No. 22-60008

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CONSUMERS' RESEARCH; CAUSE BASED COMMERCE, INCORPORATED; KERSTEN CONWAY; SUZANNE BETTAC; ROBERT KULL; KWANG JA KERBY; TOM KIRBY; JOSEPH BAYLY; JEREMY ROTH; DEANNA ROTH; LYNN GIBBS; PAUL GIBBS; RHONDA THOMAS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of the
Federal Communications Commission

JOINT EN BANC BRIEF OF INTERVENORS USTELECOM, NTCA, AND CCA IN SUPPORT OF RESPONDENTS

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September 6, 2023

CERTIFICATE OF INTERESTED PERSONS

No. 22-60008

Consumers' Research; Cause Based Commerce, Incorporated; Kersten Conway; Suzanne Bettac; Robert Kull; Kwang Ja Kerby; Tom Kirby; Joseph Bayly; Jeremy Roth; Deanna Roth; Lynn Gibbs; Paul Gibbs; Rhonda Thomas
v.
Federal Communications Commission;
United States of America

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Petitioners

1. Consumers' Research. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
2. Cause Based Commerce, Incorporated. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
3. Kersten Conway
4. Suzanne Bettac
5. Robert Kull
6. Kwang Ja Kerby
7. Tom Kirby
8. Joseph Bayly

9. Jeremy Roth
10. Deanna Roth
11. Lynn Gibbs
12. Paul Gibbs
13. Rhonda Thomas

Respondents

14. Federal Communications Commission
15. United States of America

Intervenors

16. Benton Institute for Broadband & Society. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
17. National Digital Inclusion Alliance. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
18. Center for Media Justice (d/b/a MediaJustice). It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
19. Schools, Health & Libraries Broadband Coalition. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

20. USTelecom – The Broadband Association. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
21. National Telecommunications Cooperative Association d/b/a NTCA – The Rural Broadband Association. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
22. Competitive Carriers Association. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Counsel

23. Boyden Gray & Associates PLLC: R. Trent McCotter, Jonathan Berry, Michael Buschbacher, and Jared M. Kelson are counsel for Petitioners.
24. Federal Communications Commission: P. Michele Ellison, Jacob M. Lewis, and James M. Carr are counsel for Respondent Federal Communications Commission.
25. United States Department of Justice: Brian M. Boynton, Sarah E. Harrington, Mark B. Stern, and Gerard J. Sinzdak are counsel for Respondent United States of America.
26. Andrew Jay Schwartzman is counsel for Intervenors Benton Institute for Broadband & Society, National Digital Inclusion Alliance, and Center for Media Justice.

27. HWG LLP: Jason Neal is counsel for Intervenor Schools, Health & Libraries Broadband Coalition.

28. Wilkinson Barker Knauer, LLP: Jennifer Tatel and Craig Gilmore are counsel for Intervenors USTelecom – The Broadband Association, National Telecommunications Cooperative Association d/b/a NTCA – The Rural Broadband Association, and Competitive Carriers Association.

/s/ Jennifer Tatel

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JURISDICTIONAL STATEMENT

USTelecom – The Broadband Association ("USTelecom"), National Telecommunications Cooperative Association d/b/a NTCA – The Rural Broadband Association ("NTCA"), and Competitive Carriers Association ("CCA") (collectively, "Telecom Intervenors") adopt the jurisdictional statement made by Respondents the Federal Communications Commission ("FCC") and the United States of America.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Telecom Intervenors adopt the statement of issues made by Respondents.

STATEMENT OF THE CASE

A. Intervenors' Interest in this Case

USTelecom is a non-profit association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks. Its diverse member base ranges from large publicly traded communications corporations to local and regional companies and cooperatives, providing advanced communications services to consumers and businesses across the country.

NTCA is a general cooperative association whose membership is composed of approximately 850 independent, family-owned and community-based telecommunications companies providing voice and broadband services in rural

areas. NTCA's members build and deliver connectivity and operate essential services in rural and small-town communities across the United States. NTCA's members use universal service funds to serve customers who would otherwise go unserved or who would face the prospect of paying rates for services far exceeding those available in urban areas.

CCA is the nation's leading association for competitive wireless providers and stakeholders across the United States. Members range from small, rural carriers serving fewer than 5,000 customers to regional and national providers serving millions of customers, as well as vendors and suppliers that provide products and services throughout the wireless communications ecosystem. CCA's members use universal service funds to serve customers who would otherwise go unserved.

B. Background

Congress established the FCC in part "to make available . . . to all the people of the United States . . . communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. Since its inception, the FCC has aimed to achieve that end.

Until the late 1990s, the FCC "achieved universal service by authorizing rates to monopoly providers sufficient to enable revenue from easy-to reach customers, such as city dwellers, to implicitly subsidize service to those in areas that were hard to reach." *AT&T, Inc. v. FCC*, 886 F.3d 1236, 1242 (D.C. Cir. 2018) (citation

omitted). However, with the breakup of AT&T in 1984, *see United States v. AT&T Co.*, 552 F. Supp. 131, 170 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), such implicit subsidies became harder to maintain. To begin to replace implicit subsidies, the FCC created the Universal Service Fund ("USF") to ensure universal service in high-cost areas. *See Rural Tel. Coal. v. FCC*, 838 F.2d 1307, 1311-12 (D.C. Cir. 1988). As the D.C. Circuit explained, the USF "was proposed in order to further the objective of making communication service available to all Americans at reasonable charges . . . ." *Id.* at 1315. The D.C. Circuit found that establishing the USF was within the FCC's authority because the USF's purpose was limited to "ensuring that 'telephone rates are within the means of the average subscriber.'" *Id*. (citation omitted). In addition to USF support for service to high-cost areas, the FCC also established the Link Up America and Lifeline programs to assist low-income households with telephone installation and service charges. *See ALC Commc'ns Corp. v. FCC*, 925 F.2d 487 (D.C. Cir. 1991) (unpublished).

Against this backdrop, and with increasing technological change in the industry, Congress enacted the Telecommunications Act of 1996 ("1996 Act"). "The 1996 Act made competition in the local basic service market one of its main goals." *Tex. Off. of Pub. Util. Couns. v. FCC*, 265 F.3d 313, 317 (5th Cir. 2001) (*TOPUC II*). While promoting competition, the 1996 Act also sought to "continu[e]

the provision of affordable universal service to all Americans." *Id.* at 318. Because competition and implicit universal service subsidies operated in tension with each other, Congress "required that the implicit subsidy system of rate manipulation be replaced with explicit subsidies for universal service." *Id.*

Congress did so through 47 U.S.C. § 254, which provided for the "preservation and advancement of universal service," 47 U.S.C. § 254(b), and directed the FCC to make support for universal service "explicit." *Id.* § 254(e). Congress specified that the FCC "shall base policies" implementing universal service on principles that Congress articulated, allowing the FCC to add principles only where doing so is "necessary and appropriate for the protection of the public interest, convenience, and necessity and" is consistent with the Communications Act of 1934, as amended. *Id.* § 254(b). Congress mandated in Section 254(d) that every telecommunications carrier "shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms" supporting universal service. *Id.* § 254(d). In addition to codifying the preservation and advancement of existing universal service mechanisms, Congress also directed the FCC to establish new mechanisms to support telecommunications service to rural health care providers as well as to schools and libraries. *See id*. § 254(h).

Pursuant to Section 254's directive, the FCC promulgated implementing regulations to delineate in detail the mechanics of the universal service mechanisms

and contributions to fund them. *See Changes to the Bd. of Dirs. of the Nat'l Exch. Carrier Ass'n, Inc.*, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400, 18461 (1997). The mechanisms supporting universal service are divided into four programs to provide support for: (1) rural areas; (2) low-income customers; (3) schools and libraries; and (4) rural health care. As noted above, the FCC established support for rural areas and low-income consumers before the 1996 Act, and the 1996 Act codified these earlier programs, established the programs for schools and libraries and rural health care, and articulated principles to which the FCC must adhere in implementing each of these four programs.

