

No. 24-354

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,
Petitioners,

v.

CONSUMERS' RESEARCH, *ET AL.*,
Respondents.

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

**BRIEF OF THE SOFTWARE & INFORMATION
INDUSTRY ASSOCIATION AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

STEPHEN I. VLADECK
Counsel of Record
600 New Jersey Ave., N.W.
Washington, DC 20001
(202) 662-9313
svladeck@gmail.com

Counsel for Amicus Curiae

October 30, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE E-RATE PROGRAM HAS BEEN WILDLY SUCCESSFUL AND HAS CREATED SUBSTANTIAL RELIANCE INTERESTS.....	5
II. AFFIRMING THE DECISION BELOW WOULD PRODUCE AN ARRAY OF DRAMATIC AND DELETERIOUS CONSEQUENCES	10
CONCLUSION	15

TABLE OF AUTHORITIES

Cases

<i>Consumers’ Research v. FCC</i> , 67 F.4th 773 (6th Cir. 2023)	3
<i>United States ex rel. Heath v. Wis. Bell, Inc.</i> , 92 F.4th 654 (7th Cir. 2024), <i>cert. granted</i> , No. 23-1127 (U.S. to be argued Nov. 4, 2024)	10
<i>United States v. Am. Library Ass’n</i> , 539 U.S. 194 (2003)	12
<i>Vt. Pub. Serv. Bd. v. FCC</i> , 661 F.3d 54 (D.C. Cir. 2011)	3

Statutes

Children’s Internet Protection Act (CIPA), Pub. L. No. 106-554, 114 Stat. 2763	4, 12
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56	1, 2, 3, 4

Administrative and Legislative Materials

Fed. Comms. Comm’n, Consumer Guide: Children’s Internet Protection Act (CIPA), Dec. 30, 2019	12
Fed. Comms. Comm’n, <i>Final Rule: Addressing the Homework Gap Through the E-Rate Program</i> , 89 Fed. Reg. 67,303 (Aug. 20, 2024)	5, 7

TABLE OF AUTHORITIES (CONTINUED)

Fed. Comms. Comm'n, <i>The Universal Service Fund: How it Impacts Texas</i> , Aug. 8, 2024	8
S. CONF. REP. No. 104-230 (1996)	1
<i>The State of Universal Service: Hearing Before the S. Comm. on Commerce, Science, & Transportation, Subcomm. on Comms. Media, & Broadband</i> (May 11, 2023) (testimony of Timothy Chavez, Technology Director, Cuba Independent School District)	6
UNIV. SERV. ADMIN. CO., 2023 ANNUAL REPORT (2024)	8
<u>Other Authorities</u>	
Adrienne B. Furniss, INST. FOR BROADBAND & SOC'Y, <i>The Importance and Effectiveness of the E-Rate Program</i> , Aug. 28, 2023	5
GRANDVIEW RESEARCH, EDUCATION TECHNOLOGY MARKET SIZE AND SHARE REPORT, 2024–2030 (2024)	2
Katherine Schaeffer, PEW RESEARCH INST., <i>What We Know About Online Learning and the Homework Gap Amid the Pandemic</i> , Oct. 1, 2021	6

TABLE OF AUTHORITIES (CONTINUED)

Software & Info. Indus. Ass'n,
Ed Tech Success Stories:
Dallas and ST Math, July 2021..... 7

Software & Info. Indus. Ass'n,
Education Technology Industry's
Principles for the Future of AI in
Education, Nov. 2023..... 12

* * *

INTEREST OF *AMICUS CURIAE*¹

Amicus curiae the Software & Information Industry Association (SIIA) is the principal trade association for the software and digital information industries. SIIA's membership includes more than 350 software companies, search engine providers, data and analytics firms, and digital publishers that serve nearly every segment of society—including business, education, government, healthcare, and consumers. SIIA is dedicated to creating a healthy environment for the creation, dissemination, and productive use of information.

SIIA's interest in this case arises from the critical significance to its members of the Schools and Libraries Universal Service Support program—commonly known as the Education-rate (“E-Rate”) program. Congress created E-Rate in 1996 to help schools and libraries across the country better afford access to telecommunications and information services—especially in rural and economically disadvantaged areas. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 101(a), 110 Stat. 56, 71–75 (codified as amended at 47 U.S.C. § 254); *see also* S. CONF. REP. No. 104-230, at 132 (1996) (“The ability of K-12 classrooms, libraries and rural health care providers to obtain access to advanced telecommunications services is critical to ensuring

1. No counsel for a party has authored this brief in whole or in part, nor did any person or entity other than *amicus curiae* or its counsel provide a monetary contribution to the preparation or submission of this brief. *Amicus* provided the parties with notice of its intent to file this brief inside the 10-day period provided for by Rule 37.2, but petitioners and respondents both consented to waiver of the notice period.

that these services are available on a universal basis.”). E-Rate provides funding for *substantial* discounts for eligible products and services (“eligible services”)—everything from internet access itself to the routers, switches, and hotspots that make that access widely scalable.

