

NOS. 24-354 and 24-422

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In the  
**Supreme Court of the United States**

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

v.

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

SCHOOLS, HEALTH & LIBRARIES BROADBAND COALITION,  
ET AL.,

*Petitioners,*

v.

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

On Writ of Certiorari to the  
U.S. Court of Appeals for the Fifth Circuit

**BRIEF OF COLORADO AND 21 STATES AND  
THE MAINE OFFICE OF THE PUBLIC  
ADVOCATE AS AMICI CURIAE  
IN SUPPORT OF PETITIONERS**

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## INTERESTS OF THE AMICI

For almost a century, Congress has embraced legislation that advances the extremely popular goal of affordable universal access to communications services. For many decades, “universal service,” as this policy is called, involved “implicit” subsidies that were built into the overall regulated rate structure of a monopolistic local telephone system. This meant, for example, that urban customers paid above cost rates to subsidize rural customers who paid below cost rates. When Congress passed the Telecommunications Act of 1996 (1996 Act), however, it replaced the monopoly-based implicit subsidy regime with explicitly funded universal service. There, Congress expressly directed the Federal Communications Commission (FCC) to ensure universal service consistent with six specific principles, and to fund this service through fees paid by service providers.

Implementing Congress’ principles and instructions, the FCC has done just that through the Universal Service Fund (USF or Fund) and the Fund’s related programs. As a result, advanced telecommunications and information services are now available in rural and remote areas, in healthcare facilities, in schools and libraries, and to low-income users. The decision below, which concluded that the detailed statutory provisions governing universal service violated the nondelegation doctrine, would eradicate these essential programs and jeopardize the commitment to universal service that Congress has clearly endorsed.

Amici here are the States of Colorado, Arizona, Connecticut, Delaware, the District of Columbia, Ha-

wai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Dakota, Vermont, Wisconsin, and Wyoming, and the Maine Office of the Public Advocate, and their interests in this issue are myriad and substantial. Universal service is essential to allow Amici's citizens to participate in virtually every aspect of modern life—the economy, government, politics, healthcare, education, and cultural life. This access is critical, not just to the users of the services provided through the Fund, but to everyone who wishes to communicate with them. Its eradication could seriously disrupt—at a minimum—the overall development of the states' economies, the provision of healthcare, and the education system.

Amici are further interested in this case because the Fund operates under the supervision of a Federal-State Joint Board that allows Amici to participate in the development of these programs and to develop complementary state programs to further bolster universal service. Some of the Amici have developed their own state programs in reliance on the operation of the Fund and its programs. Declaring the Fund unconstitutional would result in a major disruption of Amici's complementary efforts to provide universal service.

Finally, much of the funding provided by the USF is distributed over long time periods, with telecommunications providers making investments in significant infrastructure projects based on long-term payouts, or schools entering long-term service contracts based on the promise of subsidized rates. If the funding programs were eradicated, these entities would be subject

to financial chaos and potential bankruptcies, with ripple effects extending to many other entities, like public and private lenders, and resulting in the potential need for Amici to step in to prevent catastrophic outcomes.

### **SUMMARY OF THE ARGUMENT**

Since 1934, Congress has sought to ensure that advanced communications technology is accessible throughout the country. In the era of regulated telecommunications monopolies, this was accomplished by a system of cross-subsidies where urban and rural consumers paid the same rates even though the cost of providing services to urban customers was less than providing service to rural customers. But when Congress allowed competition to enter the communications market, it recognized that the cross-subsidy system could no longer achieve universal service and put a new structure in place: the USF.

Implemented by the FCC and administered by the Universal Service Administrative Company (USAC) with the FCC's oversight, the USF has worked hard to achieve Congress' vision—following the statutory principles and other detailed limits that Congress laid out. Because of the USF, entire swaths of the country have broadband access, allowing them to participate in civic and community life to the same extent as their urban counterparts. Rural hospitals are better able to provide life-saving care in areas of the country that have few local specialized providers. Schools and libraries with fewer resources can provide many of the same opportunities to their students and patrons as those in better-funded communities. And people of limited means are able to afford phone service.



Invalidating the USF, as respondents seek here, would result not only in the loss of these benefits to the detriment of the many constituencies that Congress intended to help, but it would also have substantial negative consequences for other stakeholders. Many service providers, schools, and others have made long-term investments and agreements in reliance on the availability of USF funds. Its sudden loss would mean cuts in other services, diminished access to the technology Congress wanted to be made universally available, and in some instances, bankruptcies and job losses.

There is no reason for any of these devastating consequences to come to pass. The USF does not violate the nondelegation doctrine because Congress provided intelligible principles to guide the FCC's exercise of authority. And in enacting the USF, Congress made the difficult policy decisions about whether to provide universal service and how it should be funded, leaving it to the FCC to fill in the details consistent with the principles and limits Congress set forth in the 1996 Act. Furthermore, the FCC's creation of USAC to provide administrative services for the USF does not violate the private nondelegation doctrine because USAC operates entirely under the FCC's authority and supervision. Finally, given the role the Federal-State Joint Board plays and the history of state involvement in universal service efforts, nothing about the USF undermines federalism; to the contrary, the USF is a model of cooperative federalism.

The USF is also subject to several different oversight mechanisms that can address any issues that

arise with the program. The FCC's Office of the Inspector General routinely audits the USF; Congress holds regular hearings regarding the USF; USAC's recommendations can be challenged before the FCC; and the FCC's decisions can be challenged in court. Many different avenues exist to ensure the program functions as Congress intended.

Nearly thirty years ago, Congress enacted the current universal service regime to the benefit of the entire country. Losing this vital program would be devastating and is not constitutionally required. This Court should reverse the decision below.

## **ARGUMENT**

### **I. The USF Has Provided the Precise Benefits Congress Intended.**

#### **A. Congress Has Clearly Legislated the Importance of Universal Service.**

For almost a century, universal service has been a guiding principle of Congress' telecommunications policy. In the 1934 Communications Act, Congress assigned the FCC the task of "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communications service with adequate facilities at reasonable charges." Communications Act of 1934, Pub. L. No. 73-652, § 1, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151).

For most of the 20th century, telecommunications regulation was premised "on the belief that service could be provided at the lowest cost to the maximum

number of consumers through a regulated monopoly network.” *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 15505 (1996) (*Local Competition Order*). In this environment, “universal service” was achieved primarily through implicit or cross-subsidies. Like the commitment of the Post Office to provide mail service to rural and urban communities at the same prices, monopoly providers priced telephone service at uniform levels for rural and urban communities. This meant that urban communities paid above-cost rates so that rural communities could be served below cost. And because business customers were provided service at higher rates than residential customers, that cross-subsidy constituted a second form of implicit subsidies that were built into the rate structure. Finally, long-distance rates were also priced well above costs as a means of subsidizing local rates.

