No. __-____

IN THE
# Supreme Court of the United States

UNITED STATES TELECOM ASSOCIATION
AND CENTURYLINK, INC.,
*Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
*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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## QUESTION PRESENTED

Whether the Federal Communications Commission lacked the clear congressional authorization required to assert plenary authority over a large and growing segment of the economy by imposing public-utility, common-carrier obligations on broadband Internet access service.

## PARTIES TO THE PROCEEDINGS

Petitioners United States Telecom Association* and CenturyLink, Inc. participated in the proceedings before the Federal Communications Commission ("FCC") and were petitioners-intervenors in the court of appeals proceedings.

Respondents FCC and the United States of America were respondents in the court of appeals proceedings.

Respondents American Cable Association; AT&T Inc.; CTIA – The Wireless Association®; NCTA – The Internet & Television Association; and Wireless Internet Service Providers Association participated in the proceedings before the FCC and were petitioners-intervenors in the court of appeals proceedings.

Respondents Daniel Berninger; Alamo Broadband Inc.; Full Service Network; Sage Telecommunications LLC; Telescape Communications, Inc.; and TruConnect Mobile participated in the proceedings before the FCC and were petitioners in the court of appeals proceedings.

Respondents Ad Hoc Telecommunications Users Committee; Akamai Technologies, Inc.; Scott Banister; Wendell Brown; CARI.net; 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.; David Frankel; Free Press; Charles Giancarlo; Independent Telephone & Telecommunications Alliance; Kickstarter, Inc.; Level 3 Communications, LLC; Meetup, Inc.; National Association of Regulatory Utility Commissioners; National Association of State Utility Consumer Advocates;

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* The United States Telecom Association now does business as USTelecom – The Broadband Association.

Netflix, Inc.; New America's Open Technology Institute; Public Knowledge; Jeff Pulver; TechFreedom; Tumblr, Inc.; Union Square Ventures, LLC; Vimeo, LLC; and Vonage Holdings Corporation participated in the proceedings before the FCC and were intervenors in the court of appeals proceedings.

## STATEMENTS PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, petitioners United States Telecom Association and CenturyLink, Inc. state as follows:

**United States Telecom Association** ("USTelecom") is a non-profit association of service providers and suppliers for the telecom industry. Its members provide broadband services, including retail broadband Internet access services, to millions of consumers and businesses across the country. USTelecom has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

**CenturyLink:** The CenturyLink companies participating in this case are CenturyLink, Inc. (a publicly traded company) and its wholly owned subsidiaries. CenturyLink, Inc. owns subsidiaries that provide broadband Internet access and other communications services (e.g., voice, broadband, and video) to consumers and businesses. Among the subsidiaries owned by CenturyLink, Inc. are regulated incumbent local exchange carriers. CenturyLink's local exchange carriers provide local exchange telecommunications and other communications services in 37 States, including broadband Internet access. Another subsidiary is CenturyLink Communications, LLC, which provides intrastate and interstate communications services, both domestically and internationally, including broadband Internet access. CenturyLink, Inc. has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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APPENDIX:*



* See the three-volume Petition Appendix with the caption "*AT&T Inc. v. FCC*," which has been submitted on behalf of all petitioners that are filing separate certiorari petitions seeking review of the D.C. Circuit's judgment below.

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Petitioners United States Telecom Association and CenturyLink, Inc. respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the D.C. Circuit in this case.

## INTRODUCTION

In the order under review here, the Federal Communications Commission ("FCC" or "Commission") for the first time classified broadband Internet access under the Communications Act of 1934 as a "telecommunications service" and subjected a significant and growing portion of the national economy to common-carrier, public-utility regulation. Under the FCC's expansive ruling, the agency is authorized, among other things, to engage in rate regulation of thousands of Internet access providers, large and small, and to invalidate any practices that it deems unjust and unreasonable under an open-ended "Internet conduct standard" that is so nebulous that even the FCC's own Chairman admitted that he did not know what it meant.[1]

In drastically expanding its authority in this way, the FCC repudiated nearly two decades of bipartisan consensus, affirmed by this Court in *Brand X*,[2] as to the appropriate regulatory classification of broadband under the Communications Act. The FCC's about-face on this fundamental classification decision is at odds with Congress's express directive to maintain a lightly regulated environment in which the Internet could thrive — a policy that has been wildly successful in spurring innovation and investment in

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[1] *See* February 26, 2015 Open Commission Meeting, *available at* https://www.fcc.gov/news-events/events/2015/02/february-2015-open-commission-meeting (165:30-166:51).

[2] *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 973-74 (2005).

broadband Internet services. A divided panel of the D.C. Circuit nevertheless found that the Commission's power grab was entitled to *Chevron* deference.

As Judges Brown and Kavanaugh wrote in separate dissents from denial of rehearing en banc, that ruling was error. No deference is warranted to "the administrative state shoehorning major questions into long-extant statutory provisions without congressional authorization." App. 1429a[3] (Brown, J., dissenting from the denial of rehearing en banc). Under this Court's precedents, the court of appeals should not have deferred to the agency's interpretation, which enlarged its own authority so substantially and resolved major policy questions that Congress would not have implicitly delegated to the agency. *See Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("*UARG*"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

This Court should grant the petition and vacate the D.C. Circuit's decision below to vindicate Congress's scheme of sharply limited regulation for broadband and, more generally, to ensure that courts do not permit unelected agencies to expand their regulatory powers over important aspects of the national economy without clear congressional authorization.

In May 2017, the FCC opened a new proceeding to consider whether to return broadband Internet service to its historical status as an information service unencumbered by common-carriage obligations.[4]

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[3] Citations to "App. __a" are to the three-volume appendix filed by AT&T Inc. on behalf of all petitioners that are filing separate certiorari petitions seeking review of the D.C. Circuit's judgment below.

[4] *See* Notice of Proposed Rulemaking, *Restoring Internet Freedom*, 32 FCC Rcd 4434 (2017).

