Nos. 24-354 and 24-422

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL., PETITIONERS

v.

CONSUMERS' RESEARCH, ET AL.

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

v.

CONSUMERS' RESEARCH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
VIVEK SURI
Assistant to the Solicitor General
MARK B. STERN
GERARD J. SINZDAK
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

P. MICHELE ELLISON
General Counsel
JACOB M. LEWIS
Deputy General Counsel
JAMES M. CARR
MATTHEW J. DUNNE
Counsel
Federal Communications Commission
Washington, DC 20554

QUESTIONS PRESENTED

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

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

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

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

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

TABLE OF CONTENTS

Page

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations—Continued: Page

Regulations—Continued: Page

In the Supreme Court of the United States

No. 24-354

FEDERAL COMMUNICATIONS COMMISSION, ET AL., PETITIONERS

v.

CONSUMERS' RESEARCH, ET AL.

No. 24-422

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

v.

CONSUMERS' RESEARCH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-124a) is reported at 109 F.4th 743. The opinion of the court of appeals panel (Pet. App. 125a-140a) is reported at 63 F.4th 441.

JURISDICTION

The judgment of the en banc court of appeals was entered on July 24, 2024. The petitions for writs of certiorari were filed on September 30, 2024, and October 11, 2024, and were granted on November 22, 2024. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix. App., *infra*, 1a-30a.

STATEMENT

A. Universal Service Fund

1. The Communications Act of 1934 (Communications Act or Act), ch. 652, 48 Stat. 1064 (47 U.S.C. 151 *et seq.*), establishes the Federal Communications Commission (FCC or Commission) and empowers it to regulate communications services. One of the FCC's core missions is to "make available, so far as possible, to all the people of the United States, * * * a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. 151. That objective—*i.e.*, ensuring the availability of affordable and reliable communications services throughout the United States—is known as universal service. See *AT&T, Inc.* v. *FCC*, 886 F.3d 1236, 1241 (D.C. Cir. 2018).

Until the 1990s, the FCC and state regulators promoted universal service primarily through a system of implicit subsidies. See *In re Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8784 (1997). For example, it generally cost telephone companies more money to build networks and provide service in rural areas than to do so in cities, creating the risk that prohibitively high rates would prevent some rural customers from receiving telephone service. See *ibid.* To address that risk, telephone companies were required to charge below-cost rates in rural areas, but were allowed to charge above-cost rates in cities. See *ibid.* Through that approach, urban customers implicitly subsidized the provision of telephone service to rural customers. See *ibid.*

2. In 1996, Congress overhauled the Act in order to promote competition and eliminate monopolies in the telecommunications industry. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. As part of those reforms, Congress created a new framework for achieving universal service, replacing the old system of implicit subsidies with a new system of explicit subsidies. See 47 U.S.C. 254.

The amended Act directs the FCC to establish a set of programs known collectively as the Universal Service Fund (Fund). See 47 U.S.C. 254(a). Carriers that provide interstate telecommunications services must "contribute" to the Fund in accordance with the statute and FCC regulations. 47 U.S.C. 254(d). The Commission must use the money in the Fund to subsidize universal service. See 47 U.S.C. 254(e).

The Act specifies six "principles" that guide and limit the FCC's exercise of that authority. 47 U.S.C. 254(b). It provides that (1) services should be available at "just, reasonable, and affordable rates"; (2) "all regions of the Nation" should have access to services; (3) customers throughout the Nation should have access to services that are "reasonably comparable" in quality and price to those provided in urban areas; (4) carriers should make "equitable and nondiscriminatory" contributions to universal service; (5) universal service subsidies should be "specific, predictable[,] and sufficient"; and (6) "schools," "libraries," and "health care providers" should have access to services. 47 U.S.C. 254(b)(1)-(6). The Commission may adopt additional principles if the

Commission and the Federal-State Joint Board on Universal Service (Joint Board) determine that doing so is "necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with" the Act. 47 U.S.C. 254(b)(7).

The Act guides and limits the collection and spending of universal service contributions in additional ways. For example, the Act specifies the entities that must pay contributions, see 47 U.S.C. 254(d); the entities that may receive subsidies, see 47 U.S.C. 254(e) and (h); and the types of services that the Fund may subsidize, see 47 U.S.C. 254(c).

In accordance with the Act, the FCC has established four universal service programs, which assist (1) rural, insular, and high-cost areas; (2) low-income customers; (3) schools and libraries; and (4) rural healthcare providers. See 47 C.F.R. Pt. 54, Subpts. D-G. All four programs subsidize telephone and high-speed internet services, see 47 C.F.R. 54.101, and the program for schools and libraries subsidizes internal connections as well, see 47 C.F.R. 54.502(a) and (b).

3. In 1997, the FCC directed that the Universal Service Administrative Company (USAC or Company) be established to help the Commission administer the Fund. See *In re Changes to the Board of Directors of the National Exchange Carrier Ass'n, Inc.*, 12 FCC Rcd 18,400, 18,418-18,419 (1997). USAC is a private, not-for-profit corporation chartered in Delaware. See Pet. App. 59a.

USAC is subject to the FCC's oversight and control. Its sole stockholder, an association of carriers, must "act in compliance with the [FCC's] Rules and Orders when exercising its stockholder duties and powers." *Amended and Restated By-Laws of Universal Service*

Administrative Company, Art. I, ¶ 1 (rev. Jan. 26, 2024). FCC rules identify the groups represented on the Company's Board of Directors—*e.g.*, carriers, program beneficiaries, and state regulators—and the FCC Chair selects directors after reviewing nominations from those groups. See 47 C.F.R. 54.703(b) and (c). The Company also must obtain the Commission's approval of its budget. See 47 C.F.R. 54.715(c).

The FCC has "appointed" USAC as the Fund's "permanent Administrator." 47 C.F.R. 54.701(a). The Administrator provides financial projections that the Commission uses in computing the amounts of universal service contributions. See 47 C.F.R. 54.709. The Administrator also sends out bills and collects contributions. See 47 C.F.R. 54.702(b). Finally, the Administrator disburses money to program beneficiaries in accordance with FCC rules. See *ibid.*

Although the Administrator performs administrative tasks on the FCC's behalf, it exercises no independent regulatory power. The Administrator "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress." 47 C.F.R. 54.702(c). It must comply with the Commission's rules, see 47 C.F.R. 54.701-54.717, and with "orders, written directives, and other instructions promulgated by the Commission or its bureaus and offices," *Memorandum of Understanding Between the Federal Communications Commission and the Universal Service Administrative Company* 2 (Oct. 17, 2024). Any party that is aggrieved by the Administrator's decisions may request de novo review by the Commission. See 47 C.F.R. 54.719-54.725.

4. The FCC's regulations prescribe a process for computing each carrier's quarterly contribution to the

Fund. See 47 C.F.R. 54.709. In general, that process involves projecting the Fund's expenses, calculating the carriers' revenues, and computing contributions based on the ratio of the projected expenses to the revenues. See 47 C.F.R. 54.709(a).

At least 60 days before the start of the quarter, the Administrator must submit to the FCC its projections of the expenses (benefits plus administrative overhead) that the universal service programs will incur. See 47 C.F.R. 54.709(a)(3). The Administrator must also inform the FCC of "the basis for those projections," enabling the Commission and its staff to review (and, if necessary, revise) the projections. *Ibid.* The projections "must be approved by the Commission before they are used" to calculate contributions. *Ibid.*

The FCC's rules separately require carriers to file quarterly forms projecting their revenues from interstate and international telecommunications services for the upcoming quarter. See 47 C.F.R. 54.711(a). The Administrator must then calculate the "total contribution base"—*i.e.*, carriers' total projected revenues—by aggregating the information provided by individual carriers. 47 C.F.R. 709(a)(3). It must report the total contribution base to the Commission at least 30 days before the start of the quarter. See *ibid.*

The FCC then computes a "contribution factor"—*i.e.*, a number based on the ratio of the projected expenses to the total revenues. See 47 C.F.R. 54.709(a)(2). It announces the projections and contribution factor in a public notice and on its website. See 47 C.F.R. 54.709(a)(3). The Commission reserves the right, at any time during the ensuing 14 days, to revise the projections (and thus the contribution factor) and to set them "at amounts that the Commission determines will serve the public interest." *Ibid.* If the Commission takes no action within 14 days, the projections and contribution factor are "deemed approved." *Ibid.*

Once the FCC approves the contribution factor, the Administrator calculates each carrier's contribution by applying the factor to the carrier's interstate and international telecommunications revenues. See 47 C.F.R. 54.709(a)(3). For example, if the contribution factor is 25%, each carrier would owe 25% of its interstate and international telecommunications revenues. Carriers may pass the cost of contributions on to customers. See 47 C.F.R. 54.712(a).

B. Proceedings Below

1. In November 2021, the Administrator submitted its projections of program expenses for the first quarter of 2022. See J.A. 1-82. In December 2021, it submitted its calculation of the total contribution base for that quarter. See Pet. App. 150a-159a. Based on those projections, the FCC proposed a contribution factor of 25.2%. See *id.* at 141a-149a.

Respondents—a nonprofit organization, a carrier, and a group of consumers—filed comments requesting that the FCC set the contribution factor at 0% instead. See Gov't C.A. Br. 17. Respondents did not object to the Administrator's projections or to the Commission's computation of the contribution factor based on those projections. They instead argued that the Universal Service Fund was itself unlawful because Congress had unconstitutionally delegated legislative power to the FCC and the Commission had unconstitutionally redelegated power to the Administrator. See Pet. App. 11a.

The FCC took no further action within 14 days after publishing the proposed contribution factor, and the factor therefore was deemed approved. See Pet. App. 11a.

2. Respondents filed a petition for review in the Fifth Circuit. See Pet. App. 11a. Multiple groups of Universal Service Fund beneficiaries intervened in support of the government. See C.A. Doc. 516199644 (Feb. 11, 2022); C.A. Doc. 516199667 (Feb. 11, 2022); C.A. Doc. 516180110 (Jan. 26, 2022). A unanimous panel denied the petition for review. See Pet. App. 125a-140a.

The panel held that Section 254 does not unconstitutionally delegate legislative power to the FCC. See Pet. App. 132a-137a. It determined that Section 254 sets forth "numerous intelligible principles" that constrain the Commission's exercise of its authority. *Id.* at 137a. The panel also rejected respondents' claim that the FCC had unconstitutionally delegated governmental power to the Administrator. See *id.* at 137a-140a. The panel emphasized that the Administrator lacks independent regulatory authority and functions "subordinate[ly]" to the Commission. *Id.* at 140a.

3. The court of appeals granted respondents' petition for rehearing en banc. See Pet. App. 160a-161a. By a vote of 9-7, the en banc court subsequently granted respondents' petition for review. See *id.* at 1a-124a.