The 1996 Act fundamentally changed the telecommunications marketplace. For the first time, it required local telephone companies to open their networks to competition. *E.g.*, Telecommunications Act of 1996, Pub. L. No. 104–104, §§ 251–261, 110 Stat. 56, 61–79 (codified as amended at 47 U.S.C. §§ 251–261). At the same time, the 1996 Act also reconceived of how to advance the policy of universal service. *Id.* § 254(b), 110 Stat. at 71–72 (codified at 47 U.S.C. § 254(b)). Rather than furthering universal service through implicit subsidies, the Act created an express funding mechanism: charges paid by carriers. *Id.*, § 254(d), 110 Stat. at 73. In its *Local Competition Order*, the FCC observed that the implicit subsidy system needed to be reworked to enable competition to be the “driving force” to guarantee affordable service to

all Americans. *Local Competition Order*, 11 FCC Rcd. at 15507. The Commission recognized that the old system distorted, rather than enhanced, competition and that “universal service reform was vitally connected” to the new focus on local competition. *Id.* (cleaned up).

The Act formalized Congress’ commitment to a new model of universal service by creating a Federal-State Joint Board, comprised of FCC Commissioners, state utility commissioners, and a state consumer advocate, to make recommendations to the FCC about how to modernize universal service systems. 1996 Act, § 254(a), 110 Stat. at 71. The Act also set forth detailed guidelines that the FCC and the Joint Board must consider in order to preserve and advance universal service. *Id.* § 254(b), 110 Stat. at 71–72. Specifically, Congress instructed the FCC and the Joint Board to base their policies on six principles:

1. quality services should be available at just, reasonable, and affordable rates;
2. access to advanced telecommunications and information services should be provided in all regions of the Nation;
3. access by low-income and those in rural, insular and high-cost areas to telecommunications and information services should be comparable to those provided in urban areas at rates reasonably comparable to those charged for similar services in urban areas;
4. all telecommunications service providers must contribute;

5. support mechanisms should be specific, predictable, and sufficient to preserve and advance universal service; and
6. schools, health care, and libraries should have access to advanced telecommunications services.

*Id.* § 254(b)(1)–(6), 110 Stat. at 71–72.

In addition to these specific principles, Congress authorized the FCC and the Joint Board to adopt “such other principles ... [that] are necessary and appropriate for the protection of the public interest, convenience, and necessity.” *Id.* § 254(b)(7), 110 Stat. at 72.

The FCC implemented Congress’ directions by establishing four programs: the High Cost Program, to support network deployment and maintenance cost in rural areas, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776, 8995–9001 (1997) (*Universal Service Order*); the low-income programs (Lifeline and Link Up), to make service affordable for low-income households and low-income residents of Tribal lands, *id.* at 8952–93; the E-Rate Program (also known as the Schools and Libraries program), to help offset communications service costs to schools and libraries, *id.* at 9002–92; and the Rural Health Care Program, to support communications service to rural health care providers, *id.* at 9093–9156. These programs are supported by contributions from telecommunications service providers, including wireline, wireless, and interconnected Voice over Internet Protocol (VoIP) providers, based on an assessment on their interstate and international end-user revenues. 47 C.F.R. § 54.712.

To implement universal service reform, the FCC created and designated USAC as the program administrator to annually bill contributors, collect contributions, and disburse funds. 47 C.F.R. § 54.702(b). The FCC prohibited USAC from making policy, interpreting unclear provisions of the statute or rules, or interpreting Congressional intent. If the Act or rules are unclear, USAC must seek guidance from the FCC. 47 C.F.R. § 54.702(c).

Central to these efforts was Congress' direction that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation." 47 U.S.C. § 254(b)(2); *see also id.* § 254(b)(3) & (6), (h)(2) (affirming the need for access to advanced telecommunications and information services for rural and high-cost areas, as well as schools, healthcare providers, and libraries). But Congress knew that what was considered "advanced telecommunications and information services" would change over time. Indeed, between 1934 and 1996, the country had witnessed the invention of fax machines, car phones, handheld cellular phones, and dial-up internet service.

And so, Congress expressly recognized that "[u]niversal service is an evolving level of telecommunications services" that would need to be evaluated from time to time to account for "advances in telecommunications and information technologies and services." 47 U.S.C. § 254(c)(1). To conduct that evaluation, Congress set standards and then delegated authority to the Commission to apply those standards when determining the types of services necessary to achieve Congress' goal of ensuring that no part of the nation was

left behind in the ever-evolving technological landscape.

Specifically, Congress statutorily directed the Commission to 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.

*Id.* § 254(c)(1)(A)–(D).

As time passed and technology advanced, Congress enacted another key statute to further improve access to broadband services throughout the United States. In 2009, Congress instructed the FCC and the Assistant Secretary of Commerce for Communications and Information to establish the Broadband Technology Opportunities Program (BTOP) to:

1. provide access to broadband service to consumers residing in unserved areas of the United States;
2. provide improved access to broadband service to consumers residing in underserved areas of the United States;

3. provide broadband education, awareness, training, access, equipment, and support to--
  - a. schools, libraries, medical and healthcare providers, community colleges and other institutions of higher education, and other community support organizations and entities to facilitate greater use of broadband service by or through these organizations;
  - b. organizations and agencies that provide outreach, access, equipment, and support services to facilitate greater use of broadband service by low-income, unemployed, aged, and otherwise vulnerable populations; and
  - c. job-creating strategic facilities located within a State-designated economic zone, Economic Development District designated by the Department of Commerce, Renewal Community or Empowerment Zone designated by the Department of Housing and Urban Development, or Enterprise Community designated by the Department of Agriculture;



4. improve access to, and use of, broadband service by public safety agencies; and
5. stimulate the demand for broadband, economic growth, and job creation.

American Recovery & Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001, 123 Stat. 115, 512–13 (codified at 47 U.S.C. §1305(a) and (b)).

As part of the same legislation, Congress directed the FCC to develop a National Broadband Plan to “ensure that all people of the United States have access to broadband capability.” *Id.* § 6001, 123 Stat. at 515–16 (codified at 47 U.S.C. § 1305(k)(2)) (cleaned up). Congress also required the plan to include a detailed strategy for achieving affordability and maximizing use of broadband to advance “consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes.” *Id.* § 6001, 123 Stat. at 516.

After receiving significant public comment, holding several workshops, and collaborating with other government agencies and Congress, in early 2010, the FCC submitted the National Broadband Plan (Plan) to Congress, which included detailed recommendations on each of the topics it was directed to address. FED. COMM’NS COMM’N, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (2010), <https://www.fcc.gov/general/national-broadband-plan>.

