No.

IN THE

Supreme Court of the United States

CTIA–THE WIRELESS ASSOCIATION, ET AL.,
Petitioners,

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

Mobile broadband Internet access service (or "mobile broadband") is the high-speed, wireless service that provides an Internet connection to smartphones, tablets, and other mobile devices. Two independent provisions of the Communications Act of 1934 restrict the ability of the Federal Communications Commission ("FCC") to subject mobile broadband to onerous, common-carrier regulation. Congress provided that common-carrier treatment cannot apply to any "information service," and is instead reserved for a "telecommunications service" that involves pure "transmission" of information. 47 U.S.C. § 153(24), (50)–(51), (53). Congress also provided that common-carrier treatment cannot apply to any mobile service unless it is "interconnected" with "the public switched network," *id.* § 332(c), (d), which the FCC has repeatedly interpreted to mean the telephone network.

In 2015, the FCC reversed decades-old interpretations of multiple statutes in order to subject Internet access service to common-carrier regulation. The FCC reclassified mobile and fixed broadband as "telecommunications services" under Section 153. And it concluded that mobile broadband is "interconnected" under Section 332 by redefining "the public switched network" to claim that the telephone network and the Internet are actually *one* network—even though millions of users of each network cannot reach each other.

CTIA agrees with other petitioners that this Court should review whether the FCC unlawfully reclassified broadband Internet access service as a "telecommunications service" under 47 U.S.C. § 153.

The additional question presented by this petition is: Whether the FCC unlawfully reclassified mobile broadband Internet access service as a "commercial mobile service" under 47 U.S.C. § 332.

PARTIES TO THE PROCEEDING

Petitioners in the consolidated cases below were U.S. Telecom Ass'n ("USTelecom") (Nos. 15-1063 & 15-1086); Alamo Broadband Inc. (Nos. 15-1078 & 15-1164); NCTA–The Internet and Television Ass'n ("NCTA") (No. 15-1090); CTIA–The Wireless Ass'n ("CTIA")* (No. 15-1091); AT&T Inc. (No. 15-1092); American Cable Ass'n ("ACA") (No. 15-1095); CenturyLink (No. 15-1099); Wireless Internet Service Providers Ass'n ("WISPA") (No. 15-1117); Daniel Berninger (No. 15-1128); and Full Service Network, TruConnect Mobile, Sage Telecommunications LLC, and Telescape Communications, Inc. (No. 15-1151).

Respondents in these consolidated cases were the FCC and the United States of America.

Intervenors in these consolidated cases were ACA (in No. 15-1151 only); Ad Hoc Telecommunications Users Committee; Akamai Technologies, Inc.; AT&T (in No. 15-1151 only); Scott Banister; Wendell Brown; CARI.net; Center for Democracy & Technology; CenturyLink (in No. 15-1151 only); Cogent Communications, Inc.; ColorOfChange.org; COMPTEL; Credo Mobile, Inc.; CTIA (in No. 15-1151 only); DISH Network Corp.; Demand Progress; Etsy, Inc.; Fight for the Future, Inc.; David Frankel; Free Press; Charles Giancarlo; Kickstarter, Inc.; Independent Telephone & Telecommunications Alliance; Level 3 Communications, LLC; Meetup, Inc.; National Ass'n of Regulatory Utility Commissioners; National Ass'n of State Utility Consumer Advocates; Netflix, Inc.; New America's Open Technology Institute; NCTA (in No. 15-1151 only); Public Knowledge; Jeff Pulver; TechFreedom; Tumblr, Inc.; Union Square Ventures, LLC; USTelecom (in No. 15-1151 only); Vimeo, Inc.; Vonage Holdings Corporation; and WISPA (in No. 15-1151 only).

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* *See City of Arlington, Tex. v. FCC*, 569 U.S. 290, 294 n.1 (2013).

Amici in these consolidated cases were A Medium Corporation; American Civil Liberties Union; American Civil Liberties Union of the Nation's Capital; American Library Ass'n; Ass'n of College and Research Libraries; Ass'n of Research Libraries; Automattic, Inc.; Jack M. Balkin; Yochai Benkler; Richard Bennett; John Forbes Blevins; Broadband Institute of California; Broadband Regulatory Clinic; Michael J. Burstein; Business Roundtable; Center for Boundless Innovation in Technology; Chamber of Commerce of the United States of America; Competitive Enterprise Institute; Computer & Communications Industry Ass'n; Consumers Union; Michael Copps; Susan Crawford; Dwolla, Inc.; Electronic Frontier Foundation; Engine Advocacy; Anna Eshoo; Foursquare Labs, Inc.; Rob Frieden; Brett Frischmann; Harold Furchtgott-Roth; Future of Music Coalition; General Assembly Space, Inc.; Georgetown Center for Business and Public Policy; Github, Inc.; Theodore L. Glasser; Ellen P. Goodman; Reed Hundt; Imgur, Inc.; International Center for Law and Economics and Affiliated Scholars; Internet Ass'n; Nicholas Johnson; Keen Labs, Inc.; William J. Kirsch; Lawrence Lessig; Mapbox, Inc.; Edward J. Markey; Media Alliance; Sascha Meinrath; Members of Congress; Mobil Future; Mozilla; Multicultural Media, Telecom and Internet Council; National Alliance for Media Arts and Culture; National Ass'n of Manufacturers; Dawn C. Nunziato; Officers of State Library Agencies; Open Internet Civil Rights Coalition; Our Film Festival, Inc.; Phoenix Center for Advanced Legal and Economic Public Policy Studies; Professors of Administrative Law; Reddit, Inc.; Pamela Samuelson; Shapeways, Inc.; Squarespace, Inc.; Zephyr Teachout; Telecommunications Industry Ass'n; Fred Turner; Rebecca Tushnet; Twitter, Inc.; Users of the Internet; Barbara van Schewick; Washington Legal Foundation; Jonathan T. Weinberg; Writers Guild of America, West, Inc.; Tim Wu; Yelp,

Inc.; and Christopher Seung-gil Yoo. A motion by William Michael Cunningham to participate as *amicus curiae* was denied on December 21, 2015.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, CTIA is a Section 501(c)(6) not-for-profit corporation organized under the laws of the District of Columbia and represents the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and Internet companies, and other industry participants. CTIA has not issued any shares or debt securities to the public, and no parent or publicly held company owns 10% or more of CTIA's stock.

