the broader mathematical principle of rate equalization, Congress provided the President with four items to "take into consideration," *id*. at 401, when "ascertaining the differences in costs of production," *id*. at 403. In upholding the statute, the Court considered

Congress's purpose and the mechanisms the statute used to accomplish that purpose, scrutinized the degree of guidance provided in the statute, and then found guidance in part from the broad mathematics of rate equalization. *See id*. at 404–09.

J.W. Hampton does not stand for the proposition that delegations lacking some sort of Congressional formula lack sufficient guidance. *See id*. Neither do other precedents. *See, e.g., Lichter v. United States*, 334 U.S. 742, 785 (1948) ("It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program.") (upholding statute and explaining "the purpose of the [statute] and its factual background establish a sufficient meaning for 'excessive profits' as those words are used in practice").

Next, Petitioners argue that 47 U.S.C. § 254 lacks any real limits and affords the FCC too much discretion. They assert that § 254 offers no "meaningful definitions" and has "standardless" principles. Pet'rs Br. at 35, 44. *American Power* informs us that a statute's "standards need not be tested in isolation," and that standards "derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." 329 U.S. at 104. The FCC points to numerous statutory provisions that provide an intelligible principle and restrict the FCC's discretion in implementing the USF. Looking to § 254 to analyze "what task it delegates and what instructions it provides" and determining whether

Congress "sufficiently guide[d]" the FCC's discretion, *Gundy*, 139 S. Ct. at 2123, we hold that Congress provided an intelligible principle and its delegation does not violate the separation of powers.

1. Subsection 254(b)'s Principles

Congress provided its principles for universal service in § 254(b). Contrary to Petitioners' assertion that these principles are "standardless" and nothing more than "tautologies," Pet'rs Br. at 44, Congress's principles are fairly detailed and instructive— especially relative to other statutes that have been upheld as constitutional. *See Whitman*, 531 U.S. at 474 (listing principles the Supreme Court has found intelligible and collecting cases); *Lichter*, 334 U.S. at 786 (same). These principles are essentially the goals of universal service and, alongside other provisions of § 254, limit the FCC in how it funds the USF. Therefore, we agree with the Fifth Circuit that Petitioners' "position is untenable." *Consumers' Rsch.*, 63 F.4th at 448.

In § 254(b), Congress first provided a high-level goal for universal service when it instructed that the FCC and the Joint Board work towards "the preservation and advancement of universal service." Congress did not end with this high-level goal but enumerated specific principles of universal service. *Id*. It mandated that, in working to effectuate this goal, the FCC and the Joint Board "*shall*" abide by numerous enumerated principles when effectuating the congressional "policies for the preservation and advancement of universal

service." 47 U.S.C. § 254(b) (emphasis added).[9] When Congress then listed each principle individually, it stopped using "shall" and started using "should." *E.g.*, *id*. § 254(b)(1) ("Quality services *should* be available at just, reasonable, and affordable rates." (emphasis added)). Reading these two provisions together, as other courts have, indicates that Congress *required* that the FCC base its efforts to preserve and advance universal service on the enumerated principles while allowing the FCC to then "*balance* [each] principle[] against one another when they conflict." *See Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001) (emphasis added).

The enumerated principles identify specific goals and provide a detailed framework for universal service. "Section 254 expressly requires the FCC to ensure that telecommunications services are: (1) of decent quality and reasonably priced; (2) equally available in rural and urban areas; (3) supported by state and federal mechanisms; (4) funded in an equitable and nondiscriminatory manner; (5) established in important public spaces (schools, healthcare providers, and libraries); and (6) available broadly across all regions in the nation." *Consumers' Rsch*., 63 F.4th at 448. Thus, some principles focus on the **availability, accessibility, and affordability of service** by requiring that the FCC pursue services that are of

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[9] The entire provision reads: "The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles." 47 U.S.C. § 254(b).

sound quality and affordable; accessible regardless of region; and of comparable access and rates for low-income consumers, rural consumers, and consumers in areas where service is costly. *See* 47 U.S.C. § 254(b)(1)–(3). Other principles, such as those in § 254(b)(4)–(5), instruct on the **funding of universal service and creation of specific approaches** to "preserv[ing] and advanc[ing] universal service" by directing that "providers of telecommunications services" financially contribute to the USF by "mak[ing] an equitable and nondiscriminatory contribution," and requiring that there "be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." *Id*. § 254(b)(4)–(5). And the principle articulated in § 254(b)(6) names **additional beneficiaries of the USF** (health care providers, schools, and libraries) that "should have access to advanced telecommunications services." *See id*. § 254(b)(6). And, of course, Congress indicated its support to continue addressing high-cost service and low-income communities' access to telecommunication services. *See id*. § 254(b)(3).

