Nos. 14-610, 14-898, 14-900 and 14-901

In the Supreme Court of the United States

UNITED STATES CELLULAR CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

CELLULAR SOUTH, INC., DBA C SPIRE WIRELESS, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ALLBAND COMMUNICATIONS COOPERATIVE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

In 2011, in accordance with statutory directives to encourage the nationwide deployment of broadband communications facilities and services, the Federal Communications Commission (FCC) comprehensively reformed its rules governing universal-service subsidies (which support communications service in rural and other high-cost areas) and intercarrier compensation (a parallel regime under which local telephone companies receive payments from other carriers for originating and terminating calls). The court of appeals upheld the FCC's actions against a variety of legal challenges. The questions presented are as follows:

1. Whether the court of appeals correctly upheld the FCC's authority to make universal-service subsidies conditional on the recipients' deployment of broadband facilities and services.

2. Whether the court of appeals correctly rejected petitioner Allband's challenges to a cap on the amount of universal-service subsidies, where Allband may never be subject to the cap because the FCC has granted it a waiver.

3. Whether the court of appeals correctly upheld the FCC's decision to reform the intercarrier-compensation system by adopting a bill-and-keep methodology as the default compensation mechanism for all telecommunications traffic exchanged with local telephone carriers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-266a)[1] is reported at 753 F.3d 1015. The order of the Federal Communications Commission (Pet. App. 281a-1509a) is reported at 26 F.C.C.R. 17,663.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2014. Petitions for rehearing were denied on August 27, 2014 (Pet. App. 267a-268a). The petition for a writ of certiorari in No. 14-610 was filed on November 25, 2014. On November 12, 13, and 17, 2014, Justice Sotomayor granted requests to extend the time within which to file petitions in Nos. 14-898, 14-900, and 14-901 to and including January 26, 2015, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress established the Federal Communications Commission (FCC or Commission) 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. In accordance with that statutory directive, "[u]niversal service"—the nationwide availability of affordable, reliable telecommunications service—"has been a fundamental goal of federal telecommunications regulation since the passage of the Communications Act of 1934" (Communications

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[1] Citations to "Pet. App." refer to the appendix to the petition for a writ of certiorari in No. 14-901.

Act or Act), 47 U.S.C. 151 *et seq. Alenco Commc'ns, Inc.* v. *FCC*, 201 F.3d 608, 614 (5th Cir. 2000).

In the decades after the Act's passage, the FCC and the States used rate-regulation to establish a complex system of implicit subsidies that achieved near-universal availability of voice telephone service, even in the Nation's "most expensive to serve, most rural, and insular communities." Pet. App. 283a. More recently, Congress directed the FCC to replace those implicit subsidies with explicit payments to carriers serving high-cost areas. 47 U.S.C. 254(e). It has also recognized the growing importance of "advanced telecommunications and information services," and has directed the Commission to ensure that "[c]onsumers in all regions of the Nation" have access to those advanced services in addition to basic voice service. 47 U.S.C. 254(b)(2) and (3); see 47 U.S.C. 1302(a) and (b). In particular, Congress has instructed the Commission to develop a "national broadband plan" to "ensure that all people of the United States have access to broadband" Internet services. 47 U.S.C. 1305(k).

2. This case arises out of the FCC's comprehensive reform of two programs supporting universal service: universal-service subsidies and intercarrier compensation. Both programs had become inefficient, outdated, and ill-suited to advance Congress's objective of ensuring nationwide access to broadband.

a. Universal-service subsidies are governed by Section 254 of the Communications Act, 47 U.S.C. 254, which was added to the Act in 1996. Before that date, local telephone service had been regulated as a natural monopoly, and "States typically granted an exclusive franchise in each local service area to a local exchange carrier (LEC)." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Monopoly regulation allowed the FCC and state utility commissions to promote universal access by "hold[ing] down charges for telephone service in [high-cost] rural markets" while setting artificially high rates for "urban and business users." *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 480 (2002).

The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, fundamentally changed telecommunications law by "end[ing] the longstanding regime of state-sanctioned monopolies" in local telephone service. *AT&T*, 525 U.S. at 371. Subjecting incumbent LECs to market competition effectively eliminated the implicit subsidies that had previously supported affordable service in rural and other high-cost areas. *Rural Cellular Ass'n* v. *FCC*, 685 F.3d 1083, 1085 (D.C. Cir. 2012). Recognizing that reality, Congress enacted Section 254 "to replace the system of implicit subsidies with explicit ones." *Ibid.*

Under Section 254, the FCC must establish funding mechanisms "to preserve and advance universal service." 47 U.S.C. 254(b)(5). Those "explicit" subsidies are available to eligible telecommunications carriers serving high-cost areas, as designated by state utility commissions or by the FCC. 47 U.S.C. 254(e); see 47 U.S.C. 214(e). The subsidies are financed by mandatory contributions from carriers providing interstate telecommunications service. 47 U.S.C. 254(d).

Section 254 defines "[u]niversal service" as "an evolving level of telecommunications services that the Commission shall establish periodically" by "taking into account advances in telecommunications and information technologies and services." 47 U.S.C.

254(c)(1). When the FCC first issued implementing regulations in 1997, it designated certain voice telephone services as the level of telecommunications service that would be subsidized under Section 254. *Federal-State Joint Bd. on Universal Serv.*, 12 F.C.C.R. 8776, 8809-8822 ¶¶ 61-82 (1997), aff'd in part and rev'd in part, *Texas Office of Pub. Util. Counsel* v. *FCC*, 183 F.3d 393 (5th Cir. 1999) (*TOPUC*), cert. denied, 530 U.S. 1210 (2000).