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TABLE OF APPENDICES[†]

[†] AT&T Inc. has filed a multi-volume petition appendix in *AT&T Inc. v. FCC* on behalf of CTIA and other petitioners seeking review of the judgment below. This table references that appendix.

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PETITION FOR A WRIT OF CERTIORARI

CTIA respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the D.C. Circuit in this case.

OPINIONS BELOW

The opinion of the D.C. Circuit (Pet. App. 1a–187a) is reported at 825 F.3d 674.[1] The order of the D.C. Circuit denying rehearing en banc, including an opinion concurring in the denial and two opinions dissenting from the denial, is reported at 855 F.3d 381 and reproduced at Pet. App. 1356a–1468a. The FCC's order and declaratory ruling (Pet. App. 188a) is available at 80 Fed. Reg. 19,738, and at 30 FCC Rcd. 5601.

JURISDICTION

The D.C. Circuit entered a judgment denying the consolidated petitions for review, including CTIA's petition (No. 15-1091), on June 14, 2016. CTIA filed a petition for rehearing en banc on July 29, 2016. The D.C. Circuit denied that petition on May 1, 2017. On July 20, 2017, the Chief Justice granted an application by CTIA and other petitioners to extend the time to file a petition for a writ of certiorari to September 28, 2017. This Court has jurisdiction over this timely petition pursuant to 28 U.S.C. § 1254(1).

[1] Citations to "Pet. App." are to the multi-volume appendix filed by the petitioner in *AT&T Inc. v. FCC* on behalf of CTIA and other petitioners seeking review of the judgment below.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

47 U.S.C. § 332 provides in relevant part:

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter … .

…

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. …

…

(d) Definitions

For purposes of this section—

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by

the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B); and

(3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

* * *

47 C.F.R. § 20.3 (2015) provides in relevant part:

Interconnected Service. A service:

(a) That is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from other users on the public switched network; or

(b) For which a request for such interconnection is pending pursuant to section 332(c)(1)(B) of the Communications Act, 47 U.S.C. 332(c)(1)(B). A mobile service offers interconnected service even if the service allows subscribers to access the public switched network only during specified hours of the day, or if the service provides general access to points on the public switched network but also restricts access in certain limited ways. Interconnected service does not include any interface between a licensee's facilities and the public switched network exclusively for a licensee's internal control purposes.

…

Public Switched Network. The network that includes any common carrier switched network,

whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan, or public IP addresses, in connection with the provision of switched services.

* * *

47 C.F.R. § 20.3 (2014) provides in relevant part:

Interconnected Service. A service:

(a) That is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network; or

(b) For which a request for such interconnection is pending pursuant to section 332(c)(1)(B) of the Communications Act, 47 U.S.C. 332(c)(1)(B). A mobile service offers interconnected service even if the service allows subscribers to access the public switched network only during specified hours of the day, or if the service provides general access to points on the public switched network but also restricts access in certain limited ways. Interconnected service does not include any interface between a licensee's facilities and the public switched network exclusively for a licensee's internal control purposes.

…

Public Switched Network. Any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services.

INTRODUCTION

This case is about the future of the Internet, and that future is increasingly wireless. Every day, more and more Americans rely on their cell phone, tablet, and other mobile devices for all manner of tasks, from the entertaining to the essential. These devices are now "a pervasive and insistent part of daily life," *Riley v. California*, 134 S. Ct. 2473, 2484 (2014), because of the connection they provide to the worldwide web.

Petitioner's members include companies that provide the public with that mobile connection to the Internet, with enormous success. Mobile broadband service is characterized by surging popularity, high customer satisfaction, fierce competition, soaring investment, and innovative offerings focused on consumer demand. In the decision at issue here, 30 FCC Rcd. 5601 (2015) (the "*Order*"), a bare majority of the FCC nonetheless declared, for the first time, that mobile broadband should be subject to common-carrier regulation—the maximum-governmental-control framework originally designed for railroads, and then repurposed in the 1930s for copper-wire telephone monopolies.

It was not supposed to be like this. The Communications Act of 1934, as amended by Congress, provides that 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"—including "service[s] … that provid[e] access to the Internet"—"*unfettered by Federal or State regulation*." 47 U.S.C. § 230(b)(2), (f)(2) (emphasis added).

Yet the *Order*'s explicit purpose and effect is to stop relying on the competitive free market, and to

transform the FCC into a "Department of the Internet." Hundreds of millions of Americans, and billions of devices, are affected by the *Order*, which makes it "one of the most consequential regulations ever issued by any executive or independent agency in the history of the United States." Pet. App. 1430a (Kavanaugh, J., dissenting from denial of rehearing en banc). The staggering reach of the *Order* alone makes it deserving of review by this Court.

What is more, the *Order*'s legality depends on multiple interpretive backflips. Three FCC Commissioners signed onto a results-oriented order that abandons several long-held statutory interpretations and regulatory definitions, in order to reach their desired destination of maximum regulatory control over every corner of the Internet. Most astounding and indefensible of all, the Commission took two different networks—the one comprising 10-digit telephone numbers (the telephone network) and the one comprising Internet Protocol ("IP") addresses (the Internet)—and declared that they are actually *one* network, even though millions of users of each network have no ability to communicate with each other. This was not reasoned agency action; it was a floor exercise in statutory gymnastics. A ruling that will change so much, and that rests on such a wobbly legal foundation, is eminently worthy of review by this Court.

STATEMENT

A. The Communications Act Doubly Immunizes Mobile Broadband From Common-Carrier Treatment

1. The Communications Act authorizes the FCC to regulate "common carrier[s]" who provide communication services, including telecommunications. 47 U.S.C. § 153(11), (51); *see generally id.* §§ 201–261.

Common-carrier regulation was designed to address the problems posed by genuine monopolies, so it is extremely invasive by design. For example, Title II of the Act gives the FCC immense power to regulate the rates and business practices of common carriers to prevent what it deems "unjust or unreasonable discrimination," "undue or unreasonable preference or advantage," and "undue or unreasonable prejudice or disadvantage." *Id.* § 202(a). Title II also exposes common carriers to sweeping enforcement provisions, including suits by private parties that can come with liability for damages and attorney's fees, *id.* §§ 206–208. Title II further regulates "network features, functions, or capabilities," *id.* § 251(a)(2); *see also id.* §§ 255–256, and authorizes the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out" these provisions and others, *id.* § 201(b).

