Nos. 23-456 and 23-743

# In the Supreme Court of the United States

CONSUMERS' RESEARCH, ET AL., PETITIONERS

*v.*

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

CONSUMERS' RESEARCH, ET AL., PETITIONERS

*v.*

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SIXTH AND ELEVENTH CIRCUITS*

**BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION**


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## QUESTIONS PRESENTED

1. Whether 47 U.S.C. 254(d), which requires telecommunications providers to contribute to a universal-service fund, violates the nondelegation doctrine.

2. Whether the Federal Communications Commission violated the Constitution by appointing a private entity to provide billing, accounting, and related administrative services for the universal-service program.

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# In the Supreme Court of the United States

No. 23-456

CONSUMERS' RESEARCH, ET AL., PETITIONERS

*v.*

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 23-743

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*v.*

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SIXTH AND ELEVENTH CIRCUITS*

**BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION**

## OPINIONS BELOW

In No. 23-456, the opinion of the court of appeals (Pet. App. 1a-46a*) is reported at 67 F.4th 773. In No. 23-743, the opinion of the court of appeals (23-743 Pet. App. 1a-43a) is reported at 88 F.4th 917.

* We use "Pet." and "Pet. App." to refer to filings in No. 23-456, and "23-743 Pet." and "23-743 Pet. App." to refer to filings in No. 23-743.

## JURISDICTION

In No. 23-456, the judgment of the court of appeals was entered on May 4, 2023. A petition for rehearing was denied on May 30, 2023 (Pet. App. 56a-57a). On August 1, 2023, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including October 27, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

In No. 23-743, the judgment of the court of appeals was entered on December 14, 2023. The petition for a writ of certiorari was filed on January 5, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

### A. Legal Background

1. The Communications Act of 1934 (Act), 47 U.S.C. 151 *et seq.*, establishes the Federal Communications Commission (FCC or Commission) and empowers it to regulate telecommunications carriers. The Commission's mission includes achieving "universal service," see 47 U.S.C. 254—*i.e.*, ensuring that "everyone in the United States has access to critical telecommunications services," *AT&T, Inc.* v. *FCC*, 886 F.3d 1236, 1239 (D.C. Cir. 2018).

The Act defines "universal service" as "an evolving level of telecommunications services that the Commission shall establish periodically," "taking into account advances in telecommunications and information technologies and services." 47 U.S.C. 254(c)(1). It directs the FCC to promote universal service through subsidy programs known as "universal service support mechanisms." *Ibid.* The Act requires "[e]very telecommunications carrier that provides interstate telecommunica-

tions services [to] contribute, on an equitable and nondiscriminatory basis, to the * * * mechanisms established by the Commission to preserve and advance universal service." 47 U.S.C. 254(d).

The Act's provisions guide and limit the FCC's exercise of that authority. The Act requires the Commission to "base policies for the preservation and advancement of universal service" on a series of specific "principles" —for example, the principle that consumers in rural areas "should have access to telecommunications and information services * * * that are reasonably comparable to those services provided in urban areas." 47 U.S.C. 254(b)(3); see 47 U.S.C. 254(b). The Act also requires the agency, when deciding whether to support a service through "universal service support mechanisms," to consider certain factors—for example, the extent to which the service in question is "essential to education, public health, or public safety." 47 U.S.C. 254(c)(1)(A); see 47 U.S.C. 254(c)(1).

2. In accordance with the Act, the FCC has created four universal-service programs, which assist (1) deployment in remote areas, (2) low-income consumers, (3) schools and libraries, and (4) rural healthcare providers. See 47 C.F.R. 54.302-54.321, 54.400-54.423, 54.500-54.523, 54.600-54.633, 54.801-54.1515. All four programs subsidize telephone and broadband 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).