Together, these principles provide comprehensive and substantial guidance and limitations on how to implement Congress's universal-service policy, and in turn, how the FCC funds the USF. The principles 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.

Petitioners' argument that these principles are too abstract, "lofty," and "aspirational only" is unpersuasive. Pet'rs Br. at 45 (quoting *TOPUC II*, 265 F.3d at 321). Their citation to *TOPUC II*'s statements about the § 254(b) principles is inapplicable. *TOPUC II* considered whether the FCC's CALLS Order, which in part raised a price cap on the amount that "end-users of basic local service pay" on their monthly telephone bills, *TOPUC II*, 265 F.3d at 318, violated the *statute's* "requirement of affordable universal access," *id*. at 320. The court applied *Chevron*'s two steps, asking "whether Congress has spoken directly on the precise question at issue," and if not and § 254 was ambiguous, then asking whether the FCC's "answer is based upon a permissible construction." *Id*. (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984)). *TOPUC II* did *not* evaluate the constitutionality of Congress's delegation, *see generally id.*, but rather considered whether the FCC's price cap violated the Act's (specifically, § 254(b)(1)'s and § 254(i)'s) principles regarding the "just, reasonable, and *affordable* rates" of universal service. *Id*. at 320–21; *see also* 47 U.S.C. § 254(b)(1) (emphasis added), 254(i) (emphasis added).

When explaining why the court determined that the statute was ambiguous under *Chevron*'s step one and required moving on to *Chevron*'s step two, *TOPUC II* explained that it had "previously analyzed § 254(b)

under *Chevron* step-two because the listed principles use 'vague, general language,' rendering the section ambiguous" under *Chevron*. 265 F.3d at 321 (quoting *TOPUC I*, 183 F.3d at 421). The Fifth Circuit found that, because the principle of affordability was an "*aspirational guideline* that must be carefully balanced with other statutory objectives," when the FCC acted in a manner that served other principles more than it served *affordability*, it did not violate § 254. *Id*. (emphasis added). Again, *TOPUC II* did not address the constitutional question about Congress's delegation and did not hold that § 254's principles were too lofty or aspirational to provide an intelligent principle or limitation on the FCC's discretion. *Id*. at 320–22. And, even in the statutory context, Congress's decision to require that the FCC consider these principles and balance them against one another affords the FCC"considerable"—but "not absolute"—discretion. *See TOPUC I*, 183 F.3d at 434 (reviewing FCC's interpretation of § 254 and commenting on § 254's limits on the FCC's discretion).

Subsection 254(b)(7)'s final principle—requiring that the Joint Board and the FCC "shall base policies for the preservation and advancement of universal service on . . . [s]uch other principles" that they "determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter"—does *not* strip away the intelligible principle and the limits on the FCC's discretion that Congress imposed in the first six principles and throughout § 254. As the Fifth Circuit recently noted, "the statute enables, and likely

obligates, [the FCC] to add principles 'consistent with' § 254's overall purpose." *Consumers' Rsch.*, 63 F.4th at 448 (quoting 47 U.S.C. § 254(b)(7)). Thus, any new principle could only be "necessary and appropriate for the protection of the public interest, convenience, and necessity" and must be "consistent with" § 254's detailed scheme for universal service. 47 U.S.C. § 254(b)(7).

