No. 17-___

IN THE

Supreme Court of the United States

UNITED STATES TELECOM ASSOCIATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Despite this clear congressional intent, the Federal Communications Commission's (FCC) Report and Order on Remand, Declaratory Ruling, and Order, Protecting and Promoting the Open Internet, reclassifies all broadband providers as common carriers subject to Title II of the Communications Act of 1934. 30 FCC Rcd. 5601 (2015) (JA 188a-1090a) (the "Order" or the "Open Internet Order"). The D.C. Circuit panel below upheld this reclassification under the deferential standard of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and the full court declined to rehear the case *en banc*.

Congress "twice over" immunized mobile broadband from common carrier regulation. *Cellco P'ship v. Fed. Commc'ns Comm'n*, 700 F.3d 534, 538 (D.C. Cir. 2012) [hereinafter *Cellco*]. To overcome this immunity, the Order reinterprets the term "public switched network" to include "all users of public IP addresses. Order, 30 FCC Rcd. at 5615 (JA 617a).

The questions presented are:

(1) Whether the FCC's Order imposing common carrier status upon broadband providers:

(A) constitutes a major rule of vast "economic and political significance," requiring Congress to "speak clearly" if it wishes to delegate the matter to an agency's interpretive discretion, *Utility Air Regulatory Group v. E.P.A* (*U.A.R.G.*), 134 S.Ct. 2427, 2444 (2014), when the Order will affect (i) every American Internet service provider, which collectively invest over $78 billion in network investments annually as

of 2014; (ii) every Internet content provider, an industry that currently includes the five largest companies in the United States by market capitalization; and (iii) every Internet consumer, currently totaling over 275 million Americans; and

(B) if so, whether Congress expressly authorized the FCC to issue the major rule, when (i) Congress enacted the Telecommunications Act of 1996, upon which the FCC relies, with the express purpose of ensuring "the Internet and other interactive computer services," remain "unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(2); and (ii) the FCC concedes that "the Communications Act did not clearly resolve the issue of how broadband should be classified." *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J. dissenting) (internal citations omitted) (JA 1446a) [hereinafter *U.S. Telecomm.*].

2. Whether the FCC's reinterpretation of the term "public switched network" to include IP enabled services is, by virtue of implicating additional services, a minor or major question.

PARTIES TO THE PROCEEDING

The following were parties to the proceedings in the U.S. Court of Appeals for the District of Columbia Circuit:

1. TechFreedom, Jeff Pulver, Charles Giancarlo, and Scott Banister, intervenors on review, were intervenors below. They participated in the proceedings before the FCC.
2. The Federal Communications Commission, respondent on review, was a respondent below.
3. Additional petitioners below, who are nominal respondents on review, were the United States Telecom Association; AT&T Inc.; CTIA – The Wireless Association®; CenturyLink; NCTA – The Internet & Television Association; and the American Cable Association.
4. Petitioner-intervenor below (with respect to certain petitions for review), who is a nominal respondent on review, was the Independent Telephone and Telecommunications Alliance.
5. Respondent-intervenors below (with respect to certain petitions for review), who are respondents (or in some cases, nominal respondents) on review, are Alamo Broadband Inc.; Daniel Berninger; Full Service Network; Sage Telecommunications LLC; Telescape Communications, Inc.; TruConnect Mobile; Wireless Internet Service Providers Association; Ad Hoc Telecommunications Users Committee; Akamai Technologies, Inc.;

Center for Democracy & Technology; Cogent Communications, Inc.; ColorOfChange.org; COMPTEL; Credo Mobile, Inc.; Demand Progress; DISH Network Corporation; Etsy, Inc.; Fight for the Future, Inc.; Free Press; Kickstarter, Inc.; Level 3 Communications, LLC; Meetup, Inc.; National Association of Regulatory Utility Commissioners; National Association of State Utility Consumer Advocates; Netflix, Inc.; New America's Open Technology Institute; Public Knowledge; Tumblr, Inc.; Union Square Ventures, LLC; Vimeo, LLC; and Vonage Holdings Corporation.

RULE 29.6 DISCLOSURE STATEMENT

Intervenor TechFreedom is a not-for-profit, non-stock corporation organized under the laws of the District of Columbia. TechFreedom has no parent corporation. It issues no stock.

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PETITION FOR A WRIT OF CERTIORARI

Intervenors respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the District of Columbia Circuit dismissing its petitions to review the order issued by the Federal Communications Commission ("FCC") declaring broadband providers to be common carriers subject to Title II of the Communications Act of 1934. Report and Order on Remand, Declaratory Ruling, and Order, Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015) (JA 118a-1126a) (the "Order"). This petition focuses on the "major questions" doctrine and what deference, if any, was owed to the FCC in reviewing its Order. This petition does not address other aspects of the D.C. Circuit's opinion and decision, including the aspects of the decision that concern (i) the First Amendment status of broadband providers, the (ii) the Fifth Amendment implications of the Order, or (iii) compliance by the FCC with the Administrative Procedure Act.

OPINIONS BELOW

The opinion of the D.C. Circuit (JA 1a-187a) is reported at *United States Telecom Ass'n v. Fed. Commc'ns Comm'n,* 825 F.3d 674 (D.C. Cir. 2016). The D.C. Circuit's orders denying panel rehearing and rehearing *en banc* (JA 1354a-1468a) are reproduced at *U.S. Telecomm.,* 855 F.3d at 417.

JURISDICTION

On May 1, 2017, the D.C. Circuit denied timely petitions for panel rehearing or rehearing en banc. *U.S. Telecomm.*, 855 F.3d 381 (JA 1356a). On July 20, 2017, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including September 28, 2017. See No. [17A54]. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The Constitution of the United States provides, in pertinent part, that "[t]he judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority … [and] to Controversies to which the United States shall be a party." U.S. Const. art. III, § 2, cl. 1. The "major questions" doctrine rests on the separation of powers enshrined in the Constitution. *See U.A.R.G.*, 134 S.Ct. at 2446 ("Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution's separation of powers. Under

our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them.") (quoting U. S. Const., Art. II, § 3)). Congress makes laws and the President, acting at times through agencies like EPA, "faithfully execute[s]" them. Relevant provisions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 151 et seq., are reproduced at J. App. 1469a-1475a.

INTRODUCTION

Certiorari is needed to conclusively resolve a matter of utmost importance: whether the FCC has the statutory authority to classify broadband as a common carrier telecommunications service subject to Title II of the Communications Act, when (i) Congress has never passed legislation clearly authorizing the FCC to make such a classification, and (ii) the rule is arguably "one of the most consequential regulations ever issued by any executive or independent agency in the history of the United States," ultimately affecting "every Internet service provider, every Internet content provider, and every Internet consumer" in the United States. *U.S. Telecomm.,* 855 F.3d at 417 (Kavanaugh, J. dissenting) (JA 1442a).

