

**DISSENTING STATEMENT OF
COMMISSIONER BRENDAN CARR**

Re: *Safeguarding and Securing the Open Internet*, Declaratory Ruling, Order, Report and Order, and Order on Reconsideration, WC Docket Nos. 23-320, 17-108 (Apr. 25, 2024)

The Internet in America has thrived in the absence of 1930s command and control regulation by the government. Indeed, bipartisan consensus emerged early on that the government should not regulate the Internet like Ma Bell’s copper line telephone monopoly.

In the Telecommunications Act of 1996, a Republican Congress and a Democrat President came together and agreed “to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation.”¹ Just two years later, the FCC issued a report addressing the terms Congress added to the Communications Act of 1934 in that 1996 enactment—including the distinction Congress had drawn between a lightly regulated Title I “information service” and a heavily regulated Title II “telecommunications service.”² The FCC, chaired at the time by a Democrat and President Clinton appointee, confirmed that Internet access service is a Title I information service under the statute.

For decades, that bipartisan position held. It held through the remainder of the Clinton Administration. It held through all eight years of the Bush Administration. And it held through the first six years of the Obama Administration. Every FCC Chair across those nearly 20 years, Republican and Democrat alike, repeatedly affirmed that broadband Internet access service (BIAS) remained a Title I information service, not a Title II telecommunications service. The FCC did so again³ and again⁴ and again⁵ and again.⁶ And it even did so while pursuing a variety of “net neutrality” initiatives.⁷

¹ See Telecommunications Act of 1996, § 509, P.L. 104-104, 100 Stat. 56, 137 (1996) (1996 Act); see 47 U.S.C. § 230(b)(2).

² See *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1998) (*Stevens Report*); see also Dissenting Statement of Commissioner Ajit Pai, *Protecting and Promoting the Open Internet, Order on Remand Order and Declaratory Ruling*, 30 FCC Rcd 5601, at 33-35 (rel. Mar. 12, 2015), <https://docs.fcc.gov/public/attachments/FCC-15-24A5.pdf> (*Pai 2015 Title II Dissent*).

³ See *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (classifying broadband Internet access service over cable systems), *aff’d sub nom. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

⁴ See *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (classifying broadband Internet access service over wireline facilities).

⁵ See *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006) (classifying broadband Internet access service over power lines).

⁶ See *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (classifying broadband Internet access service over wireless networks).

⁷ *Preserving the Open Internet; Broadband Industry Practices*, 25 FCC Rcd 17905, 17972-80, 17981, paras. 124-35, 137 (2010) (2010 *Open Internet Order*); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, Policy Statement, 20 FCC Rcd 14986 (2005).

Indeed, while activists on the political fringe lobbied for years to persuade the FCC to change course and regulate the Internet as a public utility under Title II, the FCC never wavered. Not once. Classifying the Internet as a Title II service remained the third rail of communications policy—both unlawful and misguided.

All of that changed in a flash. In fact, the years of bipartisan consensus vanished over the course of just 117 seconds. On November 10, 2014, President Obama published a YouTube video calling on the FCC to label broadband Internet access service a Title II telecommunications service for the first time ever and to impose sweeping new government controls on the Internet in the name of “net neutrality.”⁸



President Obama’s one minute and 57 second video was the culmination of an unprecedented and coordinated effort by the Executive Branch to pressure an independent agency into grabbing power that the Legislative Branch never said it had delegated. Indeed, on the very same morning that President Obama released his video calling for Title II, activists showed up at the home of the FCC Chairman and used their bodies to blockade his driveway, demanding that he classify the Internet as a Title II service or else they would not let him leave. They returned to his home again that same night. Chairman Wheeler would later write an email suggesting that he believed those activists that showed up at his home did not act independently from the White House.⁹

⁸ See Ezra Mehaber, *President Obama Urges FCC to Implement Stronger Net Neutrality Rules*, White House Blog (Nov. 10, 2014), <https://obamawhitehouse.archives.gov/blog/2014/11/10/president-obama-urges-fcc-implement-stronger-net-neutrality-rules>.

⁹ See Hearing before the Committee on Oversight and Government Reform, House of Representatives, *FCC: Process and Transparency*, at 14-19 (Mar. 17, 2015), <https://oversight.house.gov/wp-content/uploads/2016/04/3-17-15-FCC-Process-and-Transparency.pdf> (2015 *FCC Process and Transparency Hearing*); see also Hearing before the Committee on Oversight and Government Reform, House of Representatives, *FCC: Process and Transparency. FCC Hearing Packet*, at 3 (Mar. 17, 2015), <https://oversight.house.gov/wp-content/uploads/2015/03/FCC-Hearing-Packet.pdf> (2015 *Oversight Hearing Packet*).



The pressure campaign continued to mount. Just weeks later, Title II activists rushed the dais during the FCC’s monthly Commission meeting—obstructing an official proceeding—and unfurled a “Reclassify Now” banner behind the heads of FCC Commissioners before FCC security intervened.



And just days before President Obama released his Title II video, Jeff Zients—who serves today as President Biden’s Chief of Staff, but was serving then as President Obama’s Director of the National Economic Council—took the unprecedented step of visiting the FCC Chairman in his FCC office so that he could deliver a message about President Obama’s upcoming announcement on Title II.

Why this flurry of pressure from the White House in November of 2014? As FCC emails show, the FCC Chairman was just days away from circulating a draft decision that would have adopted net neutrality rules but stopped short of full Title II classification.¹⁰ The White House decided that it had to stop this FCC plan before the FCC Chairman took it public. So it acted to derail the compromise path that the FCC Chair had been charting.

The Wall Street Journal ran a deeply reported story on all of this, titled “Net Neutrality: How White House Thwarted FCC Chief.”¹¹ It describes “an unusual, secretive effort inside the White House,

¹⁰ See U.S. Senator Ron Johnson, *Regulating the Internet: How the White House Bowled Over FCC Independence. A Majority Staff Report of the Committee on Homeland Security and Governmental Affairs*, United States Senate, at 9-17 (2016), https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/FCC%20Report_FINAL.pdf (2016 Senate Report).

¹¹ See Gautham Nagesh and Bordy Mullins, *Net Neutrality: How the White House Thwarted FCC Chief*, Wall St. J. (Feb. 4, 2015), <https://www.wsj.com/articles/how-white-house-thwarted-fcc-chief-on-internet-rules-1423097522>.

led by two aides . . . [a]cting like a parallel version of the FCC itself.”¹² Internal FCC communications later obtained by Congress only confirmed and added additional concerning details to this reporting.¹³

The Legislative Branch caught wind of the Executive Branch’s power play. It did not sit idly by. The Chief of Staff to then Senate Majority Leader Harry Reid wrote the FCC Chair. He said that he had spoken to the White House again and “told them to back off Title II. Went through once again the problems its creates for us.”¹⁴ Majority Leader Reid’s Chief of Staff followed up adding: “My main point to the WH is how can you declare that regulations written in the 1930’s will work fine for 2014 technology. Let Tom do his job and this will be fine.”¹⁵

E-mails From the Chief of Staff to the Senate
Majority Leader to the FCC Chairman

May 15, 2014

From: Krone, David (Reid) [mailto: [REDACTED]@reid.senate.gov]
Sent: Thursday, May 15, 2014 9:26 AM
To: Tom Wheeler [e-mail redacted]
Subject: <no subject>

Good luck today.

Not sure how things have landed but I trust you to make it work. Please shout if you need anything.

Spoke again last night with the WH and told them to back off Title II Went through once again the problems it creates for us.

From: Krone, David (Reid) [mailto: [REDACTED]@reid.senate.gov]
Sent: Thursday, May 15, 2014 6:15 PM
To: Tom Wheeler [e-mail redacted]
Subject: Re: <no subject>

Too funny. I literally just watched your remarks from this morning. Spot on. Thank you!!!

P.S. Zients was definitely reacting to the press reports. Or, should I say, overreacting. My main point to the WH is how can you declare today that regulations written in the 1930's will work fine for 2014 technology **Let Tom do his job and this will be fine.**

Except the White House did not let the FCC Chair do his job. The President intervened. He flipped him.

Reflecting on the White House campaign while testifying before Congress, FCC Chairman Wheeler was asked about President Obama’s November 10 announcement and whether it had an impact on the Title II debate at the FCC. “Of course it did,” Chairman Wheeler testified.¹⁶ “[W]hen Jeff Zients came to see me and said this is what the President is going to do. That was substantial significance.”¹⁷ That testimony is true. Emails confirm that the FCC stopped the presses on its compromise or hybrid

¹² *Id.*

¹³ See 2016 Senate Report at 9-17; see also 2015 FCC Process and Transparency Hearing at 13-17; 2015 Oversight Hearing Packet at 1-7.

¹⁴ 2015 Oversight Hearing Packet at 4; see also 2015 FCC Process and Transparency Hearing at 22-23, 41-42.

¹⁵ 2015 Oversight Hearing Packet at 4.

¹⁶ 2015 FCC Process and Transparency Hearing at 5.

¹⁷ 2015 FCC Process and Transparency Hearing at 40.

approach, delayed the vote, and quickly drafted a decision that went full Title II—just as the President had demanded.¹⁸ Chairman Wheeler would refer to the episode in an email as his “Damascus Road experience.”¹⁹

Ever since President Obama flipped FCC Chairman Wheeler,²⁰ there has been no turning back. Title II is now a matter of civic religion for activists on the left. They demand that the FCC go full Title II whenever a Democrat is President. Everyone knows what is expected. Indeed, President Biden made restoring Title II a campaign promise, and Jeff Zients is back in the White House.²¹

So, yes, millions of comments have been filed at the FCC on Title II and net neutrality over the years. But none of them mattered. None of them persuaded the FCC to go full Title II. Only the President mattered. This also explains why the FCC has never been able to come up with a credible reason or policy rationale for Title II. It’s all shifting sands. And that’s because the agency is just doing what it has been told to do by the Executive Branch and cobbling together *post hoc* rationalizations as it goes along.

* * *

Now, you may wonder why I am starting out my statement by recounting this bit of FCC history. Well, for starters, I think it tells an important part of the Title II story. The FCC’s position on Title II did not simply evolve over the course of years. The Overton window on Title II did not just naturally shift. President Obama forced the FCC’s hand. I understand that there are many people that would like to sweep that entire episode under the rug and forget about it. I am not one of them.

But I am also starting out my statement here for a more fundamental reason. After all, it is not surprising that the Executive Branch tried to pressure another component of the government into doing something the President thought would benefit him politically. In many ways, that is a story as old as the Republic itself. But what is surprising is that it succeeded—that the courts sanctioned the power grab.

You see, the Framers understood the nature of those in power, and they set up a series of checks and balances to avoid government overreach. Chief among them is the Constitution’s separation of powers. In Article I, “the People” vested “[a]ll” federal “legislative powers . . . in Congress.”²² As Chief Justice Marshall put it, this means that “important subjects . . . must be entirely regulated by the legislature itself,” even if Congress may leave the Executive Branch to “fill up the details.”²³ That did not happen here. Congress never passed a law saying that the Internet should be heavily regulated like a utility, nor did it pass one giving the FCC authority to make that monumental determination. The Executive Branch pressured the agency into claiming a power that remained—and remains—with the Legislative Branch.

¹⁸ 2016 *Senate Report* at 17-29.

¹⁹ 2016 *Senate Report* at 5, 14.

²⁰ See *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (2015 *Title II Order*).

²¹ See, e.g., Biden-Sanders Unity Task Force Recommendations, at 13 (July 8, 2020), <https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf>.

²² U.S. Const. Art. I. § 1; U.S. Const. preamble.

²³ *Wayman v. Southard*, 10 Wheat. 1, 42-43 (1825).

Fundamentally, I would argue, much of the fault lies with the judiciary’s application of *Chevron*. The Supreme Court’s decision in *Chevron* created a situation where the Executive Branch could engage in the type of pressure campaigns that we witnessed with Title II. That is because *Chevron*, at least as applied by some courts, has allowed agencies to seize big, new powers without an express grant of authority from Congress. If a statute were ambiguous, *Chevron* held, an agency could go ahead and regulate. In cases of vast economic or political significance at least, *Chevron* not only creates an environment in which agencies push beyond the bounds of their authority, it creates an incentive for the Executive Branch or other political actors to pressure them into doing so.

That is why the Supreme Court’s decision in *West Virginia v. EPA* is so important.²⁴ It makes clear that on matters of enormous significance, like the one before us today, administrative agencies must point to far more than an ambiguous statute to persuade a reviewing court that Congress authorized the agency to act. After all, as a constitutional matter, Congress does not operate like a sieve—inadvertently spilling grants of massive new authorities. After *West Virginia*, Congress’s delegation of authority in these types of cases can no longer be implicit; it must be explicit. Properly applied, *West Virginia* will stop the flip-flopping and eliminate the incentives for the Executive Branch to engage in the type of pressure campaigns we have seen on Title II. It will help improve administrative agency decisions, too, by ensuring that they are driven by the facts, the law, and the record. It will allow the natural forces of compromise to work their will on legislating, rather than winner-take-all party line votes at agencies. And it will ensure that the legislative powers will remain with Congress unless and until the Legislature decides to delegate them.²⁵

If that weren’t enough, today’s Order independently violates the Supreme Court’s command in *West Virginia* through its unrestrained use of forbearance.²⁶ Although the FCC may forbear from parts of Title II, the Order indiscriminately applies that authority to fundamentally rewrite the 1996 Act by line-item vetoing more than a dozen provisions central to Title II’s legislative design. As multiple Supreme Court decisions confirm, that unrestrained application of forbearance is illegitimate. Indeed, just last year, the Supreme Court struck down the Biden Administration’s use of analogous waiver authority after the Education Department tried to use it to wipe away student loan debt.²⁷ As a matter of statutory construction and implied delegation, the FCC is not presumed to have the sweeping power to refashion Title II into an entirely new legislative scheme by picking and choosing which parts of Title II will apply.

* * *

The FCC’s flip-flopping also informs how seriously one should take the Order’s policy arguments. The FCC tries to dress up its latest power grab in a 400-plus page Order that offers a laundry list of bogus justifications. Few of them rely on actual evidence. Virtually none point to real problems. All fall apart under casual scrutiny. Indeed, it’s not even clear the FCC believes the reasons it offers today for Title II.

²⁴ *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022). See *infra* I.A.1-2.

²⁵ See Letter from the Hons. Cathy McMorris Rodgers and Ted Cruz *et al.* to the Hon. Jessica Rosenworcel, Chairwoman, FCC, at 2 (Apr. 23, 2024) (“Congress’s decision to treat broadband Internet access as an information service, rather than a telecommunications service, was a deliberate policy choice.”); Letter from the Hon. Josh Gottheimer *et al.* to the Hon. Jessica Rosenworcel, Chairwoman, FCC, at 2 (Apr. 20, 2024) (“Given that there is no threat of imminent harm requiring Commission action, we ask the Commission to defer action on the NPRM to allow this legislative process to continue and to avoid imperiling important federal policy objectives.”).

²⁶ See *infra* I.A.3.

²⁷ *Biden v. Nebraska*, 143 S. Ct. 2355 (2023).

Today's Order is not about "net neutrality."²⁸ When we abandoned Title II in 2017, proponents of greater government control flooded the zone with apocalyptic rhetoric. Media outlets and politicians mindlessly parroted their claims. They predicted "the end of the Internet as we know it" and that "you'll get the Internet one word at a time." Consumers would have to pay to reach websites. None of it happened. Americans were subjected to one of the greatest hoaxes in regulatory history.

Nor is today's Order about preventing Internet "gatekeepers" from squashing innovation and free expression.²⁹ Again, check the receipts. After 2017, it was not the ISPs that abused their positions in the Internet ecosystem. It was not the ISPs that blocked links to the New York Post's Hunter Biden laptop story, old Twitter did that. It was not the ISPs that just one day after lobbying the FCC on this Order blocked all posts from a newspaper and removed all links to the outlet after it published a critical article, Facebook did that.³⁰ It was not the ISPs that earlier this month blocked the links of California-based news organizations from showing up in search results to protest a state law, Google did that.³¹ And it was not the ISPs that blocked Beeper Mini, an app that enabled interoperability between iOS and Android messaging, Apple did that.³²

Since 2017, we have learned that the real abusers of gatekeeper power were not ISPs operating at the physical layer, but Big Tech companies at the application layer. Perversely, today's Order makes Big Tech behemoths even stronger than before.

And today's Order is not about correcting a market failure. Broadband access is more vibrant and competitive than ever, no matter how you slice the reams of data. Americans benefited from lower prices, faster speeds, broader and deeper coverage, increased competition, and accelerated Internet builds.

Here's what the data show. Internet speeds are up 430% since 2017 on the fixed broadband side, and they are up 647% on the mobile side. In real terms, the prices for Internet services have dropped by about 9% since the beginning of 2018, according to BLS CPI data. On the mobile broadband side alone, real prices have dropped by roughly 18% since 2017, according to BLS and industry data. And for the most popular broadband speed tiers, real prices are down 54%, and for the fastest broadband speed tiers, prices are down 55%, over the past 8 years, according to BLS and industry data.³³

* * *

The FCC realizes that the old justifications for Title II will no longer cut it. So, as if nothing ever happened, as if the old predictions were not disproven, the agency invents new justifications. The FCC throws whatever it can think of against the wall to see if anything sticks. The Order now claims Title II is

²⁸ See *infra* II.A.1.

²⁹ See *infra* II.A.3.

³⁰ See Sherman Smith, *Facebook Apologizes for Blocking Kansas Reflector, Then Expands Crackdown to Other News Sites*, Kansas Reflector (Apr. 5, 2024), <https://kansasreflector.com/2024/04/05/facebook-apologizes-for-blocking-kansas-reflector-then-expands-crackdown-to-other-news-sites/>.

³¹ See Gerrit De Vynck and Laura Wagner, *California Wants Big Tech to Pay for News. Google is Fighting Back* (Apr. 21, 2024), <https://www.washingtonpost.com/technology/2024/04/21/google-blocks-california-news/>.

³² See Emma Roth, *FCC Commissioner Wants to Investigate Apple Over Beeper Mini Shutdown*, The Verge (Feb. 12, 2024), <https://www.theverge.com/2024/2/12/24071226/fcc-commissioner-brendan-carr-apple-beeper-mini>.

³³ See *infra* II.A.4; Statement of FCC Commissioner Brendan Carr, *New Data Confirm What Americans Already Know: The Internet Is Not Broken and President Biden's Plan for Government Control Won't "Fix It,"* (Apr. 19, 2024), <https://docs.fcc.gov/public/attachments/DOC-401950A1.pdf>.

necessary for national security, for public safety, for law enforcement, for pole attachments, for accessibility, for privacy and cybersecurity—the list goes on and on.

But the FCC’s latest set of claims fare no better than those trotted out back in 2015. They are simply new pretext to justify an old power grab.

Take national security.³⁴ The FCC has identified no gap in national security that Title II is necessary to fill. Rather, the FCC record makes clear that Congress has already empowered agencies with national security expertise—including the Departments of Homeland Security, Justice, Commerce, and Treasury—to address these issues in the communications sector. Indeed, the Biden Administration’s own filing in this proceeding confirms national security agencies already have and “exercise substantial authorities with respect to the information and communications sectors.”

In particular, the Biden Administration already has the authority to prohibit entities controlled by the Chinese Communist Party (CCP) from operating in the U.S. today. Indeed, the Commerce Department codified one such set of authorities back in 2021. So Title II fills no gap in authority. Indeed, as to those specific CCP-aligned companies, the FCC’s own database of ISPs shows that they are not offering any broadband services that would be subject to Title II even after reclassification.

Or take consumer privacy.³⁵ The FTC already regulates ISPs and their privacy practices. Indeed, at this very moment, broadband consumers benefit from the same set of federal privacy rules that protect consumers across the economy. But those federal rules go away with respect to broadband if the FCC votes for Title II. That is because, by law, the FTC loses 100% of its authority over any service that is regulated by the FCC under Title II. In turn, the FCC’s Title II decision would leave broadband consumers with no federal privacy rules to protect them because Congress prohibited the FCC from applying its own privacy rules or any substantially similar ones to ISPs back in 2017. While the FCC claims that there would still be some residual Section 222 statutory privacy provisions that could apply to ISPs, that assertion is dubious at best given the 2017 law. So, far from filling a gap in consumer privacy rules, an FCC decision to apply Title II to broadband would create one.

Or take cybersecurity.³⁶ Once again, the agency makes no serious attempt to argue that Title II is necessary to promote cybersecurity. For one, Congress and the Executive Branch have already formulated a comprehensive cybersecurity regime that is solidly grounded in existing law. That effort is led, not by the FCC, but by the Cybersecurity & Infrastructure Security Agency, which is part of DHS. Nothing in Title II gives the FCC any additional authorities when it comes to participating in the federal government’s CISA-led process. For another, Title II does not authorize the FCC to adopt national cybersecurity standards. Indeed, even under the FCC’s reading, Title II does not even apply to the vast range of cyber targets, like cloud providers and tech platforms, further undermining any claim that Title II is necessary to ensure America’s cybersecurity.

Or take network resiliency and outage reporting.³⁷ Here, too, the FCC makes no coherent case for Title II advancing any of these interests. For one, the FCC already collects outage reports, operational status, and restoration information from broadband service providers. For another, America’s broadband networks are more robust and resilient than those in countries with far more heavy-handed or Title II-like

³⁴ See *infra* II.B.1.

³⁵ See *infra* II.B.2.

³⁶ See *infra* II.B.1.

³⁷ See *infra* II.B.3.

regulatory regimes. And with respect to 911 in particular, the FCC already has specific rules in place today that address outages that impact this public safety service.

Or take public safety.³⁸ The FCC rests this claim on a single event that, it turns out, has nothing to do with Title II or net neutrality. In that 2018 incident, a fire department purchased a data-limited plan and experienced reduced speeds after exceeding its limits. The ISP made an exception and lifted the reduction. Although it constantly invokes this event, the FCC studiously avoids stating that this type of issue would be prevented by Title II. Under today's Order, it would remain lawful for multiple reasons.

* * *

Misleading the American people is one thing, but the Order also leaves them worse off.

