



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

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

COMMENTS OF THE U.S. CHAMBER OF COMMERCE

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December 14, 2023

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I. Introduction and Summary

The U.S. Chamber of Commerce (“Chamber”) respectfully submits these comments in response to the notice of proposed rulemaking (“NPRM”) in the above-titled proceeding. The Chamber vigorously opposes the Federal Communication Commission’s (“FCC” or “Commission”) proposal to impose onerous, utility-style regulation on broadband providers by reclassifying broadband as a “telecommunications service” under Title II of the Communications Act.

Six years ago this month, the FCC voted to repeal its short-lived experiment in treating broadband providers like common carriers under the same regulatory framework that used to apply to monopoly telephone networks. At the time, pro-Title II advocates told the public that reversing Title II classification would end the Internet as we know it, resulting in reduced speeds, higher prices, and Internet service providers (“ISPs”) deciding what content consumers were allowed to see. But as has become apparent to any reasonable observer, none of these dire predictions came to pass. To the contrary, broadband service is faster and cheaper and consumers have more options than ever before. Our networks helped keep the country connected during the COVID-19 pandemic at a time when millions of Americans worked from home and made significant use of the Internet for telehealth, e-learning, online gaming, and video streaming.

Nonetheless, the FCC proposes to double down on failed regulatory strategies from the past. While the FCC cannot identify new evidence of open internet violations to support sweeping prescriptive regulation, we are now told that Title II is needed for a host of new, unrelated policy reasons—from national security to privacy to cybersecurity to public safety.

But the Commission does not come close to adequately explaining how classifying broadband as a Title II service would advance these goals, let alone be superior to other more targeted approaches under its existing authority.

Title II reclassification will accomplish one thing—increasing the FCC’s control over the Internet. But this expansive assertion of authority is both unlawful and unwise. The Communications Act does not authorize Title II classification of broadband, and in any event, the Supreme Court’s major questions doctrine prohibits it. In recent cases, the Supreme Court has treated skeptically broad and novel assertions of agency authority over major sectors of the economy absent clear Congressional authorization. And the Court has cited approvingly Justice Kavanaugh’s seminal opinion from his time on the D.C. Circuit that addressed the precise issue raised by the NPRM and concluded that Congress did *not* clearly authorize Title II classification and the FCC exceeded its authority in deciding this major question itself.

The Commission should spare itself, the courts, and the public the time and expense involved with retreading Title II classification, when any new Title II order is destined to be vacated by the Supreme Court. In the meantime, as was true in 2015, Title II would depress innovation and investment and impose significant costs on providers—particularly new entrants and small or rural providers that lack resources to absorb significant regulatory uncertainty. The FCC should instead stay the current course and continue to treat broadband as a Title I “information service.” Rather than relitigate Title II, the FCC should focus on pro-competitive, pro-growth policies that will help America continue to lead in the global race for next-generation connectivity.

II. The Internet Is Thriving Under The Restoring Internet Freedom Order’s Targeted Regulatory Approach.

Five years after the *Restoring Internet Freedom Order* (“RIF Order”),¹ the Internet continues to flourish in a national economy increasingly reliant on a broadband connection. As Commissioner Brendan Carr reiterated in his NPRM dissent, after the FCC’s “decision to return the Internet to the same successful and bipartisan regulatory framework under which it thrived for decades, broadband speeds in the U.S. have increased, prices are down, competition has intensified, and record-breaking new broadband builds have brought millions of Americans across the digital divide.”² Under the RIF Order’s approach, U.S. broadband providers were able to meet significant challenges, including the COVID-19 pandemic. Rather than cause the Internet collapse that pro-Title-II advocates forewarned, the RIF Order has propelled continued growth in the broadband industry and the broader Internet economy, enabling more Americans to have access to better and faster Internet service and novel products and services. Preserving the approach taken by the RIF Order will ensure that the Internet continues to thrive, and that the United States remains the leader in connectivity and the products and services that depend on it.

A. The Apocalyptic Predictions Surrounding the *Restoring Internet Freedom Order* Never Happened.

In the years that the RIF Order has been in effect, U.S. consumers have not only enjoyed an unprecedented period of broadband prosperity—as discussed in more detail below—but did so without experiencing the end of the Internet that opponents of the Order claimed would occur. Opponents asserted confidently that Title II classification was necessary because absent heavy-

¹ *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2018), <http://tinyurl.com/mt3a7bpj> (“RIF Order”).

² *Safeguarding and Securing the Open Internet*, Notice of Proposed Rulemaking, WC Docket No. 23-320, FCC-23-83, at 136-143 (Oct. 19, 2023), <https://tinyurl.com/y6hhry6y> (“NPRM”) (Dissenting Statement of Commissioner Brendan Carr).

handed, utility-style regulation, broadband providers would enact anti-consumer prioritization and pricing models that would “smother innovation” and lead to consumers “get[ting] the internet one word at a time.”³ News outlets predicted that the RIF Order would empower “internet service providers to do practically whatever they like—including paid prioritization, throttling, and otherwise messing with traffic as it moves across the internet” and potentially “reshape the internet in very ugly ways.”⁴ A *New York Times* opinion piece even suggested that the RIF Order created a “nightmare scenario [at] America’s digital doorstep” that would result in a “digital dystopia” comparable to the Internet experience in the People’s Republic of China.⁵

None of this has happened. During the five years since the U.S. adopted the RIF Order’s approach, “there has not been any evidence of ISPs blocking or erecting toll lanes on the internet as . . . predicted with unshakable certitude uttered in dark, apocalyptic tones.”⁶ Rather than blocking or throttling content, “the Internet has become more competitive than ever before.”⁷ Yet in the NPRM, the Commission never seeks comment on how these failed predictions should bear on its proposal to reclassify broadband as a Title II service. Nor does the NPRM identify *any* specific concerns or examples regarding ISP conduct during the period the RIF Order has been in effect that would justify a change in regulatory regime. Instead, the Commission looks to stakeholders to justify the decision the agency appears to have already made, requesting

³ *Id.* at 136-138 (Dissenting Statement of Commissioner Brendan Carr) (quoting tweets from Senate Democrats and Ed Markey).

⁴ Makena Kelly, *Net neutrality is dead—what now?*, The Verge (June 11, 2018), <https://tinyurl.com/mr425fhh>.

⁵ Nick Frisch, *What if You Couldn’t See This Page?*, New York Times (Dec. 14, 2017), <https://tinyurl.com/yks78763>.

⁶ Michael Powell, *Net Fatality: The FCC Is About to Blow our Best Chance to Have Internet for All*, NCTA (Oct. 31, 2023), <https://tinyurl.com/ymcftxdw>.

⁷ Jonathan Cannon & Canyon Brimhall, *The revival of net neutrality relitigates a ‘solution’ in search of a problem*, The Hill (Oct. 11, 2023), <https://tinyurl.com/mpkbefjs>.

comment on any “examples of conduct that has harmed Internet openness.”⁸ In so doing, the Commission cites a single 2019 study regarding alleged throttling practices by wireless ISPs in the U.S. and elsewhere⁹—the methodology, veracity, and import of which has been contested by providers and others.¹⁰

The Commission’s focus on potential harm—while failing to identify verified instances of harmful conduct—reveals that “worst-case-scenario nightmares of outright blocking or throttling of Internet services . . . are less realistic than ever” in a competitive broadband market with “significant checks on behavior that diminish the need for extensive regulation.”¹¹ By proposing to drastically alter a regulatory framework without a clear indication of need, the NPRM impliedly recognizes the RIF Order’s strengths as the product of both “an extensive diagnosis of the problems the regulations are intended to solve and . . . [consideration of] the

⁸ NPRM ¶ 129.

⁹ *Id.* ¶ 129 n.421 (citing Fangfan Li et al., A Large-Scale Analysis of Deployed Traffic Differentiation Practices, SIGCOMM ’19, at 130-144 (2019), <https://tinyurl.com/2za46p53> (“Li Study”)); *see also* Khalida Sarwari, Northeastern University Researcher Finds that Wireless Networks are Throttling Video Streaming 24/7, Northeastern Global News (Aug. 27, 2019), <https://tinyurl.com/f6cvmt95>).

¹⁰ *See* Letter from Edward J. Markey et al., U.S. Senate, to Hon. Ajit Pai, Chairman, FCC, OL Docket No. 19-9 (Feb. 6, 2019), <http://tinyurl.com/yk9ukzty>; *id.* at Attachment: Letter from AT&T (Dec. 6, 2018) (explaining that Wehe, the application created and used by the researchers in the Li Study to detect alleged throttling, “is not an accurate barometer of whether a carrier is engaged in throttling Internet traffic for several reasons[,] [t]he most critical and obvious” of which being that the app “fails to account for customer choice,” which leads consumers to elect standard-definition over high-definition streaming for various reasons); *id.* at Attachment: Letter from Verizon (Dec. 6, 2018) (explaining that “the claims in the Wehe study . . . are inaccurate” and that “[w]hile [Verizon] manage[s] [its] network reasonably, [it] does not make any distinction based on the content of the video or the source website,” nor does Verizon “distinguish between one video provider and another”); *id.* at Attachment: Letter from Sprint (Dec. 6, 2018) (explaining that “Sprint does not throttle lawful internet traffic based on content, application or service, and does not single out [specific apps cited in the Li Study] for differential treatment”); *id.* at Attachment: Letter from T-Mobile (Dec. 6, 2018) (explaining that “reasonable network management” practices to accommodate customer demand for high-bandwidth activities like video streaming “have been in place for years, and these practices have always been deemed permissible – not only under the light-touch transparency-based regime set out in the . . . [RIF Order], but also under the previous, more prescriptive rules the FCC adopted in 2015”); Ross Marchand, *New Evidence Debunks Big Myth That Repealing Internet Rules Caused Throttling*, The Federalist (Sept. 19, 2018), <https://tinyurl.com/y92exscc> (explaining that the traffic variations detected by the researchers “reflect data management rather than a plot to prioritize in-house streaming”).

¹¹ Comments of the Information Technology & Innovation Foundation (“ITIF”), WC Docket Nos. 17-108, 17-287, 11-42, at 3-4 (filed Apr. 20, 2020), <https://tinyurl.com/4s9t366u>.

public choice incentives that could lead regulators to behave in a less-than-optimal way.”¹² Through this analysis, the Commission that adopted the RIF Order realized that, while “the potential harm to consumers from blocking and throttling is real . . . the likelihood that broadband providers will engage in blocking or throttling is substantially mitigated because consumers value openness and broadband ISPs often face significant competition.”¹³

B. Targeted Regulation Has Improved Broadband Investment, Deployment, Speed, and Price.

Indeed, the data bears out that under the RIF Order, the Internet has not only continued to operate, but has thrived. The FCC’s return to a targeted regulatory framework in the RIF Order has encouraged greater broadband investment and deployment, more innovation, increased broadband speeds and capacity, and decreased prices for consumers.¹⁴ For example, in 2017—the year that the Commission announced its intention to adopt the RIF Order—total capital expenditures on broadband first started to increase after a multi-year decline that occurred during the period that broadband was regulated under Title II. In 2018, the RIF Order went into effect, and broadband investment reached \$80 billion—the highest amount since 2001, when broadband providers were in the midst of building out the first-ever consumer broadband networks to replace dial-up services.¹⁵ The Commission reported that “[d]uring 2018 . . . broadband providers, both small and large, deployed fiber networks to 5.9 million new homes, the largest number ever recorded.”¹⁶ In the years since, this upward trend has continued under the RIF

¹² See Jerry Ellig, *Restoring Internet Freedom as an Example of How to Regulate*, 3 Bus. Entrepreneurship & Tax L. Rev. 236, 238 (2019), <https://tinyurl.com/5az7f29a>.

¹³ *Id.* at 242.

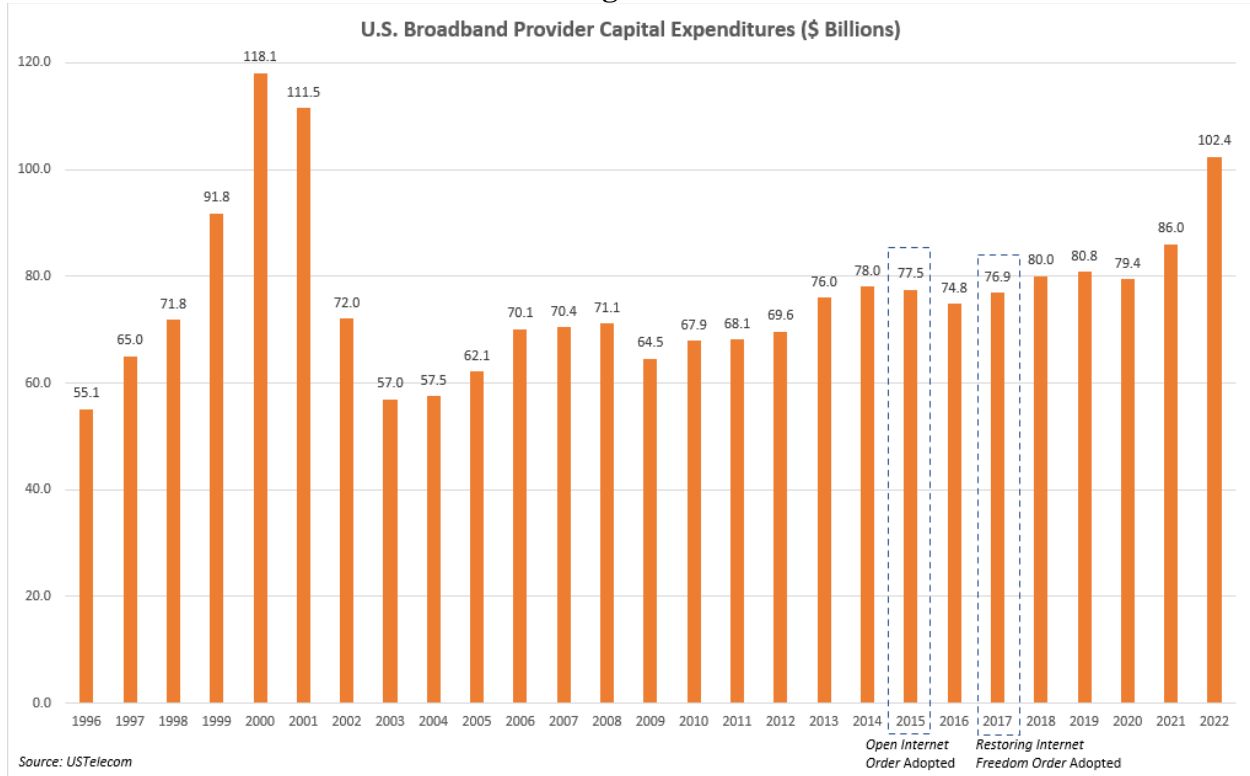
¹⁴ See *id.*

¹⁵ Patrick Brogan, *U.S. Broadband Investment Continued Upswing in 2018*, USTelecom (July 31, 2019), <http://tinyurl.com/2dce58yx>.