As Judge Kavanaugh explained, in dissenting from the denial of a rehearing *en banc*, "[i]n a series of cases over the last 25 years, the Supreme Court has required clear congressional authorization for major rules of this kind." *Id*. (J.A. 1430a). This "major rules doctrine," he continued, "helps preserve the separation of powers and operates as a vital check on expansive and aggressive assertions of executive authority." *Id*. (J.A. 1430a-1431a). In contemplation

of this Court's precedent on the major rules doctrine, Judge Kavanaugh concluded that the Order's reclassification of broadband was unlawful, as courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Id.* (citing *U.A.R.G*, 134 S.Ct. at 2444 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)) (JA 1430a).

Indeed, as Judge Brown also noted in dissenting from the denial of a rehearing en banc, the D.C. Circuit itself "already characterized net neutrality regulation as a 'major question,'" which requires the FCC to act only within the confines granted by Congress. *Id.* at 402 (Brown, J. dissenting) (citing *Verizon v. F.C.C.*, 740 F.3d 623, 634 (D.C. Cir. 2014) (citations omitted)) (JA 1399a). Specifically, the *Verizon* court said:

> Before beginning our analysis, we think it important to emphasize that … the question of net neutrality implicates serious policy questions, which have engaged lawmakers, regulators, businesses, and other members of the public for years .... Regardless of how serious the problem an administrative agency seeks to address, … it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law. 740 F.3d at 634.

The magnitude of the question addressed by the FCC lies not only in the importance of broadband service in our modern economy—estimated at $75

billion annually[1]—but in the broader uncertainty created by the contorted reading of the statute necessary to support reclassification of broadband, which extends to other Internet services. The rule openly claims authority to regulate "a single network comprised of all users of public IP addresses and [traditional telephone] numbers." Order, 30 FCC Rcd. at 5615 (JA 617a). In other words, the FCC has claimed sweeping authority not merely over broadband but across any services that connect to the Internet (by using public IP addresses).

Yet, this case also has significant implications beyond the constitutional separation of powers concerns raised by the major questions doctrine. As Judge Kavanaugh notes, "[t]he rule will affect every Internet service provider, every Internet content provider, and every Internet consumer." 855 F.3d at 417 (JA 1442a). Absent any decision by this Court, there will be two kinds of uncertainty plaguing the

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[1] *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 FCC Rcd 1375, 1383, ¶ 15 (2015) [hereinafter 2015 Broadband Progress Report] (noting that broadband providers recognized "both the value of and the need for continued investment to develop a robust broadband network that will meet consumers' demands," and that between 2012 and 2013, broadband providers had increased their investments by approximately 10%, to $75 billion).

long-term decisions of those innovating and investing in the Internet ecosystem.

The Order creates vast uncertainty on how the FCC might use the powers it has claimed under Title II. As Judge Brown notes:

> The Order acknowledges its tailoring of the Act's common carrier requirements so as to capture broadband Internet access is "extensive," "broad," "[a]typical," and "expansive" — including at least 30 Title II provisions and 700 rules promulgated under them. See Order ¶¶ 37, 51, 438, 461, 493, 508, 512, 514. The Order also says this level of forbearance results in a modernization of Title II "never" before contemplated. *See id.* (JA 1356a-1412a).

The stakes are too high for a "wait and see" approach on how the FCC might further attempt to "tailor" or "modernize" the Communications Act—or how the Order's reinterpretations of the Act will ensnare other Internet services into Title II, such as the Voice over Internet Protocol (VoIP) services developed by Intervenors Pulver, Giancarlo and Banister.

The FCC, currently under Republican leadership, is considering a Notice of Proposed Rulemaking that would rescind the Order, and reverse reclassification of broadband providers. But, as the D.C. Circuit rightly noted, this will only create more uncertainty. *See Id*. at 382 (noting "the uncertainty surrounding the fate of the FCC's order"). Absent *any* decision by the Court, the regulatory status of broadband providers (and perhaps other Internet companies) will

remain subject indefinitely to a game of ping-pong depending on results of elections.

Such regulatory ping-pong creates two significant issues that require this Court's immediate attention: Perhaps most importantly, such uncertainty will continue to stifle the investment in broadband deployments necessary to ensure *all* Americans have access to Internet. Millions of Americans will suffer impediments to access websites and resources that, as Justice Kagan recently noted, "have become embedded in our culture as ways to communicate and ways to exercise our constitutional rights." Transcript of Oral Argument, *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017) (No. 15-1194). Indeed, the FCC's 2015-2018 Strategic Plan declares the Commission's primary purpose to be removing such uncertainty by "ensuring an *orderly* policy framework within which communications products and services can be efficiently and effectively provided to consumers and businesses." FED. COMMC'NS COMM'N, STRATEGIC PLAN 2015-2018 4 (2015). Letting the Title II ping-pong match continue indefinitely would be anything but "orderly."

It would also continue to consume taxpayer resources, and the limited bandwidth of the FCC and the courts. Continued litigation has already been all but guaranteed. When asked if Congressional Democrats should support some kind of legislation now that the Republican-led FCC has proposed to reverse reclassification, Gigi Sohn, who served as Special Advisor to former FCC Chairman Tom Wheeler and helped draft the Order, unequivocally declared: "I'd rather take my chances in court…." The Future of Net Neutrality, Politico (Sept. 18, 2017,

12:05 PM) (comment at 22:20), *available at* http://goo.gl/iQ1hAE.

This petition does not ask this Court to revisit its holding in *Nat'l Cable & Telecomm'ns Ass'n v. Brand X*, 545 U.S. 967 (2005), which deferred to the FCC on the minor question of whether it could choose *not* to impose common carrier status on a part of broadband networks. Rather, this petition asks this Court to address a distinct issue: should the Commission's decision on the *major* question to impose common carrier burdens on broadband providers be reviewed under the deferential two-step analysis of *Chevron*, or *de novo* at "Chevron Step Zero." *See* Cass R. Sunstein, Chevron Step Zero, 92 VA. L. Rev. 187 (2006). In doing so, the Court will provide much needed guidance to courts and federal agencies by further defining the major questions doctrine, and will resolve a divisive and perpetual issue of great importance to the Nation.

STATEMENT OF THE CASE

The 1996 Telecommunications Act[2] codified the distinction long drawn by the FCC between "basic services" (defined as "a pure transmission capability over a communications path") and "enhanced services" (comprising "any offering over the telecommunications network which is more than a basic transmission service"). *See Verizon*, 740 F.3d at 630 (citing 47 U.S.C. § 153(24), (50), (51), (53)). Congress adopted the terms used by the district court that broke up the AT&T monopoly: "telecommunications services" and "information services." *United States v.*

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[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

AT&T, 552 F. Supp. 131, 139, 167 (D.D.C. 1982). Thus, the 1996 Act drew a bright line between Title II and the Internet—leaving the Internet subject to laws of general application, such as consumer protection and antitrust laws.