Further, this final principle allows the FCC to comply with its mandate to account for the advances to the world of "evolving" telecommunications. *See* 47 U.S.C. § 254(c)(1). Enabling the FCC to account for "evolving" telecommunications reflects the exact rationale that underpins the nondelegation doctrine. *See Gundy*, 139 S. Ct. at 2123. Caselaw acknowledges that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta*, 488 U.S. at 372; *Am. Power*, 329 U.S. at 105 (explaining this precedent "is a reflection of the necessities of modern legislation dealing with complex economic and social problems"); *Gundy*, 139 S. Ct. at 2123 (explaining that the Court's holdings recognize these considerations "time and again"). Congress's decision to grant an agency the ability to address new concerns while still constricting the agency's discretion to do so within the statute's purpose and principles does not turn a statute with an intelligible principle into an unconstitutional delegation.

2. Section 254's Other Provisions and the Statute's Purpose

Section 254's other provisions also limit the FCC's discretion over the USF. For instance, § 254(c) limits the FCC in deciding **which kinds of telecommunications services** are supported by the USF. By doing so, § 254(c) "limits distribution of USF funds" for specific services. *Consumers' Rsch.*, 63 F.4th at 450. Subsection 254(c) narrows the universe of telecommunications services eligible for inclusion by identifying the characteristics of the permissible types of services: Only "telecommunications services" that have been evaluated for the four factors specified by Congress may be included as services in the Fund. Specifically, § 254(c) mandates that the FCC, when identifying which telecommunications services are included, "*shall* consider the extent to which such telecommunications services . . . are [(A)] essential to education, public health, or public safety," (B) popular with "a substantial majority of residential customers," (C) "deployed in public telecommunications networks by telecommunications carriers[,] and" (D) "consistent with the public interest, convenience, and necessity." 47 U.S.C. § 254(c)(1) (emphasis added).

The FCC also points to the relationship between the first three factors and the fourth factor as a further limitation. FCC Br. at 38–39. The first three factors (the telecommunications service's essentiality, popularity, and the degree of deployment) are factual questions to examine. *Id*. The fourth factor then tethers those factual factors to § 254's purpose and statutory

context by mandating that the telecommunications services included be "consistent with the public interest, convenience, and necessity." 47 U.S.C. § 254(c)(1)(D); *see also* FCC Br. at 38–39. The FCC argues that this relationship is evidence of § 254's purpose, "factual background, and the statutory context." FCC Br. at 39 (quoting *Am. Power*, 329 U.S. at 104). As *American Power* explained, a statute's standards "derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." 329 U.S. at 104. Here, these limits on which telecommunications services are eligible for inclusion in the Fund lend further meaning to the statute's standard governing universal-service principles and impose additional constraints in determining which services the Fund can include and collect contributions for.

Congress's **method of funding USF's mechanisms** yet again limits the FCC's discretion. In § 254(d) Congress (1) mandated *who* pays for the universal-service mechanisms and (2) provided a general principle for *how* the FCC should calculate the amount each carrier must contribute. "[T]o preserve and advance universal service," § 254(d) requires that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute[] on an equitable and nondiscriminatory basis" to the Fund. That the contributions must be "on an equitable and nondiscriminatory basis" prevents case-by-case contribution amounts and equalizes the obligation on carriers. *Id*.

More limits on the FCC's discretion exist in § 254(e), which "limits distribution of USF funds to eligible communication carriers under § 214(e)—and even those carriers may only receive support 'sufficient to achieve the purposes of' § 254." *Consumers' Rsch.*, 63 F.4th at 450 (quoting 47 U.S.C. § 254(e)). There are limits on **which "telecommunications carrier[s]. . . shall be eligible to receive specific Federal universal service support**." 47 U.S.C. § 254(e) (emphasis added). Section 254 also restricts **how eligible carriers spend the support funds** they receive by limiting support spending to "only . . . the provision, maintenance, and upgrading of facilities and services for which the support is intended," and instructs the FCC that it should make "[a]ny such support . . . explicit and *sufficien*t to achieve the purposes of this section." *Id*. (emphasis added); *see also Alenco*, 201 F.3d at 620.

Not only does subsection 254(e) provide the FCC additional guidance for implementing universal service, but also its "sufficiency" command places a soft cap on the size and budget of the program, allowing growth no larger than what is "sufficient to achieve the purposes of" universal service. 47 U.S.C § 254(e); *see also TOPUC I*, 183 F.3d at 412 ("[T]he plain language of § 254(e) makes sufficiency of universal service support a direct statutory command rather than a statement of one of several principles."); *Alenco*, 201 F.3d at 620 ("[E]xcessive funding [of the USF] may itself violate the sufficiency requirements of the Act."). *Alenco* explained that "[b]ecause universal service is funded by a general pool subsidized by all telecommunications

providers—and thus indirectly by the customers—excess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market." *Id*.