¹⁶ *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2019 Broadband Deployment Report, 34 FCC 3857, ¶ 3 (2019), <http://tinyurl.com/5exxaysn>.

Order’s framework, with broadband providers investing a record \$102.4 billion in capital expenditures in 2022.¹⁷

Figure 1



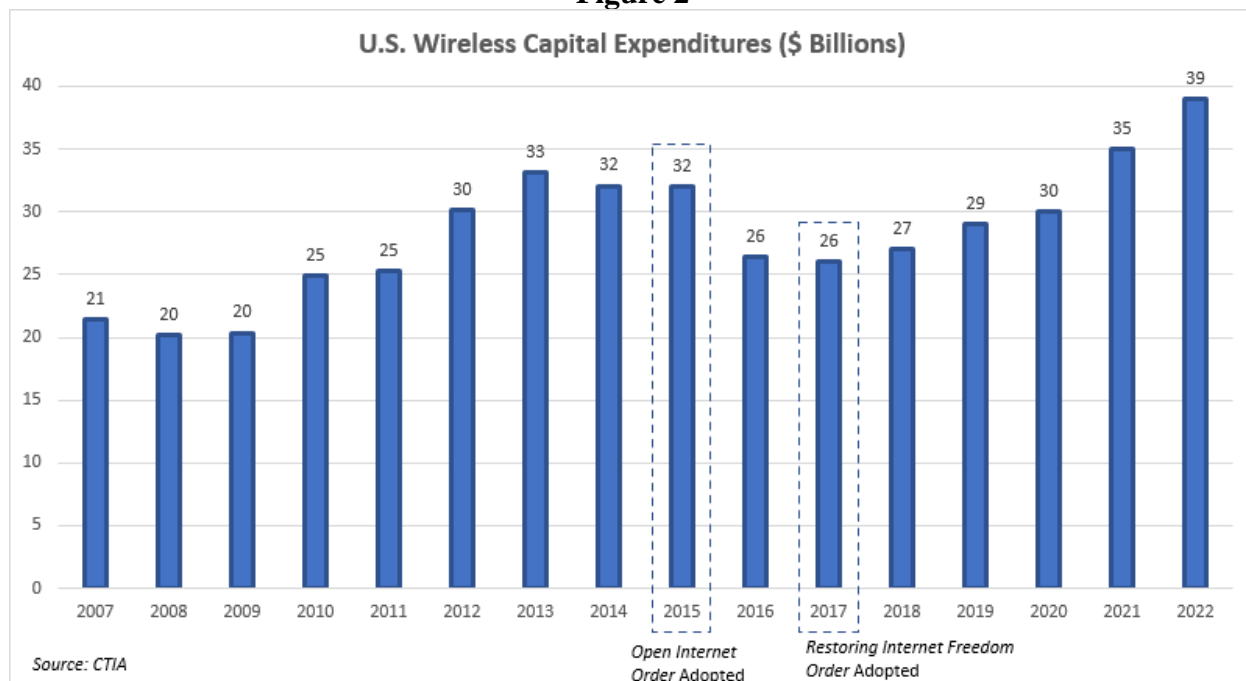
In the mobile broadband context, the trends are similar: surging capital investment began in 2017, reversing “historic declines” brought on by Title II regulation.¹⁸ Since then, wireless infrastructure investment has increased—and set records—year after year, reaching \$39 billion in 2022.¹⁹

¹⁷ 2022 Broadband Capex Report, USTelecom (Sept. 8, 2019), <http://tinyurl.com/3cxdjhf9>.

¹⁸ Comments of the Telecommunications Industry Association, WC Docket Nos. 17-108, 17-287, 11-42, at 4 (filed Apr. 20, 2020), <https://tinyurl.com/mrxupz7v>.

¹⁹ 2023 Annual Survey Highlights, CTIA, at 4 (July 25, 2023), <http://tinyurl.com/uu6akehw> (“CTIA 2023 Annual Survey Highlights”); see also Summary of CTIA’s Annual Wireless Industry Survey, CTIA, at 6 (2021), <https://tinyurl.com/2p82mw9y> (detailing cumulative capital expenditures by the U.S. wireless industry from 2001 to 2020).

Figure 2



These investments have allowed providers to build out infrastructure to expand coverage and keep pace with technological advancements. As a result of investment and expansion, wireless networks currently support over 73.7 trillion megabytes of traffic: “the greatest increase in mobile data traffic ever and nearly double the year-over-year increase from 2020 to 2021.”²⁰ And in 2022, more than 142,000 small cell deployments were operational across the U.S., helping to power 5th generation (“5G”) wireless networks and the high-speed, low-latency communications that 5G enables.²¹ Additionally, the past five years have been significant for fiber deployment, which “passed 7.9 million additional homes in the U.S. in 2022—the highest annual deployment ever, even with challenges in materials supply chain and labor availability.”²²

²⁰ CTIA 2023 Annual Survey Highlights at 3.

²¹ *Id.* at 7.

²² Ashley Schulte, *Fiber Broadband Deployment Accelerate in 2022 Ahead of BEAD Funding Infusion, Setting New Homes Passed Record*, Fiber Broadband Association (Dec. 21, 2022), <https://tinyurl.com/2ps883yt>.

Considering this progress, “industry is currently on pace to deploy all-fiber networks to about 50% of U.S. households by 2025.”²³

This rapid deployment, enabled by the targeted regulatory approach and “pro-investment momentum that followed the [RIF Order’s] repeal of public utility-like regulation under Title II,”²⁴ has allowed broadband to reach more Americans than ever before. As of January 2023, the United States has 311.3 million Internet users and 383.4 million cellular mobile connections.²⁵ According to FCC data, the percentage of Americans with access to two or more high-speed, fixed ISPs increased to approximately 295 million in 2022—a 30 percent increase since 2017.²⁶ Even by conservative estimates, more than 90 percent of U.S. households could have access to one broadband provider offering 100/20+ Mbps service—while 74 percent could have access to two—by December 2025.²⁷

²³ *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2020 Broadband Deployment Report, 35 FCC Rcd 8986, ¶ 92 (2020), <http://tinyurl.com/ymabz8ve>.

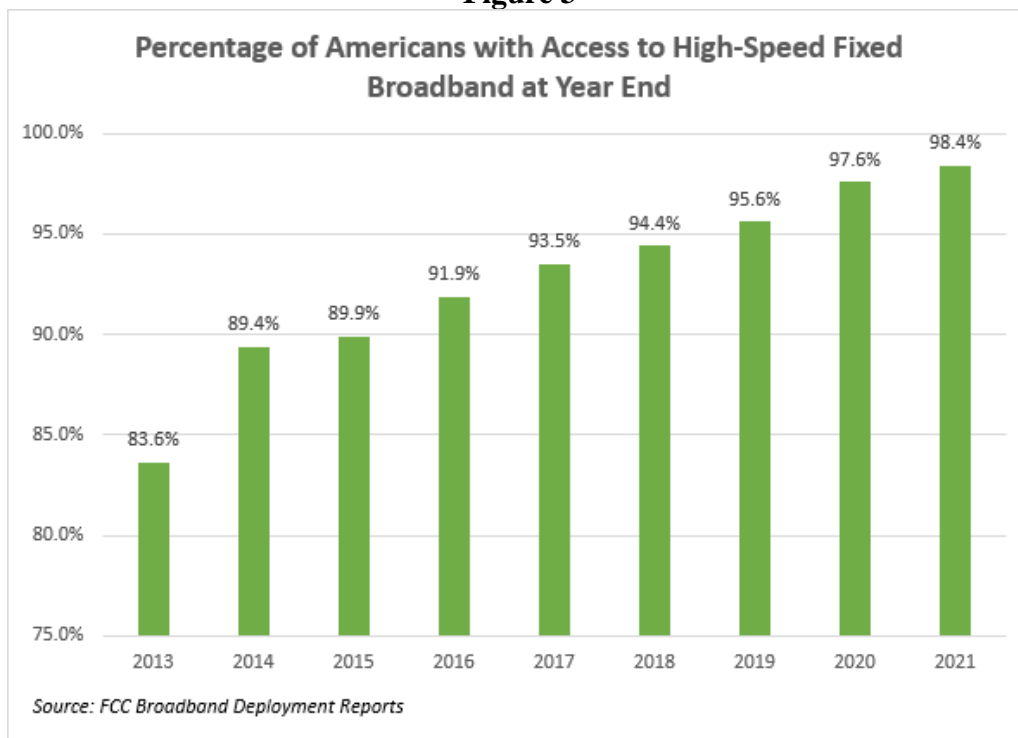
²⁴ Seth L. Cooper, *FCC Report Shows Broadband Success Under Pro-Market Policies*, The Free State Foundation (May 11, 2023), <https://tinyurl.com/3v33tpwv>.

²⁵ Simon Kemp, *Digital 2023: The United States of America: The Essential Guide to the Latest Connected Behaviors*, We Are Social (Feb. 9, 2023), <https://tinyurl.com/mwbephs8>.

²⁶ See *Communications Marketplace Report*, Report, 33 FCC Rcd 12558, 12654 (2018), <http://tinyurl.com/bdd7887z> (showing that, in 2017, 139.957 million Americans had access to two high-speed fixed ISPs and 91.174 million had access to more than two, resulting in approximately 229.1 million Americans (or 70.4 percent of the U.S. population) with access to two or more high-speed fixed ISPs); *Communication Marketplace Report*, 2022 Communications Marketplace Report, GN Docket No. 22-203, FCC 22-103, at 283 (Dec. 30, 2022), <https://tinyurl.com/4j8n789y> (showing that, as of December 31, 2021, 89.9 percent of U.S. households—or approximately 116.6 households—had access to two or more high-speed fixed ISPs, which is equivalent to 295 million Americans when multiplied by 2.53, the average number of persons per household in 2021) (“2022 Communications Marketplace Report”); see also *Broadband Competition is Thriving Across America: An ACA Connects White Paper*, ACA Connects, at 12-18 (June 23, 2022), <https://tinyurl.com/3se6uw24> (describing increasing numbers of households with access to broadband providers) (“ACA Connects White Paper”).

²⁷ ACA Connects White Paper at 4.

Figure 3



Moreover, more than 94 million homes and businesses use 5G fixed broadband services, which provides Americans with one of several options for home broadband.²⁸ 5G will also likely comprise approximately 91 percent of U.S. wireless connections by 2028.²⁹ This substantial 5G deployment will directly impact Americans, by contributing up to \$1.7 trillion to U.S. GDP and creating between 3.8 million and 4.6 million jobs over the next ten years.³⁰ The 5G revolution also has heralded an unprecedented era of technological advancement, enabling the vast Internet of Things (“IoT”) ecosystem to become a reality. Last year, 162 million 5G end-user devices were operational—“nearly double the number of 5G devices in 2021.”³¹ This explosive growth

²⁸ NPRM at 139 (Dissenting Statement of Commissioner Brendan Carr).

²⁹ *The State of 5G: Evaluating Progress and Charting the Path Forward*, CTIA, at 28 (July 2023), <https://tinyurl.com/yuks2uc9> (“State of 5G Report”).

³⁰ Enrique Duarte Melo et. al, *5G Promises Massive Job and GDP Growth in the US*, Boston Consulting Group and CTIA, at 3 (Feb. 2021), <https://tinyurl.com/yck7kdv3>.

³¹ CTIA 2023 Annual Survey Highlights at 5.

in 5G connections “play[s] an integral role in unlocking the power of IoT, with 5G networks’ high capacity enabling thousands of sensors to work together and support innovations,” such as drones, autonomous vehicles, smart cities, advanced manufacturing, and precision agriculture.³²

The RIF Order’s targeted approach has also propelled faster Internet speeds for Americans across the country. Currently, the United States has one of the highest average fixed broadband download speeds in the world.³³ According to September 2023 Ookla data, the United States maintains a top-ten-globally-ranked fixed Internet speed and the fastest mobile broadband speed in North America.³⁴ According to another Internet speed test provider, in 2022 alone, “internet speeds rose over 20% year over year to a national average of 119.03 Mbps.”³⁵ These metrics echo the progress from 2018 to 2022, when “16 major Internet providers in the US saw speeds trending upwards, with many reaching 150 Mbps across the board.”³⁶ This momentous improvement comes as no surprise, as Internet speeds improved by forty percent in 2018 alone—the same year that the RIF Order went into effect.³⁷

In addition, the era of targeted regulation has been marked by significantly decreased prices for consumers. For wireless services, CTIA reports a 73 percent decrease in per megabyte prices for since 2017.³⁸ NCTA likewise reports that, according to data from the U.S. Bureau of Labor Statistics, real U.S. broadband prices, adjusted for inflation, have fallen 12 percent over

³² *Id.*

³³ NPRM at 139 (Dissenting Statement of Commissioner Brendan Carr).

³⁴ *Median Country Speeds September 2023*, Ookla, <https://tinyurl.com/4k2573jm> (last visited Dec. 13, 2023).

³⁵ Alex Kerai, *State of the Internet in 2023: As Internet Speeds Rise, People Are More Online*, HighSpeedInternet.com (Sept. 28, 2023), <https://tinyurl.com/2ncz9tjj> (citing Peter Holsin, *The Fastest Internet Providers in 2023: Assessing more than 20 leading internet providers for speed and latency* (Nov. 2, 2023), <https://www.highspeedinternet.com/resources/fastest-internet-providers>).