Congress reinforced this distinction with a clear statement of policy:

> It is the policy of the United States … to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation. 47 U.S.C. § 230(b)(2).

Congress explicitly included Internet access providers in the operative definition of Section 230:

> The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions. 47 U.S.C. § 230(f)(2) (JA 1470a).

This means that broadband providers are protected by Section 230's "Good Samaritan" immunity, the second part of which is most relevant here:

> (2) Civil liability: No provider or user of an interactive computer service shall be held liable on account of—
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material

> that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected. 47 U.S.C. § 230(c)(2)(A).

Yet the FCC has spent the last twelve years attempting to regulate broadband providers from exercising the editorial discretion that Congress plainly *intended* to allow by granting them broad immunity. After two losses before the D.C. Circuit, the FCC, in the present Order, imposed upon broadband providers a regulatory status, common carriage, that is utterly antithetical to what Congress intended.

REASONS FOR GRANTING THE PETITION

Initially, it may seem that the Court is being asked to address the same narrow issue that the D.C. Circuit confronted no fewer than four times in the last seven years: "an effort by the Federal Communications Commission to compel internet openness—commonly known as net neutrality—the principle that broadband providers must treat all internet traffic the same regardless of source." *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674, 689 (D.C. Cir. 2016) ("For the third time in seven years, we confront an effort by the Federal Communications Commission to compel internet openness."). In dismissing petitions for *en banc* review of the Order, the D.C. Circuit noted: "[t]he agency will soon consider adopting a Notice of Proposed Rulemaking that would replace the existing rule with a markedly different one." *See U.S. Telecomm.*, 855 F.3d at 382. The court concluded: "[e]n banc review

would be particularly unwarranted at this point in light of the uncertainty surrounding the fate of the FCC's Order." *Id.*

But it is precisely because of this uncertainty—and the general uncertainty about the regulatory status of broadband that has plagued, and will continue to plague, consumers, broadband providers and state and local governments alike for years—that this Court should grant certiorari. This Court should take this opportunity to address the question not yet considered by any court: not the minor question of the permissibility of a simple rulemaking or whether the FCC may disclaim broad powers over the Internet, but the *major* question of whether the FCC may impose common carriage regulation upon broadband services.

Granting certiorari could resolve an issue of immense economic and political significance to the Nation, finally affording businesses and consumers with the regulatory stability necessary to deploying broadband and ensuring *all* Americans have access to "arguably the most important innovation in communications in a generation." *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010). Or, as former Chairman Tom Wheeler put it, in defending the Order issued under his lead, "[t]he most powerful network ever known to Man."[3]

I. Certiorari is needed to clarify the "major questions" doctrine.

In the aftermath of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837

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[3] *See* Remarks of FCC Chairman Tom Wheeler, Silicon Flatirons Center 5 (Feb. 9, 2015) *available at* https://goo.gl/Jt4zZB.

(1984), Justice Breyer noted the tension between federal judges allowing agencies to tackle complex problems on the one hand, and the need for vigilant judicial oversight to ensure that agencies do not "exercise their broad powers [in a manner that] lead[s] to unwise policies or unfair or oppressive behavior" on the other.[4] In an attempt to reconcile these competing concerns, Justice Breyer concluded that "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[5]

Thus was born what this Court has since called the "major questions doctrine" or "major rules doctrine." Under either name, the doctrine requires "Congress to speak clearly if it wishes to assign to an agency, decisions of vast 'economic and political significance.'" *U.A.R.G.*, 134 S.Ct. at 2444 (quoting *Brown & Williamson*, 529 U.S. at 160). Put differently, when evaluating how administrative agencies make such decisions, courts ought not presume Congress intended to delegate the matter to agencies implicitly. Rather, as this Court has held repeatedly, and twice since 2014, before an agency issues a major rule, Congress must *expressly* have authorized the agency to do so. *See, e.g., King v. Burwell*, 135 S.Ct. 2480 (2015) ("In extraordinary cases … there may be reason to hesitate before

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[4] Stephen G. Breyer, *Judicial Review of Questions of Law and Policy,* 38 ADMIN. L. REV 363, 370 (1986); *see also* Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 489 (2016) (discussing Justice Breyer's seminal article in detail).

[5] *Id.*

concluding that Congress has intended such an implicit delegation.") (quoting *Brown & Williamson*, 529 U.S. at 159); *U.A.R.G.*, 134 S.Ct. at 2444 (recognizing for questions of vast economic and political significance, courts expect Congress to speak clearly); *MCI Telecommunications Corp. v. Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994).

Despite such clear guidance from this Court, the D.C. Circuit in this case dismissed the major questions doctrine entirely with a mere paragraph. *U.S. Telecomm.*, 825 F.3d at 704. Not until Judge Kavanaugh and Judge Brown raised the issue in their dissents did the court address the doctrine in any detail. *U.S. Telecomm.*, 855 F.3d at 382. Yet again, however, the D.C. Circuit dismissed the issue, claiming to "know [that] Congress [had] vested the agency with authority to impose obligations like the ones instituted by the Order because the Supreme Court has specifically told us so." *U.S. Telecomm.*, 855 F.3d at 383. The court relied on this Court's markedly different holding in *Brand X*, which deferred to the FCC on the *minor* question of whether it could choose *not* to impose burdensome common carrier status on a part of broadband networks. 545 U.S. 967 (2005) .

To say that the *Brand X* Court's finding that the FCC has the discretion to *disclaim* Title II authority over the Internet, somehow means that the Commission must also have the discretion to *claim* such authority is illogical. True, discretion does, usually, cut both ways. But, as Justice Breyer stated in dissenting in *United States v. Mead*, 533 U.S. 218, 229 (2001) (Breyer, J. dissenting), *Chevron* does not always apply, and is "inapplicable" where it is unclear

that Congress intended to delegate particular interpretive authority to an agency. That's because *Chevron* has one prior step: the so-called "Step Zero."[6] As this Court said, declining to apply *Chevron* in *King v. Burwell*:

> This approach "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Id.*

The D.C. Circuit's dismissal of the major questions doctrine and subsequent misapplication of *Brand X* does not require this Court to revisit its holding in that case. However, it reveals that the bounds of the major questions doctrine are more unclear than clear. Indeed, the lower court even noted it had "no need … to resolve the existence or precise contours of the major rules … doctrine described by our colleagues." *U.S. Telecomm.*, 855 F.3d at 383.

