U.S. Chamber of Commerce

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Safeguarding and Securing the Open Internet	)	WC Docket No. 23-320
	)	

REPLY COMMENTS OF THE U.S. CHAMBER OF COMMERCE

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I. Introduction and Summary

The U.S. Chamber of Commerce ("Chamber") respectfully submits these reply comments in response to the notice of proposed rulemaking ("NPRM") in the above-titled proceeding.[1] The record developed in the initial comments in this proceeding confirms the Chamber's conclusions that American broadband networks have flourished under the Commission's current tailored approach to broadband regulation, made possible by Title I classification. In addition, none of the comments provide a persuasive reason to believe that Title II classification is necessary for any of the public policy goals identified by the Commission in its NPRM. Nor do any comments alter the conclusion that a new Title II order would be unlawful and destined to be vacated by the U.S. Supreme Court. The Chamber urges the Commission to stay the course and preserve broadband's current Title I classification, while focusing on pro-competitive, bipartisan solutions that will help ensure American leadership in next-generation connectivity.

II. The Record Shows that the Internet Continues to Thrive Under the Restoring Internet Freedom Order's Targeted Approach, While Title II Regulation Presents Grave Risks to the Broadband Industry and Consumers.

As the Chamber emphasized in its opening comments, the Internet continues to prosper in an evolving national economy that increasingly relies on broadband for connectivity.[2] Specifically, the Chamber demonstrated how the *Restoring Internet Freedom Order*'s ("RIF Order")[3] targeted regulatory approach has enabled increased broadband investment, deployment,

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[1] *Safeguarding and Securing the Open Internet*, Notice of Proposed Rulemaking, WC Docket No. 23-320, FCC-23-83, (rel. Oct. 20, 2023), https://tinyurl.com/y6hhry6y ("NPRM").

[2] Comments of the U.S. Chamber of Commerce, WC Docket No. 23-320, at 3 (filed Dec. 14, 2023) ("Chamber Comments").

[3] *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (rel. Jan. 4, 2018), http://tinyurl.com/mt3a7bpj ("RIF Order").

and speeds while decreasing prices for consumers.[4] Additionally, its comments highlighted how this sustained growth powered the United States through the COVID-19 pandemic and equipped American broadband networks to outperform their European counterparts.[5] The Chamber also explained that Title II regulation historically has had the opposite effects—hampering investment and stifling innovation for consumers—and emphasized that these effects are likely to be even more severe given that the NPRM is even more onerous than its 2015 counterpart.[6] Significant record support exists for each of these conclusions.

A. Evidence Submitted by Numerous Commenters Demonstrates that the Status Quo Has Fostered Broadband Investment, Deployment, Speeds, Affordability, and Competition.

Like the Chamber underscored, "the data bears out that under the RIF Order, the Internet has not only continued to operate, but has thrived"[7]—as demonstrated by improved investment, deployment, speed, and price.[8] The record bolsters this conclusion on each of these metrics, resulting in a robustly competitive marketplace that cannot justify heavy-handed regulatory intervention.

Investment. In contrast to the implausible claims by some that Title II regulation has no negative impact on investment,[9] the weight of the record emphasizes how targeted broadband regulation under the RIF Order has allowed investment to proliferate.[10] For example, one

[4] Chamber Comments at 3, 6-12.

[5] *Id*. at 3, 12-14.

[6] *Id.* at 15-21.

[7] *Id.* at 6.

[8] *Id.* at 6-12.

[9] Comments of Free Press, WC Docket No. 23-320, at 74 (filed Dec. 14, 2023) ("Free Press Comments").

[10] *See e.g.*, Comments of USTelecom and Opposition to Petitions for Reconsideration, WC Docket Nos. 23-320, 17-108, 17-287, 11-42, at 37-38 (filed Dec. 14, 2023) ("USTelecom Comments") (explaining that "[s]ince 2018, private sector investment in broadband has increased dramatically"); Comments of AT&T and Opposition to Petitions for Reconsideration, WC Docket Nos. 23-320, 17-108, 17-287, 11-42, at 8 (filed Dec. 14 2023) ("AT&T Comments") (noting that "[i]nvestment has surged"); Comments of Comcast Corporation, WC Docket No. 23-320, at 33-36 (filed

commenter explained that U.S. broadband and wireless companies increased capital spending by 31 percent from 2019 to 2022—even while expanding broadband access and 5G wireless services.[11] As the commenter noted, the Progressive Policy Institute found that this robust "investment surge is holding down prices" and generated faster average download speeds compared to Taiwan, Japan, South Korea, and any European country.[12] Rather than suggesting a *decrease* in capital spending,[13] the data reiterates the investment boom under targeted regulation, evidenced by the broadband industry's unprecedented $102.4 billion investment in 2022 alone.[14]

The record also reinforces the Chamber's analysis showing that investment trends are similar in the wireless context.[15] For instance, one commenter noted that wireless investment continues to flourish, with a 12 percent increase to $39 billion in 2022.[16] Another appended a comprehensive economic analysis concluding that "U.S. mobile wireless providers invested a total of nearly $364 billion in nominal dollars ($434 billion in December 2022 dollars) between 2010 and 2022, which is an average investment rate of more than $30 billion/year in nominal dollars ($36 billion/year in December 2022 dollars)."[17] While Free Press would dismiss the period of depressed investment from 2015-2017 while the FCC's Title II Order was in effect as a

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Dec. 14, 2023) ("Comcast Comments") (describing "unprecedented levels of private sector investment"); Comments of CTIA, WC Docket No. 23-320, at 1-2, 13-14 (filed Dec. 14, 2023) ("CTIA Comments") (highlighting that "the light-touch Title I regulatory framework that fosters a dynamic broadband ecosystem drives investment and innovation").

[11] Comcast Comments at 33 n.102 (citing Michael Mandel & Jordan Shapiro, *Investment Heroes 2023*, Progressive Policy Institute, at P7 (Oct. 2023), http://tinyurl.com/6jp6f9f8).

[12] *Id.* (citing Michael Mandel & Jordan Shapiro, *Investment Heroes 2023*, Progressive Policy Institute, at P7 (Oct. 2023), http://tinyurl.com/6jp6f9f8).

[13] *See* Free Press Comments at 92-93 (arguing that "[t]he Pai FCC's *RIF Order* was followed by a sharp and continuous decline in telecom capital spending").

[14] Chamber Comments at 6-7; USTelecom Comments at 37; AT&T Comments at 8.

[15] Chamber Comments at 7.

[16] AT&T Comments at 10 (citing CTIA Comments Exhibit A, Bryan Keating, *An Economic Analysis of Mobile Wireless Competition in the United States*, Compass Lexecon & CTIA (Dec. 11, 2023) ("CTIA Exhibit A")); *see also* Chamber Comments at 7-8.

[17] CTIA Comments Exhibit A at 5 (citations omitted).

"slight pause" that does not reflect the regulatory environment,[18] the weight of the record tells a different story, and confirms that "[t]he wireless industry is highly competitive, having grown since its infancy under a long bipartisan history of light-touch, market-oriented policies."[19]

Deployment. The record also bears out that the RIF Order's targeted regulation has encouraged greater broadband deployment, with several commenters focusing on new data released in 2023.[20] This improved deployment shows that the marketplace already fosters what even proponents of Title II regulation agree marks success: "the progress in making [network] technology available to users and the total value of economic activity that the technology then enables."[21] As one commenter highlighted, "51.5% of primary residences now have access to fiber broadband services."[22] According to the Fiber Broadband Association, "2023 set a new record for the highest annual [fiber-to-the-home] FTTH growth, with nine million homes newly passed by network operators this year alone."[23] This unprecedented growth in 2023 facilitated 78 million homes, a 13 percent increase, passed and marketed to consumers.[24] Enhanced broadband deployment does not stop there. Fiber broadband services pass almost 69 million

[18] Free Press Comments at 94.

[19] CTIA Exhibit A at 48-49.

[20] Chamber Comments at 8-11; *see e.g.*, Comments of NCTA – The Internet & Television Association, WC Docket Nos. 23-320, 17-108, 17-287, 11-42, at 88-90 (filed Dec. 14, 2023) ("NCTA Comments") (emphasizing that "Americans have more choice in broadband providers today than ever before" because of greater investment, "enhancement of existing broadband networks and deployment of new broadband networks"); Comments of T-Mobile USA, Inc., WC Docket No. 23-320, at 12-13 (filed Dec. 14, 2023) ("T-Mobile Comments") (describing rapid expansion of 5G networks).

[21] *See* Free Press Comments at 91 (stating that "[w]hat really matters is not just the raw total spent on network technology, but the progress in making that technology available to users and the total value of economic activity that the technology then enables").

[22] Comments of The Free State Foundation, WC Docket No. 23-320, at 33 (Filed Dec. 14, 2023) ("Free State Foundation Comments") (citing Masha Abarinova, *More than 50% of U.S. Homes Now Have Access to Fiber, FBA Says*, FierceTelcom (Dec. 11, 2023) http://tinyurl.com/yc4z9ud7).

[23] *Fiber Broadband Association Reports North America Hit Highest Annual FTTH Growth Record*, Fiber Broadband Association (Dec. 11, 2023), http://tinyurl.com/4svy3hhy ("FBA Dec. 2023 Release"); *see* Free State Foundation Comments at 33 (citing Abarinova, *supra* note 22).

[24] FBA Dec. 2023 Release.

unique homes.[25] Significantly, another commenter notes that the FCC's November 2023 Broadband Map reinforces these strong deployment trends, showing that "unserved homes and businesses have decreased to 7.2 million locations, down from 8.3 million locations" merely six months earlier.[26]

Indeed, newly available economic analysis suggests that the digital divide is narrower than ever. As the Chamber noted in its opening comments, according to FCC data, roughly 90 percent of U.S. households had access to two or more fixed internet service providers ("ISPs") offering 25/3 Mbps service at the end of 2021.[27] The record now shows that access to fixed ISPs is increasing across a broader metric: "U.S. locations," which "include both residential and business locations that the FCC considers to be serviceable with mass market broadband."[28] According to a new analysis of FCC broadband collection data, "[n]inety four percent of U.S. locations have access to at least one fixed broadband provider offering at least 25/3 Mbps service, and 80 percent of those have at least two fixed providers offering service."[29] Additionally, "91 percent [of] U.S. locations have access to at least one fixed broadband provider offering at least 100/20 Mbps service, and 60 percent of those have at least two fixed providers offering service."[30]

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[25] *Id.*

[26] Free State Foundation Comments at 31 (citing Chairwoman Jessica Rosenworcel, *National Broadband Map 3.0: Thankful for Continued Improvements*, FCC (Nov. 17, 2023), http://tinyurl.com/53rhub6x).

[27] Chamber Comments at 9 & n.26.

[28] NCTA Comments Exhibit A, Declaration of Mark Israel, Bryan Keating, and Allan Shampine, at 12 (filed Dec. 14, 2023) ("NCTA Exhibit A") (analyzing FCC Broadband Data Collection data, FCC Broadband Data Collection, Dec. 31, 2022 As of Date, http://tinyurl.com/mr3uymdf (last updated Aug. 16, 2023) (retrieved Aug. 28, 2023) ("FCC Broadband Data Collection")). The report further clarifies that "[l]ocations" for this purpose "can represent multiple households or businesses." *Id.*

[29] *Id.* at 9-12.