Everything we love about the Internet comes from *investment*. Our broadband networks are built on private capital, and those investment decisions in turn depend on a company's best guess of the long-term financial horizon. Will ISPs invest as intensively when the rules of the road are opaque, when business choices can be second-guessed without notice, when regulators reserve the right to dictate the rate of return, or when upgrades and innovations require more and more paperwork and approvals?

Uncertainty riddles every aspect of this Order. Will consumers pay new broadband taxes? Not today, but maybe tomorrow. Can ISPs offer customized plans for consumers with unique data, speed, or cost needs? Possibly, but it depends. What about intelligent networks to prevent congestion? Sure, but only if a handful of indeterminate factors are met. Does the FCC intend to issue new regulations? Definitely, but you will have to wait and see what the agency does.

By all indications, things will get worse before they get better. Apart from this Order, the Biden Administration is on a spree of unchecked regulatory excess. At President Biden's urging, the FCC adopted a *Digital Equity Order* that hands the Administrative State veto power over every decision about the provision of Internet service in the country. Elsewhere, the FCC is laser focused on nullifying private contracts, micromanaging advertising, dictating rates, blindsiding companies by enforcing legal expectations that aren't on the books, and stepping into the swim lanes traditionally occupied by other federal agencies.

The FCC apparently doesn't understand—or doesn't care—how this volatile and punitive climate of regulation will deter investment in broadband networks. This isn't just heady economic theory. Again, let's go to the tape. Broadband investment slowed down after the FCC imposed Title II in 2015, and it picked back up after we restored Title I in 2017. Or look at Europe, where regulators have long applied centralized, utility-style controls to their continent's Internet infrastructure. While America's digital economy is the envy of the world, sluggish European networks suffer from chronic underinvestment.

Without greater investment, the Biden Administration's broader policy objectives fall apart. The Administration wants ISPs to opt into federal support programs so they can bring broadband to high-cost, unserved communities. But who will take that financial risk when an ISP's returns can be wiped away with the stroke of a bureaucrat's pen? This Administration has pushed ISPs to deploy open, interoperable networks to offer competitive options beyond the dominant Chinese equipment manufacturers. But who will invest in Open RAN when its core functionalities—virtualization and network slicing—might violate an amorphous rule against “impairing” or “degrading” traffic?

³⁸ See *id.*

While misrepresenting Title II’s benefits, the Order takes an ostrich-like approach to its documented harms. It is a textbook example of “arbitrary and capricious” agency action to reach a predetermined outcome.

In the end, though, I remain optimistic. I am confident that we will right the ship. And I am certain that the courts will overturn this unlawful power grab. I dissent.

I. THE FCC LACKS STATUTORY AUTHORITY TO RECLASSIFY BROADBAND AS A TITLE II SERVICE.

A. The Major Questions Doctrine Prohibits the FCC from Reclassifying Broadband Under Title II

In the inevitable appeal of today’s Order, the reviewing court will ask a fundamental but straightforward question: Did Congress authorize the FCC to impose Title II utility-style regulations on broadband Internet access service? The court will start there for a simple reason. In Article I of the Constitution, “the People” vested “[a]ll” federal “legislative powers . . . in Congress.”³⁹ If Congress has not lawfully delegated a power to an agency, then it remains for Congress, not an unelected administrative agency, to decide whether to exercise that legislative power.

On appeal, the FCC will argue that Congress has provided it with the requisite authority. And the agency will undoubtedly seek refuge in prior judicial rulings—whether *Brand X*, *Mozilla*, or *U.S. Telecom*—that upheld the FCC’s assertion of statutory authority to classify broadband as a Title I or Title II service. In those rulings, the courts applied *Chevron*’s familiar two-step test to affirm, in the circumstances particular to those cases, what the courts found to be the FCC’s reasonable interpretation of an ambiguous statute.⁴⁰

But those cases provide no support for the FCC’s position today because *Chevron* is not the standard that will apply. In 2022, the Supreme Court formally adopted the “major questions doctrine” (MQD) in its seminal *West Virginia v. EPA* decision.⁴¹ As articulated in *West Virginia*, an agency exceeds its statutory bounds when it renders a “decision of vast economic or political significance” without “clear congressional authorization” for the power it asserts.⁴² Applied here, the MQD requires the FCC to possess an unambiguous congressional delegation of power, through a clear grant of statutory authority, to regulate ISPs as common carriers under Title II.

Whether sounding as a “clear statement” canon of statutory construction or a substantive prohibition against the delegation of legislative power, the MQD reflects a bedrock principle of constitutional law. Administrative agencies like the FCC do not have *sub silentio* authority to act as roving policymakers, with the unbounded discretion to enact economy-altering regulations at whim. Rather, agencies “have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency [may] add pages and change the plot line.”⁴³ Agencies must interpret statutes through the lens of separation of powers and “a practical understanding of

³⁹ U.S. Const. Art. I, § 1; U.S. Const. preamble.

⁴⁰ *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2018); *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 422 (D.C. Cir. 2017) (*U.S. Telecom II*); *United States Telecom Association v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (*U.S. Telecom I*); *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); see *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁴¹ *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022).

⁴² *West Virginia*, 142 S. Ct. at 2605; see also *Biden v. Nebraska*, 143 S. Ct. 2355, 2375 (2023).

⁴³ *West Virginia*, 142 S. Ct. at 2609 (cleaned up).

legislative intent,” for “Congress intends to make major policy decisions itself, not leave those decisions to agencies.”⁴⁴ As Justice Scalia aptly framed it many years earlier: Congress does not “hide elephants in mouseholes” by “alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions.”⁴⁵

Although it was not formally established until 2022, the MQD has its origins in so-called “step zero” decisions from the Supreme Court beginning more than two decades ago in *Brown & Williamson*.⁴⁶ Under this line of cases, the deferential *Chevron* standard was considered inapt to guide the judicial review of significant agency actions. This makes sense because, whatever the merits of *Chevron* deference in the mine-run of minor administrative agency decisions, it should be clear that questions of vast economic and political consequence have been addressed by Congress in the first instance.

In *U.S. Telecom II*, the D.C. Circuit upheld the FCC’s 2015 *Title II Order* under *Chevron* and its progeny, but before the Supreme Court fully developed and formally recognized the MQD. Since *U.S. Telecom II*, however, *Chevron* has fallen into desuetude and may be soon overruled. Meanwhile, the Court has applied the MQD with greater frequency and articulated the circumstances under which the doctrine will govern exceptional assertions of agency authority. With the exception of then-Judge Kavanaugh, who presciently foresaw the MQD and would have employed it to invalidate the 2015 *Title II Order*,⁴⁷ the courts have not fully grappled with the MQD’s application to Title II, given that the Supreme Court formally institutionalized the doctrine in 2022 and reaffirmed it in 2023.

Today’s Order is unlawful because it satisfies both prongs of the MQD, as discussed at greater length in the sections below.⁴⁸

First, the Order’s decision to regulate broadband as a public utility under Title II represents a “major question” of “vast economic and political significance.” No single factor is determinative on this question under the Court’s precedent. In evaluating agency actions, the Court has considered their broader economic impact, their impact on industry sectors, the scope and scale of regulatory burdens they impose on the public at large, their political ramifications, and the extent to which they discover unheralded new powers in long-extant statutes. By any measure, the Order has decided a major question.

Second, the Order lacks “clear congressional authorization” under the 1996 Act to apply Title II regulation to ISPs. Starting from first principles, the statute’s text, the 1996 Act’s deregulatory purpose, and the FCC’s regulatory antecedents confirm that broadband is best considered an “information service.” But even if the 1996 Act’s meaning were ambiguous, as the Supreme Court and lower courts have recognized time and again, that ambiguity decisively cuts against today’s Order. If the statute is ambiguous about Title II regulation of broadband, Congress could not have clearly authorized it as *West Virginia* requires. Indeed, even if the FCC were to establish a plausible textual basis for its position, *West Virginia* would still require courts to vacate this Title II decision. Plausibility alone is not enough; there must be clear congressional authorization.

⁴⁴ *West Virginia*, 142 S. Ct. at 2609 (quoting *U.S. Telecom II*, 855 F.3d at 419 (Kavanaugh, J., dissenting from denial of rehearing en banc)).

⁴⁵ *Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001).

⁴⁶ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

⁴⁷ *U.S. Telecom II*, 855 F.3d at 422 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

⁴⁸ Citing a law review article, the Order misstates the Supreme Court’s two-prong MQD test by recasting it as an amorphous multifactorial balancing test comprising of various factors at play in the various decisions. See Order at para. 256 & n.1073. But the Court has never described the MQD in the manner the Order describes.

Experts across ideological and partisan lines agree. Two former Solicitors General from the Obama Administration—individuals who support Title II regulation of broadband as a policy matter—have concluded “[t]here is no doubt” that whether broadband may be classified as a Title II service “presents a major question,” and “the Commission lacks clear statutory authority to reclassify broadband under Title II.”⁴⁹

Finally, the Order independently violates the MQD through its unrestrained use of forbearance. Although Section 10 of the 1996 Act allows the FCC to forbear from provisions of Title II, the Order indiscriminately applies that authority to fundamentally rewrite the 1996 Act by excising more than a dozen provisions central to Title II’s legislative design. Two Supreme Court decisions confirm that the Order’s application of forbearance is illegitimate. As a matter of statutory construction and implied delegation, the FCC is not presumed to have the sweeping power to refashion Title II into an entirely new legislative scheme by picking and choosing which sections will apply, with the resulting economic impact in the billions of dollars.

1. The Order Decides a Policy Question of “Vast Economic and Political Significance”

The FCC’s decision to impose Title II regulation on broadband constitutes a major question. As the D.C. Circuit confirmed in its 2014 *Verizon* decision, the “regulation of broadband Internet providers certainly involves decisions of great ‘economic and political significance.’”⁵⁰ As then-Judge Kavanaugh observed in 2017, it is “indisputable” that Title II presents a major question, and “any other conclusion would fail the straight-face test.”⁵¹ And as Judge Millett wrote in 2019, this is an area “fraught with political contest.”⁵²

Those conclusions are only more true today. Over the last 25 years, the Supreme Court’s MQD decisions and their forerunners have considered various criteria under which agency action touches on policy questions of “vast economic and political significance.” All of these criteria are present here.

Consider Title II’s political significance.⁵³ So-called “net neutrality” is perhaps the most contentious political issue that the modern FCC has ever confronted. No wonder President Biden, like President Obama before him, took the extraordinary step to pressure the FCC—an independent agency that is designed to operate outside undue political influence from the Executive Branch—to reinstate Title II regulation of broadband.⁵⁴ No wonder that President Obama’s Director of the National Economic Council personally paid the FCC Chair a visit back in 2014 to discuss this issue. And no wonder that the FCC’s previous Title II proceedings were the most active in the agency’s history, receiving millions of comments. But Congress has evaluated and rejected many bills that would have given the FCC authority

⁴⁹ Donald B. Verrilli, Jr. & Ian Heath Gershengorn, *Title II “Net Neutrality” Broadband Rules Would Breach Major Questions Doctrine*, at 10, 13 (Sept. 20, 2023), <https://aboutblaw.com/bazq>.

⁵⁰ *Verizon*, 740 F.3d at 639 (D.C. Cir. 2014) (quoting *Brown & Williamson*, 529 U.S. at 160).

⁵¹ *U.S. Telecom II*, 855 F.3d at 417 (Kavanaugh, J., dissenting from denial of rehearing en banc).

⁵² *Mozilla*, 940 F. 3d at 95 (Millett, J., concurring).

⁵³ *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (observing that the Attorney General’s ban on prescribing drugs for physician-assisted suicide implicated a “subject of an earnest and profound debate across the country”).

⁵⁴ Executive Order on Promoting Competition in the American Economy, § 5(1)(2) (July 9, 2021).

to regulate broadband as a Title II, common carrier service.⁵⁵ This is the quintessential issue best left to Congress to decide.

Or consider first the scope and scale of expanded FCC powers over the communications industry.⁵⁶ Title II does not merely regulate more at the margins. It regulates virtually everything. And Title II does not create incremental liability risk. It makes ISPs potentially liable for everything they do. The Order's application of Title II entails the following:

- **Vague standards** through amorphous “reasonableness” and “nondiscrimination” requirements that encourage anyone to complain about almost anything;⁵⁷
- **Unlimited regulation** through new rulemaking powers to implement any provision in Title II, including the “reasonableness” and “nondiscrimination” requirements;⁵⁸
- **Unlimited punishment** through new enforcement powers that the FCC can apply whenever it wants;⁵⁹
- **Endless lawsuits** through a new private right of action and money damages for any violation in Title II;⁶⁰ and
- **Government permission** for ISPs to enter the broadband market.⁶¹

But it does not end there. Using its Title II authority, the Order adopts the Internet Conduct Rule, which makes almost every aspect of an ISP's network management potentially illegal, subject to a bureaucrat's “case-by-case” review of “a non-exhaustive list of factors.”⁶² Today, the Order says the following practices *might* be illegal, without saying when:

- **Free and sponsored data plans**, like when a wireless provider offers Netflix without counting against data caps;⁶³

⁵⁵ *U.S. Telecom II*, 855 F.3d at 417 (Kavanaugh, J., dissenting from denial of rehearing en banc) (citing H.R. 5252, 109th Cong. (2006); H.R. 5273, 109th Cong. (2006); H.R. 5417, 109th Cong. (2006); S. 2360, 109th Cong. (2006); S. 2686, 109th Cong. (2006); S. 2917, 109th Cong. (2006); S. 215, 110th Cong. (2007); H.R. 5353, 110th Cong. (2008); H.R. 5994, 110th Cong. (2008); H.R. 3458, 111th Cong. (2009); S. 74, 112th Cong. (2011); S. 3703, 112th Cong. (2012); H.R. 2666, 114th Cong. (2016)).

⁵⁶ *West Virginia*, 142 S. Ct. at 2609 (observing that EPA regulation to effectively shift energy protection away from coal-fired plants implicated “unprecedented power over American industry”); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994) (“It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion ...”).

⁵⁷ 47 U.S.C. §§ 201(b), 202(a).

⁵⁸ 47 U.S.C. § 201(b).

⁵⁹ 47 U.S.C. §§ 208-209.

⁶⁰ 47 U.S.C. §§ 206-207.

⁶¹ 47 U.S.C. § 214(a).

⁶² Order at para. 513.

⁶³ Order at para. 533.

- **5G network slicing**, an innovative technology to offer customized connectivity for public-safety, cybersecurity, autonomous vehicles, automated factories, and other applications that have unique speed, capacity, or latency requirements;⁶⁴
- **Usage-based pricing**, which allows ISPs to offer cheaper plans to consumers with limited data needs;⁶⁵
- **Techniques to deliver streaming mobile video**, using bitrate management techniques to provide high-quality resolution on small screens without overloading the network;⁶⁶ and
- **Wholesale practices**, which involve no direct relationship with consumers.⁶⁷

The Order's pervasive ambiguity on these issues is compounded by the FCC's decision to insert language, at the eleventh hour, to expand the definition of "throttling" to cover plans that offer faster speeds but leave no consumer worse off.⁶⁸ This novel idea, barely if ever contemplated in the NPRM, creates a new maze of internal contradictions and ambiguities. For one, the faster-is-throttling rule runs headlong into the no-throttling rule as traditionally understood, which requires that some other traffic streams be made worse off—*i.e.*, "degraded" or "impaired."⁶⁹ But even as advocates for faster-is-throttling concede, network resources are "not a zero-sum game."⁷⁰ In other words, users on the network often will see no impairment or degradation simply because others contract for a guaranteed quality-of-service (QoS). For another, the faster-is-throttling rule drives a truck through the no-paid-prioritization rule, which prohibits favoring traffic *only when* it involves (a) affiliated content or (b) paid content.⁷¹ Through a flick of the wrist at the last minute, the FCC suddenly throws another wrench into the Title II Rube Goldberg machine.

And it does not end there, for the FCC envisions more Title II rulemakings. While the Order does not offer the full list, it gives us a sneak preview of what ISPs might be forced to do in the future:

- **Financial restrictions** through ownership limitations that force mobile providers, especially smaller ones, to divest critical investment from overseas;⁷²
- **Data restrictions** that would cover only ISPs while leaving Big Tech, data brokers, and other privacy abusers regulated under a different set of rules;⁷³ and

⁶⁴ Order at paras. 199-203.

⁶⁵ Order at para. 542.

⁶⁶ Order at paras. 196-97, 500-01.

⁶⁷ Order at para. 193.

⁶⁸ Order at paras. 499, 500.

⁶⁹ Order at para. 498.

⁷⁰ Letter from Scott Jordan & Jon Peha, WC Docket No. 23-320, at 4 & n.24 (Apr. 19, 2024).

⁷¹ Order at para. 503.

⁷² Order at para. 438.

⁷³ Order at para. 359.

- **Government approvals** for mobile ISPs to offer service by obtaining authorizations traditionally limited to subsea cables and other international services.⁷⁴

Or consider the Order’s sweep on private parties.⁷⁵ The United States has more than 2,000 ISPs. As then-Judge Kavanaugh observed, Title II regulation “will affect every Internet service provider, every Internet content provider, and every Internet consumer.”⁷⁶ But the Order goes even further than the 2015 *Title II Order*, asserting Title II authority to regulate wholesalers (and potentially other upstream entities that offer economic inputs in the broader supply chain) that interact with broadband providers.⁷⁷

Or consider the Order’s economic impact to a “significant portion of the U.S. economy.”⁷⁸ The U.S. broadband market, by some accounts, generates at least \$150 billion in annual revenue.⁷⁹ And one study estimates that “the persistent prospect of Title II policy reduced investment by about 10%, on average, between 2011 and 2020.”⁸⁰ That reduction in investment, in turn, translated into tens of billions in foregone broadband capital spending, a \$1.45 trillion loss in GDP over ten years, and “an annual loss to the nation of about 81,500 information sector and 195,600 total jobs.”⁸¹ Another study projected a 20% reduction in capital spending thanks to Title II.⁸²

In response, the FCC asserts that broad application of forbearance authority mitigates the Order’s economic impact and thus renders the MQD inapplicable.⁸³ That is wrong twice over. Even with forbearance, the Order affects a “significant portion of the U.S. economy” by opening the door to plenary rulemaking and enforcement authority over the broadband industry. And, independently, the Order’s unrestrained use of forbearance actually confirms why it violates the MQD, as discussed below.⁸⁴

⁷⁴ Order at para. 344 & n.1386.

⁷⁵ *Nat’l Federation of Independent Business v. OSHA*, 142 S. Ct. 661 (2022) (observing that OSHA vaccine mandate would cover roughly 84 million workers); *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014) (observing that EPA limits on greenhouse gas emissions would have “require[d] permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide”).

⁷⁶ *U.S. Telecom II*, 855 F.3d at 417 (Kavanaugh, J., dissenting from denial of rehearing en banc).

⁷⁷ See Order at para. 193.

⁷⁸ *Brown & Williamson*, 529 U.S. at 160; see also *Alabama Association of Realtors v. Dept of HHS*, 141 S. Ct. 2485 (2021) (observing that the HHS eviction moratorium on rental properties had an economic impact of \$50 billion).

⁷⁹ See IBISWorld, *Internet Service Providers in the US – Market Size* (Sept. 11, 2023), <https://www.ibisworld.com/industry-statistics/market-size/internet-service-providers-unitedstates/> (estimating size of U.S. broadband market by total annual revenue).

⁸⁰ George S. Ford, *Investment in the Virtuous Cycle: Theory and Empirics*, 22-23 (Dec. 12, 2023), <https://phoenix-center.org/pcpp/PCPP62Final.pdf>.

⁸¹ *Id.*

⁸² George S. Ford, *Regulation and Investment in the U.S. Telecommunications Industry*, 50 Applied Economics 6073–6084 (2018), <https://www.fcc.gov/ecfs/document/1214841324432/3>; see also George S. Ford, *In Response to the FCC ...*, Phoenix Center Perspectives 24-04 (Apr. 18, 2024), <https://www.phoenix-center.org/perspectives/Perspective24-04Final.pdf> (“As detailed here, the Commission’s effort to discredit my earlier work [in the draft Order] on investment through replication falls flat. ... Properly analyzed, including estimation using the method of Synthetic Counterfactuals as recommended in the Draft Order, the revised [Bureau of Economic Analysis] data reveals large and negative investment effects.”).

⁸³ Order at para. 257.

⁸⁴ See *infra* I.A.3.

Likewise, the FCC asserts that “[w]e do not think the rules we adopt today have the extraordinary economic and political effect required.”⁸⁵ But this ostrich-like claim, one that will be entitled to no deference, is not credible. The FCC itself asserts in the Order that these regulations are vital in its view to advancing everything from national security, law enforcement, cybersecurity, public safety, network resiliency, consumer privacy and data security, access to broadband itself, access for people with disabilities, and free expression on the Internet. Title II’s proponents have further argued that common carriage is “one of the most important . . . legal frameworks in human history”⁸⁶ and potentially “transformative” for society.⁸⁷ The same agency or outside entities that put these claims forward cannot now be heard to argue that this decision lacks the relevant significance for MQD purposes.

Or consider the FCC’s claim of comparative expertise.⁸⁸ As discussed in the sections below, the FCC can lay no claim as the expert agency in many of the areas for which it allegedly needs Title II—whether national security, law enforcement, cybersecurity, consumer protection, privacy, or data security.

Or consider the Order’s “claim to discover in a long-extant statute an unheralded power.”⁸⁹ The FCC has regulated broadband under Title I for all but two years since the 1996 Act. We have done so repeatedly on a bipartisan basis—rejecting Title II both as a general matter (1998, 2010, 2017, 2020)⁹⁰ and in the technology-specific context of wireline facilities (2005),⁹¹ cable modem services (2005),⁹² broadband over power lines (2006),⁹³ and wireless broadband (2007).⁹⁴ The FCC’s claim that Congress implicitly delegated the agency authority to heavily regulate broadband as a Title II utility service all the

⁸⁵ Order at para. 257.

⁸⁶ Comments of Free Press, WC Docket No. 23-320, at 2 (Dec. 14, 2023).