Section 254 also limits the **type of beneficiaries of the USF**. Under § 254, universal- service efforts must address high-cost areas and low-income communities. 47 U.S.C. § 254(b)(3). Subsection 254(h) also includes "a new statutory mandate to subsidize support for certain beneficiaries"—rural health care providers, schools, and libraries. *TOPUC I*, 183 F.3d at 440; *see also* 47 U.S.C. § 254(h). Section 254 requires telecommunications carriers, upon request, to provide telecommunications services to rural health care providers and includes a specific formula that must be used to calculate the subsidies the FCC issues to these carriers for these services. 47 U.S.C. § 254(h)(1)(A). With regard to schools and libraries, Congress specifically required that telecommunications carriers serving certain geographical areas provide schools and libraries with services "for educational purposes at rates less than the amounts charged for similar services to other parties" upon request. *Id*. § 254(h)(1)(B). Section 254 instructs the FCC and States to set the discount by "determin[ing what] is appropriate and necessary to ensure affordable access to and use of such services by such entities." *Id*. Congress provided two alternative formulas for how carriers would receive subsidies for their discounted service. *Id*. § 254(h)(1)(B)(i)–(ii). These two provisions show that Congress kept for itself the decision of how much

carriers could ultimately receive for the services they provide to rural health care providers and schools and libraries—market-value or discounted services, respectively. Finally, further limits exist with regards to "[a]dvanced services" in § 254(h)(2).

Congress has historically pursued universal service since before 1934. *See* 47 U.S.C. § 151 (creating the FCC in 1934 "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."); *TOPUC I*, 183 F.3d at 405–06. We find even more evidence of an intelligible principle in § 254 from Congress's consistent intention and the statute's purpose. *See Am. Power*, 329 U.S. at 104. Petitioners' dissatisfaction and disagreement with Congress's and the FCC's policy choices "does not translate to a constitutional or statutory violation." *Consumers' Rsch.*, 63 F.4th at 449 n.4. "Rather than leave the FCC with 'no guidance whatsoever,' Congress provided ample direction for the FCC in § 254." *Id.* at 448–49 (quoting *Jarkesy v. SEC*, 34 F.4th 446, 462 (5th Cir. 2022)). Section "254 sets out the FCC's obligations with respect to administration of the USF and the FCC, in turn, calculates what funds are necessary to satisfy its obligations." *Id.* at 450. We therefore conclude that § 254(b)'s principles, Congress's numerous details and limitations on the FCC's implementation of the USF throughout the remainder of § 254, the statute's purpose, and Congress's history of pursuing universal service clearly articulate an intelligible principle and

sufficiently limit the FCC's discretion. *See id*. at 447–50; *Rural Cellular*, 685 F.3d at 1091 ("[S]ection 254 of the Act clearly provides an intelligible principle to guide the Commission's efforts, viz., 'to preserve and advance universal service.'"). We hold that § 254 does not violate the nondelegation doctrine.

C. PRIVATE-NONDELEGATION DOCTRINE

The private-nondelegation doctrine addresses the Constitution's bar on the government's delegation of "unchecked legislative . . . power" to private entities. *Oklahoma v. United States*, 62 F.4th 221, 228 (6th Cir. 2023); *see also Carter v. Carter Coal Co.*, 298 U.S. 238, 310–11 (1936); *Currin v. Wallace*, 306 U.S. 1, 15–16 (1939). An unlawful delegation of authority to a private entity does not exist when the private entity "function[s] subordinate[] to the" agency while aiding the agency and the agency "has authority and surveillance over the activities of" the private entity. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388, 399 (1940); *Texas v. Rettig*, 987 F.3d 518, 532 (5th Cir. 2021), *cert. denied sub nom. Texas v. Comm'r*, 142 S. Ct. 1308 (2022); *Consumers' Rsch.*, 63 F.4th at 450–51; *Oklahoma*, 62 F.4th at 229 ("[A] private entity must be subordinate to a federal actor in order to withstand a non-delegation challenge."). Our cases teach that "a private entity may aid a public federal entity that retains authority over the implementation of federal law" in numerous ways. *Oklahoma*, 62 F.4th at 228–29. For example, "[p]rivate entities may serve as advisors that propose regulations. And they may undertake ministerial functions, such as fee collection,"

id. at 229 (citations omitted), gather facts for the agency, or advise on or make policy recommendations to the agency, *see U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004).