[30] *Id.*

The record also underscores the RIF Order's pivotal role in fostering 5G deployment.[31] One mobile ISP observed that it "and the wireless industry have invested in widespread 5G infrastructure deployments to deliver nearly ubiquitous 5G coverage."[32] The commenter also noted that the U.S. has the fastest 5G speeds and is "the largest country in the world with three nationwide 5G networks."[33] Another appended an economic analysis noting that "[n]inety-seven percent of the U.S. population has access to 5G service, and 90 percent has access to 5G service through at least two providers."[34] And another predicted that North America will lead 5G subscription penetration with 92 percent of mobile subscriptions (approximately 430 million subscribers) by 2029.[35]

Speeds. Additionally, the record endorses the Chamber's comments underscoring that "[t]he RIF Order's targeted approach has also propelled faster Internet speeds for Americans across the country."[36] For example, one commenter submitted a new economic analysis showing that "median download speeds have approximately quadrupled over the past seven years and have doubled in the past three years."[37] Another commenter cited data showing that "[s]ince 2015, the download speeds offered in providers' most popular tier increased by 141.5%

[31] *See e.g.*, T-Mobile Comments at 11-15 (describing 5G investment and expansion amidst increased wireless traffic); Comments of Ericsson, WC Docket No. 23-320, at 5-13 (filed Dec. 14, 2023) ("Ericsson Comments") (shedding light on 5G growth and innovation).

[32] T-Mobile Comments at 11.

[33] *Id.* at 13 (citing *Positions: Competition*, CTIA, http://tinyurl.com/3vv7f48n (last visited Jan. 13, 2024)).

[34] NCTA Exhibit A at 9.

[35] Ericsson Comments at 6 (citing *Ericsson Mobility Report*, Ericsson, at 4 (Nov. 2023), http://tinyurl.com/yc7tmhpk ("Ericsson Mobility Report")); Ericsson Mobility Report at 4, 6-7.

[36] Chamber Comments at 11.

[37] CTIA Exhibit A at 13 (citations omitted).

while upload speeds increased by nearly 285%."[38] Strikingly, "in the fastest-offered tier, download speeds increased by 117.1% with upload speeds going up by nearly 90%."[39]

Prices. Commenters also echoed the Chamber's point that targeted regulation enables better prices for consumers.[40] One commenter noted that while "[i]nflation has been commanding headlines and is a significant source of concern for American consumers, . . . broadband has been a notable bright spot."[41] The commenter pointed to analysis of FCC data illustrating that "weighted monthly broadband prices have gone down significantly across multiple speed tiers in recent years."[42] Another commenter presented data showing that, "[f]rom 2022 to 2023, adjusted for inflation, the price of providers' most popular broadband speed tier dropped by 18.1%."[43] At the same time, "the price of providers' fastest speed tier option dropped by 6.5%."[44] This follows improving price trends from 2015 to 2023, when "Real BPI-Consumer Choice tier prices dropped by 54.7%" and "Real BPI-Speed tier prices dropped by 55.8%."[45]

[38] USTelecom Comments at 39 (citing Arthur Menko, *2023 Broadband Pricing Index: Broadband Prices Continue to Decline*, USTelecom, at 3 (2023), http://tinyurl.com/mwfea4ys ("USTelecom 2023 Broadband Pricing Index")).

[39] *Id.* (quoting USTelecom 2023 Broadband Pricing Index at 3).

[40] Chamber Comments at 11-12; *see e.g.*, USTelecom Comments at 38-39; Comcast Comments at 29-32 (citing U.S. Bureau of Labor Statics ("BLS") and Consumer Price Index ("CPI") data "show[ing] that, between 2010 and 2022, inflation-adjusted broadband prices *declined* 22 percent").

[41] Comcast Comments at 30.

[42] *Id.* (citing Scott Wallsten, *Broadband Prices Mostly Stable Last Year*, Technology Policy Institute (Dec. 22, 2022), http://tinyurl.com/3r292bf4).

[43] USTelecom Comments at 38-39 (citing USTelecom 2023 Broadband Pricing Index at 2).

[44] *Id.* (citing USTelecom 2023 Broadband Pricing Index at 2).

[45] USTelecom 2023 Broadband Pricing Index at 3; *see* USTelecom Comments at 39 (noting that the USTelecom 2023 Broadband Pricing Index shows that the 2022-2023 price "decrease is consistent with the long-term trend") (citing NCTA Exhibit A at 34-37).

Like the Chamber, commenters noted that prices also have decreased for wireless services since the RIF Order has been in effect.[46] An economic analysis submitted by one commenter notes that "the price of wireless has declined over the last 24-month period, while over the same period, once-in-a-generation inflationary pressures have raised the prices of other products by 12 percent."[47] Decreased prices have not come at the cost of quality service. As the economist explained, mobile subscribers have enjoyed "higher quality (in the form of more generous data plans and higher quality networks resulting from substantial investment in those networks by mobile network operators) even as they pay less."[48]

Competition. Ultimately, the improved investment, deployment, speed, and price fostered by the RIF Order have cultivated a competitive market that does not need heavy-handed Title II regulation.[49] Consumers now benefit from robust competition with respect to fixed, mobile, and satellite broadband options.[50] For example, and in addition to the deployment data discussed above, economists analyzing FCC data found that 80 percent of U.S locations with at least 25/3 Mbps service "have access to two or more fixed broadband providers, with 49 percent having access to three or more."[51] As one commenter highlighted, fixed broadband competition will only strengthen in the future "with the intensifying deployment of nascent competitive services such as fixed wireless broadband."[52] This strong competition reinforces the

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[46] Chamber Comments at 11-12 (highlighting that "the era of targeted regulation has been marked by significantly decreased prices for consumers" and that "[f]or wireless services, CTIA reports at 73 percent decrease per megabyte prices for 2017.") (citing 2023 Annual Survey Highlights, CTIA, at 8 (July 25, 2023), http://tinyurl.com/uu6akehw).

[47] CTIA Exhibit A at 3 (analyzing Bureau of Labor Statistics data).

[48] *Id.* at 29.

[49] *See e.g.*, Comcast Comments at 18 (underscoring that "[u]nlike the early twentieth century telephone monopolies Title II was designed to regulate, there is no evidence that broadband providers today have the sort of monopoly power that would justify application of common-carrier regulation").

[50] NCTA Exhibit A at 10-25.

[51] *Id.* at 11-12 (citing FCC Broadband Data Collection).

[52] AT&T Comments at 9 (citing NCTA Exhibit A at 10-20).

Commission's 2022 analysis that the broadband market "is on the cusp of generational change," with potential for increased competition through new technologies including 5G fixed wireless services.[53] Another commenter cited data showing that fixed wireless services have increased by 4.45 million net adds—800,000 over five quarters—as of Q2 2023.[54] This increased subscribership continued in Q3 2023, as "T-Mobile and Verizon alone added 941,000 fixed wireless customers."[55]

Furthermore, robust competition exists in the mobile wireless and satellite broadband marketplace. In the mobile wireless context, data appended by one commenter shows that "the main facilities-based carriers have invested in nationwide coverage and now offer nearly ubiquitous coverage across the country."[56] Additionally, FCC data demonstrates that "5G service covers 97 percent of the population, and . . . the great majority of locations have a choice of providers."[57] This increased coverage comes as "wireless traffic grew at a compound annual rate of approximately 55 percent between 2010 and 2022."[58] In the satellite context, competition

[53] *2022 Communications Marketplace Report*, Report, 37 FCC Rcd 15514, ¶ 4 (2022); *see* T-Mobile Comments at 53-54 (encouraging the Commission, in the event that it reclassifies BIAS as a Title II service, to exercise broad forbearance based on "well-documented findings" of "[r]obust broadband competition").

[54] NCTA Exhibit A at 16 (citing *About 840,000 Added Broadband in 2Q 2023*, Leichtman Research Group (Aug. 14, 2023), http://tinyurl.com/36dpr2jt).

[55] *Id.* (citing Luke Bouma, *T-Mobile is the Fastest Growing Home Internet Provider in the United States as Cord Cutting 2.0 Grows*, Cord Cutters News (Nov. 13, 2023), http://tinyurl.com/59bb9k7w).

[56] CTIA Exhibit A at 15-16 (citing *5G & 4G Coverage Map*, T-Mobile, http://tinyurl.com/386b3tmu (last visited Jan. 13, 2024) (stating "98% of Americans have 5G coverage from T-Mobile today'"); *Explore Verizon 5G and 4G LTE Network Coverage in your Area*, Verizon, http://tinyurl.com/4zru4rw ("Our 4G LTE network covers more than 2.68 million square miles, 327 million people and over 99% of the U.S. population —and continues to expand"); *AT&T Coverage Map*, CoverageMap.com, http://tinyurl.com/mw3mfjew (last updated Nov. 20, 2023) ("The AT&T 4G LTE network is the largest network in the United States, covering 57.0% of the land area in the country and over 99% of Americans."); *USA 5G Experience Report*, Open Signal (July 2023), http://tinyurl.com/375jz7j2).

[57] NCTA Exhibit A at 21-22 (citing FCC Broadband Data Collection and the U.S. Census Bureau).

[58] CTIA Exhibit A at 17 (citing *CTIA's Wireless Industry Indices Report*, CTIA, Chart 1 (July 2023)).

defines the burgeoning broadband marketplace enhanced by new capabilities including low-earth orbit satellites.[59]

The record makes it clear: the broadband industry "do[es] not show any kind of market dysfunction, let alone a market failure that could conceivably justify the dramatic expansion of regulatory requirements associated with Title II."[60] As another commenter explained: "[p]ervasive regulation of broadband should require evidence of market failure sufficient to justify the costs and risks of that regulation. No such market failure exists here."[61] On the contrary, evidence submitted by commenters reinforces that the broadband industry is a "dynamic, competitive marketplace" enriched by "innovative services that customers demand."[62] Ultimately, this ongoing investment surge fosters a broadband marketplace that "serves to protect Internet openness and wards off the need for imposing Title II."[63]

Accordingly, rather than pursue heavy-handed utility-style oversight, the Commission should continue its focus on the existing targeted regulatory approach, which fosters a marketplace characterized by rapid innovation, increased offerings, better prices for consumers, and robust competition.

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[59] NCTA Exhibit A at 23-25.

[60] *See* Comments of WISPA – *Broadband Without Boundaries*, WC Docket No. 23-320, at 13 (filed Dec. 14, 2023) ("WISPA Comments").

[61] NCTA Exhibit A at 55.

[62] *See* USTelecom Comments at 4 (showing that the Commission's proposed Title II regulation "will stagnate the current, dynamic, competitive marketplace, diverting resources away from innovative services that customers demand"); *see also* NCTA Exhibit A at 55 (stating that "the broadband industry is highly competitive and dynamic, and broadband competition and availability are increasing widely including by new technologies and new entrants"); Comcast Comments at 28 (explaining that "[b]y the end of the decade, as cable, fiber, fixed wireless, and LEOs compete for market share, most Americans will be able to choose from among several fixed broadband providers, and even the hardest to serve households will be able to choose between at least two providers").

[63] CTIA Comments at 13.

B. The Record Emphasizes that the RIF Order's Targeted Approach Propelled American Broadband Networks to Thrive During the COVID-19 Pandemic.

As the Chamber's opening comments articulated, "U.S. broadband networks were able to pass the tests posed by COVID-19 with flying colors, while nations with onerous, utility-style regulation struggled."[64] Multiple commenters drew the same conclusion from the facts.[65] These conclusions echo the Commission's own endorsement of broadband companies' performance during the pandemic, which the FCC described as going "'above and beyond the call to keep Americans connected during the pandemic.'"[66]

In particular, several commenters cited data showing that "the U.S. fixed-broadband download speed exceeded the global speed by 83%, and those of the EU, EU-4, and OECD by 35%, 30%, and 55% respectively."[67] Specifically, a commenter noted that "U.S. mean download speed was 138 Mbps while the weighted mean download speeds in the EU, EU-4 (Germany, France, Italy, and Spain), and OECD were 102 Mbps, 106 Mbps, and 89 Mbps."[68]

U.S. broadband networks' impressive performance during COVID-19 also enhanced mobile download speeds.[69] "The U.S. mobile average (mean) download speed was 37% higher

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[64] Chamber Comments at 14.