One key recommendation set forth in the Plan was to establish the Connect America Fund (CAF) to

ensure universal access to affordable broadband and voice services. *Id.* at 145–46. In 2011, the FCC issued its lengthy Report and Order to create the CAF and shift USF from a voice-centric High Cost program and prioritize broadband service. *Connect America Fund*, 26 FCC Rcd. 17663 (2011) (*Connect America Fund Order*), *aff'd sub nom. In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014). In the *Connect America Fund Order*, the FCC established goals to guide the transition to support broadband services:

1. preserve and advance voice service;
2. ensure universal access to voice and broadband to homes, businesses and anchor institutions;
3. ensure mobile voice and broadband availability where Americans live, work or travel;
4. ensure reasonably comparable rates for broadband and voice services; and
5. minimize universal contribution burden on consumers and businesses.

*Id.* at 17680–83. More recently, the FCC also adopted a universal service program to support wireless broadband service in underserved areas. *Rural Digital Opportunity Fund Connect America Fund*, 35 FCC Rcd. 686 (2020) (*RDOF Order*); *see also* 47 C.F.R. §§ 54.801–.806.

To further ensure that the concept of universal service did not lag behind the times—leaving millions of Americans without the benefits Congress intended to provide—Congress authorized the occasional reconsideration of the types of services that qualified for universal service support. 47 U.S.C. § 254(c)(2). The

evolving nature of “universal service,” guided by the 1996 Act’s standards is an important feature of the system Congress created.

**B. For Decades, the USF Has Functioned to Provide the Benefits Congress Intended and Whose Loss Would be Highly Disruptive.**

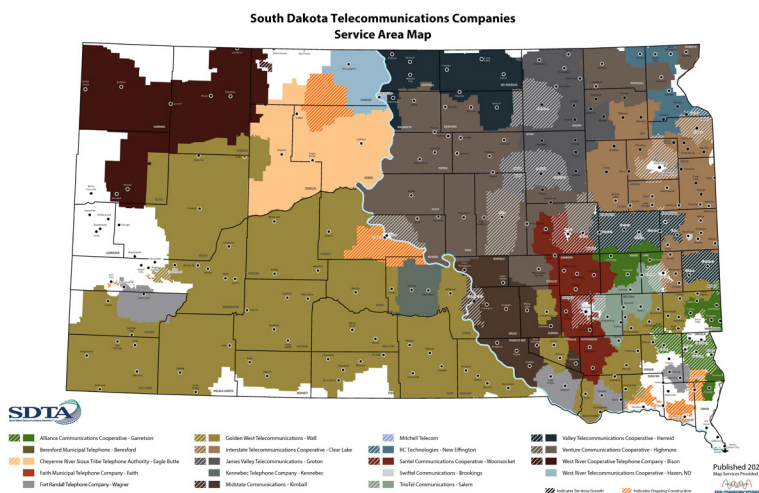
**1. The High Cost Program Has Benefited Rural Users and Providers.**

The High Cost program (later enacted as the CAF and Rural Digital Opportunity Fund (RDOF)) provides support to eligible telecommunications carriers to deliver affordable voice and broadband service in rural areas that would otherwise be unserved or underserved. *See generally RDOF Order*, 35 FCC Rcd. 686 (2020). The FCC designates unserved or underserved rural communities where the market alone cannot support the costs to deploy network infrastructure. *Id.* at 690–94. In 2018, the Commission conducted an auction to deliver High Cost funds to eligible areas across the United States through which \$1.49 billion was allocated over ten years to provide fixed broadband and voice services to over 700,000 locations in 45 states. Public Notice, Fed. Commc’ns Comm’n, Connect America Fund Phase II Auction (Auction 903) Closes Winning Bidders Announced (Aug. 28, 2018), <https://docs.fcc.gov/public/attachments/DA-18-887A1.pdf>. Less than two years later, in October 2020, the Commission established the 5G Fund to distribute another \$9 billion in universal service support to bring 5G mobile broadband service to rural America, including \$680 million to serve Tribal lands. Press Release, Fed. Commc’ns Comm’n, *FCC Establishes 5G Fund for*

*Rural America* (Oct. 27, 2020), <https://docs.fcc.gov/public/attachments/DOC-367778A1.pdf>.

According to the 2023 USAC Annual Report, in 2023 alone, the High Cost program “distributed \$4.3 billion to telephone companies, cable and satellite providers, electric co-ops, and other carriers to build out advanced network infrastructure and deliver affordable, reliable voice and broadband connections in communities that might otherwise be left unserved.” UNIVERSAL SERV. ADMIN. CO., 2023 ANN. REP. 9 (2024) (2023 USAC ANNUAL REPORT) [https://www.usac.org/wp-content/uploads/about/documents/annual-reports/2023/2023\\_USAC\\_Annual\\_Report.pdf](https://www.usac.org/wp-content/uploads/about/documents/annual-reports/2023/2023_USAC_Annual_Report.pdf).

In the country’s most rural states, the impacts of these programs are profound. In South Dakota, for example, nearly the entire geographic area of the state is served by local providers who depend on USF Funds, as the map below shows:



The solid-colored areas on the map are supported by the High-Cost program. The cross-hatched areas

reflect where providers were able to expand to provide high-speed broadband to areas that otherwise would not be served. In short, without the USF, the overwhelming majority of South Dakota would not have broadband access.

A more granular example shows the value that the Fund provides to rural communities. In 2021, a tornado struck the small farm community of Pleasant Hill, Tennessee, carving a nearly 6-mile path of destruction. To help rebuild the town, Charter Communications—with support from the RDOF—strung high speed fiber, enabling emergency weather infrastructure that will protect against similar weather disasters in the future. The RDOF project also fostered new economic opportunities for local businesses, such as Linda’s Coffee Shop and Sunrise Dairy. With the benefits of high-speed broadband services, the town’s mayor “looks at the emerging growth of family-run Sunrise Dairy as just the beginning for the small rural community.” News & Views, *Rural Expansion Brings Broadband to Pleasant Hill*, Charter Commc’ns (Sept. 13, 2023), <https://corporate.charter.com/newsroom/spectrum-rural-expansion-brings-broadband-to-pleasant-hill>.

## **2. The Fund Has Benefitted Rural Healthcare.**

Rural healthcare has also been significantly improved through the USF, as Congress intended. See 47 U.S.C. § 254(h)(1)(A). The Commission promotes telehealth in rural areas through the Rural Health Care Program (RHC Program), which provides financial support to help rural health care providers obtain

broadband and other communications services at discounted rates. These services are then used by healthcare providers to offer telehealth to patients living in and around the communities they serve. *Promoting Telehealth in Rural Am.*, 34 FCC Rcd. 7335, 7336 (2019). In 2023, the RHC program disbursed more than \$468 million to nearly 11,000 health care providers. 2023 USAC ANNUAL REPORT 3, 13; FED. COMM'NS COMM'N, RHC PROGRAM COMMITMENTS 3–4 (Aug. 8, 2024), <https://docs.fcc.gov/public/attachments/DOC-404602A6.pdf>.