The en banc court noted that respondents' challenge to the specific FCC action at issue—the contribution factor for the first quarter of 2022—"might be moot" because sovereign immunity might preclude recovery of money already paid into the Universal Service Fund. Pet. App. 13a. The court held, however, that the case "is nonetheless justiciable because it is capable of repetition yet evading review." *Ibid.*

On the merits, the en banc court stated that "Congress through [Section] 254 may have delegated legislative power to FCC because it purported to confer upon FCC the power to tax without supplying an intelligible principle to guide FCC's discretion." Pet. App. 19a. The court characterized Section 254's limits on the Commission's authority as "minimal," "contentless," "a hollow shell," and "so amorphous that no reviewing court could ever possibly invalidate any FCC action." *Id.* at 27a, 29a, 41a. The court found those nondelegation concerns to be "especially salient" because Section 254 "implicates the taxing power"—a "quintessentially legislative" power. *Id.* at 19a, 41a n.13.

The en banc court then stated that the FCC "may have impermissibly delegated the taxing power to private entities." Pet. App. 19a. The court concluded that the Administrator's projections could "take legal effect without formal FCC approval." *Id.* at 49a. The court also expressed the view that, as a practical matter, the Commission " 'rubber stamp[s]' whatever contribution amount [the Administrator] proposes." *Id.* at 50a (citation omitted). Finally, the court stated that Section 254 does not authorize the Commission to delegate power to the Administrator in the first place. See *id.* at 55a.

Although the en banc court was "highly skeptical" of the constitutionality of Congress's grant of power to the FCC, and of the FCC's vesting of administrative responsibilities in the Administrator, the court did not decide whether either conferral of authority standing alone would violate the Constitution. See Pet. App. 64a. The court instead held that "*the combination* of Congress's sweeping delegation to FCC and FCC's unauthorized subdelegation to [the Administrator] violates the Legislative Vesting Clause." *Ibid.* In the court's view, the "double-layered delegation" at issue in this case constituted "a historical anomaly" and undermined "democratic accountability." *Id.* at 73a-74a.

Judge Elrod, joined by two other judges, issued a concurring opinion in which she concluded that "Congress's delegation of legislative power to the FCC and the FCC's delegation of the taxing power to a private entity each individually contravene[s] the separation of powers." Pet. App. 82a. Judge Ho issued a concurring opinion in which he emphasized that "all legislative powers" are "exercised by the people we elect." *Id.* at 85a.

Judge Stewart, joined by six judges, dissented. See Pet. App. 88a-114a. He reasoned that Section 254 "evinces a clear intelligible principle delimiting agency discretion"; that the en banc court of appeals' analysis reflected an "exaggerated conception of [the Administrator's] role and discretion"; and that "delegations of the taxing power are not subject to stricter scrutiny." *Id.* at 97a, 103a-104a. Judge Higginson, joined by four judges, also dissented. See *id.* at 115a-124a. He criticized the en banc court's "'combination' theory" as inconsistent with this Court's precedents. *Id.* at 116a.

4. This Court granted petitions for writs of certiorari filed by the government and by the intervenors. See 2024 WL 4864036 (Nov. 22, 2024). The Court directed the parties to brief the following question, in addition to those presented by the petitions: "Whether this case is moot in light of the challengers' failure to seek preliminary relief before the Fifth Circuit." *Ibid.*

SUMMARY OF ARGUMENT

I. This case is not moot. Because the FCC sets a new contribution factor each quarter, and because a quarter is too short a period for a challenge to the factor to be fully litigated, this case fits within the "capable of repetition, yet evading review" exception to mootness.

Respondents' failure to seek preliminary relief does not affect that conclusion. The capable-of-repetition exception focuses on the nature of the suit, not on the conduct of the parties, and this Court has applied the exception even when litigants have failed to move for preliminary relief. Treating a motion for preliminary relief as a prerequisite for applying the exception would needlessly encourage parties to litigate, and courts to address, complex legal claims in haste.

II. The court of appeals erred in holding that the universal service contribution system violates the nondelegation doctrine.

A. Section 254 does not effect an impermissible delegation of legislative power to the FCC. Although Congress may not delegate legislative power to executive agencies, Congress may authorize an agency to exercise discretion in implementing a statute. A statute effects a lawful grant of discretion, rather than an unlawful delegation of legislative power, if it supplies an intelligible principle to guide the agency—that is, if it defines the general policy that the agency must pursue and the boundaries of the agency's power.

That test is not demanding. Applying it, this Court has upheld statutes that authorize agencies to regulate in the "public interest," to fix "just and reasonable" prices, and to identify and recover "excessive profits." Those decisions are consistent with the Constitution's original meaning, as evidenced by early Congresses' enactment of statutes granting broad discretion to the Executive Branch.

Section 254 satisfies that constitutional test. By directing the agency to base universal service policies on six enumerated "principles," 47 U.S.C. 254(b), the statute defines the general policy that the FCC must pursue. The Commission must ensure, for example, that services are available at "affordable" rates; that "rural" consumers have access to services that are "reasonably comparable" to services available in "urban areas"; and that "schools" and "libraries" have access to services. 47 U.S.C. 254(b)(1), (3), and (6).

Section 254 also defines the boundaries of the FCC's authority. The statute specifies who must pay universal service contributions, the terms on which they must do so, the purposes for which the funds must be used, the types of services that the Commission must subsidize, and the types of entities that may receive funding. The statute provides further guidance concerning the scope of the individual programs—for instance, by specifying how the subsidy provided to rural health care providers should be calculated. Section 254's detailed guidance far exceeds what this Court's precedents require.

B. The FCC did not subdelegate legislative power to the private Administrator. Just as Article I prohibits Congress from delegating legislative power to executive agencies, it also prohibits Congress from delegating such power to private persons. When exercising executive power, however, an agency may properly solicit and rely on private advice. This Court and courts of appeals have upheld statutes under which private entities propose, and government agencies decide whether to adopt, regulations. This Court has similarly explained that an Article III court does not delegate judicial power by relying on a non-binding recommendation from a non-Article III adjunct, such as a magistrate judge or special master.

Within the limits set by Congress, the FCC determines the amount of money that carriers must contribute to the Universal Service Fund. The Administrator simply gives the FCC advice—namely, projections of the universal service programs' expenses and the carriers' revenues for the upcoming quarter, calculated according to FCC rules. Those projections do not bind the Commission. The Commission may review and adjust the projections before using them to calculate the contribution factor, and it reserves the right to revise the projections during the 14-day period after it announces the factor. Because the Commission rather than the Administrator makes the ultimate decision, the Administrator's advisory role does not violate the nondelegation doctrine.

C. The combination of Congress's grant of discretion to the FCC and the FCC's conferral of responsibility upon the Administrator does not violate the nondelegation doctrine. Because Section 254 supplies an intelligible principle, it effects a grant of executive power. That executive power does not become legislative power simply because the Commission, in carrying out its universal service responsibilities, considers advice provided by the Administrator.

ARGUMENT

Universal service has been an essential component of federal telecommunications policy since Congress established the FCC in 1934. For more than a quarter century, Congress and the Commission have sought to promote that policy through the Universal Service Fund. The subsidies provided by the Fund have made telephone service affordable for rural and low-income consumers, have supported the provision of essential rural health care services, and have facilitated internet access in schools and libraries.

In the decision below, the en banc Fifth Circuit held that the universal service contribution system violates the nondelegation doctrine. That decision conflicts with decades of precedent and centuries of practice; reflects a misreading of the Communications Act and the FCC's rules; and threatens to nullify the universal service programs, to the detriment of the millions of Americans whom those programs serve. This Court should reverse the court of appeals' judgment.

I. THIS CASE IS NOT MOOT

A. In general, a case is moot if "it is impossible for a court to grant any effectual relief." *MOAC Mall Holdings LLC* v. *Transform Holdco LLC*, 598 U.S. 288, 295 (2023) (citation omitted). In this case, the court of appeals found that at least one of the entities that had petitioned for review "had Article III standing when the petition was filed," since as of the filing date "vacatur of the FCC's approval of the proposed contribution factor would have prevented collection of" the entity's quarterly contribution. Pet. App. 12a. At the present time, however, a court can no longer redress the specific FCC action—the contribution factor for the first quarter of 2022—that is the immediate subject of respondents' challenge. Because that quarter has ended, prospective relief is no longer feasible. And because the applicable judicial-review statute does not waive the government's immunity from damages claims, see 28 U.S.C. 2342(1), a court may not order the government to repay universal service contributions that were collected during that quarter.

This suit nonetheless remains justiciable because the dispute is "capable of repetition, yet evading review." See *United States* v. *Sanchez-Gomez*, 584 U.S. 381, 391 (2018). That exception to the mootness doctrine applies if "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Ibid.* (citation omitted). This case satisfies the first requirement because the quarterly contribution factor is effective for only one quarter. See *Kingdomware Technologies, Inc.* v. *United States*, 579 U.S. 162, 170 (2016) (explaining that "a period of two years" is often "too short to complete judicial review"). And the case satisfies the second requirement because the FCC calculates a new contribution factor every quarter. See *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911) (applying the capable-of-repetition exception to a challenge to an agency's repeated "short term orders").

B. Some courts of appeals have held that a party may invoke the capable-of-repetition exception only if it has moved for preliminary relief. See, *e.g.*, *New York City Employees' Retirement System* v. *Dole Food Co.*, 969 F.2d 1430, 1435 (2d Cir. 1992); *Iowa Protection & Advocacy Services* v. *Tanager, Inc.*, 427 F.3d 541, 544 (8th Cir. 2005); *Newdow* v. *Roberts*, 603 F.3d 1002, 1009 (D.C. Cir. 2010), cert. denied, 563 U.S. 1001 (2011). Those decisions are incorrect.

This Court has never held or suggested that a party must seek preliminary relief in order to invoke the capable-of-repetition exception. To the contrary, the Court has applied the exception even in cases where the complaining party does not appear to have sought such relief. See, *e.g.*, *Kingdomware*, 579 U.S. at 169-170; *SEC* v. *Sloan*, 436 U.S. 103, 108-109 (1978); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973), overruled on other grounds by *Dobbs* v. *Jackson Women's Health Organization*, 597 U.S. 215 (2022). And in identifying the criteria that govern this exception, the Court has consistently articulated the two-part test described above without alluding to the presence or absence of a request for preliminary relief.

Some courts of appeals have concluded that a dispute does not "evade review" if the complaining party could have sought preliminary relief that would delay a challenged action's occurrence, thereby preventing the complainant's challenge from becoming moot. See, *e.g.*, *Iowa Protection & Advocacy Services*, 427 F.3d at 544 ("Where prompt application for a stay pending appeal can preserve an issue for appeal, the issue is not one that will evade review.") (citation omitted). Those courts have held that, in order to invoke the capable-of-repetition exception, a party must "make a full attempt to prevent his case from becoming moot, an obligation that includes filing for preliminary injunctions." *Newdow*, 603 F.3d at 1009. Those courts appear to view a complainant's failure to seek preliminary relief as a lack of due diligence that should disentitle the complainant to the potential benefits of the exception. That reasoning is unsound.