Under its implementing regulations, the FCC established the Universal Service Administrative Company ("USAC") to administer universal service programs. *See* 47 C.F.R. §§ 54.701-725. As relevant here, the FCC provided that contributions to universal support "be based on contributors' projected collected end-user telecommunications revenues, and on a contribution factor determined quarterly by the Commission." *Id.* § 54.709(a). To assist with these calculations, the FCC charged USAC with submitting to the agency projections of demand for the universal service mechanisms and administrative expenses for the upcoming quarter. *See id.* § 54.709(a)(3). When USAC submits its quarterly projections, the FCC then issues a public notice announcing them and proposing a contribution factor based on those projections. If the FCC takes no further action within 14 days after release of

the public notice, then the FCC's contribution factor is deemed approved. *See id.* However, the FCC "reserves the right to set projections of demand and administrative expenses at amounts that the Commission determines will serve the public interest." *Id.*

Once the FCC approves the contribution factor, USAC applies it to calculate each telecommunications carrier's quarterly USF assessment. *Id.* The USF program thus is "financed by fees charged to telephone companies and other providers of interstate telecommunications services." *Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 57 (D.C. Cir. 2011) (citation omitted). Telecommunications providers "may pass these fees along to their customers, and almost always do." *Id*. This system of determining and collecting contributions has remained in place for a quarter century.

In accord with this regulatory regime, USAC submitted its projections of demand and administrative expenses for the First Quarter 2022 on November 2, 2021. *See Proposed First Quarter 2022 Universal Service Contribution Factor*, Public Notice, DA 21-1550, at 1 (rel. Dec. 13, 2021) ("Public Notice"). On December 13, 2021, the FCC's Office of Managing Director issued the Public Notice, which set forth the projections that USAC had estimated and the associated "quarterly contribution factor calculated by the [FCC]." *Id*. at 1-4. The proposed contribution factor was deemed approved by the FCC on December 27, 2021, and

Petitioners filed their Petition in this Court challenging that approval on January 5, 2022. Notably, Petitioners challenged neither USAC's estimated projections nor the FCC's calculation of the contribution factor based on those projections.

A panel of this Court denied the Petition on March 24, 2023, finding that "there are no nondelegation doctrine violations" with Congress's direction to the FCC regarding the collection of funds to support universal service or the FCC's reliance on USAC for ministerial support. *Consumers' Rsch. v. FCC*, 63 F.4th 441, 445 (5th Cir. 2023). Petitioners sought rehearing en banc, which this Court granted on June 29, 2023.

In addition to multiple cases in this Court, Petitioners have brought similar cases challenging the constitutionality of the USF contribution system before the Sixth, Eleventh, and D.C. Circuit Courts of Appeals. The Sixth Circuit panel unanimously denied the petition before that court on May 4, 2023, finding that the statutory framework for universal service contributions does not violate the nondelegation doctrine because it contains an intelligible principle by offering "nuanced guidance and delimited discretion to the FCC." *Consumers' Rsch. v. FCC*, 67 F.4th 773, 797 (6th Cir. 2023). Further, the panel upheld the FCC's reliance on

USAC for "assistance with fact gathering and ministerial support." *Id.* The Sixth Circuit denied Petitioners' request for rehearing en banc on May 30, 2023.[1]

SUMMARY OF ARGUMENT

Section 254's directive that the FCC assess and collect contributions to preserve and advance universal service is constitutional. Under the Supreme Court's binding approach for reviewing nondelegation challenges, Section 254's dictate to the FCC falls well within constitutional bounds. Section 254 prescribes far more detailed directions than other statutes that have been upheld repeatedly by the Supreme Court over the past century when challenged on the same grounds. The statute constrains and directs the FCC at each step of the way in constructing universal service programs and in collecting the contributions that fund them. This case is wholly unlike the only two cases in which the Supreme Court has struck down statutes on nondelegation grounds, both of which involved the complete absence of legislative guidance. Even under a more searching standard—which could be adopted only by the Supreme Court—Section 254 still would pass constitutional muster. In addition, the contributions collected in furtherance of Section 254 are fees and not taxes. Even if they were taxes, however, the nondelegation analysis remains the same under binding Supreme Court authority.

[1] Petitioners' challenges are still pending before the Eleventh and D.C. Circuits. The Eleventh Circuit heard oral arguments on June 21, 2023.

Furthermore, USAC's role in administering universal service programs is constitutional because USAC plays only a ministerial role in helping to calculate the contribution factor according to a methodology established by the FCC and is expressly precluded from exercising decision-making authority. The only role USAC played in this case was the accounting exercise of projecting demand and administrative expenses for the First Quarter 2022. The FCC calculated the contribution factor based on those projections.

In an effort to overcome controlling authority contrary to their position, Petitioners exaggerate every aspect of this case. Petitioners overstate the stringency of the Supreme Court's "intelligible principle" test used to determine whether a statutory delegation is constitutional and entice this Court to apply a special test that does not exist under binding precedent. Petitioners exaggerate the breadth of Section 254's delegation to the FCC and mischaracterize the limits inherent in that delegation. And Petitioners exaggerate USAC's role in determining quarterly contribution factors. The en banc Court should affirm the panel and join the unanimous Sixth Circuit in rejecting Petitioners' arguments.

ARGUMENT

I. SECTION 254 IS NOT AN UNCONSTITUTIONAL DELEGATION.

Section 254's direction to the FCC to assess and collect contributions complies with both the binding intelligible principle test and, though foreclosed by

precedent, Petitioners' claimed "original understanding of nondelegation." *Cf.* En Banc Br. at 19. In support of their arguments to the contrary, Petitioners overstate the breadth of Section 254 and improperly minimize previous judicial constructions of Section 254 demonstrating the limits that cabin the FCC's discretion. Under either test, Section 254's decades-old direction to the FCC to collect contributions from providers of telecommunications services for universal service passes constitutional muster.

Applying the intelligible principle test, the Supreme Court has repeatedly affirmed directives from Congress to administrative agencies that are brief and standard-based—it has not required directives that are lengthy or rule-like. *See Mistretta v. United States*, 488 U.S. 361, 373 (1989) (collecting cases). Moreover, Petitioners' claims that the intelligible principle test applies heightened scrutiny to "revenue-raising" statutes incorrectly attempts to tie cases' holdings to facts that were not material to their outcome and ignores the reasoning in Supreme Court delegation cases.

Petitioners' claims about the original understanding of the nondelegation doctrine similarly are without merit. Those claims are contrary to this Court's and Supreme Court precedent. And even if this Court were to analyze Section 254 under such an approach, Section 254 complies with the factors set forth in Justice Gorsuch's dissent in *Gundy v. United States*, 139 S. Ct. 2116 (2019).

A. Section 254 Satisfies the Intelligible Principle Test.

Under the Supreme Court's intelligible principle test, "a statutory delegation is constitutional as long as Congress lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Id.* at 2123 (plurality) (cleaned up). Consistent with this test, the Supreme Court has affirmed congressional delegations to agencies, explaining that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta*, 488 U.S. at 372 (citation omitted). For instance, in the face of challenges invoking the nondelegation doctrine, the Supreme Court has upheld multiple delegations to agencies based upon principles far less limiting than those articulated by Congress here. *See, e.g.*, *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943) (*NBC*) (upholding delegation to FCC to regulate broadcast licensing in the "public interest"); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24-25 (1932) (upholding delegation to the Interstate Commerce Commission to approve railroad consolidations that are in the "public interest"); *see also Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001) (citation omitted) (upholding delegation to the Environmental Protection Agency to regulate ambient air quality standards "which in the judgment of the Administrator . . . are requisite to protect the public health"); *FPC v. Hope Nat. Gas Co.*, 320 U.S.

591, 600-01 (1944) (upholding delegation to the Federal Power Commission to ensure "just and reasonable" rates).