The next 15 years brought dramatic changes in the telecommunications landscape. *Connect Am. Fund*, 26 F.C.C.R. 4554, 4559-4560 ¶ 8 (2011) (*NPRM*). With the explosive growth of the Internet, demand for broadband Internet access surged, and "[u]biquitous broadband infrastructure" became "crucial to our nation's economic development and civic life." *Id.* at 4558-4560 ¶¶ 3, 8. "Businesses need broadband to start and grow; adults need broadband to find jobs; children need broadband to learn. Broadband enables people with disabilities to participate more fully in society and provides opportunity to Americans of all income levels." *Id.* at 4558 ¶ 3. Access to broadband is "even more important in America's more remote small towns, rural and insular areas, and Tribal lands." *Ibid.* Yet in 2010, "as many as 24 million Americans"—one out of every thirteen—"live[d] in areas where there [was] no access to any broadband network." *Id.* at 4558 ¶ 5 & n.8.

The high cost of deploying broadband networks in remote and sparsely populated areas means that for many Americans that currently lack broadband access, the "prospect for stand-alone private sector action is limited." Pet. App. 286a. But the FCC's previous universal-service system was ill-suited to close the gaps in broadband coverage because it had been "designed for 20th century networks and market dynamics" and remained "directed at telephone service, not broadband." *NPRM*, 26 F.C.C.R. at 4559 ¶¶ 6, 8. At the same time, universal-service subsides had become wasteful and even counterproductive, "provid[ing] more support than necessary" in some areas while distorting market incentives. *Id.* at 4559 ¶ 7.

b. Intercarrier compensation is a system of payments between carriers to compensate for the origination, transport, and termination of telecommunications traffic. Before the 1996 Act, the FCC and the States had administered a system of "access charges" that providers of long-distance service—known as interexchange carriers (IXCs)—paid to LECs for originating and terminating long-distance calls. For example, when an AT&T long-distance subscriber placed a call from San Francisco to Boston, AT&T paid per-minute access charges to the caller's local carrier in San Francisco and to the recipient's local carrier in Boston. See *National Ass'n of Regulatory Util. Comm'rs* v. *FCC*, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985). The FCC regulated access charges for interstate calls, while States regulated access charges for intrastate long-distance calls (*e.g.*, from Philadelphia to Pittsburgh). *Access Charge Reform*, 12 F.C.C.R. 15,982, 15,988 ¶ 11 (1997). By allowing LECs to recover a portion of their costs from IXCs, access charges kept rates for local service artificially low. *National Ass'n of State Util. Consumer Advocates* v. *FCC*, 372 F.3d 454, 457 (D.C. Cir. 2004).

The 1996 Act expanded the scope of federal regulation of intercarrier compensation by imposing on

LECs a federal "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. 251(b)(5). Initially, the FCC interpreted that provision to apply only to local calls, "such as when a customer of one [LEC] makes a call to a customer of [another LEC] in the same local calling area." *NPRM*, 26 F.C.C.R. at 4705 ¶ 499. Reciprocal compensation arrangements between such competing local carriers were established through a broader process created by the 1996 Act to govern newly competitive local markets. Absent a negotiated agreement, reciprocal compensation and other matters governing relationships between competing local carriers were resolved through arbitrations conducted by state utility commissions under rules prescribed by the FCC. 47 U.S.C. 252; see *NPRM*, 26 F.C.C.R. at 4573-4574 ¶ 53.

Even after the 1996 Act, intercarrier compensation for long-distance calls continued to be governed by the pre-1996 system of federal and state access charges. That regime remained in force under a provision of the 1996 Act requiring LECs to continue to provide "exchange access * * * to interexchange carriers" in accordance with existing "restrictions and obligations (including receipt of compensation)" until those obligations were "explicitly superseded by regulations prescribed by the Commission." 47 U.S.C. 251(g); see *NPRM*, 26 F.C.C.R. at 4705 ¶ 499 & n.710.

Like universal-service subsidies, this "byzantine" system of intercarrier compensation failed to keep pace with changes in technology and market conditions. Pet. App. 288a-289a. LECs were paid per-minute charges for voice calls over legacy networks, and their compensation was "eroding rapidly as consumers increasingly shift[ed] from traditional telephone service to substitutes including Voice over Internet Protocol (VoIP), wireless, texting, and email." *Id.* at 288a. As a result, intercarrier-compensation revenues became "dangerously unstable, impeding investment." *Ibid.*

The intercarrier-compensation system was also inefficient. Because it was uncertain whether voice calls on advanced Internet-protocol (IP) based networks were eligible for access charges, the system "had the effect of rewarding carriers for maintaining outdated infrastructure rather than migrating to [IP] based networks." *NPRM*, 26 F.C.C.R. at 4559 ¶ 6. And "because rates that local carriers receive[d] to deliver a call var[ied] widely depending on where the call originated and the classification and type of service providers involved," the system created "incentives for wasteful arbitrage." *Id.* at 4559 ¶ 7. Those practices and the resulting disputes between carriers "cost hundreds of millions of dollars annually." *Ibid.*; see Jonathan E. Nuechterlein & Philip J. Weiser, *Digital Crossroads: American Telecommunications Policy in the Internet Age* 293 (2005) (explaining that the "incoherent patchwork" of intercarrier compensation schemes led to severe "competitive distortion").

3. To address these problems, the FCC comprehensively reformed its universal-service and intercarrier-compensation regulations. Pet. App. 281a-1509a.

a. First, the FCC reoriented the universal-service program to support advanced communications networks with both voice and broadband capability. Pet. App. 343a-764a. The Commission required that, as a condition of receiving universal-service subsidies, carriers must invest in broadband-capable networks and must "offer broadband service in their supported area * * * at rates that are reasonably comparable to offerings of comparable broadband services in urban areas." *Id.* at 352a-353a. The specific conditions imposed depend on the type of carrier seeking the subsidies. *Id.* at 297a-304a.