First, the case-or-controversy requirement and the capable-of-repetition exception concern the nature of the dispute between the parties rather than their conduct of the litigation. See, *e.g.*, *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 424 (2021) (explaining that the case-or-controversy requirement limits federal courts to matters "of a Judiciary Nature") (citation omitted); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 547 (1976) (explaining that the capable-of-repetition exception applies to disputes that are "by nature short-lived"). The capable-of-repetition exception reflects this Court's recognition that a justiciable controversy between adverse parties sometimes may continue to exist even when the specific action that originally prompted the suit has been completed and cannot be undone. See, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190-192 (2000); *id.* at 213-214 (Scalia, J., dissenting). A party's decision whether to seek interim relief at an earlier stage of a case has no logical bearing on whether a justiciable Article III controversy continues to exist after a particular challenged action has run its course.

Second, a court's decision whether to grant a request for preliminary relief is neither a decision on the merits nor a step towards a decision on the merits. Although the availability of preliminary relief turns in part on the perceived likelihood that the moving party will ultimately prevail, a judicial stay or preliminary injunction simply determines the parties' respective rights and obligations during the pendency of the litigation. See, *e.g.*, *University of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."). By declining to seek preliminary relief, a complainant accepts the prospect that the challenged action of the defendant may remain in effect pending the court's resolution of the merits. A complainant's decision to accept that consequence does not, however, manifest a lack of diligence in prosecuting the suit.

C. As this case illustrates, requiring parties to seek preliminary relief in order to invoke the capable-of-repetition exception would make little practical sense. If respondents had sought preliminary relief, the parties and the court of appeals might have been forced to brief and address complex constitutional questions in haste—within just a single quarter. If the court had granted a preliminary injunction preventing the collection of universal service contributions, its ruling would have seriously disrupted the administration of a major national program. Dismissing this case as moot because of respondents' decision not to seek preliminary relief would invite those disruptive consequences in the next suit challenging universal service contributions, and in analogous suits challenging other types of recurring agency action. This Court should clarify that a request for preliminary relief is not necessary to invoke the capable-of-repetition exception and should go on to resolve the merits of this case.

II. NEITHER CONGRESS NOR THE FCC HAS EFFECTED AN UNCONSTITUTIONAL DELEGATION OF POWER

The court of appeals erred in concluding that "the combination" of Congress's grant of power to the FCC and the FCC's reliance on the advice provided by the Administrator violates the Constitution. Pet. App. 19a. Section 254 does not delegate legislative power to the Commission. The Commission did not subdelegate power to the Administrator. And the combination of those two conferrals of responsibility does not violate the Constitution.

A. Section 254 Does Not Delegate Legislative Power To The Commission

The Fifth Circuit stated that Congress "may have delegated legislative power" in enacting Section 254. Pet. App. 19a. But as three other courts of appeals have held, Section 254 does not effect any such delegation. See *Consumers' Research* v. *FCC*, 67 F.4th 773, 787-795 (6th Cir. 2023), cert. denied, 144 S. Ct. 2628 (2024); *Consumers' Research* v. *FCC*, 88 F.4th 917, 923-924 (11th Cir. 2023), cert. denied, 144 S. Ct. 2629 (2024); *Rural*

Cellular Ass'n v. *FCC*, 685 F.3d 1083, 1091 (D.C. Cir. 2012).

1. Congress may confer discretionary power upon an agency if the governing statute provides an intelligible principle to guide the agency's exercise of that power

a. Article I provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. Art. I, § 1. Congress may not delegate those powers to the other branches of the government. See *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 529 (1935); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421 (1935). Congress may, however, seek "assistance from another branch." *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928). In particular, it may authorize executive agencies to exercise "discretion" in implementing and enforcing the laws that Congress enacts. *Ibid.*; see, *e.g.*, *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369, 394 (2024) ("In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion."); *Wayman* v. *Southard*, 10 Wheat. 1, 46 (1825) (Marshall, C.J.) ("[T]he maker of the law may commit something to the discretion of the other departments.").

If a statute sets forth an "intelligible principle" to guide an executive agency's actions, it effects a lawful grant of discretion rather than an unlawful delegation of legislative power. *J.W. Hampton*, 276 U.S. at 409. A statute satisfies that requirement if it defines both "the general policy" that the agency must pursue and "the boundaries of th[e] delegated authority." *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946). That test is "not demanding." *Gundy* v. *United States*, 588 U.S. 128, 146 (2019) (plurality opinion).

Only twice in the country's history has this Court held that a statute effected an unconstitutional delegation of legislative power to the Executive Branch. See *Schechter Poultry*, 295 U.S. at 529-542; *Panama Refining*, 293 U.S. at 414-420. Both cases involved the National Industrial Recovery Act, ch. 90, 48 Stat. 195, which Congress had enacted during the depths of the Great Depression. The provision at issue in one of those cases authorized the President to "regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 474 (2001); see *Schechter Poultry*, 295 U.S. at 529-542. The provision in the other case supplied "literally no guidance for the exercise of discretion." *American Trucking*, 531 U.S. at 474; see *Panama Refining*, 293 U.S. at 414-420.

By contrast, this Court has repeatedly upheld broad statutory grants of discretion to executive agencies. For example, it has upheld laws that authorize agencies to:

- Regulate in the "public interest." See *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225-226 (1943) (*NBC*) (broadcast licensing); *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 576-577 (1939) (milk prices); *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 24-25 (1932) (railroad acquisitions).
- Prohibit "unreasonable" obstructions to the free navigation of navigable waters. See *Union Bridge Co.* v. *United States*, 204 U.S. 364, 387 (1907).

- Raise the minimum wage "as rapidly as economically feasible without substantially curtailing employment." See *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U.S. 126, 142-146 (1941).
- Set "just and reasonable" rates for natural gas. See *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944).
- Set "fair and equitable" commodity prices. See *Yakus* v. *United States*, 321 U.S. 414, 420-427 (1944).
- Prohibit corporate structures that "unfairly or inequitably distribute voting power among security holders" in holding companies. See *American Power & Light*, 329 U.S. at 104-106.
- Determine and recover "excessive profits" from military contractors. See *Lichter* v. *United States*, 334 U.S. 742, 774-787 (1948).
- Set air-quality standards that are "requisite to protect the public health." See *American Trucking*, 531 U.S. at 472-476.

b. This Court's nondelegation jurisprudence accords with the Constitution's original meaning. Since "the beginning of the Government," Congress has enacted "general provisions" that confer substantial policymaking discretion upon the Executive Branch. *United States* v. *Grimaud*, 220 U.S. 506, 517 (1911); see Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277, 332-366 (2021).

The First Congress repeatedly granted broad discretionary powers to the President. It authorized the President to adopt "rules and regulations" to govern "trade and intercourse with the Indian tribes," Act of

July 22, 1790, ch. 33, § 1, 1 Stat. 137; to restructure the country's foreign debt "for the interest of the [United] States," Act of Aug. 4, 1790, ch. 34, § 2, 1 Stat. 139; and to fix "reasonable and proper" salaries for revenue officers, Act of Mar. 3, 1791, ch. 15, § 58, 1 Stat. 213.

The First Congress also granted broad discretionary powers to other executive officers. It empowered the Secretary of the Treasury to establish "reasonable" terms and conditions for returning property seized by revenue officers, Act of Mar. 3, 1791, ch. 15, § 43, 1 Stat. 209; empowered the Patent Board to decide which inventions were "sufficiently useful and important" to warrant patents, Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109-110; and empowered the Sinking Fund Commission to pay off the national debt under "such regulations as shall appear to them best calculated to fulfill the intent of this act," Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186.

Subsequent Congresses enacted similar provisions. The Second Congress authorized the Postmaster General to provide for the carrying of the mail "as he may judge most expedient" and to prescribe such postal regulations "as may be found necessary." Act of Feb. 20, 1792, ch. 7, § 3, 1 Stat. 234. The Third Congress authorized the President to lay embargoes "whenever, in his opinion, the public safety shall so require"; to impose such embargo regulations "as the circumstances of the case may require"; and to extend or revoke an embargo "whenever he shall think proper." Act of June 4, 1794, ch. 41, § 1, 1 Stat. 372. The Fourth Congress empowered the Secretary of the Treasury to refund a "just and reasonable" portion of a license fee in cases of "peculiar hardship." Act of Mar. 3, 1797, ch. 18, § 2, 1 Stat. 509. And the Fifth Congress provided that, "in case of the prevalence of a contagious or epidemical disease at the seat of government," the President could relocate the government "to such other place or places as, in his discretion, shall be deemed most safe and convenient for conducting the public business." Act of Feb. 25, 1799, ch. 12, § 6, 3 Stat. 620-621.

Particularly salient here, early Congresses vested Executive Branch officials with substantial discretion even when implementing tax legislation. See Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power*, 130 Yale L.J. 1288, 1318-1345 (2021). In 1798, Congress imposed a direct tax on real estate and established a federal board of tax commissioners in each State to implement the tax. See Act of July 9, 1798, ch. 70, §§ 3, 4, 1 Stat. 584. Congress authorized each board to divide the State into districts and to increase or decrease all the property valuations in any district, *en masse*, by any percentage that "shall appear to be just and equitable." § 22, 1 Stat. 589. The boards were thereby empowered to determine the geographic distribution of the burden of the real-estate tax across each State's regions. See Parrillo 1391-1392. The federal board in Maryland, for example, increased all valuations in Baltimore by 100%, shifting much of the tax burden to the State's "mercantile elite." *Id.* at 1408. The federal board in Pennsylvania, meanwhile, reduced all valuations in Allegheny County by 50%, seemingly because the county had been "the cradle of the Whiskey Rebellion" a few years earlier. *Id.* at 1342.

The practices of the First Congress and of other early Congresses provide "contemporaneous and weighty evidence of the Constitution's meaning." *CFPB* v. *Community Financial Services Ass'n*, 601 U.S. 416, 432 (2024) (citation omitted). Here, early practice confirms that Congress possesses substantial leeway in conferring discretionary powers upon the Executive Branch.

c. This Court's nondelegation precedents also reflect the practical reality that constitutional limits on delegation are not "readily enforceable by the courts." *Mistretta* v. *United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting). "A certain degree of discretion * * * inheres in most executive * * * action." *American Trucking*, 531 U.S. at 475 (brackets and citation omitted). And legislation must often address "complex conditions involving a host of details with which the national legislature cannot deal directly." *Panama Refining*, 293 U.S. at 421.

"Once it is conceded, as it must be," that "some judgments, even some judgments involving policy considerations, must be left to the officers executing the law," "the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree." *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting). The "precise boundary" between a lawful grant of discretion and an unlawful delegation of power "is a subject of delicate and difficult inquiry"; the "line has not been exactly drawn." *Wayman*, 10 Wheat. at 43, 46. This Court accordingly 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." *American Trucking*, 531 U.S. at 474-475 (citation omitted).