If the FCC issues new regulations returning broadband Internet access service to its proper classification, petitioners will file a supplemental brief explaining why the Court should grant the petition and vacate the D.C. Circuit's opinion on mootness principles. If the FCC fails to reverse its position, the Court should grant the petition and set the case for argument.

## OPINIONS BELOW

The opinion of the court of appeals (App. 1a-187a) is reported at 825 F.3d 674. The order of the Federal Communications Commission (App. 188a-1126a) is reported at 30 FCC Rcd 5601.

## JURISDICTION

The court of appeals entered its judgment on June 14, 2016. On May 1, 2017, the court of appeals issued an unreported order denying petitions for panel rehearing (App. 1354a-1355a) and an order, and accompanying opinions, reported at 855 F.3d 381, denying petitions for rehearing en banc (App. 1356a-1468a). On July 20, 2017, the Chief Justice extended the time for filing a certiorari petition to and including September 28, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Communications Act of 1934 and of Title 47 of the Code of Federal Regulations are reproduced at App. 1469a-1479a.

## STATEMENT OF THE CASE

*Statutory Framework*. The Communications Act of 1934 ("Communications Act" or "Act") divides interstate telecommunications into two broad, mutually exclusive categories. Title II of the Act, 47 U.S.C. § 201 *et seq.*, subjects "common carriers" to "mandatory" regulation by the FCC. *Brand X*, 545 U.S. at 977. Its provisions were intended to mitigate the problems of the "virtual monopoly over the Nation's telephone service" that existed in 1934. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 220 (1994). Title II subjects providers to regulation of all their rates and practices, and enforcement both before the FCC and under a federal private cause of action. *See* 47 U.S.C. §§ 201-202, 206-208. In contrast, other communications services are subject only to Title I of the Act, 47 U.S.C. § 151 *et seq.* The FCC may regulate providers of such services under its "general jurisdictional grant," but only when doing so advances a "statutorily mandated responsibilit[y]." *American Library Ass'n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005). Providers subject to Title I are not common carriers and cannot be subjected to the public-utility regulation in Title II. *See Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014); *see also* 47 U.S.C. § 153(51) ("A telecommunications carrier shall be treated as a common carrier under this chapter *only* to the extent that it is engaged in providing telecommunications services . . . .") (emphasis added).

In enacting the Telecommunications Act of 1996 ("1996 Act"), Congress mirrored the historical division in those Titles of the Communications Act. "Telecommunications service[s]" are subject to Title II's common-carrier requirements, while the mutually exclusive category of "information service[s]" cannot be

subject to such requirements.[5] A "telecommunications service" is an "offering of telecommunications for a fee directly to the public" — that is, on a common-carrier basis. 47 U.S.C. § 153(53). "Telecommunications," in turn, "means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(50). An "information service," on the other hand, is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." *Id.* § 153(24).[6]

Congress made clear in the text of the 1996 Act that it intended the "information service" category both to remain largely unregulated and to include Internet access services. Congress specifically found that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." *Id.* § 230(a)(4). And Congress defined the term "interactive computer service" as "*any information service* . . . that provides or enables computer access by multiple users" and stated further that "includ[ed] specifically" among those information services is any "*service or system that provides access to the Internet*." *Id.* § 230(f)(2) (emphases added). Congress confirmed its understanding that Internet access services are information services two years later when

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[5] *See* Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, ¶ 39 (1998) ("*Universal Service Report*").

[6] This definition excludes "any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(24).

it added § 231 to the Act, which states that "[t]he term 'Internet access service' . . . does not include telecommunications services." *Id.* § 231(e)(4).

*Post-1996 Act Classification of Internet Access Services.* For two decades, the FCC consistently classified broadband Internet access services as information services subject only to "light-touch" Title I regulation by the FCC. In 1998, the Commission recognized that Internet access services were more than just a "pure transmission path" and thus were not the provision of mere "telecommunications." *Universal Service Report* ¶ 73. Instead, Internet access services "combine computer processing, information provision, and other computer-mediated offerings with data transport." *Id.* Internet access services thus "crucially involve[] information-processing elements" and "offer[] end users information-service capabilities inextricably intertwined with data transport." *Id.* ¶ 80. The FCC's conclusion on this issue was "reinforced by the negative policy consequences of a conclusion that Internet access services should be classed as 'telecommunications [services].'" *Id.* ¶ 82. Recognizing the "unique qualities of the Internet," the Commission declined to assume that "legacy regulatory frameworks" — i.e., Title II — "are appropriately applied to it." *Id.*

In 1998, the FCC formally classified a form of "broadband" or high-speed Internet for the first time. It found that telephone companies' provision of Internet access using digital subscriber line ("DSL") technology to provide high-speed transmission of Internet content to their customers over ordinary telephone lines was (like all Internet access) fundamentally an information service. *See* Memorandum Opinion and Order, and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced*

*Telecommunications Capability*, 13 FCC Rcd 24011, ¶ 36 (1998) ("*1998 DSL Order*"). While the FCC classified the Internet access service as an information service, "based on th[e] history" of its pre-1996 regulation of telephone companies, "rather than on an analysis of contemporaneous market conditions," *Brand X*, 545 U.S. at 1001, the FCC continued to treat the pure DSL transmission between the customer's premises and the phone network as a common-carrier service so that other providers could purchase that transmission link and combine it with their own Internet access capabilities to provide their own Internet access service.

In 2002, the FCC similarly classified the high-speed Internet access that cable companies provided to their customers as an information service. *See* Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) ("*Cable Modem Order*"). But, unlike its prior decision as to DSL, the FCC took a fresh look at market conditions and concluded that cable companies were not making a separate *offering* of telecommunications (i.e., pure transmission) in sending that Internet content at high speed between the cable company's network and the customer's premises. "As provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities." *Id.* ¶ 39. Cable broadband was therefore a unitary information service.

