DISSENTING STATEMENT OF
COMMISSIONER BRENDAN CARR

Re: *Addressing the Homework Gap through the E-Rate Program,* WC Docket No. 21-31, Report and Order and Further Notice of Proposed Rulemaking (July 18, 2024).

In 2021, Congress passed a law authorizing the FCC to provide funding that schools and libraries could use to lend Wi-Fi hotpots out to students and patrons.[1] It was called the Emergency Connectivity Fund or ECF. For my part, I was pleased to work with my FCC colleagues to vote in favor of standing up the ECF program, consistent with the statutory provisions passed by Congress. And I was grateful that my colleagues agreed to a number of my suggestions that helped maximize the program's benefits for those families that remained stuck on the wrong side of the digital divide.

In passing the COVID-era statute, Congress specified a number of limitations on this Wi-Fi initiative. First, Congress provided a specific cap on the amount of taxpayer dollars that could be used on the initiative. Second, Congress provided clear congressional authorization for the FCC to fund hotspots that would be used at locations other than a school or library—a marked contrast, as we will see, from the language that Congress included in the E-Rate portion of the Communications Act. Third, Congress ensured that the initiative would not increase consumers' monthly telecom bills by expressly providing that Universal Service Fund dollars could not be expended on the ECF Wi-Fi effort. And fourth, Congress specifically provided that the program would sunset when the COVID-19 emergency ended—a date that, for ECF purposes, included a transition period that expired at the end of the last month. Congress's decision to include a sunset date makes sense. After all, Congress passed the law to address the spike in remote learning that flowed from the government's decision to close down in person learning.

Now that the ECF program has expired, its future is up to Congress. The Legislative Branch retains the power to decide whether to continue funding this Wi-Fi loaner program—or not. But Congress has made clear that the FCC's authority to fund this initiative is over.

Except that is not how the FCC sees it today. Instead, the Commission cites to Congress's decision to end this Wi-Fi hotspot program as a reason for the FCC to keep it going—and to keep it going in a way that is fundamentally out of step with the decisions that Congress has made. Indeed, the FCC Order runs contrary to every one of the four guardrails that Congress included when it did authorize the FCC to fund Wi-Fi hotspots in the ECF law.[2] The FCC includes no limit on the amount of ratepayer dollars that can be expended in aggregate over the course of years, no limit on the locations at which the hotpots can be used, no sunset date on the program, and no protection against this program increasing consumers' monthly bills.

Regardless of one's views on the issue as a policy matter, this is not how the Constitution or delegations of authority work. The Supreme Court's recent decision in *Loper Bright* makes this abundantly clear. After *Loper Bright*, the FCC can no longer point to a merely permissible construction of a statute to prevail in court.[3] Instead, courts will now determine the best reading of the relevant law. So what does the text of the statute say?

In Section 254, Congress limited the FCC's E-Rate authority to enhancing the access of, to use Congress's terms, "classrooms" and "libraries" to telecommunication services—not any remote location

[1] *See* American Rescue Plan Act, 2021, H.R. 1319, Pub. L. No. 117-2, 117th Cong., tit. VII, § 7402.

[2] *See, e.g.*, FCC Chairwoman Jessica Rosenworcel and Senator Ed Markey, "We Got Millions of Low-Income Students and Families Online Before Funding Expired. Restoring It Is Essential." USNews, June 27, 2024, https://www.usnews.com/opinion/articles/2024-06-27/we-got-millions-of-low-income-students-and-families-online-before-funding-expired-restoring-it-is-essential.

[3] This is not to suggest that the FCC is adopting the type of permissible reading that a court might have deferred to under *Chevron*.

at which people might want to learn.[4] This language stands in stark contrast to the ECF law. Indeed, unlike the ECF statute, Congress has never authorized the FCC to use its E-Rate program to provide funding that schools and libraries could use to lend Wi-Fi hotpots out to students and patrons—and that is certainly not the best reading of the law. It may be a good idea, but it is not one that Congress has authorized the FCC to carry out. If it were, I would imagine that this FCC or another would have taken this action long ago.

The FCC's erroneous reading of Section 254 is further highlighted by the fact that it has no limiting principle—none. If the FCC can rely on Section 254 to fund students' and patrons' connectivity at locations other than schools and libraries, then I don't see why the FCC's reading would not allow it to use Section 254 as authority to fund Internet service for virtually every single person in the country, since everyone could be either a student or a library patron. That would be an absurd result and out of step with the plain text of the Communications Act. But that is what happens when an agency takes an action that is untethered to the statutory text.

The FCC's decision here and elsewhere to exceed the limits of our E-Rate authorization has not gone unnoticed by Members of Congress that write the laws. Just look at a recent brief that Senator Ted Cruz, Ranking Member of the Senate Commerce Committee, filed in the Fifth Circuit. In a case challenging the FCC's 2023 decision to support Wi-Fi on school busses, Senator Cruz and his Senate colleagues expressed deep concerns about the FCC's "unlawful and misguided" attempts to expand E-Rate support beyond Congressional intent.[5] "Once limitations are set by Congress, they must be followed—not thwarted—by the federal regulators charged with their enforcement," the Senators wrote.[6] Yet that is exactly what the Commission does today—again.

But legal authority is not my only concern today. The FCC's decision to expand the USF program has put the entire endeavor on an unsustainable path. While the contribution factor keeps hitting record highs, the FCC is not taking any action to address some of the fundamental contributions, disbursement, and oversight concerns that I and others have been raising for years now. We cannot continue to spend other peoples' money in this way without a real conversation at this agency about reform. I have put ideas out there and would welcome a discussion about paths forward.

My concerns today are only compounded by the lack of data and analysis into the hundreds of millions of dollars that have gone towards supporting various federal and state Wi-Fi hotspot programs that were stood up since 2020. Indeed, the data we do have is concerning. For instance, earlier this year, the Chicago Public Schools' Inspector General published a report that found that every single device from three dozen schools were unaccounted for.[7] And that IG report also showed that during the 2021-2022 school year, more than 77,000 devices were reported lost or stolen—including $23 million worth of laptops, hotspots, and iPads.

To be sure, one school district's failure to put in place commonsense safeguards doesn't necessarily mean that other efforts will lead to similar results. But it counsels in favor of the FCC ensuring that strong protections are in place.

In closing, I'd like to thank staff from the Wireline Competition Bureau for their work on this item. But because the Order exceeds our authority, I must respectfully dissent.

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[4] 47 U.S.C. § 254(h)(2)(A).

[5] Brief of U.S. Senators as Amici Curiae in Support of Petitioners, *Molak v. FCC*, Case No. 23-60641, at 2.

[6] *Id.* at 1.

[7] *See* Dana Rebik, Peter Curi," CPS report shows $23M worth of technology unaccounted for," Jan. 9, 2024, WGN9, https://wgntv.com/news/chicago-news/cps-report-shows-23m-worth-of-technology-unaccounted-for/.