No. _____

In The

Supreme Court of the United States

CELLULAR SOUTH, INC., D/B/A C SPIRE WIRELESS, and RURAL INDEPENDENT COMPETITIVE ALLIANCE,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Communications Commission, which has no statutory authority to regulate broadband Internet access providers as common carriers, *see Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), may nevertheless condition Universal Service Fund payments to such providers on their performance of duties of common carriage, and, if not, whether the Universal Service Fund portions of the Order should be vacated.

PARTIES TO THE PROCEEDING

Cellular South, Inc., d/b/a C Spire Wireless, and the Rural Independent Competitive Alliance, petitioners in this Court, were petitioners in the proceedings before the Tenth Circuit.

The following parties were respondents in the proceedings before the Tenth Circuit:

Federal Communications Commission
United States of America

The following parties were petitioners in the proceedings before the Tenth Circuit:

Adak Eagle Enterprises LLC
Adams Telephone Cooperative
Alenco Communications, Inc.
Allband Communications Cooperative
Arizona Corporation Commission
Arlington Telephone Company
AT&T Inc.
Bay Springs Telephone Company, Inc.
Big Bend Telephone Company, Inc.
The Blair Telephone Company
Blountsville Telephone LLC
Blue Valley Telecommunications, Inc.
Bluffton Telephone Company, Inc.
BPM, Inc.
Brantley Telephone Company, Inc.
Brazoria Telephone Company
Brindlee Mountain Telephone LLC
Bruce Telephone Company
Bugs Island Telephone Cooperative
Cameron Telephone Company, LLC
Cellular Network Partnership, A Limited Partnership
CenturyLink, Inc.

Chariton Valley Telephone Corporation
Chequamegon Communications Cooperative, Inc.
Chickamauga Telephone Corporation
Chickasaw Telephone Company
Chippewa County Telephone Company
Choctaw Telephone Company
Clear Lake Independent Telephone Company
Comsouth Telecommunications, Inc.
Consolidated Communications Holdings, Inc.
Copper Valley Telephone Cooperative
Cordova Telephone Cooperative
Core Communications, Inc.
Crockett Telephone Company, Inc.
Darien Telephone Company
Deerfield Farmers' Telephone Company
Delta Telephone Company, Inc.
Direct Communications Cedar Valley, LLC
Docomo Pacific, Inc.
East Ascension Telephone Company, LLC
Eastern Nebraska Telephone Company
Eastex Telephone Coop., Inc.
Egyptian Telephone Cooperative Association
Elizabeth Telephone Company, LLC
Ellijay Telephone Company
Farmers Telephone Cooperative, Inc.
Flatrock Telephone Coop., Inc.
Franklin Telephone Company, Inc.
Fulton Telephone Company, Inc.
Gila River Indian Community
Gila River Telecommunications, Inc.
Glenwood Telephone Company
Granby Telephone LLC
H & B Communications, Inc.
Halo Wireless, Inc.
Hart Telephone Company
Hiawatha Telephone Company

Holway Telephone Company
Home Telephone Company
(Moncks Corner, SC)
Home Telephone Company (St. Jacob, Ill.)
Hopper Telecommunications Company, Inc.
Horry Telephone Cooperative, Inc.
Interior Telephone Company
The Kansas State Corporation Commission
Kaplan Telephone Company, Inc.
City of Ketchikan, Alaska
KLM Telephone Company
La Harpe Telephone Company, Inc.
Lackawaxen Telecommunications Services, Inc.
Lafourche Telephone Company, LLC
Lakeside Telephone Company
Lincolnville Telephone Company
Loretto Telephone Company, Inc.
Madison Telephone Company
Matanuska Telephone Association, Inc.
McDonough Telephone Coop., Inc.
MGW Telephone Company, Inc.
Mid Century Telephone Coop., Inc.
Mid-Maine Telecom LLC
Midway Telephone Company
Mound Bayou Telephone & Communications, Inc.
The Moundridge Telephone Company of Moundridge, a Kansas business corporation
Moundville Telephone Company, Inc.
Mukluk Telephone Company, Inc.
National Association of Regulatory Utility Commissioners
National Association of State Utility Consumer Advocates

National Telecommunications Cooperative Association
National Telephone of Alabama, Inc.
Nex-Tech Wireless, LLC
North County Communications Corporation
Ontonagon County Telephone Company
Otelco Mid-Missouri LLC
Otelco Telephone LLC
Panhandle Telephone Cooperative, Inc.
Pembroke Telephone Company, Inc.
Pennsylvania Public Utility Commission
People's Telephone Company
Peoples Telephone Company
Piedmont Rural Telephone Cooperative, Inc.
Pine Belt Telephone Company
Pine Telephone Company, Inc.
Pine Tree Telephone LLC
Pioneer Telephone Association, Inc.
Pioneer Telephone Cooperative, Inc.
Poka Lambro Telephone Cooperative, Inc.
PR Wireless, Inc.
Public Service Telephone Company
Public Utilities Commission of Ohio
Ringgold Telephone Company
Roanoke Telephone Company, Inc.
Rock County Telephone Company
Rural Telephone Service Company, Inc.
Saco River Telephone LLC
Sandhill Telephone Cooperative, Inc.
Shoreham Telephone LLC
The Siskiyou Telephone Company
Sledge Telephone Company
South Canaan Telephone Company
South Central Telephone Association
Star Telephone Company, Inc.
Stayton Cooperative Telephone Company

The North-Eastern Pennsylvania Telephone Company
Tidewater Telecom, Inc.
Tohono O'Odham Utility Authority
Totah Communications, Inc.
Transcom Enhanced Services, Inc.
tw telecom inc.
Twin Valley Telephone, Inc.
U.S. TelePacific Corp.
United States Cellular Corporation
Unitel, Inc.
Vermont Public Service Board
The Voice on the Net Coalition, Inc.
War Telephone LLC
West Carolina Rural Telephone Cooperative, Inc.
West Tennessee Telephone Company, Inc.
West Wisconsin Telcom Cooperative, Inc.
Wiggins Telephone Association
Winnebago Cooperative Telecom Association
Windstream Communications, Inc.
Windstream Corporation
Yukon Telephone Co., Inc.