Because common carriage is so burdensome, Congress strictly limited its application. Congress was particularly cautious not to stifle innovation in new communication systems—especially mobile systems—that do not pose the same threats as the telephone monopolies of decades past. Two different provisions of the Act prohibit the FCC from classifying providers of mobile broadband Internet service as "common carriers."

2. First, and relevant to all providers of communication services (whether using fixed wireline or wireless technology), Section 153 states that common-carrier regulation applies to providers of "telecommunications services," which are services (like traditional landline telephone service) that offer pure "transmission … , without change in the form or content of the information." 47 U.S.C. § 153(50)–(51),

(53). Common-carrier regulation cannot be applied, however, to providers of "information services," which are services that offer (in relevant part) a capability "for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." *Id.* § 153(24). These two categories are mutually exclusive. As other petitioners explain, before adopting the Order, the FCC repeatedly found that both mobile and fixed broadband Internet services are "information service[s]." *See, e.g.*, *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd. 5901 (2007) ("2007 Wireless Order").[2] This Court upheld that classification in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), a case involving cable Internet access service.

3. Title III of the Communications Act affords providers of mobile services a second, unique shield from common carriage: Only a "commercial mobile service" can be subject to common-carrier regulation, 47 U.S.C. § 332(c), (d). Congress defined "commercial mobile service" as a service that is "interconnected with the public switched network." *Id.* § 332(d)(1), (2). Any mobile service that is not interconnected with the public switched network (and is not the "functional equivalent" of such a service) falls into the residual category of "private mobile service," and is immune from common-carrier regulation, even if it is offered to the public and widely used. 47 U.S.C. § 332(c)(2), (d)(3); *see also* Pet. App. 53a ("private mobile service"

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[2] The petitions submitted by USTelecom, NCTA, and AT&T, among others, address in more detail the classification of broadband Internet access service under Section 153.

is a "residual category" encompassing all services that are not "commercial mobile service[s]").

Congress adopted these provisions in 1993 in order to harmonize the treatment of mobile *voice* service with that of traditional landline telephone service (which had long been regulated as a common-carrier service), while simultaneously protecting *all other* mobile services against common-carrier regulation, lest government stifle their innovation. *See Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, Second Report and Order ¶¶ 7, 11–15, 9 FCC Rcd. 1411 (1994).

The FCC is authorized to provide definitions—that is, *reasonable* definitions—of the terms "interconnected" and "the public switched network." *See* 47 U.S.C. § 332(d). For 20 years prior to the *Order*, the FCC did so, by defining "interconnected" to mean the ability to communicate with "all other users" on the public switched network. 47 C.F.R. § 20.3 (1994); *accord id.* § 20.3 (2014) (Pet. App. 1476a). And the Commission defined "the public switched network" as the telephone network: the public network that uses the "North American Numbering Plan" of 10-digit phone numbers. *See id.* § 20.3 (1994); *id.* § 20.3 (2014) (Pet. App. 1476a–1477a).

The FCC repeatedly applied these definitions to conclude that mobile broadband is a "private mobile service"—and thus cannot be subject to common-carrier regulation—because the Internet itself does not "interconnec[t]" with the telephone network. As the FCC observed, a mobile broadband user cannot communicate with "all other users on the public switched network." 2007 Wireless Order ¶ 45.

4. Congress itself also weighed in on the regulatory treatment of the Internet in 1996. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 230(b)(2), (f)(2), 110 Stat. 56, 138. Congress endorsed the FCC's light-touch regulatory approach by making it the express "policy of the United States" to "preserv[e] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation"—"including specifically" services that "provid[e] access to the Internet." 47 U.S.C. § 230(b)(2), (f)(2).

B. Under Extraordinary Political Pressure, The FCC Reclassifies Mobile Broadband By Retrofitting Longstanding Definitions

In the *Order*, the FCC abruptly imposed common-carrier regulation on mobile broadband by reclassifying it for the first time as a "telecommunications service" under Section 153 and as a "commercial mobile service" under Section 332. The *Order*'s simultaneous reclassification under these two independent sections was not coincidental: The FCC was under intense political pressure to achieve this result, and rewrote multiple regulations to do so. But "[u]nder the Constitution, congressional inaction does not license an agency to take matters into its own hands, even to solve a pressing policy issue." *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 460 (D.C. Cir. 2017).

1. The rulemaking that gave rise to the *Order* began as a modest effort to "find the best approach to protecting and promoting Internet openness." *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking ¶ 4, 29 FCC Rcd. 5561 (2014) ("NPRM") (Pet. App. 1131a). "Internet openness," or

"net neutrality," refers to "the principle that broadband providers must treat all internet traffic the same regardless of source." Pet. App. 2a. CTIA and its members are committed to delivering an open Internet, support reasonable efforts to protect the open Internet, and have long and voluntarily ensured that consumers can use their mobile broadband service to access any lawful content on the Internet.

The NPRM proposed to adopt two discrete rules, relying for legal authority on "the blueprint offered by the D.C. Circuit in its decision in *Verizon v. FCC*, [740 F.3d 623 (D.C. Cir. 2014)]." NPRM ¶¶ 3–4 (Pet. App. 1131a). *Verizon* held that the FCC can rely on an entirely different provision of the Telecommunications Act, section 706 (47 U.S.C. § 1302), in order to adopt certain net-neutrality rules. 740 F.3d at 635. The NPRM noted, in addition, that the FCC would "seriously consider" Title II as a source of authority to regulate, NPRM ¶ 4 (Pet. App. 1131a), and it asked whether mobile broadband "fit[s] within the definition of 'commercial mobile service,'" *id.* ¶ 150 (Pet. App. 1251a). But the Commission did not propose to modify any existing definitions or to subject mobile broadband to common-carrier regulation.

Then in November 2014, after the comment period closed, the President responded to behind-the-scenes lobbying from activist groups by publicly pressuring the FCC to reclassify all broadband Internet access services—including mobile services—as common carriers.[3] By a 3 to 2 vote, the FCC scrapped its original,

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[3] *See, e.g.*, Pet. App. 1415a (Brown, J., dissenting from denial of rehearing en banc); Maj. Staff of S. Comm. on Homeland Sec., *Regulating the Internet: How the White House Bowled over FCC Independence* (2016), http://goo.gl/52ceDs; Brian Fung, *Obama to*

more modest proposal and obliged—without seeking further comment.