2. Section 254 provides intelligible principles to guide the FCC in administering the Universal Service Fund

Section 254 defines both "the general policy" that the FCC must pursue and "the boundaries of this delegated authority." *American Power & Light*, 329 U.S. at 105.

a. A statutory provision captioned "Universal service principles" states that "the Commission shall base policies for the preservation and advancement of universal service" on six specific "principles." 47 U.S.C. 254(b). Those principles are:

- "Quality services should be available at just, reasonable, and affordable rates." 47 U.S.C. 254(b)(1).
- "Access to advanced telecommunications and information services should be provided in all regions of the Nation." 47 U.S.C. 254(b)(2).
- "Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to the rates charged for similar services in urban areas." 47 U.S.C. 254(b)(3).
- "All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service." 47 U.S.C. 254(b)(4).
- "There should be specific, predictable[,] and sufficient Federal and State mechanisms to preserve and advance universal service." 47 U.S.C. 254(b)(5).
- "Elementary and secondary schools and classrooms, health care providers, and libraries should

> have access to advanced telecommunications services as described in subsection (h)." 47 U.S.C. 254(b)(6).

Those principles provide substantial guidance about the policy that the FCC must pursue. The Commission must ensure that telecommunications services are "of decent quality and reasonably priced," "available broadly across all regions," "equally available in rural and urban areas," and "established in important public spaces (schools, healthcare providers, and libraries)." Pet. App. 133a (panel opinion). The Commission must achieve those goals through "state and federal mechanisms" and must obtain funding "in an equitable and nondiscriminatory manner." *Ibid.*

b. Section 254 also delineates the boundaries of the FCC's authority. In the universal service principles listed above and in other provisions, the statute specifies "from whom funds are exacted," "who receives the benefit of the funds," "what minimum standards of service must be provided," and much else besides. Pet. App. 93a (Stewart, J., dissenting).

The Act specifies the entities that must pay universal service contributions and the terms on which they must do so. "Every telecommunications carrier that provides interstate telecommunications services shall contribute" toward universal service. 47 U.S.C. 254(d). Carriers must contribute "on an equitable and nondiscriminatory basis." *Ibid.* The FCC may exempt a particular carrier only if its activities are so limited that its contribution "would be de minimis." *Ibid.*

The Act also identifies the purposes for which the FCC must use contributions. The statute instructs the Commission to assist "rural, insular, and high cost areas"; "low-income consumers"; "schools" and "libraries"; and "health care providers for rural areas." 47 U.S.C. 254(b)(3), (6), and (h)(1); see 47 U.S.C. 254(b)(6) (cross-referencing Section 254(h)). The agency has established a universal service program for each of those groups. See p. 4, *supra*.

The Act likewise specifies the types of services that the FCC may fund. See 47 U.S.C. 254(c). Generally, the Commission may fund only "telecommunications services." 47 U.S.C. 254(c)(1). In deciding which services to fund, the Commission must consider the extent to which the services (1) "are essential to education, public health, or public safety"; (2) "have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers"; (3) "are being deployed in public telecommunications networks by telecommunications carriers"; and (4) "are consistent with the public interest, convenience, and necessity." *Ibid.* Applying those factors, the Commission has decided to fund telephone and high-speed internet services. See 47 C.F.R. 54.101.

Finally, the Act specifies which carriers may receive subsidies and how the subsidies may be used. See 47 U.S.C. 214(e), 254(e). To be eligible to receive funds, a carrier must offer its services and advertise their availability "throughout the service area." 47 U.S.C. 214(e)(1); see 47 U.S.C. 214(e)(5) (defining "service area"). A carrier may use funds "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 U.S.C. 254(e).

c. In addition to delineating the boundaries of the universal service programs generally, the Act specifies the scope of the individual programs. One of the Act's universal service principles states that rural and low-income consumers should have "access" to services that are "reasonably comparable to those services provided in urban areas," at rates that are "reasonably comparable to rates charged for similar services in urban areas." 47 U.S.C. 254(b)(3). The Act accordingly does not grant the FCC unfettered power to subsidize rural and low-income consumers as much (or as little) as it wishes, but instead instructs the agency to use services and rates in urban areas as a benchmark.

The Act provides even more detailed instructions about funding for rural health care providers. It states that, if a "public or nonprofit" rural health care provider seeks telecommunications services that are "necessary for the provision of health care services," a carrier must provide those telecommunications services "at rates that are reasonably comparable to rates charged for similar services in urban areas in that State." 47 U.S.C. 254(h)(1)(A). The carrier may then recoup, from the Universal Service Fund, "the difference" between the rural rate that it would normally charge and the urban rate that the Act requires it to charge. *Ibid.*

The Act likewise provides detailed instructions about funding for schools and libraries. If a school or library requests telecommunications services "for educational purposes," a carrier must provide those services "at rates less than the amounts charged for similar services to other parties." 47 U.S.C. 254(h)(1)(B). "The discount shall be an amount that the Commission * * * and the States * * * determine is appropriate and necessary to ensure affordable access to and use of such services." *Ibid.* The carrier may then recoup the amount of the discount from the Universal Service Fund. See *ibid.*

d. In the decision below, the court of appeals focused on the FCC's discretion to determine "how much" money the universal service programs collect and pay out. Pet. App. 26a. But the Act meaningfully constrains that aspect of the Commission's discretion as well.

As discussed above, the Act provides significant guidance about the nature and scope of the universal service programs. The FCC must follow that guidance in setting the amount of the subsidies. For example, in setting funding levels for rural areas, the Commission must seek to ensure that rural services and rates are "reasonably comparable" to urban ones. 47 U.S.C. 254(b)(3). The Commission could not provide extra funding to make services in rural areas better or cheaper than those in urban areas. So too, in deciding how much funding to provide for schools and libraries, the agency must determine the discount that would be "appropriate and necessary to ensure affordable access to and use of such services." 47 U.S.C. 254(h)(1)(B). The agency could not provide a higher subsidy simply because it prefers the services to be free, rather than merely "affordable." *Ibid.*

The Act also provides that universal service funding "should be" "sufficient to achieve the purposes of this section." 47 U.S.C. 254(e); see 47 U.S.C. 254(b)(5) ("sufficient Federal and State mechanisms to preserve and advance universal service"); 47 U.S.C. 254(d) ("sufficient mechanisms established by the Commission to preserve and advance universal service"). That language limits the "size and budget" of the universal service programs, "allowing growth no larger than what is 'sufficient to achieve the purposes' of universal service." *Consumers' Research*, 67 F.4th at 794 (quoting 47 U.S.C. 254(e)); see *Alenco Communications, Inc.* v. *FCC*, 201 F.3d 608, 620 (5th Cir. 2000) ("[E]xcessive funding may itself violate the sufficiency requirements of the Act."); cf. *American Trucking*, 531 U.S. at 475-

476 (construing the statutory term "requisite" to mean "not lower or higher than is necessary").

Finally, one of the universal service principles states that services should be available at "affordable rates." 47 U.S.C. 254(b)(1). That principle, too, limits the size of the universal service programs. "Because universal service is funded by a general pool subsidized by all telecommunications providers—and thus indirectly by the customers—excess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market." *Alenco*, 201 F.3d at 620. The affordability principle instructs the FCC to ensure that the universal service contribution does not become "so large as to risk making basic telephone services unaffordable." *Rural Cellular Ass'n* v. *FCC*, 588 F.3d 1095, 1108 (D.C. Cir. 2009).

e. The Act easily satisfies the intelligible-principle test. The Act provides far more detailed guidance than many other statutes that this Court has upheld or that early Congresses enacted. See pp. 20-23, *supra*. If Congress may authorize an executive agency to regulate in the "public interest," to set "just and reasonable" rates, or to decide which inventions are "sufficiently useful and important" to warrant patents, it may authorize the FCC to administer the Universal Service Fund within the framework discussed above.

The Act also bears no resemblance to the National Industrial Recovery Act provisions that the Court has previously held invalid under the nondelegation doctrine. Whereas the provision in *Schechter Poultry* "conferred authority to regulate the entire economy," *American Trucking*, 531 U.S. at 474, Section 254 confers authority to collect payments from a specific set of entities to fund a defined set of services. And while the provision in *Panama Refining* "provided literally no guidance for the exercise of discretion," *ibid.*, Section 254 provides "comprehensive and substantial guidance and limitations on how to implement Congress's universal-service policy," *Consumers' Research*, 67 F.4th at 791.

3. The court of appeals understated the extent to which the Act guides and constrains the FCC

The court of appeals asserted that Section 254 provides the FCC with "'no guidance whatsoever,'" and that the Commission may use universal service contributions "to fund whatever projects it might like." Pet. App. 27a-28a, 30a (citation and emphasis omitted). The court's stated bases for that conclusion lack merit.

a. The court of appeals concluded that, because the universal service principles specify what the FCC "should" do, 47 U.S.C. 254(b), they are purely "aspirational," Pet. App. 28a. That is incorrect. The Act states that the FCC "shall base policies * * * on the [listed] principles." 47 U.S.C. 254(b). The word "shall" imposes a "mandatory duty": The Commission "must base its policies on the principles." *Qwest Corp.* v. *FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001).

Congress's use of the word "should" in articulating the individual principles allows the Commission to "balance the principles against one another when they conflict." *Qwest*, 258 F.3d at 1200. But the Commission "may not depart from [the principles] altogether to achieve some other goal." *Ibid.* Consistent with the nondelegation doctrine, Congress often directs agencies to make tradeoffs or to balance competing interests. See, *e.g.*, *Michigan* v. *EPA*, 576 U.S. 743, 752-753 (2015).

b. The court of appeals also emphasized that the FCC may supplement the enumerated universal service principles. See Pet. App. 28a-29a; 47 U.S.C. 254(b)(7).* But that authority is itself constrained by an intelligible principle: The FCC may add a new principle only if the Commission and the Joint Board determine that doing so is "necessary and appropriate for the protection of the public interest, convenience, and necessity" and is "consistent with" the Act. *Ibid.* This Court has held that the "public interest, convenience, and necessity" standard, as used in the Communications Act, complies with the nondelegation doctrine. See *NBC*, 319 U.S. at 225-226. The Court also has rejected nondelegation challenges to other statutes that adopt "public interest" standards. See p. 20, *supra*.

The court of appeals was also wrong to suggest that the FCC in adding new principles may "disregard[] [the] enumerated principles." Pet. App. 28a. Any new principles added by the Commission must be "consistent with" the Act. 47 U.S.C. 254(b)(7). The Commission thus may not adopt a new principle that conflicts with the six enumerated principles.

In all events, the Communications Act's severability clause states that, "[i]f any provision of this [Act] * * * is held invalid, the remainder of the [Act] * * * shall not be affected thereby." 47 U.S.C. 608; see *Barr* v.