Indeed, the Supreme Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting). Consistent with the Supreme Court's framework, this Court has upheld statutes with broader delegations where limited by an intelligible principle,[2] and found unconstitutional a statute only where Congress "offered *no guidance* whatsoever."[3]

A "nondelegation inquiry always begins (and often almost ends) with statutory interpretation." *Big Time Vapes, Inc.*, 963 F.3d at 443 (quoting *Gundy*, 139

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[2] *See, e.g.*, *Big Time Vapes, Inc. v. FDA*, 963 F.3d 436, 439 (5th Cir. 2020) (cleaned up) (affirming delegation to the Food and Drug Administration to regulate three listed tobacco products and also "*any other* tobacco products that the Secretary [of Health and Human Services] by regulation *deems* to be subject to" the relevant act) (emphasis added); *United States v. Mirza*, 454 F. App'x 249, 255-56 (5th Cir. 2011) (per curiam); *United States v. Whaley*, 577 F.3d 254, 263-64 (5th Cir. 2009) (upholding, against a nondelegation challenge, the Sex Offender Registration and Notification Act, the same statute upheld in *Gundy*); *United States v. Jones*, 132 F.3d 232, 239 (5th Cir. 1998).

[3] *Jarkesy v. SEC*, 34 F.4th 446, 462 (5th Cir. 2022). In *Jarkesy*, the panel majority held that Congress went too far when it granted the Securities and Exchange Commission ("SEC") "open-ended" authority to choose whether to bring an enforcement action within the agency (without a jury) or in court (with a jury), because Congress "said nothing at all indicating how the SEC should make that call in any given case." *Id*. As discussed below, Section 254's detailed guidance to the FCC presents no such concerns.

S. Ct. at 2123 (plurality)). The text of Section 254 provides far more guidance than a "public interest," "just and reasonable," or other broad standard that has previously passed constitutional muster. First, Section 254(d) mandates 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." 47 U.S.C. § 254(d). Thus, Congress answered the threshold question of who would be required to contribute.[4]

Further, Congress set forth explicit principles for the FCC to follow in implementing Section 254. These six universal service principles laid out in Section 254(b) include that "[q]uality services should be available at just, reasonable, and affordable rates," and that "[t]here should be specific, predictable and sufficient

[4] Although Section 254(d) permits the FCC to require contributions from "[a]ny other provider of interstate telecommunications . . . if the public interest so requires," this flexibility to adapt to technological and marketplace changes falls squarely within the authority permitted in *Big Time Vapes, Inc.*, 963 F.3d at 438 (finding no delegation issue in a statute permitting the Food and Drug Administration to regulate "any other tobacco products" deemed to be subject to the act). *See also Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1239-41 (D.C. Cir. 2007) (analyzing statutory definitions and voice over Internet Protocol service to conclude that the FCC "has section 254(d) authority to require interconnected VoIP providers to make" contributions).

Federal and State mechanisms to preserve and advance universal service." *Id.* § 254(b).[5]

Petitioners nonetheless claim these fail to meaningfully limit FCC authority because they are no more than tautologies and "aspirational only." En Banc Br. at 35 (quoting *TOPUC II*, 265 F.3d at 321). However, Petitioners misapprehend the impact of *TOPUC II* in making this claim. *TOPUC II* was decided under the deferential *Chevron* standard that applies to agency interpretations of ambiguous statutes. *TOPUC II*, 265 F.3d at 321-22 ("Under this deferential review, we have approved the FCC's interpretation of the statutory principles as aspirational only." (citing *Tex. Off. of Pub. Util. Couns. v. FCC*, 183 F.3d 393, 421 (5th Cir. 1999) (*TOPUC I*)). In *TOPUC II* this Court was analyzing just how tightly the Section 254 statutory principles constrain the FCC—not whether they constrain the FCC at all. Petitioners also claim that the use of "should" in the specific listed principles renders them "[n]ot [m]andatory." En Banc Br. at 34. But this ignores the overarching command that the FCC "shall" base policies on those specific principles. 47 U.S.C. § 214(b); *see also TOPUC I*, 183 F.3d at 418 (stating that "we agree that the use of the word 'shall' indicates a congressional command").

[5] While Section 254(b) permits the creation of additional principles, this permission is not boundless, as such principles must be "necessary and appropriate for the protection of the public interest, convenience, and necessity and [be] consistent with this [Act]." 47 U.S.C. § 254(b)(7).

Underscoring that the FCC's discretion is limited by these principles, the Tenth Circuit has twice concluded that an FCC order did not properly interpret them. *See Qwest Corp. v. FCC*, 258 F.3d 1191, 1201, 1205 (10th Cir. 2001) (*Qwest I*) (concluding that the FCC had inadequately explained how its decision was related to the statutory requirements provided in Section 254); *Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005) (*Qwest II*) (concluding that the FCC had erred in its constructions of "sufficient" and "reasonably comparable" by ignoring other universal service principles). In an effort to minimize the significance of *Qwest II*, Petitioners' mischaracterize the case as concluding that the FCC "fail[ed] to comply with *procedural* requirements like explaining its conclusions." En Banc Br. at 41. In fact, the *Qwest II* court rejected the FCC's construction of "sufficient" in Section 254(b) on the merits. *Qwest II*, 398 F.3d at 1234 ("The issue is more than semantic.").[6] Petitioners also incorrectly suggest that the *Qwest I* court's acknowledgement that "any particular principle can be trumped in the appropriate case" implies that the principles are not binding. En Banc Br. at 42 (quoting *Qwest I*, 258 F.3d at 1200). But *Qwest II* set aside the FCC's construction of "sufficient" because it "ignore[d] the vast majority of § 254(b) principles by

[6] That the *Qwest II* court framed its analysis in terms of the FCC's failure to justify its conclusion and remanded the matter to the FCC is simply a product of the well-established principle that when a court concludes that an agency's decision is erroneous, the ordinary course is to remand to the agency. *See, e.g.*, *Negusie v. Holder*, 555 U.S. 511, 517 (2009).

focusing solely on" one principle. *Qwest II*, 398 F.3d at 1234. In other words, the FCC *must* account for all principles established by Congress in Section 254(b).

Similarly, Petitioners' claim that the FCC is free to raise revenue with "no limit at all" is incorrect. En Banc Br. at 2. Rather, the FCC first determines what constitutes universal service pursuant to Section 254(c). From there, the FCC determines "sufficient" mechanisms and support levels "to preserve and advance universal service." 47 U.S.C. § 254(b)(5), (d); *see also id.* § 254(e) (stating that universal support "should be explicit and sufficient to achieve the purposes of this section"). The level of support therefore is directed by what is sufficient to support universal service and by market demand. *See* 47 C.F.R. § 54.709(a)(3) (basing total contribution amount on projections of demand). This Court has noted that "excessive funding may itself violate the sufficiency requirements of the Act" if it undermines "universal service by causing rates unnecessarily to rise, thereby pricing consumers out of the market." *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000). As the D.C. Circuit observed in *Rural Cellular Ass'n v. FCC* (*Rural Cellular I*), "it is hard to imagine how the Commission could achieve the overall goal of § 254(b) . . . if the USF is 'sufficient' for purposes of § 254(b)(5), yet so large it actually makes telecommunications services less 'affordable,' in

contravention of § 254(b)(1)." 588 F.3d 1095, 1103 (D.C. Cir. 2009). These precedents demonstrate that Section 254 limits total contributions.[7]

Petitioners place a great deal of emphasis on their claim that the FCC may define its own statutory mission under Section 254(b)(7), supposedly resulting in a "rare 'dual-layer' delegation" in which the FCC may add universal service principles "virtually at will." En Banc Br. at 2; *see also id.* at 39-41. This criticism again misses the mark. Congress has guided and constrained the FCC at each step, and that is what the intelligible principle test requires.[8] Section 254(b)(7) only permits the FCC to rely on other principles that are "necessary and appropriate for the protection of the public interest, convenience, necessity and are consistent with this Act" when developing the universal service program. Even if this were the sole guidepost, it would be permissible under the intelligible principle test. *See NBC*,

[7] Petitioners' references to the expanded budget of universal service are also misplaced. *See* En Banc Br. at 12. Expansion of budget has little probative value in assessing the scope of delegation. Petitioners have failed to adjust for inflation, which dampens the real effects of market driven budget expansion. More importantly, it is perfectly sensible that a regulatory program in its initial stages would start incrementally as an agency develops further expertise in the field. Courts should not encourage agencies to start with maximalist programs in an effort to ward off nondelegation challenges in the future.