[65] *See e.g.*, USTelecom Comments at 44-45 (emphasizing that "[t]he progress the U.S. broadband industry has made in recent years is highlighted by the ability of ISPs to withstand the unprecedented challenges of the COVID-19 pandemic"); CTIA Comments at 8-9 (underscoring that "[t]he COVID-19 pandemic demonstrated the strength and resiliency of U.S. broadband networks in the absence of common carrier regulation"); NCTA Comments at 2 (stating that "broadband networks performed remarkably well in handling a significant surge in traffic and reliably served as the primary means by which Americans learned, worked, accessed medical care, and socialized from the safety of their homes"); NCTA Exhibit A at 39 (noting that "[t]he more heavily regulated Europe has had less widespread deployment by fewer firms than the U.S. has")

[66] AT&T Comments at 16 (citing *Companies Have Gone Above and Beyond the Call to Keep Americans Connected During Pandemic*, FCC, http://tinyurl.com/bdfw32z7 (last updated Jan. 25, 2021)).

[67] Anna-Maria Kovacs, *U.S. Broadband Networks Rise to the Challenge of Surging Traffic During the Pandemic*, Georgetown Center for Business and Public Policy, at 3 (June 2020), http://tinyurl.com/rz9a86v4 ("Kovacs Study") (cited by *see e.g.*, USTelecom Comments at 44; CTIA Comments at 9).

[68] USTelecom Comments at 44 (citing Kovacs Study at 3).

[69] *See* Kovacs Study at 3 (noting that U.S. mobile-broadband speed also outpaced European networks).

than the global rate, and 9%, 15%, and 16% higher than those of the EU, EU-4, and OECD."[70] The U.S. outshines even when evaluating median rates, surpassing the "global average by 70%" and "the EU, EU-4, and OECD by 6%, 18%, and 11% respectively."[71] By contrast, under an all-encompassing regulatory approach, Europe now faces the need to eliminate regulatory barriers and strengthen its broadband networks.[72] Accordingly, the Commission should continue its targeted regulatory approach, which commenters agree has equipped American broadband networks to excel during the COVID-19 global pandemic.

C. Many Commenters Agree That Returning to Title II Regulation Would Generate Significant Risks to Investment and Innovation.

As the Chamber explained in its opening comments, in contrast with the success of the RIF Order's approach, returning to Title II regulation would decrease investment and generate other undesirable outcomes for consumers across the country.[73] Contrary to opinions that "fears about a negative impact from Title II . . . are wholly irrational,"[74] numerous commenters emphasize that Title II regulation poses significant risks for broadband. For example, the Phoenix Center for Advanced Legal & Economic Public Policy Studies ("Phoenix Center")[75] cited its study released last month, which found that "Title II regulation (and its ongoing prospects) has resulted in a lost investment of $81.5 billion over . . . ten years (2011-2020), or

[70] *Id.*

[71] *Id.*

[72] USTelecom Comments at 38 (citing Théophane Hartmann, *Breton's View of EU Geopolitics in the Telecom Sector vis-à-vis China, US*, EURACTIV (Oct. 12, 2023), http://tinyurl.com/m5frd9v6; *see* Thierry Breton, *A 'Digital Networks Act' to Redefine the DNA of Our Telecoms Regulation*, LinkedIn (Oct. 10, 2023), http://tinyurl.com/nhk5fjer.

[73] Chamber Comments at 15-21.

[74] *See* Free Press Comments at 90.

[75] Comments of the Phoenix Center for Advanced Legal & Economic Public Policy Studies, WC Docket No. 23-320 (filed Dec. 14, 2023).

$8.1 billion annually."[76] According to the study, this lost investment decreased information sector employment opportunities by 81,494 jobs—or 2.9 percent of total sector employment.[77] Furthermore, the study estimates that Title II heavy-handed regulation has reduced Gross Domestic Product ("GDP") by $145 billion annually, resulting in $1.45 trillion lost over ten years.[78]

Commenters agree that Title II reclassification would undercut the competitive broadband networks fostered by the current regulatory environment,[79] thereby threatening an ecosystem that "has grown tremendously in breadth and depth over the past decades, marked by an exponential increase of users and their usage of the internet."[80] For example, economists cited by one commenter explain that "[t]he *NPRM*'s proposed regulation will chill investment during an important phase of the industry where competition and dynamism is increasing and multiple new access technologies are being deployed."[81]

In particular, "the size and importance of the broadband industry" make it more likely that "long-term effects of the proposed utility-style regulation are likely to be substantial."[82] Heavy-handed regulation under Title II would emulate the European broadband ecosystem which, as discussed above, succumbed to numerous challenges during the COVID-19

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[76] George S. Ford, *Investment in the Virtuous Circle: Theory and Empirics*, Phoenix Center, at 22 (Dec. 2023), http://tinyurl.com/yeuzsh8w ("Ford December 2023 Study").

[77] *Id*. at 23.

[78] *Id.* at 23-24.

[79] *See* Comcast Comments at 18 (citing Clay Sturgis, *Broadband Industry Market and Transaction Trends 2023 Update*, Moss Adam (June 30, 2023), http://tinyurl.com/553dd5am) (stating that "Federal oversight of broadband . . . [including] both state and federal regulation of internet service providers (ISPs) creates high barriers to entry for service providers"); Free State Foundation Comments at 45-59 (demonstrating that Title II regulation "would cause harm to innovation, investment, and consumer access to broadband").

[80] *See* USTelecom Exhibit A, Michael Kende et. al, *Evolution of the Internet in the U.S. Since 2015*, Analysis Mason & USTelecom, at 4 (Dec. 12, 2023) (describing the evolution of the internet from dial-up access to "sophisticated wireless applications for individuals and enterprises").

[81] NCTA Exhibit A at 6.

[82] *Id.* at 39, 47-55.

pandemic.[83] In addition, European broadband lags behind the U.S. overall, with American broadband networks "consistently [having] broadband more widely available than in Europe, particularly with respect to 'rural' areas."[84] For example, 60 percent of European rural households have access to 30 Mbps or higher fixed broadband.[85] In stark contrast, 91 percent of American rural households have access to fixed broadband measuring similar speeds.[86] Rather than foster continued growth, Title II regulation would stunt the broadband industry, "one of the great success stories of the U.S. economy."[87] Thus, commenters who suggest that "no valid data . . . support[s]" the claim that regulation hinders investment are mistaken.[88] Instead, the facts underscore that, absent a targeted regulatory approach, the benefits abounding under the RIF Order—including improved investment, deployment, speed, price, and competition—could be reversed.[89]

Relatedly, and again consistent with the Chamber's opening comments, [90] others in the record emphasized the negative impact that Title II costs have on rural and underserved areas. One commenter emphasized the substantial increases experienced by its members in fiber-to-the-premises deployments for rural communities, from 79.3 percent in 2022 to 83.5 percent in 2023.[91] Additionally, "broadband subscription rates for speeds between 100 Mbps and 1 gig

[83] *See supra* Section II.B.

[84] NCTA Exhibit A at 47-55 (comparing American and European broadband environments).

[85] *Id.* at 48 (noting that European "rural" areas are defined more broadly than in the U.S.).

[86] *Id.*

[87] *Id.* at 55.

[88] *See* Free Press Comments at 89.

[89] CTIA Exhibit A at 49 (emphasizing that "Title II is not necessary to create or intensify competition, and in fact, may stifle the very investment that has led the industry to this point of widespread availability, low prices, diversity in plans and offerings, and flourishing innovation").

[90] Chamber Comments at 17-19.

[91] Comments of NTCA–The Rural Broadband Association, WC Docket No. 23-320, at 5 (filed Dec. 14, 2023).

increased from 36.7% in 2022 to 48.5% in 2023."[92] Returning to Title II regulation could jeopardize these key improvements in rural communities by smaller ISPs, "who are critical to a vision of universal connectivity."[93] Ultimately, the facts underscore that the FCC's regulatory approach should not "shackle smaller providers with unnecessary regulatory burdens."[94]

The record also reinforces the Chamber's conclusion that "the impacts of this especially onerous Title II regime are likely to be particularly severe."[95] The negative impacts of heavy-handed Title II regulation could be even more dramatic than anticipated because the Commission's "reclassification regime is more intrusive than the one the FCC adopted in . . . 2015[.]"[96] As the Phoenix Center study articulates, the proposed Title II reclassification includes "far-reaching new purposes cited by the 2023 NPRM as motives for Title II regulations, such as national security and cybersecurity, which had never been part of the debate or scope of potential Commission regulations until now."[97]

Overall, rather than dismissing "the return of light-touch Title II and basic Net Neutrality rules [as] a total non-factor,"[98] commenters strongly reinforced the Chamber's analysis that a targeted approach increases broadband investment, deployment, speed, and price—as evident by the U.S. networks' success during the tenure of the RIF Order and through the COVID-19 pandemic, in particular. Furthermore, the record supports that Title II would risk investment and innovation. Accordingly, the Commission should follow the data, refrain from imposing Title II

[92] *Id.*

[93] *See id.* at 2.

[94] *See* WISPA Comments at 11.

[95] Chamber Comments at 19.

[96] Ford December 2023 Study at 24.

[97] *Id.* at 25 (emphasis removed).

[98] *See* Free Press Comments at 120 (suggesting that "ISPs think broadband is a great, extremely profitable business to be in, and that the return of light-touch Title II and basic Net Neutrality rules are a total non-factor").

heavy-handed regulation on the broadband ecosystem, and continue the targeted regulatory approach of the status quo.

III. The Record Refutes the FCC's New Policy Justifications for Reclassification.

Apart from the economic consequences of reclassification, as the Chamber showed in its opening comments, the Commission has not provided specific examples of what it plans to do with additional Title II authority, why such authority is necessary, or in some instances, how the authority it is seeking is within its jurisdiction.[99] The FCC has instead asked numerous questions about how it could use expanded authority to effect change in a grab bag of new policy areas that are unrelated to open internet issues, and has looked to commenters to identify why it needs such authority. In so doing, the agency perhaps hoped that commenters would provide the specifics that the NPRM could not offer, but the record here has failed to provide the Commission with adequate support of any harms that might require reclassification.

Instead, the record strongly supports the Chamber's assertion that the Commission is using the issue of reclassification as a trojan horse for unrelated policies.[100] In many cases, the Commission appears to be seeking new authority for the sake of authority, without any coherent justification for how that authority might be employed. As one commenter put it, the Commission essentially asks if "by reclassifying BIAS, the Commission can claim more power

[99] *See* Chamber Comments at 31-38.

[100] *See e.g.* Comcast Comments at 5 n.11 ("The NPRM's invocation of issues such as national security, public safety, and privacy is a series of red herrings."); NCTA Comments at 5 ("The NPRM makes no bones about how sweeping this claim to power is; it asserts that Title II reclassification of broadband would enable the Commission not only to adopt Open Internet rules—which had been the Commission's only supposed justification until recently—but also to address all manner of other items on its policy wish list, including national security, cybersecurity, privacy, network resiliency, and over a half-dozen other newfound issues. Under this view of the world, Title II reclassification gives the Commission a blank check to legislate in the broadband arena—an outcome clearly at odds with the statutory authority granted to the Commission by Congress."); AT&T Comments at 24 ("To justify Title II reclassification, therefore, the NPRM ultimately relies not so much on the familiar "net neutrality" boogeymen as on its wish to undertake unrelated regulatory adventures that the 2015 Title II Order never even imagined, such as new rules to govern network reliability, resilience, and cybersecurity.").

for itself to act in more areas."[101] "That framing," the commenter continued, "stacks the deck in favor of reclassification, as it is nothing more than a tautology: Would the Commission have more regulatory authority if it gave itself more regulatory authority?"[102]

The record also shows that the Commission's newly chosen justifications for Title II reclassification, such as privacy, security, and network resiliency, all raise questions that "go beyond the well-developed open internet conduct and transparency rules."[103] Even proponents of reclassification and these newly minted justifications concede that "[t]his record does not provide a useful forum for developing a record on such complex issues[,]"[104] and that considering them "would require additional proceedings, with records focused on their technical aspects, specific costs and benefits, and legal considerations."[105] The record affirms Title II reclassification of broadband is a solution in search of a problem. For example, the few cybersecurity and privacy harms that commenters alleged are not clearly solved by reclassification, especially without the proper statutory forbearance analysis that "provide[s] reasoned explanation for [the Commission's] action."[106]

Indeed, beyond simply not providing enough evidence of the need for reclassification, the record demonstrates that reclassification would cause immediate and substantial harms in several of the areas that the FCC plans to use its new authority. The FCC's involvement in each of these

[101] CTIA Comments at 22.