---

* Exercising that authority, the FCC has added two principles. In 1997, it adopted the principle that universal service funding should be "competitively neutral," meaning that funding should "neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." *In re Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8801 (1997). In 2011, the FCC adopted the principle that universal service funding "should be directed where possible to networks that provide advanced services, as well as voice services." *In re Connect America Fund*, 26 FCC Rcd 17,663, 17,679 (2011) (citation omitted).

American Ass'n of Political Consultants, Inc., 591 U.S. 610, 627 (2020) (plurality opinion). If this Court concludes that Congress violated the nondelegation doctrine by authorizing the FCC to adopt new universal service principles, the Court should sever Section 254(b)(7)'s grant of authority rather than invalidate the whole universal service scheme.

c. Finally, the court of appeals described Section 254's provisions as "contentless," "a hollow shell," and "so amorphous that no reviewing court could ever possibly invalidate any FCC action taken in its name." Pet. App. 29a, 41a. Those descriptions are inapt.

Many of Section 254's provisions impose clear limits on the FCC's authority. For example, the Commission must collect contributions from "telecommunications carrier[s]." 47 U.S.C. 254(d). It must assist "rural" areas, "low-income consumers," "schools" and "libraries," and rural "health care providers." 47 U.S.C. 254(b)(3) and (6). And it must fund "telecommunications services." 47 U.SC. 254(c)(1).

Other provisions of the Act—such as the directive that universal service funding be "sufficient" to achieve the statute's purposes, 47 U.S.C. 254(e)—establish qualitative standards rather than bright-line rules. But the nondelegation doctrine does not require Congress to adopt a "determinate criterion," *American Trucking*, 531 U.S. at 475 (citation omitted), or a "specific formula," *Lichter*, 334 U.S. at 785. Congress may adopt qualitative criteria such as "just and reasonable," "fair and equitable," or "public interest." See pp. 20-21, *supra*.

Section 254's grant of discretion is not so broad that "no reviewing court could ever possibly invalidate any FCC action" taken under that provision. Pet. App. 41a.

In fact, courts, including the Fifth Circuit, *have* invalidated FCC action under the statute. The Fifth Circuit held that the Commission had exceeded its statutory powers by limiting the States' authority to set eligibility criteria for carriers seeking universal service funding, see *Texas Office of Public Utility Counsel* v. *FCC*, 183 F.3d 393, 417-418 (1999), and by requiring certain local carriers to recover universal service contributions from long-distance providers rather than from consumers, see *id.* at 424-425. The court also determined that the Commission had not adequately explained its decision to define a carrier's contribution base to include international revenues. See *id.* at 433-435. And the Tenth Circuit held in another case that the Commission had not adequately explained why a subsidy for rural areas would provide "sufficient" funding to ensure that rural rates were "reasonably comparable" to urban rates. See *Qwest*, 258 F.3d at 1202-1203.

4. The court of appeals erred in subjecting Section 254 to a heightened nondelegation standard

a. In discussing the applicable nondelegation standard, the court of appeals found it "especially salient" that Section 254 "implicates the taxing power." Pet. App. 41a n.13. While recognizing that this Court "has declined to apply heightened scrutiny to tax-related delegations," the court asserted that "the Constitution's original meaning would seem to compel a more restrictive test for delegations of the taxing power." *Ibid.* That reasoning is flawed on multiple levels.

To begin, Congress did not need to rely on its taxing power to enact Section 254. The Constitution empowers Congress to regulate "Commerce" "among the several States." U.S. Const. Art. I, § 8, Cl. 3. The commerce power includes the authority to regulate the channels and instrumentalities of commerce, see *Pierce County* v. *Guillen*, 537 U.S. 129, 147 (2003), which include telecommunications networks, see *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U.S. 1, 9 (1878). And Congress may regulate commerce by requiring those engaged in commerce to pay money to the government. See *Gibbons* v. *Ogden*, 9 Wheat. 1, 202 (1824) ("[D]uties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce."); 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1083, at 530 (1833) ("[T]he power to regulate commerce includes the power of laying duties."). The commerce power therefore provides an independently sufficient basis for Section 254's requirement that carriers pay universal service contributions.

In any event, this Court has specifically rejected "the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power." *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 222-223 (1989). The Court in reviewing tax laws has instead applied ordinary nondelegation principles. See *id.* at 218-224. "Congress may wisely choose to be more circumspect in delegating authority under the Taxing Clause than under other of its enumerated powers, but this is not a heightened degree of prudence required by the Constitution." *Id.* at 223.

Contrary to the court of appeals' suggestion, "the Constitution's original meaning" does not support "a more restrictive test for delegations of the taxing power." Pet. App. 42a n.13. Some constitutional provisions impose special criteria for tax legislation. For example, direct taxes must be apportioned, see U.S.

Const. Art. I, § 2, Cl. 3; indirect taxes must be uniform, see Art. I, § 8, Cl. 1; and bills to raise revenue must originate in the House of Representatives, see Art. I, § 7, Cl. 1. But "in terms of the scope and degree of discretionary authority that Congress may delegate," the Constitution's text does not distinguish the taxing power from other enumerated powers. *Mid-America*, 490 U.S. at 220-221.

Nor does historical practice support the adoption of a heightened nondelegation standard for tax laws. "From its earliest days to the present," Congress in enacting tax legislation "has varied the degree of specificity and the consequent degree of discretionary authority delegated to the Executive." *Mid-America*, 490 U.S. at 221. As noted above, a 1798 statute empowered executive officers to exercise broad discretion in implementing a federal real-estate tax. See p. 23, *supra*. Congress also has enacted, and this Court has upheld, multiple statutes granting the President broad authority to set or change tariffs. See *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 558-560 (1976); *J.W. Hampton*, 276 U.S. at 409; *Field* v. *Clark*, 143 U.S. 649, 683-689 (1892).

b. The court of appeals found Section 254 "especially troubling because the statute insulates FCC from * * * the appropriations power." Pet. App. 31a. But any concerns about the appropriations power are properly evaluated under the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, not under the nondelegation doctrine. Respondents have not brought an Appropriations Clause challenge here. See Pet. App. 32a n.10.

Section 254, in all events, does not "insulate" the FCC from the appropriations power. In enacting Section 254, Congress instead *exercised* the appropriations power by authorizing the Commission to expend the Universal Service Fund for specified purposes. Congress retains the authority to repeal that appropriation.

The court of appeals found it significant that the Fund operates "outside the [annual] appropriations process." Pet. App. 32a (emphasis omitted). But the Appropriations Clause does not require Congress to make annual appropriations. It instead allows Congress to make "standing appropriations," and Congress has done so since the beginning of the Republic. *Community Financial Services Ass'n*, 601 U.S. at 436; see *id.* at 436-437. "Frequently, too, standing appropriations do not designate specific sums of money, thus combining one type of flexibility with another." *Id.* at 444 (Kagan, J., concurring). No sound textual or historical basis exists for applying a heightened nondelegation test to such appropriations.

c. Finally, the court of appeals stated that, although Congress may direct executive agencies to apply their "technical knowledge" in implementing statutes, it may not empower executive agencies to make "significant policy judgments." Pet. App. 34a-35a. The court concluded that Section 254 grants the Commission the power to make only "policy judgments, not technical ones." *Id.* at 35a.

The court of appeals' rigid dichotomy between policy judgments and technical judgments is flawed. Agency decisionmaking is not a "rarified technocratic process, unaffected by political considerations." *Department of Commerce* v. *New York*, 588 U.S. 752, 781 (2019) (citation omitted). And agency decisionmaking usually involves *both* making policy *and* applying technical expertise. For example, in implementing Section 254's directive that services "should be available at just, reasonable, and affordable rates," 47 U.S.C. 254(b)(1), the FCC must make policy judgments about what rates are just, reasonable, and affordable in light of its technical knowledge about telecommunications services.

A statute does not delegate legislative power simply by empowering the Executive Branch to exercise policymaking discretion. This Court has repeatedly upheld statutes that direct agencies to make policy judgments —including statutes that empower agencies to regulate in the public interest, to set fair and equitable prices, and to identify and recover excessive profits. See pp. 20-21, *supra*. It is thus "no objection" that the statute "call[s] for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework." *Yakus*, 321 U.S. at 425-426.

B. The Commission Has Not Delegated Governmental Power To The Administrator

The Fifth Circuit also stated that the FCC "may have" unlawfully "subdelegat[ed]" legislative power to the Administrator, a private corporation. Pet. App. 19a. As two other courts of appeals have recognized, the Commission has done no such thing. See *Consumers' Research*, 67 F.4th at 795-797 (6th Cir.); *Consumers' Research*, 88 F.4th at 925-928 (11th Cir.). The Administrator provides advice to the Commission, and the government does not delegate legislative power by considering non-binding advice from private actors.

1. The Constitution permits the government to rely on non-binding advice provided by private actors

In *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), this Court explained that Congress may not delegate legislative power to private actors. See *id.* at 310-311. The statute at issue in that case authorized producers of two-thirds of the coal in a district to set wages and hours for all producers in that district, without review by any federal agency. See *id.* at 281-283. The Court described that grant of power as "legislative delegation in its most obnoxious form; for it is not even delegation to an official." *Id.* at 311.

In *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), however, this Court clarified that the federal government in performing its functions may rely on private assistance, including non-binding recommendations made by private actors. The statute at issue in that case authorized local boards consisting of private coal producers to propose minimum prices for coal, but empowered the National Bituminous Coal Commission, a governmental body, to approve, disapprove, or modify those prices. See *id.* at 388. The Court described that scheme as "unquestionably valid." *Id.* at 399. It emphasized that the private boards functioned "subordinately" to a government agency, that their actions were subject to the agency's "authority and surveillance," and that the agency rather than the boards ultimately "determine[d] the prices." *Ibid.* Congress has since enacted, and courts of appeals have generally upheld, many statutes authorizing private actors to propose regulations to federal agencies. See, *e.g.*, *R.H. Johnson & Co.* v. *SEC*, 198 F.2d 690, 695 (2d Cir.), cert. denied, 344 U.S. 855 (1952); *United States* v. *Frame*, 885 F.2d 1119, 1128-1129 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990); *Todd & Co.* v. *SEC*, 557 F.2d 1008, 1012-1013 (3d Cir. 1977); *Cospito* v. *Heckler*, 742 F.2d 2, 86-89 (3d Cir. 1984), cert. denied, 471 U.S. 1113 (1985); *The Pittston Co.* v. *United States*, 368 F.3d 385, 394-397 (4th Cir. 2004), cert. denied, 544 U.S. 904 (2005); *Oklahoma*

v. *United States*, 62 F.4th 221, 228-233 (6th Cir. 2023), cert. denied, 144 S. Ct. 2679 (2024); *Walmsley* v. *FTC*, 117 F.4th 1032, 1037-1039 (8th Cir. 2024), petition for cert. pending, No. 24-420 (filed Oct. 10, 2024); *Sorrell* v. *SEC*, 679 F.2d 1323, 1325-1326 (9th Cir. 1982).