Given this lack of clarity—especially in light of this Court invoking the doctrine recently in both *King v. Burwell* and *U.A.R.G.*—this Court should grant certiorari to further clarify the contours of the major questions doctrine, thus providing much needed

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[6] *See* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

guidance to courts and federal agencies evaluating their statutory mandates.

II. Absent review by this Court, the United States' communications industry will languish indefinitely in a state of regulatory uncertainty.

Despite Congress' clear directive that the U.S. "preserve the vibrant and competitive free market that presently exists for the Internet," and absent any congressional authorization to the contrary, the FCC has spent the last thirteen years grappling with the issue of an "Open Internet" or "net neutrality." 47 U.S.C. § 230(b)(2). As a result, the FCC has funneled vast resources into rulemaking and litigation that could have been spent on its own purportedly primary goal of "promot[ing] the expansion of competitive telecommunications networks." FED. COMMN'S COMM'N, STRATEGIC PLAN 2015-2018 1 (2015).

The agency has been in litigation, or between litigations, at the D.C. Circuit for nine years, resulting in four D.C. Circuit panel or *en banc* opinions. Absent the requisite express authority, it is no surprise that, in searching for authority over the Internet, the FCC has splattered the wall of that court with statutory spaghetti to see what would stick. Surely such uncertainty is not what the D.C. Circuit had in mind when it cited the "advantages … which inhere in reliance on rulemaking" for providing regulatory certainty. *Nat'l Petroleum Refiners Ass'n v. F.T.C.*, 482 F.2d 672, 675–76 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974).

Thus, while the Order itself creates vast uncertainty—not only for the broadband providers

directly subject to it, but for other Internet companies, as well—it is the constant uncertainty surrounding which regulatory aspects of Title II the FCC is going to implement from time to time and lack of hope for a final resolution, which should move this Court to grant certiorari. Regardless of whether the current FCC ultimately repeals the 2015 rule, the issue will remain in gridlock as it too will be vulnerable to challenges from another administration that wishes to—yet again—reverse course. Absent a decision by this Court, this regulatory ping-pong will not only result in continued costly litigation, but even more critically it will continue to stifle the investment in broadband deployments necessary to ensure *all* Americans have access to internet.

With tens of billions of dollars on the line, prudent Internet service providers, and their investors, understandably will continue to simply step aside and delay investment until longer-term clarity can be achieved. 2016 Fed. Commn's Comm'n Broadband Progress Rep., at 83 (Comm'r Pai concurring) ("[a]fter seven years, $63.6 billion spent, and plenty of talk, this Administration's policies have failed to deliver 'advanced telecommunications capability.'").

Finally, by granting certiorari, and providing a definitive answer to the question of the FCC's authority over the Internet, this Court may finally present the issue squarely to Congress. The purpose of the major questions doctrine is, after all, to protect the separation of powers, by ensuring that questions of major significance are resolved by elected

lawmakers, not the administrative agencies that are supposed to execute the laws, not make them.

A. Broadband providers face a cloud of uncertainty.

The nature and scope of FCC authority under Title II affords the Commission wide discretion over the areas and targets of regulation. The resulting uncertainty over the type, duration, and intensity of potential regulations impedes and deters broadband carriers from infrastructure build-out and new technologies. As FCC Chairman Ajit Pai noted, the "possibility of broadband rate regulation looming on the horizon" forced companies to modify or abrogate their plans to "build or expand networks, unsure of whether the government would let them compete in the free market." Statement of Chairman Ajit Pai, Re: Restoring Internet Freedom (WC Docket 17-108).

One class of carriers important to expanding the reach and speed of broadband is the small-to-medium sized Internet service providers (ISPs). These smaller ISPs help create a competitive broadband environment, and help introduce novel ideas and concepts that can lead to technological breakthroughs. Furthermore, these companies help reach those customers that the larger ISPs may not be capable or willing to reach, and "are critical to closing the digital divide by building-out in lower-income rural and urban areas." *Id.* at 2. By creating a broad, ambiguous standard for the applicability of Title II, the FCC has created a regulatory environment in which smaller ISPs are forced to make difficult, and possibly

existential, investment decisions under great uncertainty.

The breadth and diversity of these companies speaks to the pervasive effects of regulatory uncertainty. Rural ISPs from rural states from Arkansas to Washington have told the FCC that uncertainty caused by Title II reclassification has hindered and, in many situations, completely ceased broadband investments in their communities. In writing letters to the FCC, a coalition of seventy fixed wireless ISPs wrote that "our challenges are exacerbated by the Title II order … which has significantly increased compliance burdens and regulatory risk through heavy-handed regulation that is rife with uncertainty," and seven mobile ISPs wrote that "the uncertainty surrounding the Title II regulatory framework for wireless broadband services hinders our ability to meet our customer[s]' needs, burdens our companies with unnecessary and costly obligations and inhibits our ability to build and operate networks in rural America." *Id.*

According to the Business Roundtable, an association of chief executive officers of America's leading companies, "[h]igh levels of uncertainty are harmful to capital spending in any industry, but the long-lived investments made by telecommunications firms should be especially sensitive to it."[7] Without the resources to maintain lawyers and lobbyists to track and anticipate regulatory shifts, most small providers have chosen to simply step back and

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[7] *See* Press Release, Business Roundtable, Business Roundtable Position on Regulation of Consumer Broadband Service under Title II of the Communications Act (January 20, 2015), *available at* https://goo.gl/62AzEm.

forestall investments until longer-term clarity can be achieved. In fact, at least 90% of the businesses that will be burdened by the new utility-style network neutrality regulations will be small businesses. *See* Order, 30 FCC Rcd. at 5612 (JA 216a-218a).

Two years following the FCC's decision to reclassify broadband, it is clear that broadband investment has declined, especially in already underserved areas such as rural America and Tribal lands.[8] Former Rep. Rick Boucher (D-VA), who co-founded the Congressional Internet Caucus and chaired the House Subcommittee on Communications and the Internet, perfectly explained this issue recently:

> One simply cannot expect carriers to invest tens of billions of dollars in broadband deployments when they don't know which regulatory aspects of Title II are going to be implemented by the FCC from time to time. Will the FCC control terms and conditions of service? Will it set rates? Will it require unbundling of networks or network elements? The prudent carrier simply steps back in such a situation and forestalls investment until longer-term clarity can be achieved.[9]

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[8] According to the FCC, "in urban areas, 97% of Americans have access to high-speed fixed service. In rural areas, that number falls to 65%. And on Tribal lands, barely 60% have access. All told, nearly 30 million Americans cannot reap the benefits of the digital age." FED. COMMN'S COMM'N, BRIDGING THE DIGITAL DIVIDE FOR ALL AMERICANS (last visited Sept. 26, 2017), https://goo.gl/AQ3Z8d.