In *Brand X*, this Court affirmed the FCC's conclusion. The Court, like the agency, started from the unchallenged premise that a cable company's provision of Internet access service was an information service because it provided "a comprehensive

capability for manipulating information using the Internet via high-speed telecommunications." 545 U.S. at 987. Whether the "high-speed telecommunications" component *connecting* the customer's premises to the cable company's network should be considered a separate, accompanying offering of a telecommunications service, however, was more complex. The Court concluded that the word "offer" in this context was ambiguous; a provider could be considered to "offer" only the integrated product, or to "offer" each of its components as well. *Id.* at 990. Deferring under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the agency's decision to limit its own regulatory authority, the Court upheld as reasonable the FCC's conclusion that, from an end user's perspective, cable broadband providers offered only a single integrated Internet access service and therefore only an information service. *See Brand X*, 545 U.S. at 998-99.

Following *Brand X*, the FCC concluded that other broadband Internet access providers using different transmission mediums also offered a single information service, rather than both an information service (Internet access) and a telecommunications service (transmission to the customer's premises). *See*, *e.g.*, Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853, ¶¶ 12-17 (2005) (wireline DSL); Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, ¶¶ 19-28 (2007) (wireless).

*Open Internet Proceedings.* In 2008, the FCC adjudicated a formal complaint against Comcast concerning its broadband network management

practices. Consumer advocates challenged Comcast's practices as discriminating against a particular form of network usage — peer-to-peer file sharing — without a legitimate justification. The FCC agreed that Comcast had engaged in unreasonable discrimination, and, though Comcast had already changed its practices, imposed disclosure requirements to ensure it continued to follow practices that the Commission considered reasonable. *See* Memorandum Opinion and Order, *Formal Complaint of Free Press and Public Knowledge Against Comcast Corp.*, 23 FCC Rcd 13028, ¶¶ 52-54 (2008).

The D.C. Circuit vacated the order. The FCC had relied on its jurisdiction under Title I of the Communications Act, but the court held that the agency had failed to ground the order in any specific grant of authority under which the FCC could act pursuant to Title I. *See Comcast Corp. v. FCC*, 600 F.3d 642, 651 (D.C. Cir. 2010).

In response, the FCC initiated a rulemaking to consider its authority to regulate broadband Internet access and any substantive rules it should promulgate. At the end of that proceeding, the FCC adopted three new rules: (1) a transparency rule, requiring disclosure of broadband providers' "network management practices, performance characteristics, and terms and conditions"; (2) a "no blocking" rule, which prohibited blocking of "lawful content, applications, services, or non-harmful devices" by fixed broadband providers and "lawful websites" and certain voice or video telephony applications by mobile broadband providers; and (3) a proscription on "unreasonable discrimination" by fixed broadband providers that, the agency explained, would likely bar broadband providers from allowing so-called "edge providers"

(companies like Google that relied on Internet access to deliver their services)[7] to pay for prioritization of their traffic. Report and Order, *Preserving the Open Internet; Broadband Industry Practices*, 25 FCC Rcd 17905, ¶¶ 1, 27-29, 76 (2010) ("*2010 Order*"). The FCC grounded its authority to impose these requirements in Title I and § 706 of the 1996 Act, 47 U.S.C. § 1302.[8] *See 2010 Order* ¶¶ 117-123.

The D.C. Circuit again reversed. In *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), the court deferred to the FCC's conclusion that § 706 gave the FCC some affirmative authority. *See id.* at 636-41. But § 706 could not support the "no blocking" and nondiscrimination rules as drafted, because they

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[7] The FCC "use[s] 'edge provider' to refer to content, application, service, and device providers, because they generally operate at the edge rather than the core of the network." *2010 Order* ¶ 4 n.2.

[8] Section 706(a) provides in relevant part:

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

47 U.S.C. § 1302(a). The section also requires the FCC to determine annually whether "advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion," and, if it is not, to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." *Id.* § 1302(b).

subjected information service providers to common-carrier regulation in violation of the Communications Act. *See id.* at 655, 658. Although the court therefore vacated the *2010 Order*, it indicated that the FCC could promulgate similar rules under § 706 that left "sufficient room for individualized bargaining" between providers and their customers and therefore did not constitute common-carrier regulation. *Id.* at 658.

*The 2015 Order*. Again, the FCC responded by issuing a notice of proposed rulemaking. The notice "propos[ed] to reinstitute the no-blocking rule adopted in 2010 and creat[e] a new rule that would bar commercially unreasonable actions from threatening Internet openness (as well as enhanc[e] the transparency rule that is currently in effect)." Notice of Proposed Rulemaking, *Protecting and Promoting the Open Internet*, 29 FCC Rcd 5561, ¶ 3 (2014) ("*2014 NPRM*") (App. 1131a).[9] The Commission proposed to take these actions under its Title I and § 706 authority, without disturbing the legal classification of broadband Internet access as an information service. *Id.* App. B, ¶ 9 (App. 1287a). As then-FCC Chairman Tom Wheeler put it, the Commission proposed to "reinstate rules that achieve the goals of the 2010 *Order* using the Section 706-based roadmap laid out by" the D.C. Circuit in *Verizon*. *Id.* at 5647 (Statement of Chairman Wheeler) (App. 1327a).

Following intense political pressure from the White House, however, a 3-2 FCC majority changed course dramatically. *See* App. 1414a-1418a (Brown, J., dissenting from the denial of rehearing en banc). The agency reclassified broadband Internet access

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[9] The *2014 NPRM* is reproduced in its entirety at App. 1127a-1353a.

*in full* — both the transmission to the customer's premises *and* the access to the Internet — as a unitary telecommunications service subject in its entirety to Title II common-carrier regulation. *See* Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015) ("*2015 Order*") (App. 188a-1126a). In support of that conclusion, the FCC described earlier decisions as having classified parts of Internet access services as telecommunications services. *Id.* ¶¶ 314-320 (App. 506a-515a). But, while the Commission — and this Court in *Brand X* — had suggested that the Communications Act might reasonably be construed to permit the means of transmission of Internet content *between a consumer and the Internet access provider's network* to be classified, in appropriate circumstances, as a separate telecommunications service subject to Title II, *see*, *e.g.*, *1998 DSL Order* ¶ 36, the FCC had never suggested that Internet access *itself* was, or could be, a telecommunications service.