³⁶ *Id.*

³⁷ Jeff Jacoby, A year after net-neutrality’s repeal, the Internet is alive and well — and faster than ever, *The Boston Globe* (Dec. 28, 2018), <https://tinyurl.com/2bur4du4>.

³⁸ CTIA 2023 Annual Survey Highlights at 8.

that same time period.³⁹ Additionally, the Technology Policy Institute estimates that monthly broadband prices have remained stable or decreased, with 1000/100 Mbps charges decreasing from over \$135 in 2018 to \$101 in 2022.⁴⁰ Weighted median prices of plans offering 50, 100, and 1000 Mbps also decreased during this time.⁴¹ In sum, the RIF Order’s Title I reclassification has fostered greater broadband investment and deployment, while increasing Internet speeds and making broadband services more accessible and affordable for consumers than ever before.⁴²

C. The COVID-19 Pandemic Affirms the Wisdom of *Restoring Internet Freedom Order’s* Regulatory Approach.

The American broadband industry has not only achieved these major successes over the past five years, but did so during the COVID-19 pandemic—“the ultimate stress test” that brought unprecedented levels of broadband traffic.⁴³ During the pandemic, U.S. networks “far outpace[d] those in Europe,” and a favorable regulatory environment “created the incentives for the private sector to invest massive, record-breaking sums and build out robust, resilient, and competitive networks.”⁴⁴ As European networks succumbed to “a heavy-handed regulatory scheme” that “treat[ed] the internet as a static commodity,” the American approach has “imagine[d] a world where consumers gain from being able to enjoy higher-quality internet services.”⁴⁵ For example, when the pandemic hit, American households had access to two or

³⁹ *Net Fatality: Internet for All at Stake*, NCTA, <https://tinyurl.com/bd7j3puc> (last visited Dec. 13, 2023).

⁴⁰ Scott Wallsten, *Broadband Prices Mostly Stable Last Year*, Technology Policy Institute (Dec. 22, 2022), <https://tinyurl.com/3r292bf4>.

⁴¹ *Id.*

⁴² See Scott Wallsten, *Reclassifying Broadband Under Title II Will Not Increase Competition*, Technology Policy Institute (Oct. 8, 2023), <https://tinyurl.com/4www4b29> (describing increased competition in broadband and satellite capabilities under a Title I regulatory framework).

⁴³ Brendan Carr, Commissioner, FCC, Statement on Following Europe’s Approach to Internet Regulation—With Its Sweeping Government Controls—Would Be a Serious Mistake, as COVID-19 Showed, at 1 (Oct. 4, 2023), <https://tinyurl.com/5rxehxxx> (“Commissioner Carr Europe Statement”).

⁴⁴ *Id.*

⁴⁵ Christopher S. Yoo, *Coronavirus Vindicates the FCC’s ‘Net Neutrality’ Rollback*, WSJ (Apr. 14, 2020), <https://tinyurl.com/49h23xra>.

more facilities-based fixed providers at more than double the rate of European households, and five times greater for American versus European rural areas.⁴⁶ Furthermore, American 5G networks are “the world’s most available 5G networks,”⁴⁷ covering 96 percent of the population as compared with just 73 percent of Europeans.⁴⁸ While Europe rationed Internet streaming services to preserve capacity during the pandemic, U.S. networks fostered innovation through faster Internet speeds and competition.⁴⁹

Congress likewise understood that heavy-handed regulation was not the key to keeping Americans connected at an unprecedented time, and in fact would be detrimental. Rather than adopting emergency legislation that imposed some type of Title II framework on ISPs, Congress responded to the pandemic by encouraging universal service through federal support. Congress passed numerous COVID-19-era bills that appropriated funds for this purpose, including the Consolidated Appropriations Act,⁵⁰ American Rescue Plan Act of 2021,⁵¹ and Infrastructure Investment and Jobs Act (“IIJA”).⁵² The Consolidated Appropriations Act gave a total of \$6.2 billion in funding for broadband, split across the FCC, National Telecommunications and Information Administration (“NTIA”), and United States Department of Agriculture (“USDA”).⁵³ The Act appropriated \$3.2 billion to the FCC to create the Emergency Broadband

⁴⁶ Commissioner Carr Europe Statement (citing *U.S. vs. .EU. Broadband Trends: 2012-2020*, USTelecom, at 6, <https://tinyurl.com/yc779vsx>).

⁴⁷ State of 5G Report at 12.

⁴⁸ *State of Digital Communications 2023*, European Telecommunications Network Operators’ Association, at 4, 13 (Jan. 2023), <https://tinyurl.com/4eh4ytu4>.

⁴⁹ NPRM at 140-141 (Dissenting Statement of Commissioner Brendan Carr); *see* Commissioner Carr Europe Statement.

⁵⁰ Consolidated Appropriations Act, 2021, Pub. Law No. 116-260, 134 Stat. 1182.

⁵¹ American Rescue Plan Act of 2021, Pub. Law No. 117-2, 135 Stat. 4.

⁵² Infrastructure Investment Jobs Act, Pub. Law No. 117-58, 135 Stat. 429 (2021); Colby Leigh Rachfal, Cong. Rsch. Serv., IF12030, *The Broadband Digital Divide: What Comes Next for Congress?* (Jan. 31, 2022), <https://tinyurl.com/bdhwrydd> (“CRS Broadband Funding Analysis”).

⁵³ CRS Broadband Funding Analysis at 1.

Benefit Program, a universal service program that subsidizes home broadband service and devices for low-income households and was later succeeded by the Affordable Connectivity Program.⁵⁴ The American Rescue Plan Act furnished the FCC with \$7.171 billion to ensure that students, school staff, and library patrons maintained broadband connectivity and had access to devices during the pandemic.⁵⁵ And the IIJA endowed the FCC, NTIA, and USDA with a total of \$64.4 billion for various broadband programs—“the largest federal broadband investment in history.”⁵⁶ While Congress took several important steps to ensure federal funding was available to increase connectivity during the pandemic, at no point did any of those efforts impose utility-style regulation on providers who would use that federal support.

In the NPRM, the Commission claims that the COVID-19 pandemic justifies Title II reclassification because the pandemic “dramatically changed the importance of the Internet.”⁵⁷ We agree that the pandemic underscored the importance of broadband, but as Commissioner Carr notes in his dissent, “this takes the lessons learned from the pandemic and turns them on their heads.”⁵⁸ 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. American broadband has seen noteworthy success over the past five years precisely *because* of the FCC’s targeted approach, not in spite of it. By maintaining the status quo, the Commission can empower the U.S. to continue being a global leader—even in the face of major challenges.

⁵⁴ Consolidated Appropriations Act, 2021, Pub. Law No. 116-260, div. N, tit. IX, § 904, 134 Stat. 1182, 2130 (2020).

⁵⁵ American Rescue Plan Act of 2021, Pub. Law No. 117-2, tit. VII, § 7402, 135 Stat. 4, 109-10.

⁵⁶ CRS Broadband Funding Analysis at 1.

⁵⁷ NPRM ¶ 17.

⁵⁸ *Id.* at 140 (Dissenting Statement of Commissioner Brendan Carr).

III. Returning to Title II Regulation Would Depress Investment, Increase Uncertainty, and Hamper Innovation.

Evidenced by the periods where the Commission has attempted a Title II approach for broadband services, heavy-handed regulation decreases investment while increasing uncertainty and compliance costs for providers. Imposing these burdens on the broadband marketplace would yet again cause these undesirable outcomes, which are not only problematic but carry other negative consequences such as a disproportionate impact on small rural providers and subscribers. Moreover, the NPRM's far-reaching proposals suggest that this current iteration of Title II regulation would be even *more* detrimental for investment and innovation than the 2015 reclassification, particularly given that the modern-day broadband landscape is a diverse ecosystem that relies on both small and large providers as well as new technologies like advanced satellite systems in low earth orbit.

A. Past Experience Demonstrates the Harms of Title II Regulation.

Decreased investment associated with onerous regulatory regimes stems from well-known economic theory risk factors, including greater uncertainty about regulatory requirements and increased costs of compliance. Economists have pointed to numerous such factors that necessarily impact broadband providers facing Title II regulation, including “uncertainty . . . lead[ing] to delays or suspensions of investments in innovations that could be affected by the new regulation,” “diver[sion] [of] resources to compliance efforts before-the-fact,” and a “raise[d] risk of introducing new products and applications,” particularly given capacity constraints of broadband networks.⁵⁹ According to a study by George S. Ford at the Phoenix Center for Advanced Legal and Economic Public Policy Studies, “no negative investment

⁵⁹ Kevin A. Hassett & Robert J. Shapiro, *The Impact of Title II Regulation of Internet Providers on Their Capital Investments*, Georgetown McDonough School of Business, Research Paper No. 2540563, at 17 (Dec. 19, 2014), <http://tinyurl.com/yvrmvtx>.

consequences [were] found for the period [from 2005-2009] where Net Neutrality was enforced via the FCC’s ‘Four Principles’ to promote an Open Internet” under Title I, “suggesting it is reclassification—and not the principles of Net Neutrality—that is reducing investment.”⁶⁰ This makes sense, as Title II extends significantly beyond net neutrality and threatens more onerous regulations, including application of the Communication Act’s amorphous requirements that providers’ practices be “just and reasonable” and avoid “unjust or unreasonable discrimination.” Further, even when the Commission forbears from other obligations in the Act (such as the NPRM’s current assurances that the agency does not intend to engage in price regulation or require contributions to the Universal Service Fund), any Title II designation carries with it the possibility that the Commission could reverse those rulings in the future.

As the Commission explained in the RIF Order, and as the above discussion of the data makes plain, the imposition of Title II from 2015 to 2017 yielded “foregone investment and innovation.”⁶¹ The Commission’s 2015 Title II Order interrupted a “period of intense investment, broadband deployment[,] and adoption” that had increased fixed and mobile Internet connections “from 50.2 million to 355.2 million” over ten years.⁶² In contrast to the investment booms that occurred under the RIF Order’s regulatory approach of the past five years, Title II-era

⁶⁰ George S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*, Phoenix Center for Advanced Legal & Economic Public Policy Studies, at 2, 10 (Apr. 25, 2017), <https://tinyurl.com/msvw2b59> (“Ford Analysis”). In a new study released this week, Dr. Ford estimates that “[t]he persistent prospect of Title II policy reduced investment by approximately 10% on average, between 2011 and 2020, about \$8.1 billion annually, with a total loss of investment over a ten-year period of about \$81.5 billion.” The new findings also calculate \$145 billion annual losses in Gross Domestic Product (“GDP”), amounting to “\$1.45 trillion over ten years.” George S. Ford, *Investment in the Virtuous Circle: Theory and Empirics*, Phoenix Center Perspectives, at 5-6 (Dec. 2023), <http://tinyurl.com/yeuzsh8w>.

⁶¹ RIF Order ¶ 87.

⁶² *Id.* ¶ 86 (citing Comments of Comcast Corporation WC Docket, No. 17-108, at Appendix A (filed July 17, 2017), <https://tinyurl.com/342drd9y>).

investment created “the first-ever decline outside a recession.”⁶³ For example, as Figure 1, *supra* page 7, demonstrates, capital expenditures by U.S. broadband providers declined in 2015, the year that Title II regulation was adopted, and remained below 2014 levels until 2018, the year that Title I regulation was restored.⁶⁴

And these harms are not limited to when the Commission actually imposes regulations—even the mere threat of Title II classification can have significant impacts on investment. As the Commission explained in the RIF Order, according to the Ford study discussed above, former FCC Chairman Genachowski’s 2010 announcement of a Title II reclassification framework triggered “a \$30 billion-\$40 billion annual decline in investment . . . between 2011 and 2015.”⁶⁵ This decline reportedly resulted in a 20-to-30 percent investment drop for the telecommunications industry, and essentially “cost the U.S. an entire year’s worth of telecommunications investment.”⁶⁶

Moreover, increased uncertainty and compliance costs in the broadband context have an outsized impact on unserved and underserved rural areas and small providers.⁶⁷ Despite the progress made to ensure all Americans have access to high-speed broadband services, nearly 17 percent of Americans in rural areas and 21 percent of residents in Tribal lands lack access to fixed terrestrial 25/3 Mbps broadband as of 2019.⁶⁸ The costs imposed by Title II regulation

⁶³ Bloomberg Editorial Board, *No One Needs Another Net-Neutrality Fight*, Bloomberg (Oct. 17, 2023), <https://tinyurl.com/yau6ne8h>; see *2022 Broadband Capex Report*, USTelecom (2022), <https://tinyurl.com/5amzbtu7> (“2022 Broadband Capex Report Chart”) (showing that investment levels decreased starting in 2015 for the first time since the 2008 recession).

⁶⁴ See Fig. 1, *supra* (conveying data from 2022 Broadband Capex Report Chart).

⁶⁵ RIF Order ¶ 95 (citing Ford Analysis).

⁶⁶ Ford Analysis at 2, 10.

⁶⁷ RIF Order ¶ 308.

⁶⁸ *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Fourteenth Broadband Deployment Report, 26 FCC Rcd 836, ¶ 33 (2021), <http://tinyurl.com/26rrhr8n>.

place a “disproportionate and unfair burden on small broadband providers,” who “lack the resources to implement business plans that anticipate all of the potential pitfalls inherent in comprehensive common carrier regulation.”⁶⁹ These overbearing costs create a significant problem for consumers in rural areas, especially as small providers “disproportionately provide service in rural and underserved areas where they are either the only available broadband service option or provide the only viable alternative to an incumbent broadband provider.”⁷⁰ For affected consumers, Title II regulation reveals a stark reality: “some will likely not have access to high-speed services over fixed or mobile networks and some will not experience better service as quickly as they otherwise would under a Title I classification.”⁷¹

The industry’s experience moving from Title II to Title I regulation demonstrates the real differences that a targeted regulatory approach can have for small and rural providers and the consumers who depend on them. For example, in 2020, the Wireless Internet Service Providers Association (“WISPA”) reported that the RIF Order’s reclassification back to Title I created cost savings that allowed one company not only to avoid what would have been necessary rate increases of \$10-13 *per customer* to cover Title II compliance costs, but also to invest nearly \$500,000 in equipment and facility upgrades.⁷² Another “invested \$1.5 million dollars to expand its network by adding 12 new towers . . . [and] fully cover two additional counties.”⁷³ And a WISPA member from California “used the savings from reduced regulatory burdens . . . to

⁶⁹ Comments of the Wireless Internet Service Providers Association, WC Docket No. 17-108, at 11-12 (filed July 17, 2017), <https://tinyurl.com/3rs95ema>.