The FCC explained that it had authority to adopt the broadband conditions under Section 254 of the Communications Act. Pet. App. 324a-333a. Section 254 reflects the Act's distinction between "telecommunications service" and "information service." "Telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. 153(50). "Telecommunications service," in turn, is "the offering of telecommunications for a fee directly to the public." 47 U.S.C. 153(53). "Information service," in contrast, is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. 153(24). The classification of a service as a "telecommunications service" or an "information service" has important consequences for its treatment under the Act. Most significantly, providers of telecommunications services are regulated as common carriers under Title II of the Communications Act; providers of information services are not. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 975-976 (2005) (*Brand X*).

Section 254 defines "[u]niversal service" as a "level of *telecommunications services*" defined by the FCC. 47 U.S.C. 254(c)(1) (emphasis added). At the time it adopted the order under review, the Commission classified broadband Internet access as an information service rather than a telecommunications service. See *Brand X*, 545 U.S. at 977-979; *Time Warner Telecom, Inc.* v. *FCC*, 507 F.3d 205, 214 (3d Cir. 2007).[2] But the Commission explained that Section 254 makes clear that "deployment of, and access to, information services—including 'advanced' information services—are important components of a robust and successful federal universal service program." Pet. App. 332a. Indeed, two of the statutory principles governing the universal-service program direct the FCC to ensure "[a]ccess to advanced telecommunications *and information services* * * * in all regions of the Nation." 47 U.S.C. 254(b)(2) and (3) (emphasis added).

The FCC also noted (Pet. App. 329a) that, under Section 254, carriers must use universal-service subsidies to fund the "facilities and services for which the support is intended." 47 U.S.C. 254(e). The Commission interpreted that provision as authorizing it "not only to designate the types of telecommunications services for which support would be provided, but also to encourage the deployment of the types of facilities that will best achieve the principles" of Section 254. Pet. App. 329a. The Commission exercised that authority to require subsidized carriers to "invest in and deploy networks capable of providing consumers with access to modern broadband capabilities, as well as voice telephony services." *Id.* at 332a.

The FCC further explained that Section 706(b) of the 1996 Act gave it "independent authority" to adopt

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[2] The Commission recently revisited the issue and now classifies broadband Internet access as a telecommunications service. See pp. 16-17, *infra*.

the broadband conditions. Pet. App. 333a-343a. Section 706(b) provides that, if the Commission determines that advanced telecommunications capability is not being deployed to all Americans in a "reasonable and timely fashion," the FCC "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." 47 U.S.C. 1302(b). The Commission had previously determined that "broadband deployment to all Americans has not been reasonable and timely," and it concluded that the broadband conditions on universal-service subsidies fell within the authority granted by Section 706(b) because they would "eliminate a significant barrier to infrastructure investment" and promote competition. Pet. App. 335a-337a.

b. As part of its reforms of the universal-service program, the FCC made other changes to eliminate waste and inefficiency. As relevant here, the Commission adopted "a presumptive per-line cap on universal service support for all carriers," setting that cap at $250 per line per month. Pet. App. 517a-518a. The Commission explained, however, that it would "consider individual circumstances" in applying the cap, and it established a process through which a carrier can submit "financial data" and other information to justify a "waiver or adjustment of the cap" in a particular case. *Id.* at 518a-520a.

c. Finally, the Commission reformed the intercarrier-compensation system "to phase out regulated per-minute intercarrier compensation charges" over a multi-year transition period and replace that system with a default "bill-and-keep" methodology that would govern all telecommunications traffic exchanged with

LECs absent an agreement between the carriers involved. Pet. App. 834a-835a; see *id.* at 834a-953a. Under bill-and-keep, which is the approach that already governs the wireless industry, carriers recover the costs of their networks by billing their customers (and, where necessary, through explicit federal universal-service subsidies) rather than through charges imposed on other carriers by regulation. *Id.* at 306a. By "eliminating the existing opaque implicit subsidy system" that had required carriers to pay billions of dollars "to support other carriers' network costs," the Commission sought to "ensure that consumers pay only for services that they choose and receive." *Id.* at 835a-836a.

The FCC explained that it had authority to adopt this bill-and-keep methodology under Sections 201(b) and 251(b)(5) of the Communications Act. Pet. App. 858a-881a. Section 201(b) empowers the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the Act]," including Section 251. 47 U.S.C. 201(b); see *AT&T*, 525 U.S. at 378. Section 251(b)(5) imposes on all LECs the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. 251(b)(5). The Commission explained that, although it had initially construed this reciprocal-compensation obligation to apply "only to traffic that originates and terminates within a local area," it had since determined that Section 251(b)(5) is best read to reach all "telecommunications" exchanged with LECs, including intra- and interstate long-distance traffic. Pet. App. 859a (citation omitted); see *id.* at 859a-867a.

4. Numerous parties filed petitions for review of the FCC's order, and the petitions were consolidated in the court of appeals. The court upheld the order in all respects. Pet. App. 1a-266a.[3]

a. The court of appeals upheld the broadband conditions on universal-service subsidies. Pet. App. 21a-47a. Applying the framework established by *Chevron USA Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the court held that the FCC had reasonably interpreted Section 254 to give it the authority "to make funding directives that are consistent with the principles outlined" in Section 254(b), Pet. App. 33a, including the principle that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation," 47 U.S.C. 254(b)(2) and (3). The court also held that "the FCC reasonably construed section 706(b) as an additional source of support for its broadband requirement." Pet. App. 46a-47a.

b. The court of appeals rejected petitioner Allband's challenges to the $250 per-line cap on subsidies. Pet. App. 121a-127a. *Inter alia*, the court emphasized that the Commission had granted Allband a three-year waiver of the cap and had "authoriz[ed] Allband to seek an additional waiver at the end of three years." *Id.* at 127a.