SIIA’s members manufacture and distribute the hardware and software on which the value of the eligible services depends—everything from laptops and tablets to educational testing platforms for standardized tests to communications tools to e-mail services to cybersecurity solutions to online curricula to Student Information Systems to Learning Management Systems. Nationally, the market for these (and other) educational technologies was estimated to be approximately \$142 billion for 2023; it is expected to grow to as much as \$550 billion by 2030.²

Although the hardware and software that the E-Rate program subsidizes are central to the universal service goals of the Telecommunications Act, it is exactly the kinds of software and services that SIIA members provide that make universal service *valuable*. Without the subsidized broadband access that E-Rate helps to facilitate, or the heavily subsidized hardware that it makes available to schools, libraries, and health-care providers, much of the SIIA-member software and services that schools and libraries depend upon would be useless.

2. See, e.g., GRANDVIEW RESEARCH, EDUCATION TECHNOLOGY MARKET SIZE AND SHARE REPORT, 2024–2030 (2024), <https://www.grandviewresearch.com/industry-analysis/education-technology-market>.

E-Rate is one of the four separate sub-funds comprising the Universal Service Fund, which the FCC established pursuant to express statutory directives from Congress. *See Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 56–57 (D.C. Cir. 2011); *see also Consumers’ Research v. FCC*, 67 F.4th 773, 777–80 (6th Cir. 2023). And the Universal Service Fund is administered, in turn, by the Universal Service Administrative Company (USAC), “a not-for-profit private organization that is structured pursuant to the FCC’s regulations.” *Consumers’ Research*, 67 F.4th at 782.

Even though this arrangement has existed since shortly after the Telecommunications Act of 1996 was enacted, and has been upheld by every other court of appeals to entertain a challenge to it, the decision below in this case struck it down—holding that “the combination of Congress’s sweeping delegation to FCC and FCC’s unauthorized subdelegation to [the USAC] violates the Legislative Vesting Clause.” Pet. App. 64a. Judge Elrod’s and Judge Ho’s separate concurring opinions offered additional reasons why, in their views, Congress, the FCC, or both, had offended the Constitution through the creation, operation, and administration of the Universal Service Fund. *See id.* at 82a (Elrod, J., concurring); *id.* at 85a (Ho, J., concurring).

SUMMARY OF ARGUMENT

Amicus submits this brief to offer two arguments to the Court as it considers the federal government’s petition for a writ of certiorari to review the en banc Fifth Circuit’s decision. First, *amicus* explains why, as important as the questions presented in the petition are in the abstract, they are absolutely crucial to the

continuing vitality—and viability—of the E-Rate program. Thus, insofar as there is any doubt about whether the Court should grant certiorari to review the en banc Fifth Circuit’s ruling in this case, the implications for E-Rate *alone* ought to settle the matter.

Second, the implications for E-Rate are not just an unanswerable reason for granting certiorari, but they also weigh substantially *against* affirming the decision below. Without rehashing the statutory and constitutional arguments advanced by the petitioners and other *amici*, *amicus* instead aims to underscore the extent to which allowing the E-Rate program to become effectively unenforceable would not only run headlong into the plain text and undisputed purpose of the Telecommunications Act of 1996, but it would come at the literal and figurative expense of affordable access to the internet and other telecommunications services for tens of thousands of schools, libraries, and health-care providers (and their students, patients, and staff)—especially in rural and economically disadvantaged areas. The demise of that access won’t just create staggering sunk costs; it will also dramatically exacerbate the “digital divide” that the Telecommunications Act sought to close. And if that weren’t enough, it would also vitiate the principal means through which the federal government obtains and enforces compliance with the Children’s Internet Protection Act (CIPA), Pub. L. No. 106-554, §§ 1701–41, 114 Stat. 2763, 2763A-335 to -352 (codified as amended in scattered sections of 20 and 47 U.S.C.).

Thus, *amicus* respectfully submits not only that the petition should be granted, but that, after plenary review, the decision below should be reversed.