⁷⁰ Reply Comments of the Wireless Internet Service Providers Association, WC Docket No. 17-108, at 6-7 (filed Aug. 30, 2017), <https://tinyurl.com/3475vjyu>.

⁷¹ RIF Order ¶ 308.

⁷² See Comments of the Wireless Internet Service Providers Association, WC Docket Nos. 17-108, 17-287, 11-42, at 6-7 (Apr. 20, 2020), <https://tinyurl.com/jtr9nj6c> (advocating that small broadband providers, “relieved from the burdens and uncertainty of Title II regulation” can “invest[] in their networks, expand[] service areas[,] and increase[e] broadband quality”).

⁷³ *Id.* at 7.

increase its service speeds to more than 50 Mbps for its business, local government, and residential customers.”⁷⁴ These examples highlight tangible ways in which onerous regulation prevents small and rural providers from competing in the market.

B. The Proposed Title II Reclassification Would Be Particularly Harmful, Especially Given How the Broadband Market Has Evolved.

The regulatory overhaul contemplated by the current Commission threatens to inject significantly *more* uncertainty, and higher costs, into the broadband ecosystem than even the 2015 Title II reclassification. This is because (as discussed in further detail in Section IV, below) the Commission raises concerns in the NPRM about new areas of policy that have not traditionally animated the Title II debate, such as national security, cybersecurity, and privacy, though the NPRM does little to explain what steps the Commission might take to address these concerns.⁷⁵ Each of these vague proposals—and the current Commission’s inclination to pursue heavy-handed regulation to meet an evolving and expanding number of policy goals—drives home that broadband providers will face larger compliance costs and greater uncertainty about the regulatory burdens ahead if the NPRM is adopted.

In addition, the impacts of this especially onerous Title II regime are likely to be particularly severe given that the universe of providers is also quite different than it was in 2015. For example, a robust space industry has emerged both to compete with and complement terrestrial services. As the Commission explained in last year’s *Communications Marketplace Report*, “[r]eductions in launch costs and other innovations have helped make it possible to cheaply put thousands of satellites in orbit,” leading to a “rapid expansion of [low earth orbit]

⁷⁴ *Id.*

⁷⁵ NPRM ¶¶ 30, 99, 109.

satellite constellations and the emergence of new players in the commercial satellite industry.”⁷⁶

This expansion occurred mainly over the past five years, under the Title I regulatory framework.⁷⁷ Satellite operators are investing billions of dollars into these new systems for broadband services, and market analysts predict that, “[d]riven primarily by [NGSO] satellite constellations . . . the satellite connectivity and video market is projected to exceed \$20 billion” by 2030.⁷⁸

To maximize the potential of this emerging industry, the Commission initiated its *Supplemental Coverage from Space* proceeding earlier this year. In the proceeding, the Commission seeks to “take a global leadership role in facilitating the integration of satellite and terrestrial networks by proposing . . . a novel approach” that will allow “satellite operators collaborating with terrestrial service providers . . . to obtain Commission authorization to operate space stations on currently licensed, flexible-use spectrum allocated to terrestrial services.”⁷⁹ This cooperative framework is intended to “expand[] coverage to [] terrestrial licensee[s] subscribers, especially in remote, unserved, and underserved areas” as well as spur “innovation and investment in nascent satellite and terrestrial interoperable technologies and cross-industry stakeholder partnerships.”⁸⁰ Yet while the Commission works to promote the nascent space-

⁷⁶ 2022 Communications Marketplace Report ¶ 6.

⁷⁷ In 2018, the FCC granted authorization to SpaceX for its non-geostationary orbit (“NGSO”) Starlink constellation (which to date has launched nearly 4,000 satellites), followed by authorizations for other robust NGSO constellations. *Second Generation Starlink Satellites*, SPACE X,

⁷⁸ Press Release, Euroconsult, NGSO Constellations Continue to Gain Momentum, Satellite Connectivity & Video Market Expected to Double Over Next Decade (Sept. 22, 2021), <https://tinyurl.com/yc6vwx6b>.

⁷⁹ *Single Network Future: Supplemental Coverage from Space*, Notice of Proposed Rulemaking, GN Docket No. 23-65, IB Docket No. 22-271, FCC 23-22, ¶ 1 (rel. Mar. 17, 2023), <https://tinyurl.com/ycx7b3ja>.

⁸⁰ *Id.*

based broadband market with one hand, it proposes to bring down the cudgel of utility-style regulation on the other.⁸¹

The path forward is clear. History demonstrates that a targeted regulatory approach works, and that the onerous requirements of Title II will have significant negative impacts on investment, innovation, and unserved and underserved consumers. Current market conditions, coupled with the Commission’s proposal to impose unprecedented regulation under Title II, indicate that the harms caused by adoption of this NPRM would be especially severe. Rather than disrupting the success that has given consumers across the country access to high-speed, affordable, and technologically advanced broadband services, even amid a global pandemic, the Commission should maintain the status quo.

IV. The FCC’s Purported Justifications for Title II Reclassification Lack Merit.

Given that the Commission cannot justify its return to Title II classification with evidence of new open internet violations or a need to foster competition, investment, or innovation, the Commission instead seeks refuge in a grab bag of new rationales that have nothing to do with “net neutrality”—such as privacy, cybersecurity, national security, public safety, and network resiliency. Moreover, the Commission appears unwilling to fully commit to the need for reclassification in these areas, or even to describe in detail how these new rationales support reclassification. Indeed, many of the complex policy questions raised in the NPRM would better be suited for a Notice of Inquiry (“NOI”) that simply asks questions of parties to allow the Commission to form provisional views before proposing onerous, prescriptive regulation.

⁸¹ See, Letter from Cathy McMorris Rodgers, Robert Latta, et. al., U.S. House Energy and Commerce Committee, to Hon. Jessica Rosenworcel, Chairwoman, FCC, (Oct. 17, 2023) at 4 (explaining that the NPRM “also threatens to undermine investment and innovation in the emerging satellite communications industry by imposing 1930s era regulations on an industry that did not even exist until decades after those regulations were enacted.”) https://d1dth6e84htgma.cloudfront.net/FINAL_Letter_to_FCC_re_Title_II_Reclassification_5308bd2f7e.pdf.

The NPRM, for example, “tentatively concludes” only that Title II authority would “enhance the Commission’s efforts to protect the national defense . . . a responsibility that underlies its other statutory obligations,”⁸² and “reinforce the Commission’s authority to support its efforts to enhance cybersecurity in the communications sector.”⁸³ In fact, the NPRM uses the phrase “enhance the Commission’s” “ability” or “jurisdiction” no less than 11 times. These statements presuppose, correctly, that Congress has provided the Commission with other tools to address these unrelated policy areas. And the Commission’s vague suggestions that it needs Title II authority to enhance and reinforce its existing efforts cannot support reclassification, let alone justify the Commission’s tentative decision not to forbear from applying Section 214 (a decision it cannot finalize without applying the relevant statutory test). To the contrary, by injecting the Commission into areas where it either has not traditionally regulated or else has a calibrated role to play informed by other sources of authority, Title II reclassification would likely *undercut* existing whole-of-government efforts in many of these areas.

A. Cybersecurity

The Commission offers only two concrete ways in which it believes reclassification would “support [the FCC’s] effort to enhance cybersecurity”—by allowing it to adopt prescriptive cybersecurity regulations on ISPs, and by allowing it to take additional action on Border Gateway Protocol (“BGP”).⁸⁴ But there is no suggestion that either of these actions would help solve the problem the Commission identifies. The Commission also asks about a range of other potential regulatory actions that it could take following reclassification, but none of these suggestions provide any basis for supporting a return to Title II.

⁸² NPRM ¶ 26.

⁸³ *Id.* ¶ 30.

⁸⁴ *Id.* ¶¶ 30-31.

First, the agency acknowledges that it is already “actively involved in federal interagency cybersecurity planning, coordination, and response activities,” including taking action pursuant to Presidential Policy Directive 21, which tasks the Commission (using its current authority) with ““identifying communications sector vulnerabilities and working with industry and other stakeholders to address those vulnerabilities . . . [and] to increase the security and resilience of critical infrastructure within the communications sector. . . .”⁸⁵ Nevertheless, the Commission asserts that the current classification of broadband as a Title I service “limits the regulatory and operational actions that the Commission can take,” because the agency has “limited authority to require providers of non-Title II services (e.g., ISPs) to adopt cybersecurity standards or performance goals.”⁸⁶

But the Commission’s role in addressing cybersecurity is part of a larger, whole-of-government effort, as its reference to the Policy Directive makes clear. The agency’s “limited authority” is not a flaw in this context; entities within both the government and the private sector must work together to address the various challenges presented by cybersecurity, and they have actively been doing so.

Additionally, federal agencies are obligated, as a matter of reasoned decision-making, to consider existing regulatory frameworks and “determine whether, under the existing regime, sufficient protections exist[.]” to address the problem.⁸⁷ The NPRM offers no reason to think that prescriptive rules imposed only on the broadband sector would be incrementally helpful to

⁸⁵ *Id.* ¶ 30 (citing Presidential Policy Directive/PPD-21 21: Critical Infrastructure Security and Resilience, The Obama White House (Feb. 12, 2013), <http://tinyurl.com/yxmxbs4>).

⁸⁶ *Id.*

⁸⁷ *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 179 (D.C. Cir. 2010) (“The [U.S. Securities and Exchange Commission (“SEC”)]’s “failure to analyze the efficiency of the existing state law regime renders arbitrary and capricious the SEC’s judgment that applying federal securities law would increase efficiency.”).

existing whole of government efforts. To the contrary, ISPs have been working collaboratively for years with the FCC and other government agencies to enhance cybersecurity practices. The Commission has not identified any incidents or circumstances where binding regulations would have led to a better result than those already being achieved through these existing procedures. The NPRM also does not consider, and the FCC should take heed, that Congress has previously made clear that cybersecurity regulations should be guided by public-private partnerships and the authority already designated to other agencies.⁸⁸

Just as importantly, the NPRM does not mention—let alone grapple with—the costs that would come from the imposition of these regulations. The agency must take those costs into account.⁸⁹ And the costs here are not just limited to direct burdens on ISPs, though these could potentially be substantial and must be considered. They also include the damage that more prescriptive regulation by the FCC would impose on the broader cybersecurity landscape. As the Chamber explained in comments to the Office of National Cyber Director, “the current state of cybersecurity regulations is a fragmented landscape with varying standards, requirements, and compliance frameworks across jurisdictions.”⁹⁰ These fragmented policy approaches to

⁸⁸ For example, in 2018, Congress established the Cybersecurity and Infrastructure Security Agency (“CISA”), which reorganized and elevated the mission of the Department of Homeland Security’s (“DHS”) former National Protection and Programs Directorate (“NPPD”), establishing CISA as the Federal leader for cyber and physical infrastructure security. The Cybersecurity and Infrastructure Security Agency Act of 2018 (H.R. 3359, Cybersecurity and Infrastructure Security Agency Act of 2018, Pub. L. No. 115-278, 132 Stat. 4168). Previously, in 2006, the Department of Homeland Security created the Critical Infrastructure Partnership Advisory Council (“CIPAC”) in accordance with National Infrastructure Protection Plan and Presidential Policy Directive 21, Critical Infrastructure Security and Resilience. Presidential Policy Directive/PPD-21 21: Critical Infrastructure Security and Resilience, The Obama White House (Feb. 12, 2013), <http://tinyurl.com/yxmxbs4>.

⁸⁹ See *Michigan v. EPA*, 576 U.S. 743, 760 (2015) (“We hold that EPA interpreted § 7412(n)(1)(A) unreasonably when it deemed cost irrelevant to the decision to regulate power plants.”); see also *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1151 (D.C. Cir. 2011) (“[T]his type of reasoning, which fails to view a cost at the margin, is illogical and, in an economic analysis, unacceptable.”).

⁹⁰ Comments of U.S. Chamber of Commerce, Request for Information, Office of the National Cyber Director, Executive Office of the President; Cyber Regulatory Harmonization: Opportunities for and Obstacles To Harmonizing Cybersecurity Regulations, at 2 (Oct. 31, 2023), <http://tinyurl.com/3khe59sp>.

cybersecurity lead to duplicative and/or confusing security requirements, splinter organizations’ risk management budgets, and cause market distortions that weaken security for individual companies and collectively. Potential standards and mandates that apply only to one set of stakeholders, like those contemplated in the NPRM, will only add to this fragmentation. On the other hand, “improved harmonization of cyber regulations will allow organizations to focus more of their time, people, and resources on improving cyber programs and responding to incidents, rather than addressing overlapping, duplicative—and sometimes contradictory—state, federal, and international regulatory requirements.”⁹¹

Instead of having a Title II approach imposed solely on broadband, the communications sector would be better served by federal, risk-based legislation that establishes clear and consistent federal guidelines to ensure that both regulators and regulated entities can direct scarce resources at significant cybersecurity risks. This legislation could recognize businesses’ use of existing standards, guidelines, and/or frameworks to meet legal requirements, and offer private parties a menu of appropriate standards, guidelines, and/or frameworks to select from, facilitating choice among parties that may be subject to various regulatory requirements either domestically or internationally.

Second, the NPRM’s cybersecurity justification suggests that Title II authority could improve the Commission’s “inquiry into vulnerabilities threatening the security and integrity of the Border Gateway Protocol.”⁹² But as the Commission notes in the NPRM, it is already taking action on this matter. The *Secure Internet Routing* Notice of Inquiry was issued by the FCC in

⁹¹ *Id.* at 1.

⁹² NPRM ¶ 31.

2022,⁹³ pursuant to the Commission’s existing authority, and the NPRM gives no explanation about *how* Title II authority might “improve” this inquiry.

In fact, what the FCC’s inquiry has revealed so far is that FCC regulation of ISPs is particularly ill-suited to addressing Internet routing security challenges. BGP enables routers to move packets of data across the Internet and tells routers how to get the data from its origin to its destination. However, the scope of the Internet is enormous, with a wide variety of key players that are beyond the Commission’s reach, either because they are unregulated or because they are international in scope.