c. The court of appeals upheld the FCC's authority to adopt a default bill-and-keep methodology for all telecommunications traffic exchanged with LECs. Pet. App. 174a-208a. The court concluded that the FCC had reasonably interpreted Section 251(b)(5)'s reciprocal-compensation obligation "to apply to all

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[3] With the exception of a single issue that is not relevant here, the panel's decision was unanimous. See Pet. App. 153a-159a.

traffic, including access given to long-distance carriers." *Id.* at 177a. The court further held that the Commission had reasonably construed the Act to authorize the bill-and-keep methodology, observing that the Act "expressly authorizes bill-and-keep arrangements." *Id.* at 198a; see *id.* at 203a (citing 47 U.S.C. 252(d)(2)(B)(i)). The court rejected arguments that the FCC's bill-and-keep rules contravened other provisions of the Act or improperly intruded on areas reserved to the States. *Id.* at 195a-207a.

ARGUMENT

Petitioners assert various challenges to the universal-service and intercarrier-compensation rules. The court of appeals correctly rejected those challenges, and its decision does not conflict with any decision of this Court or another court of appeals. In addition, several of petitioners' claims fail for threshold reasons or have been overtaken by legal developments since the filing of the petitions. Further review is not warranted.

1. Petitioners United States Cellular Corporation (U.S. Cellular), Cellular South, Inc. (Cellular South), and the Rural Independent Competitive Alliance (RICA) contend that the FCC lacked authority to impose broadband conditions on universal-service subsidies. U.S. Cellular Pet. 15-37; Cellular South-RICA Pet. 13-35. That claim does not warrant review for three reasons. First, petitioners lack standing to challenge the funding condition on which they principally focus. Second, petitioners' arguments rest on the FCC's classification of broadband Internet access as an information service rather than as a telecommunications service. Because the FCC has now reversed that classification, petitioners' claim lacks continuing

legal or practical importance. Third, the court of appeals correctly held that the FCC was authorized to impose the broadband conditions even when it classified broadband as an information service.

a. Petitioners lack standing to challenge the funding condition on which they chiefly focus. They contend that a requirement that certain recipients of universal-service subsidies provide broadband Internet access "upon reasonable request" by a customer exceeds the FCC's authority because it amounts to common-carrier regulation of providers of an information service. Pet. App. 464a; see U.S. Cellular Pet. i, 15-17, 28-37; Cellular South-RICA Pet. i, 19-32. But the "reasonable request" condition applies only to incumbent LECs subject to a regime known as "rate-of-return" regulation. Pet. App. 463a-465a. Because petitioners are not rate-of-return incumbent LECs, they are not subject to the challenged condition.[4] And petitioners have not explained how a funding condition imposed on other carriers causes them any injury—let alone an injury sufficient to confer Article III standing. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561-562 (1992) ("When * * * a plaintiff's asserted injury arises from the government's allegedly unlaw-

[4] An incumbent LEC is the carrier that provided local telephone service in an area as of the 1996 Act's effective date. 47 C.F.R. 51.5; see 47 C.F.R. 54.5 (defining "rate-of-return carrier"). Petitioners, in contrast, are wireless providers and carriers that compete with incumbent LECs. See Cellular South-RICA Pet. 8. Petitioners would be subject to other broadband-related conditions if they sought universal-service subsidies, Pet. App. 653a-682a, but they do not contend that those distinct requirements constitute impermissible common-carrier regulation.

ful regulation (or lack of regulation) of *someone else*, much more is needed" to establish standing.).[5]

b. Even if petitioners had standing, events since the filing of the petitions have deprived their claim of continuing significance. Petitioners contend that the FCC lacked authority to require recipients of universal-service subsidies to provide broadband because the Commission classified "broadband Internet access * * * as an information service, not a telecommunications service." Cellular South-RICA Pet. 14. Petitioners urge the Court to "hold that the FCC cannot regulate broadband so long as it is classified as an information service." U.S. Cellular Pet. 1. But the FCC has now completed a notice-and-comment rulemaking proceeding in which it reexamined the proper classification of broadband Internet access. *Protecting and Promoting the Open Internet*, FCC 15-24 (Mar. 12, 2015), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf. Based on an "updated record" reflecting substantial changes in the market for Internet access, the Commission concluded that "broadband Internet access service" is best viewed as "a telecommunications service" under the Communications Act. *Id.* at 15 ¶ 47; cf. *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 989 (2005) (deferring to the FCC's prior classification at *Chevron* step two, but concluding that the Act is "ambiguous" on the question).

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[5] The government did not object to the court of appeals' consideration of petitioners' claim because some of the parties that joined their brief below were rate-of-return incumbent LECs and therefore had standing. Those parties, however, have not sought this Court's review.

Petitioners do not appear to challenge the FCC's authority to classify broadband as a telecommunications service, or to dispute that the broadband conditions on universal-service subsidies are within the Commission's authority now that it has done so. To the contrary, Cellular South and RICA acknowledge (Pet. 17) that "[t]he FCC has always had the power to expand its regulatory authority simply by reclassifying broadband Internet access as a telecommunications service." Accordingly, the question presented in the petitions—whether the Commission had authority to impose the conditions when it classified broadband as an information service—now has little practical or legal significance.

c. In any event, the court of appeals correctly held that the FCC was authorized to adopt the broadband conditions even when the Commission classified broadband Internet access as an information service.

i. Petitioners principally contend that the requirement that certain subsidy recipients offer broadband service upon a customer's "reasonable request" amounts to common-carrier regulation. Cellular South-RICA Pet. 15-32; U.S. Cellular Pet 29-30. Petitioners maintain that, by applying this requirement to broadband Internet access when it was classified as an information service, the FCC violated 47 U.S.C. 153(51), which provides that "[a] telecommunications carrier shall be treated as a common carrier under [the Act] only to the extent that it is engaged in providing telecommunications services." For two reasons, petitioners are wrong in arguing that the challenged requirement amounts to common-carrier regulation.