Having reversed itself, the Commission now imposed four rules, in addition to broadening existing disclosure requirements. Three of these rules are what the *2015 Order* describes as "bright-line rules." A provider may not block lawful traffic; may not "throttle," or impair the transmission of lawful traffic; and may not favor certain traffic in exchange for monetary or other consideration (in other words, no paid prioritization). *2015 Order* ¶¶ 104-107 (App. 295a-298a). The fourth is what the FCC termed an "Internet conduct standard." Under this rule, "the Commission can prohibit, on a case-by-case basis, practices that unreasonably interfere with or unreasonably disadvantage the ability of consumers

to reach the Internet content, services, and applications of their choosing or of edge providers to access consumers using the Internet." *Id.* ¶ 135 (App. 327a-328a); *see id.* ¶¶ 135-138 (App. 327a-332a). The order provides a list of seven factors it may consider when determining what violates the rule.[10] Those seven factors are not exhaustive, and the FCC reserves the right to take into account "other considerations" of an undisclosed nature that it deems "relevant to determining whether a particular practice violates the no-unreasonable interference/disadvantage standard." *Id.* ¶ 138 (App. 331a-332a).

The FCC majority recognized that the full suite of rules that the Act applies to common carriers in Title II was a very poor fit for broadband Internet access. That fact, however, did not lead the majority to second-guess its reversal of decades of authority as to the proper classification of broadband. Instead, the FCC chose to perform significant surgery to craft a "Modern Title II" "tailored for the 21st Century," *id.* ¶ 38 (App. 216a), by forbearing from the application of many requirements, *see* 47 U.S.C. § 160(a). Even so, the agency left in place a number of provisions, including the most sweeping common-carrier require-

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[10] These factors are: (1) end-user control (the Commission seeks to promote consumer choice); (2) competitive effects (practices should not limit competition in third-party Internet services); (3) consumer protection (intended to deal with "deceptive or unfair" practices); (4) effect on innovation, investment, or broadband deployment (practices that stifle the cycle of innovation are suspect); (5) free expression (practices should not "threaten the use of the Internet as a platform for free expression"); (6) application agnostic (a practice should not favor some applications over others); and (7) standard practices (the Commission may judge a practice by reference to industry standards). *2015 Order* ¶¶ 138-145 (App. 330a-339a).

ments in the Communications Act: §§ 201 and 202, which require providers broadly to refrain from whatever the agency deems to be unjust and unreasonable rates and practices. *2015 Order* ¶¶ 456-460 (App. 700a-705a). The FCC also left in force many of the Act's enforcement provisions, including §§ 206, 207, and 208, which allow for complaints or class actions to be filed against providers in federal court based on the broad mandates of §§ 201 and 202. *Id.* And the Commission left open the possibility that it would adopt further regulations based on its Title II authority. *Id.* ¶ 452 (App. 692a-693a).

*The D.C. Circuit Denies Relief.* A divided panel of the D.C. Circuit denied the petitions for review. App. 1a-187a. The majority upheld the FCC's reclassification of broadband Internet access in full as a telecommunications service. Applying *Chevron*, the majority found that *Brand X* disposed of the first step because this Court had held that the statutory term "offer" was ambiguous and that broadband could therefore fall into either category. App. 27a-33a. The court also rejected the argument that, because broadband Internet access qualifies under every independent prong of the definition of "information service" — that is, it "offer[s] . . . a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," 47 U.S.C. § 153(24) — the statute clearly precludes the Commission's classification decision. That statutory definition, the majority wrote, did not answer the question whether "broadband providers make a standalone offering of telecommunications." App. 29a. At the second *Chevron* step, the court held that, despite those aspects of broadband Internet access that clearly fall under the

definition of "information service," the Commission's reclassification was reasonable. App. 34a-37a.

Judge Williams would have granted the petitions and vacated the order. In his view, regardless of whether the statutory language was expansive enough to accommodate the FCC's new classification decision, the agency failed to justify its decision to do so. The agency's purported reliance on "changed facts and a new policy judgment" ignored important parts of the record, including the substantial reliance interests of broadband providers. App. 119a-120a (Williams, J., concurring in part and dissenting in part). Fundamentally, Judge Williams explained, the FCC had a difficult time justifying its decisions because it was "under a handicap in regulating internet access under the Communications Act." App. 118a. He explained:

> Two central paradoxes of the Commission's position are (1) its use of an Act intended to "reduce regulation" to instead increase regulation, and (2) its coupling adoption of a dramatically new policy whose rationality seems heavily dependent on the existing state of competition in the broadband industry, under an Act intended to "promote competition," with a resolute refusal even to address the state of competition.

App. 118a-119a.

The D.C. Circuit subsequently denied a number of petitions for rehearing and rehearing en banc. Judges Kavanaugh and Brown dissented from the denial of rehearing en banc. Writing separately, each noted that, under this Court's precedents, a court must identify *clear* congressional authorization before deferring to new agency rules of "'vast economic and political significance.'" App. 1444a

(Kavanaugh, J., dissenting from the denial of rehearing en banc) (quoting *UARG*, 134 S. Ct. at 2444); App. 1400a-1401a (Brown, J., dissenting from the denial of rehearing en banc) (same). As Judge Kavanaugh explained, this Court has made clear that, while Congress may be presumed to delegate ordinary rule-making authority when it leaves statutory gaps or ambiguity, "Congress must *clearly* authorize an agency to take . . . a major regulatory action." App. 1439a. Given the obvious significance of the *2015 Order*'s imposition of common-carrier regulation on broadband, Judge Kavanaugh would have vacated the order as beyond the authority that Congress *clearly* delegated to the FCC in the 1996 Act.