⁸⁷ Comments of Public Knowledge, WC Docket No. 23-320, at 46 (Dec. 14, 2023).

⁸⁸ *Biden v. Missouri*, 142 S. Ct. at 653.

⁸⁹ *West Virginia*, 142 S. Ct. at 2610 (observing that the agency “claim[ed] to discover in a long-extant statute an unheralded power”).

⁹⁰ *Restoring Internet Freedom*, Order on Remand, 35 FCC Rcd 12328 (2020) (2020 *Restoring Internet Freedom Remand Order*); *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2017); *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, n.381 (2010) (“The open Internet rules that we adopt today do not regulate Internet applications, much less impose Title II (i.e., common carrier) regulation on such applications”); *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1998) (*Stevens Report*) (classifying Internet access service).

⁹¹ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, para. 14 (2005).

⁹² *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (Cable Modem Order) (classifying broadband Internet access service over cable systems), *aff’d sub nom. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

⁹³ *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006) (classifying broadband Internet access service over power lines).

⁹⁴ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (*Wireline Broadband Internet Access Services Order*) (classifying broadband Internet access service over wireless networks).

way back in 1996—in a deregulatory enactment—but the FCC simply did not discover that authority until decades later, further confirms that the Commission’s decision triggers the MQD.⁹⁵

And as discussed below, the 1996 Act’s contemporaneous history is similarly clear: before and after passing the 1996 Act, Congress repeatedly rejected the unheralded power that the Order asserts, consistent with a virtually unbroken line of precedent treating broadband as a Title I service.

2. Congress Did Not Clearly Authorize the FCC to Regulate Broadband as Public Utility.

The MQD’s second prong requires an administrative agency to establish “clear congressional authorization” to regulate in the manner at issue.⁹⁶ This part of the inquiry serves a vital purpose. It ensures that the vast legislative power that the Framers vested in Congress remains with Congress unless and until Congress decides to delegate it. And it ensures that agencies like the FCC cannot reach up and seize power that belongs to the people’s elected representatives. This is one way in which the MQD marks a sea change in administrative law. When it comes major questions, administrative agencies can no longer rely on implicit or ambiguous provisions of law to make the case that Congress empowered them to act.

This portion of the MQD inquiry also operates to avoid the type of regulatory flip-flopping on major questions that *Chevron* would have otherwise allowed—a whiplashing on matters of vast significance that serves no legitimate long-term interest. That whiplashing with every change in political administration, in turn, offers persuasive evidence that Title II is properly within Congress’s remit, not the FCC’s.

The FCC puts forward just two main arguments for why its decision today satisfies *West Virginia*’s “clear congressional authorization” standard. Except the FCC does not get out of the starting blocks with either argument. In both cases, the FCC simply argues against the Court’s holding in *West Virginia* rather than showing why the FCC has satisfied it in the Order.

First, the FCC pretends that the Supreme Court never decided *West Virginia*. It argues that Congress has provided the FCC with clear congressional authorization because the D.C. Circuit’s decision in *U.S. Telecom* relied on the Supreme Court’s 2005 opinion in *Brand X*, which upheld the FCC’s authority to classify broadband as a Title I service.⁹⁷ But *Brand X* determined that the relevant statutory language is ambiguous.⁹⁸ Bootstrapping your way back to *Brand X* is fine as far as it goes, but it just does not get the FCC where it wants. Neither *U.S. Telecom* nor *Brand X* stand for the proposition that

⁹⁵ The 1998 *Advanced Services Order* is not to the contrary, and broadband today presents a more straightforward instance of an information service. In the *Advanced Services Order*, the FCC considered digital subscriber line (DSL) technology, which allowed “transmission of data over the copper loop at vastly higher speeds than those used for voice telephony or analog data transmission” between each “subscriber’s premises” and “the telephone company’s central office.” *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24026–27, para. 29 (1998). For this service, a DSL access multiplexer would direct the traffic onto a carrier’s packet-switched data network, where it could then be routed to a “location selected by the customer” like a “gateway to a . . . set of networks, like the Internet.” *Id.* at paras. 30–31. The FCC then classified only the *last-mile transmission service* between the end user and the ISP as a telecommunications service, while observing that the Internet access service itself was still an information service. *Id.* at para. 36.

⁹⁶ *West Virginia*, 142 S. Ct. at 2609.

⁹⁷ Order at para. 264.

⁹⁸ *Brand X*, 545 U.S. at 989-997.

Congress provided the FCC with clear congressional authorization as required by the Court's 2022 *West Virginia* decision.

Quite the opposite. The FCC can hug *Brand X* all it wants, but after *West Virginia* it operates as an anchor not a life preserver for the FCC's position here today. *Brand X* forecloses any FCC assertion that it has the requisite clear congressional authority because the Court determined that the statute is ambiguous on the classification question at issue. In other words, for this FCC argument to prevail, the agency would need the Supreme Court to reverse *West Virginia* and go all the way back to the *Chevron* standard.

Second, the FCC lodges an argument that would not only require the Supreme Court to overturn *West Virginia*, but would also require the Court to confer even more discretion on administrative agencies than even *Chevron* allows. Specifically, the FCC argues that, as a general matter, it is not controversial to read the Communications Act as giving the FCC power to classify some services as Title I services and others as Title II services.⁹⁹ Indeed, the FCC says, the Communications Act must be read as giving the FCC that general authority. It necessarily flows from there, the FCC asserts, that the Communications Act must also be read as giving the FCC authority to regulate broadband as a utility service under Title II because that regulation flows from the FCC's classification decision. In other words, to hear the FCC tell it, Congress has provided the FCC with clear congressional authorization to classify services and it is merely exercising that power here.¹⁰⁰

But that bit of sophistry mischaracterizes Supreme Court precedent. The relevant inquiry under *West Virginia* is not whether the FCC possess authority as a general manner to classify services. The question is whether, in the category of major questions cases to which MQD applies, the agency has "clear congressional authorization for the power it claims" or, as stated elsewhere in the decision, "'clear congressional authorization' to regulate in that manner."¹⁰¹ In other words, the question required by *West Virginia* is whether Congress provided the FCC with clear congressional authorization to subject broadband to the heavy-handed regulatory regime adopted here.

Think about it. If the FCC's position were correct, and the relevant question of legal authority were simply a matter of deciding what statutory terms mean, then an agency could use a statute that authorized it to regulate cars as a basis for regulating airplanes. Under the FCC's theory, that automobile agency must necessarily have authority to determine what constitutes a car and therefore, the FCC's argument would go, Congress has provided clear congressional authorization for it to label anything, whether airplanes, cars, or boats.

And if the FCC's position were correct, then MQD would be a dead letter, for any agency could invoke the power to interpret the law to circumvent the MQD. After all, *Chevron* presumes that, in the ordinary course, agencies possess delegated authority from Congress to give reasonable interpretations to ambiguous statutes. But the MQD operates as an exception to *Chevron*. So, whatever implied delegated authority an agency may have under normal circumstances to interpret ambiguous statutes in a reasonable

⁹⁹ Order at para. 264.

¹⁰⁰ The FCC relatedly argues that if the MQD applies to this Title II decision today, then the MQD should also have applied to the *Restoring Internet Freedom Order*. See Order at para. 254 & n.1063. Whatever the merits of that claim, it provides no basis for evading MQD review in this case. In any event, the Order's use of forbearance distinguishes it under the MQD. Forbearing from a statutory consequence (as is the case here) is decidedly different for MQD purposes than deciding to leave a service in its status quo deregulatory position (as was the case in the *Restoring Internet Freedom Order*).

¹⁰¹ *West Virginia*, 142 S. Ct. at 2609 (cleaned up).

fashion, that delegated authority is no longer presumed to exist when the agency asserts powers of “vast economic and political significance.”

And if the FCC’s position were correct, the Supreme Court’s specific MQD holdings would make little sense. The FDA’s authority to interpret the words “drugs” and “devices” would have conferred power to regulate and ban tobacco, contrary to *Brown & Williamson*.¹⁰² The EPA’s authority to interpret the term “air pollutants” would have conferred power to regulate greenhouse gases, contrary to *Utility Air*.¹⁰³ The CDC’s authority to adopt measures “necessary to prevent the ... spread of” disease would have conferred power to issue a nationwide eviction moratorium on residential properties, contrary to *Alabama Association of Realtors*.¹⁰⁴

In particular, the FCC’s position cannot be squared with *West Virginia*. Indeed, the FCC presents the same argument that the EPA ran in that case. There, the EPA argued that Congress clearly authorized it to establish emissions caps at a level reflecting, in the statute’s language, “the application of the best system of emission reduction.”¹⁰⁵ And the EPA argued that its generation shifting regulations were simply one such system. The Court rejected this argument out of hand, explaining that EPA failed to point to clear congressional authorization to regulate generation shifting.

Nor can the FCC’s position be squared with *Chevron*. Even under *Chevron*, the question is not whether a statute is clear as a general matter and, whether, in turn, it follows that the agency is entitled to deference. The question in *Chevron* is whether the statute is clear or ambiguous as applied to and in the context of a particular assertion of agency power over a specific subject. *Chevron* rejected the notion that courts should define congressional intent at a high level of generality. Instead, the Court indicated that the proper inquiry is whether Congress spoke “directly” to the “precise question at issue.”¹⁰⁶

To say it another way, the relevant question is not whether the FCC has the *abstract authority* to interpret statutes or classify some services, but whether it has the *precise authority* to interpret *the precise statutory provisions* at issue in *precisely the way* it has done. That is to say, the question is “whether Congress in fact meant to confer the power the agency has asserted”¹⁰⁷—imposing massive regulatory controls over the broadband industry, through a Frankenstein scheme that uses forbearance to pick and choose what statutory provisions will apply going forward.

The FCC does not clearly have such power. As discussed below, the statute’s text, legislative intent, and regulatory history indicate that if Congress clearly intended anything it was to keep broadband a lightly regulated Title I service. But even if those authorities were ambiguous, the Order would still fail under the MQD, for mere ambiguity—indeed, even a plausible textual basis—is not enough to give the FCC the massive powers it claims here.

a. Broadband Is an Information Service Under the 1996 Act’s Text and History.

1. Start with the statute. The Telecommunications Act of 1996 establishes two mutually exclusive categories of regulation over communications technologies. On one end are lightly regulated “information services” (Title I), which involve the “offering of a capability for generating, acquiring,

¹⁰² *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

¹⁰³ *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014).

¹⁰⁴ *Alabama Ass’n of Realtors v. Dep’t of HHS*, 141 S. Ct. 2485 (2021).

¹⁰⁵ *West Virginia*, 142 S. Ct. at 2601.

¹⁰⁶ *Chevron*, 467 U.S. 837, 842-43.

¹⁰⁷ *West Virginia*, 142 S. Ct. at 2608.

storing, transforming, processing, retrieving, utilizing, *or* making available information via telecommunications, and includes electronic publishing.”¹⁰⁸ On the other are heavily regulated “telecommunications services” (Title II), which refer to the “offering of telecommunications for a fee directly to the public.”¹⁰⁹ Both definitions incorporate the term “telecommunications,” which refers to the “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.” A Title II service offers a certain type of “telecommunications” to the public, whereas a Title I service offers capabilities “via telecommunications.”

Closely reading these definitions makes one thing obvious: Congress tilted the statutory structure to ensure that most services offered through communications networks would be lightly regulated under Title I. “Information service” is defined broadly. It establishes a list of eight expansive, qualifying capabilities, set apart with the disjunctive “or.” If broadband involves *any* of the eight criteria, it must be regulated under the light-touch Title I regime. A “telecommunications service,” by contrast, is a restrictive category involving many hoops, all of which must be met. To fall under Title II, broadband must involve the sale of an offering “to the public” of pure “transmission” between two points “specified by the user” without any change in the “form or content.”

For starters, broadband falls under Title I because it involves at least one of the capabilities listed in the definition of “information service.”¹¹⁰ In fact, broadband involves all eight. An ISP offers the capability to “generate” information through emails, social media, video streams, and file-sharing protocols. It offers the capability “store” information through cloud storage. It allows users to “acquire” and “retrieve” information through the domain name system (DNS) and caching. It “utilizes” data, applications, and services made available by other users in formats, most often unknown to the requesting user. And broadband access regularly “transforms” information by converting human instructions into a series of digital packets, which are routed through dynamic algorithms to optimize the quality of service, and then sent back to the user and converted into human readable output.

In particular, the FCC has long recognized, and the Supreme Court in *Brand X* has confirmed, that DNS and caching are integrated information-processing components. The Order does not dispute that DNS and caching provide “information-processing capabilities”¹¹¹ and would be an information service if offered by a third party. Instead, the Order claims that DNS and caching, when used by ISPs, do not render broadband an information service. The Order makes two assertions to support that claim: (1) DNS and caching fall into the exception under the definition of “information service” for telecommunications system management;¹¹² and (2) DNS and caching are not “inextricably intertwined” with broadband. Both assertions fail.

DNS takes the website’s name that a user enters (“www.fcc.gov”) and translates it into the IP addresses of servers that host the requested websites. As the Commission found in 2018, DNS “is

¹⁰⁸ 47 U.S.C. § 153(24) (emphasis added).

¹⁰⁹ 47 U.S.C. § 153(53).

¹¹⁰ See Decl. of Peter Rysavy, at paras 3–7, 27 (attached to Comments of CTIA, WC Docket No. 23-320 (Dec. 14, 2023)) (Rysavy Decl.), <https://www.fcc.gov/ecfs/document/1214144547233/1>.

¹¹¹ Order at para. 133.

¹¹² See 47 U.S.C. 153(24) (“information service ... does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”)

indispensable to ordinary users as they navigate the Internet.”¹¹³ While the Order cites the availability of third-party DNS services as evidence that DNS is not “inextricably intertwined” with broadband,¹¹⁴ that does nothing to undermine the dispositive fact that DNS is offered as an integrated part of broadband that ISPs offer. More than 90% of time,¹¹⁵ users rely on the DNS provided by the ISP. Without DNS servers preconfigured by the ISP, broadband service would be unusable out of the box, unless the user were sophisticated enough to customize her router’s configuration. If you don’t believe me, see what happens if you change your router’s DNS address. Your emails would not send, your browser would not load websites, and your cat videos would not stream. DNS service is thus integrated into ISPs’ retail broadband offerings and relevant to broadband’s status as an “information service.” And DNS falls outside the exception for telecommunications system management because it is intended to benefit consumers by facilitating web access, not to aid ISPs in managing their networks.

Caching, likewise, is an “information service” that is inextricably intertwined with broadband and designed to enhance the consumer experience. Indeed, “[a]ll major ISPs cache content using caching servers located within the ISP network,” and “[u]sers cannot directly opt out of” this caching functionality; rather it is “inextricably linked” to providers’ delivery of online content.¹¹⁶ As the *Restoring Internet Freedom Order* correctly found, “[c]aching does much more than simply enable the user to obtain more rapid retrieval of information through the network” by storing content closer to customer locations; “caching depends on complex algorithms to determine what information to store where and in what format.”¹¹⁷ This information-processing functionality thus “enables and enhances consumers’ access to and use of information online”—and, like DNS, caching is “provided as part and parcel of the broadband Internet access service.”¹¹⁸

Just as fixed broadband is an “information service,” so too is mobile broadband under Section 332 of the 1996 Act. A “commercial mobile service,” as relevant here, is any mobile service that “makes interconnected service available.”¹¹⁹ An “interconnected service” refers to a “service that is interconnected with the public switched network”¹²⁰ and “gives subscribers the capability to communicate to or receive communication from all other users on the public switched network.”¹²¹ The “public switched network” means the public switched telephone network—that is, the “common carrier switched network . . . that use[s] the North American Numbering Plan in connection with the provision of switched services.”¹²² And “private mobile service” is the reverse of commercial mobile service: “any mobile

¹¹³ *Restoring Internet Freedom Order* at para. 34 (2018) (quoting Comments of AT&T Services Inc., WC Docket No. 17-108, at 74 (July 17, 2017)).

¹¹⁴ Order at para. 148.

¹¹⁵ See Roger Entner, Don Kellogg & Brett Clark, Recon Analytics, *Broadband Survey Results* at 2 (attached to USTelecom Reply Comments, WC Docket No. 23-320 (Jan. 17, 2024)), <https://www.fcc.gov/ecfs/document/10117636723266/3>.

¹¹⁶ Rysavy Decl. at paras. 17-18.

¹¹⁷ *Restoring Internet Freedom Order* at para. 41 (quoting Comments of the Information Technology and Innovation Foundation, WC Docket No. 17-108, at 74 (July 17, 2017)).

¹¹⁸ *Restoring Internet Freedom Order* at para. 42.

¹¹⁹ 47 U.S.C. § 332(d)(1).

¹²⁰ 47 U.S.C. § 332(d)(2).

¹²¹ 47 C.F.R. § 20.3.

¹²² 47 C.F.R. § 20.3.

service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service.”¹²³

As the D.C. Circuit in *Cellco* explained, “providers of ‘commercial mobile services,’ such as wireless voice-telephone service, are common carriers, whereas providers of other mobile services are exempt from common carrier status.”¹²⁴ In particular, the court recognized Section 332’s “statutory exclusion of mobile-internet providers from common carrier status.”¹²⁵ And due to the Communications Act’s separate prohibition on treating information services providers as common carriers, the court in *Cellco* concluded that mobile ISPs are “statutorily immune, perhaps twice over, from treatment as common carriers.”¹²⁶ The D.C. Circuit in *Verizon* affirmed that conclusion: The “treatment of mobile broadband providers as common carriers would violate section 332.”¹²⁷

2. It is no accident that, within the broader landscape of the 1996 Act, Title II represents a small island of utility-style regulation within the vast ocean of a light-touch treatment. Congress did not create the distinction between Title I and Title II services out of thin air. Rather, it incorporated the rich historical backdrop of precedent before the Telecommunications Act of 1996¹²⁸ that is decisive here.¹²⁹

As an initial matter, the 1996 Act was intended to be a deregulatory piece of legislation to open up competition in the communications market following the breakup of the AT&T monopoly a decade before. The 1996 Act’s preamble makes this clear: “To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”¹³⁰

A bipartisan group of Senators confirmed that “[n]othing in the 1996 Act or its legislative history suggests that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services.”¹³¹ Or as Senator John McCain put it, “[i]t certainly was not Congress’s intent in enacting the supposedly pro-competitive, deregulatory 1996 Act to extend the burdens of current Title II regulation to Internet services, which historically have been excluded from regulation.”¹³² The FCC confirmed the 1996 Act’s deregulatory

¹²³ 47 C.F.R. § 332(d)(3).

¹²⁴ *Cellco Partnership v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Verizon*, 740 F.3d at 650.

¹²⁸ See *Brand X*, 545 U.S. at 993; *Mozilla*, 940 F.3d at 25. 203.

¹²⁹ *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 48 (2007) (noting that a statute’s historical backdrop can “hel[p] to illuminate the proper interpretation and application” of its provisions); *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (cleaned up) (“When a statutory term is obviously transplanted from another legal source, it brings the old soil with it.”).

¹³⁰ See Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996).

¹³¹ Letter from Senators John Ashcroft, Wendell Ford, John Kerry, Spencer Abraham, and Ron Wyden to the Honorable William E. Kennard, Chairman, FCC, at 1 (Mar. 23, 1998) (Five Senators Letter), <http://apps.fcc.gov/ecfs/document/view?id=2038710001>.

¹³² *Stevens Report*, 13 FCC Rcd at 11519, para. 37 (quoting Letter from Senator John McCain to the Honorable William E. Kennard, Chairman, FCC).

intent in the *Stevens Report*, which found that internet access was an “information service” both under the 1996 Act and the pre-Act precedent that Congress incorporated into the statute.¹³³

The 1996 Act’s deregulatory intent informed its distinction between Title I “information services” and Title II “telecommunications services.” That distinction reflected Congress’ intent to codify the decades-old understanding in the FCC’s pre-1996 precedent that “basic services” subject to common carrier regulation (like telephone service) are materially dissimilar for regulatory purposes from “enhanced services” (like computer processing over telephone lines).¹³⁴ That distinction was also informed by the Modification of Final Judgment breaking up the Bell system.¹³⁵

3. Developments following the passage of the 1996 Act confirm that Congress intended to regulate broadband as a Title I “information service.”

For one, Section 230 of the Communications Decency Act confirms that broadband is an information service. Congress defined the term “interactive computer service” to mean an “information service” that “provides or enables computer access by multiple users to a computer server.”¹³⁶ If that definition were not clear enough, Section 230 expressly states that an “interactive computer service” includes “specifically a service or system that provides access to the Internet.”¹³⁷ Section 230’s treatment of “provid[ing] access to the Internet” as an “information service” contradicts the Order’s Title II classification.

And Section 230 renders the conduct rules the FCC adopts here—including for blocking, throttling, prioritization, and general conduct—unenforceable. Section 230 immunizes interactive computer services from federal and state law for “restrict[ing] access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”¹³⁸

Congress was not ambiguous about its deregulatory intentions behind Section 230. As it found: “The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.”¹³⁹ And it went on to state the “policy of the United States . . . [is] to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation.”¹⁴⁰

¹³³ See *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1998) (*Stevens Report*).

¹³⁴ *In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, 417-423, ¶¶ 86-101 (1980) (*Computer II*).

¹³⁵ *United States v. AT&T Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

¹³⁶ 47 U.S.C. § 230(f)(2).

¹³⁷ 47 U.S.C. § 230(f)(2).

¹³⁸ 47 U.S.C. § 230(c)(2).

¹³⁹ 47 U.S.C. § 230(a)(4).

¹⁴⁰ 47 U.S.C. § 230(b)(2).

For another, Congress has given the FCC limited, piecemeal authority over broadband since the 1996 Act. When Congress wants to address the internet or broadband, it uses that very word.¹⁴¹ Congress knows how to delegate authority over broadband to the FCC—but it’s only done so in narrow circumstances. Tellingly, these rifle-shot authorities were not codified in Title II, but rather in separate sections, particularly a chapter titled “Broadband.”¹⁴²

And for another, since the 1996 Act, Congress has repeatedly rejected legislation that would expressly classify (or authorize the FCC to classify) broadband as a Title II service.¹⁴³ As the Supreme Court has explained, the courts cannot turn a blind eye to a new power discovered by an agency that “Congress considered and rejected multiple times.”¹⁴⁴

In short, the Communications Act does not clearly provide—anywhere—that the Commission may treat broadband as a form of telecommunications service, and if anything indicates that the opposite is true.

b. Brand X Confirms that Title II Violates the Major Questions Doctrine.