First, as the decisions on which petitioners principally rely explain, a service provider is subjected to common-carrier status only when it is "forced to offer service indiscriminately and on general terms," *Verizon* v. *FCC*, 740 F.3d 623, 652 (D.C. Cir. 2014), and cannot "make individualized decisions, in particular cases, whether and on what terms to deal," *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 701 (1979) (citation omitted). The "reasonable request" condition at issue here does not impose such a requirement. Subsidy recipients "are free to offer their broadband services on terms they choose, and may offer different pricing structures to different areas of the country"—or even within the same area—"subject only to the condition that the rates they offer in rural areas fall within a 'reasonable range of urban rates for reasonably comparable broadband service.'" *Connect Am. Fund*, 29 F.C.C.R. 7051, 7095 ¶ 125 (2014) (quoting Pet. App 382a).[6]

Second, even if petitioners were correct that an outright mandate to offer service upon reasonable request would qualify as common-carrier regulation, the FCC's order does not adopt such a requirement. Instead, it "merely imposes broadband-related conditions" on carriers that "voluntarily seek to participate" in the subsidy program. Pet. App. 132a. That "funding condition" is "unlike common carrier regulation because providers voluntarily assume the condition in exchange for support and retain[] the ability to

[6] Under the FCC's rules, there is a rebuttable presumption that rural broadband rates are "reasonably comparable" if they fall below a rate benchmark established annually based on a survey of urban rates. 47 C.F.R. 54.313(a)(12); *Connect Am. Fund*, 29 F.C.C.R. 13,485 (2014).

opt out of [the condition] entirely" by declining to seek subsidies. *Ibid.* (citations and internal quotation marks omitted; brackets in original).

Petitioners correctly acknowledge that the FCC may "impose funding conditions which promote the purposes identified by Congress in the Act." Cellular South-RICA Pet. 27; see *e.g.*, *Qwest Commc'ns Int'l Inc.* v. *FCC*, 398 F.3d 1222, 1238 (10th Cir. 2005) (upholding conditions on universal-service subsidies); *TOPUC* v. *FCC*, 183 F.3d 393, 444 (5th Cir. 1999) (same), cert. denied, 530 U.S. 1210 (2000). That is what the Commission has done here. The broadband conditions ensure that universal-service subsidies are used in furtherance of Congress's direction that "[a]ccess to advanced telecommunications *and information services* [be] provided in all regions of the Nation," including in "rural, insular, and high cost areas." 47 U.S.C. 254(b)(2)-(3) (emphasis added); see Pet. App. 352a-354a.

Petitioners maintain that the FCC cannot impose a funding condition that violates the Communications Act. Cellular South-RICA Pet. 23-28. But the broadband conditions do not violate Section 153(51) or any other provision of the Act. Section 153(51) provides that a telecommunications carrier shall be "treated as a common carrier under [the Communications Act] only to the extent that it is engaged in providing telecommunications services." 47 U.S.C. 153(51). A carrier that is required to offer service upon reasonable request only by virtue of a funding condition is not "treated as a common carrier under [the Act]" because the obligations arise from the carrier's voluntary choice to seek and accept the funds.[7]

ii. Petitioners dispute the court of appeals' holding that 47 U.S.C. 254(e) authorizes the use of universal-service funding to support the construction of broadband facilities. Under Section 254(e), only "eligible telecommunications carrier[s]" (ETCs) "shall be eligible to receive Federal universal service support." 47 U.S.C. 254(e). An ETC, in turn, is a "common carrier" that "offer[s] the services that are supported by Federal universal service support mechanisms under section 254(c)." 47 U.S.C. 214(e)(1). Petitioners argue that an entity cannot be a "common carrier" eligible for ETC designation and universal-service subsidies when it provides an "information service" like broadband. U.S. Cellular Pet. 29-30; Cellular South-RICA Pet. 26-27.

Petitioners' argument overlooks the settled principle that "one can be a common carrier with regard to some activities but not others." *National Ass'n of Regulatory Util. Comm'rs* v. *FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976); *Southwestern Bell Tel. Co.* v. *FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994). As the court of appeals explained, "it was entirely reasonable for the [FCC] to conclude that so long as a provider offers

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[7] Cellular South and RICA are wrong in asserting (Pet. 14, 28-29) that the court of appeals' approach to administrative funding conditions is inconsistent with *Electric Power Supply Association* v. *FERC*, 753 F.3d 216 (D.C. Cir. 2014), petition for cert. pending, No. 14-840 (filed Jan. 15, 2015). That case did not involve a condition on federal funds. Rather, the D.C. Circuit held that FERC lacked authority to compel a payment between *private* parties because—in the court's view—the transaction in question occurred in "the retail market" over which FERC had no jurisdiction. *Id.* at 223.

some service on a common carrier basis, it may be eligible for universal service support as an ETC under sections 214(e) and 254(e), even if it offers other services—including 'information services' like broadband Internet access—on a non-common carrier basis." Pet. App. 132a (citation and internal quotation marks omitted).

iii. Finally, U.S. Cellular contends (Pet. 18-28) that Section 706(b) does not independently authorize the Commission to impose the broadband conditions on universal-service support because—in U.S. Cellular's view—Section 706(b) is not a grant of authority at all. The court of appeals correctly rejected that argument. Section 706(b) provides that, if the FCC determines that broadband capability is not "being deployed to all Americans in a reasonable and timely fashion," the Commission "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." 47 U.S.C. 1302(b). Section 706(a) separately requires the FCC to "encourage the deployment on a reasonable and timely basis of [broadband] to all Americans." 47 U.S.C. 1302(a). As the Commission and the court of appeals explained, "it is hard to see what additional work section 706(b) does if it is not an independent source of authority." Pet. App. 46a (quoting *id.* at 339a). That conclusion is consistent with the interpretation adopted by the only other court of appeals to consider the question, which likewise held that "the Commission has reasonably interpreted section 706(b)" as an independent grant of authority that "empower[s] it to take steps to accelerate broadband deployment." *Verizon*, 740 F.3d at 641.