[8] *See* Brief for Members of Congress as Amici Curiae Supporting Respondents at 8, *Consumers' Rsch. v. FCC*, 63 F.4th 441 (5th Cir. 2023) (No. 22-60008) (citation omitted) ("Congress thus intentionally instructed the FCC to redefine universal service 'periodically,' and to ensure that the definition evolves along with technology adopted by the market.").

319 U.S. at 225-26 (finding that FCC authority to regulate in the "public interest" is permissible). Moreover, Petitioners ignore the long-established *ejusdem generis* canon that residual clauses are "controlled and defined by reference to the enumerated categories . . . which are recited just before it." *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001); *see also NAACP v. FPC*, 425 U.S. 662, 669 (1976) (holding that use of "public interest" in a regulatory statute "is not a broad license to promote the general public welfare" and instead "take[s] meaning from the purposes of the regulatory legislation"). Consistent with this limitation, the FCC has only infrequently developed additional universal service principles under Section 254(b)(7). For example, the FCC has adopted a seventh principle, that universal service mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, *Rural Cellular I*, 588 F.3d at 1098, which is an outgrowth of the principle that contributions should be equitable and nondiscriminatory under Section 254(b)(4). The FCC only may identify and apply universal service principles consistent with Congress's guidance, and it only may collect contributions in support of those principles consistent with Congress's guidance. Nothing additional is required.

Petitioners further claim that the definition of "universal service" provides no limit on the FCC's discretion, En Banc Br. at 45, but then fail to appreciate Section 254(c)'s guidance on the meaning of universal service. Section 254(c) limits the

FCC to supporting "telecommunications services." 47 U.S.C. § 254(c); *id.* § 153(53). Section 254(c)(1) prescribes factors that the FCC "shall consider" in determining whether to support a service. Significantly, Section 254(c)(1) instructs the FCC to discern whether a telecommunications service is "essential" or has "been subscribed to by a substantial majority of residential customers." The former is a high bar, and the latter is an objective measure. Moreover, Section 254(c)(3)'s provision for designating additional services for support mechanisms for schools, libraries, and health care providers demonstrates Congress's intent that Section 254(c)(1) cannot be read so broadly as to include the services identified in Section 254(c)(3). Section 254(c)(3) would be superfluous otherwise. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) (citation omitted) (stating that "we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof").

Petitioners also ignore that Section 254(e) limits the recipients of universal service funds to "eligible telecommunications carrier[s]"[9] and that such funds may only be used for "the provision, maintenance, and upgrading of facilities and services for which such support is intended." *See Blanca Tel. Co. v. FCC*, 991 F.3d 1097, 1105-06 (10th Cir. 2021) ("Congress did not intend for the USF to act as an

[9] An "eligible telecommunications carrier" is a telecommunications carrier that has been designated as eligible to receive universal service support by a state utility commission or, in some cases, by the FCC. 47 U.S.C. § 214(e).

unrestricted fund for eligible carriers to be distributed for any conceivable expense incurred while providing telecommunications services."). Just as the Clean Air Act applies to a discrete set of pollutants, *Whitman*, 531 U.S. at 473, Section 254 only allows for funds for a discrete set of communications services.

Further demonstrating that Section 254 constrains the FCC, this Court has concluded that the principles in Section 254(b) may be overcome by other mandatory provisions in Section 254. *See 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."). In other words, the FCC must carefully account for all of Congress's direction. The result is far more guidance and constraint than a simple—and clearly permissible—general "public interest" standard.

Not only does Section 254's textual guidance clearly pass the delegation test, but Section 254's purpose and history further limit the FCC's discretion. Courts employ additional tools of statutory interpretation in the intelligible principle analysis that extend beyond examining the text of the provision in question. *Big Time Vapes, Inc.*, 963 F.3d at 443; *see also Gundy*, 139 S. Ct. at 2123 (plurality) (interpreting the "text . . . alongside its context, purpose, and history"). There is no dispute that Congress included Section 254 in the 1996 Act to preserve and advance universal service that had existed under the earlier non-competitive framework that

allowed for implicit subsidies for high-cost service. En Banc Br. at 8-10; *see also* 47 U.S.C. § 254(b) (providing for "preservation and advancement of universal service"); *Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068, 1074 (8th Cir. 1997) (discussing transition from universal service using implicit support to explicit support under Section 254). The pre-1996 Act USF program was not meant for "solv[ing] the problems of the poor" but was instead meant for "the more limited purpose of ensuring that 'telephone rates are within the means of the average subscriber.'" *Rural Tel. Coal.*, 838 F.2d at 1315 (citation omitted). Section 254 preserved aspects of the existing regime while requiring changes, such as the complete transition to explicit support. By reflecting Congress's choices to retain or alter pre-1996 Act practices, Section 254 guides and constrains the FCC. *See* Brief for Members of Congress as Amici Curiae Supporting Respondents at 23 ("Congress directs the FCC's administration of Section 254 by enacting changes to the statute, requiring reports, and monitoring the programs. The USF programs are absolutely essential for Americans in all corners of the country, and Congress consistently guides the FCC in administering them.").

As an example of how Congress modified pre-1996 Act universal service, Section 254(h) established universal service support for rural healthcare and schools and libraries. The statutory directives to the FCC in Section 254(h) are even more prescriptive than those in the rest of Section 254, which demonstrates two points.

First, Section 254(h) satisfies the intelligible principle test with respect to rural healthcare and school and library support even more easily than the remainder of Section 254. Second, the addition of subsection (h) indicates that Congress contemplated that existing universal service programs would guide and constrain the interpretation of the remainder of Section 254. Indeed, nearly every federal appeals court decision analyzing Section 254 begins with an introductory section on this history of universal service. *See, e.g.*, *TOPUC I*, 183 F.3d at 405-06; *AT&T Inc.*, 886 F.3d at 1241-42.

While the text, purpose, and history of Section 254 show that Congress established an intelligible principle that constrains the FCC's discretion, *Vonage* demonstrates Congress's wisdom in leaving some regulatory flexibility to the FCC to accommodate technological changes. With this flexibility, the FCC can determine contribution levels and mechanisms that reflect market dynamics in the fast-changing technological area of telecommunications.[10] In *Vonage*, the FCC was confronted with a new technology, voice over Internet Protocol services ("VoIP"), that was in its most nascent form when the 1996 Act was passed. The FCC determined that such services should contribute to universal service as an "other

[10] *See also Gen. Tel. Co. of the SW v. United States*, 449 F.2d 846, 853 (5th Cir. 1971) ("The Communications Act was designed to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications.").

provider of interstate telecommunications." *Vonage*, 489 F.3d at 1238-41. This determination required a technical analysis about the types of services that Vonage provided and their similarities to those provided by telecommunications carriers. *See id.* at 1236. Notably, the FCC's calculation of contribution amounts from such providers was necessarily informed by technical aspects of the services provided. *See id.* at 1237 (noting that calculating contributions for wireless and VoIP providers is difficult because "customers may use their services from many locations and often have area codes that do not correspond to their true location").

B. This Case is Not Comparable to *Panama* or *Schechter Poultry*

The Supreme Court's only two decisions striking down statutes on nondelegation grounds—*Panama* and *Schechter Poultry*—involved statutes that utterly failed to constrain executive discretion. Petitioners nonetheless attempt to compare Section 254's extensive guidance to the FCC to the National Industrial Recovery Act provisions at issue in those cases. En Banc Br. at 36-37. The comparison is wholly inapt.