[102] *Id*.

[103] Comments of Microsoft Corporation, WC Docket No. 23-320, at 14 (filed Dec. 14, 2023) ("Microsoft Comments").

[104] Comments of Public Knowledge, WC Docket No. 23-320, at 66 (filed Dec. 14, 2023) ("Public Knowledge Comments"); *see also* Microsoft Comments at 14 ("The current proceeding is not an appropriate venue for weighing and implementing regulatory proposals that go beyond the well-developed open internet conduct and transparency rules.").

[105] Microsoft Comments at 14.

[106] *FCC v. Fox Television Stations Inc.*, 556 U.S. 502, 515 (2009).

broad policy areas would derail the whole-of-government approach that is most successful for rapidly growing technologies. Especially for cybersecurity and privacy matters, any sector-specific regulations of the type contemplated by the FCC run the risk of creating ambiguity, sweeping too broadly, inhibiting innovation, and failing to anticipate future technology changes.

A. Privacy

The record supports the Chamber's position that privacy regulations should remain uniform and within the Federal Trade Commission's ("FTC") jurisdiction. Moreover, and critically, the record underscores that the FCC has not provided—and indeed, cannot provide—a sufficient explanation for how it would address the limitations imposed on the agency by the 2017 resolution of disapproval under the Congressional Review Act ("CRA").

Commenters expressed support for keeping privacy regulations uniform and under the FTC's jurisdiction, rather than reclassifying a portion of the broadband industry under Title II and the concomitant common carrier exception to FTC authority.[107] As one commenter explained, "maintaining FTC oversight of BIAS provider privacy practices leaves in charge 'the agency with the most experience and expertise in privacy and data security, better reflects congressional intent, and [retains] a level playing field when it comes to Internet privacy.'"[108]

Reclassification would remove broadband providers from the FTC's jurisdiction even though the rest of the internet ecosystem would remain under FTC purview.[109] This would have

[107] *See* NCTA Comments at 77; WISPA Comments at 93 ("For privacy and data security concerns, the FTC already provides sufficient oversight and consumer protection and has exercised enforcement authority for decades.").

[108] CTIA Comments at 39 (citing RIF Order ¶ 183). *See also* NCTA Comments at 73 ("But the NPRM fails to recognize that Congress already has carefully defined the Commission's authority over these issues, making clear that the FTC and other agencies have the relevant expertise and resources to provide oversight.").

[109] Comments of Verizon and Opposition to Petitions for Reconsideration, WC Docket Nos. 23-320, 17-108, 17-287, 11-42, at 9-10 (filed Dec. 14, 2023) ("Verizon Comments") ("It makes no sense to subject broadband providers to regulation by the FCC, while leaving the rest of the internet ecosystem to the FTC, especially because other businesses often have much of the same personal data and the same volume of data as broadband providers – and in

a series of negative consequences. First, it would add to the already burdensome patchwork of privacy laws and regulations, creating further confusion about overlapping obligations and which regulator is overseeing providers.[110] Indeed, even "the same piece of consumer information [would] no longer be treated consistently across the internet ecosystem and instead [would] be subject to different rules applicable in different contexts."[111] Second, it would disproportionately impact small businesses. According to a report by the Information Technology and Innovation Foundation ("ITIF"), a 50-state patchwork of laws could cost the economy one trillion dollars over ten years, with small businesses alone taking a $200 billion hit.[112] Even if the Commission were to apply a different set of rules to larger companies, small businesses report that they would no longer be able to access the tools they need to reduce costs to compete with larger competitors.[113] The Commission must consider the cost of additional complexity and confusion as it assesses whether to move forward with proposed regulations. Third, providers would "no longer be permitted to participate in the Data Privacy Framework that the FTC has worked

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some instances, more data. Indeed, the result will be consumer confusion about which rules govern their personal data and which agency enforces them.").

[110] *See* NCTA Comments at 77 ("Far from bolstering that authority, Title II reclassification would divest the FTC of its jurisdiction over broadband providers, thereby balkanizing federal oversight of the privacy practices of participants in the Internet ecosystem between the Commission and the FTC, depending on the type of service that a particular company provides.").

[111] USTelecom Comments at 64-65 ("The rules would vary, for example, based on whether the information is provided to an ISP or an online entity (such as Google or TikTok), a retailer, or a data broker. Such fragmentation of federal privacy law, resulting from the NPRM's proposed divestiture of the FTC of its authority over consumer privacy, is highly undesirable. The FTC is the expert federal privacy regulator and has been enforcing consumer protection requirements for nearly a century. The FTC is also the only agency that can apply consumer protection rules consistently across industries. And its technology-neutral, uniform approach to privacy regulation is required to ensure that the same protections and safeguards apply to consumer data, regardless of which entity collects that data.").

[112] *50-State Patchwork of Privacy Laws Could Cost $1 Trillion More Than a Single Federal Law, New ITIF Report Finds*, ITIF (Jan. 24, 2022), http://tinyurl.com/3hvh77ma.

[113] *See* Sarah Keller, *Small Business Owners Credit Technology Platforms as a 'Lifeline' for Their Business,* U.S. Chamber of Commerce (Oct. 5, 2022), http://tinyurl.com/z48wcsem.

painstakingly to establish with its EU counterparts to facilitate transfers of personal data between the two jurisdictions."[114]

The record in this proceeding affirms that fragmentation of privacy regulations is a step in the wrong direction. If the Commission truly wants to promote protection of consumer data, rather than trying to assert control over broadband and launching a privacy rulemaking (as some commenters propose), [115] it should instead favor federal privacy legislation that can create uniform rules for all industries. As the Chamber explained in its opening comments, anything short of federal legislation would only add to the already complex patchwork of laws and regulations purporting to govern privacy and data security.[116]

The Chamber also showed in its opening comments[117] that the NPRM failed to grapple with the limitations imposed by the 2017 CRA, which disapproved of the agency's earlier attempt to impose broadband privacy rules.[118] Since 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"[119] absent a change in intervening law, the FCC does not have the authority to reissue privacy regulations that are "substantially the same" as those contained in the Broadband

[114] NCTA Comments at 77.

[115] *See e.g.*, Comments of Electronic Privacy Information Center, Public Knowledge, Consumer Federation of America, and Demand Progress Education Fund, WC Docket No. 23-320, at 15 (filed Dec. 14, 2023) ("[W]e urge the Commission to undertake reclassification with an eye towards a renewed privacy rule.").

[116] Chamber Comments at 25.

[117] *Id.* at 33-35 ("The FCC's NPRM thus not only fails to explain how reclassification will enhance the Commission's authority over privacy; it sets up a circumstance where existing privacy rules may be nullified without even considering what (if anything) will replace them. This is the apex of arbitrary and capricious rulemaking.").

[118] 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) (stating, consistent with the terms of the CRA, that the rules "shall have no force or effect").

[119] 5 U.S.C. § 801(b)(2).

Privacy Order.[120] That includes applying Section 222 beyond customer proprietary network information and extending that definition to encompass ISPs.

The record has underscored these concerns, and in fact suggests that there is no way that the Commission *can* address these limitations. As several commenters pointed out, "reclassifying broadband as a Title II service would leave a gaping hole in privacy regulation for broadband service, as neither the Commission nor the FTC would have enforcement authority."[121] The 2017 CRA means that far from providing a justification for reclassification, the issue of privacy actually serves as one of the most significant *barriers* to reclassifying broadband as a Title II service.

Public Knowledge tries to argue for a solution to the FCC's problem by pointing to the agency's authority under Section 201 of the Communications Act.[122] This argument fails, though, because Congress has specifically spoken to the Commission's authority over privacy with a complex scheme of regulation in Section 222. As a result, the Commission cannot rely on the general language of Sections 201[123] to do what it cannot do under the more specific language

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[120] *See id.*

[121] WISPA Comments at 94; *see also* USTelecom Comments at 65 ("The FTC is the expert federal privacy regulator and has been enforcing consumer protection requirements for nearly a century. The FTC is also the only agency that can apply consumer protection rules consistently across industries. And its technology-neutral, uniform approach to privacy regulation is required to ensure that the same protections and safeguards apply to consumer data, regardless of which entity collects that data."); NCTA Comments at 77 ("[T]he FTC has long exercised its consumer protection authority under Section 5 of the FTC Act to oversee ISPs' business practices, including those related to the protection of consumers' online data and the privacy. Far from bolstering that authority, Title II reclassification would divest the FTC of its jurisdiction over broadband providers, thereby balkanizing federal oversight of the privacy practices of participants in the Internet ecosystem between the Commission and the FTC, depending on the type of service that a particular company provides."); *id.* at 96 ("Even if the Commission could somehow persuade a reviewing court that the 2017 resolution of disapproval does not foreclose the extension of Section 222 to broadband services, there is no doubt that such action would flout Congress's clear intention to prevent the imposition of broadband-specific privacy requirements, based on its understanding that a uniform regime for all participants in the Internet ecosystem is vastly superior.").

[122] Public Knowledge Comments at 55-56 ("Despite the fact that Congress repealed the broadband privacy rules, the FCC still maintains its authority under Title II to treat the ISPs as common carriers and protect consumer information.").

[123] 47 U.S.C. § 201(b).

of Section 222.[124] And Section 222 itself applies only to the limited subset of information held by providers that constitutes customer proprietary network information ("CPNI"), not to broader categories of customer data.[125]

B. Cybersecurity

Cybersecurity also provides no justification for reclassification. To the contrary – application of Title II authority to broadband would cause immediate harm to the whole-of-government approach taken by the ecosystem of federal agencies and entities working together to enhance cybersecurity. The record makes clear that reclassification would contravene recent efforts made by the Biden Administration to promote harmonization of cybersecurity regulations. In the National Cybersecurity Strategy, released in March 2023, the Administration took the position that "[t]he private sector is capable of mitigating most cyber incidents without direct Federal assistance. When Federal assistance is required, the Federal Government must *present a unified, coordinated, whole-of-government response*."[126] Efforts to "[m]andat[e] compliance with prescriptive rules for a fraction of an industry also undermines the federal government's commitment in the National Cybersecurity Strategy to only enforcing '[e]ffective regulations [that] minimize the cost and burden of compliance, enabling organizations to invest resources in building resilience and defending their systems and assets.'"[127] A few months later, the White

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[124] *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012); *see also Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 644-45 (D.C. Cir. 2000).

[125] *See* USTelecom Comments at 66 ("The Commission also lacks statutory authority to comprehensively regulate consumer privacy. The Communications Act includes a specific provision, Section 222, that governs carriers' obligations to keep certain data private. As it applies to consumers, however, Section 222 does not impose any obligations beyond the protections it affords for [CPNI] in Section 222(c). CPNI is a narrow subset of the personal information that the FTC's privacy regime currently oversees.").

[126] *National Cybersecurity Strategy*, The White House, at 11 (Mar. 2023), http://tinyurl.com/34hdujjz ("National Cybersecurity Strategy") (emphasis added).