[9] Rick Boucher, *Don't Forget Rural America In Open Internet Debate*, FORBES (Aug 22, 2017), https://goo.gl/iZcaxU.

In the past, the FCC helped Congress achieve such clarity by assisting with the passage of major legislation to remedy similar "illdefined [sic] ... state[s] of regulatory uncertainty." *All. for Cmty. Media v. F.C.C.*, 529 F.3d 763, 767 (6th Cir. 2008) (discussing the state of the cable communications market prior to the passage of the Cable Communications Policy Act of 1984). However, it is now abundantly clear that this is no longer the case. This Court should act to remove the cloud of uncertainty hindering investment in broadband to ensure *all* Americans—particularly the most vulnerable—have access to the Internet.

i. Uncertainty about how Title II will be implemented has chilled broadband deployment.

The first two years under the current Title II regime saw domestic broadband capital expenditures decrease by 5.6%, or $3.6 billion.[10] This foregone investment represented a significant loss for consumers, both in terms of the reach and capabilities of broadband deployment.

Because regulatory risk is difficult to calculate without full information on how, when, and where a regulation might be created or implemented, Title II makes it extremely difficult for these companies to maintain their size and/or grow.

Companies like Sjoborg's Inc., a Minnesota-based cable provider that employs 21 people and connects

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[10] *See* Hal Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era*, HAL SINGER (March 1, 2017), *available at* http://bit.ly/2reYks0.

6,800 residential consumers to broadband, are forced into "uncertainty about possible broadband price regulation by the FCC" which affects "decision making about future capital expenditures."[11]

Aristotle Inc., an ISP that serves nearly 800 customers in rural Arkansas, "dialed back its plans to 'triple' its customer base and 'expand [its] service into unserved areas of rural Arkansas'" wholly "[b]ecause of the regulatory uncertainty created by the Order." Statement of FCC Commissioner Ajit Pai on New Evidence That President Obama's Plan to Regulate the Internet Harms Small Businesses and Rural Broadband Deployment, Fed. Commn's Comm'n (May 7, 2015). Similarly, due to "regulatory uncertainty and costs" caused by this regulatory ping-pong, KWISP Internet, which serves almost 500 customers in rural northern Illinois, had to "delay network upgrades that would have upgraded customers from 3 Mbps to 20 Mbps service, new tower construction that would have brought service to unserved areas, and capacity upgrades that would reduce congestion for existing customers—not to mention the jobs needed to make all of that happen." *Id.*

Uncertainty about how the FCC will apply, or further "tailor," *U.A.R.G.*, 134 S.Ct. at 2445, Title II makes it difficult, if not impossible, for such companies to make investments. This runs contrary to the FCC's statutory mandate to deploy broadband

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[11] Press Release, American Cable Association, Smaller ISPs Support Restoration of Title I's Light Touch As Refuge From Burdens of Common Carrier Regs (July 18, 2017), available at http://www.americancable.org/aca-reversing-title-ii-classification-needed-to-stem-decline-in-broadband-investment-innovation-and-rollout-of-new-services-3/.

to all Americans in a reasonable and timely manner. 47 U.S.C. § 1302(a).

Other communications services also face a cloud of uncertainty, as the FCC has erased any clear jurisdictional line between the Internet and the telephone network.

In 1994, Jeff Pulver founded Free World Dialup ("FWD") as the first worldwide Internet telephony company; in 2001, he co-founded Vonage, among the world's top VoIP providers; and in 1996, he founded the VON Coalition to advocate on behalf of VoIP providers.

In 2004, after years of lobbying by Pulver, the VON Coalition and others, and a year after a petition filed by Pulver, the FCC issued the so-called "Pulver Order," for the first time declaring VoIP to be a Title I information service.[12] This was a landmark decision, given that analog voice telephony is the quintessential Title II service. The Order opened as follows:

> In this Memorandum Opinion and Order (Order), we declare pulver.com's (Pulver) Free World Dialup (FWD) offering to be an unregulated information service subject to the Commission's jurisdiction. In so doing, *we remove any regulatory uncertainty that has surrounded Internet applications* such as FWD. We formalize the Commission's policy of nonregulation to ensure that Internet applications remain insulated from

[12] In re Petition for Declaratory Ruling that pulver.com's Free World Dialup Is Neither Telecommunications nor a Telecommunications Service, 19 F.C.C.R. 3307 (2004) ("Pulver Order"), *available at* https://goo.gl/phnUzg.

> unnecessary and harmful economic regulation at both the federal and state levels. This action is designed to bring a measure of regulatory stability to the marketplace and therefore remove barriers to investment and deployment of Internet applications and services. *Id.* (emphasis added).

The Commission specifically rejected arguments made by incumbent telephone service providers "that Pulver has failed to demonstrate that there is a controversy or uncertainty surrounding its offering that warrants a declaratory ruling." *Id.* at 5, n. 24.

Preserving VoIP services' freedom from heavy-handed Title II regulation was critical to the development not only of VoIP but also other "edge" Internet services, especially video streaming—by drawing a clear line between Internet services (subject to Title I) and traditional telephony (subject to Title II). But the 2015 Order effectively erased that line. As Pulver explained in an October 2014 editorial urging the FCC not to revoke the Pulver Order:

> The madness of applying Title II means declaring everything telecom. It requires an entirely new standard and ends 60 years of precedent underlying the telecom versus information services distinction. The Federal Communication Bar Association may not see a problem, but I can attest I have no idea how to judge the difference between IP transmission and IP services for the purposes of my next startup. I will not be able to explain it to investors, because the line exists entirely

> in the mind of whoever happens to be Chairman of the FCC.[13]

Specifically, the Order reinterpreted what it means to be so sufficiently interconnected with the public switched network to qualify as a common carrier. No longer will a service need to connect to "all or substantially all" points on the public switched network to qualify; instead the FCC will analyze "whether the interconnected service is 'broadly available' … to 'the public' or to such classes of eligible users as to be effectively available 'to a substantial portion of the public.'" Order, 30 FCC Rcd. at 398 (JA 5787) (quoting 47 U.S.C. § 332(d)(1)). The FCC made this change to ensure that standard wireless voice remains a common carrier service, since it interconnects with only some of the now vastly expanded "public switched network" (*i.e.*, telephone numbers, but not IP addresses). *Id.* But its new definition—a "broadly available" interconnected service—is expansive enough to implicate "edge" Internet services, such as Internet telephony, which are broadly-available IP-based services.

