

No. 23-60641

**In the United States Court of Appeals
for the Fifth Circuit**

Maurine Molak and Matthew Molak,

Petitioners,

v.

Federal Communications Commission and United States of America,

Respondents.

On Petition for Review of an Order
of the Federal Communications Commission
(FCC 23-84; WC Docket No. 13-184)

**BRIEF OF U.S. SENATORS
AS AMICI CURIAE
IN SUPPORT OF PETITIONERS**

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Certificate of Interested Persons

No. 23-60641

MAURINE MOLAK AND MATTHEW MOLAK,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

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

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Interest of *Amici Curiae*

*Amici*¹ are Members of Congress. *Amici* have an interest in upholding the laws that each Congress enacts and the separation of powers. *Amici* seek to ensure that the laws Congress enacts are faithfully interpreted by the judicial branch in the cases and controversies that come before it. Moreover, *amici* have an interest in the interpretation of Congressional enactments that affect the lives, neighborhoods, schools, and communities of their constituents.

The Constitution's separation of powers is of vital import in cases such as this one. The Communications Act of 1934, as amended, authorizes the Federal Communications Commission (FCC) to facilitate the expansion of Internet access to school classrooms and libraries. Whether the FCC should fund Internet access beyond the school classroom or library—such as making Wi-Fi available to unsupervised children on school buses—and with what safeguards is a fiercely debated legislative question. While Congress decided to expand such access with appropriated funds during the COVID-19 pandemic, that program sunsets on June 30, 2024. Once limitations are set by Congress, they must be followed—not thwarted—by the federal regulators charged with their enforcement.

Amici respectfully ask the Court to interpret the Communications Act of 1934

¹ All parties consented to the filing of this brief. See Fed. R. App. P. 29(a)(2). And pursuant to Rule 29(a)(4)(E), undersigned counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation and submission of this brief.

in accordance with its ordinary meaning, to reverse the FCC’s attempt to circumvent the law’s clear text, and to vacate the policy decision at the heart of the FCC’s unlawful action.

The following is the full list of *amici curiae*:

Sen. Ted Cruz

Sen. Marsha Blackburn

Sen. Mike Braun

Sen. Ted Budd

Sen. James Lankford

Sen. Cynthia Lummis

Sen. Pete Ricketts

Summary of the Argument

The Federal Communications Commission (FCC)’s plan to subsidize Wi-Fi on school buses is unlawful and misguided. Under section 254 of the Communications Act of 1934, the FCC is authorized to use E-Rate funds only “to enhance . . . access to advanced telecommunications and information services for . . . *school classrooms . . . and libraries.*” 47 U.S.C. § 254(h)(2)(A) (emphasis added).

But rather than follow the law restricting the use of E-Rate funds to only classrooms and libraries, the FCC chose to put Wi-Fi on school buses. And this decision comes in the wake of Congress’s decision to *not* renew the COVID program that authorized the FCC to temporarily fund Wi-Fi off-campus during the pandemic. School buses are neither “classrooms” nor “libraries” within the meaning of Section

254, making the FCC's decision to fund Wi-Fi on school buses contrary to law.

Moreover, the FCC's proposed expansion of funding raises concerns about child safety and a lack of accountability regarding federal spending. The FCC's E-Rate plan funnels millions of dollars to expired COVID-era policies without any evidence that unsupervised teenagers with smartphones on school buses will opt for trigonometry over TikTok. The FCC has not performed any analyses, produced any survey data, or even required an accounting to determine whether the money already spent on equipping school buses with Wi-Fi has resulted in more students completing their school assignments or otherwise served the academic purposes for which the COVID-era funding was intended. Rather than conduct a careful analysis based on public comment of the efficacy of funding school bus Wi-Fi, the FCC's E-Rate program greenlights children's unsupervised Internet access while failing to address the well-documented and corrosive effects on minors of social media, online pornography, and cyber bullying. The FCC's proposal is unsupported by evidence that the existing program works and lacks appropriate guidelines to ensure that the E-Rate funds advance the interests of children, parents, teachers, and taxpayers.

This Court should put a stop to the FCC's attempt to circumvent Congress and its prerogative in placing limits on the E-Rate program.

Argument

I. The School Bus Ruling Exceeds the FCC's Statutory Authority to Facilitate Internet Connectivity in School Classrooms and Libraries.