[127] CTIA Comments at 30 (citing National Cybersecurity Strategy at 9); *see also* Microsoft Comments at 10 ("Commission adoption of rigid internet infrastructure cybersecurity regulations would risk disrupting the

House Office of the National Cyber Director released a Request for Information on Cyber Regulatory Harmonization to "harmonize not only regulations and rules, but also assessments and audits of regulated entities."[128] The U.S. Department of Homeland Security also released a report to Congress in September 2023 detailing the 52 in-effect or proposed federal cyber incident reporting requirements that contribute to an inefficient patchwork of cybersecurity rules and proposals, and recommending a series of model definitions and forms to help streamline the cyber incident reporting process.[129]

The federal government also has a series of agencies working to address cybersecurity risks across sectors. The communications sector already works closely with the Cybersecurity and Infrastructure Security Agency ("CISA"), which provides guidance on protecting communications networks and services. Other relevant agencies include:

- The National Security Telecommunications Advisory Committee ("NSTAC"), which "provides policy recommendations intended to assure the continuity of vital telecommunications links through any event or crisis";

- The Communications Sector Coordinating Council ("C-SCC"), which improves "the physical and cyber security of sector assets; . . . ease[s] the flow of information within the sector, across sectors and with designated Federal agencies; and . . . address[es] issues related to response and recovery following an incident or event"; and

- The National Coordinating Center for Communications, Information Sharing and Analysis Center ("C-ISAC"), "which facilitates the exchange of information among government and industry participants regarding vulnerabilities, threats, intrusions, and anomalies affecting telecommunications infrastructure."[130]

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collaborative approach to cybersecurity today, as well as ongoing efforts to harmonize cybersecurity efforts across federal agencies. As potential threats evolve quickly, providers must remain flexible to respond and deploy resources where they are needed, rather than potentially continuing to invest in compliance with rigid regulatory mandates that may have become outdated.").

[128] National Cybersecurity Strategy at 9; *Opportunities for and Obstacles to Harmonizing Cybersecurity Regulations*, Request for Information, 88 Fed. Reg. 55694 (Aug. 16, 2023), http://tinyurl.com/2aj3wjxm.

[129] *Harmonization of Cyber Incident Reporting to the Federal Government*, U.S. Department of Homeland Security (Sept. 19, 2023), http://tinyurl.com/3ktpc6xf.

[130] NCTA Comments at 75.

Neither the Commission nor the record identify any gaps in cybersecurity policy that would demand—or even permit—the exercise of FCC authority under Title II without interfering with existing efforts.

As discussed in the Chamber's opening comments,[131] the NPRM offered only two concrete ways in which it believes reclassification would support the FCC's cybersecurity efforts – allowing the agency to adopt prescriptive cybersecurity regulations on ISPs and permitting it to take additional action on Border Gateway Protocol ("BGP").[132] But even in providing these two limited examples, the Commission failed to identify how the proposed regulations would actually enhance cybersecurity.[133] The record has not provided the Commission any additional support, and these proposed regulatory actions remain empty of any potential concrete benefits.

In fact, the record underscores that the FCC has already taken steps to further its cybersecurity goals without relying on Title II authority,[134] which further calls into question the need for any radical paradigm shift in how the agency deals with broadband. For example, the Commission recently began a proceeding to develop the voluntary Cyber Trust Mark program for Internet of Things devices, a program that has involved considerable effort on the part of both the agency and industry.[135] As one commenter suggests, "[r]ather than impose new rigid cybersecurity regulations on internet infrastructure providers, the Commission should continue to

[131] Chamber Comments at 22-28.

[132] NPRM ¶¶ 30-31.

[133] Chamber Comments at 22, 25.

[134] NCTA Comments at 74 (The FCC's current cybersecurity efforts "do not depend on classifying broadband as a Title II service, especially given the appropriate focus on cooperative efforts with industry and interagency coordination (as opposed to common carrier mandates, which would be entirely misplaced).").

[135] *Cybersecurity Labeling for Internet of Things*, Notice of Proposed Rulemaking, PS Docket No. 23-239, FCC 23-65 (rel. Aug. 10, 2023).

invest in solving evolving challenges in this space through partnerships with [CISA], other government stakeholders, and the private sector."[136]

C. National Security

The record likewise does not identify gaps in the government's current approach to national security that would justify the reclassification of broadband providers. On the contrary, several commenters emphasized that the existing regulatory landscape already addresses relevant national security threats. For example, not only does the Committee on Foreign Investment in the United States ("CFIUS") "review transactions involving foreign ownership of IP networks, broadband serving military installations, internet exchange points, submarine cables and satellite systems providing service to the Department of Defense," but the Department of Commerce's Information and Communications Technology and Services Program also "provides the Secretary of Commerce with the authority to prohibit acquisitions of information and communications services by foreign adversaries, or even use of technology developed by foreign adversaries."[137]

Further, the record highlights both the limits imposed on the FCC when it comes to taking unilateral action on national security matters and the success that the Commission has had in taking a more targeted approach under its current, more limited authority. First, one commenter flags cases at the Fifth and D.C. Circuits that have made clear that the FCC must remain within its authority and expertise when making judgments that directly impact national

[136] Microsoft Comments at 10.

[137] WISPA Comments at 92; *see also* CTIA Comments at 33-34 ("Further, within the U.S. government at large, there is no demonstrated gap in terms of addressing national security threats. For instance, the agencies that comprise the Committee on Foreign Investment in the United States ('CFIUS') routinely review transactions involving parties that may present security threats—including those that participate in the broadband industry, whether they provide BIAS or not.").

security.[138] A unilateral expansion by the FCC of its national security authority by relying on Title II authority stretches far beyond any clear authority the agency has to dictate new national security processes.[139] Second, the FCC has demonstrated that it can take more targeted action on national security where necessary (and where endorsed by Congress).[140] These actions include revising the FCC's equipment authorization program to preclude prospective authorization for equipment that appears on the FCC's Covered List, "[r]equiring ISPs to comply with the 'assistance capability requirements' of the Communications Assistance for Law Enforcement Act," and "[r]evoking the international Section 214 authorizations of several Chinese carriers found to present significant national security and law enforcement concerns."[141] No evidence has been presented showing that Title II authority is necessary to further the Commission's national security goals.

Indeed, as the Chamber explained in its opening comments, the Commission applied the forbearance analysis under Section 10 in 2015 and concluded that the statutory analysis required forbearance from Section 214 obligations.[142] The agency must conduct the same statutory test now under Section 10 of the Telecommunications Act of 1996[143] and explain why forbearance is

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[138] CTIA Comments at 24 (citing *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 427 (5th Cir. 2021); *Pac. Networks Corp. v. FCC*, 77 F.4th 1160, 1162 (D.C. Cir. 2023) ("In assessing national-security risks posed by foreign-owned companies, the FCC has long consulted other federal agencies with expertise in that area."); *China Telecom (Americas) Corp. v. FCC*, 57 F.4th 256, 261-62 (D.C. Cir. 2022) (citing the Commission's "longstanding practice" of seeking expertise from national security agencies "to help assess national security" concerns)).

[139] *See* WISPA Comments at 92 ("[T]he Commission has long deferred to the Executive Branch in matters of national security, and these agencies have extensive authority to review transactions involving broadband services companies.") (citations omitted); *see also* CTIA Comments at 24, 33-34; Verizon Comments at 11.

[140] *See* Chamber Comments at 28-29.

[141] Verizon Comments at 11.

[142] Chamber Comments at 29.

[143] *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, ¶ 509 (rel. Mar. 12, 2015), http://tinyurl.com/4m6jsy8x ("Title II Order").

no longer dictated by the statute in order to avoid an arbitrary and capricious result.[144] And on this record, it seems unlikely that a forbearance review could come to a conclusion different than the one in 2015; even the few commenters that suggest use of Title II for national security-related agency action fail to identify an actual need for the action.[145]

Finally, as discussed in the Chamber's initial comments, application of Section 214 to broadband providers would be exceedingly costly and complex, and such a proposal requires a much more detailed explanation and analysis than has been provided either in the NPRM or in any of the comments in the record to date.[146] And assuming *arguendo* the Commission has the authority to implement the proposed regulations, any actions taken in response would only increase the costs on providers without providing a clear benefit. The existing framework, which defers most national security matters to Executive Branch components with comparative expertise, is working well. Without strong support for why it is necessary to use Title II authority for national security issues, the Commission cannot use national security as a reason for reclassification.

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[144] *See* Chamber Comments at 30 ("The NPRM 'tentatively conclude[s] that we should exclude [Section 214] from any forbearance granted here,' but nowhere does the Commission conclude that application of Section 214 is 'necessary' for consumer protection or any of the other reasons specified by Section 10.") (citing NPRM ¶ 108; 47 U.S.C. § 160(a)).

[145] *See* Public Knowledge Comments at 63 (arguing that "the Commission must have authority under Section 214 to revoke the right of networks to operate."); Free Press Comments at 60 ("[I]t is certainly the case that classifying BIAS under Title II would give the Commission the power to protect consumers in situations like this if state commissions or Local Franchising Authorities are unable or incapable of acting.").

[146] *See* Chamber Comments at 31 ("Whereas the 2015 Title II Order recognized that Section 214's discontinuance obligations 'impose some costs' and that as a result the 'most prudent regulatory approach at this time is to proceed incrementally when adding regulations beyond what had been the prior status quo,' the new NPRM does not refer to this issue at all. Yet 'the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position' – something that the Commission has not adequately done to date here.") (citing Title II Order ¶ 510; *FCC v. Fox Television Stations, Inc.*, 556 U.S. at 515).

D. Public Safety and Network Resiliency

As with the other public policy rationales proposed by the Commission in the NPRM, the record has not bolstered the NPRM's dearth of harms that might justify the use of Title II authority to "advance several public safety initiatives" or "enhance the Commission's ability to ensure the nation's communications networks are resilient and reliable."[147] In fact, the record provides emphatic support for the idea that the existing classification of broadband providers has led to advances in public safety and allowed network resiliency to flourish. For example, as AT&T explains, FirstNet, the communications network specifically designed for public safety needs, "covers all 50 states, the District of Columbia, and the five U.S. territories. As of September 30, 2023, 27,000 public safety agencies and direct-support organizations use FirstNet, representing more than 5.3 million connections on the network."[148] Additionally, as USTelecom notes, the COVID-19 pandemic tested and demonstrated the success of U.S. broadband networks, and "broadband providers have made massive investment in broadband networks to ensure, as confirmed by the pandemic, that there is adequate capacity even for unprecedented levels of demand."[149] And according to reputable consumer satisfaction survey data, most consumers are satisfied with "the security of their home broadband service, and 85 percent are satisfied with its reliability."[150]

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[147] NPRM ¶¶ 33, 39

[148] AT&T Comments at 20.

[149] USTelecom Comments at 81-82; *see also id*. at 37-39, 44-45 (discussing same and citing Kovacs Study at 3; Thomas W. Hazlett, *The Pandemic That Didn't Break the Internet*, City Journal (May 7, 2020), http://tinyurl.com/mr3dcyst; *US vs. EU Broadband Trends 2012-2020*, USTelecom (Apr. 2022), http://tinyurl.com/s56a37xv).

[150] *See* Comcast Comments at 40 (citing *America's Viewpoint: Consumer Insights*, NCTA, http://tinyurl.com/yeyvf65k (reporting Morning Consult September 2023 findings) (last visited Jan. 13, 2024); *accord* Jonathan Schwantes, *Broadband Pricing: What Consumer Reports Learned From 22,000 Internet Bills*, Consumer Reports, at 34 (Nov. 17, 2022), http://tinyurl.com/ysmsk3mp (82 percent consumer satisfaction with Internet reliability)).