We again agree with the Fifth Circuit that there is no private-nondelegation doctrine violation because USAC is subordinate to the FCC and performs ministerial and fact-gathering functions. *See Consumers' Rsch.*, 63 F.4th at 451–52. USAC is "expressly subordinate[d] . . . to the FCC," as "USAC 'may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.'" *Id*. at 451 (quoting 47 C.F.R. § 54.702(b)). The FCC has not afforded USAC any authority to make actual decisions or establish or define standards. *Cf. U.S. Telecom*, 359 F.3d at 568.

It is Congress that mandates that certain telecommunications carriers contribute to the USF's mechanisms. 47 U.S.C. § 254(b). It is the FCC that implements congressional mandates regarding which services are included in the USF, which types of entities provide interstate telecommunications, and the means of calculating each carrier's contribution amount. *See, e.g.*, 47 C.F.R. § 54.709(a) ("Contributions to the mechanisms . . . shall be based on contributors' projected collected end-user telecommunications revenues, and on a contribution factor determined quarterly by the Commission."). The FCC also maintains detailed regulations regarding USAC's structure. *See, e.g.*, 47 C.F.R. §§ 54.701, 54.703. And it is the FCC that calculates the contribution factor. *Id*. § 54.709(a)–(b).

In its subordinate role, USAC provides the FCC with fact-gathering, ministerial, and administrative support. It submits for *approval* to the FCC the underlying data and projections that the FCC then uses to calculate the contribution factor. *See Adkins*, 310 U.S. at 388, 399 (explaining that the mere power to make a proposal does not run afoul of the private-nondelegation doctrine). As the FCC explained, USAC calculates the Fund's projected expenses and the contribution base subject to "detailed and specific rules and instructions with the Commission's regulations." Oral Arg. at 24:17–34. For instance, USAC does so in compliance with "FCC rules that limit or cap available support" and formulas for certain programs and presents those figures for the FCC to accept or reject.[10] *See* FCC Br. at 53–54, 56; *Adkins*, 310 U.S. at 388.

Critically, the FCC is not bound by USAC's projections. 47 C.F.R. § 54.709(a)(3). Once it has received USAC's projections, the FCC issues a Public Notice publishing the proposed contribution factor and solicits public comment. *Id*.; *see also Adkins*, 310 U.S. at 388. With the close of the public-comment period, the FCC decides whether to approve the contribution factor. 47 C.F.R. § 54.709(a)(3). "If the [FCC] take[s] no action within fourteen (14) days of the date of release of

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[10] The FCC explains, as an example, how formulas guide USAC's calculation for the High Cost Support Mechanism: "[T]he FCC's rules for high-cost support provide precise formulas that USAC must use to calculate available support." FCC Br. at 13 (citing 47 C.F.R. § 54.303(a)(1) (total eligible annual operating expenses); *id*. § 54.1304(b) (safety net additive support); *id*. § 54.901(a) (Connect America Fund Broadband Loop Support)).

the public notice . . . the contribution factor shall be deemed approved by the" FCC. *Id*.

Petitioners argue that this process functions as a rubber stamp given their belief that "the FCC has [n]ever rejected or meaningfully modified" USAC's projections. Pet'rs Br. at 65. The FCC disagrees, arguing that it "has revised USAC's calculations to account for changes in Commission policy." FCC Br. at 58 (collecting sources). Regardless, an agency exercises its policymaking discretion with equal force when it makes policy by either "decid[ing] to act" or "decid[ing] *not* to act." *See Oklahoma*, 62 F.4th at 230. And the FCC's choice often to approve the projections does not change the fact that the FCC has the authority to reject or modify the projections or render USAC's projections as more than a mere proposal. As the FCC explained at oral argument, its decision often to approve USAC's projections reflects USAC's consistent adherence to the FCC's "detailed and specific rules and instructions within the Commission's regulation" when calculating the projections, the FCC's belief that USAC accurately calculates these projections, and satisfaction with USAC's performance. *See* Oral Arg. at 24:17–25:09. Additionally, "the FCC permits telecommunications carriers to challenge USAC proposals directly to the agency and often grants relief to those challenges." *Consumers' Rsch*., 63 F.4th at 451. "Ultimately, the FCC only uses USAC's proposals after independent consideration of the collected data and other relevant information." *Id*. at 452.