2. Petitioner Allband asserts (Pet. 18-38) a variety of statutory and constitutional challenges to the presumptive $250 per-line cap on universal-service subsidies. For three reasons, those claims do not warrant further review.

First, the claims are unripe because—as Allband concedes (Pet. 16)—Allband is not now and may never be subject to the $250 cap. The FCC granted Allband a three-year waiver and invited it to seek renewal of the waiver for additional periods. *Allband Commc'ns Coop. Petition for Waiver of Certain High-Cost Universal Serv. Rules*, 27 F.C.C.R. 8310, 8315 ¶ 16 (2012) (*Allband*). In December 2014, Allband filed a renewal petition, which remains pending. Allband Pet. 16 n.15. The cap will be applied to Allband only if, at some point in the future, one of its renewal requests is denied. "A claim is not ripe for adjudication" where, as here, "it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas* v. *United States*, 523 U.S. 296, 300 (1998) (citation and internal quotation marks omitted).

Second, most of Allband's claims are not properly presented in this case. Allband does not appear to challenge the Commission's authority to adopt a $250 per-line cap as a general matter. Instead, it asserts that the "application of the per-line cap to Allband" is unlawful because of Allband's "unique" circumstances. Pet. 18; see Pet. 18-38. But the Commission recognized that the application of the cap could be inappropriate in some cases, and it therefore established a procedure for carriers to seek a waiver based on their particular financial circumstances—a procedure that Allband has now invoked to secure relief. Pet. App. 519a-520a. Allband's real complaint thus appears to be that the Commission denied its request for a permanent waiver, and instead required it to reapply after three years. See Pet. 29-30. But the Commission's decision on Allband's waiver request was made in a separate administrative proceeding, and the denial of a permanent waiver thus is not subject to review in this case.

Third, Allband's claims are meritless. Allband advances a variety of constitutional and statutory theories, but all of them rest on the premise that the FCC lacked authority to cap Allband's future universal-service subsidies because Allband borrowed money and made investments in reliance on the previous level of support. That premise is unfounded. As the court of appeals explained, Allband has not identified any legal basis for its claimed entitlement to the continued receipt of a particular level of federal subsidies. The FCC "never represented to Allband that [universal-service] funding would remain constant for the duration of Allband's loan * * * or, for that matter, any other set length of time." Pet. App. 126a.

3. Petitioner National Association of Regulatory Utility Commissioners (NARUC) contends that the FCC lacked authority to establish bill-and-keep as the default method of intercarrier compensation for all telecommunications traffic exchanged with LECs. The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of this Court or another court of appeals.

a. The FCC, after notice-and-comment proceedings, interpreted Sections 201(b) and 251(b)(5) of the Communications Act to authorize it to adopt a bill-and-keep methodology. That interpretation is entitled to the full measure of deference under *Chevron*. See, *e.g.*, *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1874-1875 (2013); *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999). The Commission's reading of the relevant statutory provisions is therefore controlling unless "the statutory text forecloses [its] assertion of authority." *City of Arlington*, 133 S. Ct. at 1871. Applying that well-established *Chevron* framework, the court of appeals correctly held that the FCC's interpretation was reasonable and entitled to deference. Pet. App. 174a-208a.

Section 251(b)(5) requires LECs to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. 251(b)(5). As the Commission explained, the Act's broad definition of "telecommunications" includes "communications traffic of any geographic scope," including "'local,' 'intrastate,' or 'interstate'" calls. Pet. App. 859a; see 47 U.S.C. 153(50). Section 251(b)(5) contains no limiting language restricting the reciprocal-compensation obligation to local traffic or any other subset of the "telecommunications" exchanged with LECs.[8] The Commission therefore reasonably concluded that Section 251(b)(5)'s reciprocal-compensation obligation applies to all telecommunications traffic exchanged with LECs, including "traffic that traditionally has been classified as access

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[8] By contrast, Congress was explicit when it addressed only a subset of telecommunications. See, *e.g.*, 47 U.S.C. 254(d) (requiring carriers "that provide[] *interstate* telecommunications services" to contribute to the federal universal-service fund (emphasis added)); 47 U.S.C. 271(c)(2)(B)(iv)-(vi) (referencing "[l]ocal loop[s]," "[l]ocal transport," and "[l]ocal switching" (emphases added)).

traffic" and governed by federal and state access charges. Pet. App. 860a.

Section 251(g) reinforces the FCC's reading. That provision requires LECs to continue to provide "exchange access * * * to interexchange carriers [*i.e.*, long-distance providers]" in accordance with existing "restrictions and obligations (including receipt of compensation)" until "such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission." 47 U.S.C. 251(g). That transitional requirement encompasses the pre-1996 regime of long-distance access charges, which are "compensation" that interexchange carriers paid to LECs for "exchange access." See *NPRM*, 26 F.C.C.R. at 4705 ¶ 499 & n.710. By specifying that those pre-1996 access charges would continue to apply only until "superseded by regulations prescribed by the Commission," Section 251(g) confirms that the 1996 Act gave the Commission authority to replace them with uniform reciprocal-compensation rules.