In *Panama*, the Supreme Court confronted a case in which Congress "provided literally no guidance for the exercise of discretion." *Whitman*, 531 U.S. at 474 (discussing *Panama*); *see also Jarkesy*, 34 F.4th at 462 ("[N]either in the last eighty years has the Supreme Court considered the issue when Congress offered *no guidance* whatsoever."). Petitioners nonetheless suggest that Section 254(b) "is

similar" to Title I, Section 1 of the National Industrial Recovery Act, which *Panama* found did not constrain the President's discretion. En Banc Br. at 36. The two statutory provisions are not similar. In *Panama*, the Supreme Court found that Title I, Section 1 of the National Industrial Recovery Act was "simply an introduction of the Act, leaving the legislative policy as to particular subjects to be declared and defined, if at all, by the subsequent sections." *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 418 (1935). In contrast, Congress made clear that Section 254(b) directs the FCC. *See* 47 U.S.C. § 254(b) (stating that "the Commission *shall* base policies . . . on the following principles") (emphasis added); *see also* Brief for Members of Congress as Amici Curiae Supporting Respondents at 3 ("Petitioners' assertion that the FCC's and USAC's administration of the USF system lacks direction from Congress is historically baseless and simply incorrect."). Reflecting its status as a hortatory statement of general policy, Title I, Section 1 of the National Industrial Recovery Act contained a wide range of goals addressed to different topics, including to "remove obstructions to the free flow of . . . commerce," "eliminate unfair competitive practices," "improve standards of labor," and "conserve natural resources." *Panama*, 293 U.S. at 417. By contrast, consistent with its function as a legislative constraint on agency guidance, all of the principles in Section 254(b) serve and explicate a unified goal—"the preservation and advancement of universal service." 47 U.S.C. § 254(b).

Petitioners' comparison of Section 254(b)(4) to two provisions of the National Industrial Recovery Act at issue in *Schechter Poultry* is similarly unconvincing. En Banc Br. at 37. The provisions in question in *Schechter Poultry* stated that the President may "impose no inequitable restrictions on admission" and must "find that the code is not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 538 (1935) (cleaned up). The two provisions only proscribed certain steps the President could *not* take, and left the President unfettered discretion regarding steps he could take. *Id.* (stating that the first provision at issue "relates only to the status of the initiators of the new laws and not to the permissible scope of such laws" and that the second leaves the President free to "approve or disapprove . . . proposals as he may see fit"). Section 254(b)(4)'s principle of equitable and nondiscriminatory contributions, on the other hand, is an affirmative mandate that the FCC "shall base" its policies upon. 47 U.S.C. § 254(b). Moreover, Section 254's limited focus on universal service in telecommunications is a far cry from the National Industrial Recovery Act, which "conferred authority to regulate the entire economy." *Whitman*, 531 U.S. at 474.

C. The Court Should Reject Petitioners' False Distinctions Regarding Application of the Intelligible Principle Test.

Petitioners attempt to evade relevant precedent by claiming to identify dividing lines establishing when courts should apply differential forms of the

intelligible principle test. They assert that "revenue-raising statutes" are subject to a more stringent standard and "matters largely incapable of advance legislative definition, such as variegated technical matters" are subject to a more relaxed standard. En Banc Br. at 26, 28. No such lines exist. In fact, the Sixth Circuit clarified that "one universal intelligible-principle test" applies "regardless of the type of statute at issue." *Consumers' Rsch.*, 67 F.4th at 788.

Petitioners wrongly overstate the stringency of the intelligible principle standard in the fee context. *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212 (1989), offers an example of Petitioners' failed attempt to create a false distinction for statutes where agencies collect payments. *Skinner* upheld a statute directing 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*." *Id.* at 214 (emphasis added). To be sure, the statute set a cap on "the aggregate of fees received for any fiscal year." *Id.* at 215. But *Skinner* noted, "[i]n enacting [the statute], Congress delimited the scope of the Secretary's discretion with much greater specificity than in delegations that we have upheld in the past." *Id.* at 219 (collecting cases). The Supreme Court also concluded that "[e]ven if the user fees are a form of taxation . . . the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny

greater than that we have applied to other nondelegation challenges." *Id.* at 223.[11] While Petitioners suggest that *Skinner* establishes a *de facto* standard that requires limitations such as a cap and specific metrics for setting fees, *Skinner* never said such statutory factors were necessary to pass muster as an intelligible principle.

Petitioners also claim that "objective limits" on the amount of revenue to be raised are required because *Hampton* reviewed a statute that they say provided that customs duties should be collected according to a "precise formula for objectively calculating such revenues." En Banc Br. at 27. But Petitioners overstate the precision of the statutory formula in *Hampton*. There, the relevant statute provided a list of considerations for the President to consider in ascertaining differences in production cost "in so far as he finds it practicable." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 401-02 (1928). Notably, the last of these considerations was "any other advantages or disadvantages in competition." *Id.* at 402. More fundamentally, *Hampton* explained that Congress cannot police every detail in a regulatory scheme. Rather, Congress may lay down the general approach for an agency to follow and the agency may implement the details. *Id.* at 407-11. This is consistent with the way in which Congress approached Section 254.

Further, Petitioners wrongly assert that the authority granted in Section 254 is comparable to the revenue-raising statute overturned in *NCTA v. United States* and

[11] *See also infra* Section II.

should likewise be overturned. En Banc Br. at 29. This analogy misses the mark, however, because the *NCTA* decision did not rule on whether the statute violated the nondelegation doctrine. Rather, the Supreme Court merely concluded that the statute at issue did not clearly grant the FCC authority to collect the fee at issue. *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336 (1974) (*NCTA*).

Petitioners cite *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946) and *NBC* for the proposition that regulation of "variegated technical matters" is subject to more relaxed scrutiny. En Banc Br. at 28-29. Neither of the cases cited support this conclusion. The Supreme Court in *American Power* expressly stated that the "legislative process would *frequently* bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation." *American Power*, 329 U.S. at 105 (emphasis added). The Supreme Court did not limit this general assertion to circumstances involving unusual technical complexity, and instead simply acknowledged the reality that "modern legislation deal[s] with complex economic and social problems." *Id.* In *NBC*, the Supreme Court specifically noted the subject matter at issue was "both new and dynamic," 319 U.S. at 219, and not some matter of musty arcana. Additionally, Petitioners fail to explain why Section 254 itself does not fall into the "variegated technical matters" that Petitioners claim receive more deference.

Finally, Petitioners note that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." En Banc Br. at 25 (quoting *Whitman*, 531 U.S. at 475); *see also id.* at 29 (identifying *Whitman* as an example of a case dealing with "variegated technical matters"). But this distinction is unavailing here. Petitioners do not acknowledge the breadth of the congressional delegation at issue in *Whitman*, which involved a "sweeping regulatory scheme[]" for "air standards that affect *the entire national economy*." 531 U.S. at 475 (emphasis added). Even in such a sweeping scheme, Justice Scalia explained that the congressional directive to set air quality standards requisite to protect the public health "fits comfortably within the scope of discretion permitted by our precedent." *Id.* at 476. In contrast, Section 254 is targeted at a single sector of the national economy.

D. Section 254's Delegation Must Be Analyzed Under Governing Precedent.

Petitioners urge this Court to analyze Section 254's delegation to the FCC under Petitioners' conception of the original understanding of the nondelegation doctrine, *see* En Banc Br. at 19, but such an approach is foreclosed by Supreme Court precedent and the precedent of this Court. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("[T]he Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions."); *Hohn v. United States*, 524 U.S. 236,

252-53 (1998) (citation omitted) ("[The Supreme Court's] decisions remain binding precedent until [the Supreme Court] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); *Big Time Vapes, Inc.*, 963 F.3d at 447 (continuing to evaluate statutes for an intelligible principle until directed otherwise by the Supreme Court); *United States v. Mecham*, 950 F.3d 257, 265 (5th Cir. 2020) (explaining that circuit courts should not "get ahead of the Supreme Court"); *Morrow v. Meachum*, 917 F.3d 870, 874 n.4 (5th Cir. 2019) ("We apply the Supreme Court's precedents faithfully."). As this Court recently recognized, "our role as an inferior court is to faithfully apply Supreme Court precedent, so we do not reach the proper historical scope of the non-delegation doctrine." *Jarkesy*, 34 F.4th at 461 n.13.