In *Brand X*, the Supreme Court upheld the FCC’s determination that broadband was an information service and did not involve a separate offering of telecommunications service. The question before the Court was whether a broadband provider “offers” a separate telecommunications service in the form of last-mile transmission, even though the provider’s broadband offering qualified as an “information service.”¹⁴⁵ As the Court explained, “it does not inexorably follow as a matter of ordinary language that [broadband providers] also ‘offe[r]’ consumers the high-speed data transmission (telecommunications) that is an input used to provide [broadband] service.”¹⁴⁶ The Communications Act, the Court concluded, “fails unambiguously to classify . . . information service providers that use telecommunications inputs to provide an information service as ‘offer[ors]’ of ‘telecommunications.’”¹⁴⁷

The Court’s ruling in *Brand X* decisively shows why the FCC cannot classify broadband under Title II. The FCC must point to “clear congressional authorization”¹⁴⁸ for the power it claims today, but *Brand X* confirms that such authority is, at best, ambiguous. If the statute is ambiguous about regulating broadband under Title II, Congress cannot have clearly authorized it as *West Virginia* requires. Indeed,

¹⁴¹ See Broadband Deployment Accuracy and Technological Availability Act, Pub. L. No. 116-130, 134 Stat. 228 (2020) (codified at 47 U.S.C. §§ 641-646); Secure Equipment Act of 2021, Pub. L. No. 117-55, 135 Stat. 423 (2021) (codified at 47 U.S.C. § 1601); Secure and Trusted Communications Networks Act of 2019, Pub. L. No. 116-124, 133 Stat. 158 (2020) (codified as amended at 47 U.S.C. §§ 1601-1609); 47 U.S.C. § 1302.

¹⁴² See generally 47 U.S.C. §§ 1301-1307.

¹⁴³ See Net Neutrality and Broadband Justice Act of 2022, H. R. 8573, 117th Cong. § 2 (2022) (proposing to amend the Communications Act’s definition of telecommunications service to “include[] the offering of broadband internet access service”); Save the Internet Act of 2019, H.R. 1644, 116th Cong. § 2(b)-(c) (2019) (proposing to “restore[] as in effect” the Commission’s 2015 classification of broadband as a telecommunications service subject to Title II).

¹⁴⁴ *West Virginia*, 142 S. Ct. at 2614 (internal quotations and citations omitted).

¹⁴⁵ *Brand X*, 545 U.S. at 988, 997.

¹⁴⁶ *Brand X*, 545 U.S. at 989.

¹⁴⁷ *Brand X*, 545 U.S. at 986.

¹⁴⁸ *West Virginia*, 142 S. Ct. at 2609.

when defending its 2015 *Title II Order*, the FCC conceded that “the Communications Act did not clearly resolve the question of how broadband should be classified.”¹⁴⁹

Now, it is true that the D.C. Circuit panel in *U.S. Telecom II* considered and rejected a version of this argument, upholding the 2015 *Title II Order* based on the reasoning that *Brand X* found a congressional delegation of authority for the FCC to decide how broadband would be classified. But *U.S. Telecom II* will not save today’s Order for several reasons.

First, the Court’s analysis in *Brand X* is outdated in key respects such that the FCC would not receive deference for the contestable statutory interpretations in the Order. *Brand X* predates the Supreme Court’s seminal MQD decisions in *West Virginia v. EPA* and *Biden v. Nebraska* and the desuetude of *Chevron* in favor of a harder look at agency decisions.

Second, the D.C. Circuit panel in *U.S. Telecom II* ignored a key distinction when it found that *Brand X* controlled instead of the Court’s pre-MQD precedent. The FCC order at issue in *Brand X* involved a deregulatory FCC decision *not* to regulate broadband under Title II. So the FCC did not—and could not—claim a newfound power of “vast economic and political significance” that would have triggered the Court’s application of MQD precursors. As a result, the Court in *Brand X* had no occasion to consider the MQD. That is not the case with today’s Order, where the FCC asserts massive powers to regulate the entire broadband industry after decades of light-touch treatment.

And finally, modern broadband presents a far easier case than the technology *Brand X* considered. At issue was the *last-mile transmission service* between the end user and the ISP, which the carrier could offer as common carriage or private carriage.¹⁵⁰ In his dissent, Justice Scalia characterized that service as a telecommunications service. As he put it: “Since . . . the broad-band connection between the customer’s computer and the cable company’s computer-processing facilities[] is downstream from the computer-processing facilities, there is no question that it merely serves as a conduit for the information services that have already been ‘assembled’ by the cable company in its capacity as ISP.”¹⁵¹ Modern broadband as regulated by the FCC in today’s Order, by contrast, is not limited to the last-mile transmission service between a customer and an ISP’s point of presence. ISPs carry data all the way to the point of interconnection, where traffic is exchanged at the Internet’s backbone, and where information processing functionalities take place.

Or to rephrase it in the terms used by Justice Scalia in his *Brand X* dissent: today’s Order is not limited to the segment between the pizza shop and its customers this go around; it instead covers the entire supply chain, from the wheat fields to the processing plants to the delivery of the dough to the pizza shop and beyond. If you were to call up the farmer and ask them if they provide pizza delivery, I don’t think the conversation would get very far. But bringing the discussion back to the Order before us—even if there were an argument that broadband were a standalone transmission service in *Brand X*, the same cannot be said of the ecosystem regulated by the FCC today.

3. The Order Cannot Circumvent the Major Questions Doctrine Through Forbearance.

In an effort to escape the MQD, the Order points out that it forbears from more than a dozen provisions in Title II. The Order’s forbearance framework extends to *ex ante* ratemaking regulation, Section 214 discontinuance authorization, universal service contribution, interconnection, truth-in-billing,

¹⁴⁹ *U.S. Telecom II*, 855 F.3d at 425 (Kavanaugh, J., dissenting from denial of rehearing en banc).

¹⁵⁰ *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14899, para. 86.

¹⁵¹ *Brand X*, 545 U.S. at 1010 (Scalia, J., dissenting).

roaming, and many other requirements. Forbearing from these requirements, the Order asserts, “will significantly mitigate any economic impact on [broadband] providers.”¹⁵²

As an initial matter, that argument fails on its own terms. As noted below, even with forbearance, the rules that the Order keeps in place are significant enough to trigger the MQD. Consider Sections 201(b) and 202(a), which give the FCC unbounded rulemaking authority over the justness and reasonableness of telecommunications practices while imposing open-ended “nondiscrimination” requirements on ISPs. Only the imagination limits how the FCC might regulate broadband providers going forward. Or consider the amorphous Internet Conduct Rule, which puts all network management decisions in the FCC’s crosshairs, subject only to the whim of a bureaucrat’s “case-by-case” review of “a non-exhaustive list of factors.”¹⁵³ It is risible to assert, as the Order does, that extending monopoly regulation to a competitive sector of the U.S. economy will not affect long-term investment by creating a cloud of regulatory uncertainty.

In any case, I am concerned that the Order’s argument is a bait and switch. Despite the Order’s protestations, nothing stops the FCC from reinstating any rule that it forbears from today—whether *ex ante* rate regulation, new broadband taxes, or requiring permission to retire legacy technologies. Likewise, the FCC remains free to adopt new rules under the broad rulemaking powers in Sections 201(b) and 202(a), an outcome the Order plainly envisions.

The FCC’s lawless application of forbearance, in fact, shows why the Order cannot survive under the MQD. Through forbearance, the FCC effectively creates a bespoke regulatory framework from scratch. In this Frankenstein scheme, the Order casts aside more than a dozen provisions integral to the overall legislative design of Title II. Although the 1996 Act authorizes forbearance, the Order’s promiscuous use of it fundamentally alters the regulatory scheme, making the resulting mishmash unrecognizable to the Congress that enacted the 1996 Act.

Two Supreme Court decisions squarely address the issue and illustrate why the Order’s forbearance determinations violate the MQD.¹⁵⁴

First, in *Biden v. Nebraska*, the Court invalidated the Secretary of Education’s attempt to cancel \$430 billion in student loan debt.¹⁵⁵ The Secretary invoked their power under a post-9/11 relief statute to “waive or modify any statutory or regulatory provision applicable to the student financial assistance programs.”¹⁵⁶ The Secretary’s authority to “waive or modify” was subject only to the conditions that it was “deem[ed] necessary in connection with a war or other military operation or national emergency” and “necessary to ensure” that student debtors were not made worse off.¹⁵⁷

Despite this broad language, the Court nonetheless held that the Secretary lacked statutory authority to forgive student debt under the MQD. As the Court found, the “waive or modify” language

¹⁵² Order at para. 257.

¹⁵³ Order at para. 518-519.

¹⁵⁴ The Order’s use of forbearance also defeats the FCC’s claim that if the MQD invalidated the Order, then the MQD would also invalidate a Title I decision, such as the *Restoring Internet Freedom Order*. See Order at para. 254 & n.1063. Forbearance distinguishes the Order from *Restoring Internet Freedom Order* under the MQD. Rewriting a statutory scheme through forbearance is decidedly different for MQD purposes than deciding to leave a service in its status quo deregulatory position wholly in place.

¹⁵⁵ *Biden v. Nebraska*, 143 S. Ct. 2355 (2023).

¹⁵⁶ *Biden v. Nebraska*, 143 S. Ct. at 2363-64 (quoting 20 U.S.C. § 1098bb(a)(1)).

¹⁵⁷ *Id.*

did not give the Secretary unbounded authority to act as they pleased. The debt relief was not a “waiver” because it “augment[ed] and expand[ed] existing provisions dramatically.”¹⁵⁸ It was, likewise, not a “modification,” which connotes “modest” changes, not the transformational power to rewrite an entire statute.¹⁵⁹

Several MQD-based factors informed the Court’s interpretation of these statutory terms. First, student debt relief was a politically charged topic, much like Title II net neutrality.¹⁶⁰ Congress was undoubtedly aware of it. Had Congress intended to authorize debt relief, surely it would have used express language to that effect just years earlier when it enacted the COVID relief bill. Second, the magnitude of the action was unprecedented. Never before had the Secretary employed the waiver/modification language this way.¹⁶¹ Finally, even though the Secretary’s action imposed no new obligations on the public, and instead relaxed the burden on student debtors, the “economic and political significance” was nonetheless “staggering by any measure.”¹⁶²

Second, in *MCI v. AT&T*, a MQD precursor, the Court invalidated the FCC’s attempt to eliminate the tariffing requirement for non-dominant carriers under the pre-1996 Act framework. The statute required common carriers to file tariffs, but allowed the FCC “in its discretion and for good cause shown, modify any requirement made by or under the authority of this section.”¹⁶³ But the FCC’s seemingly unrestricted authority to modify, the Court held, did not give it the power to effect a “fundamental revision of the statute.”¹⁶⁴ That is exactly what the FCC did by eliminating the tariffing requirement, a tenet so central to the pre-1996 Act that Congress surely would not have intended to allowed the FCC to eliminate it without express language.¹⁶⁵

Here, the Order’s boundless application of forbearance under Section 10 of the Act renders it unlawful under *Nebraska* and *MCI*. For one, whereas the agencies in *Nebraska* and *MCI* enjoyed expansive authority to waive or modify rules, Section 10 gives the FCC less latitude. To forbear from a Title II provision, the FCC must show that: (1) enforcement of the provision is not necessary to ensure just and reasonable charges, practices, classifications, or regulations; (2) the provision is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.¹⁶⁶ In that sense, this Order starts off on weaker footing than the agency actions in *Nebraska* and *MCI*.

The Order also “fundamentally rewrites” Title II through forbearance. Consider the fact that the Order refrains from extending Title II rules plainly intended for legacy telephone service because they are “tangentially related to [broadband].”¹⁶⁷ These rules expressly refer to “Bell operating companies” and “local exchange carriers” while regulating services like “payphones.”¹⁶⁸ Simply put, the FCC recognizes

¹⁵⁸ *Id.* at 2371.

¹⁵⁹ *Id.* at 2359.

¹⁶⁰ *Id.* at 2373.

¹⁶¹ *Id.* at 2372.

¹⁶² *Id.* at 2373.

¹⁶³ *MCI*, 512 U.S. at 225 (quoting 47 U.S.C. § 203 (1988 ed. and Supp. IV)).

¹⁶⁴ *MCI*, 512 U.S. at 231-32.

¹⁶⁵ *Id.* at 230.

¹⁶⁶ 47 U.S.C. § 160(a).

¹⁶⁷ Order at para. 425.

¹⁶⁸ 47 U.S.C. §§ 271-276.

that applying Title II as written to broadband would lead to absurd outcomes. That is a dead giveaway why it cannot be the correct interpretation of the Communications Act. To avoid illogical consequences, the Order is forced to use forbearance to retrofit the statute in a systematic and customized manner. That is the exercise of raw legislative power, not an implementation of judgments that Congress already made.

And the “economic and political significance” of the Order’s forbearance is “staggering by any measure.”¹⁶⁹ Take just one example: the decision to forbear from requiring contributions to the universal service fund. At stake are hundreds of billions of dollars in funding collected by broadband providers, which would be passed along to every American with an Internet subscription; the broader solvency of the USF program; and years-long legislative efforts within Congress to reform our broadband funding mechanisms. Forbearance from the contribution requirement alone implies a major question.

But, of course, the Order does not simply forbear from a single requirement. There is also interconnection, Section 214 discontinuance, truth-in-billing, roaming, and more. When you tally up every requirement the Order decides not to apply, it isn’t a particularly close call: the FCC is acting like a legislature instead of an expert agency with limited powers. That is precisely the outcome the MQD is intended to prevent.

It is of no relevance that the Order refrains from new requirements rather than imposing them. The MQD still applies, as *Nebraska* and *MCI* confirm, and an agency cannot fundamentally rewrite a statute by picking and choosing what regulations will apply using its power to “waive,” “modify,” or “forbear.” Yet that is precisely what the Order does. Far from saving the Order, forbearance further dooms it.

B. Section 706 Does Not Authorize Title II.

In a last-ditch argument, the Order cites Sections 706(a)¹⁷⁰ and 706(b)¹⁷¹ of the 1996 Act as “independent, complementary sources of affirmative Commission authority for the rules adopted today.”¹⁷² Apart from that evasive language, the Order offers scant explanation of what work these provisions do to support new conduct rules, or how these provisions could possibly authorize Title II. And understandably so. Section 706 cannot salvage the Order for many reasons. Here are some of the highlights.

¹⁶⁹ *Biden v. Nebraska*, 143 S. Ct. at 2373.

¹⁷⁰ 47 U.S.C. § 1302(a) (“The Commission ... 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.”); *see also* 47 U.S.C. § 1302(d)(1) (“The term “advanced telecommunications capability” is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”).

¹⁷¹ 47 U.S.C. § 1302(b) (“The Commission shall [on an annual basis] initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) ... In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”).

¹⁷² Order at para. 612.

First, the D.C. Circuit unequivocally held in *Verizon* that Section 706(a) and 706(b) do *not* give the FCC legal authority to impose Title II duties on broadband providers. In *Verizon*, the court considered the FCC’s attempt in 2010 to adopt disclosure, blocking, and conduct rules on broadband providers. At the time, broadband was a Title I service. The 2010 Order did not try to reclassify broadband under Title II, but instead invoked Sections 706(a) and 706(b) as the basis to adopt new rules without reclassification. The *Verizon* court properly rejected the FCC’s end-run around Title II: the blocking and discrimination rules, the court found, “relegated [broadband providers] to common carrier status.”¹⁷³ Such common carrier treatment, the court held, was unlawful while broadband remained a Title I service.

Second, while the Order seeks to reclassify broadband, it cannot lawfully rely on Section 706 to do so under the MQD. Section 706 is at most an ambiguous source of authority to issue *any* regulation—a point the D.C. Circuit expressly confirmed in *Verizon*¹⁷⁴ and reaffirmed in *Mozilla*.¹⁷⁵ Section 706(a) merely states that the FCC “shall encourage” the reasonable and timely deployment of broadband. Section 706(b), meanwhile, states that the FCC “shall take immediate action to” accelerate broadband deployment if the FCC finds that broadband is not being deployed to all Americans in a reasonable and timely manner.

As that language makes clear, Section 706 can “certainly be read as simply setting forth a statement of congressional policy.”¹⁷⁶ After all, Congress knows how to confer rulemaking authority on the FCC. It does so throughout the Communications Act, and when it wants to give the FCC that authority, it uses far more precise language than the words employed in Section 706.¹⁷⁷ As the *Restoring Internet Freedom Order* outlined at extensive length, Section 706 is devoid of the elementary details that would normally accompany a congressional grant of agency power, like “the providers or entities whose conduct could be regulated.”¹⁷⁸ Given its nebulous mandate and lack of specificity, Section 706 appears to be “hortatory” and “better read as directing the Commission regarding its exercise of regulatory authority granted elsewhere.”¹⁷⁹

While the Order strains to justify Section 706 rulemaking authority under first principles, that effort is ultimately futile. The D.C. Circuit in *Mozilla* and *Verizon* found it reasonable to read Section 706 as a statement of policy rather than a freestanding source of unbounded regulatory power. Because the courts have determined that Section 706 does not provide “clear congressional authorization” to issue

¹⁷³ *Verizon*, 740 F.3d at 652 (cleaned up).

¹⁷⁴ *Verizon*, 740 F.3d at 635-36.

¹⁷⁵ *Mozilla*, 940 F.3d at 46.

¹⁷⁶ *Verizon*, 740 F.3d at 637.

¹⁷⁷ See 47 U.S.C. § 227(b)(2) (“The Commission shall prescribe regulations to implement the requirements of this subsection”); *id.* § 251(d)(1) (“the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section”); *id.* § 201(b) (“The Commission[] may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act”); *id.* § 205(a) (“the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge”); *id.* § 205(a) (“the Commission is authorized and empowered . . . to make an order that the carrier or carriers shall cease and desist”); *id.* § 213(b) (“The Commission may at any time require any such carrier to file with the Commission an inventory of all or of any part of the property owned or used by said carrier”).

¹⁷⁸ *Restoring Internet Freedom Order* at para. 271.

¹⁷⁹ *Id.*

any regulation, the MQD precludes the FCC from using that ambiguous language to justify today’s decision of “vast economic or political significance.”

Third, the Order’s reliance on stale data and outcome-driven analysis sinks its ability to rely on Section 706(b), which states that the FCC shall “accelerate deployment” of broadband “by removing barriers to infrastructure investment and by promoting competition in the telecommunications market” if the FCC determines broadband is not being deployed to Americans in a timely and reasonable manner.¹⁸⁰ The FCC’s *Section 706 Report*, conveniently released weeks before today’s Order, made a negative finding about the pace, cadence, speed of broadband deployment.¹⁸¹

As I explained in considerable detail,¹⁸² these factual findings defy the impressive progress in broadband deployment—whether fiber, fixed wireless, 5G, or high-speed satellite—that every American consumer has seen with their own eyes since 2017. To accomplish this, the *Section 706 Report* rests on outdated and error-ridden datasets that understate the scope and scale of broadband availability, even though better information was at the FCC’s fingertips. The *Section 706 Report* also inflated the number of purportedly unserved Americans by excluding high-speed satellite broadband covering more than 99% of the United States and by relying on a more demanding speed benchmark (100/20 Mbps) for the first time to effectively move the goalposts.

Finally, assuming the FCC had rulemaking authority under Section 706, and assuming further that it validly made a negative determination under Section 706(b), the Order fails to provide specific explanations, based on the record, how utility-style regulation would “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans”¹⁸³ or “accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”¹⁸⁴ Indeed, concluding that monopoly-style regulation “remov[e]s barriers to infrastructure investment” and “promot[es] competition” stretches words to their breaking point.

As noted below,¹⁸⁵ Title II threatens investment and competition by saddling providers with new costs and regulatory uncertainty. And while the Order tries to nitpick the reams of real-world economic data, based on our natural experiment before and after Title II, the Order offers no affirmative finding that the opposite would be true. In other words, the Order makes no positive finding that Title II will lead to more infrastructure investment. Indeed, in paragraph after paragraph discussing Title II’s effect on investment after 2017, the most the Order can say is that the empirical evidence is “inconclusive.”¹⁸⁶

¹⁸⁰ 47 U.S.C. § 1302(b).

¹⁸¹ See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Report, FCC 24-27, GN Docket No. 22-270 (Mar. 18, 2024) (*Section 706 Report*).

¹⁸² Dissenting Statement of Commissioner Brendan Carr, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Section 706 Report, GN Docket No. 22-270 (Mar. 14, 2024), <https://docs.fcc.gov/public/attachments/DOC-401205A3.pdf>.

¹⁸³ 47 U.S.C. § 1302(a).

¹⁸⁴ 47 U.S.C. § 1302(b).

¹⁸⁵ See *infra* II.A.2.

¹⁸⁶ Order at para. 288.

II. THE ORDER'S ADOPTION OF TITLE II IS ARBITRARY AND CAPRICIOUS.

Even if the FCC had clear congressional authorization to apply Title II to broadband, the Order would still violate the law by running afoul of the Administrative Procedures Act (APA).

The APA requires agencies like the FCC to examine “the relevant data” and articulate “a satisfactory explanation” for the conclusions it reached and the rules it adopted, “including a rational connection between the facts found and the choice made.”¹⁸⁷ When an agency changes its policy, as the FCC does here, it must “show that there are good reasons for the new policy.”¹⁸⁸ But an agency must go further and provide a “more detailed justification” either when: (1) “its new policy rests upon factual findings that contradict those which underlay its prior policy”; or (2) “its prior policy has engendered serious reliance interests that must be taken into account.”¹⁸⁹ While both circumstances are present here, sufficient justifications from the FCC are not.