Section 254 of the Communications Act of 1934 is clear. The law authorizes the

FCC to enhance “access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries.” 47 U.S.C. § 254(h)(2)(A). The scope of the FCC’s E-Rate authority is limited to “school classrooms, . . . and libraries.” *Id.* Where, as here, the statutory language is plain, “the sole function of the courts is to enforce it according to its terms.” *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917)). The operative terms—“classrooms” and “libraries”—impose unambiguous textual limitations on the FCC’s authority.

The statutory limitation is even more pronounced considering the support that Congress once provided for off-campus funding outside Section 254. During COVID, when many schools and libraries were closed, Congress enacted the American Rescue Plan Act of 2021 (ARPA), which, unlike Section 254, authorized funding for advanced telecommunication and information services for use in locations “*other than the school*” and “*other than the library.*” American Rescue Plan Act, Pub. L. No. 117-2, § 7402(a)(1)–(2), 135 Stat. 4 (2021) (emphasis added). Thus, when desired, Congress funded off-campus Internet access. But in Section 254—the basis for the FCC’s E-Rate decision—Congress expressly limited funding for only “school classrooms . . . and libraries.” 47 U.S.C. § 254(h)(2)(A).

Although Congress authorized FCC funding for Wi-Fi outside schools and libraries under the ARPA, that temporary provision sunsets on June 30, 2024. American Rescue Plan Act § 7402(d)(5)(B), 135 Stat. 109–10. Congress could have extended ARPA or enacted a separate law to support unsupervised off-campus

Internet activity among children and teenagers. It did neither. Lawmakers considered but ultimately rejected efforts to extend E-Rate Wi-Fi funding beyond classrooms to school buses. Leading Infrastructure for Tomorrow's America (LIFT America) Act, H.R. 1848 , 117th Cong. § 13301 (2021).

The only law Congress enacted to fund off-campus Wi-Fi is ARPA. American Rescue Plan Act § 7402(a), 135 Stat. 109. This provision was designed only to enable remote learning in the homes of teachers and students subject to COVID-related shutdowns. And Congress did not renew ARPA or amend the FCC's E-Rate authority under Section 254.

The FCC's E-Rate decision unlawfully extends ARPA's support of COVID-based remote learning to non-classroom locations. The FCC's new E-Rate plan extends beyond the COVID crisis, purportedly to "address the education needs of the millions of students caught in the 'Homework Gap,'" because students allegedly do not have broadband connectivity at home. *Modernizing the E-Rate Program for Schools and Libraries*, FCC 23-84, WC Docket No. 13-183 at 1 ("Declaratory Ruling"). While reasonable minds can disagree about the policies best suited to increase broadband connectivity for students, it is not the place of a federal agency to reach beyond the clear lines established by Congress nor to reallocate universal service funds to replace an appropriation that Congress has allowed to lapse.

Congress declared an end to the COVID-19 emergency and opted to not extend ARPA's temporary measures. National Emergencies Act, Pub. L. No. 118-3, 137 Stat. 6 (2023). The sunset of a law designed to address the COVID-19 crisis is not an implicit invitation for the FCC to extend a limited program by regulatory fiat. As

Justice Gorsuch warned, doing so enables an unrestrained approach to policymaking at the expense of constitutional order and individual rights. *Az. v. Mayorkas*, 143 S. Ct. 1313, 1316 (2023) (“[R]ule by indefinite emergency edict risks leaving all of us with a shell of a democracy and civil liberties just as hollow.”). This Court should reject the FCC’s effort to expand Wi-Fi funding on the heels of a temporary authority designed to address a different issue.

The FCC tries to skirt the statutory limitations on the E-Rate program by claiming the authority to fund programs “for educational purposes.” Declaratory Ruling at 6. But the term “educational purposes” in Section 254 qualifies the services that telecommunications carriers must provide under certain circumstances to “elementary schools, secondary schools, and libraries.” 47 U.S.C. § 254(h)(1)(B) (“All telecommunications carriers . . . shall . . . provide [their] services to elementary schools, secondary schools, and libraries for educational purposes”). This provision is moreover inapposite because the Declaratory Ruling is neither directed at nor limited to “telecommunications carriers” or “telecommunications services.” And contrary to the FCC’s E-Rate decision, Section 254 does not authorize the FCC to fund connectivity of unsupervised children. Rather, the law limits the E-Rate program to subsidize only “classrooms” and “libraries,” and not school buses, which is why the FCC previously and consistently determined that “off-campus use of eligible services, even if used for an educational purpose, is ineligible for support.” *See, e.g., Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Order, DA 22-1313 (WCB 2022); *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Order, DA 21-1602 (WCB