2. The *Order* declared that all broadband Internet service, whether fixed or mobile, is a "telecommunications service" under Section 153, *see Order* ¶¶ 355–87 (Pet. App. 555a–559a). But that reclassification was not sufficient to treat mobile broadband as a common-carriage service, given Section 332's additional protection for mobile services that are not "interconnected" with "the public switched network." The Commission was not to be deterred. A majority thought it would be an intolerable "contradiction" to treat mobile Internet services differently from fixed broadband services, *id.* ¶ 403 (Pet. App. 630a), even though one of the very purposes of Section 332 is to provide mobile services with additional protection against regulation.

So the *Order* also reclassified mobile broadband as a "commercial mobile service" under Section 332. *Order* ¶¶ 388–408 (Pet. App. 605a–636a). In doing so, the FCC did not apply its existing regulations and contend that the technology of mobile broadband service has changed, such that it now allows users to "interconnect" with—that is, to communicate with "all other users" of—the telephone network. 47 C.F.R. § 20.3 (2014) (Pet. App. 1476a). Instead, invoking a euphemism of understatement, the FCC "update[d]" the definition of the term "the public switched network" to declare that it now refers to *both* the telephone system (comprised of 10-digit telephone numbers) *and* the Internet (comprised of IP addresses). *Order* ¶ 396 (Pet. App. 619a). Or as the *Order* put it, "the public

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the FCC: Adopt 'the Strongest Possible Rules' on Net Neutrality, Including Title II, Wash. Post (Nov. 10, 2014), http://wpo.st/zMrk1.

switched network" now refers to a supposed "*single network* comprised of all users of public IP addresses and [telephone] numbers." *Ibid.* (Pet. App. 619a) (emphasis added).[4]

In tacit recognition of the radical nature of this reimagining of "the public switched network," the *Order* proposed a fallback. Mobile broadband service supposedly "interconnect[s]" even to the telephone network, the FCC said, because *some* broadband users can communicate with telephone numbers by downloading and accessing Voice over Internet Protocol ("VoIP") applications provided by third parties, such as Skype, Google Hangouts, and others. *Order* ¶¶ 400–01 (Pet. App. 626a–628a). In the mobile-device context, VoIP is a type of software program that breaks down a voice call into data packets and then sends those packets over the Internet.

The Commission's reliance on VoIP, even as a secondary argument, was a dramatic about-face. VoIP is not a new technology. Less than a decade ago, the Commission convincingly demonstrated that the availability of third-party VoIP software *does not* make mobile broadband an "interconnected service," because Section 332 specifically focuses on the technological features of the mobile service at issue, and mobile broadband, "in and of itself, does not provide the ability to reach all other users of the public switched network," *Order* ¶ 400 (Pet. App. 626a–627a) (citing

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[4] *See also Order* ¶ 391 (Pet. App. 609a) ("[W]e revise the definition of 'public switched network' to mean 'the network that includes any common carrier switched network … that use[s] the North American Numbering Plan, or public IP addresses, in connection with the provision of switched services.'").

2007 Wireless Order ¶ 45). The *Order* simply announced that this description "no longer accurately reflects the current technological landscape," *id.* ¶ 401 (Pet. App. 627a), but provided no meaningful support for that conclusion. The Commission did not contend, for example, that mobile broadband service *itself*—as distinct from third-party services that can be downloaded over the web—now provides the ability to reach all telephone numbers in ways that it did not before.

The Commission's redefinition of "the public switched network" faced another potentially fatal obstacle: FCC regulations have always interpreted the term "interconnected" in Section 332(d) to require that *all users* of the network be able to communicate "[with] *all other* users." 47 C.F.R. § 20.3 (1994) (emphasis added); *accord* 47 C.F.R. § 20.3 (2014) (Pet. App. 1476a). But the *Order* claimed merely that mobile broadband enables users to "send and receive communications from all other users *of the Internet*." *Order* ¶ 398 (Pet. App. 622a) (emphasis added). The *Order* did not (and could not) contend that mobile broadband users can send and receive communications with all *telephone users*, who are all supposedly part of their same public switched network.

So the *Order* simply dropped the requirement that an interconnected network allow users to reach "all" other users. *Order* ¶ 402 & n.1175 (Pet. App. 629a–630a). In a move mentioned only in a footnote and euphemistically dubbed a "conforming change," *id.* ¶ 402 n.1175 (Pet. App. 630a), the FCC erased the word "all" from the regulation interpreting "interconnected service." *See* 47 C.F.R. § 20.3 (2015) (Pet. App. 1477a). The *Order* thus contends that a service can be "interconnected" with the public switched network

even when users of that service cannot reach vast swaths of endpoints on the network.

C. A Divided Panel Of The D.C. Circuit Upholds The *Order*

CTIA and other petitioners sought judicial review of the *Order*. The Judicial Panel on Multidistrict Litigation consolidated the petitions for review in the D.C. Circuit. *See* 28 U.S.C. § 2112.

1. A divided panel of the D.C. Circuit upheld the *Order* in full, including the FCC's reclassification of mobile broadband under Section 332. The panel majority accepted the FCC's assertion that "the public switched network" reasonably refers to both the Internet and the telephone network combined, and that mobile broadband provides "interconnected service" with this newly defined network. Pet. App. 58a–59a.

Notably, however, the panel majority *did not* accept the FCC's deletion of the "*all* other users" requirement from the definition of "interconnected" service. *See* Pet. App. 63a, 71a–72a. Instead, the panel assumed that an "interconnected" network is a system where everyone on the network can reach everyone else. But that left an intractable problem: Defining the public switched network to include both the telephone system and the Internet is lawful *only if* each of those services allows users "to communicate to or receive communication from all other users." 47 C.F.R. § 20.3 (2014) (Pet. App. 1476a). And as the FCC has recognized since 2007, mobile broadband service simply does not allow users to reach all telephone numbers, and vice versa.