The Order trots out the now-familiar parade of justifications for Title II that the agency invoked back in the 2015 *Title II Order*: Internet “openness,” the “virtuous cycle of innovation,” and “gatekeeper” theories of vertical integration and foreclosure. But the last six years without Title II brought more competition, more investment, more capacity, faster speeds, and lower prices. Since 2017, meanwhile, there have been no credible allegations that ISPs have made the Internet less open to edge providers or to consumers. Simply put, the FCC has no plausible argument that the Internet ecosystem will not continue to thrive in the absence of Title II, let alone a claim that broadband will be left without federal oversight.

The FCC has apparently realized that these warmed-over justifications for Title II are not selling today the way they did during those earlier rounds of debate. Indeed, according to former FCC Chairman Wheeler, they are “yesterday’s issue.”¹⁹⁰ So, in addition to burning down the usual straw men, for the first time in the history of the FCC’s net neutrality proceedings, the Order pivots to a grab bag of new reasons *that have nothing to do with net neutrality*: privacy, cybersecurity, national security, broadband access, and network resiliency. While the goalposts have moved, the goal remains the same: increasing government control over the Internet.

Every rationale the Order puts forward—old or new—fails. Before discussing each, it is worth highlighting three errors that apply across the board to infect the Order’s overall reasoning.

First, today’s Order is predicated on the false assertion that “there has been no effectual federal oversight” over ISPs since “the Commission’s abdication of authority over broadband in 2017.”¹⁹¹ This factual assertion is wrong—twice over.

For starters, the claim is contradicted by the legal authorities the Federal Trade Commission (FTC) already has. The FTC oversees ISP practices and has pursued allegations of ISP misconduct on

¹⁸⁷ *State Farm*, 463 U.S. at 43 (1983) (internal quotation marks omitted).

¹⁸⁸ *Fox*, 556 U.S. at 515.

¹⁸⁹ *Id.*

¹⁹⁰ Stern Overly, *The future of the net neutrality fight*, Politico (Mar. 18, 2024), <https://www.politico.com/newsletters/digital-future-daily/2024/04/18/the-future-of-the-net-neutrality-fight-00153126>.

¹⁹¹ Order at para. 2.

everything from billing¹⁹² to advertising¹⁹³ to credit and consumer practices¹⁹⁴ to data security¹⁹⁵ to consumer privacy¹⁹⁶ to mobile cramming.¹⁹⁷ In 2019, for example, the FTC settled a \$60 million lawsuit with an ISP over deceptive throttling disclosures.¹⁹⁸ The FTC would lose that authority following Title II because the FTC lacks authority over common carriers.¹⁹⁹

For another, the FCC itself has asserted broad and direct regulatory authority over ISPs without Title II. Indeed, just last year, this FCC voted to give itself regulatory power over practically every decision regarding the provision of Internet service in the country.²⁰⁰ In the *Digital Equity Order*, the FCC claimed the roving enforcement and information-collection powers to prohibit ISP “policies or practices” that have the intent or effect of “differentially impact[ing] consumers’ access to broadband internet access service based on their income level, race, ethnicity, color, religion or national origin.”²⁰¹ The *Digital Equity Order*’s text expressly empowers the FCC to regulate each and every ISP’s:

- “network infrastructure deployment, network reliability, network upgrades, network maintenance, customer-premises equipment, and installation”;

¹⁹² *FTC v. Verity Int'l, Ltd.*, 335 F. Supp. 2d 479 (S.D.N.Y. 2004).

¹⁹³ *Juno Online Servs., Inc.*, No. C-4016 (F.T.C. June 25, 2001), <https://www.ftc.gov/enforcement/cases-proceedings/002-3061/juno-online-services-inc>; *CompuServe, Inc.*, No. C-3789 (F.T.C. Mar. 16, 1998), <https://www.ftc.gov/enforcement/cases-proceedings/962-3096/compuserve-inc-matter>; *Prodigy Servs. Corp.*, No. C-3788 (F.T.C. Mar. 16, 1998), <https://www.ftc.gov/enforcement/cases-proceedings/952-3332/prodigy-services-corporation-matter>; *Am. Online Inc.*, No. C-3787 (F.T.C. Mar. 16, 1998), <https://www.ftc.gov/enforcement/cases-proceedings/952-3331/america-online-inc-matter>.

¹⁹⁴ *United States v. Sprint Corp.*, 2:15-cv-9340 (D. Kan. Oct. 21, 2015), <https://www.ftc.gov/enforcement/cases-proceedings/142-3094/sprint-corporation-sprint-asl-program-0>; *United States v. Time Warner Cable, Inc.*, 13-cv-8998 (S.D.N.Y. Dec. 20, 2013), <https://www.ftc.gov/enforcement/cases-proceedings/122-3149/time-warner-cable-inc>.

¹⁹⁵ *FTC v. Pricewert LLC*, No. C-09-CV-2407 RMW (N.D. Cal. Apr. 8, 2010), <https://www.ftc.gov/enforcement/cases-proceedings/092-3148/pricewert-llc-dba-3fnnet-ftc>; Letter from Maneesha Mithal, Assoc. Dir. of the Div. of Privacy & Identity Prot., Fed. Trade Comm’n (Nov. 12, 2014), https://www.ftc.gov/system/files/documents/closing_letters/verizon-communications-inc./141112verizonclosingletter.pdf.

¹⁹⁶ See FTC Staff Report, *A Look At What ISPs Know About You: Examining the Privacy Practices of Six Major Internet Service Providers* (2021), https://www.ftc.gov/system/files/documents/reports/look-what-isps-know-about-you-examining-privacy-practices-six-major-internet-service-providers/p195402_isp_6b_staff_report.pdf.

¹⁹⁷ *FTC v. T-Mobile USA, Inc.*, No. 2:14-cv-0097-JLR (W.D. Wa. Dec. 19, 2014), <https://www.ftc.gov/enforcement/cases-proceedings/132-3231/t-mobile-usa-inc>; *FTC v. AT&T Mobility, LLC*, No. 1:14-cv-3227-HLM (N.D. Ga. Oct. 8, 2014), <https://www.ftc.gov/enforcement/cases-proceedings/132-3248/att-mobility-llc>.

¹⁹⁸ Press Release, Federal Trade Commission, *AT&T to Pay \$60 Million to Resolve FTC Allegations It Misled Consumers with ‘Unlimited Data’ Promises* (Nov. 5, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/11/att-pay-60-million-resolve-ftc-allegations-it-misled-consumers-unlimited-data-promises>.

¹⁹⁹ 15 U.S.C. § 45(a)(2).

²⁰⁰ *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, Report and Order and Further Notice of Proposed Rulemaking, GN Docket No. 22-69, FCC 23-100 (rel. Nov. 20, 2023) (*Digital Equity Order*).

²⁰¹ *Digital Equity Order* at para. 3.

- “speeds, capacities, latency, data caps, throttling, pricing, promotional rates, imposition of late fees, opportunity for equipment rental, installation time, contract renewal terms, service termination terms, and use of customer credit and account history”; and
- “mandatory arbitration clauses, pricing, deposits, discounts, customer service, language options, credit checks, marketing or advertising, contract renewal, upgrades, account termination, transfers to another covered entity, and service suspension.”²⁰²

As exhausting as it is to read that list, the FCC says it is not an exhaustive list. And the *Digital Equity Order* reserves the right under this plan to regulate both “actions and omissions, whether recurring or a single instance.”²⁰³ In other words, if you take any action, you may be liable, and if you do nothing, you may be liable.

Now, the *Digital Equity Order* is unlawful, and I am confident will be struck down in court, as I explained elsewhere.²⁰⁴ But this FCC clearly does not believe that, and the *Digital Equity Order* itself is the law on the books today. So, the question remains: what is the Order’s basis for claiming Title II rulemaking²⁰⁵ and enforcement authority²⁰⁶ over “unjust or unreasonable charges, practices, and regulations”²⁰⁷ and “unjust or unreasonable discrimination”²⁰⁸ when they largely duplicate the open-ended list of topics in the *Digital Equity Order*? Likewise, given the *Digital Equity Order*’s list of commercial practices, including “throttling,” what is the basis for the Internet Conduct Rule, which prohibits ISP practices that “unreasonably disadvantage” broadband access and is enforced on a “case-by-case basis” using a “non-exhaustive list of factors”?²⁰⁹ The Order does not say.²¹⁰

The *Digital Equity Order* is merely one example of powers the FCC already has, but nonetheless claims to need from Title II. Others abound. Even without Title II, for instance, the FCC can adopt a “Transparency Rule” that compels ISPs to disclose their network management practices, performance characteristics, and commercial terms. In fact, the *Restoring Internet Freedom Order* did just that. What is more, Congress gave the FCC specific authority to require so-called “broadband nutrition labels,” which the agency adopted last year.²¹¹ So, why does the FCC need Title II for the laundry list of new ISP

²⁰² *Id.* at para. 102.

²⁰³ *Id.*

²⁰⁴ See Dissenting Statement of Commissioner Brendan Carr, *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, Report and Order and Further Notice of Proposed Rulemaking, GN Docket No. 22-69, FCC 23-100 (rel. Nov. 20, 2023) (*Carr Digital Equity Order Dissent*), <https://docs.fcc.gov/public/attachments/DOC-398477A3.pdf>.

²⁰⁵ 47 U.S.C. § 201(b).

²⁰⁶ 47 U.S.C. §§ 206-208, 216-217.

²⁰⁷ 47 U.S.C. § 201(b)

²⁰⁸ 47 U.S.C. § 202(a).

²⁰⁹ Order at para. 518.

²¹⁰ The Order states that Sections 201 and 202 “enable the Commission to advance digital equity in other ways not contemplated elsewhere, including providing authority for our open Internet rules.” Order at para. 328. But the Order does not meaningfully grapple with the overlap in authorities, including the *Digital Equity Order*’s express regulation of various commercial terms that play a role in the Internet Conduct Rule, including “throttling.”

²¹¹ See *Empowering Broadband Consumers Through Transparency*, CG Docket No. 22-2, Report and Order and Further Notice of Proposed Rulemaking, CG Docket No. 22-2, FCC 22-86 (2022) (*Broadband Labels Order*).

disclosures the Order adopts today, including disclosures this agency previously considered and found too uninformative or burdensome for broadband labels?²¹² Here again, the Order does not say.

Beyond the *Broadband Labels Order* and the *Digital Equity Order*, more than 96% of ISPs already offer some other FCC-regulated service—whether voice telephony, VoIP, or cable television.²¹³ That means every ISP offering comingled services is already subject to FCC rules governing outage disclosures, pole attachments, and more. Here again, this is merely another example why ISPs are not falling through the cracks. Others are discussed below.

Second, the notion that the FCC needs more control over ISPs to prevent harmful outcomes finds precious little support in actual facts. The Order is chock full of conjecture and speculation. Repeatedly, we are told the FCC needs Title II because ISPs “could,” “may,” “would,” or “have the incentive or ability” to do many things the FCC dislikes. But actual evidence comes in short supply.

Finally, even if the FCC had prevailed in establishing that some of sort of regulatory “gap” existed, the agency has fallen far short of showing that it justifies the leap to Title II. The Order has failed the APA’s tailoring requirement to demonstrate a rational connection between the facts found and the Title II choice it has made. Strong claims require strong evidence. If this agency wants to treat ISPs like public utilities, it must come to the table with the goods. Going full Title II on this record is like deciding to scuttle a ship today because it might spring a small leak in the future.

That is especially the case for the Order’s cost-benefit analysis. While misrepresenting Title II’s benefits, the Order takes an ostrich-like approach to Title II’s potential harms, especially the chilling effect of indeterminate utility-style rules on investment. Contrary to the FCC’s claims, Title II is not “light-touch.” At root, Title II means: (1) a collection of amorphous “reasonableness” and “nondiscrimination” requirements that encourage anyone to complain about almost anything; and (2) virtually unbounded rulemaking authority that permits the FCC to do whatever it wants. Even assuming *arguendo* the benefits the Order claims, the FCC would still flunk any semblance of rigorous cost-benefit analysis by failing to account for Title II’s significant costs.

So, to recap, the Order identifies no meaningful gap that Title II regulation would be necessary to close. And it points to no meaningful problem that Title II regulation would be necessary to solve. All of this makes the Order illegal under bedrock principles of administrative law. Because the Order strays from “the bounds of reasoned decisionmaking,”²¹⁴ it is “arbitrary and capricious” under the APA²¹⁵

A. The Internet Did Not Break After the FCC Returned to Light-Touch Regulation.

In many ways, the FCC’s decision today pulls up the 2015 *Title II Order*, selects all, presses control + C, and then presses control + V into a new document. In doing so, it brings forward into today’s Order the same old justifications for Title II that the agency offered up in 2015. To the extent those

²¹² Compare *Broadband Labels Order* at para. 43 (declining to require disclosure of speeds based on peak usage periods), and *id.* at para. 45 (declining to require disclosure of packet loss), with Order at para. 554 (requiring disclosure of packet loss), and *id.* at para. 556 (requiring disclosure of speeds based on peak usage periods).

²¹³ About 950,000 Added Broadband in Q3-2023, <https://leichtmanresearch.com/wp-content/uploads/2023/11/LRG-Press-Release-11-13-2023.pdf>; accord 2020 *Restoring Internet Freedom Remand Order* at para. 73; Order at para. 88.

²¹⁴ *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983).

²¹⁵ 5 U.S.C. § 706(2)(A).

arguments carried any water back then (they didn't), they are particularly bone dry today. The FCC's rationales provide no support for Title II.

1. Internet Openness

Let's start with the FCC's claims about Title II being necessary to ensure a free and open Internet.

Six years ago, Americans lived through one of the greatest hoaxes in regulatory history. They were told that the 2017 *Restoring Internet Freedom Order*'s decision to overturn Title II would quite literally break the Internet. It was a viral disinformation campaign replete with requisite doses of Orwellian wordplay. Rather than shedding light on this debate, far too many people in DC simply fanned the false flames of fear. While some have tried to memory hole this entire episode, it is important to remember what we were told about Title II.

Senator Bernie Sanders stated that "This is the end of the Internet as know it" and "If this passes, the internet and its free exchange of information as we have come to know it will cease to exist."²¹⁶ Senator Ed Markey stated that "If the @FCC kills #NetNeutrality, the internet will never be the same"²¹⁷ and that "If we don't #SaveNetNeutrality @AjitPaiFCC will turn the Internet into a digital oligarchy." Senator John Tester wrote that "Ending #NetNeutrality ends the Internet as we know it."²¹⁸ Senate Democrats asserted that "If we don't save net neutrality, you'll get the internet one word at a time."²¹⁹

The media parroted these false claims. The *New York Times* ran an article headlined "The Internet Is Dying. Repealing Net Neutrality Hastens That Death." Another *New York Times* opinion piece warned of a "nightmare scenario [at] America's digital doorstep" that would result in a "digital dystopia" rivaling Chinese-style censorship.²²⁰ *GQ* published, in its news section, an article titled "How the FCC's Killing of Net Neutrality Will Ruin the Internet Forever."²²¹ Not to be outdone, *CNN* ran a bolded, banner headline across the top of its main page proclaiming the "End of the internet as we know it."²²² *The Verge* predicted broadband providers would "do practically whatever they like—including paid prioritization, throttling, and otherwise messing with traffic as it moves across the internet" and potentially "reshape the internet in very ugly ways."²²³

Not surprisingly, people believed the Apocalyptic rhetoric that the so-called "experts" on this issue were feeding them. One person was sentenced to prison for threatening to murder the family of then FCC Chairman Ajit Pai over Title II. Another was indicted for calling in a bomb threat to the FCC's

²¹⁶ See Dissenting Statement of Commissioner Brendan Carr, *Safeguarding and Securing the Open Internet*, Notice of Proposed Rulemaking, WC Docket No. 23-320, FCC 23-83 (Oct. 19, 2023), <https://docs.fcc.gov/public/attachments/DOC-397827A3.pdf> (*Carr Title II NPRM Dissent*).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Nick Frisch, *What if You Couldn't See This Page?*, *New York Times* (Dec. 14, 2017), <https://www.nytimes.com/2017/12/14/opinion/net-neutrality-china-internet.html>.

²²¹ Jack Moore, *How the FCC's Killing of Net Neutrality Will Ruin the Internet Forever* (Nov. 20, 2017), <https://www.gq.com/story/fcc-killing-net-neutrality-explained>.

²²² See *Carr Title II NPRM Dissent* at 3.

²²³ Makena Kelly, *Net neutrality is dead—what now?*, *The Verge* (June 11, 2018), <https://www.theverge.com/2018/6/11/17439456/net-neutrality-dead-ajit-pai-fcc-internet>.

headquarters, which resulted in us having to evacuate the Commission meeting room during our vote on repealing Title II.

Did any one of the predictions following the 2017 *Restoring Internet Freedom Order* come to pass? Of course not. And the Order points to no relevant examples of consumer abuses since we returned to Title I in 2017.

In fairness, the Order does try. But what it cobbles together is so weak that it barely merits discussion. As expected, the Order retreats to the same handful of tired examples that Title II advocates have been complaining about for more than 20 years (such as the Madison River incident). As then-Commissioner Pai reflected in 2015:

The evidence of these continuing threats? There is none; it's all anecdote, hypothesis, and hysteria. A small ISP in North Carolina allegedly blocked VoIP calls a decade ago. Comcast capped BitTorrent traffic to ease upload congestion eight years ago. Apple introduced FaceTime over Wi-Fi first, cellular networks later. Examples this picayune and stale aren't enough to tell a coherent story about net neutrality. The bogeyman never had it so easy.²²⁴

These stories, now the stuff of urban legends, have been debunked time and again by this point. Each example was either successfully addressed without Title II or irrelevant to broader concerns about net neutrality.²²⁵ The Order even goes so far to credit Public Knowledge's allegations about ISP conduct outside the United States.²²⁶

Elsewhere, the Order engages in misdirection, claiming that "major [ISPs] are currently engaged in throttling"²²⁷ but only citing evidence that mobile operators manage streaming video bitrates to deal with network congestion.²²⁸ That is not a net neutrality violation, but something even this Order recognizes can be a permissible form of "reasonable network management."²²⁹ Likewise, the Order cites the so-called Wehe Study,²³⁰ long since discredited,²³¹ which claims to establish mobile "throttling" by comparing video quality on a mobile network and test devices in a laboratory setting. To show "throttling" in any meaningful sense, the study would need to establish that *the ISP* impaired or degraded

²²⁴ *Pai 2015 Title II Dissent* at 14.

²²⁵ See *Restoring Internet Freedom Order*, at paras. 111-115 (rebutting the relevance of the Order's cited examples of Madison River, Comcast/BitTorrent, and AT&T/FaceTime, see Order at para. 472); NCTA Reply Comments, WC Docket No. 23-320, at 19-21 (Jan. 17, 2024) (explaining that allegations of self-preferencing that the Order credits, see Order at para. 460 & n.1821, did not involve net neutrality concerns but rather interconnection disputes, which the Order forbears from regulating, see Order at paras. 392-415, or privacy complaints, which I address below).

²²⁶ See Order at n.1821 (citing Public Knowledge Comments at 16-22).

²²⁷ Order at para. 479.

²²⁸ Order at n.1860 (citing David Choffnes Comments at 2-3). The other examples cited in this footnote are similarly irrelevant and involve issues unrelated to ISP throttling, like interconnection disputes, which the Order declines to address.

²²⁹ See Order at paras. 500, 575.

²³⁰ See Order at n.1821 (citing Fangfan Li *et al.*, *A Large-Scale Analysis of Deployed Traffic Differentiation Practices* (Feb. 2018), <https://wehe.meddle.mobi/papers/wehe.pdf> (Wehe Study)).

²³¹ See CTIA Reply Comments, WC Docket No. 23-320, at 10-18 (Jan. 17, 2024); Ross Marchand, *New Evidence Debunks Big Myth That Repealing Internet Rules Caused Throttling*, *The Federalist* (Sept. 19, 2018), <https://thefederalist.com/2018/09/19/new-evidence-debunks-big-myth-repealing-net-neutrality-caused-throttling/> (rebutting the Wehe Study, explaining that the traffic variations detected by the researchers "reflect data management rather than a plot to prioritize in-house streaming").

lawful traffic based on its content, application, or service, and for reasons unrelated to reasonable network management. The Wehe Study did no such thing. It admits that it could not pinpoint whether video resolution quality was the result of the user’s data plan,²³² a setting selected by the streaming service,²³³ “confounding factors such as varying network conditions,”²³⁴ or “IP addresses, peering arrangements, interconnection congestion, traffic volume, or other factors independent of IP payloads.”²³⁵

If a net neutrality problem existed, that information would be readily available for the Order to cite, instead of grasping at apocryphal tales or irrelevant examples. After all, the *Restoring Internet Freedom Order* enshrined a Transparency Rule, still in effect, that requires ISPs to disclose network management practices, on their websites or an FCC docket, that identifies blocking, throttling, and prioritization practices. But ISP disclosures disprove the premise of ongoing abuses,²³⁶ and the Order does not contend otherwise.

2. Broadband Investment

The Order’s agnosticism about Title II’s effect on investment also misses the mark.

1. Private investment in broadband networks drives faster speeds, more competition, greater capacity, and lower prices. The broadband industry is famously capital intensive. Without hundreds of billions of dollars in long-term investment, ISPs cannot dig trenches, lay fiber, build towers, purchase and deploy spectrum, launch satellites, virtualize networks, develop intermodal and multimodal services, and take other steps to deliver broadband.

The 2017 *Restoring Internet Freedom Order* observed that Title II regulation of ISPs from 2015-2017 accompanied a decline in broadband investment. The *Restoring Internet Freedom Order* also predicted that “reclassification of broadband Internet access service from Title II to Title I is likely to increase ISP investment and output.”²³⁷

The Order must disprove those conclusions. To lawfully change its policy of light regulation, the FCC must meaningfully address factual findings that “underlay” its return to Title I in 2017.²³⁸ And

²³² Wehe Study at 136 § 5, 132 § 3.3, 138 § 6.2.

²³³ *Id.* at 140 § 7.2.

²³⁴ *Id.* at 131 § 3.1.