A clear example of the RHC Program's success involves Moab, Utah. Outside of Moab (a town of approximately 5,300 people),<sup>1</sup> an individual who had a stroke was taken to the local hospital where a CT scan was performed. A communications technician at the hospital set up Telestroke,<sup>2</sup> which connected them to a University of Utah Medical Center neurologist. This communications link allowed the neurologist to make a time-sensitive diagnosis and to direct administration of a drug that resulted in almost immediate improvement of the patient's condition. Presentation, UNIVERSAL SERV. ADMIN. CO., *Welcome to Rural Health Care* 16, <https://www.usac.org/wp-content/up->

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<sup>1</sup> *Moab City, Utah*, U.S. CENSUS BUREAU, [https://data.census.gov/profile/Moab\\_city,\\_Utah?g=160XX00US4950700](https://data.census.gov/profile/Moab_city,_Utah?g=160XX00US4950700) (last visited Jan. 14, 2025).

<sup>2</sup> Telestroke is a telemedicine approach for connecting healthcare providers in smaller communities with neurological experts who are more commonly located in urban centers. Mayo Clinic, *Telestroke (stroke telemedicine)*, (Jan. 18, 2023), <https://www.mayoclinic.org/tests-procedures/stroke-and-telemedicine/about/pac-20395081>.

loads/about/documents/tribal-nations/Tribal-Documents/Webinar-Slides/RHC-101-Introduction-to-RHC-Programs-2023-1.pdf (last visited Jan. 14, 2025); *see also Telestroke Partnership Between U of U Health and Moab Regional Hospital Saves Patient’s Life*, UNIV. OF UTAH (Feb. 2, 2021), <https://healthcare.utah.edu/patient-stories/telestroke-partnership-between-u-of-u-health-and-moab-regional-hospital-saves> (relating how a Texas man traveling in Utah was helped after he had a stroke). Having broadband access throughout the country is necessary to be able to provide this kind of care, which can save lives and avoid debilitating, lifelong symptoms, no matter where someone lives or may be visiting.

### **3. The E-Rate Program Has Benefitted Schools and Libraries.**

Congress dictated as a principle of universal service that “[e]lementary and secondary schools and classrooms . . . and libraries should have access to advanced telecommunications services.” 47 U.S.C. § 254(b)(6). To that end, it mandated that all “telecommunications carriers serving a geographic area” must “provide such services to elementary schools, secondary schools, and libraries” at “rates less than the amounts charged for similar services to other parties.” 47 U.S.C. § 254(h)(1)(B). And through the E-Rate program, the Fund offsets the cost to carriers of that otherwise-unfunded mandate. *See* 47 C.F.R. §§ 54.500–.523 (rules for E-Rate program).

The E-Rate program’s results are impressive. In Colorado, for example, every single school district participates—with discounts ranging from 20% for the

wealthiest districts to 90% for the neediest schools, allowing far more internet access than these districts could otherwise afford to give students. *See* FED. COMM’NS COMM’N, E-RATE: UNIVERSAL SERVICE PROGRAM FOR SCHOOLS AND LIBRARIES (Dec. 31, 2019), [https://www.fcc.gov/sites/default/files/e-rate\\_universal\\_service\\_program\\_for\\_schools\\_and\\_libraries.pdf](https://www.fcc.gov/sites/default/files/e-rate_universal_service_program_for_schools_and_libraries.pdf). Colorado’s E-Rate subsidies now average more than \$26.5 million annually (statewide) and have totaled nearly \$670 million since 1998. E-RATE CENTRAL, FUNDING COMMITMENT OVERVIEW: COLORADO, <https://tools.e-ratecentral.com/us/stateInformation.asp?state=CO> (last visited Jan. 14, 2025).

That average annual subsidy accounts for well over half the cost of schools’ internet services. Schools like Arrupe Jesuit High School, a Catholic school in one of West Denver’s historic Chicano neighborhoods,<sup>3</sup> gets a 90% discount on its internet service—thus providing students 10 times more service than it could otherwise get for the same dollars. UNIVERSAL SERV. ADMIN. CO., E-RATE SEARCH COMMITMENTS TOOL, <https://opendata.usac.org/stories/s/jj4v-cm5x>.<sup>4</sup> Atlas Preparatory School and Salida del Sol—charter schools bringing rigorous, college-prep curricula to high-poverty neighborhoods in Colorado Springs and Greeley, respectively—likewise bring connectivity to

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<sup>3</sup> ARRUPÉ JESUIT HIGH SCHOOL, SCHOOL PROFILE, <https://arrupejesuit.com/who-we-are/school-profile.html> (last visited Jan. 14, 2025).

<sup>4</sup> To identify the entry for Arrupe Jesuit High School, filter the detailed funding report data by funding year “2023” and billed entity state by “CO”; download the resulting Detailed Funding Report; search for “Arrupe Jesuit High School” in the report data.



their students for ten cents on the dollar. *Id.*<sup>5</sup> And the same 90% discount applies district-wide to Mountain Valley School District and Sierra Grande School District in the San Luis Valley; the tiny Huerfano School District and Aguilar School District on the drive south of Pueblo, Colorado; remote Granada School District and Vilas School District, on the eastern plains; and Sheridan School District and Adams 14 School District, in inner-ring Denver suburbs where more than 85% of students qualify for free or reduced price lunches. *Id.*<sup>6</sup>

These funds are essential to schools and libraries, and there would be hard budgetary choices to be made—requiring large cuts to life-altering programs—if these dollars go away. And beyond budgets, the E-Rate program has created new opportunities for innovation. Most notably, as many schools shifted to remote learning during the COVID-19 pandemic, Congress authorized funding through the FCC to assist schools in providing internet access to support remote learning. *E.g.*, Press Release, Fed. Commc’ns Comm’n, *FCC Commits over \$1.2 Billion in First Funding Wave*

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<sup>5</sup> To locate the information for Atlas Preparatory School and Salida del Sol, search the previously downloaded Detailed Funding Report for those schools by name and identify the entries where the “Service Type” listed in Column J is “Data Transmission and/or Internet Service.”

<sup>6</sup> To locate E-Rate information for these school districts, search the previously downloaded Detailed Funding Report for these districts by name and identify the entries where the “Service Type” listed in Column J is “Data Transmission and/or Internet Service.” For demographic and geographic information, visit the Colorado Department of Education’s “SchoolView” website at <https://www.cde.state.co.us/schoolview/explore/welcome/>.