The following parties were intervenors-petitioners in the proceedings before the Tenth Circuit:

3 Rivers Telephone Cooperative, Inc.
Alpine Communications, LC
Arlington Telephone Company
The Blair Telephone Company
Cambridge Telephone Company
Central Texas Telephone Cooperative, Inc.
CenturyLink, Inc.
Clarks Telecommuncations Co.
Connecticut Public Utilities Regulatory Authority
Consolidated Telephone Company

Consolidated Telco, Inc.
Consolidated Telecom, Inc.
The Curtis Telephone Company
Eastern Nebraska Telephone Company
Emery Telcom
Great Plains Communications, Inc.
Hot Springs Telephone Company
Hypercube Telecom LLC
Independent Telephone &
Telecommunications Alliance
K. & M. Telephone Company, Inc.
Level 3 Communications, LLC
Montana Public Service Commission
National Exchange Carrier Association, Inc.
Nebraska Central Telephone Company
Northeast Nebraska Telephone Company
Penasco Valley Telephone Cooperative, Inc.
RCA – The Competitive Carriers Association
Rock County Telephone Company
Ronan Telephone Company
Rural Telecommunications Group, Inc.
Smart City Telecom
Smithville Communications, Inc.
South Slope Cooperative Telephone Co., Inc.
Spring Grove Communications
Sprint Nextel Corporation
Star Telephone Company
T-Mobile USA, Inc.
Three River Telco
Venture Communications Cooperative, Inc.
Virginia State Corporation Commission
Walnut Telephone Company, Inc.
West River Cooperative Telephone Company,
Inc.
Western Telecommunications Alliance

The following parties were intervenors-respondents in the proceedings before the Tenth Circuit:

AT&T Inc.
Comcast Corporation
Cox Communications, Inc.
National Cable & Telecommunications Association
National Exchange Carrier Association, Inc.
National Telecommunications Cooperative Association
Verizon
Verizon Wireless
Vonage Holdings Corporation

The following party was an *amicus curiae* in the proceedings before the Tenth Circuit:

State Members of the Federal-State Joint Board on Universal Service

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Cellular South, Inc., d/b/a C Spire Wireless, is a wholly owned subsidiary of Telapex, Inc., a privately held company. No publicly held company owns more than 10% of Cellular South, Inc.'s stock.

The Rural Independent Competitive Alliance is a not-for-profit corporation representing the interests of rural competitive local exchange carriers (rural CLECs). Its members include rural CLECs, vendors and professional service firms. It has no parent entity and no publicly traded stock.

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The opinion of the United States Court of Appeals for the Tenth Circuit is reported as *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014). The Order of the Federal Communications Commission ("FCC") reviewed therein is reported as *Connect America Fund*, 26 F.C.C.R. 17663 (2011).

JURISDICTION

On November 18, 2011, the FCC issued an extensive order entitled *Connect America Fund*, 26 F.C.C.R. 17663 (2011) ("Order"). The Order was published in the Federal Register on November 29, 2011. 76 Fed. Reg. 73830 (2011).

On December 8, 2011, within the 60 days provided by 28 U.S.C. § 2344, Cellular South, Inc., d/b/a C Spire Wireless, filed a petition for review with the United States Court of Appeals for the Fifth Circuit, invoking its jurisdiction granted by both the Communications Act, 47 U.S.C. § 402(a), and the Hobbs Act, 28 U.S.C. § 2342(1). The Rural Independent Competitive Alliance ("RICA") timely filed its petition with the United States Court of Appeals for the District of Columbia Circuit on January 24, 2012. Many of the parties who had participated in the proceedings before the FCC filed similar petitions, and the Judicial Panel on Multidistrict Litigation, acting pursuant to 28 U.S.C. § 2112(a)(3), consolidated all petitions for consideration before the United States Court of Appeals for the Tenth Circuit. *Consolidation Order of the Judicial Panel on Multidistrict Litigation*, MCP No. 108 (Dec. 14, 2011).

On May 23, 2014, the Tenth Circuit issued its judgment affirming the Order. *In re FCC 11-161*, *supra*. Some petitioners timely filed petitions for

rehearing on July 7, 2014, tolling the time within which certiorari may be sought pursuant to this Court's Rule 13.3. *See Missouri v. Jenkins*, 495 U.S. 33, 45-50 (1990) (applying Rule 13 as it then existed). The Tenth Circuit denied those petitions on August 27, 2014. App. 161a-162a.

This Court has jurisdiction to review the judgment of the Tenth Circuit under 28 U.S.C. § 2350 and 28 U.S.C. § 1254(1). This petition is filed within the extended time permitted by § 2350(a) and this Court's Rule 13.

STATUTES INVOLVED

Reproduced in the appendix are the relevant provisions of 47 U.S.C. §§ 153(24), (51), (53), 214, 254, 332, and 1302.

STATEMENT OF THE CASE

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), the most extensive revision ever adopted of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, occupies 106 pages of the Statutes at Large. The Order of the FCC challenged in this petition, *Connect America Fund*, 26 F.C.C.R. 17663 (2011), sprawls over 752 pages of the FCC Record. The Order fills the interstices that Congress consciously left in the Act in the same sense that the transcontinental railroad filled gaps in freight lines in Kansas and Missouri. However commendable the project, lawmaking of this magnitude is ordinarily the prerogative of Congress.

Congress authorized the FCC to impose charges on telephone ratepayers to finance a Universal Service Fund ("USF") to ensure the provision of telecommunications service to all Americans. Instead, the FCC in its Order diverts the USF to

construct facilities to provide high-speed broadband Internet access, which it has refused to classify as a telecommunications service subject to common carrier regulation under Title II of the 1934 Act. *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). Because the Order requires the carriers receiving USF money to provide broadband service to all who reasonably request it, *i.e.*, on a common carrier basis, it contravenes the Act. *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

Even the spending authority of Congress has constitutional limits. *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012). The District of Columbia Circuit has recently held that financial incentives cannot be used to circumvent regulatory restrictions imposed by Congress. *Electric Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014). Because Congress did not delegate to the FCC the authority to impose common carriage requirements on information services as a condition for receipt of USF money, this Court should grant certiorari and reverse the judgment of the Court of Appeals for the Tenth Circuit approving the Order.

i. Congressional and administrative developments prior to this rulemaking proceeding

National policy, since 1934, has been "to make available, so far as possible, to all the people of the United States … a rapid, efficient … communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. This is universal service.

This case concerns the 1996 Act,

> an unusually important legislative enactment … [whose] primary purpose was to reduce

> regulation and encourage "the rapid deployment of new telecommunications technologies." The major components of the statute have nothing to do with the Internet; they were designed to promote competition in the local telephone service market, the multichannel video market, and the market for over-the-air broadcasting.

Reno v. ACLU, 521 U.S. 844, 857-58 (1997), quoting Title, Pub. L. No. 104-104, 110 Stat. 56 (1996).

The 1996 Act introduced "two new important regulatory classifications," *Time Warner Telecom v. FCC*, 507 F.3d 205, 213 (3d Cir. 2007), by defining "telecommunications service," a common-carrier service subject to regulation under Title II, 47 U.S.C. § 153(53), and "information service," a service exempt from Title II regulation, 47 U.S.C. § 153(24). *Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 11501, 11508 (1998). The definition of "telecommunications carrier" provides that such a carrier "shall be treated as a common carrier … only to the extent that it is engaged in providing telecommunications services." 47 U.S.C. § 153(51).