²³⁵ *Id.* at 132 § 3.3.

²³⁶ See, e.g., Verizon, *Network Management*, <https://verizon.com/about/our-company/network-management> (last visited Apr. 24, 2024) (“Verizon Online does not affirmatively manage congestion on the network through mechanisms such as real-time throttling, blocking, or dropping of specific end user traffic based on source or content. There are no usage caps applicable to Verizon Online’s internet access services.”); AT&T, *Network Practices* (last visited Apr. 24, 2024), <https://about.att.com/sites/broadband/network> (“AT&T does not favor certain websites or internet applications by blocking or throttling lawful internet traffic on the basis of content, application, service, user, or use of nonharmful devices on its broadband internet access services.”); Comcast, *Xfinity Internet Broadband Disclosures*, <https://www.xfinity.com/policies/internet-broadband-disclosures> (last visited Apr. 24, 2024) (“Comcast does not directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, or resource reservation, to benefit an affiliate. . . . Comcast does not degrade or impair access to lawful Internet traffic on the basis of content, application, service, user, or use of a non-harmful device.”).

²³⁷ *Restoring Internet Freedom Order* at para. 98.

²³⁸ *Fox*, 556 U.S. at 515.

investment effects represent “serious reliance interests” that “must be taken into account” when an agency changes its policy.²³⁹ Besides, any cost-benefit analysis is illegitimate unless it considers how Title II controls undermine private investment decisions. In all cases, the Order fails to meet its legal burden.

2. Start with the historical evidence of broadband investment, which validates the *Restoring Internet Freedom Order*’s conclusions and predictions.

After the FCC adopted the 2015 *Title II Order*, many ISPs reduced their investments and halted the expansion of their networks. Indeed, it was the only period of time outside of a recession where broadband investment declined. One study found that the 2015 Title II rules reduced broadband investment by \$5.6 billion.²⁴⁰ Another found that “[t]he persistent prospect of Title II policy reduced investment by approximately 10% on average, between 2011 and 2020, about \$8.1 billion annually, with a total loss of investment over a ten-year period of about \$81.5 billion.”²⁴¹ That study calculated “\$145 billion annual losses in Gross Domestic Product, amounting to “\$1.45 trillion over ten years.”

And after the FCC repealed Title II rules in 2017, broadband providers set new records for building out Internet infrastructure. This makes sense because a regulatory onslaught from Washington and new compliance costs are not actions that free up more capital for constructing networks. In 2022, the broadband industry invested a record \$102.4 billion in U.S. communications infrastructure, which represents a 21-year high for investment and a 19% year-over-year increase.²⁴²

Data from the wireless industry vividly illustrates the dip in investment brought about by Title II and resurgence in investment after the FCC returned to Title I.

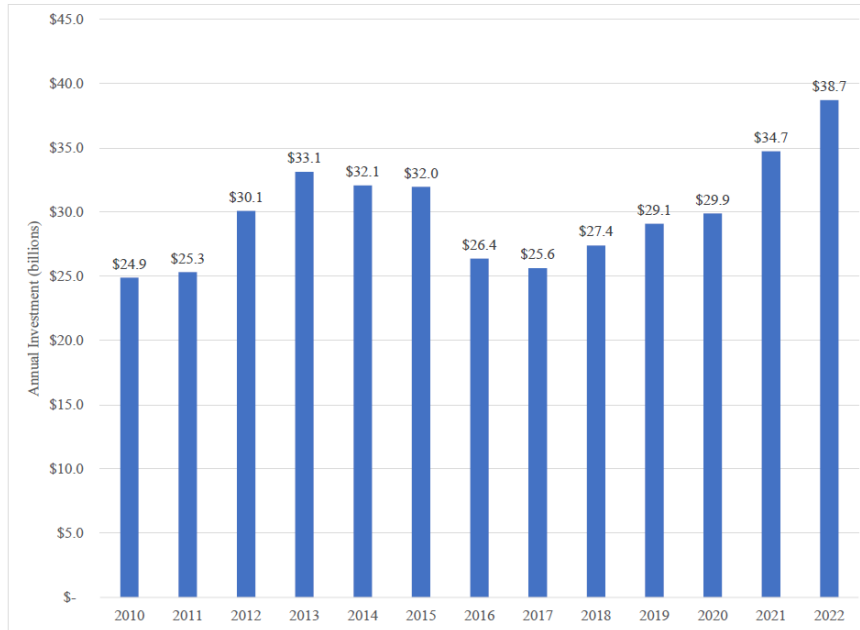
²³⁹ *Id.*

²⁴⁰ See Michael Horney, *Broadband Investment Slowed by \$5.6 Billion Since Open Internet Order*, Free State Foundation Blog (May 5, 2017), <https://freestatefoundation.blogspot.com/2017/05/broadband-investment-slowed-by-56.html>.

²⁴¹ George S. Ford, *Investment in the Virtuous Circle: Theory and Empirics*, Phoenix Center Perspectives, at 5-6 (Dec. 2023), <https://phoenix-center.org/pcpp/PCPP62Final.pdf>.

²⁴² USTelecom, *2022 Broadband Capex Report: Broadband Providers Invested \$102.4B in Communications Infrastructure Last Year* (Sept. 8, 2023), <https://www.ustelecom.org/wpcontent/uploads/2023/09/2022-Broadband-Capex-Report-final.pdf>.

Figure 2: Mobile Wireless Investment (Annual) (2010-2022)



Source: CTIA, "CTIA's Wireless Industry Indices Report," July 2023, Table 16.

A peer-reviewed study published in 2023 confirms the *Restoring Internet Freedom Order's* finding about the negative relationship between broadband investment and Title II regulation. This econometric study analyzed 2000-2021 data across OECD countries, spanning both the two years of Title II and the subsequent six years under Title I.²⁴³ The study found that utility-style net neutrality rules was associated with a 22-25% decrease in fiber investments. The study's finding held even after controlling for other factors that might have influenced investment, like macroeconomic conditions.

The Order offers no persuasive response. At the outset, the Order suggests that regulations have virtually no impact on investment—a point that appears divorced from reality. The Order then finds that the empirical evidence is “inconclusive due to methodological issues.”²⁴⁴ Next, the Order seemingly acknowledges that investment declined after 2015 and picked up after 2017, but offhandedly attributes

²⁴³ Wolfgang Briglauer, Carlo Cambini, Klaus Gugler, & Volker Stocker, *Net neutrality and high-speed broadband networks: Evidence from OECD countries*, 55 Eur. J. L. & Econ. 533-571 (2023).

²⁴⁴ Order at para. 288.

that fluctuation to other factors.²⁴⁵ Finally, the Order relies on theoretical studies, mostly before 2015, that are either speculative,²⁴⁶ uninformative to the matter at hand,²⁴⁷ or outright wrong.²⁴⁸

Tellingly, the Order presents no affirmative empirical findings of its own. Nor does the Order point to post-2015 studies that reviewed the data and contradicted the *Restoring Internet Freedom*'s conclusions about Title II's effect on investment.

Think about that. The FCC now has investment data from 2015-2017 and from 2018 onward. If Title II increased investment, or if Title I depressed it, surely the Order would have touted that finding from the rooftop. The FCC's failure to do either is a dead giveaway that it does not believe in Title II's positive effect on investment.

3. Turning from the past to the future, the Order predicts Title II will have minimal effects on broadband investment going forward. To support that prediction, the FCC says it adopts "a light-touch regulatory framework" that merely reinstates net neutrality while forbearing from burdensome rules.²⁴⁹

That characterization is pure gaslighting. The FCC apparently hopes the public will not understand how much control the agency is wresting. Far from "light-touch," Title II regulates virtually every aspect of how an ISP does business.

For starters, Title II common carrier regulation has two centerpieces: (1) a collection of broad and amorphous "reasonableness" and "nondiscrimination" requirements that encourage anyone to complain about almost anything; and (2) virtually unbounded rulemaking and enforcement authority that permit the FCC to take virtually any action it wishes.

Using this new rulemaking authority, the FCC adopts the Internet Conduct Rule, which allows the FCC to prohibit any network management practice after the fact, based on a "non-exhaustive list of factors" applied on a "case-by-case basis." In practice, the Internet Conduct Rule operates as a backdoor form of *ex post* rate regulation, for it ultimately governs how ISPs may price their data and capacity. Already, the Order makes clear that longstanding ISP practices to optimize network performance while offering consumer services in a cost-efficient manner—from zero-rating to usage-based pricing to network slicing to managing the bitrate for streaming mobile video—may violate the Internet Conduct Rule based on indeterminate criteria applied sometime in the future. These nebulous requirements

²⁴⁵ Order at para. 285 & n.1182 (relying on, *inter alia*, 2017 comments from Free Press). The Order attributes the post-2015 dip in broadband investment, along with the post-2017 rebound, to the putatively coincidental timing of 4G/5G deployment lifecycles. That explanation, however, assumes the very conclusion in dispute by treating 4G/5G deployment decisions as exogenous to Title II rather than influenced by it. Having made no effort to establish causal directionality, the Order's latest explanation should be afforded no probative value, as it lacks the rigor the FCC purports to expect from numerous peer-reviewed studies that found a deleterious effect on investment from Title II.

²⁴⁶ Order at para. 284 & nn.1179-1180 (investor guidance from 2014).

²⁴⁷ Order at n.1165 (citing old studies on the effect of UNE unbundling); *id.* at n.1168 (citing generic studies on the interaction between regulation and innovation).

²⁴⁸ Order at para. 282 & n.1171 ("[I]f paid prioritization is allowed, ISPs have an incentive to reduce investment because expanding broadband capacity would lower the price that ISPs can charge for priority access.") (quoting Jay P. Choi & Byung-Cheol Kim, *Net Neutrality and Investment Incentives*, 43 RAND J. Econ. 446 (2010)). The quoted prediction in the Order is wrong, of course, because paid prioritization *was* allowed after 2017, and investment *increased* as ISPs' revenue per gigabyte *declined*.

²⁴⁹ Order at para. 484.

threaten to chill investment at the margins by always casting doubt on the legality of any innovative ISP network technique or business model that benefits consumers.

In effect, the FCC has assumed the power to regulate rates and impose price controls surreptitiously. How an ISP manages and monetizes its network capacity directly impacts how much it can charge. If a wireless provider is required to deliver 8K video without managing network congestion, the cost per gigabit of service will skyrocket. I have heard that it may cost at least one provider close to a billion dollars to deliver full-resolution video in all circumstances. Those costs will translate into higher prices for consumers. And without sponsored data plans, consumers will be forced to pay for capacity they get for free today. While the Order says it does not adopt “*ex ante* rate regulation,” that assurance offers no comfort, for the FCC intends to indirectly regulate rates *ex post*. The FCC would do by subterfuge what it says it will not do openly. But the bank shot still counts.

The FCC’s new powers do not end there. Through its Section 214 authority, the FCC assumes the power to prohibit any ISP from the U.S. market.²⁵⁰ That power to ban an ISP is not an authority that the FCC has today under Title I. Applying Title II, moreover, appears to give the President the authority to ban broadband service in the U.S. altogether during times of emergency.²⁵¹ And any alleged violations of Title II would subject ISPs to endless lawsuits through a new private right of action and money damages,²⁵² along with enforcement authority that the FCC can apply whenever it wants.²⁵³

4. The Order will threaten investment until the door is definitively shut on price controls. I have repeatedly warned about this Administration’s inexorable march towards rate regulation.²⁵⁴ The Order, for its part, repeatedly disavows the intent to impose *ex ante* and *ex post* price controls given their dampening effect on investment.²⁵⁵ It is important that this rare point of consensus—one that spanned Title I and Title II—not unravel.

In a new paragraph, the Order asserts that a “state affordability program” is not necessarily preempted simply because it is labeled as a “state affordability program.”²⁵⁶ That is true as far as it goes. Whether a state law is preempted turns on its substance, not its branding. For instance, a state law that, in the name of “affordability,” lowers permitting fees to encourage more robust competition, and thus leans on market forces to put downward pressure on prices, is not preempted by the Order even if it were called a “state affordability program.” By the same token, the Order does *not* provide that any state initiative—regardless of its substance—survives a run in with the Supremacy Clause merely because lawmakers label it a “state affordability program.”²⁵⁷

²⁵⁰ Order at para. 513.

²⁵¹ 47 U.S.C. § 606(d).

²⁵² 47 U.S.C. §§ 206-207.

²⁵³ 47 U.S.C. § 208-209.

²⁵⁴ See *Carr Title II NPRM Dissent* at 6; *Carr Digital Equity Order Dissent* at 3; Dissenting Statement of Commissioner Brendan Carr, *Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices*, Notice of Proposed Rulemaking, FCC-23-106, MB Docket No. 23-405 (2023), <https://docs.fcc.gov/public/attachments/FCC-23-106A3.pdf>.

²⁵⁵ Order at paras. 280-281, 386. As noted above, however, I read the Order as leaving open the possibility of indirect *ex post* rate regulation by targeting the cost structure of broadband capacity.

²⁵⁶ Order at para. 275.

²⁵⁷ While the Order does not define “state affordability program,” it drops a reference to the Infrastructure Investment and Jobs Act (IIJA), which requires state BEAD programs to ensure that ISPs offer a “low-cost

If it were otherwise, states would be free to undermine what the Order calls “a more uniform federal regulatory framework for BIAS.”²⁵⁸ Take New York’s so-called “Affordable Broadband Act” as an example.²⁵⁹ In my view, it is the type of naked rate regulation that is plainly preempted by today’s Order, regardless of the legislation’s title.

That conclusion does not change with the Second Circuit’s recent decision to uphold the New York law.²⁶⁰ While the Second Circuit issued its decision one day after the FCC voted on the Order, the court’s decision did not turn on the Order or its Title II classification. Quite the opposite. In the court’s view, Title I regulation (which applied when the litigation commenced and will apply until the Order’s effective date) did not preempt New York’s rate regulation. Putting aside my views on the merits of the Second Circuit decision, its analysis in my opinion is now moot and no longer controlling. As the court explained, a far different preemption analysis would apply if the law sought to regulate the rates of a Title II service.²⁶¹ Thus, in my view, the Order and the Second Circuit’s opinion should be read as preempting New York’s broadband price controls.

In short, neither the states nor the courts should interpret the Order as an invitation to regulate rates. The Order must be read to mean what it says about barring both *ex ante* and *ex post* price controls.²⁶² For my part, I intend to hold the FCC accountable for its representations and assurances, if laws like New York’s are brought to this agency for a preemption determination. Whatever the politics, the legal analysis is straightforward.

Even so, ISPs face a regulatory climate rife with uncertainty. Will the FCC seize its newfound powers to adopt cradle-to-grave regulation, as it did immediately after the 2015 *Title II Order*? How will the FCC interpret the minefield of ambiguous provisions buried in this Order? These and other unknowns will be priced into investment decisions.

So, to say Title II’s effect on investment is indeterminate, as the Order does, defies credulity. And to say this regime is “light-touch,” as the Order does, strays even further from the truth. ISPs will give second thought before spending money to develop network innovations or business models that benefit consumers. And in many cases, it simply won’t be worth the hassle.

5. In two particular cases, Title II makes hassles of the Biden Administration’s signature broadband initiatives—BEAD and Open RAN.

The BEAD program will disburse \$42.45 billion in federal grants for ISPs to deploy high-speed broadband in unserved areas. These areas also happen to present the greatest business risk. Even as it provides financial support, the BEAD program depends critically on complementary private investment

broadband service option” for eligible subscribers. *See* Order at n.1146 (citing 47 U.S.C. §§ 1702(h)(4)(B), (h)(5)). However, the IIJA is equally clear that nothing therein authorizes NTIA to “regulate the rates charged for broadband service.” Pub. L. 117-158 § 60102(h)(5)(D) (2021).

²⁵⁸ Order at para. 411.

²⁵⁹ N.Y. Gen. Bus. Law § 399-zzzzz(2).

²⁶⁰ *See N.Y. State Telecomms. Ass’n, Inc. v. James*, No. 21-1975, 2024 WL 1814541 (2d Cir. Apr. 26, 2024).

²⁶¹ *Id.* at *14.

²⁶² *See, e.g.*, Order at para. 386 (“Given the protection of our open Internet rules, we do not find *ex ante* or *ex post* rate regulation necessary for purposes of section 10(a)(1) and (a)(2), and we find it in the public interest to forbear from applying sections 201 and 202 insofar as they would permit the adoption of such rate regulations for BIAS in the future.”).

known as “matches.”²⁶³ NTIA encourages states, in distributing BEAD program support, to “encourage[] to require a match from” participating broadband providers.²⁶⁴ States “are required to” encourage “matches of greater than 25 percent from [ISPs] wherever feasible” and must give preference to proposals from broadband providers that commit to larger match amounts (and thereby will reduce the amount of BEAD program funding needed to complete projects).²⁶⁵

With or without matches, ISPs assume a great deal of upfront risk when they participate in BEAD, which only covers the expenses of building broadband. BEAD does not cover the costs of operating and maintaining broadband networks going forward. Those costs will fall entirely on ISPs. By increasing ISPs’ costs and depressing their rates of return, Title II may cause ISPs to devote less private capital for matches. With fewer matching funds, the federal government would spend more per location, thereby accelerating the depletion of the BEAD fund. Perversely, Title II might magnify the risk that BEAD leaves many parts of America behind.

That is to say nothing of the risk that some ISPs will decide that BEAD is not worth the financial risk when their business motives are always questioned under a Title II regime. If ISPs opt out of BEAD, that would not only increase the per-location cost, but it also could result in less-qualified ISPs’ receiving a greater share of the available funding, further imperiling the initiative’s success.

The same is true of Open RAN. The Biden Administration has embraced Open RAN technologies—whether to encourage more competition against dominant and untrustworthy equipment vendors like Huawei and ZTE through an ecosystem of radio network manufacturers and interoperable standards—or for other policy reasons. Open RAN proponents generally describe the technology as critical to advancing both U.S. leadership in wireless and our national security.

For wireless providers with brownfield networks, however, Open RAN is an expensive proposition. It requires providers to replace radio units and other proprietary components with new equipment that is compatible with Open RAN standards. Many providers have not embraced Open RAN out of the gate due to its questionable return on investment. Congress has sought to incentivize Open RAN deployment by establishing a \$1.5 billion Public Wireless Supply Chain Innovation Fund that is administered by the Department of Commerce.

As noted above, Title II would chill infrastructure investment necessary for Open RAN’s success. But it is even worse than that. Title II would eliminate some of the key advantages of Open RAN standards. Popular implementations of Open RAN move much of the network’s intelligence from equipment at the cell site to the core. Virtualized networks based in the cloud are attractive because they allow for the kinds of network management that Title II suddenly imperils, including network slicing and artificial intelligence. Superimposing a “mother, may I” regime would threaten Open RAN technology right at the time when the ecosystem needs more incentives and investment.

3. Market Power and Competition

1. As if the last six years never happened, today’s Order reinstates the 2015 *Title II Order* through the regulatory equivalent of cut-and-paste. To justify this massive expansion in economic control

²⁶³ See NTIA, *Broadband Equity, Access, and Deployment Program Notice of Funding Opportunity*, § III.B.1 (May 12, 2022), <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf> (BEAD NOFO).

²⁶⁴ BEAD NOFO § III.B.2.

²⁶⁵ *Id.*; see also *id.* §§ IV.B.7.a.ii, IV.B.7.b.i-ii.

over the broadband industry, today's Order repeats the FCC's speculative musings from 2010 and 2015 that ISPs have the "incentive and ability" to harm edge providers and consumers by favoring ISP-delivered content, like pay-television bundles.²⁶⁶

Broadband service is a two-sided market, and the Order must therefore rely on two distinct market power claims: (1) an upstream market power claim, alleging that ISPs will choke off edge providers by extracting anticompetitive tolls, and (2) a downstream market power claim, alleging that consumers are locked in due to insufficiently robust retail competition.

One might have expected the Order to demonstrate evidence of market power or market failure to support these conjectures. After all, the FCC²⁶⁷ and federal courts²⁶⁸ have determined that anticompetitive vertical restraints, like the "foreclosure" and "self-preferencing" theories that animate large parts of the Order, typically require a showing of market power absent direct evidence of consumer harm (which, as noted above, does not exist). But the Order does not venture to prove market power, claiming that the 1996 Act does not require it.²⁶⁹

Even as it disclaims the burden to prove market power or market failure, the Order turns around and baldly asserts that broadband providers are "gatekeepers" that "generally possess some degree of market power" that arises from "limited choice" and which "exacerbate[s]" the "incentive and ability" to engage in anticompetitive conduct.²⁷⁰ Elsewhere, the Order points to incomplete and gerrymandered statistical evidence to suggest retail competition is weak.²⁷¹ The Order also labels ISPs as "terminating access monopolies" over edge providers, an anachronistic term that is irrelevant to ISPs because it refers to a market dynamic peculiar to the monopoly telephone system.²⁷²

Reasoned decision-making is the very least required of administrative agencies like the FCC.²⁷³ If Title II generally, and the Internet Conduct Rule specifically, depend on assumptions about the economic structure of the ISP market, the Order must back those assumptions with rigorous analysis. If the Order wishes to present an affirmative claim about the state of ISP competition, it should do so

²⁶⁶ Order at para. 464 & n.1859 (citing *2015 Title II Order* at para. 75; *2010 Open Internet Order* at para. 21).

²⁶⁷ *Restoring Internet Freedom Order* at para. 123.

²⁶⁸ *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018) (to demonstrate indirectly that a vertical restraint in a two-sided market violates Section 1 of the Sherman Act, the plaintiff must offer "proof of market power plus some evidence that the challenged restraint harms competition"). See generally Herbert Hovenkamp, *Antitrust and Self-Preferencing*, 38 *Antitrust Vol. 1*, at 7 (2023) ("To generalize, while current United States antitrust law has many prohibitions on self-preferencing, they apply only when the firm in question has market power in the dominant good and competitive harm results from the refusal to give equal treatment."), <https://www.americanbar.org/content/dam/aba/publications/antitrust/magazine/2023/vol-38-issue-1/antitrust-and-self-preferencing.pdf>.

²⁶⁹ Order at para. 251.