Judge Srinivasan, who authored the panel opinion together with Judge Tatel, wrote an opinion concurring in the denial of rehearing en banc and (among other things) defending the panel's opinion against Judge Kavanaugh's argument that it had erred by ignoring this Court's major-rules doctrine. Judge Srinivasan did not reject the premise that the *2015 Order* was a major rule that required clear authorization from Congress. *See* App. 1359a-1360a (Srinivasan, J., concurring in the denial of rehearing en banc). Instead, he argued that this Court, in *Brand X*, had already held that the FCC had discretion under the Communications Act to classify broadband Internet access as either a telecommunications service or an information service. As Judge Srinivasan interpreted it, *Brand X* held that "the FCC *could* elect to treat broadband [Internet service providers ("ISPs")] as common carriers (as it had done with DSL providers), but the agency did not *have* to do so." App. 1361a.

## REASONS FOR GRANTING THE PETITION

The question whether the FCC may lawfully regulate modern Internet access services using Depression-era public utility requirements is quite evidently one of surpassing importance, and the Court should grant certiorari here for a number of reasons. Many of those reasons are detailed in the petitions filed by AT&T, NCTA, and others, and we will not repeat them. Rather, this petition focuses on one important and recurring issue of significance both in this case and to administrative law more generally: the D.C. Circuit's decision to defer to an FCC ruling arrogating to itself vast regulatory power over a large and growing sector of the U.S. economy, without any indication, much less the *clear* indication required by this Court's cases, that Congress intended to empower the Commission to make such a change. The Court should grant review and hold that deference is inappropriate in such circumstances, so that, in the future, the federal courts ensure that Congress, and not a group of unaccountable bureaucrats, makes such fundamental policy determinations.

In the 1996 Act, Congress recognized that "[t]he rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens." 47 U.S.C. § 230(a)(1). It then made clear that, in enacting the new legislation, it was acting "to promote the continued development of the Internet" by "preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*." *Id.* § 230(b)(1)-(2) (emphasis added).

By treating Internet access only as an information service subject to light-touch regulation, the FCC had for decades effectuated that legislative judgment and, in so doing, successfully encouraged massive innovation and investment. In the order at issue here, the FCC reversed that consistent interpretation of the Act and asserted expansive new regulatory authority at odds with what Congress intended and that, at the least, Congress never explicitly granted.

The D.C. Circuit improperly deferred to the FCC's new interpretation. As this Court has held, courts should not presume that Congress implicitly delegated interpretive authority to an agency to decide major policy questions. An agency's claim of such interpretive authority must be based on a *clear* statutory authorization. The D.C. Circuit should have been deeply skeptical of the Commission's novel conclusion that statutory provisions drafted two decades ago empowered it to impose common-carrier regulation on broadband. Given the statutory context and the tremendous economic and social importance of broadband Internet access, there is no reason to presume that Congress implicitly delegated such power to the FCC. In the absence of a clear delegation of such authority, the *2015 Order* cannot stand.

## THE PETITION PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WITH PROFOUND IMPLICATIONS FOR THE NATION'S ECONOMY

### A. The *2015 Order* Burdens Significant Parts of the Economy with Regulations of Unknown Extent

Broadband Internet access is, by any measure, a vital component of our national economy. The annual gross output of fixed and mobile broadband providers is conservatively estimated to be more than $620 billion.[11] And those providers include not only large corporations, but also small entities,[12] which often serve rural areas and are particularly vulnerable to increased regulatory burdens.[13]

Broadband also plays a major role in enabling other sectors of the economy. Consumers buy more than $389 billion worth of goods and services over the Internet annually.[14] Nearly 80 percent of job

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[11] *See* Bureau of Economic Analysis, U.S. Dep't of Commerce, *Gross Output by Industry* (Nov. 3, 2016) (using 2015 numbers, the latest released by the Bureau), *available at* https://www.bea.gov/industry/gdpbyind_data.htm.

[12] *See 2015 Order* App. B, ¶ 19 ("[W]e estimate that the majority of broadband Internet access service provider firms are small entities.") (App. 887a).

[13] *See* Notice of Proposed Rulemaking, *Restoring Internet Freedom*, 32 FCC Rcd 4434, ¶ 47 (2017) ("[S]mall providers have had to modify or abandon altogether past business models to account for increased compliance costs and depressed investment from outside investors.").

[14] *See* U.S. Census Bureau, U.S. Dep't of Commerce, *Estimated Quarterly U.S. Retail Sales (Adjusted): Total and E-commerce* (Aug. 17, 2017) ("Time Series available in Excel Format: Adjusted Sales"), *available at* https://www.census.gov/retail/index.html.

seekers use online resources in their job search, making it an invaluable resource for the unemployed.[15] And this Court has repeatedly recognized the social and civic significance of the "vast democratic forums of the Internet." *Reno v. ACLU*, 521 U.S. 844, 868-69 (1997); *see also Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (recognizing "cyberspace" as "the most important place[] . . . for the exchange of views").

All of this was enabled by the fact that, secure in the understanding that the FCC would impose only "light-touch" regulation on their services,[16] broadband providers have invested huge sums in infrastructure, furthering the purpose of the 1996 Act to expand access to advanced telecommunications capability, *see* 47 U.S.C. § 1302. Broadband providers have invested about $1.5 trillion in fixed and mobile infrastructure since 1996.[17] The largest

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[15] *See* Aaron Smith, Pew Research Ctr., *Searching for Work in the Digital Era* 2-3 (Nov. 19, 2015), http://assets.pewresearch.org/wp-content/uploads/sites/14/2015/11/PI_2015-11-19-Internet-and-Job-Seeking_FINAL.pdf.

[16] The FCC's finding in the *Universal Service Report* that Internet access providers are "appropriately classed as information service providers" was "reinforced by the negative policy consequences of a conclusion that Internet access services should be classed as 'telecommunications.'" *Universal Service Report* ¶¶ 81-82. The Commission noted that "classifying Internet access services as telecommunications services could have significant consequences for the global development of the Internet." *Id.* ¶ 82. Further, the Commission specifically rejected the argument that Title II regulation with significant forbearance would be an acceptable alternative, explaining that "uncertainty about whether the Commission would forbear from applying specific provisions could chill innovation." *Id.* ¶ 47.