Congress recognized that competition in local communications markets would threaten the existing revenue flows that traditionally supported universal service. Therefore, the 1996 Act both codified universal service policy and created a statutory USF program in Parts I and II of Title II. *See* 47 U.S.C. §§ 214(e), 254.

The 1996 Act mandates that only common carriers designated as eligible telecommunications carriers ("ETCs") under § 214 by States are eligible for USF support; they must offer FCC-defined supported telecommunications services throughout their service

areas, as required by § 214(e)(1)(A) and § 254(c)(1). Section 254(e) permits an ETC to use USF support "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."

Congress established the Federal-State Joint Board on Universal Service, composed of state and federal regulators and a consumer advocate, to "coordinate federal and state regulatory interests" related to universal service. *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 406 (5th Cir. 1999). Congress in § 254(c)(1) defined universal service as "an evolving level of telecommunications services that the [FCC] shall establish periodically … taking into account advances in telecommunications and information technologies and services," and directed the Board to recommend, and the FCC to establish, the definition of the telecommunications services supported by the USF. When defining the supported services, the Board and the FCC must consider, *inter alia*, the extent to which the telecommunications services: "are essential to education, public health, or public safety"; have "been subscribed to by a substantial majority of residential customers"; and "are being deployed in public telecommunications networks by telecommunications carriers." 47 U.S.C. § 254(c)(1)(A)-(C).

The FCC's USF rules must be based on six statutory universal service principles and additional Board-recommended principles adopted by the FCC. 47 U.S.C. § 254(b)(1)-(7). These principles include, *inter alia*, that "[q]uality services should be available [and] affordable"; services in all areas of the Nation should be "reasonably comparable" to services available in cities, at "reasonably comparable" rates; and "[t]here should be specific, predictable and

sufficient … mechanisms to preserve and advance universal service."

The miscellaneous provisions of the 1996 Act included § 706, which instructs the FCC to "take immediate action to accelerate deployment of [advanced telecommunications] capability." Pub. L. No. 104-104, Title VII, § 706(b), 110 Stat. 56, 153 (1996). This section did not amend the 1934 Act, but was codified in the notes to 47 U.S.C. § 157 until 2008, when it was amended and codified at 47 U.S.C. § 1302 by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008).

In March 2002, the FCC found that cable Internet access service was an information service. *High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4822-23 (2002), *aff'd*, *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). In July 2002, the Board opined that, if classified as an information service, broadband Internet access service could not be included within the statutory definition of USF-supported services, because § 254 "limits the definition of supported services to telecommunications services." *Federal-State Joint Board on Universal Service*, 17 F.C.C.R. 14095, 14103 (Jt. Bd. 2002). The FCC then issued a series of decisions classifying other broadband Internet access services as information services. *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C.R. 14853, 14862-65 (2005), *review denied*, *Time Warner Telecom*, *supra*; *Classification of Broadband Over Power Line Internet Access Service as an Information Service*, 21 F.C.C.R. 13281, 13286 (2006); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 F.C.C.R. 5901-12 (2007).

In 2007, the Board recommended, *inter alia*, that the FCC revise the definition of supported services to include broadband Internet access service, finding that it met the statutory criteria for inclusion as a telecommunications service. *See High-Cost Universal Service Support*, 22 F.C.C.R. 20477, 20491-92 (Jt. Bd. 2007). The FCC rejected the Board's recommendation. *High-Cost Universal Service Support*, 24 F.C.C.R. 6475, 6492 (2008).

Shortly thereafter, the District of Columbia Circuit held that the FCC lacked Title I ancillary jurisdiction to impose the broadband requirements it had adopted. *Comcast Corp. v. FCC*, 600 F.3d 642, 645-47, 651-61 (D.C. Cir. 2010). The FCC then initiated a proceeding to determine whether it has authority to promote investment and innovation in what it had called "broadband Internet access service," *Framework for Broadband Internet Service*, 25 F.C.C.R. 7866, 7866-67 & n.1 (2010), specifically questioning whether it had statutory authority under § 254 of the Act and § 706 of the 1996 Act to restructure USF to support broadband Internet access service, *id.*, at 7880-83.

ii. The challenged Order

On February 9, 2011, the FCC issued a notice of proposed rulemaking to "fundamentally modernize" the USF system. *Connect America Fund*, 26 F.C.C.R. 4554, 4557 (2011). The FCC sought to "refocus USF … to make affordable broadband available to all Americans and accelerate the transition from circuit-switched to IP networks." *Id.*, at 4560.[1] The FCC

[1] This Court briefly explained the workings of the traditional circuit-switched system in *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 489-90 (2002). As another Court succinctly explained, "Voice communication using the Internet has been

opined that it could extend USF support to "broadband services offered as information services" either under §§ 254 and 706, or pursuant to Title I ancillary authority, or both. *Id.*, at 4577. The FCC solicited public comment on its opinion, as well as on any other legal authorities under which it could provide USF support to broadband. *Id.*, at 4577, 4582.

On April 18, May 23, and August 24, 2011, petitioner C Spire submitted comments objecting to the FCC's authority to require the provision of broadband Internet access services as a condition of receipt of USF support. C Spire has qualified as an ETC in competition with incumbent providers, having invested in a system to serve its rural customers throughout all of Mississippi, as well as portions of Florida, Alabama, and Tennessee. As measured by number of subscribers, it is the largest privately held wireless carrier in the United States.[2]

Petitioner RICA is a national organization of small rural competitive local exchange carriers ("CLECs") affiliated with rural incumbent carriers. Several RICA members have received ETC designation and received USF support under the prior rules, now being phased out.

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called Internet Protocol ("IP") telephony, and rather than using circuit switching, it utilizes 'packet switching,' a process of breaking down data into packets of digital bits and transmitting them over the Internet." *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F.Supp.2d 993, 995 (D. Minn. 2003).

[2] Under 47 U.S.C. § 332(c)(1), "providers of 'commercial mobile services,' such as wireless voice-telephone service, are common carriers, whereas providers of other mobile services are exempt from common carrier status." *Cellco Partnership v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012).