²⁷⁰ Order at para. 471.

²⁷¹ Order at para. 663.

²⁷² *Restoring Internet Freedom Order* at n.493 ("We note that the terminating monopoly problem in voice telecommunications is one created by common-carriage regulation, not one solved by it. Specifically, carriers must interconnect with each other and originating carriers must pay terminating carriers rates set by the terminating carrier in their tariff (with some government oversight). That leads to a "bargaining" situation where one party sets the terms of the deal and the other must accept it or complain to the regulator—in other words, the regulations prohibit a normal free market from developing. Such regulatory requirements do not exist in broadband.").

²⁷³ *State Farm*, 463 U.S. at 52.

directly instead of lobbying drive-by assertions. The Order cannot have it both ways, alleging market power in passing while disavowing the legal obligation to prove it.

In any event, market power is the hallmark of Title II “common carrier” regulation.²⁷⁴ So, to apply monopoly-era Title II rules consistent with the APA’s requirement of reasoned decision-making, and to support its finding that the benefits outweigh the costs, the FCC was obligated to prove the existence of durable market power and a market failure that only common-carrier regulation could address.

2. Start with the Order’s upstream market power claims about ISPs’ status as “gatekeepers” over edge providers.

To see why a market power showing is necessary, consider a hypothetical. Say a small ISP in Louisiana tries to restrict access to Netflix. Is that possibility real enough to justify regulation? Only if the ISP can get away with it. And that depends on whether consumers can switch to another provider, whether the ISP can realistically hold Netflix hostage to extract above-market rates, and whether the ISP has a financial reason, like promoting a rival video service, to act this way.

If that hypothetical sounds far-fetched, it is. ISPs—especially the thousands of small ones across the United States—cannot play hardball with the world’s largest tech companies. The companies that primarily drive of Internet traffic—Microsoft, Google, Meta, Amazon, Apple—have market capitalizations in the trillions of dollars. The *Restoring Internet Freedom Order* observed that “the market capitalization of the smallest of these five companies, Amazon, is more than twice that of the largest ISP, Comcast, and the market capitalization of Google alone is greater than every cable company in America combined.”²⁷⁵

Since 2017, the power differential between Big Tech and ISPs has ballooned as the market capitalization of each Big Tech firm has climbed from the hundreds of billions of dollars in 2017 into the trillions of dollars in 2024.²⁷⁶ The idea that ISPs, especially the hundreds of small and rural ISPs across the country, can exercise “gatekeeper” power over Big Tech is farfetched. Yet that is exactly what the Order assumes in all cases, for all providers in all markets, based on zero proof, and regardless of the facts.

The Order’s reliance on *ipse dixit* instead of actual evidence of market power is especially inexcusable in 2024, even if the FCC might have gotten away with it in 2015.²⁷⁷ Back then, the FCC applied Title II to ISPs for the first time in American history. Some measure of predictive judgment might have been acceptable at the time. Now we have a natural experiment: two years with Title II (2015-2017) and the last six years without it (2018-2024). As noted above, the Order cannot point to an example after 2017 where a provider successfully leveraged gatekeeper power in the way net neutrality proponents envision. It is no longer enough for the FCC to engage in fact-free postulation, as the Order does today, that broadband providers are “gatekeepers” with the “incentive and ability” to harm edge innovation.²⁷⁸

²⁷⁴ *Restoring Internet Freedom Order* at para. 123 (“The premise of Title II and other public utility regulation is that ISPs can exercise market power sufficient to substantially distort economic efficiency and harm end users.”).

²⁷⁵ *Restoring Internet Freedom Order* at para. 134.

²⁷⁶ Companies Market Cap, *Largest Companies by Market Cap*, <https://companiesmarketcap.com/> (last visited Apr. 24, 2024).

²⁷⁷ *U.S. Telecom II*, 825 F. 3d at 708 (D.C. Cir. 2016).

²⁷⁸ The Order floats the self-defeating thesis that state net neutrality regulation of ISPs prevented such behavior after 2017. See Order at para. 493. Even if that were true, it would obviate the need for Title II at the federal level.

Apart from the Order's lack of evidence, it is difficult to imagine a scenario under which the FCC's gatekeeper theory of broadband would be plausible. That is because both the "incentive" and the "ability" sides of the equation fall short. And that is even more true today than it was in 2015 or 2017.

Start with ISPs' "incentive." Net neutrality was originally premised on the idea that broadband providers would unfairly compete with edge providers in preferencing ISPs' rival media, content, and other applications.²⁷⁹ An ISP's control over the last mile, according to Big Tech talking points, would provide an anticompetitive advantage to dictate consumer choices and keep them in walled gardens.

If that were true, ISPs would have a chokehold on pay-television—once the crown jewel from a revenue standpoint—after 2017. But linear, facilities-based television—whether satellite TV or cable—has experienced a freefall as millions of consumers switched to over-the-top video offered by streaming behemoths like Netflix and Disney+.²⁸⁰ And while broadband providers once considered expanding their businesses to the edge more than a decade ago, that experiment turned out to be a failure for market-based reasons. ISPs have since reversed course and deleveraged, returning their focus to connectivity.²⁸¹

The idea of net neutrality also originated during an era of crude network management techniques and crippling bandwidth scarcity. When they offered 56 kbps speeds, ISPs faced severe capacity constraints and struggled to keep up with peer-to-peer sharing and web 2.0 startups, whose success resulted in an explosion of traffic. Whatever the merits of net neutrality as an economic construct nearly 25 years ago, it holds no relevance today. Bandwidth is more plentiful and far cheaper than ever, even compared to the last Title II proceeding six years ago. A provider's revenue per megabyte has declined by orders of magnitude since 2017,²⁸² after ISPs invested billions of dollars to boost network capacity through spectrum, fiber, infrastructure, and intelligent network management.

Providers also have far less "ability" to behave in the way that the Order supposes. Since 2015, Big Tech has dominated the modern economy to the point where Congress and competition agencies worldwide have taken action. The idea that even the largest ISP holds enough negotiating leverage to threaten cutting off Amazon Prime or Apple+ is laughable. For one, Big Tech is heavily invested in internet infrastructure, including content delivery networks, cloud backends, fiber, and undersea cables, which also carry unaffiliated ISP traffic. That means the leverage is not one-sided, and ISPs also depend

²⁷⁹ Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. on Telecomm. & High Tech. L. 141 (2003); Mark A Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. Rev. 925 (2001).

²⁸⁰ See Pew Research Center, *Cable and Satellite TV Use Has Dropped Dramatically in the U.S. since 2015* (Mar. 17, 2021), <https://www.pewresearch.org/short-reads/2021/03/17/cable-and-satellite-tv-use-has-dropped-dramatically-in-the-u-s-since-2015/>; NS Screen Media, US Traditional Pay TV, <https://nscreenmedia.com/us-pay-tv/>, (last visited Apr. 24, 2024); Keith Nissen, US Q3'23 Video Cord Cutter Update: Viewing Live TV Makes a Comeback (Nov. 8, 2023), <https://www.spglobal.com/marketintelligence/en/news-insights/research/us-q3-23-video-cord-cutter-update-viewing-live-tv-makes-a-comeback>.

²⁸¹ See, e.g., Press Release, AT&T, *AT&T Discovery Close WarnerMedia Transaction* (Apr. 8, 2022), <https://about.att.com/story/2022/close-warnermedia-transaction.html>.

²⁸² Bryan Keating, *An Economic Analysis of Mobile Wireless Competition in the United States*, at para. 43 (Dec. 11, 2023), https://api.ctia.org/wp-content/uploads/2023/12/CL_Dec-2023.pdf (attached to Comments of CTIA, WC Docket No. 23-320 (Dec. 14, 2023) (*Mobile Wireless Competition*) ("Revenue per GB has declined by 98 percent since 2012 and by 75 percent since 2017.")).

on Big Tech for critical connectivity inputs. Since 2015, Big Tech has shown that it will retaliate against companies who play hardball in the way the Order envisions.²⁸³

3. Now turn to downstream market power, concerning the state of retail competition and the extent to which consumers are locked into their current ISPs.

The disciplining effect of competition explains why ISPs lack the “incentive” or “ability” to restrict access to content. Consumers enjoy more choices as intermodal competition has intensified since 2017. In what is by now a familiar pattern, the Order discounts the existence of ISP competition without undertaking a rigorous competition analysis. The Order asserts, without offering data, that “switching costs” remain high.²⁸⁴ It suggests, without saying so, that new forms of intermodal ISP competition are not viable substitutes.²⁸⁵ And it relies on the artificially high speed benchmark of 100/20 Mbps, without explaining why consumers are “unserved” if they do not have a 20 Mbps upload speed that bears little practical relevance to modern edge services.²⁸⁶

The evidence belies the Order’s prognostications about the state of ISP rivalry. By any measure, the competitive melee for customers is more cutthroat than ever. Just look at how much ISPs spend on advertising, which demonstrates not only their need to attract and keep customers, but also their belief that consumers are willing to switch.²⁸⁷ Or look at the rate of churn, which exemplifies consumers’ revealed willingness to switch.²⁸⁸ Or look at the declining average revenue per user (ARPU), which illustrates competitive pressures on profitability.²⁸⁹

Or look at the existence of new entrants in the fixed wireless, satellite, and fiber sectors. The FCC’s latest data shows 2,193 fixed ISPs, 1,534 of which offer broadband over fiber to the premises. There are also 57 separate operators offering mobile broadband, 54 of which offer 4G LTE service and 16 of which offer 5G service. According to the latest National Broadband Map, 100% of serviceable locations have 25/3 Mbps service and 99.96% have 100/20 Mbps service. In the latest *Section 706*

²⁸³ See, e.g., Tim Marcin, *Meta briefly blocked a local news organization critical of Facebook*, Mashable (Apr. 6, 2024), <https://mashable.com/article/meta-block-kansas-reflector>.

²⁸⁴ See Order at para. 471 & n.1874.

²⁸⁵ See Order at para. 473 & n.1882.

²⁸⁶ Dissenting Statement of Commissioner Brendan Carr, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Section 706 Report, GN Docket No. 22-270, FCC 24-27 (Mar. 14, 2024), <https://docs.fcc.gov/public/attachments/DOC-401205A3.pdf>.

²⁸⁷ See Declaration of Mark Israel, Brian Keating & Allan Shampine, at para. 71 (appended to NCTA Comments, WC Docket No. 23-320 (Dec. 14, 2023), <https://www.fcc.gov/ecfs/document/121484978453/1>).

²⁸⁸ *Mobile Wireless Competition*, at para. 59 (noting a monthly average churn of 1.53% for wireless carriers, translating to 18% turnover from one carrier to another on an annualized basis).

²⁸⁹ *Mobile Wireless Competition*, at para. 42 (cleaned up) (“CTIA data indicate that ARPU declined by 29 percent from 2012 to 2022 when excluding equipment revenue and by 16 percent when including equipment revenue. CTIA data also show declines in ARPU from \$38.66 in 2017 to \$34.56 in 2022 (a decline of approximately eleven percent) even as the BLS indices were approximately flat. Taking general inflation into account reveals even more favorable price trends: the real (as opposed to nominal) ARPU has declined by 45 percent since 2012 and by 26 percent since 2017.”).

Report, the FCC estimates 99.7% of households have more than three options for 25/3 Mbps service and more than 60% of households have multiple options for 100/20 Mbps service.²⁹⁰

For one, wireless ISPs—both traditional mobile broadband operators and WISPs—are leveraging network improvements to offer fixed wireless to the home at a breakneck pace. 5G fixed wireless access is growing so rapidly that it accounted for 90% of the net new broadband subscriptions in 2022, compared to only 20% in 2021.²⁹¹ According to Ookla, fixed wireless has taken market share from cable and DSL providers, and the “aggressive pricing strategies of [fixed wireless] providers have driven prices down across the market, with cable providers for example offering slimmed down broadband and content packages at competitive prices, while AT&T Fiber now prices its entry fiber package of 300 Mbps at \$55/month.”²⁹² Fixed wireless is projected to account for approximately 90% of net subscriber additions over the next couple of years.²⁹³ All told, the latest Broadband Map shows 66.0 million locations with fixed wireless service at 100/20 Mbps.

For another, the industry is in the middle of a massive fiber rollout. That is especially so for traditional wireless carriers that are building out their wireline assets. Verizon has invested billions in its Fios network, a “wide-scale, all-fiber deployment to bring new broadband competition” that is expected to pass 18 million homes by the end of 2025.²⁹⁴ AT&T has already deployed fiber-based broadband to more than 26 million locations.²⁹⁵ T-Mobile has rolled out fiber in 13 markets at symmetrical 2 Gbps speeds.²⁹⁶

And for another, low-earth orbit satellite ISPs now provide new sources of intermodal competition. Satellite providers offered high-speed broadband at 100/20 Mbps speeds to 99.6% of locations, as of June 30, 2023. That is up from 16.09% according to the previous version of the FCC’s National Broadband Map. Starlink successfully launched approximately 1,000 satellites between December 31, 2022 and June 30, 2023.²⁹⁷

²⁹⁰ *Section 706 Report* at Fig. 6; Order at para. 471.

²⁹¹ See Leichtman Rsch. Grp. Press Release, About 3,500,000 Added Broadband from Top Providers in 2022 (Mar. 2, 2023), <https://leichtmanresearch.com/about-3500000-added-broadband-fromtop-providers-in-2022/>.

²⁹² Mike Giles, *U.S. – The Rise of 5G FWA & the Battle for Fixed Broadband Customers* (Dec. 20, 2023), <https://www.ookla.com/articles/fixed-wireless-access-us-q3-2023>.

²⁹³ Mike Dano, *FWA to Remain 'Biggest Disruptor' through 2024* (June 29, 2023), <https://www.lightreading.com/fixed-wireless-access/fwa-to-remain-biggest-disruptor-through-2024>

²⁹⁴ Masha Abarinova, *Verizon Fiber Exec Dishes on Build Progress, Cell Site Upgrades* (Oct. 3, 2023), <https://www.fiercetelecom.com/broadband/verizon-fiber-exec-dishes-build-progress-cell-site-upgrades>.

²⁹⁵ Sean Buckley, *AT&T eyes extending its fiber reach beyond its 30M target*, *Broadband News* (Jan. 24, 2024), <https://www.broadbandtechreport.com/home/article/14304075/att-eyes-extending-its-fiber-reach-beyond-its-30m-target>.

²⁹⁶ Linda Hardesty, *T-Mobile Now Offers Fiber Broadband in 13 Markets* (Feb 7, 2024), <https://www.fiercetelecom.com/broadband/t-mobile-now-offers-fiber-broadband-13-markets>.

²⁹⁷ See Wikipedia, *List of Starlink and Starshield launches*, https://en.wikipedia.org/wiki/List_of_Starlink_and_Starshield_launches (last visited Mar. 8, 2023).

4. Prices, Speed, and Availability

The FCC's claim that Title II is necessary to ensure improved connectivity also fails. The robust competition and investment since our return to Title I has brought better performance to consumers. The proof can be seen in the latest data from Ookla:

- Median fixed download speeds in the U.S. have increased by more than five-fold or approximately 430% since 2017, according to Ookla data.
- Median mobile download speeds have increased by more than seven-fold or approximately 647% since 2017, according to Ookla data.
- The United States has leaptfrogged other countries since 2017 and now ranks among the highest in the world for fixed, mobile, and 5G broadband speeds, according to Ookla data.

Industry data tells a similar story. 5G wireless networks are capable of delivering peak speeds up to 20 Gbps and average speeds of greater than 100 Mbps.²⁹⁸ Median download speeds have quadrupled over the past seven years and have more than doubled in the past three years.²⁹⁹ Starlink's average download speed increased from 89.38 Mbps to 129.64 Mbps from 2022 to 2023, upload speed increased from 10 Mbps to 15 Mbps, and latency decreased by 10ms.³⁰⁰

And prices? They're down across the board since we returned to Title I. From 2022 to 2023, the inflation-adjusted price of fixed providers' most popular broadband speed tier dropped by 18.1%, and the price of fixed providers' fastest speed tier option dropped by 6.5%.³⁰¹ The U.S. weighted average nominal price for the most popular speed tiers by subscription has decreased by 37% over the past eight years (54.7% drop adjusting for inflation), and the weighted average price for the fastest speed tiers has decreased by 38.6% (55.8% drop adjusting for inflation).³⁰² The declining cost of consumer broadband stands in marked contrast to the rising cost of other essential consumer goods and services, which have increased during the same period by approximately 28%.³⁰³ As for mobile broadband, inflation-adjusted real prices have dropped by 18-19% since 2017.³⁰⁴

In contrast to America's successful, light-touch approach, regulators in Europe have long applied centralized, utility-style controls to their continent's Internet infrastructure. This is a marked difference from the light-touch approach that a bipartisan set of U.S. lawmakers pioneered in 1996 and applied to

²⁹⁸ Qualcomm, *Everything you need to know about 5G*, <https://www.qualcomm.com/5g/what-is-5g> (last visited Apr. 24, 2024).

²⁹⁹ *Mobile Wireless Competition* at para. 4.

³⁰⁰ Jessica Dine & Joe Kane, *The State of US Broadband in 2022: Reassessing the Whole Picture*, Info. Tech. & Innovation Found. (Dec. 5, 2022), <https://itif.org/publications/2022/12/05/state-of-usbroadband-in-2022-reassessing-the-whole-picture/>; Brian Westover, *Starlink Speed: How Much Faster Is Elon's Satellite Internet in 2023 vs. 2022?*, PC Mag. (May 17, 2023), <https://www.pcmag.com/news/starlink-speed-tests-2023-vs-2022>.

³⁰¹ Arthur Menko, 2023 Broadband Pricing Index, USTelecom, <https://ustelecom.org/wp-content/uploads/2023/10/USTelecom-2023-BPI-Report-final.pdf>.

³⁰² *Id.*

³⁰³ *See id.*; *see also* News Release, Bureau of Labor Statistics, Consumer Price Index – October 2023 (Nov. 14, 2023), https://www.bls.gov/news.release/archives/cpi_11142023.htm.

³⁰⁴ *Mobile Wireless Competition*, at para. 40.

networks here in America—an approach that has allowed the free and open Internet to thrive in this country and our Internet economy to become the envy of the world. Indeed, networks in America far outpace those in Europe.

- U.S. networks are faster than in every single country in Europe, as Ookla’s fixed, median download speed rankings show.³⁰⁵
- U.S. networks are more competitive than those in Europe, with the U.S. having a nearly two-fold or 40 percentage point lead (87% to 45%) when it comes to households with access to two or more wired, facilities-based providers.³⁰⁶
- U.S. networks bridge the digital divide more so than those in Europe, with the U.S. leading Europe by 11 percentage points (98% to 87%) when it comes to households with high-speed, fixed broadband, and by an even larger, 31 percent (91% to 60%) in rural areas.³⁰⁷
- U.S. 5G networks cover 95% of the U.S. population compared to just 72% in Europe, according to EU officials.³⁰⁸
- U.S. networks are benefiting from providers here investing three-fold more per household than their European counterparts.³⁰⁹

Indeed, this gap is why one of the EU’s top regulators recently remarked that “[i]n terms of 5G deployment, the EU lags behind other regions of the world.”³¹⁰

During the pandemic, as remote work and stay-at-home mandates spread across the world, Internet traffic surged dramatically. With the sudden spike in online traffic, COVID-19 represented the ultimate stress test for a country’s approach to network regulation. In Europe, regulators responded to the upswing in traffic by asking Netflix and YouTube to throttle down their online services “to prevent the internet collapsing under the strain of unprecedented usage.”³¹¹ Asking Netflix and others to ration their Internet streams was part of what one EU regulator described as “a joint responsibility to take steps to ensure the smooth functioning of the internet during the battle against the virus.”³¹²

³⁰⁵ Speedtest Global Index, *Median County Speeds March 2024* (last visited Apr. 24, 2024), <https://www.speedtest.net/global-index>.

³⁰⁶ See USTelecom, *US vs. EU Broadband Trends 2012-2020*, at 13 (Apr. 1, 2022) (“*Broadband Trends*”), <https://ustelecom.org/research/us-eu-broadband-trends/>.

³⁰⁷ See *id.*

³⁰⁸ See Foo Yun Chee, *EU’s Breton Cites Telcos’ Investment Gap for Big Tech Network Fee Push*, Reuters (June 6, 2023) (*Reuters Story*), <https://www.reuters.com/business/media-telecom/eus-breton-cites-telcos-investment-gap-big-tech-network-fee-push-2023-06-06/>.

³⁰⁹ See *Broadband Trends* at 13.

³¹⁰ See *Reuters Story*.

³¹¹ See Hadas Gold, *Netflix and YouTube are Slowing Down in Europe to Keep the Internet from Breaking*, CNN (Mar. 20, 2020), <https://www.cnn.com/2020/03/19/tech/netflix-internet-overload-eu/>.

³¹² *Id.*

European regulators had good reason to think that their continent’s fragile, underinvested networks—a product of Europe’s outdated utility regulation—would fail to sustain the surge in Internet traffic that spiked in the spring of 2020. Indeed, “[t]he performance of the EU’s networks deteriorated significantly” at the time and “Expose[d] Europe’s Creaking Internet for All to See,” as many reports noted.³¹³

In the U.S., we did not have to ask streamers like Netflix or Disney+ to degrade the quality of consumers’ streams because we got it right with our successful, light-touch approach to Internet regulation. Our framework created the incentives for the private sector to invest massive, record-breaking sums and build out robust, resilient, and competitive networks. Or, as former FCC Chairman Tom Wheeler wrote while reflecting on the performance of U.S. networks during COVID-19: “Credit is due to the nation’s broadband providers. The fact we can work from home is the result of hundreds of billions of investment dollars and construction and operational skill.”³¹⁴

Here’s the bottom line. America’s networks are not broken. Our light-touch regulatory model has not failed. But Europe’s utility-style regime has. But that will change with a return to Title II, as the FCC emulates a regulatory framework that would make networks in America look more like the fragile, underinvested ones in Europe.