[17] *See* USTelecom Press Release, *Broadband Investment Remains Large, but Ticked Down in 2015* (Dec. 14, 2016)

broadband providers are leaders in domestic capital expenditures among *all* American companies.[18]

The *2015 Order* represents an abrupt about-face from the prior bipartisan consensus as to the proper scope of broadband regulation. Instead of a light-touch regulatory framework intended to maximize investment, the FCC has now asserted for the first time the authority to impose a common-carrier regulatory regime designed for monopoly voice providers. And, although the FCC has purported to "forbear" from some aspects of Title II, the core of public-utility regulation still remains. Broadband providers remain subject to the fundamental public-utility requirements of providing services at what an agency or court determines after the fact to be reasonable rates and practices. *See* 47 U.S.C. §§ 201, 202. Plaintiffs' lawyers can now bring complaints and class actions against providers seeking damages based on creative theories about how providers' practices may violate § 201, § 202, or other provisions that the FCC has left in force. *See id.* §§ 206-209.

The Commission also gave itself the ability to engage in after-the-fact regulation through the amorphous "Internet conduct standard," which the

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(estimating $1.5 trillion), https://www.ustelecom.org/news/press-release/broadband-investment-remains-large-ticked-down-2015; *see also* NCTA, *Broadband by the Numbers* (estimating $1.4 trillion), https://www.ncta.com/broadband-by-the-numbers (last accessed Sept. 26, 2017).

[18] *See* Michelle Di Ionno & Michael Mandel, Progressive Policy Inst., *Investment Heroes 2016: Fighting Short-termism* 3 (Oct. 2016) (finding that, in ranking of all nonfinancial companies, "as in the previous four years, AT&T is the leading company on our list," and that "[n]ext on the list is Verizon . . . followed by Exxon Mobil"), http://www.progressivepolicy.org/wp-content/uploads/2016/10/InvestHeroes_2016.pdf.

Commission may use to prohibit new practices.[19] Given that any significant conduct by broadband providers is likely to implicate the seven factors on the FCC's non-exhaustive list, the agency has given itself a blank check to regulate as it sees fit.

By subjecting any new practice to scrutiny under this nebulous standard, the FCC has significantly discouraged innovation. The Commission staff has already cast doubt on the pro-consumer practice of "zero rating" or "sponsored data," in which a content provider, rather than the customer, pays for the data usage to access its content, thus providing *free* service to consumers in a manner akin to toll-free calling.[20] Other innovative and pro-competitive practices are likely to come under scrutiny as well.

Broadband investment has already slowed in response to the *2015 Order*. In 2015, for the first time in years, investment showed a year-over-year

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[19] *2015 Order* ¶ 295 (App. 489a-491a). The Internet conduct standard is a common-carrier rule. It "represents [the FCC's] interpretation of sections 201 and 202," and the FCC "will evaluate whether a practice is unjust, unreasonable, or unreasonably discriminatory" under §§ 201 and 202 when applying the standard. *Id.* ¶¶ 137, 295 (App. 329a-330a, 489a-491a). This rule goes well beyond "prohibit[ing] practices that are not commercially reasonable," *id.* ¶ 150 (App. 341a-343a), and could be grounded only in Title II.

[20] *See* Wireless Telecommunications Bureau, *Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services* (Jan. 11, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0111/DOC-342987A1.pdf. After the change in Administrations, the FCC closed its investigation into sponsored data plans, concluding that they "have enhanced competition in the wireless marketplace." FCC Press Release, Chairman Pai Statement on Free Data Programs (Feb. 3, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-343345A1.pdf.

decrease.[21] Since 2015, the total investment likely forgone because of the *2015 Order* is at least $5 billion.[22] Indeed, if the FCC's imposition of European-style public-utility regulation[23] heralds a move toward European-level capital expenditures, U.S. investment in broadband infrastructure could ultimately fall by more than *half*.[24]

As Judge Kavanaugh explained, "under any conceivable test for what makes a rule major, the net neutrality rule qualifies as a major rule." App. 1442a (Kavanaugh, J., dissenting from the denial of rehearing en banc).

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[21] *See* USTelecom Press Release, *Broadband Investment Remains Large, but Ticked Down in 2015* (Dec. 14, 2016), https://www.ustelecom.org/news/press-release/broadband-investment-remains-large-ticked-down-2015.

[22] *See* Michael Horney, *Broadband Investment Slowed by $5.6 Billion Since Open Internet Order*, Free State Found. (May 5, 2017) (estimating $5.6 billion lost), http://freestatefoundation.blogspot.com/2017/05/broadband-investment-slowed-by-56.html; *see also* George S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*, Phoenix Center Perspectives, No. 17-02, at 2 (Apr. 25, 2017) (finding that even the possibility of Title II classification indicated by the FCC's NPRM might have reduced investment between 2011 and 2015 by more than $100 billion), http://www.phoenix-center.org/perspectives/Perspective17-02Final.pdf.

[23] *See 2015 Order* (Dissenting Statement of Commissioner Ajit Pai) (noting that, "in Europe, where broadband is generally regulated as a public utility," fixed and mobile broadband speeds are generally lower than in the United States) (App. 956a-957a).

[24] *See* Patrick Brogan, USTelecom, *Utility Regulation and Broadband Network Investment: The EU and US Divide* (Apr. 25, 2017), https://www.ustelecom.org/sites/default/files/documents/Utility%20Regulation%20and%20Broadband%20Investment.pdf.

### B. The FCC's Imposition of Common-Carrier Regulation on Broadband Internet Access Lacks Clear Congressional Authorization

This Court has previously rejected agencies' attempts to find, in what the agency contends is ambiguous statutory language, the authority to resolve major policy questions. The FCC's imposition of common-carrier regulation on broadband Internet access is a paradigmatic example of a major rule that requires clear congressional authorization. We concur in AT&T's demonstration that Congress affirmatively directed the FCC *not* to impose common-carrier regulation on broadband Internet access. *See* AT&T Pet. 11-20. At the very least, however, the Communications Act lacks such a clear delegation of authority to the Commission to alter the regime governing the Internet in this dramatic fashion. The D.C. Circuit nevertheless deferred to the FCC's assertion of authority based on the theory that Congress's instructions were sufficiently ambiguous to allow the FCC free reign to assert itself in this area. That was a significant error of administrative law that, absent review by this Court, will have important consequences for the distribution of authority between Congress and federal agencies.