USAC's role in handling the administrative functions of billing the contributing carriers and

disbursing the universal-service funds, 47 C.F.R. § 54.702(b), is permissible ministerial support and further reflects its subordination to the FCC. *See Oklahoma*, 62 F.4th at 229 (explaining private entities "may undertake ministerial functions, such as fee collection"). USAC distributes invoices to each contributing carrier once the FCC approves the contribution factor; USAC applies the approved contribution factor to each "contributor's interstate and international end-user telecommunications revenues to calculate the amount of individual contributions." 47 C.F.R. § 54.709(a)(3); *see also id*. § 54.702(b). A private entity may assist an agency with this sort of ministerial support. Because USAC is appropriately subordinated to the FCC and serves a fact-gathering and ministerial function without exercising decision-making power, there is no private-nondelegation doctrine violation.

IV. CONCLUSION

The Constitution permits "Congress [to] obtain[] the assistance of its coordinate Branches," where it provides an intelligible principle. *Mistretta*, 488 U.S. at 371–72. Congress provided the FCC with a detailed statutory framework regarding universal service. That framework contains an intelligible principle because it offers nuanced guidance and delimited discretion to the FCC. Section 254 therefore does not violate the nondelegation doctrine. Because of USAC's subordination to the FCC and its assistance with fact gathering and ministerial support, there is no private-nondelegation doctrine violation. Accordingly, we **DENY** the Petition for Review.

APPENDIX B

Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554
New Media Information 202/418-0500
Internet: http://www.fcc.gov
TTY: 1-888-835-5322

PUBLIC NOTICE
DA 21-1134
Released: September 10, 2021

Proposed Fourth Quarter 2021 Universal Service Contribution Factor CC Docket No. 96-45

In this Public Notice, the Office of Managing Director (OMD) announces that the proposed universal service contribution factor for the fourth quarter of 2021 will be 0.291 or 29.1 percent.[1]

Rules for Calculating the Contribution Factor

Contributions to the federal universal service support mechanisms are determined using a quarterly contribution factor calculated by the Federal Communications Commission (Commission).[2] The Commission calculates the quarterly contribution factor based on the ratio of total projected quarterly costs of

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[1] *See* 47 C.F.R. § 54.709(a).

[2] *See id*.

the universal service support mechanisms to contributors' total projected collected end-user interstate and international telecommunications revenues, net of projected contributions.[3]

USAC Projections of Demand and Administrative Expenses

Pursuant to section 54.709(a)(3) of the Commission's rules,[4] the Universal Service Administrative Company (USAC) submitted projections of demand and administrative expenses for the fourth quarter of 2021.[5] Accordingly, the projected demand and expenses are as follows:

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[3] *See* 47 C.F.R. § 54.709(a)(2).

[4] *See* 47 C.F.R. § 54.709(a)(3).

[5] *See* Federal Universal Service Support Mechanisms Fund Size Projections for the Fourth Quarter 2021, available at <https://www. usac. org/fcc-filings> (filed August 2, 2021) (*USAC Filing for Fourth Quarter 2021 Projections; See also* Federal Universal Service Support Mechanisms Quarterly Contribution Base for the Fourth Quarter 2021, available at <https://www.usac.org/fcc-filings> (filed September 1, 2021) (*USAC Filing for Fourth Quarter 2021 Contribution Base*).