B. New Title II Justifications Fare No Better: More Problems that Do Not Exist In Search of Solutions that Do Not Work.

Given that the Commission cannot justify its return to Title II classification with evidence of new open internet violations or a need to foster competition, investment, or innovation, the Commission instead seeks refuge in a grab bag of new rationales that have nothing to do with “net neutrality”—such as privacy, cybersecurity, national security, public safety, and network resiliency. None of them provide a basis for today’s Order that would survive APA review.

1. National Security and Law Enforcement

The Order asserts that Title II will enhance the FCC’s ability to protect “networks from entities that pose threats to national security and law enforcement.”³¹⁵ But this claim is nothing more than pretext.

For starters, the Order does not say specifically why the FCC’s oversight must be “enhanced” or how Title II would accomplish it. At most, the Order vaguely insinuates that Title II is necessary to deal with Chinese state-owned entities providing private data services on U.S. soil.³¹⁶ But the Order stops short of claiming that the FCC could take additional action against these entities under Title II.

And for good reason. None of those providers—not China Telecom Americas, not China Unicom, not Pacific Networks, and not ComNet—appears on the FCC’s list of 2000-plus ISPs that offer

³¹³ See Chiara Albanese, Thomas Seal, Rodrigo Orihuela, *Pandemic Exposes Europe’s Creaking Internet for All to See*, *Bloomberg* (Oct. 9, 2020), <https://www.bloomberg.com/news/articles/2020-10-09/europe-s-bad-internet-risks-missing-out-on-133-billion-a-year>; Anna-Maria Kovacs, *U.S. Broadband Networks Rise to the Challenge of Surging Traffic During the Pandemic* (June 2020), <https://cbpp.georgetown.edu/news/anna-maria-kovacs-releases-policy-paper-us-broadband-networks-rise-to-the-challenge-of-surging-traffic-during-the-pandemic/>.

³¹⁴ Tom Wheeler, *Why the Internet Didn’t Break* (Apr. 2, 2020), <https://www.brookings.edu/articles/why-the-internet-didnt-break/>.

³¹⁵ Order at para. 30.

³¹⁶ Order at para. 36.

the kind of retail broadband service that Title II now covers.³¹⁷ That is because the FCC already revoked their Section 214 authorizations without Title II authority over broadband.³¹⁸ At most, as their Form 499 registrations confirm, those companies currently either offer private data services, or are designated as no longer active.³¹⁹ So, it is unclear how Title II gives the FCC additional authority against these entities.

To be sure, the Order does point to a real problem: ISPs interconnecting with PRC state-backed carriers through their points-of-presence. That is why, since 2020, I have called for the FCC to “start a proceeding that examines whether we should prohibit regulated carriers from directly interconnecting with entities that pose a national security threat,” even if those entities do not have Section 214 authorizations. We did not need Title II to open such an inquiry.³²⁰ And we could have addressed the issue using a scalpel instead of a chainsaw. But this FCC did not seem interested in exploring such an option. The FCC’s failure to examine this long-known issue belies its stated concern for national security here, and provides more evidence that national security is merely a pretext for more control over the broadband industry.

Indeed, it would be quite odd if, as the Order suggests, the U.S. government were powerless to address these cyber threats or malicious foreign control over our Internet infrastructure in the absence of President Roosevelt’s Title II. In fact, that is not the case. The U.S. government has ample authorities today without Title II.

The Executive Branch already has the authority to prohibit Chinese entities from continuing to offer private data services in the U.S. Indeed, President Trump issued an Executive Order in 2019,³²¹ and the Commerce Department codified a set of implementing rules in 2021,³²² that are more than sufficient to deal with this specific threat. These authorities allow the Secretary of Commerce to prohibit “information communications technologies and services” subject to the control or influence of foreign adversaries that pose unacceptable risks to national security. The Commerce Secretary’s authority extends broadly over foreign adversary hardware or software “primarily intended to fulfill or enable the

³¹⁷ See FCC National Broadband Map, “Provider Summary – Fixed Broadband,” <https://broadbandmap.fcc.gov/datadownload/nationwide-data?version=jun2023>.

³¹⁸ See *China Telecom (Americas) Corporation*, GN Docket No. 20-109, File Nos. ITC-214-20010613-00346, ITC214-20020716-00371, ITC-T/C-20070725-00285, Order on Revocation and Termination, 36 FCC Rcd 15966 (2021) (China Telecom Americas Order on Revocation and Termination), *aff’d China Telecom (Americas) Corp. v. FCC*, 57 F.4th 256 (D.C. Cir. 2022); *China Unicom (Americas) Operations Limited*, GN Docket No. 20-110, File Nos. ITC-214-20020728-00361, ITC-214-20020724-00427, Order on Revocation, 37 FCC Rcd 1480 (2022), argued 9th Cir. Argued Feb. 15, 2023; *Pacific Networks Corp. and ComNet (USA) LLC*, GN Docket No. 20-111, File Nos. ITC214-20090105-00006, ITC-214-20090424-00199, Order on Revocation and Termination, 37 FCC Rcd 4220 (2022), *aff’d Pacific Networks Corp. and ComNet (USA) LLC v. FCC*, No. 22-1054 (D.C. Cir. 2023).

³¹⁹ See, e.g., 499 Registration, China Telecom (Americas) Corporation, <https://apps.fcc.gov/cgb/form499/499detail.cfm?FilerNum=822646>; 499 Registration, China Unicom Americas Operations LTD, <https://apps.fcc.gov/cgb/form499/499detail.cfm?FilerNum=824402>; 499 Registration, Comnet (USA), LLC, <https://apps.fcc.gov/cgb/form499/499detail.cfm?FilerNum=823684>.

³²⁰ Statement of Commissioner Brendan Carr, *Pacific Networks Corp. and ComNet (USA) LLC*, GN Docket No. 20-111; ITC-214-20090105-00006; ITC-214-20090424-00199, <https://docs.fcc.gov/public/attachments/FCC-22-22A3.pdf>.

³²¹ Exec. Order No. 13873, *Securing the Information and Communications Technology and Services Supply Chain*, 84 Fed. Reg. 22689 (May 15, 2019).

³²² 15 C.F.R. pt. 7.

function of information or data processing, storage, retrieval, or communication by electronic means,” including “transmission, storage or display.”³²³

Today, security threats to Internet infrastructure are addressed by a combination of multistakeholder initiatives, public-private partnerships, and Executive Branch agencies directly accountable to the President as the commander in chief. These agencies include CFIUS, the Department of Homeland Security (including CISA), the Department of Commerce, the Department of Justice (including the FBI), and the Department of Defense. In recent years, the capabilities of these agencies have been augmented to deal with emerging threats. Among these authorities, Congress established CISA in 2018 as the Federal leader for cyber and physical infrastructure security.³²⁴ And the Presidential Policy Directive 21³²⁵ and the National Infrastructure Protection Plan³²⁶ designated DHS, not the FCC, as the lead agency to address critical infrastructure threats in the communications sector.

Undeterred, the Order asserts that the FCC lacks the authority it needs to address national security threats without Title II.³²⁷ Here again, the Order identifies no such gap. If one existed, the FCC would have gone straight to Congress instead of waiting years for the votes to push through Title II. Congress would have then passed targeted legislation to deal with the threat. That is what normally happens. Two recent examples include the Secure and Trusted Communications Network Act of 2019³²⁸ and the Secure Equipment Act of 2021,³²⁹ which collectively prohibited FCC authorization of untrustworthy Chinese equipment in the United States. It would be incredible, if it were true, that the FCC has known about a national security threat for years now, simply stood by the wayside, did not seek to eliminate it through existing authorities or new ones, and waited to raise it until now—in fact, that is not credible.

The Order also asserts that Title II will give the FCC a seat at the table to participate in a “whole-of-government” approach to protect national security.³³⁰ The Order identifies no empty seat. Indeed, none of the Executive Branch agencies mentioned above came forward in this proceeding to support the FCC’s view that it could not meaningfully contribute to national security. The Administration’s filing, submitted by NTIA, offered the FCC tepid support at best on national security. NTIA said that “to the extent that regulations are necessary, they should be narrowly tailored,” and asked the FCC to defer when its authority “may overlap with that of another agency with appropriate expertise.”³³¹ Hardly a ringing invitation for Title II.

³²³ 15 C.F.R. § 7.2.

³²⁴ Cybersecurity and Infrastructure Security Agency Act of 2018, Pub. L. No. 115-278, 132 Stat. 4168.

³²⁵ The White House, Presidential Policy Directive 21, *Critical Infrastructure Security and Resilience* (Feb. 12, 2023), <https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-criticalinfrastructure-security-and-resil>.

³²⁶ DHS, *National Infrastructure Protection Plan: Partnering for Critical Infrastructure Security and Resilience*, at 23 (2013), <https://www.cisa.gov/sites/default/files/publications/national-infrastructure-protection-plan-2013-508.pdf>.

³²⁷ Order at para. 40.

³²⁸ See *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, Report and Order, Further Notice of Proposed Rulemaking, and Order, 34 FCC Rcd 11423, paras. 26, 43 (2019).

³²⁹ See *Protecting Against National Security Threats to the Communications Supply Chain through the Equipment Authorization Program*, Report and Order, Order, and Further Notice of Proposed Rulemaking, 37 FCC Rcd 13493, para. 32 (2022).

³³⁰ Order at para. 39.

³³¹ Comments of NTIA, WC Docket No. 23-320, at 7 (Mar. 20, 2024).

As for law enforcement, the Department of Justice and the FBI have ample authority over ISPs through the Foreign Surveillance Intelligence Act, the Electronic Communications Privacy Act, the Wiretap Act, and other authorities. As for the FCC's limited role, the Communications Assistance for Law Enforcement Act (CALEA) already applies to broadband providers without Title II regulation.³³²

2. Privacy and Data Security

As the Order tells it, the need to protect broadband privacy justifies Title II.³³³ That is more than wrong. By wresting oversight from the Federal Trade Commission, Title II creates a gaping doughnut hole that would leave no broadband privacy rules in place.

As an initial matter, the Order identifies no privacy gap for the FCC to fill. The FTC already regulates broadband providers and their privacy practices through its authority to enforce unfair and deceptive trade practices under Section 5 of the FTC Act.³³⁴ The FTC is recognized as the federal privacy cop on the beat. Indeed, at this very moment, broadband consumers benefit from the same set of federal privacy rules that protect consumers across the economy.

But those federal rules would go away if broadband were regulated under Title II. The FTC lacks statutory authority over “common carrier” services, including those the FCC regulates under Title II.³³⁵

The FCC is powerless to fill that regulatory gap using Title II. In a 2017 resolution adopted pursuant to the Congressional Resolution Act (CRA), Congress prohibited the FCC from applying Title II broadband privacy rules, which the FCC issued in 2016.³³⁶ Because a rule disapproved by Congress “may not be reissued in substantially the same form, and a new rule that is substantially the same . . . may not be issued,” the FCC lacks authority to reissue any privacy rules that are “substantially the same” as those in the FCC’s 2016 broadband privacy order.³³⁷

While the Order claims that some baseline statutory privacy provisions could still apply to ISPs, even with the 2017 congressional resolution, that assertion is dubious at best. *First*, voice “calls” are the only telecommunications services specifically mentioned in Section 222. Indeed, the Order waives the FCC’s existing CPNI rules to broadband providers, finding that they “were adopted to address specific concerns in the voice context” and not a “good fit” for broadband.³³⁸ *Second*, the CRA would not permit the FCC to reinstate any one of the invalidated rules (or even some combination of them), even if the FCC did not reinstate all of them.³³⁹ That means the FCC could not reinstate the invalidated rules that would

³³² *Communications Assistance for Law Enforcement Act (CALEA) and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989 (2005).

³³³ Order at paras. 67-68.

³³⁴ 15 U.S.C. § 45(a)(2).

³³⁵ 15 U.S.C. § 45(a)(2).

³³⁶ See Joint resolution providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Federal Communications Commission relating to “Protecting the Privacy of Customers of Broadband and Other Telecommunications Services,” Pub. L. No. 115-22, 131 Stat. 88 (2017) (*2017 CRA*) (stating, consistent with the terms of the CRA, that the rules “shall have no force or effect”).

³³⁷ 5 U.S.C. § 801(b)(2).

³³⁸ Order at para. 359.

³³⁹ Dissenting Statement of Commissioner Brendan Carr, *Data Breach Reporting Requirements*, Report and Order, WC Docket No. 22-21, FCC 23-111, <https://docs.fcc.gov/public/attachments/FCC-23-111A3.pdf>.

extend Section 222 to broadband providers.³⁴⁰ Nor could it reinstate a definition of CPNI that covers data and metadata elements specifically collected by broadband providers.³⁴¹ Without these foundational components, the FCC could take no further action over ISP privacy.

So, far from filling a gap in consumer privacy rules, the Order's decision to apply Title II to broadband would create one. And far from providing lawful justification for Title II, privacy considerations provide one more reason why the Order is arbitrary and capricious.

3. Public Safety, Resiliency, and Reliability

The Order's claim that Title II is necessary for public safety³⁴² rests on a single event that, it turns out, has nothing to do with the FCC's Title II net neutrality rules. In that 2018 incident, a fire department purchased a data-limited plan that cost less than an unlimited data plan. When the fire department hit that pre-specified limit, the service experienced a speed reduction as outlined in its plan before the provider made an exception and lifted the reduction.³⁴³ The FCC invokes this incident in a way that leaves one with the impression that this violated net neutrality.³⁴⁴

But it did not, as the FCC's own rulemaking record makes clear. For one, the FCC's Title II rules do not apply to data plans marketed only to government users like public safety agencies. The 2015 *Title II Order* carved out enterprise plans—like the plan Santa Clara subscribed to—from the definition of “broadband internet access service.”³⁴⁵ For another, the 2015 *Title II Order* expressly allowed data-limited plans, like the plan Santa Clara voluntarily purchased.³⁴⁶ Indeed, the Order notes all of these points and does not disagree with them. That is why the Order studiously avoids stating that this type of issue would be prevented by Title II despite the agency's consistent invocation of the event.³⁴⁷

The Santa Clara incident, to the extent it has any relevance, actually reveals the FCC's deep mischaracterization of public safety in the real world. The Order envisions that public safety professionals will rely on the “best efforts” Internet,³⁴⁸ and traffic would compete with cat videos for scarce bandwidth. But that is not how public safety systems work. Not in the least. Rather, these systems need the kind of priority treatment (known as “preemption”) that Title II would make illegal in the retail context. As FirstNet describes it, preemption is a “mission-critical feature” that “moves first responders to the front of the ‘communications line,’ prioritizing their network needs.”³⁴⁹ In fact, public

³⁴⁰ *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, et al.*, Order, 32 FCC Rcd 5442, at paras. 39-40 (2016), *abrogated by 2017 CRA*.

³⁴¹ *Id.* at paras. 46-105.

³⁴² Order at paras. 51-58, 451-463.

³⁴³ Daniel Lyons, *One More Time: The Verizon-Santa Clara Fire Dispute Has Nothing to Do with Net Neutrality*, American Enterprise Institute (Nov. 13, 2019), <https://www.aei.org/technology-and-innovation/one-more-time-the-verizon-santa-clara-fire-dispute-has-nothing-to-do-with-net-neutrality/>.

³⁴⁴ Order at para. 458.

³⁴⁵ 2015 *Title II Order* at para. 207.

³⁴⁶ *Id.* at para. 82.

³⁴⁷ Order at para. 458-49.

³⁴⁸ Order at para. 52.

³⁴⁹ AT&T, *FirstNet Launches Ruthless Preemption for First Responders* (Dec. 12, 2017), https://about.att.com/story/preemption_for_first_responders.html.

safety represents one of the most obvious applications of network slicing,³⁵⁰ another innovation the Order would threaten to make illegal in the retail context. Prioritizing public safety is no different in concept than allowing an ambulance to bypass traffic congestion to get to the hospital.

Stripped of a single example that proved nothing at all, the Order cannot point to a public-safety consideration that Title II would improve:

- Not outage reporting in the Disaster Information Reporting System (DIRS), which the FCC extended to ISPs, without Title II, to collect outage reports, operational status, and restoration information;³⁵¹
- Not the Wireless Emergency Alert (WEA) program, which is voluntary by statute and already commands participation from the three major wireless carriers;³⁵²
- Not 911 outage reporting, which already applies to cable, satellite, wireless and wireline systems;³⁵³
- Not network resiliency and reliability standards, which the FCC made mandatory on wireless carriers a few years ago;³⁵⁴
- And not disability access during emergencies, which is covered in the *Digital Equity Order*'s nebulous rules over ISPs.³⁵⁵

At bottom, resilient commercial networks and reliable public-safety systems depend on investment and innovation. Thanks to massive investment over the last six years, America's broadband networks are more robust and resilient than ever, especially when compared to networks in countries with far more heavy-handed or Title II-like regulatory regimes. Just look at Europe. When COVID-19 hit and Internet traffic levels suddenly surged to unprecedented levels, median network speeds in America exceeded those in the Old World by 83%.³⁵⁶ Nothing would impair public safety, resiliency, or reliability more than reducing private investment in American networks—which is precisely what Title II threatens to do.

³⁵⁰ See Karen Schulz, *Verizon Accelerates Network Slicing Technology with New Public Safety Use Case*, Verizon (Nov. 28, 2023), <https://www.verizon.com/about/news/network-slicing-technology-public-safety>.

³⁵¹ See *Resilient Networks et al.*, Second Report and Order and Second Further Notice of Proposed Rulemaking, PS Docket No. 21-346 *et al.*, FCC 24-5, at para. 10 (2024) (requiring “cable communications, wireline, wireless, and interconnected VoIP providers (subject providers) to report their infrastructure status information in DIRS daily when the Commission activates DIRS in geographic areas in which they provide service”).

³⁵² See Warning, Alert, and Response Network Act, Title VI of the Security and Accountability for Every Port Act of 2006, Pub. L. No. 109-347, 120 Stat. 1884 (2006) (WARN Act); 47 U.S.C. § 1201(a); 47 C.F.R. § 10.10(d).

³⁵³ 47 C.F.R. § 4.9.

³⁵⁴ See *Resilient Networks et al.*, Report and Order and Further Notice of Proposed Rulemaking, 37 FCC Rcd 8059, at para. 10 (2022).

³⁵⁵ *Digital Equity Order* at para. 102.

³⁵⁶ Anna-Maria Kovacs, *U.S. Broadband Networks Rise to the Challenge of Surging Traffic During the Pandemic*, at 3 (June 2020), <https://georgetown.app.box.com/s/8e76udzd1ic0pyg42fqsc96r1yzkz1jf>.

4. Broadband Access and Infrastructure

The Order asserts that Title II will enhance access to pole attachments and allow for greater regulation of multi-tenant environments (MTEs). But more than 96% of ISPs are already covered by existing rules because they offer some other FCC-regulated service—whether voice telephony, VoIP, or cable television.³⁵⁷ The Order does not dispute that figure.³⁵⁸ We need Title II for 100% of ISPs to deal with something that has to do with only 4% of them? In any event, since 2017, the FCC has faced no regulatory impediments to tightening its rules on MTEs or pole attachments.³⁵⁹

Of the few broadband-only ISPs that exist, the Order utterly fails to demonstrate that they have been stymied from pole access or face higher attachment costs that deter deployment or impede competition. Likewise, the Order offers no examples of broadband-only ISPs' exploiting their status to engage in anti-competitive behavior with respect to MTEs, much less any evidence of a widespread market failure attributable to the existing scope of the MTE regime.

If anything, Title II will deter broadband access and infrastructure deployment. The Commission has historically preempted state, local, and private rules that impair the ability of antenna users to install, maintain, or use such as small satellite TV dishes. In 2021, the Commission preempted state and local regulation of over-the-air reception devices (OTARDs) for fixed wireless access.³⁶⁰ Because the Communications Act preserves some state and local regulation over certain Title II “commercial mobile services,”³⁶¹ the 2021 OTARD rule limited preemption to information services, which at the time included standalone fixed wireless.³⁶² Title II reclassification, however, will likely invalidate the legal basis for the 2021 OTARD rule and open the door for state and local regulation that could frustrate fixed wireless adoption. This is more than theoretical, as state and local governments have called for Title II so they can penalize broadband providers and slow down infrastructure deployment through pretextual regulation.³⁶³

5. Accessibility

The Order asserts that Title II will improve access for those with disabilities.³⁶⁴ In the four paragraphs devoted to the topic, the draft Order identifies no example of an accessibility problem that Title II is necessary to solve. The FCC already has broad authority under the Twenty-First Century Communications and Video Accessibility Act (CVAA) to ensure that “advanced communications services” are accessible to and usable by people with disabilities. The CVAA does not turn on Title II.

³⁵⁷ About 950,000 Added Broadband in Q3-2023, <https://leichtmanresearch.com/wp-content/uploads/2023/11/LRG-Press-Release-11-13-2023.pdf>; accord *Restoring Internet Freedom Remand Order* at para. 73; Order at para. 88.

³⁵⁸ Order at para. 88.

³⁵⁹ See, e.g., *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Fourth Report and Order, Declaratory Ruling, and Third Further Notice of Proposed Rulemaking, WC Docket No. 17-84, FCC 23-109 (2023); *Improving Competitive Broadband Access to Multiple Tenant Environments*, Report and Order and Declaratory Ruling, 37 FCC Rcd 2448 (2022).

³⁶⁰ *Updating the Commission's Rule for Over-the-Air Reception Devices*, Report and Order, 36 FCC Rcd 537, at para. 20 (2021).

³⁶¹ See 47 U.S.C. § 332(c)(7)(A).

³⁶² 47 C.F.R. § 1.4000(a)(5).

³⁶³ Order at para. 80 (crediting the CPUC's argument that Title II would allow state and local governments to apply “safety regulations” to ISPs).

³⁶⁴ Order at paras. 102-105.

Furthermore, the *Digital Equity Order* already governs disparate treatment by ISPs against persons with disabilities.

III. CONCLUSION

As I noted at the beginning of this proceeding, I am well aware that neither my position nor reason will prevail today. Reinstating Title II is now an article of faith for many in Washington (and a handy fundraising tool to boot).

But make no mistake: this FCC decision to impose Title II on the Internet will be overturned by the courts, by Congress, or by a future FCC.

I dissent.