The FCC has appointed the Universal Service Administrative Company (Company) as the Administrator of those four programs. See 47 C.F.R. 54.701(a). The Company is an independent, not-for-profit, private corporation whose directors include representatives of in-

dustry groups, consumer groups, tribal communities, and recipients of universal-service funding. See 47 C.F.R. 54.703(b). The directors are nominated by the groups they represent and are appointed by the Chair of the Commission. See 47 C.F.R. 54.703(c).

As its title suggests, the Administrator's role is purely administrative. It is responsible for "billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds." 47 C.F.R. 54.702(b). 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). "Where the Act or the Commission's rules are unclear, or do not address a particular situation," the Administrator must "seek guidance from the Commission." *Ibid.* The Administrator must comply with detailed regulations issued by the FCC, see 47 C.F.R. 54.701-54.717, and any party that is aggrieved by its decisions may request de novo review by the Commission, see 47 C.F.R. 54.719-54.725.

The Administrator helps the FCC compute the amount of each quarterly payment that telecommunications carriers must contribute toward universal service. See 47 C.F.R. 54.709. Before each quarter, the Administrator submits to the Commission its projections of the expenses that the four universal-service programs will incur and the revenues that telecommunications carriers will earn through interstate and international telecommunications services. See 47 C.F.R. 54.709(a)(3). The Commission uses those projections to compute a "contribution factor"—a number that is based on the ratio of the projected expenses to the projected revenues. 47 C.F.R. 54.709(a)(2).

The FCC then announces to the public the projections and the proposed contribution factor. See 47 C.F.R. 54.709(a)(3). The Commission may revise the projections (and thus the contribution factor) and may set them "at amounts that the Commission determines will serve the public interest." *Ibid.* If the FCC takes no action within 14 days after the announcement of the proposed contribution factor, however, the factor is "deemed approved." *Ibid.* Once the Commission approves the contribution factor, the Administrator calculates each carrier's contribution by applying the factor to that carrier's "contribution base" (generally, the carrier's projected interstate and international telecommunications revenues). *Ibid.* Carriers may pass on to customers the cost of their contributions. See 47 C.F.R. 54.712(a).

**B. No. 23-456**

1. In August and September 2021, the Administrator submitted its projections of expenses and revenues for the fourth quarter of 2021. See Pet. App. 48a & n.5. Based on those projections, the Commission proposed a contribution factor of 29.1%. See *id.* at 47a.

In response, petitioners—a nonprofit organization, a carrier, and a group of consumers—filed a comment requesting that the FCC set the contribution factor at 0% instead. See Pet. App. 3a, 15a. Petitioners did not object to the Administrator's projections or to the Commission's computation of the contribution factor based on those projections. Petitioners instead argued that the universal-service program was itself unlawful. See *id.* at 15a. As relevant here, they argued that Congress had unconstitutionally delegated legislative power to the FCC and that the Commission had unconstitutionally redelegated power to the Administrator. See *ibid.*

The Commission took no further action within 14 days after publishing the proposed contribution factor. See 21-3886 Gov't C.A. Br. 18. As a result, the factor was deemed approved. See Pet. App. 15a.

2. Petitioners filed a petition for review in the Sixth Circuit. See Pet. App. 3a. The court denied the petition. See *id.* at 1a-46a.

The court of appeals first held that Congress had not unlawfully delegated legislative power to the FCC by empowering it to collect contributions to the universal-service program. See Pet. App. 23a-42a. The court observed that Congress's grant of authority to an executive agency does not amount to a delegation of legislative power if Congress has established an "intelligible principle" to guide the agency's exercise of that authority. *Id.* at 24a (citation omitted). The court concluded that the Act's universal-service provisions satisfy that test. See *id.* at 31a-42a. It emphasized that the statute sets forth several "fairly detailed" principles to which universal-service policies must conform. *Id.* at 31a-32a; see 47 U.S.C. 254(c)(1). And it explained that other provisions of the Act, read in light of the statute's purpose and history, "sufficiently limit the FCC's discretion." Pet. App. 41a-42a; see *id.* at 37a-42a.