To solve that problem, the panel upgraded the FCC's fallback position regarding VoIP to the centerpiece of the analysis—even though the Government in

its brief to the D.C. Circuit had not even bothered to defend the VoIP argument against the petitioners' explicit attack.[5] Pet. App. 72a–73a. The panel majority reasoned that the fact that mobile broadband users can reach telephone customers "via VoIP suffices to render the network … 'interconnected.'" Pet. App. 69a. The majority also agreed that reclassification under Section 332 was necessary to avoid a supposed "statutory contradiction" if mobile broadband and fixed broadband service faced different treatment. Pet. App. 74a–75a.[6]

Judge Williams concurred in part and dissented in part, based on his conclusion that neither fixed nor mobile broadband had reasonably been reclassified under Section 153. Pet. App. 116a. Judge Williams's conclusions as to Section 153 meant that he did not have occasion to address the FCC's reclassification of mobile broadband under Section 332, but his opinion noted the highly competitive nature of the mobile broadband market. Pet. App. 129a, 133a.

2. CTIA and other petitioners timely sought rehearing en banc. The D.C. Circuit denied each petition.

Judges Brown and Kavanaugh each forcefully dissented from the denial of rehearing en banc. Judge

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[5] The Government's brief did not mention VoIP at all in the context of mobile-broadband reclassification, and instead merely quoted, without argument, the *Order*'s generic finding of "convergence between mobile voice and data networks … [since] 2007." *Order* ¶ 401 (Pet. App. 627a).

[6] The panel majority did not dispute that notice regarding reclassification under Section 332 was lacking, but it held any error "harmless." Pet. App. 75a–79a.

Brown wrote that the *Order*'s reclassification decisions for both mobile and fixed broadband are contrary to the text of the Communications Act, and that these decisions were so significant that the FCC needed (and lacked) clear congressional authorization to make them. Pet. App. 1383a–1388a, 1396a–1411a. She further highlighted the separation-of-powers concerns raised by the *Order*. Pet. App. 1414a–1429a. Judge Kavanaugh largely agreed with Judge Brown's statutory analysis; he focused on the lack of clear congressional authorization. Pet. App. 1430a–1431a, 1432a–1449a. He further explained that the *Order* violated the First Amendment. Pet. App. 1431a–1432a, 1449a–1467a.

The members of the panel majority concurred in the denial, noting that the FCC appeared to be poised to replace the *Order* with a "markedly different" new rule. Pet. App. 1357a. Judge Brown and Judge Kavanaugh replied that the FCC's future actions should not affect the court's decision whether to review the important legal issues raised by the petitions. Pet. App. 1382a–1383a n.1 (Brown, J., dissenting from denial of rehearing en banc) ("[R]egardless of any future FCC action, the broad implications of [the panel opinion] remain; Supreme Court involvement may yet be warranted."); *see* Pet. App. 1432a n.1 (Kavanaugh, J., dissenting from denial of rehearing en banc).

3. On May 18, 2017, the FCC proposed to adopt a new regulatory framework for broadband Internet access service. *Restoring Internet Freedom*, Notice of Proposed Rulemaking, 32 FCC Rcd. 4434 (2017). This framework would return both mobile and fixed broadband to their former classification as "information services" under Section 153 of the Communications Act,

and would also reclassify mobile broadband as a "private mobile service" under Section 332. *Id.* ¶ 55. The deadline for filing reply comments expired on August 30, 2017, and the matter remains pending before the FCC.

REASONS FOR GRANTING THE PETITION

The proper regulatory treatment of mobile broadband Internet access service for cellphones, tablets, and other mobile devices is a question of exceptional importance that warrants this Court's review, irrespective of how the FCC decides to proceed in the pending proceeding. S. Ct. R. 10(c). There are more active wireless Internet subscriber connections in the United States than there are people. And the number of wireless customers grows every year, reflecting the enormous value that Americans place on fast, secure, stable mobile access to the Internet. Fierce competition in the wireless broadband industry has spurred hundreds of billions of dollars in investment and innovative offerings to expand coverage, increase reliability, and ensure affordability. The popularity and growth of the 21st century mobile-broadband market makes the *Order*'s application of 1930s common-carrier regulation shocking and significant.

Until and unless Congress acts, the FCC is right to take the initiative in seeking to restore Internet freedom through the pending proceeding. But there is no way to know with certainty what, if anything, will emerge from the FCC's current process and whether the result will adequately remedy the mobile broadband industry's concerns. CTIA's members suffer injury *every day* that the *Order* continues to apply archaic, public-utility regulation to wireless broadband, and this Court should grant certiorari to

review the D.C. Circuit's decision upholding the *Order*. Nor should the Court assume that the FCC's new proceeding will eventually dispense with the need for review—at least not until the result of that proceeding is known and addressed by the parties. With millions of customers and billions of dollars affected by the *Order*, the proper interpretation of the Communications Act remains an issue of enormous public concern, and this Court should not withhold review based on the pendency of a new proceeding when the final result is far from settled.

Review is needed because the *Order* is illegal. Broadband Internet access is an information service, not a telecommunications service, as petitioners such as USTelecom, NCTA, and AT&T persuasively demonstrate. CTIA agrees with those arguments and adopts them.

In addition, this Court must review the specific immunity against common-carrier treatment that Congress provided to *mobile* services in 47 U.S.C. § 332—and that the FCC overwrote in the *Order*. The FCC's redefinition of "the public switched network" was unreasonable for at least two reasons. First, the agency was wrong to say that mobile broadband service provides access to telephone numbers. Mobile *broadband* service indisputably does not do that, even if it assists users in acquiring separate services from different providers that do bridge the gap between the two systems. Second, the FCC's redefinition means that mobile *voice* service—the one service that everyone agrees Section 332 was meant to govern—no longer qualifies as "interconnected," because *even with VoIP*, there are billions of IP addresses that can never be dialed over a telephone line. That absurd re-

sult renders the FCC's statutory interpretation unreasonable under this Court's precedents. *See Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2439 (2014) ("*UARG*").

Instead of giving the statutory text a fair interpretation and then applying that interpretation to the facts of mobile broadband, this agency started with its desired result—common-carrier regulation for all types of Internet access service—and worked backward through as many statutory redefinitions as it took to achieve that power grab. Wielding a sharp blue pencil, the FCC "rewr[o]te clear provisions of the statute" to "accommodate" its vision of regulatory command and control. *UARG*, 134 S. Ct. at 2446. That is not how administrative agencies are supposed to work. The FCC's decision will affect literally billions of Internet endpoints—everything from phones to e-readers to cars to televisions—and it warrants review by this Court.