*of Emergency Connectivity Fund Program to Connect over 3.6 Million Students* (Sept. 24, 2021), <https://docs.fcc.gov/public/attachments/DOC-376028A1.pdf>. Such connectivity had long been lacking in precisely the high-poverty communities most exposed to the pandemic. This experience allowed the FCC to adjust the E-Rate program to provide schools more flexibility for mobile wi-fi and similar remote-learning aids. *E.g.*, *Addressing the Homework Gap Through the E-Rate Program*, 89 Fed. Reg. 67303 (August 20, 2024). These investments have in turn fueled an explosion in educational innovation, as more and more families explore online education, microschools, and other nontraditional formats. *E.g.*, Dana Goldstein, *A School With 7 Students: Inside the 'Microschools' Movement*, N.Y. TIMES (June 17, 2024), <https://www.nytimes.com/2024/06/17/us/public-schools-education-voucher-microschools.html>. Educational demands change just as fast as telecommunications technology does—and through the Fund's paired mandates and subsidies, the FCC has honored Congress' goal that the nature of covered service must evolve over time.

As Congress intended, the E-Rate program has provided universal connectedness for schools and libraries, kept up to date with the latest technology and most pressing national needs, allowing Amici to prepare a new generation of technologically proficient students to enter the workforce.

#### **4. The Lifeline Program Has Benefited Tribes and Low-Income Users.**

Since even before the 1996 Act, the Commission’s Lifeline program helped low-income consumers purchase phone lines. Congress made clear that it wanted that program to continue when it passed the 1996 Act, stating that nothing in the act affected “the collection, distribution, or administration of [that program].” 47 U.S.C. § 254(j). And the program—funded by the USF—has continued to operate, making modern telecommunications available to individuals throughout the nation regardless of their financial status.

As of March 2024, the Commission’s data demonstrates that nearly 7.6 million subscribers have benefited from the Lifeline Program. UNIVERSAL SERV. ADMIN. CO., LIFELINE PARTICIPATION RATE, <https://www.usac.org/wp-content/uploads/lifeline/documents/Data/Lifeline-Participation-Rate.xlsx>. But just as with the programs above, the numbers do not tell the whole story. The benefits provided through the Lifeline Program make it possible for people to have a phone they can answer when their work schedule changes unexpectedly. They allow everyone in the country to access information so they can participate in the political process. These benefits are foundational to the ability to participate in modern society, consistent with Congress’ goals.

### **5. The Loss of These Programs Will Harm the Many Constituencies That Rely on Them in Expected and Unexpected Ways.**

Each of the programs and the benefits they provide rely on the framework Congress created in directing the FCC to establish universal service. Their loss would be nothing short of catastrophic. Broadband networks and whatever advanced technology follows it would not reach rural America.<sup>7</sup> Cash-strapped schools would lose the chance to provide their students with the basic resources they need to thrive in the modern world. Healthcare would be harder to access, and outcomes will be poorer. People with fewer economic resources would be that much less connected to their family, their friends, their work, and the nation. Large swaths of America—contrary to Congress’ intent—would be left behind.

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<sup>7</sup> A recent survey by NTCA—The Rural Broadband Association—found that 68% of respondent broadband service providers (mostly small or rural broadband providers) said that, if the Fund were abolished, they would need to cancel deployment projects equaling over \$1 billion, which represents nearly 79% of the providers’ planned broadband investments for 2025. Similarly, 71% of respondents indicated they would need to cancel 2026 deployment projects, equaling nearly \$900 million and representing nearly 83% of planned investments for 2026. Press Release, NTCA-The Rural Broadband Ass’n, *NTCA Survey Highlights Significant Risks of Skyrocketing Consumer Bills, Plummeting Broadband Investment & Loans in Peril if USF Support were Eliminated* (Sept. 4, 2024), <https://www.ntca.org/ruraliscool/newsroom/press-releases/2024/4/ntca-survey-highlights-significant-risks-skyrocketing> (NTCA Survey). The loss of investment is not hypothetical, it will be overwhelming.

Each of these consequences is obvious. But they do not tell the full story. The RDOF component of the High Cost Program provides a stark example of the less obvious, indirect impacts that would flow from upending the USF. Through RDOF, broadband providers build networks at significant upfront expense using their own capital and debt and then recoup costs through annual RDOF reimbursements over 10 years. For example, a \$10 million RDOF award is paid out at a rate of \$1 million per year for 10 years. RDOF requires the broadband provider to meet certain build out requirements:

40% complete by end of year 3.

60% complete by end of year 4.

80% complete by end of year 5.

100% complete by end of year 6.

47 C.F.R. § 54.802(c).

To continue with the example, then, by year 3, the provider has already spent at least \$1 million more than they have received and by year 6, \$4 million more. This structure creates a built-in mismatch between the up-front expense of building the network and when USF money is dispersed.

If the RDOF payments were terminated before the full subsidy is received because the program ends, providers would not be fully compensated for their large up-front broadband construction expenses. So, beyond the lack of broadband expansion into rural America that would likely occur, RDOF-awarded broadband providers who were “enticed” to build through the RDOF program would be left only partly compensated.

That gap in funding would then have follow-on effects. The debt the broadband providers accepted in reliance on the RDOF funding must still be paid or the provider could be forced into bankruptcy. Indeed, when NTCA—The Rural Broadband Association conducted a survey of the potential impacts of the loss of USF funding on its members, 61% of respondents indicated they would likely default on loans within the next three years. NTCA Survey. And because 70% percent of service-provider respondents with outstanding debt indicated their loans were with the U.S. Department of Agriculture, *id.*, taxpayers may ultimately foot the bill for broadband service provider bankruptcies.

This pattern of disrupted expectations would occur throughout the USF's programs. Schools, hospitals, and libraries that signed long-term broadband agreements in reliance on the E-Rate program would be left with large, unfunded contractual obligations. That money will need to come from somewhere else whether it be teacher salaries, programming, supplies, or other improvements that would have to be forgone.

Similarly, the loss of the Lifeline Program means that broadband service providers, local phone companies, small rural electric cooperatives, and other providers would not only lose the supplement the Lifeline Program provides, they may also lose subscribers who can no longer afford the services without the discount. Those losses doubly harm the companies which rely on not just the Lifeline Program, but also on the subscribers' payment to stay afloat.

The end of the USF would have many negative consequences, particularly for the direct beneficiaries of the universal service Congress sought to create. But it would also result in the many participants who help the Nation stay connected and provide vital services across the country—who relied on a long-standing, successful program that Congress created in compliance with this Court’s precedent—being left to face the consequences of its disappearance on their own.