By way of example, there are more than 70,000 Autonomous System (“AS”) networks operating on the Internet that need to use BGP to find and talk to each other. Improved routing security starts with these AS operators, who must alter their practices to sign traffic they originate (which would allow transit providers to better recognize network security issues). Without a substantial increase in signed traffic, filtering can provide little benefit. But these operators are not ISPs and are not within the Commission’s jurisdiction regardless of how broadband is classified. Instead, these AS networks are run by public and private entities, including many federal government agencies. That is why the Commission’s *Secure Internet Routing* inquiry has led recently to a series of workshops aimed at addressing the contribution of these various stakeholders to improving BGP and network security. To the extent the NPRM posits that Title II regulation would somehow cut this Gordian knot, it is simply mistaken. Title II authority over consumer broadband would not provide the FCC with authority to regulate government agencies and non-provider private sector entities, that operate in the enterprise and

⁹³ See *id.* ¶ 31 n.113 (citing *Secure Internet Routing*, Notice of Inquiry, 37 FCC Rcd 3471, ¶¶ 1-2 (2022), <http://tinyurl.com/8a3bypfk>).

wholesale provider marketplace that are positioned to contribute to improvements in network security risk management.

Moreover, even with respect to ISPs, reclassification is not necessary and may be counterproductive. ISPs are already taking steps independently to improve BGP security. Since 2013, the Resource Public Key Infrastructure (“RPKI”) has enabled ISPs to validate that the IP address blocks and AS number advertised with a route do in fact come from the AS that owns them.⁹⁴ The ISP industry has also developed Mutually Agreed Norms for Routing Security (“MANRS”), which sets baseline actions for network operators, Internet Exchange Points, content delivery networks, and cloud providers.⁹⁵ Because technical solutions aimed at increasing security can restrict routes and access, FCC regulation of these entities can undermine these core principles. Thus, any steps taken to promote secure and reliable Internet routing must be considered carefully and balanced against their potential impact on these foundational priorities.⁹⁶

Third, the Commission asks about a variety of other actions that it might be able to take once it has reclassified broadband as a Title II service, such as “consider[ing] cybersecurity in its annual inquiry under Section 706 of the Telecommunications Act 1996,”⁹⁷ or taking unspecified action to “address threats related to the [Domain Name System (“DNS”).”⁹⁸ The Commission also suggests that it could mandate adoption of the Communications Security, Reliability, and Interoperability Council’s (“CSRIC”) best practices, enforce implementation of Executive Order

⁹⁴ See NIST Technical Note 2060, *BGP Secure Routing Extension (BGP-SRx): Reference Implementation and Test Tools for Emerging BGP Security Standards*, NIST (Sept. 2021), <http://tinyurl.com/5avanhcc>.

⁹⁵ *Protect the Internet*, MANRS, <http://tinyurl.com/3zk5bxbh> (last visited Dec. 13, 2023).

⁹⁶ The Commission “invite[s] commenters to address how [the] proposed classification may promote or inhibit advances in diversity, equity, inclusion, and accessibility.” NPRM ¶ 54.

⁹⁷ *Id.* ¶ 32.

⁹⁸ *Id.*

(“EO”) 14028’s network security practices,⁹⁹ establish cybersecurity requirements for Internet exchange facilities and data centers, and require comprehensive cyber incident reporting.¹⁰⁰

These are all areas where existing collaborative efforts are paying dividends. As with the Commission’s proposal to require cybersecurity standards for ISPs, above, the Commission has not identified a need for *regulatory* action in any of these areas.

Indeed, one of the questions posed by the Commission – “[c]ould the Commission use Title II authority to require ISPs to block IP addresses that originate malicious software and ransomware” – identifies an issue that might be *more* problematic under common carrier regulation than current, Title I regulations.¹⁰¹ As a general matter, imposing a regulatory obligation on providers to carry all traffic equally makes it harder to filter and block problematic traffic or destinations, which is precisely the opposite of what the Commission appears to contemplate here.

B. National Security

The FCC’s suggestion that it needs reclassification to promote national security is similarly unsupported.¹⁰² There is already an interactive dialogue between the FCC and Congress in the security space that helps ensure the Commission obtains the authority it needs. For example, in 2019, the Commission first implemented rules to prevent the Universal Service Fund (“USF”) from being used to purchase equipment and products from companies determined to threaten national security.¹⁰³ Congress subsequently responded, passing the Secure Networks

⁹⁹ Exec. Order No. 14028, 86 Fed. Reg. 2663 (May 17, 2021), <http://tinyurl.com/ynmww73>.

¹⁰⁰ NPRM ¶ 32.

¹⁰¹ *Id.*

¹⁰² *Id.* ¶ 25.

¹⁰³ *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, Report and Order, Further Notice of Proposed Rulemaking, and Order, 34 FCC Rcd 1142 (2019), <http://tinyurl.com/2s4fh52u>.

Act, which codified the Commission’s approach, prohibited certain Federal funding programs from being used to purchase communications equipment or services posing national security risks, and gave the FCC the authority to create the Covered List.¹⁰⁴ And again, when the Commission proposed an order that would use the Covered List as a basis to deny requests for equipment authorization, Congress passed targeted legislation that clearly laid out the role it expected the FCC to play in this area.¹⁰⁵ Additionally, several other agencies with comparative national security authority have roles to play, which Congress has historically taken into account in these statutes.¹⁰⁶

In other words, Congress has taken a careful, surgical approach in this context, providing limited and targeted authority to the FCC as needed, building on the agency’s existing authority, and considering the views and roles of other expert agencies. By contrast, the FCC is proposing a dramatic, wholesale expansion of its authority through reclassification. The Commission fails to explain why this blunt approach is necessary, and it would in any event have costly unintended consequences, both in the national security space and beyond.

For example, the Commission suggests that it needs Title II authority to enhance national security by expanding the scope of Section 214 authorizations. In the 2015 Title II Order, the Commission forbore from applying Section 214 to broadband, holding that Section 214 met the statutory test under Section 10 of the Telecommunications Act of 1996.¹⁰⁷ Under Section 10(a),

¹⁰⁴ See Secure and Trusted Communications Networks Act of 2019, Pub. L. No. 116-124, 134 Stat. 158 (2020), <https://tinyurl.com/46mwpndy>.

¹⁰⁵ See, e.g., *Protecting Against National Security Threats to the Communications Supply Chain through the Equipment Authorization Program*, Report and Order, Order, and Further Notice of Proposed Rulemaking, 37 FCC Rcd 13493, ¶ 6 (2022), <http://tinyurl.com/3j9hjzvy>.

¹⁰⁶ *Id.* ¶¶ 5-23 (discussing the extensive coordination between Congress, Executive Branch agencies, and the Commission in the field of securing networks and devices against national security threats).

¹⁰⁷ *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling and Order, 30 FCC Rcd 5601, ¶ 509 (2015), <http://tinyurl.com/4m6jsy8x> (“Title II Order”).

the Commission “shall forbear” when the statutory criteria are met.¹⁰⁸ In a significant departure, the new NPRM proposes not to forbear from Section 214 and fails utterly to justify this reversal.

The NPRM refers to the China Telecom Americas Section 214 revocation and asserts that the Commission “believe[s] that the same national security and law enforcement threats identified in those proceedings equally exist with respect to entities providing BIAS, and that reclassifying BIAS as a telecommunications service would allow the Commission to use its section 214 authority to address those threats and other threats to our communications networks.”¹⁰⁹ But while the NPRM proposes to use the same analytical approach as the Commission did in 2015,¹¹⁰ it does not actually conduct the statutory forbearance analysis that the 2015 Commission employed.¹¹¹ The NPRM “tentatively conclude[s] that we should exclude [Section 214] from any forbearance granted here,”¹¹² 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 10.¹¹³

As with cybersecurity, the Commission appears reluctant to assert that Section 214 is “necessary,” because doing so would imply that the Commission does not have adequate tools to address these issues under the current Title I classification. The FCC cannot evade this issue indefinitely, though. It would be arbitrary and capricious for the Commission to decline from forbearance of Section 214 without performing the statutory analysis and making the requisite

¹⁰⁸ 47 U.S.C. § 160(a).

¹⁰⁹ NPRM ¶ 27.

¹¹⁰ *Id.* ¶ 101.

¹¹¹ Title II Order ¶ 435.

¹¹² NPRM ¶ 108.

¹¹³ 47 U.S.C. § 160(a).

finding.¹¹⁴ As Judge Williams wrote in his partial dissent in *US Telecom*, this refusal to adopt a full-throated policy position may be “strategic ambiguity” on the part of the agency.¹¹⁵ “But strategic ambiguity on key propositions underlying its regulatory choices is just a polite name for arbitrary and capricious decisionmaking.”¹¹⁶

The NPRM also simply ignores the costs and complexity that come with application of Section 214. 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,”¹¹⁷ 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.¹¹⁸

Critically, the new NPRM also does not wrestle with the possibility that state governments will seek to use reclassification and Section 214 to impose their own entry, transaction review, and other broadband regulations. State governments may argue that the application of Section 214, and the Commission’s refusal to forbear from enforcing this

¹¹⁴ The Commission’s forbearance authority comes from Section 10 of the 1996 Telecommunications Act, *Ting v. AT&T*, 319 F.3d 1126, 1132 (9th Cir. 2003), and the Commission cannot disregard the terms of Section 10 when forbearing, *Ass’n of Comm’ns. Enter. v. FCC*, 235 F.3d 662,665-66 (D.C. Cir. 2001). Section 10 imposes a mandatory duty on the Commission to forbear when the criteria in Section 10(a) are met. 47 U.S.C. § 160(a) (“the Commission *shall* forbear from applying any regulation or any provision of this chapter . . . if it determines that” the relevant criteria are satisfied) (emphasis added). In considering whether forbearance is warranted, the Commission cannot simply disregard this duty and the attendant statutory standard. *See, e.g., Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary where “the agency has relied on factors which Congress has not intended it to consider,” or has “entirely failed to consider an important aspect of the problem”).

¹¹⁵ *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 744 (D.C. Cir. 2016) (Williams, J., concurring in part and dissenting in part) (“*USTA F*”).

¹¹⁶ *Id.*

¹¹⁷ Title II Order ¶ 510.

¹¹⁸ *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009).

provision, gives them the power to regulate local broadband providers. This is especially true given the FCC’s apparent reluctance to fully embrace a uniform national standard and preempt state regulation in this area. The suggestion in the NPRM that broadband regulation should be governed “primarily” by a national “floor” of ISP conduct rules could be read to openly invite these regulatory efforts by the states.¹¹⁹

C. Privacy

The NPRM “tentatively conclude[s] that reclassification of BIAS as a telecommunications service would support the Commission’s efforts to safeguard consumers’ privacy and data security. . . .”¹²⁰ Similar to other justifications, the FCC offers little in the way of specifics about how reclassification will serve this end, other than noting “[t]he Commission’s efforts will rely on, among other things, its authority under section 222 of the Act.”¹²¹

However, Congress has already rejected applying Section 222 to broadband providers. In 2016, following its first reclassification of broadband as a Title II service, the FCC adopted privacy rules that were intended to apply to broadband services.¹²² Such rules were necessary, the FCC reasoned, because the common carrier exemption took the newly reclassified broadband offerings out from under the Federal Trade Commission’s (“FTC”) jurisdiction, and thus required that the FCC articulate its own privacy rules for these services for the first time. These broadband privacy rules were premised on the idea that Section 222(a) “imposes a duty on all telecommunications carriers to protect the confidentiality of their customers’ ‘proprietary

¹¹⁹ NPRM ¶ 94.

¹²⁰ *Id.* ¶ 41.

¹²¹ *Id.*

¹²² *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, 31 FCC Rcd 13911, ¶ 22 (2016), <http://tinyurl.com/nrumd6ze>.

information,’ or PI.”¹²³ The Broadband Privacy Order contains a lengthy discussion of this interpretation of Section 222(a),¹²⁴ and applies it broadly to “all telecommunications carriers providing telecommunications services subject to Title II, including broadband Internet access service (BIAS).”¹²⁵

In April of 2017, Congress passed a resolution of disapproval under the Congressional Review Act¹²⁶ (“CRA”) invalidating the rules adopted by the Broadband Privacy Order.¹²⁷ Pursuant to the CRA, 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, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution”¹²⁸

The FCC is thus without authority to reissue privacy regulations that are “substantially the same” as those contained in the Broadband Privacy Order; that includes applying Section 222(a) to “Consumer proprietary information” and extending that definition to broadband. In light of the common carrier exemption for FTC rules, it is not clear *what* privacy rules will or can apply to broadband if it is reclassified as a Title II service. 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.

¹²³ *Id.*

¹²⁴ *Id.* ¶¶ 86-87.

¹²⁵ *Id.* ¶ 39.

¹²⁶ *See* 5 U.S.C. § 801.

¹²⁷ 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”).

¹²⁸ 5 U.S.C. § 801(b)(2).

Remarkably, given this potential outcome, the NPRM does not even ask about the impact of the CRA. However, the Commission has recognized the concerns that the CRA raises in other proceedings. In its 2023 Data Breach NPRM, the FCC specifically requested comment on “the effect and scope of the Congressional disapproval” of the broadband privacy rules on future rules covering the same ground.¹²⁹ The same questions apply even more directly in this proceeding, and the FCC must articulate how it plans to deal with them in order to survive judicial review.¹³⁰

In its recent draft order adopting new data breach regulations (“Draft Data Breach Order”), the Commission previews how it might address this obstacle. The agency asserts that the CRA “does not prohibit the Commission from revising its breach notification rules in ways that are similar to, or even the same as, some of the revisions that were adopted in the 2016 Privacy Order, unless the revisions adopted are the same, in substance, as the 2016 Privacy Order as a whole.”¹³¹ The Draft Data Breach Order also asserts that, in the Commission’s view, the CRA resolution of disapproval here was not motivated by the former data breach rules. Rather, “Senators who spoke in favor of the resolution cited the 2016 Privacy Order’s treatment of broadband providers and the information they hold as different from providers of other services on the internet.”¹³²

The Commission’s interpretation of the CRA in the Draft Data Breach Order cannot be squared with the statutory text that the Commission itself quotes. As the Draft Data Breach Order concedes, “[t]he statutory term ‘rule,’ as used in the CRA, refers to ‘the whole or a part of

¹²⁹ *Data Breach Reporting Requirements*, Notice of Proposed Rulemaking, WC Docket No. 22-21, FCC 22-102, ¶ 52 (rel. Jan. 6, 2023), <http://tinyurl.com/3t3py8km>.