The FCC also reasonably concluded that Section 201(b) authorized it to adopt bill-and-keep as the proper default method of reciprocal compensation. Pet. App. 867a-870a. Section 201(b) provides that the Commission "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the Act]." 47 U.S.C. 201(b). That directive "*explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies," *AT&T*, 525 U.S. at 380, including Section 251(b)(5)'s reciprocal-compensation obligation.

The FCC explained that bill-and-keep is the method of reciprocal compensation most consistent with the policies of the Communications Act and the public interest because it "requires carriers to recover the cost of their network through end-user charges, which are potentially subject to competition," rather than by shifting the costs to other carriers. Pet. App. 838a-839a. The Commission also found that, due to technological changes, "the incremental cost of call termination is very nearly zero," such that "an efficient, positive intercarrier compensation charge" would be exceedingly small—on the order of "$0.0000001 per minute." *Id.* at 852a-853a. The Commission explained that "[e]xact identification of efficient termination charges would be extremely complex," and that "the benefits obtained from imposing even a very careful estimate" of such charges "would be more than offset by the considerable costs of doing so." *Id.* at 853a.

b. NARUC asserts various challenges to the Commission's adoption of a uniform default bill-and-keep methodology. Those arguments lack merit.

i. NARUC principally contends (Pet. 21-27) that, by preempting state access charges for intrastate long-distance calls, the FCC contravened statutory provisions preserving state authority. Section 152(b) of the Communications Act provides that, with specified exceptions, "nothing in [the Act] shall be construed to apply or give the Commission jurisdiction with respect to * * * charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." 47 U.S.C. 152(b). Section 601(c)(1) of the 1996 Act provides that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." 47 U.S.C.

152 note. NARUC asserts (Pet. 25-26) that those provisions preclude *Chevron* deference by requiring the FCC to "construe preemptive portions of the Act *narrowly*" unless Congress unambiguously displaced state authority (internal quotation marks omitted).

NARUC does not cite any authority endorsing that reading of Sections 152(b) and 601(c)(1), and this Court rejected a materially identical argument in *AT&T*. In that case, the court of appeals had read Section 152(b) to "create[] a presumption in favor of preserving state authority over intrastate communications" that required a "clear" statement of congressional intent to displace state law. 525 U.S. at 375. This Court declined to adopt such a clear-statement rule and instead emphasized that, consistent with ordinary *Chevron* principles, ambiguities in the 1996 Act are to be "resolved by the implementing agency." *Id.* at 397. The Court explained that Section 251—among other provisions added by the 1996 Act—"clearly 'appl[ies]' to intrastate service," and that the 1996 Act had thus "removed a significant area from the States' exclusive control" in favor of a "new *federal* regime [that] is to be guided by federal-agency regulations." *Id.* at 378 n.6, 379, 381 n.8.

Accordingly, as the court of appeals explained in this case, NARUC's argument is foreclosed by *AT&T*. Pet. App. 186a-187a. NARUC makes no attempt to reconcile its position with this Court's decision, relying instead (Pet. 26 n.31) on the dissenting opinions that would have adopted a different reading of Section 152(b).

ii. NARUC further contends (Pet. 28-31) that the Commission's adoption of a bill-and-keep methodology violated Section 252(c) and (d). Those provisions govern the process for resolving disputes that arise when another carrier seeks access to an incumbent LEC's network in order to provide competing service. See 47 U.S.C. 252(a). Section 252 directs that such disputes shall be resolved through arbitration before state utility commissions, and Section 252(c)(2) specifically requires that the state commission "shall establish any rates for interconnection, services, or network elements according to subsection (d)." 47 U.S.C. 252(c)(2). Section 252(d)(2)(A), in turn, requires the state commission to determine just and reasonable "terms and conditions for reciprocal compensation" between the LECs under Section 251(b)(5). 47 U.S.C. 252(d)(2)(A). NARUC contends that the FCC's bill-and-keep methodology violates those provisions by effectively setting an intercarrier-compensation rate of zero and thereby displacing state commissions' authority to establish rates.[9]

The court of appeals correctly rejected NARUC's argument. The court explained that, although Section 252(c)(2) preserves state commissions' authority to "establish any rates" for a number of different matters governed by Subsection (d), Section 252(d)'s provision specifically addressing reciprocal compensation "expressly allows" bill-and-keep arrangements that *eliminate* intercarrier rates. Pet. App. 197a-198a. Section 252(d)(2)(B)(i) states that "[t]his paragraph shall not be construed to preclude arrangements that afford the mutual recovery of costs through the offsetting of re-

[9] NARUC also appears to challenge (Pet. 28) certain interim rate caps that the FCC adopted to ease the transition to bill-and-keep. That claim is not properly before this Court because the court of appeals correctly held that NARUC had forfeited it below. Pet. App. 200a n.5.

ciprocal obligations, including arrangements that waive mutual recovery (*such as bill-and-keep* arrangements)." 47 U.S.C. 252(d)(2)(B)(i) (emphasis added). That provision refutes NARUC's contention that Section 252(c) and (d) barred the Commission from prescribing a bill-and-keep methodology. Consistent with Section 252(d)(2)(A), the Commission's rules continue to allow state commissions to determine through arbitration the "terms and conditions for reciprocal compensation" under the bill-and-keep method. 47 U.S.C. 252(d)(2)(A).[10]

There is also no merit to NARUC's contention (Pet. 28-29) that the bill-and-keep rules conflict with this Court's decision in *AT&T*. To the contrary, *AT&T* supports the decision below. This Court held that the Commission's Section 201(b) rulemaking authority allows it to require state commissions to use a particular ratemaking methodology in arbitrations under Section 252(c)(2), so long as the commissions retain the ability to apply that methodology in particular cases. See *AT&T*, 525 U.S. at 384-385. Here, the Commission has exercised similar authority to prescribe a methodology that—consistent with Section 252(d) itself—*eliminates* the need for intercarrier rates, while preserving state commissions' authority to arbitrate the "terms and conditions" of reciprocal compensation in particular cases. The FCC thus did