($ millions)

Program Demand	Projected Program Support	Admin. Expenses	Application of True-Ups & Adjustments	Total Program Collection (Revenue Requirement)
Schools and Libraries	573.39	20.30	0.45	594.14
Rural Health Care[6]	153.01	0.00	0.11	153.12
High-Cost	1,349.47	17.22	(229.56)	1,137.13
Lifeline	237.22	16.36	22.65	230.93
Connected Care	8.33	0.31	(0.09)	8.55
Total	2,321.43	54.19	(251.74)	2,13.87

USAC Projections of Industry Revenues

USAC submitted projected collected end-user telecommunications revenues for October 2021 through December 2021 based on information contained in the Fourth Quarter 2021 Telecommunications Reporting

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[6] Rural Health Care administrative costs of $6.35 million are funded within the program cap. *See* Federal Universal Service Support Mechanisms Fund Size Projections for the Fourth Quarter 2021, available at <http://www.usac.org/fcc-filings> (filed August 2, 2021) (*USAC Filing for Fourth Quarter 2021 Projections*).

Worksheet (FCC Form 499-Q).[7] The amount is as follows:

> Total Projected Collected Interstate and International End-User Telecommunications Revenues for Fourth Quarter 2021: $9.517295 billion.

Adjusted Contribution Base

To determine the quarterly contribution base, we decrease the fourth quarter 2021 estimate of projected collected interstate and international end-user telecommunications revenues by the projected revenue requirement to account for circularity and decrease the result by one percent to account for uncollectible contributions. Accordingly, the quarterly contribution base for the fourth quarter of 2021 is as follows:

> Adjusted Quarterly Contribution Base for Universal Service Support Mechanism
>
> (Fourth Quarter 2021 Revenues - Projected Revenue Requirement) * (100% - 1%)
>
> = ($9.517295 billion – $2.123870 billion) * 0.99
>
> =$7.319491 billion.

Unadjusted Contribution Factor

Using the above-described adjusted contribution base and the total program collection (revenue requirement) from the table above, the proposed

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[7] *USAC Filing for Fourth Quarter 2021 Contribution Base* at 4.

unadjusted contribution factor for the fourth quarter of 2021 is as follows:

> Contribution Factor for Universal Service Support Mechanisms
>
> Total Program Collection / Adjusted Quarterly Contribution Base
>
> =$2.123870 billion / $7.319491 billion
>
> =0.290166

Unadjusted Circularity Factor

USAC will reduce each provider's contribution obligation by a circularity discount approximating the provider's contributions in the upcoming quarter. Accordingly, the proposed unadjusted circularity factor for the fourth quarter of 2021 is as follows:

> Unadjusted Circularity Factor for Universal Service Support Mechanisms
>
> =Total Program Collection/Projected Fourth Quarter 2021 Revenues
>
> =$2.123870 billion/$9.517295 billion
>
> =0.223159

Proposed Contribution Factor

The Commission has directed OMD to announce the contribution factor as a percentage rounded up to

the nearest tenth of one percent.[8] Accordingly, the proposed contribution factor for the fourth quarter of 2021 is as follows:

29.1%

Proposed Circularity Discount Factor

The Commission also has directed OMD to account for contribution factor rounding when calculating the circularity discount factor.[9] Accordingly, the proposed circularity factor for the fourth quarter of 2021 is as follows:

0.225384[10]

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[8] *See Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format*, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, Order and Second Order on Reconsideration, 18 FCC Rcd 4818, 4826, para. 22 (2003) (*Second Order on Reconsideration*).

[9] *Id*.

[10] The proposed circularity discount factor = 1 + [(unadjusted circularity discount factor – 1) * (unadjusted contribution factor / proposed contribution factor)]. The proposed circularity discount factor is calculated in a spreadsheet program,

Conclusion

If the Commission takes no action regarding the projections of demand and administrative expenses and the proposed contribution factor within the 14-day period following release of this Public Notice, they shall be deemed approved by the Commission.[11] USAC shall use the contribution factor to calculate universal service contributions for the fourth quarter of 2021. USAC will reduce each provider's contribution obligation by a circularity discount approximating the provider's contributions in the upcoming quarter.[12] USAC includes contribution obligations less the circularity discount in invoices sent to contributors. Contribution payments are due on the dates shown on the invoice. Contributors will pay interest for each day for which the payments are late. Contributors failing to pay contributions in a timely fashion may be subject to the enforcement provisions of the Communications Act of 1934, as amended, and any other applicable law. In addition, contributors may be billed by USAC for reasonable costs of collecting overdue contributions.[13]

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which means that internal calculations are made with more than 15 decimal places.