The court of appeals also held that the FCC had not unconstitutionally delegated governmental power to a private entity by utilizing the Company as the universal-service programs' Administrator. See Pet. App. 42a-46a. The court emphasized that the Administrator performs "ministerial" functions such as "billing the contributing carriers" and "disbursing the universal-service funds." *Id.* at 45a-46a. It noted that the Administrator exercises no "decision-making power" and that

the Commission "is not bound by [the Administrator's] projections." *Id.* at 44a, 46a.

**C. No. 23-743**

1. In August and September 2022, the Administrator submitted its projections of expenses and revenues for the fourth quarter of 2022. See 23-743 Pet. App. 45a & n.5. Based on those projections, the Commission proposed a contribution factor of 28.9%. See *id.* at 44a.

In response, petitioners—the same nonprofit organization and carrier as in No. 23-456, joined by an overlapping but different group of consumers—filed comments requesting that the FCC set the contribution factor at 0% instead. See 23-743 Pet. App. 3a; 22-13315 Gov't C.A. Br. 17-19. As in No. 23-456, petitioners did not object to the Administrator's projections or to the Commission's computation of the contribution factor based on those projections. Petitioners instead argued, once more, that the universal-service program was itself unlawful—in particular, that Congress had unconstitutionally delegated legislative power to the FCC and that the Commission had unconstitutionally redelegated power to the Administrator. See 22-13315 Gov't C.A. Br. 19.

The FCC took no further action within 14 days after publishing the proposed contribution factor. See 22-13315 Gov't C.A. Br. 19. As a result, the factor was deemed approved. See *ibid.*

2. Petitioners filed a petition for review in the Eleventh Circuit. See 23-743 Pet. App. 3a. The court denied the petition. See *id.* at 1a-43a.

The court of appeals first held that Congress had not unlawfully delegated legislative power to the FCC by empowering it to collect contributions to the universal-service program. See 23-743 Pet. App. 7a-10a. The court

observed that Congress's grant of authority to an executive agency does not amount to a delegation of legislative power if Congress has established an "intelligible principle" to guide the agency's exercise of that authority. *Id.* at 7a (citation omitted). It concluded that the Act's universal-service provisions satisfy that test. See *id.* at 8a-10a. The court emphasized that the statute sets forth several "general principles" to which universal-service policies must conform. *Id.* at 9a; see 47 U.S.C. 254(b). It stated that, "[b]ecause Congress is afforded wide latitude to delegate authority to executive agencies, these limits suffice." 23-743 Pet. App. 10a.

The court of appeals also held that the FCC had not unconstitutionally delegated governmental power to a private entity by utilizing the Company as the universal-service programs' Administrator. See 23-743 Pet. App. 10a-18a. The court emphasized that the Administrator performs "ministerial" functions such as "billing contributors" and "disbursing universal service support funds." *Id.* at 14a (citations omitted). It also noted that the Commission "maintains deep and meaningful control" over the Administrator's actions. *Id.* at 17a.

Judge Newsom issued an opinion concurring in the judgment. See 23-743 Pet. App. 20a-42a. He agreed that Section 254(d) satisfies the nondelegation doctrine "under existing precedent," *id.* at 28a, but he questioned that precedent as a matter of "constitutional first principles," *id.* at 20a. He also agreed with the court of appeals' rejection of petitioners' private nondelegation challenge to the Administrator's role, see *id.* at 29a, but suggested that petitioners could have challenged the Administrator's activities on statutory or Article II grounds, see *id.* at 30a-41a.