While some commenters outlined regulatory mandates they would like to see the Commission impose on broadband providers under Title II authority, these comments failed to either identify the harms that the new regulations would solve or explain how the FCC would justify the significant departure from how the Commission has approached regulation of broadband providers for many decades.[151] Indeed, commenters proposing specific regulatory mandates for emergency services ignore another important point: Congress has had numerous opportunities to expand the Commission's authority over public safety services, but has instead looked for alternative, market-based approaches such as establishing FirstNet in order to address the need for emergency communications. Further, as the Chamber discussed in our initial comments, the Commission has been able to take significant action to advance public safety under its existing authority, and the record does not explain how the FCC's existing actions are insufficient or require additional authority.[152] The Commission therefore could not identify any marginal benefit that could support incremental regulation in this space.[153] Additionally, as two commenters explain, the mandates proposed "could potentially impose tens of billions of dollars in costs on broadband providers," which would require reallocation of funds that otherwise

[151] *See e.g.*, Comments of the American Civil Liberties Union, WC Docket No. 23-320, at 12 (filed Dec. 14, 2023) ("ACLU Comments") ("Reclassification would enable the FCC to promote network reliability and resiliency by requiring ISPs to invest in routine maintenance on their networks . . . The FCC could also require networks to maintain on-site backup power, so that networks can continue to function during power outages . . . Moreover, reclassification would enable the Commission to require ISPs to harden networks and apply existing network resilience regulations to broadband only providers."); Public Knowledge Comments at 63 ("Title II would also provide the Commission with needed authority to impose backup power requirements and other steps the Commission may find necessary to ensure operation of broadband during national emergencies"); Free Press Comments at 58 (arguing that the FCC could use Title II authority to "requir[e] ISPs to transmit emergency alerts to their subscribers").

[152] *See* Chamber Comments at 37 (discussing E911 requirements implemented under Kari's Law and the RAY BAUM's Act).

[153] *See id*. at 24 & n.89 (citing relevant authorities).

"could be used to upgrade and expand broadband networks, particularly to high-cost areas in rural America where the economics of deployment are already challenging."[154]

In the absence of concrete harms, the Commission cannot simply assume that the application of vast, new regulations is an unmitigated good, and use this assumption as support for reclassification. That is especially true in critical areas such as network resiliency and public safety. In fact, a departure from the Commission's successful regulatory approach on these issues could cause significant harm by discouraging investment and burdening providers.

IV. The Major Questions Doctrine Applies to This Proceeding and Confirms that Any Attempt to Classify Broadband as a Title II Service is Unlawful.

As the Chamber explained in its initial comments, the major questions doctrine precludes classification of broadband as a Title II service.[155] Given the enormous economic impact that Title II classification would have on the Internet economy, and the political stakes of such a decision, it is "indisputable" that such classification would constitute "a major rule."[156] And the statutory ambiguity identified in *National Cable & Telecommunications Association v. Brand X Internet Services* "torpedoes" any argument that Congress clearly authorized Title II classification.[157] That means the FCC lacks authority to impose Title II classification on broadband. And arguments in the record that the major questions doctrine does not apply are unpersuasive.

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[154] US Telecom Comments at 82-83; *see also* AT&T Comments at 29 ("The new rules would also cause carriers to spend money on strict compliance with rigid regulatory requirements—which will grow increasingly obsolete over time—rather [than] deploying the optimal technologies and infrastructure currently available.")

[155] *Id.* at 49-61.

[156] *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 422 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("*USTA II*").

[157] *Id.* at 426.

A. The Commission Cannot Avoid Application of the Major Questions Doctrine.

Perhaps aware that any new Title II order is destined to be vacated under the major questions doctrine, Public Knowledge urges the Commission to attempt a procedural maneuver to avoid it. Specifically, Public Knowledge suggests that the FCC could simply grant pending motions for reconsideration of the *Mozilla v. FCC* remand order and avoid any judicial reckoning of whether the agency has authority to classify broadband as a Title II service.[158] But such sleight-of-hand would be both legally indefensible and unwise as a policy matter.

As background, the D.C. Circuit upheld the core legal conclusions of the RIF Order—namely, that the FCC had legal authority to classify broadband as a Title I "information service" and had adequately supported the core competition-based rationale for doing so.[159] The D.C. Circuit, however, concluded that the FCC had failed to provide an adequate explanation of the impact of Title I reclassification on three ancillary issues discussed in the RIF Order—public safety, Lifeline, and pole attachments.[160] The court did not vacate the order, however, because it concluded that the FCC could well address those issues subsequently on remand and, under those circumstances, the court did not wish to "yet again flick the on-off switch of common-carrier regulation."[161]

On remand, the FCC addressed the outstanding issues. Following an additional round of notice and public comment, the FCC concluded once again that Title I adequately protected

[158] Public Knowledge Comments at 3.

[159] *Mozilla Corp. v. FCC*, 940 F.3d 1, 20, 23 (D.C. Cir. 2019).

[160] *Id*. at 86.

[161] *Id*.

public safety, the availability of Lifeline subsidies, and broadband access to poles.[162] Some parties, including Public Knowledge, petitioned the FCC for reconsideration of these decisions.[163] The California Public Utilities Commission, meanwhile, petitioned for review of the remand order in court.[164] That petition for review is now being held in abeyance in light of the pending petitions for reconsideration.[165]

In its petition for reconsideration, Public Knowledge urged the Commission to issue a new NPRM to update the record on the need for Title II classification and subsequently issue a new classification decision.[166] Such a rulemaking would be necessary, Public Knowledge argued, to show that the Commission had the "'open mind necessary' to properly consider its statutory obligations."[167] In a separate petition for reconsideration, INCOMPAS made the same request.[168] The FCC has now invited the public to comment on a broad array of legal and policy considerations that bear on Title II classification—including whether the FCC has authority to classify broadband as a Title II service under the major questions doctrine, the Communications Act, and FCC precedent.[169] Meanwhile, the Commission did not seek public comment on the petitions for reconsideration for *over two years* after they were filed, only issuing a Bureau-level

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[162] *Restoring Internet Freedom; Bridging the Digital Divide for Low-Income Consumers; Lifeline and Link Up Reform and Modernization*, Order on Remand, 35 FCC Rcd 12328, ¶¶ 2, 19-87 (2020), http://tinyurl.com/8umyx7s7 ("RIF Remand Order").

[163] Petition for Reconsideration of Public Knowledge, WC Docket Nos. 17-108, 17-287, 11-42 (filed Feb. 8, 2021) ("Public Knowledge Petition"); Petition for Reconsideration of INCOMPAS, WC Docket Nos. 17-108, 17-287, 11-42 (filed Feb. 4, 2021) ("INCOMPAS Petition"); Petition for Reconsideration of Common Cause, et al., WC Docket Nos. 17-108, 17-287, 11-42 (filed Feb. 8, 2021) ("Common Cause Petition"); Petition for Reconsideration County of Santa Clara, et al., WC Docket Nos. 17-108, 17-287, 11-42 (filed Feb. 8, 2021) ("Santa Clara Petition").

[164] *California Public Utilities Comm'n v. FCC*, No. 21-1016 (D.C. Cir. filed Jan. 14, 2021).

[165] Clerk's Order, *California Public Utilities Comm'n v. FCC*, No. 21-1016 (D.C. Cir. Apr. 8, 2021).

[166] Public Knowledge Petition at 7.

[167] *Id.* at 2.

[168] INCOMPAS Petition at 2, 24.

[169] *See generally*, *Safeguarding and Securing the Open Internet*, Notice of Proposed Rulemaking, 88 Fed. Reg. 76048 (Nov. 3, 2023) ("NPRM Federal Register Notice").

Public Notice for comment in conjunction with the Commission's consideration of this NPRM.[170]

Despite obtaining the new rulemaking it requested, Public Knowledge now suggests that the Commission could simply disregard the new proceeding it initiated and restore the Obama-era 2015 *Open Internet Order* ("2015 Title II Order") based solely on the limited issues presented by the *Mozilla* remand.[171] That would be possible, Public Knowledge argues, if the Commission simultaneously grants the petitions for reconsiderations and issues a new Title II classification order. This wild gambit would fail, however, for multiple reasons.

First, as noted, the Commission has elected to start a new proceeding to consider anew all the legal and policy reasons for and against Title II classification. Having invited comment on the broad spectrum of issues bearing on this classification decision, the Commission cannot now ignore this voluminous record and insulate a new classification decision from review on any basis other than those narrow issues presented by the *Mozilla* remand order. The FCC must "consider and respond to significant comments received during the period for public comment,"[172] and would act arbitrarily and capriciously if it "entirely failed to consider an important aspect of the problem."[173] And in related contexts, courts have permitted aggrieved parties to mount challenges to issues decided in prior rulemakings where agencies have "opened the issue up anew"[174]—as the FCC plainly did here in the NPRM.

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[170] *Wireline Competition Bureau Seeks Comment on Petitions Seeking Reconsideration of the RIF Remand Order*, Request for Comments, 88 Fed. Reg. 74389 (Oct. 31, 2023).

[171] Public Knowledge Comments at 2-5.

[172] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015).

[173] *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[174] *Public Citizen v. Nuclear Regul. Comm'n*, 901 F.2d 147, 150 (D.C. Cir. 1990).

Second, even assuming that the petitions for reconsideration could somehow be considered separately from the NPRM, that would not cabin judicial review in the way Public Knowledge suggests. The *Mozilla* remand order did not merely evaluate the impact of Title I classification on public safety, Lifeline, and pole attachments. Rather, the Commission concluded that the "overwhelming benefits of Title I classification and restoration of light-touch regulation outweigh any adverse effects" that might result from any of these three issues.[175] Accordingly, if the FCC were now to reject its prior balancing of the equities and conclude that the benefits of Title II classification outweighed any costs, that would necessarily entail revisiting all the issues presented in the RIF Order. That balancing would also necessarily entail consideration of any new evidence bearing on these issues over the past six years—precisely the record that the FCC is now compiling in connection with the NPRM. And the balancing would include consideration of legal authority issues too, as the FCC in the RIF Order concluded that one factor supporting Title I classification of broadband is that it reflected the better reading of the statute.[176]

Third, as a practical matter, judicial review of the contemplated new Title II classification proceeding would impact the lawfulness of any past, related Commission action. Should the U.S. Supreme Court conclude that the FCC lacks statutory authority to classify broadband as a Title II service because of the major questions doctrine, that would necessarily mean that the FCC's 2015 Title II Order was unlawful and that the D.C. Circuit's decision upholding that order in *USTelecom v. FCC* is no longer good law. The Commission could not continue to treat broadband as a Title II service and impose obligations on it that flow from that classification

[175] RIF Remand Order ¶ 18.

[176] RIF Order ¶ 157.

decision—whether pursuant to a 2024 order, the 2015 Title II Order, or any other purported rule or regulation.

Fourth, and finally, Public Knowledge's proposal would make a mockery of both the rulemaking and judicial process. The FCC has asked the public for significant, substantive input on how broadband should be regulated—drawing tens of thousands of comments and detailed expert evidence from numerous parties on both sides of this issue. The FCC should, as a matter of due process and good government, consider this evidence carefully and make a reasoned decision that reflects current information on how broadband should be classified. Courts should then have an opportunity to consider any legal challenges to the FCC's decision to provide certainty to the agency, the regulated community, and the public. The FCC should not attempt to shortcut this process by relying on the (flawed) procedural expedient of granting motions for reconsideration related to the prior administration's classification order. Indeed, if the FCC thought that these petitions raised public-safety issues that urgently needed addressing, it could have put them out for comment years ago—instead of waiting to seek public input in a Bureau-level notice issued at the same time as its more comprehensive NPRM. The FCC should instead have the courage of its convictions and explain to the public why Title II classification, in 2024, is supportable as both a legal and policy matter.

B. Title II Classification of Broadband Indisputably Raises a Major Question.

Public Knowledge also raises various other objections to the application of the major questions doctrine to the FCC's Title II classification decision. None are persuasive.

First, Public Knowledge argues that "because this is a remand, major question doctrine [sic] cannot apply."[177] But the major questions doctrine is a canon of interpretation[178]—the "current procedural posture"[179] is irrelevant.