Indeed, the political branches routinely solicit advice from private individuals. Members of Congress speak to lobbyists, listen to witnesses at committee hearings, and hold town halls with their constituents. Presidents consult with private groups before making nominations, see *Public Citizen* v. *United States Department of Justice*, 491 U.S. 440, 444-445 (1989), and agencies solicit private advice when they conduct notice-and-comment rulemaking, see 5 U.S.C. 553(c). Those practices comport with Articles I and II because the government does not delegate its power by taking account of private advice in deciding how to exercise that power.

By the same token, Article III vests the judicial power in federal courts, and neither Congress nor the courts themselves may delegate that power to persons who lack specified tenure and salary protections. See U.S. Const. Art. III, § 1; *Stern* v. *Marshall*, 564 U.S. 462, 482-485 (2011). Yet courts may rely on the recommendations of non-Article III adjuncts, such as magistrate judges, special masters, and law clerks. Such recommendations comply with Article III because they are "advisory," *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932), and because the court retains the power to issue "the ultimate decision," *United States* v. *Raddatz*, 447 U.S. 667, 681-683 (1980). This Court likewise considers recommendations from advisory committees when issuing the Federal Rules of Procedure and Evidence, and the lower courts consider recommendations from advisory committees when issuing local rules. See 28 U.S.C. 2073, 2077(b).

The nondelegation doctrine does not limit private actors to advisory roles alone. Since the Founding, private actors have participated in the implementation of federal law in a variety of ways, including by serving on grand and petit juries, see U.S. Const. Amends. V-VII; bringing *qui tam* suits, see *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 776-777 (2000); and buying shares in government-chartered corporations, such as the Bank of the United States, see *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 386-387 (1995). This Court has also upheld statutes under which agency rules may take effect only if approved in a referendum of the regulated parties. See *Rock Royal*, 307 U.S. at 577-578; *Currin* v. *Wallace*, 306 U.S. 1, 15-16 (1939). To resolve this case, however, the Court need not identify the full range of functions that the government may properly confide to private entities. For present purposes, it suffices to hold that no delegation concerns arise when an agency receives non-binding advice from a private body.

2. The Administrator lawfully provides non-binding advice to the Commission

The Administrator's role in calculating the universal service contribution complies with the private nondelegation doctrine. Within the limits set by Congress, the FCC determines how much carriers must pay. See 47 C.F.R. 54.709(a) (stating that the contribution factor is "determined quarterly by the Commission"). The Administrator simply helps the Commission set the contribution factor by providing non-binding advice—namely, projections of the programs' expenses and the carriers' revenues. See 47 C.F.R. 54.709(a)(2) and (3).

The Administrator must make those projections in accordance with FCC rules. The rules establish detailed eligibility requirements for beneficiaries, see, *e.g.*, 47 C.F.R. 54.410; impose caps on particular types of support, see, *e.g.*, 47 C.F.R. 54.507; and set formulas for calculating the amount of the subsidy, see, *e.g.*, 47 C.F.R. 54.604-54.606. The Administrator must apply those rules when projecting the programs' expenses; it may not change the projections based on its own policy judgment that beneficiaries should receive more or less money. See 47 C.F.R. 54.702(c), 54.709(a)(3). The rules also require each carrier to file a form reporting its own projected revenues for the upcoming quarter. See 47 C.F.R. 54.711. The Administrator must add up the numbers reported by the carriers, fill in estimates for carriers that do not submit the required forms, and report the total to the Commission. See 47 C.F.R. 54.709.

Projections of program expenses "must be approved by the Commission before they are used to calculate the quarterly contribution factor." 47 C.F.R. 54.709(a)(3). The Administrator must submit those projections and "the basis for those projections" to the Commission and the FCC's Office of the Managing Director at least 60 days before the quarter begins. *Ibid.* That requirement enables the Commission and its staff to review—and, if necessary, revise—the projections before using them to calculate the contribution factor.

The Administrator must likewise report the "total contribution base" (*i.e.*, the carriers' total projected revenues) to the FCC at least 30 days before the start of the quarter. See 47 C.F.R. 54.709(a)(3). The FCC may adjust that figure as well. In this case, for example, the Administrator reported a total contribution base of approximately $9.2 billion, see Pet. App. 158a, and the

Commission then adjusted that figure to approximately $7.3 billion, see *id.* at 144a. The change reflected two routine adjustments: one to ensure that the projected revenues were "net of projected contributions," 47 C.F.R. 54.709(a)(1), and the other "to account for uncollectible contributions," Pet. App. 144a.

The FCC then uses the information provided by the Administrator to calculate a quarterly contribution factor, which the Commission announces in a public notice and on its website. See 47 C.F.R. 54.709(a)(3). At any time within the ensuing 14-day period, the FCC may revise the contribution factor by setting projections "at amounts that the Commission determines will serve the public interest." *Ibid.* Only if the Commission takes no further action during that 14-day period is the factor "deemed approved." *Ibid.* At that point, the Administrator must "calculate the amount of individual contributions" by "apply[ing] the quarterly contribution factor" to each individual carrier's revenues. *Ibid.*

Further limiting the Administrator's role, a carrier that is aggrieved by the Administrator's actions may seek de novo review before the FCC. See 47 C.F.R. 54.719(b). And the Administrator "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress." 47 C.F.R. 54.702(c). If the statute or the rules "are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission." *Ibid.* Thus, if the Administrator confronts an unsettled legal or policy issue in the course of making projections (or taking any other action), it must seek guidance from the Commission rather than resolving the issue itself.

The Administrator's projections, in short, constitute non-binding advice. The FCC determines the manner in which the Administrator computes those projections; reviews and revises the projections before calculating the contribution factor; and retains the power to make further revisions during the 14-day period after the Commission announces the contribution factor. The Administrator's advisory role complies with the nondelegation doctrine.

3. The court of appeals' contrary reasoning lacks merit

a. The court of appeals reasoned that, although an agency may "solicit advice" from a private person, the agency "must affirmatively act to give legal effect to that advice because it alone has constitutional authority to execute [the law]." Pet. App. 49a. The court believed that the FCC's rules violate that principle because they allow the Administrators's "projections [to] take legal effect without formal FCC approval." *Ibid.* But the court misread the applicable regulations.

Contrary to the court of appeals' view, projections provided by the Administrator lack independent legal effect. Only the contribution factor has legal effect. See 47 C.F.R. 54.709(a)(3) (directing the Administrator to calculate carriers' contributions by "apply[ing] the quarterly contribution factor"). That factor is "determined by the Commission," "announced by the Commission in a public notice," and "approved by the Commission." 47 C.F.R. 54.709(a)(2) and (3).

As discussed above, the FCC retains the power to review and revise the projections before using them to calculate the contribution factor. See p. 42, *supra*. The Administrator must submit the projections and underlying data to the Commission in advance. See 47 C.F.R. 54.709(a)(2) and (3). Projections of the programs' expenses "must be approved by the Commission before they are used to calculate the quarterly contribution factor," 47 C.F.R. 54.709(a)(3), and the Commission may also adjust the total contribution base as it deems appropriate, see, *e.g.*, Pet. App. 144a.

The court of appeals emphasized the FCC rule providing that, if the Commission takes no further action within 14 days after announcing the contribution factor, then the factor and the underlying projections are "deemed approved." 47 C.F.R. 54.709(a)(3); see Pet. App. 49a. But that provision simply gives the FCC an additional opportunity to revise the projections. It does not limit or displace the FCC's authority to adjust the projections before it announces the contribution factor.

b. The court of appeals also asserted that the FCC "rubber stamp[s]" the Administrator's projections, and that the Administrator sets the contribution factor "*de facto* if not *de jure*." Pet. App. 7a. That claim is both legally irrelevant and factually incorrect.

As a legal matter, the relevant question is whether the FCC has *authority* to reject the Administrator's advice, not how often the FCC exercises that power. In *Sunshine Anthracite*, for example, this Court held that a regulatory scheme complied with the nondelegation doctrine because a federal agency had the "authority" to approve, reject, or modify the private entities' proposals. 310 U.S. at 399; cf. *United States* v. *Arthrex, Inc.*, 594 U.S. 1, 27 (2021) (plurality opinion) ("[A principal officer] need not review every decision of the [inferior officer]. What matters is that the [principal officer] have the discretion to review decisions rendered by [inferior officers]."). In this case, the court of appeals did not deny that the Commission retains plenary authority to review and revise the Administrator's projections.

The court of appeals' contrary approach conflicts with basic separation-of-powers principles. Article II vests the President with the "general administrative control of those executing the laws," *Myers* v. *United States*, 272 U.S. 52, 164 (1926), and directs him to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3. It is the President's responsibility, not the courts' responsibility, to ensure that executive officers exercise "independent judgment" and avoid "rubber stamp[ing]" their advisers' proposals. Pet. App. 7a, 50a. Judicial inquiry into those matters would represent "'a substantial intrusion' into the workings of another branch," and would violate the "general rule against inquiring into 'the mental process of administrative decisionmakers.'" *Department of Commerce*, 588 U.S. at 781 (citations omitted). It would also contravene the principle that a court should "generally take at face value" a coordinate branch's "own report of its actions," *NLRB* v. *Noel Canning*, 573 U.S. 513, 551 (2014)—here, the FCC's report that the Commission independently approves the projections and determines the contribution factor, see 47 C.F.R. 54.709(a).

Even apart from those difficulties, the court of appeals identified no workable standard for determining how much weight a government actor may properly give to private recommendations. Taken to its logical conclusion, the court's approach would permit litigants to allege that members of Congress have delegated legislative power by relying too much on staffers; that the President has delegated executive power by relying too much on advisers; or that judges have delegated judicial power by relying too much on law clerks. Courts lack administrable standards for resolving such claims; no clear line separates lawful reliance on advice from unlawful "*de facto* abdication." Pet. App. 50a.

As a factual matter, moreover, the FCC does conduct meaningful review of the Administrator's actions. On several occasions, including twice in 2023, the FCC has departed from the Administrator's projections when calculating the quarterly contribution factor. See, *e.g.*, FCC, *Proposed Fourth Quarter 2023 Universal Service Contribution Factor*, No. 96-54, 2023 WL 60362377, at *1 (Sept. 13, 2023); FCC, *Proposed Third Quarter 2023 Universal Service Contribution Factor*, No. 96-54, 2023 WL 4012359, at *1 (June 14, 2023); *Revised Second Quarter 2003 Universal Service Contribution Factor*, 18 FCC Rcd 5097, 5097 (2003). The FCC also has awarded relief when it has disagreed with the Administrator's calculation of contributions owed by individual carriers. See, *e.g.*, *In re Universal Service Contribution Methodology*, 31 FCC Rcd 13,220, 13,220 (2016). The relative infrequency with which the Commission revises the Administrator's decisions reflects the Administrator's limited role, the detailed rules constraining its actions, and the Commission's general oversight of its activities. See Pet. App. 121a (Higginson, J., dissenting).

c. Finally, the court of appeals stated that, "[e]ven if the Constitution does not categorically forbid FCC's delegation to" the Administrator, the Act "does not authorize it." Pet. App. 55a. But respondents have raised only a constitutional claim under the private nondelegation doctrine, not a statutory claim under the Act. See *id.* at 63a n.21. The court erred by addressing a statutory challenge that respondents never raised. See *United States* v. *Sineneng-Smith*, 590 U.S. 371, 375-376 (2020).