I. The Proper Regulatory Treatment Of Mobile Broadband Is Extraordinarily Important

"Mobile wireless services are an essential and ubiquitous part of Americans' daily lives … ." *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Twentieth Report ¶ 1, FCC WT Docket No. 17-69 (2017) ("2017 Report");[7] *see also Riley v. California*, 134 S. Ct. 2473, 2484 (2014).

Between 2014 and 2016, the total number of active wireless subscriber connections in the United States increased from about 357 million to 398 million, figures that exceeded the corresponding U.S.

[7] http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0927/FCC-17-126A1.pdf.

population. 2017 Report ¶ 19 & Chart II.B.1. Wireless data usage more than tripled from about 4.1 trillion megabytes to 13.7 trillion megabytes during this same time period. *Id.* ¶ 5. This trend is expected to continue: "Global mobile data traffic will increase sevenfold between 2016 and 2021." Cisco, *Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2016–2021*, at 3 (2017).[8]

Much of mobile broadband's explosive growth is due to thriving, "effective competition" in the market. 2017 Report ¶ 2. Providers "compete for customers across many dimensions, including on price, service characteristics, service quality, advertising and marketing, investment, network coverage and technology, and speed of service." *Id.* ¶ 47. Major carriers have, for example, reintroduced "'unlimited' data plans" in response to market changes, and compete for customers by "exempt[ing] streaming video from participating content providers from subscribers' monthly data allowance." *Id.* ¶¶ 51–52. To meet consumers' demand, wireless providers have made capital investments of about $200 billion over the past seven years. *Id.* ¶ 68. As a result of this "[i]ntense competition among cell-service providers," wireless prices are down nearly 13% from April 2016. Ben Leubsdorf, *How Cell-Phone Plans with Unlimited Data Limited Inflation*, Wall St. J. (May 19, 2017).[9] A 2013 survey found that 91% of wireless customers were "highly satisfied" with their wireless service. *See*

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[8] http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/mobile-white-paper-c11-520862.pdf (last visited Sept. 27, 2017).

[9] https://blogs.wsj.com/economics/2017/05/19/how-cell-phone-plans-with-unlimited-data-limited-inflation/.

McLaughlin & Assocs. & Penn Schoen Berland, *2013 Annual Consumer Survey.*[10]

Mobile broadband's popularity and growth reflect its status as a means of accessing "America's most important platform for economic growth, innovation, competition, free expression, and broadband investment and deployment." NPRM ¶ 1 (Pet. App. 1130a). Nearly half of U.S. adults (45%) "often" received news on a mobile device in March 2017, compared to 21% in 2013. *Continued Rise in Use of Mobile Devices for News*, Pew Research Ctr. (May 9, 2017).[11] Some of the most important videos sparking recent national discourse on race were shot on cell phones and shared over a mobile Internet connection. *See* Mercy Benzaquen, Damien Cave & Rochelle Oliver, *The Raw Videos That Have Sparked Outrage over Police Treatment of Blacks*, N.Y. Times (Aug. 19, 2017).[12] President Clinton was correct when he predicted in 2000 that, "[i]n the new century, liberty will spread by cell phone and cable modem." *Full Text of Clinton's Speech on China Trade Bill*, N.Y. Times (Mar. 9, 2000).[13]

Nor are the effects of regulating mobile broadband service limited to mobile devices. Mobile access to the

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10 http://www.actwireless.org/media-center/data-center/2013-national-survey (last visited Sept. 27, 2017).

11 http://www.journalism.org/2017/05/10/americans-attitudes-about-the-news-media-deeply-divided-along-partisan-lines/pj_2017-05-10_media-attitudes_0-03/.

12 http://www.nytimes.com/interactive/2017/08/19/us/police-videos-race.html.

13 https://partners.nytimes.com/library/world/asia/030900clinton-china-text.html.

Internet enables on-the-go interaction with an ever-expanding number of fixed and mobile electronic devices. Today, laundry machines, photo frames, thermostats, television set-top boxes, oven ranges, home security systems, printers, vehicles, smoke detectors, and baby monitors are among the throngs of devices that connect directly to the Internet—and thus, according to the *Order*, are now part of "the public switched network."

When the FCC asserted authority to micromanage mobile broadband offerings, it unnecessarily made a catastrophic misstep. True, the FCC was not foolish enough to *exercise* its newly claimed regulatory authority all at once. While the *Order* lays the groundwork for "nimbly" imposing new common-carrier obligations and fees in the future, *Order* ¶ 470 (Pet. App. 721a), it stops short of imposing full-scale rate regulation and some other of the most serious Title II burdens "at this time." *E.g.*, *id.* ¶¶ 470, 490 (Pet. App. 720a–721a, 745a–747a).

But the regulatory authority claimed by the Commission in the *Order* is vast indeed, and the FCC's decision to forbear from some regulatory requirements—for now, as a matter of grace—is no reason for this Court to give it a pass on the actual reclassification decision. The *Order* sets the stage for the FCC to take whatever steps it deems necessary to achieve predetermined goals in the future. And the *Order* does not forbear from the "core provisions of Title II," *Order* ¶ 409 (Pet. App. 637a), including the sweeping, command-and-control common-carrier authority to declare what shall and shall not be "unjust or unreasonable discrimination" or an "undue or unreasonable preference or advantage." 47 U.S.C. § 202(a); *see id.* § 201.

The FCC's assertion of authority to apply this amorphous standard against mobile broadband raises deeply troubling questions for innovative, consumer-focused offerings. For example, the FCC under the prior Administration threatened to use these standards to target creative "zero-rating" offerings, the market-driven plans (loved by consumers, but opposed by many proponents of reclassification) that allow users to stream video or music from certain providers *without* that data counting against the user's data limit (and without blocking access to other streaming services). *Compare* Thomas Gryta, *FCC Raises Fresh Concerns over 'Zero-Rating' by AT&T, Verizon*, Wall St. J. (Dec. 2, 2016),[14] *with* Thomas Gryta, *FCC Ends 'Zero-Rating' Review*, Wall St. J. (Feb. 3, 2017).[15]

The implications of the FCC's self-appointment as the Ministry of Mobile are staggering, and this Court should review the FCC's action before allowing it to remake the Internet without clear congressional authorization.