The Order proceeded "to support broadband networks, regardless of regulatory classification." App. 219a. It adopted the Board's recommended universal service principle, that support "should be directed where possible to networks that provide advanced services, as well as voice services." App. 213a. The FCC found that § 254 and § 706 empowered it to provide USF support for telecommunications services and to "condition" the receipt of that support on the deployment of broadband networks. App. 206a. The FCC did not add broadband to its list of USF-supported services, App. 214a, but required telecommunications carriers that receive USF support both to "invest in modern broadband-capable networks," App. 213a, and to offer to all in their service areas who so request broadband services meeting "basic performance requirements," "at rates that are reasonably comparable to offerings of comparable broadband services in urban areas." App. 234a.[3]

The FCC consolidated its definition of USF-supported services into a single service called "voice telephony," regardless of technology, App. 226a-228a, thereby including IP voice services that are not regulated as telecommunications services. It adopted

[3] The rule implementing this portion of the Order is codified as 47 C.F.R. § 54.313(f)(1)(i). Subsequent FCC orders have continued to require carriers to offer broadband service at regulated quality and price levels. *See Connect America Fund*, Report and Order, FCC 14-190, Dec. 18, 2014, ¶ 57: "ETCs receiving Connect America support will be required to offer reasonably comparable voice and broadband services in their funded high-cost census blocks at rates that are reasonably comparable to urban areas." The new Order continues to require rate of return regulated carriers to offer broadband where there is a reasonable request.

a new rule restating the § 254(e) restriction that support be used "only for … facilities and services for which the support is intended," but added that support can be used for "investments in plant that can … provide access to advanced telecommunications and information services." App. 776a-777a (47 C.F.R. § 54.7).

iii. The Tenth Circuit opinion

The Tenth Circuit required the entire group of petitioners to organize their arguments into groups of briefs by issue rather than by party. Petitioners C Spire and RICA joined the briefs designated as the Joint Universal Service Fund Briefs, and C Spire joined the Wireless Carrier Universal Service Fund Briefs. Both sets of briefs challenged the authority of the FCC to impose the broadband funding condition on USF recipients, including the requirement that recipients offer broadband Internet access service on a common carrier basis. The FCC's lawyers responded to these arguments on the merits without objecting to their consideration by the Court. The Tenth Circuit denied all petitions and upheld the Order in its entirety.

Beginning with the issues raised by the Joint USF Briefs, the Court found that § 254 did not prohibit the broadband requirement, but, in fact, authorized it. Acknowledging that § 254(c)(1) defines "universal service" as "an evolving level of telecommunications services," App. 26a, that language did not prohibit the FCC from requiring the provision of non-telecommunications services as a condition for receiving USF support. "More specifically, nothing in subsection (c)(1) expressly or implicitly deprives the FCC of authority to direct that a USF recipient … use some of its USF funds to provide services or build

facilities related to services that fall outside of the FCC's current definition of 'universal service.'" App. 30a. The Court went further, declaring that "nothing in the statute limits the FCC's authority to place conditions … on the use of USF funds." *Id.*

The Court then turned to § 254(e), which reads, in pertinent part:

> [O]nly 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.

The parties advocated diametrically opposed interpretations of this language. The FCC claimed that the second sentence "authorizes it to direct that USF recipients provide broadband Internet access to customers upon reasonable request." App. 30a. Petitioners argued that the last phrase of the second sentence, "which reads 'for which the support is intended,' must be interpreted as a limit on the FCC's authority and effectively requires USF funds to be used … only in relation to 'universal service.'" App. 32a. The Court found that phrase insufficiently "precise" to support petitioners' position: "For example, the concluding phrase could have read 'for universal service' (rather than 'for which the support is intended')." *Id.* In light of this imprecision, the Court found it "certainly reasonable for the FCC to have concluded that the language was intended as an implicit grant of authority to the FCC to flesh out precisely what 'facilities' and 'services' USF funds should be used for." *Id.* The Court further reasoned

that the Congressional grant of authority in the second sentence permitted the FCC "to make funding directives that are consistent with the principles outlined in § 254(b)(1) through (7)." App. 33a.

The Court also agreed with the FCC that § 706(b) of the 1996 Act delegated additional authority concerning deployment of broadband. Upon a determination that "advanced telecommunications capability," as defined in § 706(c), is not being timely deployed, § 706(b) requires the FCC to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." Unlike § 706(a), which refers to regulatory methods granted in the 1934 Act as amended, "section 706(b) does not specify how the FCC is to accomplish this latter task, or otherwise refer to forms of regulatory authority that are afforded to the FCC." App. 46a. The Court therefore agreed that "section 706(b) thus appears to operate as an independent grant of authority to the FCC 'to take steps necessary to fulfill Congress's broadband deployment objectives.'" *Id.*, quoting App. 220a. Rejecting petitioners' argument that any authority granted by § 706(b) could not override limitations imposed by § 254, the Court repeated its conclusion that "section 254 does not limit the use of USF funds to 'telecommunications services.'" App. 47a.

Discussing the Wireless Carrier USF Briefs, the Court addressed the argument that the definition of "telecommunications carrier" in § 153(51) also restricted the FCC's authority to subsidize and regulate broadband Internet access. The definitional requirement that "[a] telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing

telecommunications services," according to petitioners, "'clearly prohibits the FCC from treating telecom carriers as common carriers under Title II when they are engaged in providing an information service,'" App. 131a, quoting Wireless Carrier USF Brief at 14, such as broadband Internet access. The Court did not directly address the contention that the funding condition imposed common carriage duties upon USF recipients. Rather, the Court found that the condition did not constitute regulation:

> [T]he Order does not regulate broadband internet service or providers. Rather, it merely imposes broadband-related conditions on those ETCs that voluntarily seek to participate in the USF funding scheme. As the FCC notes, a provider of telecommunications services is not required to seek USF funding. But if it does so, it clearly can be subjected to certain conditions that the FCC may choose to attach to the funding. As the FCC notes, "[a] funding condition, like the broadband public interest obligation, is unlike common carrier regulation because providers voluntarily assume the condition in exchange for support and 'retain[] the ability to opt out of [the condition] entirely by declining … federal universal service subsidies.'" [FCC Brief] at 22 (quoting *WWC Holding Co. v. Sopkin*, 488 F.3d 1262, 1274 (10th Cir. 2007)).

App. 133a-134a.

REASONS FOR GRANTING THE PETITION

Because petitions for review of orders of many federal agencies are channeled to a single Court of Appeals by 28 U.S.C. § 2112(a)(3), directly conflicting rulings, as contemplated by this Court's Rule 10(a),

are quite rare. Here, however, separate reviews of two closely connected FCC orders have produced logically conflicting results. The District of Columbia Circuit has held that the FCC cannot impose common carrier requirements on providers of broadband Internet access because it is classified as an information service, not a telecommunications service. *Verizon v. FCC*, 740 F.3d 623, 649-55 (D.C. Cir. 2014). Here, the Tenth Circuit has declared that requirements which easily meet the definition of common carriage may be imposed upon providers of broadband Internet access because they do not constitute regulation at all, but only a condition imposed upon the receipt of federal funds. App. 133a-134a. By contrast, the District of Columbia Circuit has held that another agency cannot use financial incentives to circumvent restrictions otherwise imposed by Congress upon its authority. *Electric Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014).

The question presented by this opinion also qualifies as "an important question of federal law that has not been, but should be, settled by this Court," within the meaning of Rule 10(c). The question of proper regulation of broadband Internet access closely divided this Court in *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), and has divided the Courts of Appeals ever since. Moreover, approval of the use of funding conditions to overcome statutory restrictions on FCC authority necessarily implicates every act of Congress delegating authority to an agency, because it permits the FCC to do indirectly what it cannot do directly. This practice should be carefully considered by this Court.