Thus, the FCC's reinterpretation of "public switched network" blurs the bright-line distinction drawn by the Pulver Order, potentially exposing to Title II regulation to the very services that the FCC claims to protect. Order, 30 FCC Rcd. at 5603 (JA 5603). It prevents innovators such as Jeff Pulver and his fellow Intervenors from knowing, before investing

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[13] Jeff Pulver, *Fear and Loathing as Telecom Policy*, HUFFPOST (Aug. 6, 2014), *available at* https://goo.gl/kdSfb1.

substantial resources, what ultimately would be subject to this regulation.

Furthermore, the Order results in regulation of edge services directly—and opens the door to still more such regulation in the future—despite its rhetoric to the contrary. Specifically, the Order states that the FCC does have authority over interconnection. *See, e.g.,* Order, 30 FCC Rcd. at 5682 (JA 381a-382a) (defining Broadband Internet Access Service and stressing that its definition "encompasses arrangements for the exchange of Internet traffic"). And the Order subjects edge providers to Title II's common carrier rules. *Id*. 30 FCC Rcd. at 5734, 4747 (JA 500a-502a, 532a-534a). Banning "paid prioritization" bars companies and entrepreneurs—such as the intervening innovators who join this petition—from buying a service that would benefit them and their customers, and in some cases, that is vital to their business models. Notably, Charles Giancarlo's company offers consumers an a la carte wireless plan that could be cheaper and more flexible than traditional by-the-gigabyte data bundles. Yet this innovative business model is now subject to the FCC's hopelessly vague "general conduct" rule.

III. This case presents issues of vast economic, political, and legal consequence.

The Internet is an indispensable economic, social, and communicative tool. As network effects continue to increase the value of broadband, the political and social dynamic surrounding its use has become more pronounced. The nature, range, and depth of the debate over Title II regulation is indicative of the far-reaching consequences of its outcome. Because of the

vast economic, political, and legal importance of this case, we ask the Court to grant certiorari.

A. Economic Significance

The Internet increasingly serves as a major hub for economic activity, allowing millions of users to access informational and communicative services. It "drives the American economy and serves, every day, as a critical tool for America's citizens to conduct commerce, communicate, educate, entertain, and engage in the world around them." *See* Order (JA 194a). The broadband industry alone serves 85% of Americans, and invested $1.3 trillion of private capital in broadband infrastructure between 1996 and 2013.[14] The FCC's 2016 Broadband Progress Report noted that private broadband providers in the U.S. invested $78 billion in network infrastructure in 2014 alone.[15]

Further, the U.S. government alone currently spends about $10 billion annually subsidizing broadband service.[16] According to the U.S. Telecom association, more than 275 million Americans access

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[14] Patrick Brogan, *Latest Data Show Broadband Investment Surged in 2013*, USTELECOM THE BROADBAND ASSOCIATION (Sept. 8, 2014), *available at* https://goo.gl./CKGZKN.

[15] *See* Fed. Commn's Comm'n, GN Docket No. 15-191, 2016 Broadband Progress Report ¶ 137 (2016), *available at* https://goo.gl/9MJevz.

[16] SCOTT WALLSTEN & LUCÍA GAMBOA, TECHNOLOGY POLICY INSTITUTE, PUBLIC INVESTMENT IN BROADBAND INFRASTRUCTURE: LESSONS FROM THE U.S. AND ABROAD 2 (June 2017).

the Internet via broadband in and outside the home.[17] As of March, the U.S. companies with the largest market capitalization were all Internet content or "edge" companies providing Internet content and service: Apple ($730.06 billion), Alphabet ($580.77 billion), Microsoft ($497.11 billion), Amazon ($402.42 billion), and Facebook ($397.75 billion).[18]

B. Political Significance

The reclassification of broadband as a Title II telecommunications service has also drawn significant political and social interest, and has become the subject of significant debate. For Sen. Ron Wyden (D-OR), the repeal of Title II would mean the "end of the Internet as we know it … it's just that simple."[19] Conversely, Sen. Orrin Hatch (R-UT) sees Title II as an "outdated answer to a largely imagined problem."[20] Rep. Greg Walden (R-OR), Chairman of the House Energy and Commerce Committee, plead for legislative resolution, saying there's "too much is at stake to have this issue ping-pong between

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[17] *See* Patrick Brogan, *Broadband Investment Gains Continued in 2014*, USTELECOM THE BROADBAND ASSOCIATION (Jul. 24, 2015), *available at* https://goo.gl/c31Xao.

[18] Kenneth Kiesnoski, *The Top 10 U.S. Companies by Market Capitalization,* CNBC (March 8, 2017), *available at* https://goo.gl/anEYTY.

[19] Tony Romm, *Democrats in Congress are promising to do everything they can to stop the FCC from gutting net neutrality*, Recode (July 12, 2017), available at https://goo.gl/7jie31.

[20] Hon. Orrin Hatch, *An Unwise and Unnecessary Internet Power Grab*, FORBES (Feb. 5, 2015), *available at* https://goo.gl/ko72Va.

different FCC commissions and various courts over the next decade."[21]

C. Legal Significance

The outcome of this case will have profound and far-reaching implications for administrative law generally, for states, for the entire U.S. economy, and for the present and future regulation of the Internet, which both the D.C. Circuit and Federal Circuit have described as being "arguably the most important innovation in communications in a generation. *Clearcorrect Operating, LLC v. Int'l Trade Comm'n*, 810 F.3d 1283, 1302 (Fed. Cir. 2015) (O'Malley, J., concurring) (quoting *Comcast*, 600 F.3d at 661).

Further, the Internet has come to mean far more than the "network of networks" by which our computers—or even or even our mobile "phones"—access websites or load apps (call that the "Web"). The "Internet of Things" connects a myriad of devices that increasingly permeate our lives: from things we wear to vehicles we drive.[22] Given this ever expanding definition of the Internet, Judge Kavanaugh correctly noted in dissenting from the denial of a rehearing en banc, that the outcome of this case "will affect every Internet service provider, every Internet content provider, and every Internet consumer." *U.S. Telecomm.*, 855 F.3d at 417, and that the rule at issue may very well be "one of the most consequential

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[21] Melissa Quinn, *Despite Republican appeals, Democrats not willing to deal on net neutrality legislation*, WASHINGTON EXAMINER (July 24, 2017), *available at* https://goo.gl/9CZh1P.

[22] *See Internet of Things Before the H. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Hon. Darrell Issa, Chairman, H. Subcomm. on Courts, Intellectual Property, & the Internet).

regulations ever issued by any executive or independent agency in the history of the United States." *Id.*

IV. The decision below conflicts with this Court's decisions in *U.A.R.G.* and *Brown & Williamson*.

The Internet is of "such economic and political magnitude" that courts must not lightly conclude that Congress committed Internet regulation to the discretion of an agency without specific, express authorization. *Brown & Williamson*, 529 U.S. at 133. Indeed, as Judge Kavanaugh rightfully noted below, "[i]n a series of important cases over the last 25 years," this Court has made it abundantly clear that Congress must speak clearly to these issues. *U.S. Telecomm.*, 855 F.3d at 417. Congress granted no such authorization here.