ARGUMENT

I. THE E-RATE PROGRAM HAS BEEN WILDLY SUCCESSFUL AND HAS CREATED SUBSTANTIAL RELIANCE INTERESTS

In the 27 years it has been in existence, the E-Rate program has helped to facilitate (if not directly to have caused) enormous progress in bridging the “digital divide,” *i.e.*, the “inequity that leaves some students, school staff, and library patrons unable to fully participate in schoolwork or access library resources.” Fed. Comms. Comm’n, *Final Rule: Addressing the Homework Gap Through the E-Rate Program*, 89 Fed. Reg. 67,303, 67,305 (Aug. 20, 2024). Indeed, although more recent amendments have focused on expanding access to the internet *outside* of public schools and libraries, *see id.*, perhaps the central achievement of the E-Rate program has been in ensuring that schools and libraries *themselves* are able to afford fast and reliable internet access—especially in rural areas and economically disadvantaged communities. *See, e.g.*, Adrienne B. Furniss, BENTON INST. FOR BROADBAND & SOC’Y, *The Importance and Effectiveness of the E-Rate Program*, Aug. 28, 2023, <https://www.benton.org/blog/importance-and-effectiveness-e-rate-program>.

E-Rate has achieved these goals by providing for the acquisition at *significant* discounts (up to, and sometimes exceeding, 90%) of hardware, software, and other resources necessary for schools, libraries, and health-care providers to have access to the relevant telecommunications infrastructure. To take just one of countless examples, students in the tiny, rural Cuba Independent School District in northern New Mexico have all received Starlink internet satellite systems to use at their homes—a critical

asset given that there are numerous days every year in which the road conditions make it impossible for the students to reach their educational institutions. *See The State of Universal Service: Hearing Before the S. Comm. on Commerce, Science, & Transportation, Subcomm. on Comms. Media, & Broadband* (May 11, 2023) (testimony of Timothy Chavez, Technology Director, Cuba Independent School District), available at <https://www.commerce.senate.gov/services/files/B32B2EA9-3494-452C-8985-C951AFA8709D>. According to Mr. Chavez, “[w]hile Cuba Graduation rates were 62% in 2019, they have risen substantially to 95% in 2021 as a result of the strategic goals and initiatives implemented by the district *with the help of federal funds.*” *Id.* (emphasis added).

The story of the Cuba Independent School District is illustrative, but it is no outlier. If anything, the COVID pandemic underscored both the advancement in school- and library-based internet access that the E-Rate program had already helped to facilitate and the continuing work still to be done in ensuring that students and patrons would be able to take advantage of that access from their homes. *See, e.g.,* Katherine Schaeffer, PEW RESEARCH INST., *What We Know About Online Learning and the Homework Gap Amid the Pandemic*, Oct. 1, 2021, <https://www.pewresearch.org/short-reads/2021/10/01/what-we-know-about-online-learning-and-the-homework-gap-amid-the-pandemic/>.

An illustrative example comes from MIND Education’s ST Math program. Prior to the pandemic, ST Math was used by approximately 1.3 million students. But when many schools closed and/or

switched to online instruction in March 2020, MIND offered free access to ST Math—and provided a COVID-19 resource page to allow *any* parents and schools to sign up for the program. In three months alone, an *additional* 1.8 million students received free access to the program, allowing them to continue progressing in their math education even while they were physically out of the classroom. See Software & Info. Indus. Ass’n, *Ed Tech Success Stories: Dallas and ST Math*, July 2021, <https://www.siiia.net/wp-content/uploads/2021/07/MIND-Edtech-Case-Study-1.pdf>. The more that students and teachers have had (and continue to have) meaningful, reliable, high-speed internet access, the more they have been able to take advantage of those kinds of services from software providers both during and after the pandemic.

That pandemic example—and countless others—have led the FCC in its latest rulemaking respecting the E-Rate program to focus more directly on closing the “homework gap”—the difficulties faced by “students unable to fully participate in educational opportunities because they lack broadband connectivity in their homes.” 89 Fed. Reg. at 67,304. The new rules “are intended to be another step in updating the E-Rate program to reflect the realities of many schools and libraries by lending Wi-Fi hotspots and services through community and school libraries across the country so that students, school staff, and library patrons with the greatest need can be connected and learn without limits.” *Id.* After all, software programs like ST Math are only as good as the internet access that students have to use them.