II. This Court's Review Is Necessary To Prevent The FCC From Unlawfully Regulating Mobile Broadband And The Millions Of Devices That Use It

The FCC's redefinition of "the public switched network" in Section 332 was unreasonable. As a result, the FCC acted unlawfully when it imposed heavy-handed common-carrier regulation on hundreds of millions of wireless broadband connections.

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14 http://www.wsj.com/articles/fcc-raises-fresh-concerns-over-zero-rating-by-at-t-verizon-1480695463.

15 https://www.wsj.com/articles/fcc-ends-zero-rating-review-1486157682.

See 5 U.S.C. § 706(2). "[T]he need to rewrite clear provisions of the statute should have alerted [the FCC] that it had taken a wrong interpretive turn," not led it to pile one unreasonable redefinition on top of the other. *UARG*, 134 S. Ct. at 2446.

A. The FCC Unreasonably Concluded That The Internet And The Telephone System Are A Single Network, Even Though Millions Of Endpoints Cannot Interconnect

The Communications Act provides that if a mobile service is not "interconnected with the public switched network," then it "shall not … be treated as a common carrier for any purpose." 47 U.S.C. § 332(c), (d). The Commission's delegated authority to define the relevant statutory terms is constrained by its obligation to define them in a reasonable way. *See UARG*, 134 S. Ct. at 2442 ("Even under *Chevron*'s deferential framework, agencies must operate within the bounds of reasonable interpretation." (quotation marks omitted)). The statutory text refers to a single, particular network—"the" public switched network—so the FCC's authority is limited to identifying the one network that Congress had in mind for that term.

The conclusion of the *Order*—that the term refers to a "single network" comprising all Internet "IP addresses" *and* all telephone numbers put together, *Order* ¶ 396 (Pet. App. 619a)—is bureaucratic doublespeak. It does not take an engineering degree to understand that the Internet and the telephone network are distinct. They serve different functions, use different technologies, and rely on different interfaces. You cannot pick up your home telephone, with its 10-digit numeric keypad, and dial www.supremecourt.gov. Little wonder that in 2012,

Congress expressly distinguished "the public Internet" from "the public switched network" in 47 U.S.C. § 1422(b)(1)(B)(ii).

The Commission's workaround was simply to redefine the term "interconnected" without reference to its core characteristic: that "all" endpoints on the network are able to communicate with one another. *See Order* ¶ 402 & n.1175 (Pet. App. 629a–630a) (deleting the word "all" from the definition); 47 C.F.R. § 20.3 (2015) (Pet. App. 1477a). That attempted redefinition is manifestly unreasonable: The fact that everyone on a network can reach everyone else is the very property that makes it an "interconnected" single network, as the FCC had repeatedly held prior to the *Order*. *See, e.g.*, 47 C.F.R. § 20.3 (2014) (Pet. App. 1476a); *see also Merriam-Webster's Collegiate Dictionary* 609 (10th ed. 1996) (an interconnected system provides "internal connections between the parts or elements").

The D.C. Circuit panel majority, to its credit, declined to rely on that regulatory sleight of hand. *See* Pet. App. 63a, 71a–72a. Rather, the majority correctly recognized that the FCC's redefinition of the public switched network is lawful *only if* the resulting network allows users "'to communicate to or receive communication from *all other users*'"—both telephone and Internet. Pet. App. 63a (quoting 47 C.F.R. § 20.3 (2014)) (emphasis added). But the panel erred, for at least two reasons, in finding that requirement satisfied for mobile broadband service based on Internet subscribers' ability to use separate VoIP applications. Pet. App. 64a–73a.

First, although some VoIP applications provided by third parties like Skype and Google assist some mobile broadband users in making telephone calls, it is not true that *mobile broadband service*—provided by

Verizon, AT&T, and others—allows subscribers to reach telephone lines. When a consumer walks out of a Verizon store with a new mobile broadband Internet connection for her tablet, she cannot place a telephone call. To do that, she must sign up for separate service with, and perhaps pay a separate fee to, a different company.

The D.C. Circuit panel found that the statute does not "draw a talismanic (and elusive) distinction between (i) mobile broadband alone enabling a connection, and (ii) mobile broadband enabling a connection through use of an adjunct application such as VoIP." Pet. App. 68a. Conclusory adjectives aside, the text of the statute draws precisely that distinction: Section 332 asks whether *the* "*service*"—here, mobile broadband Internet access service—"*is interconnected* with the public switched network," 47 U.S.C. § 332(d)(2) (emphases added), not whether that service allows consumers to go online and acquire *other services* that bridge the gap to the telephone network.[16]

There is nothing elusive about distinguishing wireless broadband service from the applications that

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[16] Section 332 thus focuses on the technological operation of mobile services. Section 153's definition of "information service," by contrast, focuses on the "capabilit[ies]" offered to end users via a defined technological process ("telecommunications"), 47 U.S.C. § 153(24), and thus may contemplate consideration of how the service integrates with third-party software. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 987 (2005) (noting that the FCC classified cable Internet access as an information service because it "enables users, for example, to browse the World Wide Web, to transfer files from file archives available on the Internet … , and to access e-mail," among other things).

consumers may separately choose to use. Wireless broadband service works with a mobile device's transmission *hardware* to provide a connection to the worldwide web. VoIP apps are *software* applications, just like the Uber app, the Netflix app, the New York Times app, and the Starbucks app, that rely on the customer's online connection to send and receive certain kinds of data. VoIP apps do not transform Verizon's data service into a telephone service any more than the Uber app transforms it into a car-and-driver service or the Starbucks app transforms it into a coffee service.

The FCC recognized this as recently as 2007, when it declined to classify mobile broadband service as a commercial mobile service based on VoIP. *See* 2007 Wireless Order ¶ 45. The Commission explained that VoIP is "separate from broadband internet access service." *Id.* ¶ 46. As for what has changed since then, the *Order* said only that VoIP's popularity has increased, and VoIP apps now come pre-downloaded on certain mobile devices. *Order* ¶ 401 (Pet. App. 627a–628a). Those things may be true, but they do not suggest that these two services are no longer "separate." Both operate the same way they did in 2007.[17]

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[17] The panel majority's conclusion that VoIP apps are inseparable from mobile broadband service under Section 332 is also irreconcilable with the statement, earlier in the opinion, that "consumers perceive broadband service … as a standalone offering." Pet. App. 19a. Indeed, it was essential to the panel's decision to uphold the reclassification of broadband service as a "telecommunications service" under Section 153 that such service is "independent of" "'add-on' applications … that are generally information services." Pet. App. 20a (citations omitted).