## **II. This Case Is a Poor Vehicle to Revisit the Nondelegation Doctrine.**

### **A. Congress’ Universal Service Program Is Guided by an Intelligible Principle that Has Allowed the FCC to Permissibly Implement Congress’ Policy Decisions.**

The programs described above implement the policy decisions Congress made when it passed the 1996 Act. It was Congress—not the FCC or USAC—that determined that everyone in the country should have access to the same types of “advanced telecommunications and information services” regardless of their location or income. 47 U.S.C. § 254(b)(2). And it was Congress that determined that the costs of providing these services should be borne by telecommunication carriers at levels “sufficient” to achieve Congress’ vision. 47 U.S.C. § 254(d).

To avoid an impermissible delegation of legislative power to an agency, Congress need only provide an “intelligible principle” that guides an agency’s actions. *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472 (2001); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). In other words, Congress must make “clear to the delegee ‘the general policy’ he

must pursue and the ‘boundaries of [his] authority.’” *Gundy v. United States*, 588 U.S. 128, 146 (2019) (plurality) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

The 1996 Act more than satisfies this standard. The Sixth Circuit Court of Appeals, in considering this same issue, described in detail how Congress had made the important policy choices and limited the Commission’s authority. *Consumers’ Research v. FCC*, 67 F.4th 773, 788–95 (6th Cir. 2023), *cert. denied* 144 S. Ct. 2628 (Mem.) (2024). As that court found, Congress set out in statute:

- what Congress intended for the Commission to pursue;
- how the Commission must fund its efforts, including who must pay and how to calculate the payment amounts;
- the methods the Commission must use to promote universal service;
- who Congress intended to benefit from universal service; and
- the kinds of services Congress intended to be supported.

*Id.* (discussing the standards from 47 U.S.C. § 254).

These directives offer far more than a mere intelligible principle; they set out a comprehensive structure for how to achieve Congress’ goal of providing universal service and give authority to the Commission to “fill up the details.” *Gundy*, 588 U.S. at 157 (Gorsuch, J., dissenting).



Take, for example, the determination of which services are part of universal service. Congress laid out specific factors the Commission would need to consider before setting the terms of “universal service”:

- is the service “essential to education, public health, or public safety”;
- has the service “through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers”;
- is the service “being deployed in public telecommunications networks by telecommunications carriers”; and
- is providing the service “consistent with the public interest, convenience, and necessity.”

47 U.S.C. § 254(c)(1).

And just over a year after the passage of the 1996 Act, the Commission—with the assistance of the Joint Board—applied Congress’ factors when considering at least ten different types of services to determine whether they should be part of the initial universal service Congress intended to create. Universal Service, 62 Fed. Reg. 32862-01, 32863–66 (June 17, 1997). Thus, “Congress, the courts, and the public” can look to the Commission’s actions, compare them against the criteria Congress set forth, and determine “whether Congress’s guidance has been followed.” *Gundy*, 588 U.S. at 158, 166 (Gorsuch, J., dissenting) (quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944)). Here, Congress’ guidance has been followed. As described above, the USF—funded by carrier con-

tributions—has increased access to advanced telecommunications and information services to communities throughout the nation, all as Congress intended.

In creating the USF, Congress went beyond the types of very broad principles this Court has previously approved as setting forth an intelligible principle; moreover, it reached the consensus necessary to make the difficult policy choices embodied in the USF program and told the Commission how to permissibly implement those policies. Nothing in the USF's structure violates this Court's nondelegation jurisprudence.

**B. The Assistance USAC Provides to the FCC in Achieving Congress' Universal Service Directives Does Not Violate the Private Nondelegation Doctrine.**

This Court has long held that private parties cannot exercise legislative power. *See, e.g., Currin v. Wallace*, 306 U.S. 1, 15–16 (1939) (collecting cases). For example, empowering a majority of coal producers and miners in a given area to set maximum working hours and minimum wages for all producers and miners was an unconstitutional delegation of legislative power. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 310–12 (1936).

By contrast, the private nondelegation doctrine is not offended when private actors operate under the “authority and surveillance” of a government agency but lack their own “law-making” authority. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 387–88, 399 (1940). In *Sunshine Anthracite*, coal producers could become members of the Bituminous Coal Code,

and Code members would be broken into twenty district boards. While those boards could make various types of proposals to the National Bituminous Coal Commission within the Department of the Interior, including proposals regarding minimum pricing, the Commission was the final authority that decided whether those proposals became law. *Id.* at 388. Accordingly, there was no delegation of authority to the private actors because the private actors lacked independent authority. The program was “unquestionably valid.” *Id.* at 399.

USAC, too, lacks independent authority and is unquestionably valid. USAC’s operations are dictated by and subject to the FCC. *See generally* 47 C.F.R. §§ 54.701–.717. And the FCC’s rules make clear that USAC operates under the FCC’s authority and surveillance and has no law-making power. Indeed, by law, USAC cannot even “interpret unclear provisions of the statute or rules, or interpret the intent of Congress.” 47 C.F.R. § 54.702(c). USAC is required to bring those types of questions to the FCC. *Id.*

Instead, USAC engages in administrative functions like billing carriers, creating websites, and filing reports with Congress and the Commission. *See, e.g.*, 47 C.F.R. § 54.702(b), (f)-(h). And it performs all of its functions subject to the FCC’s oversight, including an annual audit that must be approved by the FCC’s administrative staff and filed with the FCC for its review. 47 C.F.R. § 54.717.

To be sure, part of USAC’s administrative function includes proposing calculations that will set how much carriers pay to support the universal service programs. But even there, USAC *has no authority to*

set the contributions. Whether to accept USAC’s proposed calculations is entirely within the FCC’s discretion. 47 C.F.R. § 54.709(a)(3). At no point can USAC exercise law-making authority.

Nothing about how USAC is structured and how it supports the universal service programs under the FCC’s “authority and surveillance” offends the private nondelegation doctrine, as both the Sixth and Eleventh Circuits found. *Consumers’ Research v. FCC*, 88 F.4th 917, 925–28 (11th Cir. 2023); *Consumers’ Rsch. v. FCC*, 67 F.4th 773, 795–97 (6th Cir. 2023).<sup>8</sup> Just as Congress appropriately authorized the FCC to fill in the gaps when executing Congress’ vision for universal service, the FCC properly created USAC to help administer the universal service programs under the FCC’s authority and supervision.