As the E-Rate program has evolved and expanded, schools and other recipients have come to rely upon the certainty of the funding it provides. That has created substantial reliance interests not just among the program's direct beneficiaries, but within the broader commercial ecosystem that it has generated—which has been able, as a result, to make long-term investments in providing high-quality and effective educational and other software. This symbiotic relationship has in turn helped to ensure that schools, libraries, and hospitals can modernize in a manner necessary to serve the public good—all as intended by Congress.

Some of this reality is the natural consequence of the sheer economic size of the program; according to USAC itself, E-Rate disbursements for calendar year 2023 totaled more than \$2.463 billion—paid out to 132,725 *different* beneficiary schools and libraries across the country. See UNIV. SERV. ADMIN. CO., 2023 ANNUAL REPORT 3–7 (2024), https://www.usac.org/wp-content/uploads/about/documents/annualreports/2023/2023_USAC_Annual_Report.pdf. Indeed, in Texas alone, from 2022–24, 9,523 schools and 411 libraries received \$612,411,804 for broadband connectivity and internet connections. According to the FCC, that access directly benefited 5,845,579 students. See Fed. Comms. Comm'n, *The Universal Service Fund: How it Impacts Texas*, Aug. 8, 2024, <https://docs.fcc.gov/public/attachments/DOC-404605A1.pdf#page=95>. And that was just one state.

Nationally, as E-Rate has been massively successful, it has also become a program on which countless schools have come to rely. Even before the pandemic, but especially today, schools have taken

online everything from attendance and communications to curricula and testing platforms. Unlike what was true a generation ago, when schools today need to alert parents and students of weather-related closures or other urgent information, they use internet-based communications platforms—not the local news; the radio; or a phone tree.

Thus, it's not just that E-Rate has spurred the creation and evolution of a massive commercial ecosystem that has grown up around—and come to rely upon—the funding it provides; it's that it may well be impossible to un-ring that bell. A world in which E-Rate beneficiaries overnight were to lose access to much (if not most) of their abilities to support the hardware necessary for all of these online services and software is just *not* one in which analog approaches from decades ago would necessarily be available to fill the gap; consider how many parents of school-age children today don't have a landline telephone—and therefore depend upon reliable access to broadband networks for even the most conventional modes of communication.

The simple and ineluctable reality is that, as a society, we have all come to depend far more upon the internet for even the most basic communication—to say nothing of the more advanced ways in which schools, libraries, and health-care providers utilize it. For many Americans, especially those living in rural or economically disadvantaged areas, there is no obvious backstop if that access were suddenly to disappear, or even to become less reliable.

To be sure, no one would argue that the E-Rate program has been flawless; the FCC has faced significant issues in combatting fraud and other

malfeasance among the hundreds of thousands of applicants for E-Rate discounts over the years. *Cf. United States ex rel. Heath v. Wis. Bell, Inc.*, 92 F.4th 654 (7th Cir. 2024), *cert. granted*, No. 23-1127 (U.S. to be argued Nov. 4, 2024). But it is no exaggeration to suggest that an astonishingly large number of libraries, schools, and rural health-care providers have come to depend upon the program to provide basic services to their patrons, students, and patients—in ways that would be difficult, if not impossible, to replicate in a world without it.

II. AFFIRMING THE DECISION BELOW WOULD PRODUCE AN ARRAY OF DRAMATIC AND DELETERIOUS CONSEQUENCES

The federal government’s petition for a writ of certiorari in this case identifies the most direct consequence to the E-Rate program that would result from affirming the decision below—or even leaving it intact:

If the Fifth Circuit’s decision is allowed to take effect, carriers in that circuit (and perhaps elsewhere) are likely to argue that they no longer have a legal obligation to make universal service contributions because the FCC and the Administrator lack the power to collect such payments. Such a development would devastate the FCC’s ability to ensure sufficient funding for universal service subsidies going forward.

Pet. 28.

If anything, the petition understates the practical implications. Not only would carriers likely cease their contributions to the Universal Service Fund if

the FCC and USAC lost their abilities to collect the required payments, but it is difficult to imagine how what little is left of (and in) the Fund could be administered without comprehensive statutory restructuring that, among other things, would have to involve the FCC far more directly in its maintenance and administration.

Thus, not only would Congress have to find some means of making up for the massive budgetary shortfall that would result from carriers no longer paying *into* the Universal Service Fund, but it would have to restructure the FCC itself in order to provide the apparatus for the utilization and administration of those funds that remain. Even in the best-case scenario, it would take years to stand back up a program that is currently providing well more than \$2 billion annually in telecommunications-related discounts to schools, libraries, and health-care providers. And that assumes Congress is both able and willing to put in the significant legislative work it would take to restructure E-Rate, or something like it, *especially* if there are constitutional constraints on its ability to use the existing structure as a model.