Judge Lagoa issued a concurring opinion. See 23-743 Pet. App. 43a. She stated that she shared many of Judge Newsom's concerns about "the current nondelegation doctrine," but she agreed that petitioners' claim failed under "the intelligible principle test as set forth by Supreme Court precedent." *Ibid.*

**ARGUMENT**

Petitioners contend (Pet. 19-29; 23-743 Pet. 21-34) that 47 U.S.C. 254(d) violates the nondelegation doctrine by empowering the FCC to collect universal-service contributions. They also contend (Pet. 30-33; 23-743 Pet. 34-38) that the Commission violated the Constitution by utilizing a private entity to provide billing, accounting, and related administrative services for the universal-service program. The Sixth and Eleventh Circuits correctly rejected petitioners' claims, and their decisions do not conflict with any decision of this Court or of another court of appeals. The petitions for writs of certiorari should be denied.

1. Petitioners' challenge to Section 254 does not warrant this Court's review.

a. Although Congress may not delegate legislative power to the executive, it may seek the executive's "assistance" "by vesting discretion in [executive] officers to make public regulations interpreting a statute and directing the details of its execution." *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928). If a statute sets forth an "intelligible principle to which the person or body authorized to [act] is directed to conform," the statute effects a permissible grant of discretion, not a "forbidden delegation of legislative power." *Id.* at 409. "Only twice in this country's history" has the Court "found a delegation excessive." *Gundy* v. *United States*, 139 S. Ct. 2116, 2129 (2019) (plurality opinion).

The Court has "over and over upheld even very broad delegations." *Ibid.*

The courts of appeals correctly held that the Act sets forth intelligible principles that guide and limit the FCC's exercise of discretion in collecting universal-service contributions. First, the Act requires the Commission to "base policies for the preservation and advancement of universal service" on six specific "principles," 47 U.S.C. 254(b):

- "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 * * * should have access to 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." 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." 47 U.S.C. 254(b)(6).

Second, the Act specifies the entities that must pay universal-service contributions and the terms on which they must do so. See 47 U.S.C. 254(d). "Every telecommunications carrier that provides interstate telecommunications services" must contribute toward universal service. *Ibid.* Those contributions must be made "on an equitable and nondiscriminatory basis." *Ibid.*

Third, the Act specifies the types of services that the FCC may fund. See 47 U.S.C. 254(c). Generally, only "telecommunications services" may receive universal-service support. 47 U.S.C. 254(c)(1); see 47 U.S.C. 153(53) (defining "telecommunications service"). And in determining which telecommunications services to fund, the Commission must consider the extent to which particular services "are essential to education, public health, or public safety"; have "been subscribed to by a substantial majority of residential customers"; "are being deployed in public telecommunications networks by telecommunications carriers"; and "are consistent with the public interest, convenience, and necessity." 47 U.S.C. 254(c)(1).

Fourth, the Act identifies the beneficiaries that may receive subsidies and the ways in which the subsidies may be used. See 47 U.S.C. 254(e) and (h). "[O]nly an eligible telecommunications carrier designated under [47 U.S.C. 214(e)] shall be eligible to receive specific Federal universal service support." 47 U.S.C. 254(e); see 47 U.S.C. 214(e) (specifying criteria for designating telecommunications carriers eligible to receive universal-service funding). A carrier may use the funds "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 U.S.C. 254(e). The Act also includes detailed provisions

governing subsidies for rural healthcare providers, schools, and libraries. See 47 U.S.C. 254(h).

Finally, the Act requires universal-service support to be "sufficient to achieve the purposes" of Section 254, 47 U.S.C. 254(e), and it specifies that services should be "affordable," 47 U.S.C. 254(b)(1)(A). Those provisions constrain the overall "size and budget" of the program. Pet. App. 39a. The sufficiency requirement precludes the FCC from expanding the program beyond "what is 'sufficient to achieve the purposes of' universal service." *Ibid.* (citation omitted); see *Alenco Commc'ns, Inc.* v. *FCC*, 201 F.3d 608, 620 (5th Cir. 2000) ("[E]xcessive funding may itself violate the sufficiency requirements of the Act."). And the affordability principle precludes the Commission from allowing the universal-service contribution to become "so large it actually makes telecommunications services less 'affordable.'" *Rural Cellular Ass'n* v. *FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009); see *Alenco*, 201 F.3d at 620 ("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.").