Second, Public Knowledge argues that the major question doctrine requires a new assertion of legal authority, and the Commission would not be "claiming a new authority or new interpretation" here because the Commission previously adopted a Title II classification order in 2015.[180] But the 2015 Title II Order itself violated the major questions doctrine, as Justice Kavanaugh pointed out at the time, so reasserting the power likewise violates the doctrine. The Supreme Court never had the opportunity to weigh in on the Order, and may well have agreed with Justice Kavanaugh that the Order implicated the major questions doctrine. And if the question was major then, it is no less major now. An agency's exercise of unconstitutional power does not become constitutional when exercised twice. Nor does an unconstitutional exercise of authority become constitutional through the passage of nine years. The fact that the Commission first claimed the power to classify broadband under Title II in 2015—decades after the Telecommunications Act was enacted—is a strike against the Commission, not for it.

Indeed, the Environmental Protection Agency's ("EPA") Clean Power Plan came to the U.S. Supreme Court in a similar posture and posed no obstacle to the Court's application of the major questions doctrine. In that case, a new administration had repealed the Obama-era Clean Power Plan, and a group of States petitioned the Court for review of a court of appeals' decision

[177] Public Knowledge Comment at 12 (capitalization altered).

[178] *See, e.g.*, *Biden v. Nebraska*, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring) (the major questions doctrine "is a tool for discerning … the text's most natural interpretation").

[179] Public Knowledge Comment at 12.

[180] *Id.*

that vacated the repeal.[181] The government argued that the States lacked standing to pursue the appeal, because the Biden administration announced it had no intention to enforce the Clean Power Plan, but planned to adopt a new rule instead.[182] The Supreme Court rejected the standing challenge, reasoning in part that a live controversy remained because the Biden administration could claim the same flawed legal authority underlying the Clean Power Plan in any new rule it might create.[183] In other words, the mere fact that succeeding administrations reversed prior determinations, or sought to restore the *status quo ante* (however defined), did not insulate the agency's assertion of legal authority from judicial review. The same outcome applies to any judicial review of a new Title II order, notwithstanding that the agency claimed the same unlawful authority in 2015.

Third, Public Knowledge argues that no major question is presented here because "[c]lassification is not an exercise of regulatory power" but rather "a function as a prelude" to regulatory power.[184] But this imagined distinction reads the doctrine too narrowly. In *FDA v. Brown & Williamson Tobacco Corp.*, for example, the Supreme Court held that the U.S. Food and Drug Administration ("FDA") could not classify nicotine as a "drug" under the Food, Drug & Cosmetic Act because "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[185] No one suggested that the classification decision would itself be permissible until the FDA actually imposed restrictions on nicotine. Rather, it was the FDA's "assertion of jurisdiction" that was

[181] *West Virginia v. EPA*, 142 S. Ct. 2587, 2605-06 (2022).

[182] *Id.* at 2606.

[183] *Id.* at 2607.

[184] Public Knowledge Comments at 31.

[185] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

impermissible.[186] Title II reclassification is no different. As Justice Kavanaugh has observed, Title II treatment of broadband "fundamentally transforms the Internet" immediately by "wrest[ing] control of the Internet from the people and private Internet service providers and giv[ing] control to the Government."[187] It affects "every Internet service provider, every Internet content provider, and every Internet consumer."[188] Or as Donald B. Verrilli, Jr. and Ian Heath Gershengorn have explained, the NPRM's reclassification would immediately "vastly expand the Commission's authority over [broadband]."[189]

Public Knowledge's argument fails on its own terms, moreover, because the NPRM does not merely propose reclassification—it also proposes adopting conduct rules pursuant to its Title II authority and threatens future regulatory actions in a host of areas. The NPRM, for example, seeks comment on more expansive (and potentially confusing) disclosure requirements for data caps.[190] Additionally, in the NPRM, the Commission acknowledges the potential that reclassification might be a gateway for the Commission to assert new authority over agreements between broadband providers and owners of multi-tenant environments ("MTE") such as apartment complexes.[191] Such a power expansion would be problematic because, as the Chamber has previously noted, MTE agreements are often legitimate agreements that encourage ISPs to invest in broadband infrastructure in a MTE and provide savings to consumers through bulk-pricing.[192] Further, the NPRM would establish a "general conduct standard that would

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[186] *Id.* at 131.

[187] *USTA II*, 855 F.3d at 423 (Kavanaugh, J., dissenting).

[188] *Id.*

[189] Donald B. Verrilli, Jr. & Ian Heath Gershengorn, *Title II "Net Neutrality" Broadband Rules Would Breach Major Questions Doctrine*, at 12 (Sept. 20, 2023), http://tinyurl.com/3vx37269 ("Verrilli & Gershengorn").

[190] NPRM ¶ 176 & Appendix B ¶¶ 71, 79.

[191] *Id.* ¶ 52.

[192] Comments of U.S. Chamber of Commerce Technology Engagement Center, WC Docket No. 17-142, at 2 (filed Oct. 2, 2021).

prohibit practices that cause unreasonable interference or unreasonable disadvantage to consumers or edge providers."[193] The NPRM further states that reclassification "is necessary to unlock tools the Commission needs to fulfill its objectives."[194] Those putative objectives, as explained in the prior section, include proposals such as imposing privacy or cybersecurity mandates on broadband providers. It therefore blinkers reality to describe the NPRM as a mere prelude to regulatory authority.

Fourth, Public Knowledge argues that because "the Commission has engaged in classification of services since its inception," *any* classification of *any* service cannot be considered "newfound."[195] But the mere fact that an agency has long engaged in classification decisions does not mean all conceivable classifications would pass legal muster. In *Brown & Williamson*, for example, the FDA had long classified various substances and devices under the Controlled Substances Act.[196] Yet that did not serve as precedent for classifying nicotine as a drug. *Brown & Williamson* would have come out the other way if Public Knowledge's arguments were correct.

Fifth, Public Knowledge's assertion that "*[a]ny* classification of broadband—whether as Title I, Title II or Title IV—is a 'question of significant economic and political importance'"[197] is similarly wrong. The major questions doctrine does not treat an agency's self-aggrandizing statutory interpretation the same as a restrained reading. Indeed, the major questions doctrine

[193] NPRM ¶ 23.

[194] *Id.* ¶ 21.

[195] Public Knowledge Comments at 31; *see also id.* at 39 ("The relevant 'power' . . . is the power of classifying services.").

[196] *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 134 (The Act "requires the FDA to classify all devices into one of three categories.").

[197] Public Knowledge Comments at 32; *see also id.* at 38 ("Congress requires the FCC to make a choice" as to how broadband is classified.).

exists at least in part to prevent the "significant[] expan[sion]" of an agency's "regulatory authority" "without clear congressional authorization."[198] In *Biden v. Nebraska*, for example, the major questions doctrine was implicated because the executive branch "arrogat[ed] to itself power belonging to another."[199] The agency in that case "discovered 'newfound authority'" to "cancel[] roughly $430 billion of federal student loan balances."[200] No one would have contended that had the agency chosen *not* to claim that significant expansion of regulatory authority, the major questions doctrine would have been equally implicated. Similarly, in Brown & Williamson no one would have contended that the FDA choosing not to classify nicotine as a drug would have implicated the major questions doctrine. The same logic applies here: a statutory reading that leaves in place the government's longstanding light-touch regulatory scheme does not raise the same concerns as a reading that expands the FCC's regulatory authority and transforms an industry.

Sixth, and finally, Public Knowledge asserts that Congress "has not interfered in the FCC's assertion of classification over broadband" since "the FCC classified DSL as a Title II service."[201] But as the Chamber has explained, the FCC then concluded only that in addition to an information service, DSL providers *also* separately offered consumers a separate pure transmission capability for the last mile of connectivity to a subscriber's home.[202] The FCC correctly recognized then that "Internet access" "service is an information service."[203] And even

[198] *NFIB v. OSHA*, 595 U.S. 109, 118 (2022).

[199] *Biden v. Nebraska*, 143 S. Ct. at 2373.

[200] *Id.* at 2362, 2383 (Barrett, J., concurring).

[201] Public Knowledge Comments at 32.

[202] Chamber Comments at 46.

[203] *See id.* (quoting *Deployment of Wireline Servs. Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24012 (1998), http://tinyurl.com/4y3rt7ak).

if Public Knowledge were right about the history, its assertion that Congressional "silence constitutes ratification"[204] runs contrary to Supreme Court precedent. The Court has explained that it is "at best treacherous" to "find in congressional silence alone the adoption of a controlling rule of law" and that "several equally tenable inferences may be drawn from such inaction."[205]

Nor is Public Knowledge helped by *Gonzalez v. Oregon*. Public Knowledge relies on *Gonzalez*'s statement that "[i]n many cases authority is clear because the statute gives an agency broad power to enforce all provisions of the statute."[206] But with that statement, the Supreme Court was merely contrasting statutes that empower an agency to enforce their provisions with those that do not.[207] No one disputes that the Commission has "authority to . . . 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act."[208] But Public Knowledge's argument is question-begging—the entire issue is how the "provisions of the statute" should be properly interpreted.

The agencies in the Supreme Court's recent major questions cases argued that they were statutorily empowered to act no less than Public Knowledge says the Commission is empowered to act here. But the Court rejected those arguments. In the *NFIB v. OSHA* vaccine-mandate case, for example, the Court concluded that the pertinent statutory language did not sustain the "breadth of authority" that the Occupational Safety and Health Administration ("OSHA") claimed.[209] Similarly, in the Centers for Disease Control and Prevention ("CDC") eviction-moratorium case, the "sheer scope of the CDC's claimed authority" meant that "Congress must

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[204] Public Knowledge Comments at 32.

[205] *United States v. Wells*, 519 U.S. 482, 496 (1997); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994).

[206] Public Knowledge Comments at 35.

[207] *Gonzalez v. Oregon*, 546 U.S. 243, 258-59 (2006).

[208] *Id.* at 259 (quoting 47 U.S.C. § 201(b)).

[209] *NFIB v. OSHA*, 595 U.S. at 119.

specifically authorize it."[210] In *West Virginia v. EPA*, the agency's assertion of "unprecedented power over American industry" could not stand despite the agency's "colorable textual basis."[211] And in *Biden v. Nebraska*, the "magnitude" of the power asserted could not be squared with the statutory language and purpose.[212] Title II reclassification involves the same kind of assertion of sweeping and consequential authority without clear statutory authorization.

At bottom, Public Knowledge seems to dislike the current Supreme Court Justices' views on the major questions doctrine. Public Knowledge goes so far as to suggest that the Supreme Court has "rejected" Justice Kavanaugh's purportedly "radical" and "highly restrictive" understanding of the doctrine,[213] even though he has joined the Court's major questions opinions, and even though the Court has approvingly cited his *USTA II* opinion.[214] To the contrary, as Verrilli and Gershengorn have observed, "[t]here is every reason to think that the views [Justice Kavanaugh] expressed [in *USTA II*] would command the agreement of a majority of the Justices on the Supreme Court today."[215]

V. The Commission Should Reject Calls for a Regulatory Regime that Would Encourage Patchwork State Regulation and Limit Critical Preemptive Provisions of Federal Law.

The Chamber supports clear, uniform federal rules for interstate communications services like broadband, rather than a multitude of inconsistent state laws. Because broadband networks are often national, if not global, in scope, state laws prescribing specific conduct rules for providers may, as a practical matter, require those providers to conform their networks on a

[210] *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489, 2490 (2021).

[211] *West Virginia v. EPA*, 142 S. Ct. at 2609, 2612.

[212] *Biden v. Nebraska*, 143 S. Ct. at 2372.

[213] Public Knowledge Comments at 33, 36.

[214] *See West Virginia v. EPA*, 142 S. Ct. at 2609.