Yet the D.C. Circuit breezily dismissed over a decade of precedent in which the Supreme Court insisted that questions of vast economic and political significance require *clear* congressional authorization. Despite this Court's decisions in *Brown & Williamson*, *U.A.R.G.*, and *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.* (perhaps most relevant to the FCC), the D.C. Circuit dismissed the major questions doctrine with a mere paragraph (while thanking us for raising the issue). In doing so, the court failed to even mention the vast economic and

political impact of the rule it had previously noted in *Comcast*. 600 F.3d at 661.

A. The FCC is attempting to regulate a matter of vast "economic and political significance" without clearly expressed congressional authorization.

When an agency action involves a major question of "economic and political significance," courts must be even more diligent in applying statutory limits on agencies' authority, since "Congress itself is more likely to have focused upon, and answered, major questions." *U.S. Telecomm.*, 855 F.3d at 419 (Kavanaugh, J., dissenting). The 1996 Telecommunications Act makes the intention of Congress plain: "to preserve the vibrant and competitive free market for [broadband]." 47 U.S.C. § 230(b)(2). Yet the FCC has attempted to regulate "every Internet service provider, every Internet content provider, and every Internet consumer"—the very antithesis of a "free market." *U.S. Telecomm.*, 855 F.3d at 419 (Kavanaugh, J., dissenting).

As the Supreme Court has made clear to the FCC before, when the agency lacks clear statutory authority, it cannot decide major questions—for example, this Court found it "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion. *MCI Telecommc'ns Corp.*, 512 U.S. at 231. Similarly, in *Brown & Williamson*, the agency was "asserting jurisdiction to regulate an industry constituting a significant portion of the American economy," but without anchoring its regulatory program in clear

congressional authorization to do so. *Brown & Williamson*, 529 U.S. at 159. "We are confident," the Court concluded, "that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion. *Id.* at 160. Furthermore, in *King v. Burwell*, the Court said that "had Congress wished to assign that question to an agency, it surely would have done so expressly." *King,* 135 S.Ct. at 2483.

Because broadband usage has become such a large part of society and consumer lifestyle, and because the manner of its usage has become the subject of hotly-contested political debate, Title II clearly represents an issue of great "economic and political significance."

The Order attempts to regulate a ubiquitous industry that implicates "billions of dollars in spending each year" and affects "millions of people," while leaving the door open to more regulation in the future—without due judicial assessment of the economic and political consequences. See Order (JA 248a).

B. The court below misread *Brand X*.

As Judge Brown notes in her dissent, "to avoid [the major questions doctrine], the FCC relies almost exclusively on the Supreme Court's 2005 decision in … *Brand X*." *U.S. Telecomm.*, 825 F.3d at 417 (Brown, J., dissenting) (JA 1090a-1446a). But that case is readily distinguishable:

> The FCC's light-touch regulation did not entail common-carrier regulation and was not some major new regulatory step of vast economic and political significance. The rule

> at issue in *Brand X* therefore was an ordinary rule, not a major rule. As a result, the Chevron doctrine applied, not the major rules doctrine. *Id. at* n.5 (Kavanaugh, J., dissenting) (1430a-1448a).

In contrast, this case raises the *major* question of heavy-handed common carrier regulation of broadband. As Judge Kavanaugh noted, *Brand X*—which never addressed the present question and, due to the "light regulation" imposed, started its analysis at *Chevron* step one—not only "cannot be the *source* of the FCC's authority" to promulgate a major rule, but *Brand X's* finding of statutory ambiguity serves as a *bar* to the FCC's claim of authority over a major question, *U.S. Telecomm.*, 855 F.3d at 425 (Kavanaugh, J., dissenting), because, "by definition … Congress has not *clearly* authorized the FCC to issue the net neutrality rule." *Id.* at 426.[23] As Justice Breyer stated in dissenting in *Mead*, where, as here, it is ambiguous whether Congress intended to delegate particular interpretive authority to an agency, *Chevron* is "inapplicable." 533 U.S. at 229 (Breyer, J. dissenting). In other words, "while the *Chevron* doctrine allows an agency to rely on statutory ambiguity to issue *ordinary* rules, the major rules

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[23] Similarly, the FCC's reliance on *Verizon* as a grant of authority to enact the current rule is misplaced. As Judge Brown noted below, "[w]hatever the wisdom of *Verizon's* interpretation of Section 706, the FCC did not 'reclassify broadband'; to implement 'net neutrality' principles in that case," and, "as Judge Williams noted in dissent from the Court's Opinion here, 'the *Verizon* court struck down the rules at issue on the grounds that they imposed common carrier duties on broadband carriers, impermissibly so' under the Act." *U.S. Telecom*, 855 F.3d at 400 (quoting *Verizon*, 740 F.3d at 633, 650).

doctrine prevents an agency from relying on statutory ambiguity to issue major rules." *U.S. Telecomm.*, 855 F.3d at 419 (Kavanaugh, J. dissenting).

Brand X merely gives the FCC discretion to impose "light touch" regulations consistent with Congress' express declaration that "the Internet" remain "unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(2). For the Commission to infer additional discretion on common carrier regulations would blatantly disregard congressional intent and this Court's settled precedent.

C. The FCC's Statutory Interpretations Violate Fundamental Principles of Statutory Construction.

The significance of the FCC's reclassification of broadband, and the degree to which it departs from congressional intent, becomes clear upon two specific legislative provisions whose true import was ignored by the D.C. Circuit.

1. Section 230

The panel decision and the *en banc* decision each devote a single paragraph to Section 230. The latter says, in relevant part:

> According to US Telecom, [Section 230(f)(2)'s] definition of "interactive computer service" makes clear that an information service "includes an Internet access service." As the Commission pointed out in the Order, however, it is "unlikely that Congress would attempt to settle the regulatory status of broadband Internet access services in such an oblique and indirect manner, especially given

> the opportunity to do so when it adopted the Telecommunications Act of 1996." 30 FCC Rcd. at 5777 ¶ 386; see *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.") (JA 1a-30a).

This is, notably, the only time either majority decision invokes the "major questions" doctrine. Both decisions miss the forest for the trees: they focus on the relatively narrow question of whether Section 230(f)(2), enacted as part of the Telecommunications Act of 1996, definitively resolved the meaning of "information service" throughout the Act by defining "interactive computer service" as "any information service" as "including specifically a service or system that provides access to the Internet." 47 U.S.C. § 230(f)(2). The decisions simply do not address what Section 230 *as a whole* says about the major question of what Congress intended for Internet regulation.