[11] *See* 47 C.F.R. § 54.709(a)(3).

[12] USAC will calculate each individual contributor's contribution in the following manner: (1-Circulatory Factor) * (Contribution Factor*Revenue)

[13] *See* 47 C.F.R. § 54.713.

We also emphasize that carriers may not mark up federal universal service line-item amounts above the contribution factor.[14] Thus, carriers may not, during the fourth quarter of 2021, recover through a federal universal service line item an amount that exceeds 29.1 percent of the interstate telecommunications charges on a customer's bill.

In addition, under the limited international revenues exception (LIRE) in section 54.706(c) of the Commission's rules, a contributor to the universal service fund whose projected collected interstate end-user telecommunications revenues comprise less than 12 percent of its combined projected collected interstate and international end-user telecommunications revenues shall contribute based only on projected collected interstate end-user telecommunications revenues, net of projected contributions.[15] The rule is intended to exclude from the contribution base the international end-user telecommunications revenues of any entity whose annual contribution, based on the provider's interstate and international end- user telecommunications revenues, would exceed the amount of its interstate end-user revenues.[16] The

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[14] *See* 47 C.F.R. § 54.712.

[15] *See* 47 C.F.R. § 54.706.

[16] *See Federal-State Joint Board on Universal Service*, Sixteenth Order on Reconsideration, CC Docket No. 96-45, Eighth Report and Order, CC Docket No. 96-45, Sixth Report and Order, Docket No. 96-262, 15 FCC Rcd 1679, 1687-1692, paras. 17-29 (1999) (*Fifth Circuit Remand Order*).

proposed contribution factor exceeds 12 percent, which we recognize could result in a contributor being required to contribute to the universal service fund an amount that exceeds its interstate end-user telecommunications revenue. Should a contributor face this situation, the contributor may petition the Commission for waiver of the LIRE threshold.[17]

For further information, contact Thomas Buckley at (202) 418-0725 or Kim Yee at (202) 418- 0805, TTY (888) 835-5322, in the Office of Managing Director.

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[17] Generally, the Commission's rules may be waived for good cause shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may consider considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest. *Northeast Cellular*, 897 F.2d at 1166; 47 C.F.R. § 54.802(a).

APPENDIX C

United States Court of Appeals for the Sixth Circuit

CONSUMERS' RESEARCH; CAUSE BASED COMMERCE, INC.; JOSEPH BAYLY; JEREMY ROTH; DEANNA ROTH; LYNN GIBBS; PAUL GIBBS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,

Respondents,

BENTON INSTITUTE FOR BROADBAND AND SOCIETY, ET AL,

Intervenors.

No. 21-3886

FILED May 30, 2023
DEBORAH S. HUNT, Clerk

ORDER

BEFORE: MOORE, CLAY and STRANCH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No Judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX D

47 U.S. Code § 254 - Universal service

(a) Procedures to review universal service requirements

(1) Federal-State Joint Board on universal service

Within one month after February 8, 1996, the Commission shall institute and refer to a Federal-State Joint Board under section 410(c) of this title a proceeding to recommend changes to any of its regulations in order to implement sections 214(e) of this title and this section, including the definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations. In addition to the members of the Joint Board required under section 410(c) of this title, one member of such Joint Board shall be a State-appointed utility consumer advocate nominated by a national organization of State utility consumer advocates. The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after February 8, 1996.

(2) Commission action

The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15

months after February 8, 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(1) Quality and rates

Quality services should be available at just, reasonable, and affordable rates.

(2) Access to advanced services

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, 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.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) Specific and predictable support mechanisms

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).

(7) Additional principles

Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.

(c) Definition

(1) In general

Universal service is 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. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services—

(A) are essential to education, public health, or public safety;

(B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;

(C) are being deployed in public telecommunications networks by telecommunications carriers; and

(D) are consistent with the public interest, convenience, and necessity.

(2) Alterations and modifications

The Joint Board may, from time to time, recommend to the Commission modifications in the

definition of the services that are supported by Federal universal service support mechanisms.

(3) Special services

In addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h).

(d) Telecommunications carrier contribution

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

(e) Universal service support

After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section

214(e) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

* * * * *