The validity of the Tenth Circuit's decision allowing the FCC to impose requirements on common carriers to offer information service of specified quality and price presents a critical question underlying the extraordinarily broad public interest in the agency's proposal to readopt rules imposing "net neutrality." Concern that the FCC lacks authority to impose non-discrimination obligations on information service providers underlines the unusual involvement of the President in publicly urging the agency to reclassify consumer broadband services as telecommunications services.[4] Clarification of the FCC's authority by this Court at this time would have the salutary effect of minimizing the uncertainty and costs of years of litigation that will otherwise inevitably follow any net neutrality decision by the FCC.

I. Congress has precluded the FCC from imposing common carriage requirements on providers of information services.

"We think it obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers." *Verizon*, 740 F.3d at 650. The FCC accepted this ruling and did not dispute it before the Tenth Circuit in this case. Instead, the FCC denies that requiring USF recipients to provide broadband service of specified quality to all customers upon reasonable request constitutes a mandate that such providers act as common carriers. The Tenth Circuit did not address this issue. Instead, it agreed with the FCC that "the Order does not regulate broadband internet service or

[4] White House, Office of the Press Secretary, Statement by the President on Net Neutrality, Nov. 10, 2014, p.2.

providers. Rather, it merely imposes broadband-related conditions on those ETCs that voluntarily seek to participate in the USF funding scheme." App. 133a. Accordingly, an effort by a telecommunications provider to obtain the support intended by Congress waives the protection against common carrier regulation of broadband services also intended by Congress.

As the *Verizon* opinion explained, 740 F.3d at 650, that protection arises from 47 U.S.C. § 153(51), which declares, "A telecommunications carrier shall be treated as a common carrier under this [Act] only to the extent that it is engaged in providing telecommunications services." The FCC continues to classify broadband Internet access as an information service under 47 U.S.C. § 153(24), a classification upheld as permissible by this Court in *Brand X*. The requirements placed by the Order upon providers of those information services plainly constitute common carriage, as demonstrated by long-established legal principles elucidated in *Verizon.*

The Tenth Circuit and the District of Columbia Circuit agree that some regulatory authority over broadband was provided by § 706 of the 1996 Act, now codified at 47 U.S.C. § 1302. *Verizon*, however, emphasizes that power under § 706 may not be utilized "in a manner that contravenes any specific prohibition contained in the Communications Act." 740 F.3d at 649. Because even the FCC agrees that an explicit grant of regulatory authority cannot override a prohibition imposed by Congress, certainly any implicit authority to attach conditions to financial support cannot be employed to such an effect. In another recent case, the District of Columbia Circuit rejected an effort by FERC to use financial incentives "to draw retail customers into the wholesale markets"

where FERC could regulate them. *Electric Power Supply Ass'n*, 753 F.3d at 220. The Court rejected the argument that FERC could exceed its delegated regulatory authority because of the voluntariness of the transaction, finding that argument to have "no limiting principle." *Id.*, at 221. This Court should likewise reject that argument and reverse the contrary decision of the Tenth Circuit.

A. Because the FCC has not classified broadband Internet access service as a telecommunications service, its providers cannot be regulated as common carriers.

The FCC has agreed that it cannot use any authority granted by § 706 of the 1996 Act to overcome prohibitions otherwise imposed by Congress. *Verizon*, 740 F.3d at 649-50. Therefore, although the Tenth Circuit and the District of Columbia Circuit agree that § 706 delegated some authority to regulate broadband Internet access, it is not necessary to review that ruling in the context of this petition.

The FCC has always had the power to expand its regulatory authority simply by reclassifying broadband Internet access as a telecommunications service eligible for USF support. This Court in *Brand X* upheld its refusal to do so as a reasonable construction of the Act, although the dissenters found broadband Internet access to qualify unambiguously as a telecommunications service as used in § 153(53). 545 U.S. at 1014 (Scalia, J., dissenting) (discussing definition of "telecommunications carrier" then codified at § 153(44)). The Order reiterates the FCC's refusal to classify broadband Internet access as a telecommunications service, even after the District of Columbia Circuit ruled in *Comcast Corp. v. FCC*, 600

F.3d 642 (D.C. Cir. 2010), that the FCC lacks statutory authority to regulate broadband when classified as an information service.[5]

When Congress in § 254(c)(1) defined universal service as "an evolving level of telecommunications services," it clearly understood that telecommunications carriers would be regulated as common carriers under § 153(51) while information services, as defined in § 153(24), would not be so regulated. The link between public support and public regulation is clear in the statutory language, but the FCC has broken that link, apparently because it fears the consequences of following the path provided by Congress for regulation of telecommunications services. This Court in *Brand X*, after acknowledging that the Act "subjects all providers of 'telecommunications servic[e]' to mandatory common-carrier regulation," 545 U.S. at 973, recounted the FCC's explanation for its reluctance to subject providers of broadband Internet access service to regulation as common carriers:

> "[R]esidential high-speed access to the Internet is evolving over multiple electronic platforms, including wireline, cable, terrestrial wireless and satellite." [*High-Speed Access*, 17 F.C.C.R. at] 4802, ¶ 6; see also *U.S. Telecom Assn. v. FCC*, 290 F.3d 415, 428 (C.A.D.C. 2002) (noting Commission findings of "robust competition … in the broadband market"). The Commission concluded that "'broadband services should exist in a minimal regulatory environment that

[5] Instead of changing the classification, the FCC modified its expressed understanding of the authority delegated by § 706, and the District of Columbia Circuit deferred to that statutory construction. *Verizon*, 740 F.3d at 637-40.

> promotes investment and innovation in a competitive market.'" [*High-Speed Access*, 17 F.C.C.R. at] 4802, ¶ 5.

545 U.S. at 1001.[6] This Court approved that choice, leaving the FCC without authority to impose common carrier regulations upon the very service to which it now wants to divert USF support.

Having chosen to adhere to its classification of broadband Internet access as an information service, the FCC must live with the restrictions placed by Congress upon the regulation of such a service. The FCC acknowledges that burden, but its lawyers respond in two ways. First, they contend that the challenged requirements of the Order do not amount to common carrier obligations. Second, because recipients of USF support can decide not to accept the money, they argue that the conditions imposed upon receipt do not constitute regulation at all. Neither argument is sufficient to save the Order.

B. The mandate to "offer broadband service meeting … requirements … upon their customers' reasonable request" constitutes common carriage.