Even if this Court were not bound by Supreme Court precedent, Petitioners offer a one-sided and selective reading of historical sources in support of their "original understanding" of nondelegation. *See* En Banc Br. at 20-21 (citing isolated statements of Montesquieu and Locke without proving any link to the Founders' intent). Recent academic research exhaustively reviewing legislation from before and after ratification of the Constitution undercuts Petitioners' isolated references. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277, 293, 332 (2021) (surveying historical evidence and finding that "contemporary political theory and practice before the Founding both confirm that

broad delegations of all kinds of legislative authority were not only constitutionally tolerable, but commonplace" and that after the Founding "[r]egulatory delegations were limited only by the will and judgment of the legislature").[12]

Petitioners fare no better in attempting to manufacture a requirement that Congress must legislate in numbers rather than words. They assert that Congress was obligated to adopt an "objective" formulation such as a "certain percentage of the FCC's annual budget," "the amount Congress appropriated for a separate program," "an annual dollar amount," "a certain tax percentage on . . . revenues," "the difference between two objective calculations," or "a set amount of money." En Banc Br. at 31. The intelligible principle imposes no such formal rigidity on Congress. As the Sixth Circuit acknowledged, precedent "does not stand for the proposition that delegations lacking some sort of Congressional formula lack sufficient guidance." *Consumers' Rsch.*, 67 F.4th at 790. Indeed, Congress regularly delegates authority for agencies to set pricing regulations or numerical standards without providing an "objective" formula for doing so. *See, e.g.*, *Lichter v. United States*, 334 U.S. 742 (1948) (upholding a delegation of authority to determine impermissibly excess profits during wartime); *Skinner*, 490 U.S. 212

[12] Professor Ilan Wurman responds to Mortenson and Bagley in *Nondelegation at the Founding*, but even under his analysis of Founding Era practice, Section 254 would likely pass muster because it "expressly authorize[s]" the FCC to act, the category of conduct is narrow, and the standards for the FCC's actions are "relatively precise in context." 130 Yale L.J. 1490, 1555 (2021).

(upholding a delegation to the Secretary of Transportation to establish a schedule for pipeline user safety fees); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940) (upholding the National Bituminous Coal Commission's authority to fix "reasonable" prices for coal); *Yakus v. United States*, 321 U.S. 414 (1944) (upholding commodity pricing regulation).

E. Section 254 Would Be Constitutional Even if the *Gundy* Dissent Provided the Controlling Standard.

Not only does Section 254 easily pass muster under the long-established intelligible principle standard, but it would also be constitutional even if the *Gundy* dissent's factors were the controlling law.

The *Gundy* dissent was careful to state that although Congress must make the policy decisions, Congress still may direct agencies to "fill in even a large number of details" and to "find facts that trigger the generally applicable rule of conduct specified in a statute." *Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting). Similarly, the *Gundy* dissent explained in evaluating cases from before the era of the intelligible principle: "Through all these cases, small or large, runs the theme that Congress must set forth standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed." *Id.* at 2136 (Gorsuch, J., dissenting) (quoting *Yakus*, 321 U.S. at 426). Reflecting on past cases, Justice Gorsuch stated that the Supreme Court must ask "the right questions." *Id.* at 2141 (Gorsuch, J., dissenting). Those questions

include: "Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And . . . did Congress, and not the Executive Branch, make the policy judgments?" *Id.* (Gorsuch, J., dissenting).

It is important to note how the *Gundy* dissent applied these considerations to the statute at issue in that case, which provides: "The Attorney General shall have the authority to specify the applicability of the requirements of this [title] to sex offenders convicted before the enactment of this [Act]." 34 U.S.C. § 20913(d). The *Gundy* dissent described that statute as "giving the nation's chief prosecutor the power to write a criminal code," giving "the discretion to apply or not apply any or all of [the act]'s requirements," and "allow[ing] the nation's chief law enforcement officer to write the criminal laws he is charged with enforcing." *Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting). Importantly, Justice Gorsuch contrasted this approach with what Congress could have done for the law to be permissible in his view: it could have "required all pre-Act offenders to register, but then given the Attorney General the authority to make case-by-case exceptions," and it could have "set criteria to inform that determination." *Id.* at 2143 (Gorsuch, J., dissenting).

Such a standard would still leave discretion to the executive, in just the same way that Section 254(d) does.[13]

Here, Congress has made "the policy decisions," and the FCC is filling in the details. *Id.* at 2136 (Gorsuch, J., dissenting). First, Section 254 has not given the FCC discretion, in the first instance, to determine whether there should be a universal service program or whether to require companies to contribute. Rather, Section 254(a) directs that the FCC "shall" implement a universal service program, and Section 254(d) requires that every telecommunications carrier that provides interstate telecommunications "shall" contribute.[14] Sections 254(b)(5), (d), and (e) direct the FCC to provide "sufficient" support, establishing outer bounds for universal service support. *See AT&T Inc.*, 886 F.3d at 1252 (stating that the sufficiency requirement "'seeks to strike an appropriate balance between the interests of' consumers and industry" (quoting *Rural Cellular I*, 588 F.3d at 1102));

[13] The *Gundy* dissent found the statute's lack of limits on the executive especially troubling in the criminal law context, where liberty interests are at stake. *See Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting). Of course, Section 254 is not a criminal statute.

[14] Although Section 254(d) goes on to permit the FCC to exempt a carrier or class of carriers, this is simply a conditional obligation subject to agency fact-finding. Similarly, Section 254(d)'s provision allowing for contribution from "[a]ny other provider of interstate telecommunications" likewise falls into the gap-filling category, where Congress has provided the policy, but agency gap-filling is required. *See Vonage*, 489 F.3d at 1236 (explaining that the FCC required providers of VoIP services that did not exist broadly in 1996 to make contributions and upholding that decision).

Alenco Commc'ns, Inc., 201 F.3d at 620 (stating that the Communications Act "promises universal service" and that this "is a goal that requires sufficient funding of *customers*"). Thus, Congress "resolve[d the] important policy questions." *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring).

The statement in *TOPUC II* that Congress "delegate[d] difficult policy choices to the Commission's discretion" is not inconsistent with concluding that Section 254 conforms to the *Gundy* dissent standard. 265 F.3d at 321 (quoting *Alenco Commc'ns, Inc.*, 201 F.3d at 615). Read in context, *Alenco*'s and *TOPUC II*'s statements did not suggest that Congress delegated the *constitutionally* important policy choices. Congress merely delegated the gap-filling policy choices—e.g., how to properly balance universal service principles while also moving to a competitive market structure in a rapidly evolving technological field. Balancing between Section 254(b)'s principles while the industry undergoes a tectonic shift might present difficult choices, but such choices are not the threshold policy choices that *Gundy*'s dissent suggests cannot be left to the executive.

Next, Section 254(c)(1)'s delegation to the FCC to determine what constitutes universal service similarly represents an instance of agency fact-finding or gap-filling, where Congress has provided the FCC with the relevant factors to consider. This is not a case where Congress has "found it expedient to hand off the job to the executive and direct there the blame for any later problems that might emerge."

Gundy, 139 S. Ct. at 2143 (Gorsuch, J., dissenting). Rather, Congress recognized that "the telecommunications market [would] undergo[] dramatic changes," *TOPUC II*, 265 F.3d at 322, and the definition of universal service would need to keep pace by allowing for an "evolving" standard subject to congressional prescriptions. Section 254(c)'s universal service definition provides the factors the FCC *shall* consider in determining what constitutes universal service. 47 U.S.C. § 254(c). In this way, Section 254 "set[s] forth the facts that the executive must consider and the criteria against which to measure them," and thereby "set[s] forth standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed." *Gundy*, 139 S. Ct. at 2136, 2141 (Gorsuch, J., dissenting) (quoting *Yakus*, 321 U.S. at 426). Indeed, the ability of courts to ascertain whether Congress's guidance has been followed has been borne out by federal court identification of limits on FCC action that may be taken pursuant to Section 254. *See e.g.*, *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 436 (5th Cir. 2021) (noting that caselaw does not support the argument that the FCC "may deploy the universal-service mechanism to accomplish any non-prohibited purpose in the Act"); *TOPUC I*, 183 F.3d at 435 (reversing FCC decision after concluding that "[t]he agency has offered no reasonable explanation of how this outcome, which will require companies . . . to incur a loss to participate in interstate service, satisfies [Section 254(d)'s] 'equitable and nondiscriminatory'

language"); *Qwest I*, 258 F.3d at 1201, 1205 (concluding that the FCC had inadequately explained how its decision was related to the statutory requirements provided in Section 254); *Qwest II*, 398 F.3d at 1234 (concluding that the FCC had erred in its constructions of "sufficient" and "reasonably comparable").