¹³⁰ *See, e.g., State Farm*, 463 U.S. at 43 (agency action is arbitrary if it “entirely failed to consider an important aspect of the problem”).

¹³¹ *Data Breach Reporting Requirements*, Report and Order, Public Draft, WC Docket No. 22-21, FCC-CIRC2313-06, ¶ 125 (rel. Nov. 22, 2023), <http://tinyurl.com/58sm8bhr> (“Draft Data Breach Order”).

¹³² *Id.* ¶ 129.

an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”¹³³ The agency further acknowledges “[t]he term ‘rule’ can also refer to parts of such a decision, or to various requirements as adopted or amended by such a decision.”¹³⁴ Nevertheless, the Commission concludes, contrary to this acknowledged text, “that the ‘rule’ to which the reissuance bar applies is the entire 2016 Privacy Order with all of the rule revisions adopted therein.”

This conclusion would transform the CRA from a substantive backstop on agency authority into a mere procedural speedbump that the Commission could evade by simply reenacting all of the “parts” of a disapproved rule piecemeal. It also impermissibly renders the references to “parts” of the agency decision in the statute mere surplusage.¹³⁵ Further, the Commission's focus on the supposed intent of Congress in adopted the CRA resolution is irrelevant. The text of the CRA states plainly that an agency may not issue “a new rule that is substantially the same as” a “rule that does not take effect (or does not continue)”¹³⁶ Because the various rules in the Broadband Privacy Order “d[id] not take effect,” they cannot be reissued—and that ends the matter.

In any event, as the FCC also admits in the Draft Data Breach Order, “privacy measures directed at broadband internet service providers” were the “primary animating justification

¹³³ *Id.* ¶ 128 n.440, quoting 5 U.S.C. § 804(3) (incorporating the definition of “rule” in 5 U.S.C. § 551, with exclusions); *id.* § 551(4) (defining “rule”) (emphasis added).

¹³⁴ Draft Data Breach Order ¶ 126.

¹³⁵ *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”) (citations omitted).

¹³⁶ 5 U.S.C. § 801(b)(2).

behind Congressional disapproval of the 2016 Privacy Order.”¹³⁷ Even if this purpose was “irrelevant” to the Draft Data Breach Order, it is directly relevant to the NPRM in this matter—especially since the Commission is using the purported need for privacy regulations as one of the central justifications for reclassification.

It is hard to imagine how under Title II the Commission could adopt privacy regulations that apply to “broadband providers and the information they hold” that are not “different from providers of other services on the internet,”¹³⁸ which is, in the Commission’s own words, the concern raised by Senators voting on the CRA. Indeed, the FCC does not appear to be inclined to try; the *very reason* that the Commission gives for reclassification is that it believes it must impose regulations that are different from those that already apply under the FTC Act to all providers of services across the internet. And while it is difficult to see how the Commission could avoid application of the CRA in this context, given that it is doing exactly what Congress told it not to do, at a bare minimum it must seek comment on this question. That is something the NPRM has not done.

D. Public Safety

The NPRM argues that Title II authority would “advance several public safety initiatives.”¹³⁹ The Commission supports this tentative conclusion with a lengthy discussion of its mandate to advance public safety and a variety of the ways public safety initiatives benefit consumers. The NPRM notes that such efforts to improve access to emergency services and home security are “increasingly important as the severity and frequency of natural disasters are

¹³⁷ Draft Data Breach Order ¶ 130.

¹³⁸ *Id.* ¶ 129.

¹³⁹ NPRM ¶ 33.

on the rise.”¹⁴⁰ While these are important objectives, as with both cybersecurity and national security, the Commission does not suggest that it is falling short of its mandate to advance public safety under Title I. In fact, the NPRM highlights the Commission’s existing work toward this goal such as taking “important steps to improve the effectiveness of Wireless Emergency Alerts (WEAs),”¹⁴¹ and undertaking “various efforts in recent years to improve how the public reaches and shares information with emergency service providers,”¹⁴² such as the E911 requirements implemented under Kari’s Law and the RAY BAUM’s Act.¹⁴³ The Commission has not been reluctant to use its existing authority to promote public safety objectives, and if anything, the Commission’s existing efforts illustrate its current authority is sufficient to support these objectives.

Here, too, the NPRM fails to identify specific problems that even arguably could only be solved with reclassification. The NPRM concedes that “much of the communications between public safety entities and first responders take advantage of enterprise-level dedicated public safety broadband,” which would not be covered by reclassification, but argues for reclassification on the basis that public safety entities “often rely on commercial broadband services to communicate during emergency situations.”¹⁴⁴

¹⁴⁰ *Id.*

¹⁴¹ *Id.* ¶ 35.

¹⁴² *Id.* ¶ 36.

¹⁴³ See e.g., *Implementing Kari’s Law and Section 506 of RAY BAUM’s Act*, Report and Order, 34 FCC Rcd 6607, ¶¶ 14-16, 137-220 (2019), <http://tinyurl.com/2p8r8e8u>; *Wireless E911 Location Accuracy Requirements*, Fifth Report and Order and First Further Notice of Proposed Rulemaking, 34 FCC Rcd 11592 (2019), <http://tinyurl.com/2t7tncu7>; *Wireless E911 Location Accuracy Requirements*, Sixth Report and Order and Order on Reconsideration, 35 FCC Rcd 7752 (2020), <http://tinyurl.com/3cxp4y86>; *Location-Based Routing for Wireless 911 Calls*, Notice of Proposed Rulemaking, PS Docket No. 18-64, FCC 22-96 (rel. Dec. 22, 2022); *Implementation of the National Suicide Hotline Improvement Act of 2018*, Report and Order, 35 FCC Rcd 7373, ¶ 4 (2020), <http://tinyurl.com/ycyh8y95>; *Implementation of the National Suicide Hotline Improvement Act of 2018*, Second Report and Order, 36 FCC Rcd 16901 (2021), <http://tinyurl.com/4af6jx75>.

¹⁴⁴ NPRM ¶ 34.

But the NPRM does not identify specific instances that it believes demand Title II authority. In fact, it cites extensively to the RIF Order decision on this issue and does not appear to take issue with the findings in that order, nor does it offer any additional examples of this reliance on commercial broadband. Given the number of emergencies that have occurred in the years since the RIF Order, including the COVID-19 pandemic and a variety of storms, forest fires, and other crises, it is notable that the NPRM can point to no additional examples of areas where Title I regulation has allegedly led to a negative outcome.

E. Network Resiliency

The NPRM also seeks to build on the Commission’s prior rationales for reclassification by suggesting that reclassification “would enhance the Commission’s ability to ensure the nation’s communications networks are resilient and reliable.”¹⁴⁵ The kinds of reporting, monitoring, and regulatory requirements proposed by the Commission would likely impose significant costs on providers, an issue that the NPRM does not seriously address. And as with the other justifications floated in the NPRM, there is nothing to suggest that imposing additional regulations and the accompanying costs here will actually lead to better outcomes.

For example, the Commission asks whether it should expand the Network Outage Reporting System (“NORS”) reporting requirements to ISPs.¹⁴⁶ However, the Commission does not explain the need for these requirements since ISPs are already conducting this activity and resources are publicly available to track such outages.¹⁴⁷ Would devoting significant additional resources to meeting arbitrary reporting requirements increase network reliability? Are large numbers of broadband outages currently going unreported? These basic, foundational questions,

¹⁴⁵ *Id.* ¶ 39.

¹⁴⁶ *Id.*

¹⁴⁷ See e.g., *Internet Outages Map*, ThousandEyes (Cisco), <https://tinyurl.com/33pdekvk> (last visited Dec. 13, 2023).

which go to whether there is a need for regulatory intervention at all, are more appropriate for a Notice of Inquiry than a Notice of Proposed Rulemaking. The Commission will need to answer these foundational questions before using “enhance[d]” authority as a justification for reclassification, but the NPRM treats the need to impose these obligations as a foregone conclusion.

Similarly, the Commission suggests that it could use such authority to “facilitate the use of Wi-Fi calling during emergencies or network outages,” and “apply reliability standards for Wi-Fi calling.”¹⁴⁸ But here too the NPRM treats what should have been the subject of an NOI as a basis for imposing vast regulatory burdens. To what extent is Wi-Fi calling currently being used during emergencies? Is that calling reliable? These are, again, basic, foundational questions that the Commission has skipped right past in its search for justifications for Title II regulation.

Indeed, the Commission’s proposal to reclassify broadband as a Title II service to regulate Wi-Fi calling ignores the fact that the Commission historically has not even applied Title II to interconnected VoIP calls. Rather than attempt to apply the New Deal-era Title II framework to services that have developed in recent decades like over-the-top voice capabilities, the Commission has instead drawn from its existing authorities to apply tailored regulation as needed, such as number portability or E911 calling.¹⁴⁹ Before imposing costly Title II classification on broadband without any clear sense of whether the uncertain benefits would make up for the certain costs, the Commission should determine whether to chart a similar

¹⁴⁸ NPRM ¶ 39.

¹⁴⁹ See, e.g., *Voice Over Internet Protocol (VoIP)*, FCC (Dec. 30, 2019), <https://tinyurl.com/ys2yjww7>.

course here, examining existing authorities to see how they might any address any of the specific, narrow problems identified in the NPRM.

V. The Commission Lacks Legal Authority to Classify Broadband as a Title II Service.

The Commission’s ambitious attempt to remake the Internet economy through Title II reclassification is not only bad policy—it is also unlawful. Under the better reading of the Telecommunications Act of 1996, broadband internet access service is an “information service” exempt from the common-carrier framework that applies to legacy phone services under Title II of the Act. At minimum, Congress did not *clearly* authorize the FCC to classify broadband as a Title II “telecommunications service,” as evidenced by the views of all nine Justices in the Supreme Court’s decision in *Brand X*. And where Congress has not clearly spoken to a question of major political or economic significance like this—where the FCC’s actions would replace the historically targeted approach to Internet regulation with costly utility-style mandates—the Commission lacks authority to adopt the Title II framework under consideration.

A. The Text of the Communications Act and Its Amendments Confirms that Broadband Is Best Understood as an “Information Service.”

The RIF Order currently in effect has it right—the “best reading of the relevant definitional provisions of the Act supports classifying broadband Internet access service as an information service.”¹⁵⁰

The 1996 Act divided the world of communications services into two distinct categories. While “telecommunications service[s]” are subject to Title II’s common-carrier requirements, the mutually exclusive category of “information service[s]” are not.¹⁵¹ A “telecommunications

¹⁵⁰ RIF Order ¶ 20.

¹⁵¹ *Fed.-State Joint Bd. on Universal Serv.*, Report to Congress, 13 FCC Red 11501, ¶ 39 (1998), <http://tinyurl.com/vunwftt> (“Universal Service Report”).

service” is an “offering of telecommunications for a fee directly to the public.”¹⁵²

“Telecommunications,” in turn, “means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”¹⁵³ An “information service,” on the other hand, is “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”¹⁵⁴

“[T]he [Communication] Act’s definition of ‘information service’ fits broadband Internet access like a glove.”¹⁵⁵ From a plain English perspective, the defining feature of Internet access service is providing a consumer with the “capability” to manipulate data online—such as “generating” online content, “acquiring” information, “storing” emails, “retrieving” a website from a server, “utilizing” online apps, or “making available” a personal blog. These capabilities extend well beyond mere “transmission . . . without change” of information, as typically occurs during a voice telephone call, which is classified as a telecommunications service.

Just as courts have long looked to how an average reader would understand the words in a statute,¹⁵⁶ the FCC has historically used consumer perception as a tool for evaluating how services are properly classified under the Communications Act.¹⁵⁷ As the Commission found in the RIF Order, “consumers perceive the offer of broadband Internet access service to include more than mere transmission,” and “highly value the capabilities their ISPs offer to acquire

¹⁵² 47 U.S.C. § 153(53).

¹⁵³ *Id.* § 153(50).

¹⁵⁴ *Id.* § 153(24).

¹⁵⁵ *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 395 (D.C. Cir. 2017) (Brown, J., dissenting from the denial of rehearing en banc) (“*USTA IP*”).

¹⁵⁶ *See, e.g., Perez v. Sturgis Pub. Sch.*, 598 U.S. 142, 148 (2023) (analyzing how an “ordinary reader” would understand statute).

¹⁵⁷ *See, e.g., RIF Order* ¶ 46.

information from websites, utilize information on the Internet, retrieve such information, and otherwise process such information.”¹⁵⁸

Consistent with this common-sense reading, the FCC recognized in a report to Congress adopted shortly after the passage of the 1996 Act that “Internet access services are appropriately classed as information, rather than telecommunications, services.”¹⁵⁹ The FCC explained that “Internet access providers do not offer a pure transmission path.”¹⁶⁰ For example, when consumers retrieve webpages, they are “interacting with stored data, typically maintained on the facilities of either their own Internet service provider (via a Web page ‘cache’) or on those of another. Subscribers can retrieve files from the World Wide Web, and browse their contents, because their service provider offers the ‘capability for . . . acquiring . . . retrieving [and] utilizing . . . information.’”¹⁶¹ The FCC accordingly concluded that “the text of the 1996 Act . . . *require[d]*” the Commission to classify Internet access service as an “information service.”¹⁶²

The Commission’s contemporary reading of the text of Titles I and II comports with the “regulatory history of the Communications Act.”¹⁶³ For decades prior to the 1996 Act, the Commission had drawn a consistent distinction between “basic” and “enhanced” services.¹⁶⁴ “Basic” service was “limited to the common carrier offering of transmission capacity for the movement of information.”¹⁶⁵ “Enhanced” service, by contrast, was defined as an “offering” of

¹⁵⁸ *Id.*

¹⁵⁹ Universal Service Report ¶ 73.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* ¶ 76.