USF recipients must offer broadband Internet access, an information service, "meeting initial CAF requirements, with actual speeds of at least 4 Mbps downstream and 1 Mbps upstream, upon their customers' reasonable request." App. 182a. Recipients, then, are obliged to provide broadband service of specified quality to any customer who

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[6] Presumably, the FCC still harbors such concerns, although the Order itself merely asserts that reclassification of broadband Internet access as a telecommunications service was unnecessary to the FCC's desired end. App. 210a n.67.

reasonably requests it. The obligation to provide services at specified speeds and quality on reasonable request leaves no "room for individualized bargaining and discrimination in terms" and constitutes "common carriage *per se*." *Cellco Partnership v. FCC*, 700 F.3d 534, 547-48 (D.C. Cir. 2012). *See also Verizon*, 740 F.3d at 628, 652-56. The Order itself says nothing to explain why this provision, spelled out in more detail in ¶¶ 86-114 of the Order, App. 233a-265a, does not constitute regulation of recipients as common carriers. Whatever theoretical ambiguity might exist regarding some applications of the Act's reference to common carriers simply does not exist here.

This Court last had occasion to explain the concept of common carriage to the FCC in *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Midwest Video II*). The Court stated:

> A common-carrier service in the communications context is one that "makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing …." *Report and Order*, *Industrial Radiolocation Service*, *Docket No. 16106*, 5 F.C.C.2d 197, 206 (1966) …. A common carrier does not "make individualized decisions in particular cases, whether and on what terms to deal." *National Association of Regulatory Utility Comm'rs v. FCC*, … 525 F.2d [630,] … 641 [(D.C. Cir.), *cert. denied,* 425 U.S. 992 (1976)].

440 U.S. at 701 (footnote omitted). This Court also observed that "the rules delimit what operators may

charge for access and use of equipment," *id.*, at 702, as support for its finding of an imposition of common carriage requirements.

Neither the FCC's Order nor its lawyers' briefing before the Tenth Circuit addresses the FCC's own two-prong test for determining whether services are being offered on a common carrier basis. The District of Columbia Circuit has explained:

> Under that test, common carrier status turns on:
>
> > (1) whether the carrier "holds himself out to serve indifferently all potential users"; and (2) whether the carrier allows "customers to transmit intelligence of their own design and choosing."

United States Telecom Ass'n v. FCC, 295 F.3d 1326, 1329 (D.C. Cir. 2002), quoting *Federal-State Joint Bd. on Universal Serv.*, Declaratory Ruling, 14 F.C.C.R. 3040, 3050 (1999), quoting *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1480 (D.C. Cir. 1994).[7] Under the terms of the Order, any carrier who accepts USF funds necessarily "holds himself out to serve indifferently all potential users." That is what the Order means when it says that such a recipient "must offer broadband service … upon their customers' reasonable request." App. 182a. This constitutes *per se* common carriage because "the primary *sine qua non* of common carrier status is a quasi-public

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[7] There should be little dispute about the second prong of the definition. Just as children telephoning their parents for money "transmit intelligence of their own design and choosing," users of broadband Internet access services do the same when they order a book from Amazon or a movie from Netflix.

character, which arises out of the undertaking 'to carry for all people indifferently.'" *Cellco*, 700 F.3d at 546, quoting *National Ass'n of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976).

While this Order describes the duties owed by recipients to purchasers of broadband Internet access service, the District of Columbia Circuit in *Verizon* considered the carrier's duty to so-called edge providers attempting to communicate with the carrier's customers. The Court found that provisions of the order under consideration in that case mandated common carriage:

> [G]iven the *Open Internet Order*'s anti-blocking and anti-discrimination requirements, *if* Amazon were now to make a request for service, Comcast *must* comply. That is, Comcast must now "furnish … communication service upon reasonable request therefor." 47 U.S.C. § 201(a).

740 F.3d 653-54 (emphasis in original). There, the Court rejected the FCC's argument that "a common carrier relationship may exist only with respect to those customers who purchase service from the carrier." *Id.*, at 654. Here, of course, those are exactly the customers who fall within the scope of this Order. If a customer reasonably requests to purchase broadband Internet access, a recipient of USF funds must provide it. Moreover, just as the FCC attempted in *Midwest Video II* to regulate "what operators may charge for access and use of equipment," 440 U.S. at 702, so too does the FCC here establish a procedure to ensure that "rural rates [must] be 'reasonably comparable' to urban rates under Section 254(b)(3)." App. 263a.

Further discussion of the details of the Order would add little to the analysis. Not only must recipients of USF support provide service to customers upon reasonable request, but they must meet uniform standards established by the FCC in so doing. A simple mandate to this effect upon all carriers of broadband Internet access would plainly constitute a requirement of common carriage, and the FCC barely argues to the contrary. Instead, it asserts that, because carriers do not have to accept USF support, these provisions are voluntarily assumed and do not constitute any regulation, much less common carrier regulation. The acceptance of such an argument would demolish the restrictions that Congress has placed upon the FCC's authority to regulate providers of information services.

C. Because Congress has forbidden regulation of providers of information services as common carriers, the FCC cannot impose such requirements as a funding condition.

It is plain, as the FCC admits, that it cannot regulate broadband Internet service "in a manner that contravenes any specific prohibition contained in the Communications Act." *Verizon*, 740 F.3d at 649. It should be equally plain, as the District of Columbia Circuit has held, that the FCC "would violate the Communications Act were it to regulate broadband providers as common carriers." *Id.*, at 650.[8] Whatever else the Order may contain, it requires recipients of USF funds to provide broadband Internet access on a common carrier basis in certain respects. The Tenth Circuit's explanations for its

[8] The principle applies equally to wireless providers like C Spire. *Cellco*, 700 F.3d at 538.

contravention of *Verizon* and, indeed, *Midwest Video II* are insufficient.

The Tenth Circuit agreed with the District of Columbia Circuit that § 706(b) of the 1996 Act grants the FCC certain authority over broadband services. App. 44a-47a. The Court acknowledged the argument that such delegated authority could not be used in contravention of limitations otherwise imposed by Congress, but it concluded that "section 254 does not limit the use of USF funds to 'telecommunications services.'" App. 47a. Indeed, the Court found an implicit grant of regulatory authority in the second sentence of § 254(e): "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." App. 31a-33a. There are two problems with finding no statutory limitation on the FCC's authority.

First, it stretches beyond the breaking point the deference due to an agency's interpretation of a statute it administers under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The FCC found a supposed ambiguity in the concluding phrase of § 254(e), "for which the support is intended," and determined that it delegated "the flexibility … to designate the types of telecommunications services for which support would be provided." App. 211a.[9] The obvious problem, as

[9] The Order's further determination that the second sentence authorizes the FCC "to encourage the deployment of the types of facilities that will best achieve the principles set forth in section 254(b)," *id.*, is the reddest of herrings. No one disputes that the FCC can mandate the use of USF funds to build particular types of facilities. The question is the extent of its authority to regulate the use of those facilities as common carriage.

the Tenth Circuit acknowledged, is that the FCC has never defined telecommunications services "to include broadband or VoIP services," App. 32a, much less included them within universal service as defined in § 254(c)(1). Rejecting the argument that the phrase "for which the support is intended" referred to "universal service support," the last three words of the first sentence of § 254(e), the Court said, "Had Congress intended such a result, however, it clearly could have said so in a more precise manner. For example, the concluding phrase could have read 'for universal service' (rather than 'for which the support is intended')." App. 32a. The fact that "4" is "more precise" than "2 + 2" does not make "2 + 2" ambiguous. The Court did not and could not explain how a first sentence unambiguously authorizing expenditures for "universal service support" could have so dissipated by the end of the second sentence that it authorized the FCC to spend the money on something else altogether.