### **C. Continuation of the USF Promotes Cooperative Federalism.**

Other state amici have urged this Court to deem the USF unconstitutional as a means of promoting federalism, but that argument gets it backwards. *See* Br. of Amici Curiae State of West Virginia, 14 Other States, and the Arizona Legislature in Support of Granting the Petition (States’ Cert. Amicus) at 3, 13–17. Contrary to their generalized assertions that “federal agencies are a particular threat to States’ interests,” *id.* at 15, in the 1996 Act, Congress established

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<sup>8</sup> The opinion below expressed concern over how the FCC has exercised its authority over USAC. *See* App. pp. 5a–7a. But that is a practical concern that can be dealt with through multiple proper channels, *see infra* § II.D, and does not provide a legal basis for invalidating the program.

what has long been considered “perhaps the most ambitious cooperative federalism regulatory program to date.” Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1694 (2001); *see also* Tejas N. Narechania & Erik Stallman, *Internet Federalism*, 34 HARV. J.L. & TECH. 547, 610–14 (2021). Indeed, Section 254’s first provision requires the creation of a “Federal-State Joint Board” that must work with the FCC to “recommend changes” to any FCC regulations, including establishing “the definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations.” 47 U.S.C. § 254(a)(1). Moreover, when Congress was considering the 1996 Act, states pressed for explicit universal service supports—and Congress listened by enacting Section 254. 140 CONG. REC. 14816–17 (1994) (reprinting a letter from the National Association of Attorneys General urging Congress to, among other things, “preserve and promote universal telephone service at fair, reasonable and affordable rates and also provide a clear, broad definition of universal service”); *see* Edwin A. Rosenberg & John D. Wilhelm, *State Universal Service Funding and Policy: An Overview and Survey 2* (Sept. 1998), <https://pubs.naruc.org/pub/E38AEE1F-155D-0A36-3130-404476AEA> 395.

Thus, the plain text of the 1996 Act requires collaboration between the FCC and the states to implement the USF. *See* About NARUC, *Federal Government Collaboratives*, NAT’L ASS’N OF REGUL. UTIL. COMM’NS, <https://www.naruc.org/about-naruc/our-programs/federal-government-collaboratives/>

(last visited Jan. 14, 2025) (“The Joint Board, made up of Federal Communications Commission members, State utility regulators, and consumer advocates, oversees and makes recommendations on the universal provisions of the 1996 Telecommunications Act.”). The 1996 Act charges both the “Joint Board and the Commission” with the “preservation and advancement of universal service” based on six clear “principles.” 47 U.S.C. § 254(b); *see also* 47 U.S.C. § 254(i) (charging the “Commission and the States” with ensuring that “universal service is available at rates that are just, reasonable, and affordable.”); 47 U.S.C. § 254(f) (authorizing states to adopt regulations to preserve and advance universal service); 47 U.S.C. § 251(f) (allowing states to exempt rural carriers from certain requirements). There is, therefore, no reason for this Court to find an unconstitutional delegation here to purportedly “restore the States’ rightful role in the lawmaking process.” States’ Cert. Amicus at 17-18. The states already play an indispensable role in that process under the current Federal-State Joint Board model.

In fact, the National Association of Regulatory Utility Commissioners (NARUC), the organization of utility regulators from all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands,<sup>9</sup> has long lauded the USF’s federal-state partnership. *See* About NARUC, *History & Background*, NAT’L ASS’N OF REGUL. UTIL. COMM’NS, <https://www.naruc.org/about-naruc/our-mission/history-background/> (last visited Jan. 14, 2025). As NARUC has explained, “in 1996,

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<sup>9</sup> Under the 1996 Act, a representative from NARUC maintains a seat on the Federal-State Joint Board. 47 U.S.C. § 254(a)(1).

Congress recognized the crucial partnership between the FCC and States on universal service issues—creating a structure that requires the FCC to work hand-in-glove with State commissions on Lifeline, High Cost, and other universal service programs.” Nat’l Ass’n of Regul. Util. Comm’ns, Reply Comments on Report on the Future of the Universal Service Fund 4 (Mar. 17, 2021), <https://www.fcc.gov/ecfs/document/10318217503884/1>. NARUC has acknowledged that “[l]audibly, the FCC and its staff have a long history of collaboration with States on USF issues,” and NARUC has urged that “[t]he success of these programs requires collaboration to continue.” *Id.*; *see also id.* at 22 (“NARUC looks forward to continued cooperation and coordination with the Commission on USF issues.”). Striking down Section 254 would therefore destroy, rather than promote, the USF’s robust system of cooperative federalism.

**D. Implementation of the USF is Transparent and Does Not Implicate the Nondelegation Doctrine’s Concerns.**

The FCC has implemented the USF in compliance with Congress’ statutory principles and consistent with the principles of cooperative federalism that are embedded in the 1996 Act. To the extent there are concerns regarding the USF’s operations, there are multiple channels through which those concerns can be identified and addressed to prevent the program from exceeding its statutory remit.

**1. Governmental Oversight.**

The FCC’s Office of the Inspector General (OIG) actively oversees the USF to ensure compliance with the 1996 Act. *See, e.g.*, CONG. RSCH. SERV., RL33979,

UNIVERSAL SERVICE FUND: BACKGROUND AND OPTIONS FOR REFORM 15 (Oct. 25, 2011) (CRS REPORT). As part of that oversight, the OIG regularly conducts or arranges for the completion of audits of all four USF programs and of USF contributors. *Id.* Beginning in 2006, this “large-scale beneficiary audit program” consisted of 459 audits of USF program participants. *See* FCC OFFICE OF THE INSPECTOR GENERAL, SEMIANNUAL REPORT TO CONGRESS, APRIL 1, 2007-SEPTEMBER 30, 2007 17 (Oct. 31, 2007), <https://docs.fcc.gov/public/attachments/DOC-278589A1.pdf>; *see, e.g.*, FCC OFFICE OF THE INSPECTOR GEN., INITIAL STATISTICAL ANALYSIS OF DATA FROM THE 2006/2007 COMPLIANCE AUDITS (Oct. 3, 2007), <https://docs.fcc.gov/public/attachments/DOC-277103A3.pdf>.

These audits have continued to this day, using “generally accepted government auditing standards.” FCC OFFICE OF THE INSPECTOR GEN., REPORT NO. 23-AUD-02-01, PERFORMANCE AUDIT OF THE UNIVERSAL SERVICE FUND, RURAL HEALTHCARE, TELECOMMUNICATIONS PROGRAM AT NEW RIVER VALLEY COMMUNITY SERVICE FOR FY 2019 AND FY 2020 5–6 (Feb. 28, 2024), [https://www.fcc.gov/sites/default/files/23-aud-02-01\\_pa\\_usf\\_rhc\\_nrvcs\\_02282024.pdf](https://www.fcc.gov/sites/default/files/23-aud-02-01_pa_usf_rhc_nrvcs_02282024.pdf) (finding compliance with Rural Health Care Program laws, rules, and regulations); FCC OFFICE OF THE INSPECTOR GEN., REPORT NO. 24-AUD-01-01, AUDIT OF THE FEDERAL COMMUNICATIONS COMMISSION’S FY 2023 COMPLIANCE WITH PAYMENT INTEGRITY INFORMATION ACT OF 2019 REQUIREMENTS 1 (May 29, 2024), [https://www.fcc.gov/sites/default/files/24-aud-01-01\\_fy23\\_piia\\_05292024.pdf](https://www.fcc.gov/sites/default/files/24-aud-01-01_fy23_piia_05292024.pdf).