The downstream consequences of affirming (or declining to review) the decision below would not stop with the sharp reduction in funding for (and need to completely restructure) the E-Rate program. One of the other major achievements of the E-Rate program has been in how it has provided the means for enforcing the Children's Internet Protection Act. That statute, which was designed to limit the exposure of minors to pornography and other indecent material online, is administered entirely through eligibility requirements for E-Rate beneficiaries. *See Fed.*

Comms. Comm'n, Consumer Guide: Children's Internet Protection Act (CIPA), Dec. 30, 2019, https://www.fcc.gov/sites/default/files/childrens_internet_protection_act_cipa.pdf; see also *United States v. Am. Library Ass'n*, 539 U.S. 194, 198–201 (2003) (plurality opinion) (summarizing the relationship between CIPA and the E-Rate program).

Indeed, in order to be *eligible* to participate in E-Rate, applicants must first certify that they are in compliance with CIPA—including by acquiring, implementing, and monitoring an array of hardware and software measures for ensuring that minor users are not exposed to inappropriate content. Without E-Rate, it is not at all clear how Congress could achieve anywhere near the same degree of compliance with CIPA's standards—with the concomitant risk of making it even easier than it already is for minors to access harmful online content.

And even with regard to the direct consequences for E-Rate beneficiaries, it is inevitable that the demise (or even the substantial hollowing out) of E-Rate would exacerbate the very inequities that the Universal Service Fund in general (and E-Rate, specifically) was meant to redress. Consider, in this regard, the growing use of artificial intelligence (AI) in schools. From tutoring and test preparation to assessing learner performance to relatively simple tasks like checking the spelling and grammar of a document, AI technologies are and can have great impacts on teaching and learning. See generally Software & Info. Indus. Ass'n, *Education Technology Industry's Principles for the Future of AI in Education*, Nov. 2023, <https://edtechprinciples.com/wp-content/uploads/2023/11/Education-Technology-Industrys->

[Principles-for-the-Future-of-AI-in-Education-3.pdf](#).

But given the amount of data access (and computing power) that these technologies require, they necessarily depend upon access not just to the internet, but to reliable, high-speed internet connections.

A weakened (or moribund) E-Rate program wouldn't preclude *all* schools from utilizing AI; it would just condition the utilization of AI on a school's ability to pay for its internet-related hardware and software on its own. In the process, the collapse of E-Rate would dramatically exacerbate the gap between the "haves" and "have-nots." In schools that depend upon E-Rate, educational functions would be impeded. Everyone from students and teachers to administrators and parents would be confronted with a diminution or lack of access to modern means of doing so. The myriad new efficiencies that technology has created will cease to exist in those communities (or parts of communities) that have become reliant upon E-Rate and can't replace its funding from other budgetary sources—thus exacerbating, rather than closing, the digital divide. The upshot is that those schools that *can* find another way to pay for these services will reap the benefits of new technologies—while those that cannot will be left behind.

And although none of this bears directly on the answers to the constitutional questions presented in the federal government's petition for a writ of certiorari, it hopefully *does* help to illustrate to the Court the stakes of the en banc Fifth Circuit's ruling in this case—and why this Court's review of that decision is so undeniably imperative. More than that, it also illustrates the stakes of any ruling that would

undermine the E-Rate program—even one that leaves the program nominally intact but strikes down the means by which the FCC and USAC administer it.

Perhaps if E-Rate were a brand-new program out of which no reliance interests had yet sprung, the matter would be different. But nearly three decades after Congress first authorized it, and 27 years after the FCC first funded it, the E-Rate program has become an essential means for countless schools, libraries, and health-care providers to obtain and utilize telecommunications services—something that has become a necessity, and not just a luxury, in twenty-first century America. As imperative as it is for this Court to review the en banc Fifth Circuit’s ruling in this case, it is equally incumbent upon the Court to tread lightly, and to fully account for the consequences, before disrupting that massively important (and enormously beneficial) status quo.

* * *

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the federal government's petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN I. VLADECK
Counsel of Record
600 New Jersey Ave., N.W.
Washington, DC 20016
(202) 662-9313
svladeck@gmail.com

Counsel for Amicus Curiae

October 30, 2024