2021); *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 20-1091, ¶ 16 (WCB 2020); *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Order, DA 19-1249 (WCB 2019); *Wireline Competition Bureau Seeks Comment on Draft Eligible Services List for Schools and Libraries Universal Service Program*, CC Docket No. 02-6, GN Docket No. 09-51, WC Docket No. 13-184, Public Notice, DA 14-1130 (WCB 2014); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, ¶¶ 429–30, 450–63 (1997) (repeatedly noting Congress’s decision to extend support to “classrooms”).

The FCC’s misguided effort to equip school buses with Wi-Fi is unprecedented and “eviscerates Congress’s restrictions on E-Rate.” Declaratory Ruling (Dissenting Statement of Commissioner Nathan Simington).

II. The FCC’s E-Rate Ruling Is Harmful to Children and Spends Federal Funds Without Accountability.

More egregious than the FCC’s misreading of the law are the dubious ends that the E-Rate ruling serve. Since 2021, the FCC has spent over \$60 million to subsidize Wi-Fi on school buses under the COVID-era temporary authority. Yet the FCC has never measured the effectiveness of this funding. With no studies or metrics on its school bus experiment, the FCC engages in wishful thinking that its unwarranted and unlawful expansion of the E-Rate program will result in the completion of “homework and other assignments before and after school hours.” Declaratory Ruling at 6. In contrast, there is ample evidence of the risks associated with

children's Internet and social media use, particularly in an unsupervised setting.² The FCC has provided no evidence that unsupervised children and teenagers with smartphones on school buses will opt to do their classwork rather than scroll through TikTok and Instagram, nor has the agency taken into account the countervailing dangers of enabling unsupervised social media use and its numerous documented threats to children—including cyber-bullying, development of mental health problems, exposure to pornography, and targeting by predators.³

The FCC may have tried to weigh these risks if it had asked questions in the context of a rulemaking. But rather than exercise the normal rulemaking process, which includes public comment, a divided FCC jumped headlong into a vast expansion of the E-Rate program on a party-line vote and without public comment on the efficacy of billions of dollars that have already been spent on broadband

² See, e.g., U.S. Surgeon General, *Social Media and Youth Mental Health* (2023), available at <https://www.hhs.gov/sites/default/files/sg-youth-mental-health-social-media-advisory.pdf> (last accessed Mar. 18, 2024); Muppalla S., Vuppalapati S., Reddy Pulliahgaru A., et al., *Effects of Excessive Screen Time on Child Development: An Updated Review and Strategies for Management*, *Cureus* 15(6): e40608 (Jun. 18, 2023), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10353947/> (last accessed Mar. 18, 2024); UNESCO, *Smartphones in school? Only when they clearly support learning* (Jul. 26, 2023), available at <https://www.unesco.org/en/articles/smartphones-school-only-when-they-clearly-support-learning> (last accessed Mar. 18, 2024).

³ See, e.g., Kira E. Riehm, M.S., Kenneth A. Feder, Ph.D., Kayla N. Tormohlen, M.P.H., et al., *Associations Between Time Spent Using Social Media and Internalizing and Externalizing Problems Among US Youth*, *JAMA Psychiatry* 76(12):1266–1273 (2019), available at <https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2749480> (last accessed Mar. 18, 2024).

across the federal government or the best practices that parents and teachers have placed on the use of smartphones, social media, and Internet use by children.

Technology has dramatically expanded research capabilities and academic opportunities for students. But the hazards associated with online activities among minors are also real. The threats arising from children's unsupervised Internet and social media use demand a more careful approach than the FCC's E-Rate decision. For the sake of the rule of law and public safety, the Court should vacate the FCC's Declaratory Ruling.

Conclusion

The Court should vacate the FCC's Declaratory Ruling and enter judgment for the Petitioners.

Respectfully submitted.

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Certificate of Service

On April 9, 2024, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; and (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,133 words, excluding the parts exempted by Rule 32(f); and (2) the typeface and type style requirements of Rule 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the program used for the word count).

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