Likewise, FCC rules require USAC to undergo annual audits to prevent waste, fraud, and abuse. 47 C.F.R. § 54.717. The FCC also regularly directs USAC to take corrective action to recover any improper payments. *See, e.g.*, Letter from Mark Stephens, Managing Dir., FCC, to Radha Sekar, CEO, Universal Serv. Admin. Co. (Jan. 14, 2021), <https://www.fcc.gov/sites/default/files/fcc-letter-to-usac-01142021.pdf>.

## **2. Congressional Oversight.**

Congress itself also maintains substantial control and oversight over the USF. For one thing, Congress regularly holds oversight hearings regarding the FCC and the USF. *See, e.g.*, CRS REPORT 25–27 (detailing oversight in the 111th and 112th Congresses). Congress has also repeatedly required the FCC to provide information to enable Congress to review its activities. For example, in the Infrastructure Investment and Jobs Act of 2021, Congress directed the FCC to prepare a report on the future of universal service. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 60104, 135 Stat. 429, 1205–06 (2021); *see also, e.g.*, Dep’ts of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 623, 111 Stat. 2440, 2521–22 (1997) (requiring similar reporting to Congress). Based on the information Congress collects at these oversight hearings and through these other directives, Congress can amend Section 254 as needed to ensure compliance with its intent.

And Congress has repeatedly amended Section 254 since it was enacted, demonstrating that it can step in when it wants. In 2016, for example, Congress added skilled nursing facilities to the categories of

health care providers eligible to receive USF funds under the Rural Health Care program. *See* Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, § 202, 130 Stat. 448, 512 (2016) (codified as amended at 47 U.S.C. § 254(h)(7)(B)). More recently, Congress directed the FCC to promulgate regulations for E-Rate to cover equipment for remote learning during the COVID-19 pandemic. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 7402, 135 Stat. 4, 109–10. Congress has also directed the FCC to make uniform the methodology for collecting coverage data. Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 505, 132 Stat. 348, 1094–95. And Congress has directed the FCC to require internet safety policies by schools and libraries receiving E-Rate support. Consolidated Appropriations—FY 2001, Pub. L. No. 106-554, § 1721, 114 Stat. 2763, 2763A-343–50 (2000) (codified as amended at 47 U.S.C. 254(h)).

The court below noted that some of these oversight mechanisms have uncovered overpayments or the misuse of funds under the USF. *See* App. at 8a-9a. For instance, in 2018, the FCC proposed a \$63.5 million fine against American Broadband and Telecommunications Company, which at the time was the largest ever proposed for violations of the Lifeline rules, for repeated, systematic, and large-scale violations of the Lifeline rules, including seeking Lifeline support for more than 12,000 deceased individuals. *American Broadband & Telecommunications Company*, 33 FCC Rcd. 10308 (2018).

But to the extent the OIG or Congress identifies a need for improvement in the implementation of the

1996 Act, the responsibility falls on *Congress* to address those issues. Even Respondents’ amici agree that “Congress needs to be the one to act here.” States’ Cert. Amicus 2; *see also id.* at 4 (arguing that separation of powers requires that Congress “can[not] delegate to the Courts, or to any other tribunals ... powers which are strictly and exclusively legislative.” (quoting *Wayman v. Southard*, 23 U.S. 1, 42 (1825))). Thus, to the extent there are any concerns about USAC or the FCC’s implementation of the 1996 Act, separation of powers principles dictate that Congress—not the courts—should resolve those issues, as it has done many times before.

### **3. Checks on and Challenges to USAC and FCC Determinations.**

Lastly, several mechanisms ensure that the USF remains accountable to Congress and that USAC remains accountable to the FCC by allowing for challenges to both entities’ actions.

The FCC conducts meaningful review of USAC’s actions. In 2023 alone, the FCC twice elected not to adopt USAC’s projections when setting the quarterly contribution factor. *See, e.g., Proposed Fourth Quarter 2023 Universal Service Contribution Factor*, 38 FCC Rcd. 8362, 8362 (Sept. 13, 2023); *Proposed Third Quarter 2023 Universal Service Contribution Factor*, 38 FCC Rcd. 5670, 5670 (June 14, 2023); *Revised Second Quarter 2003 Universal Service Contribution Factor*, 18 FCC Rcd. 5097, 5097 (Mar. 21, 2003). The FCC has exercised this check before as well. *See, e.g., First Quarter 1998 Universal Service Contribution Factors Revised and Approved*, 12 FCC Rcd. 21881, 21886 (Dec. 16, 1997).

Specific rules and regulations also ensure that USAC remains subordinate to the FCC and subject to the FCC’s “authority and surveillance.” *Sunshine Anthracite*, 310 U.S. at 399. For instance, the FCC has directed that if the 1996 Act or its implementing regulations “are unclear, or do not address a particular situation, the Administrator [USAC] shall seek guidance from the Commission.” 47 C.F.R. § 54.702(c). Further, any carrier that is allegedly aggrieved by USAC’s actions may challenge those actions by seeking *de novo* review before the FCC. 47 C.F.R. § 54.719(b). And any decision that the FCC renders from such a challenge is binding on USAC going forward. *Consumers’ Research v. FCC*, 88 F.4th 917, 928 (11th Cir. 2023).

Beyond that, as was done here, decisions issued by the FCC may be scrutinized by the courts. 47 U.S.C. § 402 (appeals may be taken from decisions and orders of the Commission). And through the Hobbs Act—Section 2342 of Title 28 of the U.S. Code—Congress granted the courts of appeals exclusive jurisdiction “to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the [FCC] made reviewable” by 47 U.S.C. § 402; *see Sandwich Isles Commc’ns, Inc. v. United States*, 992 F.3d 1355, 1362 (Fed. Cir. 2021).

In short, there are multiple checks on the FCC and USAC in their execution of Congress’ mandate to provide universal service. The USF is a highly successful, state-and-federal partnership that the FCC has operated pursuant to Congress’ direction and under the supervision of Congress and the courts. It should easily pass constitutional muster.

**CONCLUSION**

Amici respectfully request that the Court reverse the lower court's decision.

Respectfully submitted,

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