Regardless, the court of appeals' statutory objection lacks merit. The Act authorizes the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Act], as may be necessary in the execution of its functions." 47 U.S.C. 154(i). The Act accordingly empowers the Commission to formulate an administrative process for determining the contribution factor and to seek the Administrator's advice as part of that process.

C. The Court Of Appeals' "Combination" Theory Is Wrong

As explained above, the court of appeals was "highly skeptical" that the contribution factor at issue here comports with either "the bar on congressional delegations of legislative power" or "the general rule that private entities may not wield governmental power." Pet. App. 64a. But the court did not definitively "resolve either question in this case." *Ibid.* The court instead held that "*the combination*" of Congress's "delegation" to the FCC and the Commission's "subdelegation" to the Administrator "violates the Legislative Vesting Clause." *Ibid.*

The court of appeals' "combination" theory is flawed. Where a statute permissibly vests an agency with executive power, that power does not somehow become legislative simply because a private entity advises the agency on how to exercise it.

The court of appeals' theory also conflicts with this Court's decision in *Sunshine Anthracite*. See Pet. App. 116a-117a (Higginson, J., dissenting). In that case, as discussed above, an agency set coal prices based on proposals made by private coal producers. See p. 39, *supra*. The challengers argued that the scheme violated both the public nondelegation doctrine (by empowering the agency to set prices) and the private nondelegation doctrine (by allowing private entities to play a role in the process by which those prices were determined). See *Sunshine Anthracite*, 310 U.S. at 397-399. This Court rejected the public nondelegation challenge, explaining that Congress had specified "wholly adequate" "criteria" to guide the agency. *Id.* at 398. The Court then rejected the private nondelegation challenge, noting that the agency, not the private entities, "determine[d] the prices." *Id.* at 399. The Court "ended its analysis of both delegation challenges there"; it did not suggest that the combination of the two conferrals of authority required a further analysis beyond that needed to evaluate each challenge taken on its own. Pet. App. 116a (Higginson, J., dissenting).

The court of appeals was wrong to assert that the purported "double-layered delegation" in this case is an "anomaly." Pet. App. 73a. In exercising discretionary authority conferred by Congress, agencies routinely take account of private advice, most notably when promulgating rules after utilizing statutorily prescribed notice-and-comment procedures. See p. 40, *supra*. Congress also has enacted, and the courts of appeals have upheld, many statutes under which private parties propose rules that agencies may then approve or reject. See pp. 39-40 *supra*. Congress has likewise authorized advisory committees to propose, and this Court and lower courts to adopt, the Federal Rules and local rules. See p. 41, *supra*.

The court of appeals drew an analogy to this Court's holding in *Free Enterprise Fund* v. *PCAOB*, 561 U.S. 477 (2010), that Congress may not grant two layers of tenure protection to certain executive officers. See Pet. App. 66a. That analogy is inapt. In *Free Enterprise Fund*, the Court stated that a "second level of tenure protection" "transforms" an agency's independence by "chang[ing] the nature of the President's review." 561 U.S. at 496. "Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, ha[d] full control over the [agency]." *Ibid.* By contrast, the supposed second level of delegation in this case—the FCC's reliance on the Administrator's non-binding advice—has no such transformative effect. The Commission still decides, within the bounds set by Congress, how much carriers must pay; the Administrator simply provides data to assist the Commission in making that decision.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
VIVEK SURI
Assistant to the Solicitor General
MARK B. STERN
GERARD J. SINZDAK
Attorneys

P. MICHELE ELLISON
General Counsel
JACOB M. LEWIS
Deputy General Counsel
JAMES M. CARR
MATTHEW J. DUNNE
Counsel
Federal Communications Commission

JANUARY 2025

APPENDIX

TABLE OF CONTENTS

APPENDIX

1. 47 U.S.C. 254 provides:

Universal service

(a) Procedures to review universal service requirements

(1) Federal-State Joint Board on universal service

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

(2) Commission action

The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15 months after February 8, 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

(b) Universal service principles

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

(1) Quality and rates

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

(2) Access to advanced services

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

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions

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

(5) Specific and predictable support mechanisms

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

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

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

(7) Additional principles

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

(c) Definition

(1) In general

Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services—

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

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

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

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

(2) Alterations and modifications

The Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.

(3) Special services

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

(d) Telecommunications carrier contribution

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

(e) Universal service support

After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

(f) State authority

A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

(g) Interexchange and interstate services

Within 6 months after February 8, 1996, the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.

(h) Telecommunications services for certain providers

(1) In general

(A) Health care providers for rural areas

A telecommunications carrier shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State. A telecommunications carrier providing service under this paragraph shall be entitled to have an amount equal to the difference, if any, between the rates for services provided to health care providers for rural areas in a State and the rates for similar services provided to other customers in comparable rural areas in that State treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service.

(B) Educational providers and libraries

All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3), provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall—

(i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or

(ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

(2) Advanced services

The Commission shall establish competitively neutral rules—

(A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries; and

(B) to define the circumstances under which a telecommunications carrier may be required to connect its network to such public institutional telecommunications users.

(3) Terms and conditions

Telecommunications services and network capacity provided to a public institutional telecommunications user under this subsection may not be sold, resold, or otherwise transferred by such user in consideration for money or any other thing of value.

(4) Eligibility of users

No entity listed in this subsection shall be entitled to preferential rates or treatment as required by this subsection, if such entity operates as a for-profit business, is a school described in paragraph (7)(A) with an endowment of more than $50,000,000, or is a library or library consortium not eligible for assistance from a State library administrative agency under the Library Services and Technology Act [20 U.S.C. 9121 et seq.].

(5) Requirements for certain schools with computers having Internet access

(A) Internet safety

(i) In general

Except as provided in clause (ii), an elementary or secondary school having computers with Internet access may not receive services at discount rates under paragraph (1)(B) unless the school, school board, local educational agency, or other authority with responsibility for administration of the school—

(I) submits to the Commission the certifications described in subparagraphs (B) and (C);

(II) submits to the Commission a certification that an Internet safety policy has been adopted and implemented for the school under subsection (*l*); and

(III) ensures the use of such computers in accordance with the certifications.

(ii) Applicability

The prohibition in clause (i) shall not apply with respect to a school that receives services at discount rates under paragraph (1)(B) only for purposes other than the provision of Internet access, Internet service, or internal connections.

(iii) Public notice; hearing

An elementary or secondary school described in clause (i), or the school board, local educational agency, or other authority with responsibility for administration of the school, shall provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy. In the case of an elementary or secondary school other than an elementary school or a secondary school as defined in section 7801 of title 20, the notice and hearing required by this clause may be limited to those members of the public with a relationship to the school.

(B) Certification with respect to minors

A certification under this subparagraph is a certification that the school, school board, local educational agency, or other authority with responsibility for administration of the school—

(i) is enforcing a policy of Internet safety for minors that includes monitoring the online activities of minors and the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—

(I) obscene;

(II) child pornography; or

(III) harmful to minors;

(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors; and

(iii) as part of its Internet safety policy is educating minors about appropriate online behavior, including interacting with other individuals on social networking websites and in chat rooms and cyberbullying awareness and response.

(C) Certification with respect to adults

A certification under this paragraph is a certification that the school, school board, local educational agency, or other authority with responsibility for administration of the school—

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—

(I) obscene; or

(II) child pornography; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers.

(D) Disabling during adult use

An administrator, supervisor, or other person authorized by the certifying authority under subparagraph (A)(i) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.

(E) Timing of implementation

(i) In general

Subject to clause (ii) in the case of any school covered by this paragraph as of the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certification under subparagraphs (B) and (C) shall be made—

(I) with respect to the first program funding year under this subsection following such effective date, not later than 120 days after the beginning of such program funding year; and

(II) with respect to any subsequent program funding year, as part of the application process for such program funding year.

(ii) Process

(I) Schools with Internet safety policy and technology protection measures in place

A school covered by clause (i) that has in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C) shall certify its compliance with subparagraphs (B) and (C) during each annual program application cycle under this subsection, except that with respect to the first program funding year after the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certifications shall be made not later than 120 days after the beginning of such first program funding year.

(II) Schools without Internet safety policy and technology protection measures in place

A school covered by clause (i) that does not have in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C)—

(aa) for the first program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is undertaking such actions, including any necessary procurement procedures, to put in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C); and

(bb) for the second program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is in compliance with subparagraphs (B) and (C).

Any school that is unable to certify compliance with such requirements in such second program year shall be ineligible for services at discount rates or funding in lieu of services at such rates under this subsection for such second year and all subsequent program years under this subsection, until such time as such school comes into compliance with this paragraph.

(III) Waivers

Any school subject to subclause (II) that cannot come into compliance with subparagraphs (B) and (C) in such second year program may seek a waiver of subclause (II)(bb) if State or local procurement rules or regulations or competitive bidding requirements prevent the making of the certification otherwise required by such subclause. A school, school board, local educational agency, or other authority with responsibility for administration of the school shall notify the Commission of the applicability of such subclause to the school. Such notice shall certify that the school in question will be brought into compliance before the start of the third program year after the effective date of this subsection in which the school is applying for funds under this subsection.

(F) Noncompliance

(i) Failure to submit certification

Any school that knowingly fails to comply with the application guidelines regarding the annual submission of certification required by this paragraph shall not be eligible for services at discount rates or funding in lieu of services at such rates under this subsection.

(ii) Failure to comply with certification

Any school that knowingly fails to ensure the use of its computers in accordance with a certification under subparagraphs (B) and (C) shall reimburse any funds and discounts received under this subsection for the period covered by such certification.

(iii) Remedy of noncompliance

(I) Failure to submit

A school that has failed to submit a certification under clause (i) may remedy the failure by submitting the certification to which the failure relates. Upon submittal of such certification, the school shall be eligible for services at discount rates under this subsection.

(II) Failure to comply

A school that has failed to comply with a certification as described in clause (ii) may remedy the failure by ensuring the use of its computers in accordance with such certification. Upon submittal to the Commission of a certification or other appropriate evidence of such remedy, the school shall be eligible for services at discount rates under this subsection.