The Act, in short, provides "comprehensive and substantial guidance" to the FCC "on how to implement Congress's universal-service policy." Pet. App. 33a. The Act's provisions "sufficiently limit the [Commission's] discretion" to satisfy the nondelegation doctrine. *Id.* at 42a; see 23-743 Pet. App. 10a.

b. Petitioners' contrary arguments lack merit. Petitioners contend (Pet. 24-25; 23-743 Pet. 28) that Section 254 violates the nondelegation doctrine because it im-

poses "vague" standards and lacks "objective" limits. But the nondelegation doctrine permits Congress to rely on abstract, qualitative standards; it does not require Congress to adopt a "determinate criterion." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 475 (2001) (citation omitted). This Court has upheld statutes that empowered executive agencies to regulate in the "public interest," see *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225-226 (1943); to set prices that are "fair and equitable," see *Yakus* v. *United States*, 321 U.S. 414, 422 (1944); and to establish air-quality standards to "protect the public health," see *American Trucking Ass'ns*, 531 U.S. at 472-476. Section 254's detailed provisions fit "comfortably within the scope of discretion permitted by [this Court's] precedent." *Id.* at 476.

Petitioners also contend (Pet. 25; 23-743 Pet. 3) that the universal-service principles in Section 254(b) do not constrain the FCC because they are merely "precatory." That is incorrect. The Act provides that "the Commission *shall* base policies for the preservation and advancement of universal service on [those] principles." 47 U.S.C. 254(b) (emphasis added). And while the Commission may "balance the principles against one another when they conflict," it "may not depart from them altogether to achieve some other goal." *Qwest Corp.* v. *FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001). Courts have set aside universal-service policies when the Commission has failed to adhere to the statutory principles. See, *e.g.*, *Qwest Commc'ns Int'l Inc.* v. *FCC*, 398 F.3d 1222, 1232-1238 (10th Cir. 2005); *Qwest*, 258 F.3d at 1199-1200.

Petitioners further argue (Pet. 27-28; 23-743 Pet. 27-28) that Section 254 improperly authorizes the FCC to

adopt additional universal-service principles beyond those listed in the Act. See 47 U.S.C. 254(b)(7). But the Commission's power to adopt such principles is itself constrained by an intelligible standard: the additional principles must be "necessary and appropriate for the protection of the public interest, convenience, and necessity," and must be "consistent with" the Act. *Ibid.* And in any event, no question concerning the scope of that authority is presented in these cases, since the specific FCC orders that petitioners challenge do not adopt any such additional principles. See Pet. App. 47a-55a; 23-743 Pet. App. 44a-52a.

Petitioners also argue (*e.g.*, Pet. 20-22; 23-743 Pet. 21) that this Court should review Section 254 under an especially demanding nondelegation standard because the Act empowers the FCC to raise revenue. But the 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). Nothing in Article I's text "distinguish[es] Congress' power to tax from its other enumerated powers * * * in terms of the scope and degree of discretionary authority that Congress may delegate to the Executive." *Id.* at 220-221. "From its earliest days to the present," Congress "has varied the degree of specificity and the consequent degree of discretionary authority delegated to the Executive" in tax statutes. *Id.* at 221. And the Court has repeatedly applied ordinary nondelegation principles even in reviewing revenue-raising measures. See, *e.g.*, *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 558-560 (1976); *J.W. Hampton*, 276 U.S. at 409. In short, petitioners' "two-tiered the-

ory of nondelegation" is inconsistent with relevant constitutional text, practice, and precedent. *Skinner*, 490 U.S. at 220.

2. Petitioners' challenge to the functions performed by the Administrator likewise do not warrant review.

The Constitution limits the government's ability to empower a private entity "to regulate the affairs" of other private parties. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311 (1936). The Constitution permits such an assignment of authority only if the entity "function[s] subordinately" to a federal agency and is subject to the agency's "authority and surveillance." *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 399 (1940). The Commission's assignment of administrative functions to a private Administrator complies with those constitutional requirements.