II. PETITIONERS' TAX CLAIMS ARE WRONG ON THE LAW AND IRRELEVANT UNDER BINDING PRECEDENT.

This Court and other federal and state courts around the country have already concluded that universal service contributions are not taxes. These decisions are correct, and this Court should not heed Petitioners' effort to evade their conclusion by setting forth the wrong standard for determining whether a payment is a fee or a tax. In any event, Petitioners' arguments urging heightened nondelegation scrutiny for taxes are irrelevant because the Supreme Court held in *Skinner* that the nondelegation analysis is the same regardless of whether a payment is a tax, fee, or anything else.

A. The Fifth Circuit and Other Courts Have Concluded that Universal Service Fees Are Not Taxes.

This Court has already concluded that universal service contributions are not taxes. *See TOPUC I*, 183 F.3d at 427 n.52 (citation omitted) ("[T]he 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."). The D.C. Circuit similarly has concluded that

universal service contributions are not taxes. *See Rural Cellular Ass'n & Universal Serv. v. FCC*, 685 F.3d 1083, 1090-91 (D.C. Cir. 2012) (*Rural Cellular II*) (concluding that contributions are not taxes where "contributions to the temporary reserve support a program to subsidize broadband Internet access from which those [contributing] carriers will particularly benefit").[15]

State courts also have concluded that contributions to analogous state universal service programs are not taxes under state law. In *Schumacher v. Johanns*, the Supreme Court of Nebraska held the state agency's contribution requirement was "not to generate revenue for governmental purposes, but, rather, to regulate the telecommunications industry through a rebalancing and restructuring of rates" and was therefore "not a tax." 722 N.W.2d 37, 50-51 (Neb. 2006). The Kansas Supreme Court reached that same conclusion regarding its universal service program. *Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n*, 956 P.2d 685, 709-10 (Kan. 1998) (finding that universal service funds are not taxes because they are not meant to raise revenue and instead are part of a regulatory scheme to "manipulate the movement of the same money (extra access rate money) to the same parties (from companies purchasing access to the LECs) to be used for the same reasons (to build and maintain land lines)"). The Louisiana Supreme Court similarly concluded that

[15] *See also Rural Tel. Coal.*, 838 F.2d at 1314 (citation omitted) (rejecting tax challenge to pre-1996 Act universal service approach because "a regulation is a tax only when its primary purpose judged in legal context is raising revenue").

state universal service fund contributions are fees and not taxes because they "are not intended to raise revenue" and instead "allocate the costs for the administration of a regulatory program." *Voicestream GSM I Operating Co., LLC v. La. Pub. Serv. Comm'n*, 943 So. 2d 349, 359-62 (La. 2006). While these cases apply state law, they buttress federal court findings that charges to support universal service are regulatory in nature and not meant to raise general revenues, unlike a tax.

B. Petitioners' Fee-Versus-Tax Test Is Wrong.

Petitioners argue that this Court should not follow *TOPUC I* because, in their view, it applied the incorrect test. En Banc Br. at 55. Petitioners claim that the tax question turns solely on whether "some of the administrative costs at issue 'inure[] to the benefit of the public.'" *Id.* at 56 (quoting *Skinner*, 490 U.S. at 223).

Petitioners are wrong for several reasons. First, Petitioners ignore other factors that this Court has set forth for distinguishing taxes from fees. In *Tex. Ent. Ass'n v. Hegar*, this Court noted that a fee "is imposed (1) by an agency, not the legislature; (2) upon those it regulates, not the community as a whole; and (3) for the purpose of defraying regulatory costs, not simply for general revenue-raising purposes." 10 F.4th 495, 505-06 (5th Cir. 2021) (quoting *Neinast v. Texas*, 217 F.3d 275, 278 (5th Cir. 2000)). Applying these standards, *Tex. Ent. Ass'n* found the charge at issue to be a fee even though it was established by the legislature because it was focused on a narrow industry sector and because the funds raised were directed

to a specific fund, "not general revenue." *Id.* at 506-07. The same is true of universal service contributions, which are narrowly directed toward limited programs for telecommunications access for certain qualifying recipients and are not general revenue. Although the program might be directed toward "universal" service, the funds are not universally distributed. Rather, as directed by Section 254(e), only eligible telecommunications carriers may receive such funds.

Petitioners cite *Skinner* for the proposition that any time administrative costs inure to the benefit of the public, a payment constitutes a tax. En Banc Br. at 56. But *Skinner* held no such thing. As discussed below, *Skinner* rejected distinguishing taxes and fees in the nondelegation context. Having held that the tax-or-fee question was irrelevant, *Skinner* had no occasion to reach the question of what constitutes a fee versus a tax. 490 U.S. at 223 ("[W]e need not concern ourselves with the threshold question . . . whether the pipeline safety users 'fees' . . . are more properly thought of as a form of taxation). In addition, *Skinner*'s discussion of "some of the administrative costs at issue 'inur[ing] to the benefit of the public,'" *id.* (quoting *NCTA*, 415 U.S. at 343), was in reference to *NCTA* and another case where the Supreme Court applied the constitutional avoidance canon to interpret the underlying statute narrowly. *See id.* at 223-24 (citing *NCTA*, 415 U.S. at 342). This is a far cry from holding the statute unconstitutional.

Petitioners' reliance on *Trafigura* is also misplaced. As Petitioners have conceded, this Court reviewed that case under the Export Clause of the Constitution, which requires more "restrictive" review of purported fees than in other contexts, since the Export Clause categorically bars Congress from imposing any tax on exports. *Trafigura Trading LLC v. United States*, 29 F.4th 286, 289 (5th Cir. 2022) ("The Supreme Court has repeatedly recognized the . . . breadth of the Export Clause."); *see also United States v. United States Shoe Corp.*, 523 U.S. 360, 369 (1998).

Petitioners also argue that *TOPUC I*'s analysis is undermined by the growth of universal service in intervening years, En Banc Br. at 59-60, but Petitioners do not support this claim with any caselaw. A rule for distinguishing a fee from a tax based on the amount of money collected would invite unworkable line-drawing and undermine the finality of judicial decisions.

C. Under *Skinner*, Whether a Payment Is a Tax or a Fee Is Irrelevant to the Nondelegation Analysis.

TOPUC I correctly concluded that universal service contributions are fees and not taxes. But there is a more fundamental flaw in Petitioners' argument. As Petitioners acknowledged in calling for the Supreme Court's *Skinner* decision to be overruled in their panel brief, Pet Br. at 59, the question of whether a payment is a fee or a tax is irrelevant to the nondelegation inquiry. 490 U.S. at 222-23 ("We find no support . . . for [the] contention that the text of the Constitution 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."). Thus, "the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that . . . applied to other nondelegation challenges." *Id.* at 223. The D.C. Circuit has already reached this conclusion regarding Section 254: "Because section 254 of the Act clearly provides an intelligible principle to guide the Commission's efforts, viz., to preserve and advance universal service, whether the assessment is deemed a tax is of no real moment." *Rural Cellular II*, 685 F.3d at 1091 (cleaned up).