For Judge Brown, the "meaning [of the Telecommunications Act] could not be clearer," *U.S. Telecomm.*, 855 F. 3d at 393 (Brown J. dissenting) (JA 1381a):

> The Act found that the "Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." 47 U.S.C. § 230(a)(4) (emphasis added). Accordingly, Congress made keeping the Internet "unfettered" by "regulation" our national policy. Id. § 230(b)(2). *Id*. at 394 (JA 1383a).

This language was not merely hortatory. The inclusion of broadband (*i.e.*, Internet access) among essentially all other Internet services in Section 230(f)(2) gave substantive effect to the "policy" statement in Section 230(b)(2) by making such services eligible for the immunities provided in Section 230(c). As Alamo and Berninger noted in their petition for rehearing:

> Congress encouraged broadband providers to exercise editorial discretion by granting immunity for restricting access to objectionable content. 47 U.S.C. § 230(c)(2)(A). As a leading commentator has explained, "the statute implicitly recognizes the benefits flowing from ISPs' exercises of editorial discretion."[24]

Section 230(c)(2) provides a broad immunity:

> **(2) Civil liability** No provider or user of an interactive computer service shall be held liable on account of—
>
> > **(A)** any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected. 47 U.S.C. § 230(c)(2)(A).

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[24] Petition for rehearing and rehearing en banc, *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674 (D.C. Cir. 2017) (No. 15-1063).

This immunity is the antithesis of common carriage: the "indiscriminate, neutral transmission of any and all users' speech … characteristic of common carriage." *U.S. Telecomm.,* 825 F.3d at 742 (JA 112a). It is impossible to reconcile this provision with the FCC's reclassification of broadband, or the Order's no-blocking rule — and neither the FCC nor the majority even tried. The Order completely ignores Section 230(c)(2)(A), referring only to Section 230(c)(1), which "exempted broadband providers from defamation liability arising from content provided by other information content providers on the Internet," as evidence of the "unexpressive nature of their transmission function." Order, 30 FCC Rcd at 5871 (JA 828a-829a]). The panel and *en banc* decisions make no mention of Section 230(c) at all.

The glaring contradiction between the Order and Section 230 should have alerted the FCC that the agency had "taken an interpretive wrong turn," *U.A.R.G.*, 134 S.Ct. at 2446, and caused the D.C. Circuit to give serious consideration to this Court's "major questions" doctrine, before declaring that "the role of broadband providers is analogous to that of telephone companies: they act as neutral, indiscriminate platforms for transmission of speech of any and all users." *U.S. Telecomm.*, 825 F.3d at 743 (JA 114a).

2. Section 332(d)(2)

The imposition of common carriage regulation on *wireless* broadband is a major question unto itself, given the scale of the industry: "The broadband industry has invested $1.5 trillion dollars since 1996.

The wireline industry alone invested approximately $750 billion during that period."[25]

While wireless *voice* service has always been subject to Title II regulation, Congress "twice over" immunized mobile broadband from common-carriage regulation. *Cellco*, 700 F.3d at 538. And it has been mobile broadband services that have driven the vast bulk of the investment in wireless since 1996.[26]

To overcome this double immunity, the FCC reinterpreted the key term "public switched network," in 47 U.S.C. § 332(d)(2), to mean the Internet itself. Order, 30 FCC Rcd. at 5779 (J.A. 607a-608a) ("[N]etworks that use standardized addressing identifiers other than [traditional telephone] numbers for routing of packets"). Specifically, the FCC reinterpreted what it means to be so sufficiently interconnected with the public switched network to qualify as a common carrier. No longer will a service need to connect to "all or substantially all" points on the public switched network to qualify; instead the FCC will analyze "whether the interconnected service is 'broadly available' … to 'the public' or to such classes of eligible users as to be effectively available 'to a substantial portion of the public.'" Order, 30 FCC Rcd. at 5787 (quoting 47 U.S.C. § 332(d)(1)) (JA 628a-629a). The FCC made this change to ensure that standard wireless voice remains a common carrier service, since it interconnects with only some of the

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[25] Broadband Investment, US TELECOM THE BROADBAND INVESTMENT https://goo.gl/T2dRFd (last visited Sept. 27, 2017).

[26] *See* Patrick Brogan, *Broadband Investment Ticked Down in 2015*, USTELECOM THE BROADBAND ASSOCIATION (Dec. 14, 2016), available at https://goo.gl/SD6gkd.

now vastly expanded "public switched network" (*i.e.*, telephone numbers, but not IP addresses). *Id*. But its new definition—a "broadly available" interconnected service—is expansive enough to implicate "edge" Internet services, such as Internet telephony, which are broadly-available IP-based services.

Having immunized mobile broadband "twice over, from treatment as common carriers," *Cellco*, 700 F.3d at 538, Congress could not have intended to create a backdoor for the FCC to circumvent that double immunity. Congress simply "could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Brown & Williamson*, 529 U.S. at 160. The FCC's reinterpretations of Section 332(d)(2) raise a second "major question": regulation of "edge" services under Title II.

Erasing the line drawn by the *Pulver Order* between Title II services and "edge" Internet services creates extreme uncertainty not only for mobile broadband companies but for other Internet innovators. As Pulver warned in 2014:

> Applying Title II to IP networks creates a new Federal Computer Commission with authority to weigh in on everything connected to an IP network, in other words — everything.[27]

The FCC's reinterpretation of "public switched network" raises the major question of extending

[27] Pulver, *Fear and Loathing*, https://goo.gl/kdSfb1.

common carrier regulation to the Internet even beyond its direct implications for mobile broadband.

3. Congress Did Not Intend the FCC to Operate as a Federal Computer Commission.

A "Federal Computer Commission" is precisely what Rep. Chris Cox (R-CA), the principal drafter of Section 230, wanted to avoid. When the House of Representatives voted to add the language that became Section 230 to the House version of the 1996 Telecommunications Act, by a vote of 421-4, Cox made its intention clear:

> If we regulate the Internet at the FCC, that will freeze or at least slow down technology. It will threaten the future of the Internet. That is why it is so important that we not have a Federal computer commission do that. 141 Cong. Rec. H.8,471 (1995) (statement of Rep. Cox).

And yet, a Federal Computer Commission is precisely what the Order creates, armed with sweeping powers over not only broadband services but all services that use IP numbers — *i.e.*, the entire Internet. Judge Kavanaugh put it best:

> The net neutrality rule might be wise policy. But even assuming that the net neutrality rule is wise policy, congressional inaction does not license the Executive Branch to take matters into its own hands. *U.S. Telecomm.*, 855 F.3d at 426 (JA 1448a).

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be granted.

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