The Court also rejected the argument that the FCC's construction of § 254(e) was barred by § 254(c)(1), which authorizes the FCC, through prescribed procedures, to define universal service as a "level of telecommunications services." Rejecting petitioners' argument, the Court said:

> [N]othing in subsection (c)(1) expressly or implicitly deprives the FCC of authority to direct that a USF recipient … use some of its USF funds to provide services or build facilities related to services that fall outside of the FCC's current definition of "universal service." In other words, nothing in the statute limits the FCC's authority to place conditions, such as the broadband requirement, on the use of USF funds.

App. 30a. Whatever this Court may think of the Tenth Circuit's construction of § 254(c)(1), its conclusion that "nothing in the statute" precludes the broadband funding condition squarely contradicts the *Verizon* Court's reading of § 153(51).

This is the second reason for rejecting the Tenth Circuit's finding of unlimited FCC authority to impose funding conditions. Although it acknowledged that § 254(e) authorizes provision of USF support only to telecommunications carriers, App. 35a-36a, it failed to honor the definitional restriction in § 153(51) that "[a] telecommunications carrier shall be treated as a common carrier … only to the extent that it is engaged in providing telecommunications services." Accordingly, when an entity is using USF funds to provide information services, such as broadband Internet access, it is not a telecommunications carrier at all. It was on this definitional section that the District of Columbia Circuit based its conclusion that "the Commission would violate the Communications Act were it to regulate broadband providers as common carriers." *Verizon*, 740 F.3d at 650. The Tenth Circuit, by contrast,

> agree[d] with the FCC that it was entirely reasonable for it to conclude that, "[s]o long as a provider offers 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."

App. 133a, quoting FCC Br. 5 at 19. The flaw in this reasoning is that the Order, as demonstrated in Part I.B. above, mandates the provision of broadband

Internet access on a common carrier basis. That is precisely what *Verizon* holds that the FCC cannot do.

The Tenth Circuit's response to this obvious problem was to deny that the FCC was regulating broadband at all:

> Finally, it is clear that the Order does not regulate broadband internet service or providers. Rather, it merely imposes broadband-related conditions on those ETCs that voluntarily seek to participate in the USF funding scheme. As the FCC notes, a provider of telecommunications services is not required to seek USF funding. But if it does so, it clearly can be subjected to certain conditions that the FCC may choose to attach to the funding.

App. 133a.[10] The Court identified no limitation on the authority of the FCC to impose conditions of its choosing.[11]

This Court, of course, has authorized the FCC to impose funding conditions which promote the purposes identified by Congress in the Act. In *United*

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[10] The Tenth Circuit neglected to mention that it was accepting the arguments of the FCC's lawyers, not the reasoning of the Order itself. The Order relied on authority supposedly delegated by § 254(e) and § 706(b) to support its imposition of the broadband condition. It never suggested that the supposed voluntary nature of the receipt of USF support justified any conditions that the FCC might impose, and it certainly never declared that the multitude of requirements imposed by the Order and its implementing rules did not constitute regulation.

[11] It is peculiar on its face that the Court should have concluded that conditions embodied in the Code of Federal Regulations do not constitute regulations. *See* 47 C.F.R. §§ 54.312(b)(4), 54.313(b)(2), (e)(1)-(3), (f)(1)(i), (g), 54.1006(a), (b) (broadband performance metrics).

States v. American Libraries Ass'n, 539 U.S. 194, 211-13 (2003), this Court approved a funding condition which *barred* funds intended for education from being diverted to pornography; here, by contrast, the FCC *mandates* that funds intended for telecommunications services be diverted to information services. While an administrative agency may have authority to impose conditions appropriate to "*promote* the policies of the [a]ct" it administers, the conditions it adopts "may not contravene the Act." *Richmond Power & Light v. FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978) (emphasis added; internal quotes omitted). As that Court continued, "What the Commission is prohibited from doing directly it may not achieve by indirection." *Id.*

Recently, the District of Columbia Circuit squarely rejected an effort by an agency to use financial incentives to evade restrictions imposed by Congress on its authority. In *Electric Power Supply*, FERC, which may regulate wholesale but not retail electric power markets, sought to use financial incentives to influence the conduct of retail purchasers. The challenged order sought to reduce wholesale demand by requiring wholesale operators to pay certain "suppliers, including aggregators of retail customers," not to purchase power. 753 F.3d at 219. The dissent succinctly explained that "paying incentive payments to induce consumers not to consume electricity may be cheaper than paying generators to produce more power." *Id.*, at 229 (Edwards, J., dissenting). The majority agreed that FERC's scheme "affects the wholesale market," but concluded, "The Commission's rationale, however, has no limiting principle." *Id.*, at 221. Under the logic of the challenged order, "FERC could engage in direct regulation of the retail market whenever the retail

market affects the wholesale market, which would render the retail market prohibition useless." *Id.*, at 222. The District of Columbia Circuit rejected the argument, accepted by the Tenth Circuit here, that financial incentives somehow do not constitute regulation. "The fact that the Commission is only 'luring' the resource to enter the market instead of requiring entry does not undercut the force of Petitioners' challenge." *Id.*, at 223.

In finding the order to constitute a forbidden regulation of retail markets, the District of Columbia Circuit rejected statutory arguments similar to those advanced here. The Court acknowledged Congressional encouragement of demand response systems in FERC's authority to eliminate "unnecessary barriers to demand response participation." *Id.*, quoting Pub. L. No. 109-58, § 1252(f), 119 Stat. 594, 966 (2005). Here, too, § 706(b) of the 1996 Act authorizes the FCC "to accelerate deployment of [broadband] capability by removing barriers to infrastructure investment." The Court, however, found that "FERC went far beyond removing barriers" by "draw[ing] demand response resources into the market and then dictat[ing] the compensation providers of such resources must receive." *Id.*, at 223-24. Moreover, the Court considered the title of the statutory section referring to "Encouragement." "'To encourage' is not 'to regulate.' Although the title is 'not dispositive of the provision's meaning,' 'it is not too much to expect that it has something to do with the subject matter' of the section." *Id.*, at 224, quoting *California Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 399 (D.C. Cir. 2004). Here, of course, the title of § 254 is "Universal service," not broadband deployment.