The second problem with the suggestion that VoIP is the glue holding together the new public switched network is that VoIP is not compatible with millions of IP endpoints that might use a mobile broadband connection (to say nothing of those that use a fixed connection, as discussed below). For example, Amazon's Kindle Paperwhite E-reader can access the Internet over a mobile broadband connection, but (unlike some other tablets) it cannot download VoIP apps. This means that mobile broadband users with a Kindle Paperwhite can *never* send or receive telephone calls. Those users thus *cannot* "communicate to or receive communication from all other users" of both the telephone network and the Internet. 47 C.F.R. § 20.3 (2014) (Pet. App. 1476a). Other mobile devices that cannot use VoIP include certain flip phones; while a user may employ the phone's broadband capabilities to access websites, many of these phones are incompatible with VoIP apps like Skype. The existence of mobile devices that cannot reach the phone network through their broadband connection proves the commonsense point that the Internet and the telephone network are distinct. The FCC acted unreasonably in contending otherwise.

B. The FCC's Order Produces Absurd Results

The D.C. Circuit panel majority's rationale fails for the additional reason that, if "the public switched network" is redefined to include the telephone system and the Internet, then mobile *voice* service is no longer "interconnected" with that network, because mobile voice service does not permit access to billions of IP endpoints like servers and Internet-connected appliances. That outcome is absurd, because mobile voice

service is "the one service that everyone agrees Congress intended to be a commercial mobile service" in Section 332. Pet. App. 1047a (dissenting statement of Commissioner Ajit Pai).

The panel majority tried to shimmy past this problem by asserting that mobile voice is "interconnected" because VoIP technology allows mobile voice users to "receive" calls from—never mind whether or not they can send calls to—"mobile broadband users." Pet. App. 70a. That theory is faulty. As explained, a mobile voice customer cannot receive calls from (or send calls to) customers with a mobile broadband connection for their Kindle Paperwhite or any other device that is not VoIP-compatible. Moreover, the new public switched network as defined by the *Order* encompasses *all* IP endpoints, not just mobile ones, and there are literally billions of IP endpoints that can never use a VoIP connection at all. A telephone subscriber can neither call nor receive a call from an Internet-connected thermostat. As a result, it is simply not true that every mobile voice customer can "communicate to or receive communication from *all other users*" of IP addresses. 47 C.F.R. § 20.3 (2014) (Pet. App. 1476a) (emphasis added).

The panel majority replied that the *Order* merely "takes up the proper classification of mobile broadband, not mobile voice," so if the FCC is "asked in the future to formally address whether mobile voice qualifies as an interconnected service," it "could assess at that time whether there exists … the capability of mobile voice users to 'communicate to' IP users from their telephones." Pet. App. 69a–70a. But absurd results are evidence that the agency has exceeded its authority, not problems that can be taken up later. *See UARG*, 134 S. Ct. at 2442–43. That is particularly

true where, as here, the result is "obviously untenable," *id.* at 2439, such that "everyone agrees" it is inconsistent with the statutory scheme, Pet. App. 1047a (dissenting statement of Commissioner Ajit Pai).

C. An Agency's Preference For Regulatory Symmetry Cannot Override Asymmetrical Statutory Text

The FCC felt compelled to reclassify mobile broadband service under Section 332 *not* because of the text of that provision or any other evidence of congressional intent, but because it believed that a "statutory contradiction" would result if mobile broadband service "was a telecommunications service [under Section 153] and also … was not a commercial mobile service [under Section 332]." *Order* ¶ 403 (Pet. App. 630a). The D.C. Circuit panel, too, despite acknowledging that Section 332 "do[es] not automatically move in tandem" with classification as a telecommunications service, Pet. App. 74a, was determined to avoid the supposedly "contradictory result of classifying mobile broadband providers as common carriers under Title II while rendering them immune from common carrier treatment under Title III." Pet. App. 74a.

That reasoning is inherently flawed. A "preference for symmetry cannot trump an asymmetrical statute." *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015) (quotation marks omitted). A central point of Title III was to provide *additional* protection against common-carrier regulation for mobile services other than mobile voice service. Sections 153 and 332 of the Communications Act are located in different titles, their relevant provisions were enacted at different times, and they focus on different aspects of the service at issue (whether it provides certain capabilities, and whether as a technical matter it is interconnected

with the telephone network, respectively). There is zero indication that they must stand or fall together. In fact, the *Order*'s logic would read out Section 332 altogether: A protection against common-carrier regulation that applies only to entities that are already not common carriers (per Section 153) is no protection at all.

The fact that mobile broadband is so competitive makes the application of a public-utility-style common-carrier regime all the more jarring. In 2014, 93% of Americans were able to choose between three or more broadband providers. Pet. App. 129a (Williams, J., dissenting). In 2016, 96.6% of Americans were able to choose between three or more providers' top-tier LTE broadband networks, with 88.6% of Americans able to choose from four or more. *See* 2017 Report ¶ 77 & Chart III.D.4. Consumers take advantage of this choice; at the time of the panel decision, "18.72% of customers switch[ed] providers each year" (assuming that people do not switch providers more than once in a year), "suggesting quite robust competition." Pet. App. 133a (Williams, J., dissenting). That number increased to 26.3% for 2016. *See* 2017 Report ¶ 27.

Finally, even if the possibility of a statutory contradiction were real, the numerous definitional barriers to common-carrier treatment in Section 332 should have led the agency to conclude that Congress did not intend for *any* broadband service providers to be regulated as common carriers. Here, as in *UARG*, the perceived "need to rewrite clear provisions of the statute should have alerted" the FCC that it "had taken a wrong interpretive turn" in reclassifying mobile broadband under Section 153. 134 S. Ct. at 2446.

Certainly it cannot be said that Congress clearly authorized the FCC to make a decision of the *Order*'s magnitude.

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Common-carrier regulation was designed in the 19th century for railroads and then extended to copper-wire telephone monopolies in the 1930s. It has no place in vibrant, innovative, and rapidly growing markets like that of mobile broadband. The *Order*'s attempt to replace Congress's market-driven approach with heavy, top-down regulation will affect millions of consumers' mobile-Internet experiences. It is an exercise of raw administrative will, not reasoned decisionmaking.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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