The D.C. Circuit should have viewed with a healthy "measure of skepticism" the FCC's discovery — 20 years after its enactment and after numerous failed attempts to reach the same result through legislative amendment, *see* App. 1443a (Kavanaugh, J., dissenting from the denial of rehearing en banc) — that the 1996 Act grants it authority to impose common-carrier regulation on this massive sector of the economy. *UARG*, 134 S. Ct. at 2444. "Congress 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 court of appeals nevertheless deferred to the Commission on the theory that Congress had left ambiguous the appropriate classification of Internet access services. That deference — based in part on an incorrect reading of *Brand X*, as discussed below — was inconsistent with this Court's precedent. The court failed to identify the clear congressional authorization required for the FCC to enact a major regulatory scheme that, moreover, is "inconsisten[t] with the design and structure of the statute as a whole" as shown by the FCC's need to use its forbearance authority to craft a so-called "Modern Title II," rather than apply the actual Title II Congress enacted. *UARG*, 134 S. Ct. at 2442 (alteration in original); *see also* App. 1446a (Kavanaugh, J., dissenting from the denial of rehearing en banc) ("The problem for the FCC is that Congress has not clearly authorized the FCC to classify Internet service as a telecommunications service and impose common-carrier obligations on Internet service providers.").

In *UARG*, this Court synthesized its past precedents on "major rules" in rejecting an Environmental Protection Agency ("EPA") interpretation of the Clean Air Act that would be "inconsistent with — in fact, would overthrow — the Act's structure and design." 134 S. Ct. at 2442. There, the Court found an EPA interpretation "unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." *Id.* at 2444. The opinion continued:

> When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy,"

> we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."

*Id.* (quoting *Brown & Williamson*, 529 U.S. at 159, 160) (citation omitted). Thus, while *Chevron* mandates deference to an agency's choice between multiple interpretations of an ambiguous statute, "an agency interpretation that is inconsisten[t] with the design and structure of the statute as a whole does not merit deference." *Id.* at 2442 (citation omitted; alteration in original). The Court also noted that the EPA — like the FCC here — had rewritten other statutory requirements to avoid the excessive regulatory burden its new interpretation would otherwise cause, "essentially admit[ing] that its interpretation would be unreasonable without 'tailoring'" the regime that Congress enacted to fit the EPA's policy preference. *Id.* at 2445. This was further evidence that the EPA was claiming authority at odds with the statutory scheme that Congress intended.

Put another way, an agency may not rely on some late-discovered alleged ambiguity in a statute to justify a major expansion of the authority that Congress delegated to it. Thus, for example, the Food and Drug Administration could not permissibly interpret the meanings of "drug" and "device" under its organic act in such a way as to claim jurisdiction over tobacco. *Brown & Williamson*, 529 U.S. at 159. Given the history of tobacco regulation and the fact that it "constitut[ed] a significant portion of the American economy," the Court found "reason to hesitate before concluding that Congress . . . intended such an implicit delegation." *Id.*

For similar reasons, this Court has rejected the FCC's assertion that it could "modify" a requirement of the Communications Act by erasing entirely "the heart of the common-carrier section of the Communications Act," *MCI Telecomms.*, 512 U.S. at 229, and has rebuffed the Attorney General's attempt to prohibit physician-assisted suicide by issuing an interpretive rule under the Controlled Substances Act, *see Gonzales v. Oregon*, 546 U.S. 243, 265 (2006) ("The authority desired by the Government is inconsistent with the design of the statute in . . . fundamental respects."). Most recently, the Court declined to defer to the Internal Revenue Service on the proper interpretation of certain tax credits under the Patient Protection and Affordable Care Act. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). The tax credits were "among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. . . . [H]ad Congress wished to assign that question to an agency, it surely would have done so expressly." *Id.*

Fundamentally, "[a]n agency's interpretive authority, entitling the agency to judicial deference, acquires its legitimacy from a delegation of lawmaking power from Congress to the Executive." *City of Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting). The massive growth of the administrative state has made more important than ever the judiciary's "duty to police the boundary between the Legislature and the Executive." *Id.* "[I]f [the Court] give[s] the force of law to agency pronouncements . . . as to which Congress did not actually have an intent, [it] permit[s] a body other than Congress to perform a function that requires an exercise of the legislative power." *Michigan v. EPA*, 135 S. Ct. 2699, 2713

(2015) (Thomas, J., concurring) (citation omitted); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) (Kennedy, J., concurring in part and concurring in the judgment) ("If agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances."); *Department of Transp. v. Association of Am. Railroads*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) ("Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints.") (citation omitted); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (judicial deference "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design").

Here, the FCC not only exceeded the permissible extent of its authority; it directly contradicted Congress's explicit intent in enacting the 1996 Act. Congress defined an information service to mean "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(24). Internet access service involves the offering of all those "capabilities." Among many other things, that service offers consumers the ability to retrieve information from a website, to store information in the "cloud," and to make available information on a web page hosted on a computer in their own home. Thus, as this Court

has explained, broadband Internet access service offers users "a comprehensive capability for manipulating information using the Internet via high-speed telecommunications." *Brand X*, 545 U.S. at 987.[25] Internet access service also includes other information processing, storage, and retrieval functions that help consumers use the Internet, such as domain name service ("DNS")[26] and caching.[27]

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[25] As noted, there is an exception to the statutory definition of "information service" for "any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(24). As Judge Brown explained, App. 1406a n.4 (Brown, J., dissenting from the denial of rehearing en banc), and as other petitions discuss in more detail, that exception cannot encompass all the information-processing capabilities Internet access service offers. Indeed, the FCC represented to this Court in *Brand X* that the exception did not apply to the capabilities at issue here. *See* Reply Br. for the Fed. Pet'rs at 5 n.2, *Brand X*, Nos. 04-277 & 04-281 (U.S. filed Mar. 18, 2005), 2005 WL 640965.