[215] Verrilli & Gershengorn at 2.

nationwide basis to ensure compliance. This reality effectively creates a "race to the bottom" among states to adopt the most restrictive conduct rules, thereby both increasing compliance costs on providers and neutralizing the benefits that could come from a considered, uniform regulatory regime.[216]

While the FCC Chair initially touted the benefits of a uniform framework in her initial comments on the NPRM and her public statement on the adopted item, the final text of the NPRM distressingly suggested that FCC "net neutrality" rules could serve only as a floor, rather than a ceiling, for broadband regulation.[217] Unfortunately, as the Chamber predicted, pro-Title II advocates in their initial comments have encouraged the Commission to provide States with free rein to supplement federal rules with their own, more sweeping conduct rules.[218]

The FCC should decline this invitation and make it clear in any Report and Order that the FCC is preempting any state "net neutrality" rules that purport to impose additional obligations on broadband providers or attach additional remedies for any violations. Even assuming that the Commission has authority to classify broadband as a Title II service (which it does not), the *Commission's* judgment on whether such practices raise any anti-competitive concerns should take precedence over the judgments of fifty state legislatures. Indeed, the Commission previously determined that these practices should be reviewed, if at all, on a case-by-case basis, rather than banned prescriptively across the board.[219]

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[216] *See* Chamber Comments at 63-64.

[217] *Id*. at 63.

[218] *See* ACLU Comments at 14-15; Comments of California Attorney General Rob Bonta, WC Docket No. 23-320, at 3-4 (filed Dec. 14, 2023) ("California Comments"); Comments of the National League of Cities, WC Docket No. 23-320, at 2 (filed Dec. 15, 2023) ("NLC Comments").

[219] Title II Order ¶¶ 152 (noting both sides of the zero-rating debate and refusing to adopt a blanket rule), 195 (retaining only "targeted authority" over traffic exchange at interconnection points).

The American Civil Liberties Union ("ACLU") suggests that the Commission's adoption of strong preemption principles would prevent States from enforcing consumer-protection laws against broadband providers.[220] But that is simply incorrect. As the RIF Order correctly recognized, the scope of any FCC preemption would not prevent States from enforcing generally-applicable consumer laws (such as laws against deceptive advertising) against broadband providers.[221] The ACLU's concerns about consumer protection provides no basis for States to run rampant in imposing obligations on providers that conflict with the FCC's calibrated judgments about appropriate conduct rules. Indeed, any other conclusion would effectively permit States to *displace* federal rules in these areas, as broadband providers would have to conform their nationwide networks with the most aggressive local law in effect to ensure they are not in violation.

The National League of Cities ("NLC"), meanwhile, improperly suggests that the FCC should use this rulemaking to overturn preemption decisions made in other proceedings, such as the agency's 2018 infrastructure orders,[222] and restore the "tools and leverage that local governments have to prevent digital discrimination and hold providers accountable to their commitments and marketing claims."[223] Procedurally, this would be manifestly inappropriate—the clear and consistent action that the Commission has taken over the years to interpret and expand the protections offered by Sections 253 and 332 are by now well-established, and lie far beyond the scope of this proceeding. Under the Administrative Procedure Act ("APA"), "an agency 'must provide sufficient factual detail and rationale for the rule to permit interested

[220] ACLU Comments at 13-14.

[221] RIF Order ¶¶ 195 n.731, 196.

[222] *See* NLC Comments at 2.

[223] *Id*.

parties to comment meaningfully.'"[224] In other words, the "original notice must 'adequately frame the subjects for discussion.'"[225] Here, the question posed in the NPRM was limited to "how reclassification of BIAS as a telecommunications service may affect the Commission's application of the Act's preemption frameworks in sections 253(d) and 332(c)(3) regarding infrastructure *used to provide broadband-only services*."[226] Nothing in the NPRM proposes a broader reexamination of the interpretation of Sections 253 and 332 as they apply to telecommunications facilities generally, and there is no basis for accepting NLC's invitation to bootstrap this proceeding into a larger re-examination of these settled principles, which have been challenged and upheld on appeal.[227]

Even as a matter of policy, NLC's suggestion is deeply misguided. For nearly three decades, under both Democratic and Republican Administrations, the FCC has consistently recognized the barriers that state and local restrictions can impose on the deployment of the facilities necessary to provide advanced communications services, and has sought to implement the Congressional direction in Sections 253 and 332 to remove these barriers to entry. Thus, in 1997, the Commission recognized that build-out mandates serve as a barrier to competitive entry and are preempted,[228] and articulated the seminal principle that Section 253 preempts any state or

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[224] *Nat'l Lifeline Ass'n v. FCC,* 921 F.3d 1102, 1115 (D.C. Cir. 2019) (quoting *Fla. Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988)).

[225] *Id.* (quoting *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996)).

[226] NPRM ¶ 48 (emphasis added).

[227] *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020). *See also Small Refiner Lead Phase-Down Task Force v. U.S.E.P.A.*, 705 F.2d 506, 549 (D.C. Cir. 1983) ("As a general rule, EPA must itself provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment."); *Citizens Telecommunications Co. of Minnesota, LLC v. Fed. Commc'ns Comm'n*, 901 F.3d 991, 1006 (8th Cir. 2018) ("It may be true that the numerous comments received in the proceeding already discussed all relevant aspects of transport services. Other parties' comments may have raised the prospect of treating transport services differently, including the decision adopted in the 2017 Order, and the CLEC Petitioners may have responded to those comments. These comments, however, would not cure inadequate notice. Agencies 'cannot bootstrap notice from a comment.'" (quoting *Shell Oil Co. v. E.P.A.*, 950 F.2d 741, 760 (D.C. Cir. 1991))).

[228] *The Public Utility Commission of Texas*, Memorandum Opinion and Order, 13 FCC Rcd 3460, ¶ 11 (1997).

local legal requirement that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[229] In 2009, in interpreting Section 332, the FCC noted that providers "have often faced lengthy and unreasonable delays in the consideration of their facility siting applications," which "imped[e] the deployment of advanced and emergency services."[230] And in 2018, after reviewing a detailed record, the Commission concluded that "regulatory obstacles" at the state and local level continued to "threaten[] the widespread deployment" of advanced service offerings, particularly in the context of small wireless facilities.[231] In asking the Commission to forbear from Sections 253 and 332 to restore local authority to impose build-out mandates, NLC seeks to wind the clock back to 1996 and ignore the decades of progress that have been made in broadband deployment since.

The NLC proposal is also unworkable. As the FCC recognized in the 2018 *Small Cell Order*, broadband and other services are often offered over the same set of commingled facilities.[232] The *Small Cell Order* explained that, as a result, Sections 253 and 332 should be interpreted as reaching all such commingled facilities.[233] Providers have thus generally been able to construct broadband facilities without first having to prove to state and local governments that the facilities would be used for particular types of federally-regulated services.

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[229] *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, Memorandum Opinion and Order, 12 FCC Rcd 14191, ¶ 31 (1997).

[230] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, 24 FCC Rcd 13994, ¶ 32 (2009).

[231] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088, ¶ 4 (2018) ("*Small Cell Order*").

[232] *Id.* ¶ 36.

[233] *Id.* ¶ 35 n.84.

But if the Commission were to accept NLC's proposal to "forbear" from applying Sections 253 and 332 to broadband, it would immediately lead to significant uncertainty about the scope of the facilities covered by that forbearance. Rather than providing regulatory clarity, it could cause anomalous results such that facilities built by certain providers were within the scope of these important protections, whereas precisely the same types of facilities used to provide slightly different services might not be. It would also reinforce and extend the current lack of regulatory parity between providers that offer telecommunications services under current classifications and those that do not.[234] There is no public interest or policy benefit in such an approach. Instead of rolling back these critical statutory protections on advanced service facilities, as NLC requests, the Commission should look for ways to continue to expand the reach of Sections 253 and 332, such as by further emphasizing that the application of these statutes is determined by the *capabilities* advanced communication facilities provide, rather than by any particular service offering or business plan.

VI. Contrary to Some Commenters' Positions, Title II Cannot Be Used to Build Upon the Digital Discrimination Rules.

Finally, the FCC should reject the proposal of the National Digital Inclusion Alliance ("NDIA") and Common Sense to use this proceeding to adopt a formal complaint mechanism under Section 208 of the Communications Act for alleged instances of digital discrimination.[235]

In its recent order adopting rules implementing Section 60506 of the Infrastructure Investment and Jobs Act ("IIJA"), the Commission rejected NDIA and Common Sense's request to adjudicate purported digital discrimination violations via a formal complaint process akin to

[234] *See, e.g.*, Comments of INCOMPAS, WC Docket No. 23-320, at 23-24 (filed Dec. 14, 2023) (noting that providers that only offer broadband services may be unable to invoke the statutory protections under Sections 253 and 332).

[235] Comments of the National Digital Inclusion Alliance and Common Sense, WC Docket No. 23-320, at 3-4 (filed Dec. 14, 2023).

Section 208.[236] There, the Commission agreed with comments that an informal complaint process "provides the necessary functionality for the Commission to carry out its duties."[237] The Commission further concluded that NDIA, Common Sense, and other commenters had not "articulate[d] the reasons for [the] necessity" of a formal complaint process "in light of the self-initiated investigatory approach the Commission adopt[ed]" in its order.[238] Finally, the Commission indicated it wished to "gain[] experience investigating digital discrimination of access complaints" before revisiting whether further procedures were necessary.[239]

The Commission should reject NDIA and Common Sense's attempt to obtain reconsideration of its request for a formal complaint process through this proceeding. The Commission has already explicitly considered and rejected that request in the digital discrimination context, while expressing a desire to obtain real-world experience with the informal complaint process before revisiting it. It would be inconsistent with the Commission's past reasoning to adopt a formal complaint process now, potentially before the FCC has had any experience with the new informal-complaint procedures.[240]

Adopting a formal complaint process in this proceeding would also be procedurally improper. Nowhere in the NPRM does the Commission suggest taking measures to police potential digital discrimination violations, apart from the Section 60506 rules that Congress required the FCC to release the following month. And while the NPRM seeks comment on how

[236] *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, Report and Order and Further Notice of Proposed Rulemaking, GN Docket 22-69, FCC 23-100, ¶¶ 143, 166 (rel. Nov. 20, 2023) ("Digital Discrimination Order").

[237] *Id.* ¶ 143.

[238] *Id.*

[239] *Id.*

[240] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (noting that an unexplained inconsistency is arbitrary and capricious).

its proposals may "promote or inhibit advances in diversity, equity, inclusion, and accessibility,"[241] the FCC did not propose any equity-specific rules apart from the general Title II framework and related conduct rules the Commission adopted in 2015. Commenters therefore lack adequate notice that the Commission may adopt additional digital discrimination rules in this docket.[242] By contrast, the Commission's Report and Order on digital discrimination contained a further NPRM that included concrete, additional proposals for digital discrimination rules—but nowhere sought to reopen the question of whether a formal complaint process was needed.[243] That provides further evidence that, at least until the FCC gains experience with its informal complaint process, the agency considers the matter closed.

Finally, the Commission should decline to adopt further enforcement mechanisms for its digital discrimination rules until any legal challenges to those rules are resolved. In its comments in that proceeding, the Chamber explained that the Commission lacked legal authority to impose disparate-impact liability and civil penalties on broadband providers under Section 60506 of the IIJA.[244] The Chamber is currently exploring its legal options in connection with these rules, and other parties will have the same opportunity within the Hobbs Act's statutory review period.[245] The FCC should not subject providers to even more onerous procedures that it has already rejected before the courts have an opportunity to resolve any challenge to the lawfulness of the underlying digital discrimination rules.

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[241] NPRM Federal Register Notice at 76056.

[242] *See Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1261 (D.C. Cir. 2005) (vacating a rule for failure to comply with the APA's notice requirements).

[243] Digital Discrimination Order ¶¶ 179-215.

[244] Comments of U.S. Chamber of Commerce, GN Docket No. 22-69, at 3-5 (Feb. 21, 2023).

[245] Press Release, U.S. Chamber of Commerce, New FCC Rule Will Only Make It Harder to Bridge the Digital Divide (Nov. 15, 2023), http://tinyurl.com/29nz3bha.

VII. Conclusion

The Chamber would like to thank the Commission for considering this reply comment. If you have any questions, please reach out to Matt Furlow, Policy Director, at mfurlow@uschamber.com.

Respectfully submitted,

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