¹⁶² *Id.*

¹⁶³ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 989 (2005).

¹⁶⁴ *Second Computer Inquiry*, Final Decision, 77 FCC 2d 384, ¶¶ 92-101 (1980), <http://tinyurl.com/42zyz48p> (“Computer II Order”); *see also Brand X*, 545 U.S. at 992 (recognizing “traditional distinction between basic and enhanced service”).

¹⁶⁵ Computer II Order ¶ 93.

“more than a basic transmission service.”¹⁶⁶ Basic service was subject to Title II regulation; enhanced service was not.¹⁶⁷ Under that framework, the Commission classified “functions and services associated with Internet access” as “enhanced services” exempt from Title II regulation.¹⁶⁸ “Congress passed the definitions in the Communications Act against the background of this regulatory history,” and thus “the parallel terms ‘telecommunications service’ and ‘information service’ substantially incorporated their meaning.”¹⁶⁹ As the Supreme Court has held, when Congress uses terms “obviously transplanted from another legal source, . . . it brings the old soil with it.”¹⁷⁰

In short, in the words of the Commission following passage of the 1996 Act, “all of the services that the Commission has previously considered to be ‘enhanced services’ are ‘information services.’”¹⁷¹ Because Internet access service was an “enhanced service” under the Commission’s pre-1996 precedent, Congress naturally intended for it to be an “information service” under the 1996 Act.

Neighboring provisions in the Communications Act confirm that broadband is an “information service.” Section 230(b) declares it “the policy of the United States . . . “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”¹⁷² Congress defined

¹⁶⁶ *Id.* ¶ 97.

¹⁶⁷ See, e.g., *Implementation of the Non-Acct. Safeguards of Sections 271 & 272 of the Commc’ns Act*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, ¶ 102 (1996), <http://tinyurl.com/2s3my3h8> (“Non-Accounting Safeguards Order”).

¹⁶⁸ Universal Service Report ¶ 75.

¹⁶⁹ *Brand X*, 545 U.S. at 992; accord *Fed.-State Joint Bd. on Universal Serv.*, Report and Order, 12 FCC Rcd 8776, ¶ 788 (1997), <http://tinyurl.com/22yt3ra8>.

¹⁷⁰ *Sekhar v. United States*, 570 U.S. 729, 733 (2013).

¹⁷¹ Non-Accounting Safeguards Order ¶ 102.

¹⁷² 47 U.S.C. § 230(b)(2); see also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 217 (2012), <http://tinyurl.com/mw4xkvd6> (a purpose clause is a “permissible indicator of meaning”).

the term “interactive computer services” in relevant part to include “any *information service*, . . . including specifically a service . . . that *provides access to the Internet*.”¹⁷³ Section 231(e), meanwhile, defines “Internet access service” as “a service that enables users to access content, information, electronic mail, or other services offered over the Internet,” and “[s]uch term *does not include telecommunications services*.”¹⁷⁴ When as here Congress uses the same words in neighboring provisions of the same statute, they are presumed “to have the same meaning.”¹⁷⁵

While the 2015 Title II Order and D.C. Circuit previously concluded that Congress would not have resolved the question of broadband classification in such an “oblique and indirect manner,”¹⁷⁶ there is nothing oblique or indirect about these definitions. They are integral to the proper operation of Sections 230 and 231 and the 1996 Act as a whole.

Sections 230 and 231 are part of the Communications Decency Act (“CDA”), which in turn was adopted as part of the 1996 amendments to the Communications Act. The CDA was enacted in part to “remove disincentives for the development and utilization of blocking and filtering technologies” allowing parents to block offensive material online.¹⁷⁷ To further this goal, Section 230 provides that “[n]o provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”¹⁷⁸ This immunity shield, which some commentators have credited

¹⁷³ 47 U.S.C. § 230(f)(2) (emphases added).

¹⁷⁴ *Id.* § 231(e)(4) (emphasis added).

¹⁷⁵ *Sorenson v. Sec’y of Treasury*, 475 U.S. 851, 860 (1986) (internal quotation marks and citation omitted).

¹⁷⁶ *USTA I* at 703 (quoting Title II Order).

¹⁷⁷ 47 U.S.C. § 230(b)(4).

¹⁷⁸ *Id.* § 230(c)(2).

with creating the modern Internet,¹⁷⁹ specifically contemplates that “interactive computer services,” including Internet access services, should be permitted to engage in good-faith content curation without exposure to liability. Indeed, some of the earliest case law interpreting the Section 230 immunity shield involved internet service providers like AOL.¹⁸⁰

This immunity shield is flatly inconsistent with the rules the Commission is proposing to impose on broadband providers under Title II of the Communications Act. Relying on Title II’s prescriptions that common carriers adopt policies that are “just and reasonable” and not engage in “unjust or unreasonable discrimination,”¹⁸¹ the NPRM proposes that broadband providers should be *prohibited* from engaging in content-based blocking on pain of civil penalties¹⁸²—precisely the conduct that Section 230 authorizes. This conflict only arises because the Commission has taken a wrong interpretive turn. Because broadband is an Internet access service, and hence an “interactive computer service,” it is a Title I “information service,” and thus exempt from the non-discrimination mandates that Title II reserves for “telecommunications services” alone.

B. FCC and Supreme Court Precedent Confirm that Broadband Is Best Understood as an “Information Service.”

Contrary to what the NPRM suggests, the FCC’s early classification decisions under the 1996 Act, and the Supreme Court’s related decision in *Brand X*, support the textual reading set forth above—that broadband internet access service is best classified as a Title I “information service.”

¹⁷⁹ See generally Jeff Kosseff, *The Twenty-Six Words That Created The Internet* (1st ed. 2019).

¹⁸⁰ *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); see, e.g., *id.* 330 n.2; *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 538 (E.D. Va. 2003); *E360Insight, LLC v. Comcast Corp.*, 546 F.Supp.2d 605, 607 (N.D. Ill. 2008).

¹⁸¹ See 47 U.S.C. §§ 201, 202.

¹⁸² NPRM ¶¶ 151-53.

In 1998, the Commission formally classified for the first time an early form of Internet access that used telephone companies' digital subscriber line ("DSL") technology.¹⁸³ As opposed to what the NPRM suggests, the FCC correctly recognized, consistent with its regulatory precedent, that "Internet access" "service is an information service."¹⁸⁴ The FCC nonetheless concluded that, in addition to that information service, DSL providers *also* separately offered consumers "transmission of data over" the "copper telephone wire running the 'last mile'" to a subscriber's home.¹⁸⁵ The FCC concluded that this pure transmission capability was a separate, standalone "telecommunications service" that subscribers utilized "together with an information service, as in the case of Internet access."¹⁸⁶ In other words, under this early classification order, the Commission concluded that consumers were offered both an information service (Internet access) and a separate telecommunications service (transmission from the customer premises to the phone network).

In 2002, the Commission similarly classified high-speed Internet access service provided by cable companies ("cable modem" service) as an information service.¹⁸⁷ Unlike the DSL Order, however, which was driven in part by the access requirements imposed on legacy Title II phone facilities in the provision of Internet access, the Commission concluded that cable companies did not make a separate offering of telecommunications (i.e., pure transmission) when it sent Internet content between the cable network and the end user's premises. Rather, the FCC

¹⁸³ *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>.

¹⁸⁴ *Id.* ¶ 36.

¹⁸⁵ *Id.* ¶¶ 28-29, 35-36.

¹⁸⁶ *Id.* ¶ 36; *see also USTA II*, 855 F.3d at 456 (Kavanaugh, J., dissenting) (explaining that the DSL "Order specified the last-mile *transmission* between the end user and the Internet Service Provider is distinct from the 'enhanced service' of Internet access itself.").

¹⁸⁷ *Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 38 (2002), <http://tinyurl.com/5t3jsb43>.

reasoned that, “[a]s provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities.”¹⁸⁸ Thus, cable providers’ provision of Internet access was a unitary “information service”—“a single, integrated service that enables the subscriber to utilize Internet access service through a cable provider’s facilities and to realize the benefits of a comprehensive service offering.”¹⁸⁹

The U.S. Supreme Court affirmed this determination in *Brand X*. The Court first noted that the Commission’s decision to classify cable modem service as an “information service”—because it “provides consumers with a comprehensive capability for manipulating information using the Internet via high-speed telecommunications”—was “unchallenged.”¹⁹⁰ All nine Justices agreed with this premise. The majority reasoned that the “service that Internet access providers offer to members of the public is Internet access, not a transparent ability (from the end user’s perspective) to transmit information.”¹⁹¹ Meanwhile, the dissent acknowledged that the “Internet functionality” or “computer-processing facilities” required to make Internet access work were “information services . . . assembled by the cable company in its capacity as ISP.”¹⁹²

The only issue before the Court in *Brand X* was whether it was reasonable for the Commission to conclude that cable modem providers did not *also* “offer” a standalone telecommunications service *in addition to* a Title I Internet access service—that is, transmission from the cable companies’ facilities to the customer’s home. The Court held that the word “offer” in the definition of “telecommunications service” is “ambiguous about whether it

¹⁸⁸ *Id.* ¶ 39.

¹⁸⁹ *Id.* ¶ 38.

¹⁹⁰ *Brand X*, 545 U.S. at 987.

¹⁹¹ *Id.* at 1000.

¹⁹² *Id.* at 1008, 1010 (Scalia, J. dissenting).

describes only the offered finished product, or the product’s discrete components as well.”¹⁹³

The Court concluded that the “transmission component” in broadband is “sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering,” rather than two separate services.¹⁹⁴ The dissent, meanwhile, would have held that the “telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as” a separate “offer,” like a pizzeria’s offer of delivery is arguably separate from the offer of pizza itself.¹⁹⁵

Whatever the merits of these competing arguments, the FCC does not currently propose (nor did it in the 2015 Title II Order) merely classifying the “last-mile” transmission between the home and a provider’s network as a separate, standalone “telecommunications service.” Rather, the NPRM (as in 2015) defines the proposed Title II broadband service in relevant part as a service with “the capability to transmit data to and receive data from all or substantially all internet endpoints.”¹⁹⁶ That is, the FCC now proposes to classify *Internet access itself*—the entire, end-to-end broadband network—as a Title II service. Prior to 2015, neither Congress, nor the FCC, nor any member of the Supreme Court contemplated such an aggressive, atextual reading of the statute.

As Judge Janice Rogers Brown wrote in connection with the challenge to the 2015 Title II Order, “[n]o member of the *Brand X* Court disputed that what occurred at the Internet Service

¹⁹³ *Id.* at 989-90.

¹⁹⁴ *Id.* at 990-91.

¹⁹⁵ *Id.* at 1007-08.

¹⁹⁶ NPRM ¶ 59 (internal quotations marks omitted).

Providers’ computer-processing facilities constituted an ‘information service.’”¹⁹⁷ Or to put it another way, “no member of the *Brand X* Court disputed that the pizzeria makes pizza.”¹⁹⁸

Following *Brand X*, the Commission reconsidered its conclusion that broadband over DSL facilities contained a separate, standalone telecommunications service. Specifically, the FCC removed access requirements that applied to legacy telephone lines that provided DSL service, and concluded that, “given this new framework, the transmission component of wireline broadband Internet access is not a telecommunications service.”¹⁹⁹ The Commission subsequently classified other forms of broadband Internet access services as Title I services.²⁰⁰ And those consistent classification decisions remained in place until the FCC’s short-lived 2015 order improperly reclassified Internet access services under Title II.

C. The Major Questions Doctrine Precludes Title II Classification of Broadband

Even if the Communications Act contained some ambiguity as to whether broadband could properly be classified as a Title II service, the major questions doctrine would preclude it.

The Supreme Court has repeatedly identified cases that “have arisen from all corners of the administrative state” in which the “history and the breadth of the authority that [an] agency has asserted and the economic and political significance of that assertion, provide a reason to

¹⁹⁷ *USTA II*, 855 F.3d at 399 (Brown, J., dissenting from denial of rehearing) (citation omitted).

¹⁹⁸ *Id.*

¹⁹⁹ See, e.g., *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 4 (2005), <http://tinyurl.com/y2fcywht>.

²⁰⁰ See, e.g., *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶¶ 19-28 (2007), <http://tinyurl.com/4vexast2>; *In re United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281, ¶ 1 (2006), <http://tinyurl.com/8t2b46wb>.

hesitate before concluding that Congress meant to confer such authority.”²⁰¹ In such cases involving major questions, a “colorable” or “merely plausible textual basis” for the claimed authority is not enough.²⁰² Rather, “the agency must point to ‘clear congressional authorization’ for the power it claims.”²⁰³

In this area, the Supreme Court has cited approvingly to Justice Kavanaugh’s seminal opinion (while still a D.C. Circuit judge), reasoning that the 2015 Title II Order exceeded the FCC’s authority under the major questions doctrine—the very same rule the FCC is now reproposing with minimal changes.²⁰⁴ Should the FCC reclassify broadband as a Title II service, the Supreme Court would almost assuredly adopt the reasoning in then-Judge Kavanaugh’s opinion and hold that Title II reclassification runs afoul of the major question doctrine. For this reason too, the FCC should not adopt its new Title II proposal.

As then-Judge Kavanaugh put it in reviewing the 2015 Title II Order, “[i]n order for the FCC to issue a major rule, Congress must provide clear authorization.”²⁰⁵ The analysis thus involves two questions: (1) Is Title II classification of broadband a major rule, and if so, (2) has Congress clearly authorized it?²⁰⁶ Because the NPRM proposes a major rule that Congress has not clearly authorized, it would exceed the FCC’s authority to adopt it.

²⁰¹ *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (citation and internal quotation marks omitted); *see also id.* at 2609 (noting that the Court “‘typically greet[s] [agency] assertions of extravagant statutory power over the national economy’ with ‘skepticism’”) (citation omitted).

²⁰² *Id.* at 2609.

²⁰³ *Id.* (citation omitted).

²⁰⁴ *See id.*; *see also Biden v. Nebraska*, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring); *OSHA*, 595 U.S. at 125.

²⁰⁵ *USTA II*, 855 F.3d at 422 (Kavanaugh, J., dissenting).