[26] "DNS, among other things, matches the Web page addresses that end users type into their browsers (or 'click' on) with the Internet Protocol (IP) addresses of the servers containing the Web pages the users wish to access." *Brand X*, 545 U.S. at 987 (footnote omitted).

[27] "'Caching' is the storing of copies of content at locations in the network closer to subscribers than their original sources . . . that subscribers wish to see most often in order to provide more rapid retrieval of information." *Cable Modem Order* ¶ 17 n.76. Although the FCC concluded that DNS and caching are telecommunications "management" systems and are therefore excluded from the definition of "information service," both may be provided by third parties, *see 2015 Order* ¶¶ 370, 372 (App. 584a-588a). The FCC must therefore paradoxically argue that DNS and caching are used for telecommunications management when offered by broadband providers, but not when offered by third parties that are not telecommunications carriers and have no telecommunications to manage. *See id.*

The conclusion that Internet access fits squarely within the statutory category of largely unregulated "information services" is not surprising. Congress *specifically* understood that Internet access — like "other interactive computer services," 47 U.S.C. § 230(a)(3) — would remain "*unfettered by Federal or State regulation*." *Id.* § 230(b)(2). The 1996 Act defines the "interactive computer services" that Congress expressly intended to leave "unfettered" to mean "any *information service* . . . 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*." *Id.* § 230(f)(2) (emphases added). Congress's intention — that a service providing access to the Internet is an information service and therefore immune from heavy-handed common-carrier regulation — is thus impossible to miss.

In this way, not only are the specific statutory definitions contrary to the FCC's conclusion, but also, as in *UARG*, Congress's meaning is "clarified by the remainder of the statutory scheme" because only classifying Internet access services as information services "produces a substantive effect that is compatible with the rest of the law." *UARG*, 134 S. Ct. at 2442. The FCC was aware that subjecting broadband Internet access services to Title II is incompatible with the larger statutory scheme — it admitted the need to use its forbearance authority to craft a "Modern Title II" "tailored for the 21st Century," *2015 Order* ¶ 38 (App. 216a). As in *UARG*, such statutory revision provides further evidence that the reclassification that makes it a necessity is flawed from the start. *See UARG*, 134 S. Ct. at 2446 ("[T]he need to rewrite clear provisions of the statute should have alerted [the agency] that it had taken a

wrong interpretive turn."). And Congress's failure clearly to authorize such a regulation in the 1996 Act is underscored by the fact that Congress has repeatedly "considered (but never passed) a variety of bills relating to net neutrality and the imposition of common-carrier regulations on Internet service providers." App. 1443a (Kavanaugh, J., dissenting from the denial of rehearing en banc).

### C. The Court of Appeals Erroneously Relied on *Brand X* To Justify Deferring to the FCC's Expansive Assertion of Authority

There is no clear congressional authorization for the FCC's reclassification decision; indeed, the panel majority did not even purport to find that Congress had clearly authorized the FCC to promulgate the rules. Rather, the majority concluded that it was appropriate to defer to the FCC's interpretation under ordinary *Chevron* step-two standards. App. 34a-37a. Writing in defense of the panel opinion, Judge Srinivasan (joined by Judge Tatel) argued that the major-rules doctrine was inapplicable because *Brand X* established that the FCC had the authority to classify broadband Internet access as a telecommunications service. App. 1359a-1360a (Srinivasan, J., concurring in the denial of rehearing en banc). According to Judge Srinivasan, "[a]ll nine Justices recognized the agency's statutory authority to institute 'common-carrier regulation of all ISPs.'" App. 1363a-1364a.

That conclusion fundamentally misunderstands *Brand X*. *Brand X* concerned the limited question whether cable companies' broadband Internet access service could be classified as a single, integrated information service, or whether one, discrete portion of that service — the high-speed transmission between

the cable company's network and the customer's premises — had to be regulated separately as a telecommunications service. *See* 545 U.S. at 986. The Court did not hold — nor did any Justice take the view — that Internet access services *in their entirety* could be permissibly classified as telecommunications services. *See id.* at 987; *id.* at 1003 (Stevens, J., concurring); *id.* (Breyer, J., concurring); *id.* at 1010 (Scalia, J., dissenting). On the contrary, all nine Justices accepted that access to the Internet is an information service. *See*, *e.g.*, *id.* at 1010 (Scalia, J., dissenting) (arguing that transmission over the last mile of cable to a subscriber's computer "merely serves as a conduit for the information services that have already been 'assembled' by the cable company in its capacity as ISP").

In *Brand X*, the majority and the dissent debated whether a pizzeria can be considered to "offer" two separate services, the making of the pizza (Internet access service) and its delivery (the purportedly separate telecommunications service). *See id.* at 991 (majority); *id.* at 1007 (Scalia, J., dissenting). The majority concluded that the word "offer" was ambiguous and that the two could reasonably be considered a single "offering" of pizza. *Id.* at 991. The dissent argued that a pizzeria could *only* be reasonably viewed as "offering" pizza and *separately* "offering" delivery. What no Justice suggested — and what the FCC had never previously considered — was to classify the Internet access service itself (the making of pizza) as a mere telecommunications service. Yet that is what the *2015 Order* does: it treats broadband Internet access service, in its entirety, as an offering of a pure transmission service and therefore as a telecommunications service subject to Title II. As Judge Brown put it, the panel opinion

upheld the *2015 Order* based on "an untenable reading of *Brand X*: the pizzeria no longer offers 'pizza' or 'pizza delivery,' it just offers 'delivery.'" App. 1403a (Brown, J., dissenting from the denial of rehearing en banc).

Once the limited holding of *Brand X* is properly understood, the error of the D.C. Circuit is clear. Simply put, the court deferred to the FCC's strained attempt to use what the court understood to be, at best, "a few apparent gaps" in the statutory language to "construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 485 (2001). Indeed, the D.C. Circuit should have been particularly skeptical where the agency "has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends." *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring). This Court should grant the petition for certiorari to review and invalidate the FCC's unprecedented assertion of regulatory authority.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 28, 2017