(6) Requirements for certain libraries with computers having Internet access

(A) Internet safety

(i) In general

Except as provided in clause (ii), a library having one or more computers with Internet access may not receive services at discount rates under paragraph (1)(B) unless the library—

(I) submits to the Commission the certifications described in subparagraphs (B) and (C); and

(II) submits to the Commission a certification that an Internet safety policy has been adopted and implemented for the library under subsection (*l*); and

(III) ensures the use of such computers in accordance with the certifications.

(ii) Applicability

The prohibition in clause (i) shall not apply with respect to a library that receives services at discount rates under paragraph (1)(B) only for purposes other than the provision of Internet access, Internet service, or internal connections.

(iii) Public notice; hearing

A library described in clause (i) shall provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy.

(B) Certification with respect to minors

A certification under this subparagraph is a certification that the library—

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—

(I) obscene;

(II) child pornography; or

(III) harmful to minors; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors.

(C) Certification with respect to adults

A certification under this paragraph is a certification that the library—

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—

(I) obscene; or

(II) child pornography; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers.

(D) Disabling during adult use

An administrator, supervisor, or other person authorized by the certifying authority under subparagraph (A)(i) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.

(E) Timing of implementation

(i) In general

Subject to clause (ii) in the case of any library covered by this paragraph as of the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certification under subparagraphs (B) and (C) shall be made—

(I) with respect to the first program funding year under this subsection following such effective date, not later than 120 days after the beginning of such program funding year; and

(II) with respect to any subsequent program funding year, as part of the application process for such program funding year.

(ii) Process

(I) Libraries with Internet safety policy and technology protection measures in place

A library covered by clause (i) that has in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C) shall certify its compliance with subparagraphs (B) and (C) during each annual program application cycle under this subsection, except that with respect to the first program funding year after the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certifications shall be made not later than 120 days after the beginning of such first program funding year.

(II) Libraries without Internet safety policy and technology protection measures in place

A library covered by clause (i) that does not have in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C)—

(aa) for the first program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is undertaking such actions, including any necessary procurement procedures, to put in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C); and

(bb) for the second program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is in compliance with subparagraphs (B) and (C).

Any library that is unable to certify compliance with such requirements in such second program year shall be ineligible for services at discount rates or funding in lieu of services at such rates under this subsection for such second year and all subsequent program years under this subsection, until such time as such library comes into compliance with this paragraph.

(III) Waivers

Any library subject to subclause (II) that cannot come into compliance with subparagraphs (B) and (C) in such second year may seek a waiver of subclause (II)(bb) if State or local procurement rules or regulations or competitive bidding requirements prevent the making of the certification otherwise required by such subclause. A library, library board, or other authority with responsibility for administration of the library shall notify the Commission of the applicability of such subclause to the library. Such notice shall certify that the library in question will be brought into compliance before the start of the third program year after the effective date of this subsection in which the library is applying for funds under this subsection.

(F) Noncompliance

(i) Failure to submit certification

Any library that knowingly fails to comply with the application guidelines regarding the annual submission of certification required by this paragraph shall not be eligible for services at discount rates or funding in lieu of services at such rates under this subsection.

(ii) Failure to comply with certification

Any library that knowingly fails to ensure the use of its computers in accordance with a certification under subparagraphs (B) and (C) shall reimburse all funds and discounts received under this subsection for the period covered by such certification.

(iii) Remedy of noncompliance

(I) Failure to submit

A library that has failed to submit a certification under clause (i) may remedy the failure by submitting the certification to which the failure relates. Upon submittal of such certification, the library shall be eligible for services at discount rates under this subsection.

(II) Failure to comply

A library that has failed to comply with a certification as described in clause (ii) may remedy the failure by ensuring the use of its computers in accordance with such certification. Upon submittal to the Commission of a certification or other appropriate evidence of such remedy, the library shall be eligible for services at discount rates under this subsection.

(7) Definitions

For purposes of this subsection:

(A) Elementary and secondary schools

The term "elementary and secondary schools" means elementary schools and secondary schools, as defined in section 7801 of title 20.

(B) Health care provider

The term "health care provider" means—

(i) post-secondary educational institutions offering health care instruction, teaching hospitals, and medical schools;

(ii) community health centers or health centers providing health care to migrants;

(iii) local health departments or agencies;

(iv) community mental health centers;

(v) not-for-profit hospitals;

(vi) rural health clinics;

(vii) skilled nursing facilities (as defined in section 395i–3(a) of title 42); and

(viii) consortia of health care providers consisting of one or more entities described in clauses (i) through (vii).

(C) Public institutional telecommunications user

The term "public institutional telecommunications user" means an elementary or secondary school, a library, or a health care provider as those terms are defined in this paragraph.

(D) Minor

The term "minor" means any individual who has not attained the age of 17 years.

(E) Obscene

The term "obscene" has the meaning given such term in section 1460 of title 18.

(F) Child pornography

The term "child pornography" has the meaning given such term in section 2256 of title 18.

(G) Harmful to minors

The term "harmful to minors" means any picture, image, graphic image file, or other visual depiction that—

(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;

(ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and

(iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

(H) Sexual act; sexual contact

The terms "sexual act" and "sexual contact" have the meanings given such terms in section 2246 of title 18.

(I) Technology protection measure

The term "technology protection measure" means a specific technology that blocks or filters Internet access to the material covered by a certification under paragraph (5) or (6) to which such certification relates.

(i) Consumer protection

The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.

(j) Lifeline assistance

Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title.

(k) Subsidy of competitive services prohibited

A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

(*l*) Internet safety policy requirement for schools and libraries

(1) In general

In carrying out its responsibilities under subsection (h), each school or library to which subsection (h) applies shall—

(A) adopt and implement an Internet safety policy that addresses—

(i) access by minors to inappropriate matter on the Internet and World Wide Web;

(ii) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications;

(iii) unauthorized access, including so-called "hacking", and other unlawful activities by minors online;

(iv) unauthorized disclosure, use, and dissemination of personal identification information regarding minors; and

(v) measures designed to restrict minors' access to materials harmful to minors; and

(B) provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy.

(2) Local determination of content

A determination regarding what matter is inappropriate for minors shall be made by the school board, local educational agency, library, or other authority responsible for making the determination.

No agency or instrumentality of the United States Government may—

(A) establish criteria for making such determination;

(B) review the determination made by the certifying school, school board, local educational agency, library, or other authority; or

(C) consider the criteria employed by the certifying school, school board, local educational agency, library, or other authority in the administration of subsection (h)(1)(B).

(3) Availability for review

Each Internet safety policy adopted under this subsection shall be made available to the Commission, upon request of the Commission, by the school, school board, local educational agency, library, or other authority responsible for adopting such Internet safety policy for purposes of the review of such Internet safety policy by the Commission.

(4) Effective date

This subsection shall apply with respect to schools and libraries on or after the date that is 120 days after December 21, 2000.

2. 47 C.F.R. 54.709 provides:

Computations of required contributions to universal service support mechanisms.

(a) Prior to April 1, 2003, contributions to the universal service support mechanisms shall be based on contributors' end-user telecommunications revenues and on a contribution factor determined quarterly by the Commission. Contributions to the mechanisms beginning April 1, 2003 shall be based on contributors' projected collected end-user telecommunications revenues, and on a contribution factor determined quarterly by the Commission.

(1) For funding the federal universal service support mechanisms prior to April 1, 2003, the subject revenues will be contributors' interstate and international revenues derived from domestic end users for telecommunications or telecommunications services, net of prior period actual contributions. Beginning April 1, 2003, the subject revenues will be contributors' projected collected interstate and international revenues derived from domestic end users for telecommunications or telecommunications services, net of projected contributions.

(2) Prior to April 1, 2003, the quarterly universal service contribution factor shall be determined by the Commission based on the ratio of total projected quarterly expenses of the universal service support mechanisms to the total end-user interstate and international telecommunications revenues, net of prior period actual contributions. Beginning April 1, 2003, the quarterly universal service contribution factor shall be determined by the Commission based on the ratio of total pro-

jected quarterly expenses of the universal service support mechanisms to the total projected collected end-user interstate and international telecommunications revenues, net of projected contributions. The Commission shall approve the Administrator's quarterly projected costs of the universal service support mechanisms, taking into account demand for support and administrative expenses. The total subject revenues shall be compiled by the Administrator based on information contained in the Telecommunications Reporting Worksheets described in § 54.711(a).

(3) Total projected expenses for the federal universal service support mechanisms for each quarter must be approved by the Commission before they are used to calculate the quarterly contribution factor and individual contributions. For each quarter, the Administrator must submit its projections of demand for the federal universal service support mechanisms for high-cost areas, low-income consumers, schools and libraries, and rural health care providers, respectively, and the basis for those projections, to the Commission and the Office of the Managing Director at least sixty (60) calendar days prior to the start of that quarter. For each quarter, the Administrator must submit its projections of administrative expenses for the high-cost mechanism, the low-income mechanism, the schools and libraries mechanism and the rural health care mechanism and the basis for those projections to the Commission and the Office of the Managing Director at least sixty (60) calendar days prior to the start of that quarter. Based on data submitted to the Administrator on the Telecommunications Reporting Worksheets, the Administrator must submit the total contribution base to the Office of the Managing Director at least thirty (30) days before the

start of each quarter. The projections of demand and administrative expenses and the contribution factor shall be announced by the Commission in a public notice and shall be made available on the Commission's website. The Commission reserves the right to set projections of demand and administrative expenses at amounts that the Commission determines will serve the public interest at any time within the fourteen-day period following release of the Commission's public notice. If the Commission take no action within fourteen (14) days of the date of release of the public notice announcing the projections of demand and administrative expenses, the projections of demand and administrative expenses, and the contribution factor shall be deemed approved by the Commission. Except as provided in § 54.706(c), the Administrator shall apply the quarterly contribution factor, once approved by the Commission, to contributor's interstate and international end-user telecommunications revenues to calculate the amount of individual contributions.

(b) If the contributions received by the Administrator in a quarter exceed the amount of universal service support program contributions and administrative costs for that quarter, the excess payments will be carried forward to the following quarter. The contribution factors for the following quarter will take into consideration the projected costs of the support mechanisms for that quarter and the excess contributions carried over from the previous quarter. The Commission may instruct the Administrator to treat excess contributions in a manner other than as prescribed in this paragraph (b). Such instructions may be made in the form of a Commission Order or a public notice released by the Wireline Competition Bureau. Any such public notice will become effective fourteen days after release of the public notice, absent further Commission action.

(c) If the contributions received by the Administrator in a quarter are inadequate to meet the amount of universal service support program payments and administrative costs for that quarter, the Administrator shall request authority from the Commission to borrow funds commercially, with such debt secured by future contributions. Subsequent contribution factors will take into consideration the projected costs of the support mechanisms and the additional costs associated with borrowing funds.

(d) If a contributor fails to file a Telecommunications Reporting Worksheet by the date on which it is due, the Administrator shall bill that contributor based on whatever relevant data the Administrator has available, including, but not limited to, the number of lines presubscribed to the contributor and data from previous years, taking into consideration any estimated changes in such data.