[10] That state authority includes the important ability to define the "edge" of a carrier's network—*i.e.*, the "points 'at which a carrier must deliver terminating traffic to avail itself of bill-and-keep.'" Pet. App. 199a, 203a (quoting *id.* at 874a-875a).

not usurp any authority granted to state commissions under Section 252(c) and (d).[11]

iii. NARUC asserts (Pet. 31) that the bill-and-keep methodology violates Section 252(d)(2)(A)'s requirement that rates cover the "additional cost of terminating" covered calls. As the court of appeals explained, however, bill-and-keep complies with that standard by providing for the mutual and reciprocal recovery of costs because "each carrier obtains an 'in kind' exchange" of services—*i.e.*, the transport and termination by the other carrier of traffic that originates on its network. Pet. App. 204a-205a.[12]

iv. Finally, NARUC advances a series of statutory arguments intended to demonstrate (Pet. 35-38) that Section 251(b)(5)'s reciprocal-compensation obligation applies only to traffic within a single calling area, and does not extend to long-distance access traffic. All of those arguments are unpersuasive.

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[11] Nor does the court of appeals' decision conflict with the Eighth Circuit's decision in *Iowa Utilities Board* v. *FCC*, 219 F.3d 744 (2000), aff'd in part, rev'd in part, *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467 (2002). In that case, the Eighth Circuit vacated "proxy" prices that the FCC had adopted for use in Section 252 proceedings because it concluded that the Commission had "expressly disavowed" them before this Court in *AT&T*. *Id.* at 756. The Eighth Circuit principally held that the FCC was judicially "estopped from trying to revive the proxy prices now"—a procedural holding that does not conflict with the merits ruling below. *Ibid.* In addition, the Eighth Circuit correctly observed that this Court's decision in *AT&T* "held that the FCC 'has jurisdiction to design a pricing methodology.'" *Id.* at 757 (quoting *AT&*T, 525 U.S. at 385). That is what the Commission has done here.

[12] The decision to provide for a reciprocal in-kind recovery of costs was further supported by the Commission's finding that "the incremental cost of call termination is very nearly zero." Pet. App. 853a.

First, NARUC contends (Pet. 35) that Section 251(b)(5) must be limited to local traffic because the ratemaking standard in Section 252(d)(2)(A) contemplates the "recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." As NARUC observes (Pet. 35), that ratemaking standard is inconsistent with access traffic (*i.e.*, traffic exchanged with long-distance carriers, or IXCs) because "[c]alls do not originate or terminate on IXC networks."

Contrary to NARUC's argument, however, there is no sound basis for incorporating into Section 251(b)(5) that limitation in Section 252(d)(2)(A). Because Section 252(d)(2)(A) applies only to arrangements between LECs, it is unsurprising that the provision contains requirements consistent only with such arrangements. Pet. App. 872a. But Section 251(b)(5) is broader, applying without limitation to all "transport and termination of telecommunications" exchanged with LECs. 47 U.S.C. 251(b)(5). And while Section 252(d)(2)(A) incorporates Section 251(b)(5), "there is nothing in § 252(d)(2) to suggest that it limits the scope of § 251(b)(5)" to that context alone. Pet. App. 183a; see *ibid.* ("[Section 251(b)(5)] is incorporated into § 252(d)(2), but not the other way around.").

Second, NARUC asserts (Pet. 35-36) that Section 251(b)(5) cannot reasonably be read to reach access traffic because historically access charges ran only in one direction—from the long-distance carrier to the LEC—and thus were not "reciprocal." But the historical direction of access charges is neither an inherent feature of long-distance traffic nor one codified by the 1996 Act. To the contrary, it is merely the result of the pre-1996 intercarrier-compensation system that the FCC has now replaced with a default reciprocal compensation methodology—bill-and-keep—that the 1996 Act specifically approved. See 47 U.S.C. 252(d)(2)(B)(i).[13]

Third, NARUC argues (Pet. 37-38) that the Commission's reading of Section 251(b)(5) to reach access traffic conflicts with the established meaning of "reciprocal compensation," which NARUC asserts is a term of art limited to compensation for local traffic. "Reciprocal compensation," however, refers to a *method* of compensation. It does not specify the *type* of traffic to be compensated.

On that question, Congress provided without limitation that the reciprocal-compensation obligation applies to "the transport and termination of telecommunications." 47 U.S.C. 251(b)(5). Thus, although some state commissions had applied a "reciprocal compensation" methodology to local traffic before the 1996 Act, that usage does not suggest that "reciprocal compensation" can be applied *only* to such local traffic, particularly given the Act's broad statutory definition of "telecommunications."[14] Any doubt on that score is removed by Section 251(g), which makes clear

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[13] In any event, one-way compensation is not inconsistent with Section 251(b)(5). The statute's reciprocal-compensation provision has been applied to the exchange of traffic with paging carriers, even though in that circumstance "the compensation flows only one way." Pet. App. 181a (citing *Pacific Bell* v. *Cook Telecom, Inc.*, 197 F.3d 1236, 1242-1244 (9th Cir. 1999)).

[14] Cf. *Jama* v. *Immigration & Customs Enforcement,* 543 U.S. 335, 349 (2005) (courts do not presume congressional intent to incorporate a prior judicial construction unless "the supposed judicial consensus [is] so broad and unquestioned that [the Court] must presume Congress knew of and endorsed it").

that Section 251 authorizes the Commission to "supersede[] by regulations" the previous regime of access charges. 47 U.S.C. 251(g).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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