As an initial matter, the Administrator does not exercise any regulatory power over other private parties. The Administrator instead performs "ministerial and fact-gathering functions" for the FCC. Pet. App. 43a. The Administrator is responsible for "billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds." 47 C.F.R. 54.702(b). It "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). "Where the Act or the Commission's rules are unclear," the Administrator must "seek guidance from the Commission." *Ibid.* The Administrator, in short, has no independent "decision-making power." Pet. App. 46a.

The Administrator, in any event, "function[s] subordinately" to the FCC and is subject to its "authority and surveillance." *Sunshine Anthracite Coal*, 310 U.S. at

399. The Commission, not the Administrator, fixes the amount of each quarterly universal-service contribution. The Administrator simply provides the FCC with financial projections that the Commission may use in determining the appropriate amount. See 47 C.F.R. 54.709(a)(3). The Administrator makes those projections in accordance with detailed instructions contained in FCC regulations. See Pet. App. 44a. The Administrator must submit the projections to the Commission at least 60 days before the relevant quarter begins, giving the Commission enough time to review them before adopting a new contribution factor. See 47 C.F.R. 54.709(a)(3). The FCC "is not bound by [the] projections" but instead may reject or modify them if it concludes that such action is in the public interest. Pet. App. 44a.

The Administrator is subject to the FCC's "authority and surveillance" in other ways as well. *Sunshine Anthracite Coal*, 310 U.S. at 399. A "party aggrieved by an action taken by the Administrator" may seek review from the Commission. 47 C.F.R. 54.719(b). The Administrator also is subject to regular audits, which help ensure that it "is properly administering the universal service support mechanisms to prevent fraud, waste, and abuse." 47 C.F.R. 54.717.

Petitioners argue (Pet. 32; 23-743 Pet. 7) that, in practice, the FCC does not "meaningfully" review the Administrator's actions. The relevant constitutional question, however, is whether the Commission has the "authority" to reject or modify the Administrator's determinations, not how often the FCC exercises that authority. *Sunshine Anthracite Coal*, 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].”). Petitioners do not deny that the Commission retains plenary authority to review the Administrator’s actions.

In any event, the FCC does conduct meaningful review of the Administrator’s determinations. On several occasions, including twice in 2023, the Commission has departed from the Administrator’s calculations in setting the quarterly contribution factor. See, *e.g.*, FCC, *Proposed Fourth Quarter 2023 Universal Service Contribution Factor*, DA 23-843, 2023 WL 6036237, at *1 (released Sept. 13, 2023); FCC, *Proposed Third Quarter 2023 Universal Service Contribution Factor*, DA 23-507, 2023 WL 4012359, at *1 (released June 14, 2023); FCC, *Revised Second Quarter 2003 Universal Service Contribution Factor,* 18 FCC Rcd 5097, 5097 (released Mar. 21, 2003). The FCC also has awarded relief when it has disagreed with the Administrator’s calculation of the contribution owed by particular carriers. See, *e.g.*, *In re Universal Service Contribution Methodology*, 31 FCC Rcd 13220, 13220 (2016). The relative infrequency with which the FCC revises the Administrator’s decisions reflects the Administrator’s limited role, the detailed regulations constraining the Administrator’s actions, and the Commission’s general oversight of the Administrator’s activities.

3. Petitioners concede (Pet. 34; 23-743 Pet. 38) that “there is no circuit split yet” on the questions presented, but they assert that the en banc Fifth Circuit “is poised to create one” in *Consumers’ Research* v. *FCC*, No. 22-60008 (argued Sept. 19, 2023). But the en banc Fifth Circuit has not yet issued its decision in that case. Once it does so, the parties can determine whether to seek,

and this Court can determine whether to grant, certiorari to review that decision. For now, however, the absence of any circuit conflict counsels in favor of denying the petitions for writs of certiorari.

## CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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