Skinner is well-founded. Writing for a unanimous Court, Justice O'Connor analyzed the Constitution's text and concluded that nothing distinguished the taxing power from other enumerated powers in Article I. *Skinner*, 490 U.S. at 221-22. The opinion went on to explain that the First and Fifth Congresses after ratification of the Constitution enacted legislation granting significant authority to the secretary of the treasury regarding taxation, *id.* at 221, and that a contrary rule would call into question the Internal Revenue Service's authority to regulate under the tax code, *see id.* at 222. This Court is bound by that precedent. *Mecham*, 950 F.3d at 265; *Morrow*, 917 F.3d at 874 n.4.

III. USAC'S ROLE IS NARROWLY CONFINED AND PETITIONERS EXAGGERATE USAC'S AUTHORITY.

Petitioners contend that USAC's role in administering universal service programs "violate[s] the private nondelegation doctrine." En Banc Br. at 65.[16] This Court should reject Petitioners' arguments, which are based on an exaggerated conception of USAC's role and discretion, as the relevant regulations and the Public Notice at issue make clear.

The FCC's regulations demonstrate that USAC exercises no lawmaking authority. The relevant regulations provide that "[c]ontributions to [universal service] mechanisms . . . shall be based on contributors' projected collected end-user telecommunications revenues, and on a contribution factor determined quarterly *by the Commission*." 47 C.F.R. § 54.709(a) (emphasis added). The FCC has determined through regulation that such contributions shall be "based on the ratio of total projected quarterly expenses of the universal service support mechanisms to the total projected collected end-user interstate and international telecommunications revenues, net of projected contributions." *Id.* § 54.709(a)(2). USAC's role is merely to gather data and formulaically determine the quarterly projections from which the FCC performs the relevant calculation. *See id.*

[16] Petitioners muddle their argument by repeatedly citing cases analyzing whether an agency is *statutorily* authorized to rely on a non-agency in administering a program. *See* En Banc Br. at 61-65 (citing *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974); *Fund for Animals v. Kempthorne*, 538 F.3d 124 (2d Cir. 2008)).

§ 54.709(a)(2)-(3). The Public Notice that Petitioners challenge further bears this out. *See* Public Notice at 1, 4 (stating that the quarterly contribution factor is "calculated by the Federal Communications Commission," which USAC "shall use" to then determine the amount of individual contributions). Petitioners therefore are wrong in claiming that "USAC decides how much money to raise" each year in pursuit of universal service and how to spend it. En Banc Br. at 61.

Not only is USAC's role in setting the contribution factor limited to a ministerial data gathering and projecting function, but the FCC's regulations expressly exclude USAC from policy-making functions and responsibilities. USAC "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress," and "[w]here the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission." 47 C.F.R. § 54.702(c). Accordingly, USAC acts in a ministerial capacity when gathering data and submitting projections of demand and expenses to the FCC so that the FCC can calculate the contribution factor, and USAC does not make any laws or exercise any unreviewable authority to raise money. Telecom Intervenors routinely interact with USAC by reporting revenue, submitting contributions, and receiving support—and they interact with the FCC where policy and interpretive matters are at issue.

One of Petitioners' cited cases, *Texas v. Rettig*, shows the types of comparatively far-reaching third-party determinations that courts have viewed more skeptically (but nevertheless upheld). The regulation at issue in *Rettig* required that the rates states paid to managed-care organizations must follow the practice standards established by the Actuarial Standards Board, a private entity. 987 F.3d 518, 524-25 (5th Cir. 2021). As a result, the Actuarial Standards Board exercised "substantive *lawmaking power*, rather than some minor factual determination or *ministerial task*." *Texas v. Rettig*, 993 F.3d 408, 410 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc) (emphasis added). USAC lacks any such unreviewable power with regard to the universal service contribution factor; it simply compiles data and performs projections to provide the FCC with factual information the agency needs to determine the contribution factor.

The fact that the FCC generally accepts USAC's projections of demand is only a manifestation of the mechanical data-gathering and projecting role that USAC plays.[17] Matters of arithmetic are not subject to discretion. In this way, Petitioners' claim based on *Sierra Club v. Lynn* that the FCC only acts as a rubber stamp is

[17] The panel opinion in this case acknowledged that "the FCC only uses USAC's proposals after independent consideration of the collected data and other relevant information." *Consumers' Rsch. v. FCC*, 63 F.4th at 452. Petitioners overlook the process by which the FCC requires USAC to submit projections for the demand of the universal service mechanisms at least 60 days prior to the start of each quarter, and the total contribution base at least 30 days prior to the start of each quarter. *See* 47 C.F.R. §§ 54.701-725.

inapt—that case involved the far more fact- and judgment-intensive development by third parties of an environmental statement under the National Environmental Policy Act. 502 F.2d at 59. Performance of a mechanical accounting task such as USAC's is fundamentally different.

As the panel in this case acknowledged, and the Sixth Circuit agreed, "there is no private-nondelegation doctrine violation because USAC is subordinate to the FCC and performs ministerial and fact-gathering functions." *Consumers' Rsch.*, 67 F.4 at 795-96 (citing *Consumers' Rsch.*, 63 F.4th at 451-52).

For all these reasons, this Court should reject Petitioners' hyperbolic claims about USAC's authority.

IV. STRIKING DOWN SECTION 254 WOULD BE DISRUPTIVE AND UPSET INVESTMENT-BACKED RELIANCE INTERESTS.

Petitioners spend pages upon pages criticizing universal service. This one-sided story ignores the many benefits the USF provides and the disruption that would be caused by holding Section 254 unconstitutional in whole or part.

The universal service program includes the High-Cost Support Program, the Lifeline Program, the Schools and Libraries Program, and the Rural Healthcare Program. Through these programs, telecommunications providers across the country receive substantial funding to ensure connectivity for millions of Americans. Based on these support mechanisms, Telecom Intervenors' members have invested and will continue to invest in network infrastructure across the country.

Telecom Intervenors can confirm firsthand that universal service support helps to make the business case for deployment of networks and the delivery of services that satisfy the universal service principles articulated by Section 254. For example, high-cost support pursuant to Section 254 enables companies to deploy high-speed broadband networks and provide service at affordable rates to especially high-cost rural areas in the country, where population densities tend to average roughly four serviceable locations per square mile.[18] Lifeline support enables consumers who could not otherwise afford service to obtain service. Network effects from additional users, which arise from all universal service programs, further benefit payors by enhancing the value of networks. These benefits would be lost or significantly diminished if universal service support was cut off or curtailed, to the ultimate detriment of consumers who rely on network deployments, including in hard to serve areas.

Further, nine members of Congress from both parties agree that a decision holding the USF program unconstitutional would have a "catastrophic" and "devastating" effect, causing some of the nation's most vulnerable citizens to lose

[18] *See, e.g.*, NTCA, Broadband/Internet Availability Survey Report at 1 (Dec. 2021), https://www.ntca.org/sites/default/files/documents/2021-12/2021-broadband-survey-report-final-12-15-21.pdf (showing average serviceable area locations for respondents is 7,581, and average service area is 1,906 square miles).

essential services on which they rely. Brief for Members of Congress as Amici Curiae Supporting Respondents at 23-24.

Although Petitioners' policy claims are not relevant to the legality of Section 254, Telecom Intervenors' members' reliance interests are. To find Section 254 unconstitutional, the Supreme Court would have to overrule the cases employing the intelligible principle test. A significant factor in the *stare decisis* analysis is whether overturning existing precedent would upset reliance interests. *See Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (citation omitted) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved."). Here, many of Telecom Intervenors' members have invested in network infrastructure, made business plans, and offered service plans in reliance on future universal service payments. These investment-backed expectations should caution against overruling precedent to apply a new rule that would hold Section 254 unconstitutional.

V. CONCLUSION

For these reasons, in addition to those set forth in the Brief for Respondents, this Court should deny the Petition.

Respectfully submitted,

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September 6, 2023

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 6, 2023, I filed the foregoing Joint En Banc Brief of Intervenors USTelecom, NTCA, and CCA in Support of Respondents with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Jennifer Tatel
Jennifer Tatel

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,413 words, excluding the parts of the brief exempted by Fed. R. App. 32(f) and Circuit Rule 32.2.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word using 14-point Times New Roman font.

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