There is good reason that funding conditions should not be allowed to displace restrictions imposed by Congress. Because modern federal agencies have so many financial incentives at their disposal, such a practice could be used to negate almost any restriction intended by Congress. Even though the Constitution expressly confers the spending power upon Congress, this Court has recognized restrictions on that power. In *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), this Court held that conditions amounting to coercion cannot stand. Here, where Congress has explicitly recognized the need for "sufficient Federal and State mechanisms to preserve and advance universal service," 47 U.S.C. § 254(b)(5), it is hard to argue that recipients act entirely voluntarily when they seek the funds designated by Congress to provide sufficient levels of service. In one of the earliest cases to apply the 1996 Act, the Fifth Circuit explained the need for the USF program:

> In economic terms, universal service programs are justified as a way to address a "market failure." While the carriers have little incentive to expand the telecommunications infrastructure into areas of low population density or geographic isolation, each individual user of the network benefits from the greatest possible number of users.

Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393, 406 n.2 (5th Cir. 1999). Some sort of subsidy is required to permit carriers "to offer the 'below-cost' rates to expensive, unprofitable rural customers." *Id.*, at 406. Because competitive ETCs like C Spire cannot serve their high-cost customers economically without the USF support, their acceptance of the funds can hardly be said to be voluntary.

More importantly, even Congress cannot impose a funding condition which contravenes explicit denials of authority in the Constitution. Just last year, this Court considered a statutory requirement that certain recipients of international health funds must espouse "a policy explicitly opposing prostitution and sex trafficking." *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, 133 S. Ct. 2321, 2324 (2013), quoting 22 U.S.C. § 7631(f). Because the funding condition compelled speech by the recipient, "it violates the First Amendment and cannot be sustained." *Id.*, at 2332.[12] It would be strange indeed if an agency should be allowed to impose funding conditions that contravene the restrictions in its authorizing statute when Congress itself may not so circumvent the Constitution.[13]

"An agency action qualifies for *Chevron* deference when Congress has explicitly or implicitly delegated to the agency the authority to 'fill' a statutory 'gap' …." *Brand X*, 545 U.S. at 1003-04 (Breyer, J.,

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[12] Most of this Court's decisions concerning the limits of the Congressional spending power involve the First Amendment. *See, e.g., Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001). However, the same reasoning has been applied to invalidate state and local unconstitutional conditions violating other rights. *See, e.g., Koontz v. St. Johns River Water Mgt. Dist.* 133 S. Ct. 2586 (2013) (Fifth Amendment right to just compensation).

[13] Indeed, if a funding condition were sufficient to overcome restrictions imposed elsewhere in the Act, the Fifth Circuit would have upheld the FCC's effort to forbid USF recipients "from disconnecting Lifeline services from low-income consumers who have failed to pay toll charges." *Texas Office of Public Utility Counsel*, 183 F.3d at 421 (footnote omitted). Instead, the Court found the requirement to transgress the reservation of authority over intrastate communications which Congress left for the States. *Id.*, at 424.

concurring). Here, Congress left no gap between the mutually exclusive categories of information service and telecommunications service. Whatever implicit authority the FCC may have to impose conditions on the receipt of USF funds, the Tenth Circuit erred in permitting it to use that authority to require recipients to provide broadband Internet access as an information service on a common carrier basis.[14] This Court should grant certiorari and reverse the judgment.

II. Because the FCC would not have used the Universal Service Fund to finance construction of broadband facilities without assurances that consumers could use those facilities, those portions of the Order must be vacated.

Actions taken by the FCC outside of its statutory authority must be vacated. *Comcast*, 600 F.3d at 661. Those portions of the Order and its implementing rules which impose common carrier requirements on USF recipients with regard to the provision of broadband Internet access unquestionably transgress the limits Congress has placed on the FCC's authority

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[14] If good reason exists to place limited common carrier obligation on providers of broadband Internet access service, the statute may provide a lawful method. As the dissenters noted in *Brand X*, broadband Internet access can be classified as a telecommunications service, but the FCC may remain free to forebear from imposing certain aspects of common carrier regulations. 545 U.S. at 1011-12 (Scalia, J., dissenting). In doing so, however, the FCC would have to adhere to 47 U.S.C. § 160 and the body of law that has developed to channel its discretion. To permit the FCC simply to attach to a check any conditions it pleases would negate that portion of the statutory scheme.

over information services. Those provisions must necessarily be vacated.

It follows that the remainder of the Order's changes to the USF system must also be vacated. An agency's order or regulation is severable into valid and invalid parts only "if the severed parts 'operate entirely independently of one another,' and the circumstances indicate the agency would have adopted the regulation even without the faulty provision." *Arizona PSC v. EPA*, 562 F.3d 1116, 1122 (10th Cir. 2009), quoting *Davis County Solid Waste Mgt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997). "Severance and affirmance of a portion of an administrative regulation is improper if there is 'substantial doubt' that the agency would have adopted the severed portion on its own." *Davis County*, 108 F.3d at 1459, quoting *North Carolina v. FERC*, 730 F.2d 790, 795-96 (D.C. Cir. 1984).

The severance of the common carrier provisions in this case, without vacating the remainder of the USF portions of the Order, would provide recipients with massive amounts of support to build broadband facilities without imposing any requirement that services be provided to customers and without any guarantee of quality or equitable pricing. That is precisely the opposite of what Congress had in mind when it told the FCC in § 254(b)(3) to consider providing all consumers with "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." Indeed, the Order specifically relied upon this statutory principle as a basis for its authority to subsidize broadband deployment in the first place. App. 208a. The Order

declared its purpose "to ensure that all Americans are served by networks that support high-speed Internet access … where they live, work, and travel," App. 166a, and it designed its Order "to ensure these reforms are achieving their intended purposes." App. 177a.

There is, to say the least, "substantial doubt" that the FCC would have diverted the USF program to the construction and deployment of broadband Internet facilities without the ability to ensure that recipients would use those facilities for the purposes "for which the support is intended," in the language of § 254(e). For hundreds of years, the way to ensure that facilities are used for the benefit of the public as a whole has been to impose obligations of common carriage. That is why the FCC imposed such obligations in its Order, but it transgressed its limited authority over information services in so doing. Without the ability to police the use of the new broadband facilities, it defies reason to suppose that the FCC would have chosen to finance their deployment. This Court must therefore vacate the USF portions of the Order in their entirety and give the FCC the opportunity to pursue its stated goals within the limits of its statutory authority.

CONCLUSION

The determination of the District of Columbia Circuit in *Verizon* that the FCC may not impose common carriage regulations on the provision of broadband Internet access service is fully negated by the judgment of the Tenth Circuit in this case permitting the FCC to do so in the guise of a funding condition. The recognition of agency power to impose funding conditions that transgress statutory limitations would impermissibly circumvent the

authority of Congress, as the District of Columbia Circuit explained in *Electric Power Supply Ass'n.* Because of these conflicts, this Court should grant the petition for writ of certiorari. Upon consideration of the merits, it should reverse the judgment of the Tenth Circuit and vacate the FCC's Order with regard to the USF program.

Respectfully submitted,

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