²⁰⁶ *See id.*

1. Title II Classification of Broadband Is a Major Rule.

It is “indisputable,” as Justice Kavanaugh noted with respect to the 2015 Title II Order, that “[t]he FCC’s net neutrality rule is a major rule.”²⁰⁷ While “there inevitably will be close cases and debates at the margins about whether a rule qualifies as major,” “under any conceivable test for what makes a rule major, the net neutrality rule qualifies.”²⁰⁸ “The net neutrality rule is a major rule,” he continued, “because it imposes common-carrier regulation on Internet service providers”²⁰⁹—that is, because it entails Title II classification.

Title II classification has all the characteristics of a major question.

First, a question is major if it is of “economic and political significance.”²¹⁰ The “financial impact” of Title II in terms of “the portion of the economy affected” and “the impact on investment in infrastructure, content, and business” is “staggering.”²¹¹ The proposed rules would fundamentally change the regulatory regime applicable to the broadband industry, which is enormous and growing—by one estimate, total revenues in the U.S. are at least \$150 billion annually.²¹² Further, prior estimates of foregone economic investment due to Title II classification, or even mere Title II proposals, range from \$5 billion to \$30-40 billion.²¹³ And as explained in further detail in Section II above, Title II classification chilled development of new innovations and broadband projects, particularly among smaller providers.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 423.

²⁰⁹ *Id.*

²¹⁰ *Biden v. Nebraska*, 143 S. Ct. at 2373.

²¹¹ *Id.*

²¹² See IBISWorld, *Internet Service Providers in the US – Market Size (2005-2009)*, (Sept. 11, 2023), <http://tinyurl.com/2dp24bak>.

²¹³ See Michael Horney, *Broadband Investment Slowed by \$5.6 Billion Since Open Internet Order*, The Free State Found. (May 5, 2017), <http://tinyurl.com/yxx6af5f> (estimating \$5.6 billion lost); see also *supra* Section III.A (discussing the impact of the Commission’s 2015 Title II reclassification); RIF Order ¶ 95 (estimating \$30-40 billion annual decline in investment).

With respect to political impact, Title II treatment of broadband “fundamentally transforms the Internet” by “wrest[ing] control of the Internet from the people and private Internet service providers and gives control to the Government.”²¹⁴ It affects “every Internet service provider, every Internet content provider, and every Internet consumer.”²¹⁵

This conclusion applies with even greater force to the current proposal than it did in 2015. As the Commission acknowledges, after the Covid-19 pandemic, Internet access “has become even more essential to consumers for work, health, education, community, and everyday life.”²¹⁶ And as described above, the Commission now asserts that Title II could serve as a basis for the agency to take wholesale action on perceived issues ranging from national security to cybersecurity to privacy to public safety. It would be hard to imagine a more sweeping assertion of authority by the FCC over Internet public policy.

Unsurprisingly given the consequences, the public has “focused intensely on the net neutrality debate.”²¹⁷ Indeed, debate surrounding net neutrality has “engaged lawmakers, regulators, businesses, and other members of the public for years.”²¹⁸ The FCC received 4 million comments on its proposed net-neutrality rule in 2015, a record at that point “by far.”²¹⁹

²¹⁴ *USTA II*, 855 F.3d at 423.

²¹⁵ *Id.*

²¹⁶ NPRM ¶ 16; *see also id.* ¶ 17 (comparing need for internet to need for “electricity” and “water”); Title II Order ¶ 1 (“[t]he open internet drives the American economy and serves, every day, as a critical tool for America’s citizens to conduct commerce, communicate, educate, entertain and engage in the world around them”); Donald B. Verrilli, Jr. & Ian Heath Gershengorn, *Title II “Net Neutrality” Broadband Rules Would Breach Major Questions Doctrine*, at 10 (Sept. 20, 2023), <http://tinyurl.com/3vx37269> (“Verrilli & Gershengorn”) (during the Covid-19 pandemic “[b]roadband services provided the indispensable link that allowed hundreds of millions of Americans to do their jobs, go to school, and maintain vitally important personal and family relationships”).

²¹⁷ *USTA II* 855 F.3d at 423 (Kavanaugh, J., dissenting).

²¹⁸ *Verizon v. FCC*, 740 F.3d 623, 634 (D.C. Cir. 2014); *see also id.* (“[T]he question of net neutrality implicates serious policy questions . . .”).

²¹⁹ *Id.*

The 2017 proceeding that led to the RIF Order likewise drew millions of comments.²²⁰ And these proceedings have involved unusually direct Presidential involvement in the outcome. President Obama, for example, “publicly weighed in on the net neutrality issue” in 2015, “an unusual presidential action” that “underscores the enormous significance” of the issue.²²¹ President Biden, meanwhile, explicitly called for Title II classification of broadband in his early Executive Order on Competition, and the FCC Chair even attended the EO’s signing ceremony.²²² And as discussed below, Members of Congress have frequently debated Title II classification as well, without ever mustering the votes to apply Title II classification to broadband. To put it mildly, the “wisdom of the net neutrality rule was, and remains, a hotly debated matter.”²²³

Second, the major-questions doctrine ferrets out instances in which an agency has stretched statutory language “to suit its own sense of how the statute should operate.”²²⁴ The doctrine, accordingly, examines the “history” of the “authority that the agency has asserted” for clues as to whether an agency’s interpretive position has been reverse-engineered to advance a policy position.²²⁵

As explained in detail above, prior to 2015, the FCC consistently concluded that Internet access services should not be subject to common-carriage regulation. That conclusion informed

²²⁰ See L. Gambino & D. Rushe, *FCC flooded with comments before critical net neutrality vote*, The Guardian (Aug. 30, 2017), <http://tinyurl.com/25xjhtcu>.

²²¹ *USTA II* at 424 (Kavanaugh, J., dissenting).

²²² See Exec. Order No. 14036, 86 Fed. Reg. 36987, § 5(l)(i) (July 14, 2021), <http://tinyurl.com/2y86mj38>; John Eggerton, *Biden Executive Order Has Plenty of Advice for FCC*, The Media Institute (Jul. 9, 2021), <https://tinyurl.com/23nernw6>.

²²³ *Id.* at 383 (Srinivasan, J., concurring in the denial of rehearing en banc); compare *Gonzales v. Oregon*, 546 U.S. 243, 267 (physician-assisted suicide is an important issue subject to “earnest and profound debate across the country”) (citation omitted).

²²⁴ *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014).

²²⁵ *West Virginia*, 142 S. Ct. at 2608 (citation omitted).

pre-1996 decisions in which the FCC classified early forms of Internet access as lightly-regulated “enhanced services,” rather than “basic services” that were subject to common-carrier treatment. Congress then drew from this framework in adopting its definitions of Title I “information services” (which mirrored early “enhanced services”) and Title II “telecommunications services” (which mirrored “basic services”). The FCC then continued to classify access services as Title I “information services” exempt from Title II requirements for decades until the Commission adopted the 2015 Title II Order.

When the FCC finally decided to reclassify broadband as a Title II service in 2015, it doubtless “reverse-engineered” its interpretive position to “suit its own sense of how the statute should operate.” Apart from being inconsistent with the statutory and regulatory history of Title II to date, the FCC exercised massive forbearance from a host of requirements that were designed for legacy monopoly telephone networks to make the square peg of broadband fit the round hole of Title II. Indeed, the FCC candidly admitted in its 2015 order that it was crafting a “Modern Title II” “tailored for the 21st Century.”²²⁶

As in 2015, the NPRM once again proposes that the FCC exercise “broad forbearance” in order to avoid saddling broadband providers with regulation that Congress obviously never intended for those companies.²²⁷ And as in 2015, the Commission would “not in any real sense be implementing a policy choice by Congress” but rather would be “using statutory forbearance authority to create a bespoke regulatory framework from scratch.”²²⁸ In that way, Title II reclassification would be akin to the agency action at issue in *Biden v. Nebraska*, where the

²²⁶ Title II Order ¶ 38.

²²⁷ NPRM ¶ 104; *see also id.* ¶ 98 (“We propose to return to largely the same forbearance that was adopted in the [Title II Order]”).

²²⁸ Verrilli & Gershengorn at 13.

agency purported to “enjoy virtually unlimited power to rewrite the Education Act.”²²⁹ Because the agency’s interpretation “would effect a fundamental revision of the statute, changing it from one sort of scheme of . . . regulation into an entirely different kind,” it violated the major-questions doctrine.²³⁰ Here, the Commission’s need to reimagine forbearance “should have alerted [the agency] that it had taken a wrong interpretive turn.”²³¹ Agencies are “not free to adopt . . . unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness.”²³² The same logic applies to the FCC’s reliance on forbearance to the point where it has effectively created a Modern Title II for the 21st Century—all without Congressional involvement.

Third, and related, the major questions doctrine applies when an agency “claims to discover in a long-extant statute” an “unheralded power to regulate a significant portion of the American economy.”²³³ This “[*Utility Air*] language” is “directly on point here”—the *Utility Air* Court “might as well have been speaking about the net neutrality rule.”²³⁴ The Commission “is relying here on a long-extant statute—namely, the Communications Act of 1934, as amended in 1996.”²³⁵ Congress decided in the 1996 Act that emerging “interactive computer services” like broadband should be lightly regulated, and for decades prior to 2015, the Commission “respected

²²⁹ *Biden v. Nebraska*, 143 S. Ct. at 2373.

²³⁰ *Id.*

²³¹ *Util. Air Regul. Grp.*, 573 U.S. at 328.

²³² *Id.* (internal quotation marks and citation omitted).

²³³ *Id.* at 324.

²³⁴ *USTA II*, 855 F.3d at 424 (Kavanaugh, J., dissenting).

²³⁵ *Id.*

the Act’s deregulatory policy.”²³⁶ Only with the 2015 Title II Order did the Commission “seek[] to end this longstanding consensus.”²³⁷

Prior to 2015, even when the Commission previously attempted to adopt open internet principles, it did so under a Title I framework. In 2005, the Commission adopted a policy statement to inform its enforcement discretion, asserting that consumers are entitled to the internet content and services of their choosing, under the rubric of its Title I ancillary authority.²³⁸ When the D.C. Circuit concluded that the FCC failed to identify sufficient authority to enforce that policy statement, the Commission next relied on Section 706 of the Telecommunications Act, another non-Title II provision, to impose anti-blocking and anti-discrimination rules.²³⁹ The D.C. Circuit concluded in *Verizon v. FCC* that the FCC had discretion to use Section 706 to adopt Internet conduct rules, but held that the specific rules adopted by the Commission improperly imposed common carriage requirements on broadband providers.²⁴⁰ In response to that ruling, the Commission released an NPRM that sought to use the decision in *Verizon* as a “blueprint” for restoring open internet protections while still preserving broadband’s “information service” classification.²⁴¹

The FCC only changed this longstanding view under direct White House influence following release of the 2014 NPRM, when President Obama released an extraordinary video that called for the FCC—an independent agency—“to reclassify Internet service under Title II of

²³⁶ *Id.* at 394 (Brown, J., dissenting).

²³⁷ *Id.*

²³⁸ See *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010).

²³⁹ *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905 (2010), <http://tinyurl.com/3h64ckzc>.

²⁴⁰ *Verizon v. FCC*, 740 F.3d at 623.

²⁴¹ *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, ¶¶ 4, 89, 93 (2014).

a law known as the Telecommunications Act.”²⁴² Today, President Biden’s competition EO makes the same explicit request. The Supreme Court has previously struck down agency rules under the major questions doctrine in similar contexts—where an agency claims to discover new authority under a long-extant statute only under intense political pressure.²⁴³

Fourth, when Congress has considered and declined to enact “similar measures,” an assertion of regulatory authority is “all the more suspect.”²⁴⁴ Here, “Congress has been studying and debating net neutrality for years.”²⁴⁵ Congress has “considered (but never passed) a variety of bills relating to net neutrality and the imposition of common-carrier regulations on Internet service providers.”²⁴⁶ Indeed, members of Congress introduced legislation to reclassify broadband as a Title II service as recently as last year.²⁴⁷ Congress’s repeated failure to modify the Telecommunications Act to classify broadband as a Title II service is “a sign that an agency is attempting to work around the legislative process to resolve for itself a question of great political significance.”²⁴⁸

²⁴² See *USTA II*, 855 F.3d at 410-11 (Brown, J. dissenting).

²⁴³ E.g., *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485 (2021); *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. 109, 142 S. Ct. 661 (2022); *Biden v. Nebraska*, 600 U.S. 477, 143 S. Ct. 2355 (2023).

²⁴⁴ *West Virginia*, 142 S. Ct. at 2614 (internal quotation marks and citation omitted).

²⁴⁵ *USTA II*, 855 F.3d at 423 (Kavanaugh, J., dissenting).

²⁴⁶ *Id.* (citing Communications Act of 2006, H.R. 5252, 109th Cong.; Network Neutrality Act of 2006, H.R. 5273, 109th Cong.; Internet Freedom and Nondiscrimination Act of 2006, H.R. 5417, 109th Cong.; Internet Non-Discrimination Act of 2006, S. 2360, 109th Cong.; Communications, Consumer’s Choice, and Broadband Deployment Act of 2006, S. 2686, 109th Cong.; Internet Freedom Preservation Act, S. 2917, 109th Cong. (2006); Internet Freedom Preservation Act, S. 215, 110th Cong. (2007); Internet Freedom Preservation Act of 2008, H.R. 5353, 110th Cong.; Internet Freedom and Nondiscrimination Act of 2008, H.R. 5994, 110th Cong.; Internet Freedom Preservation Act of 2009, H.R. 3458, 111th Cong.; Internet Freedom, Broadband Promotion, and Consumer Protection Act of 2011, S. 74, 112th Cong.; Data Cap Integrity Act of 2012, S. 3703, 112th Cong.; No Rate Regulation of Broadband Internet Access Act, H.R. 2666, 114th Cong. (2015)); see also, e.g., Save the Internet Act of 2019, H.R. 1644, 116th Cong.

²⁴⁷ See Net Neutrality and Broadband Justice Act of 2022, S. 4676, 117th Cong.

²⁴⁸ *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (internal quotation marks and citation omitted).

All told, any suggestion that Title II reclassification does not involve a major question “would fail the straight-face test.”²⁴⁹ The 2015 Title II Order was “one of the most consequential regulations ever issued by any executive or independent agency in the history of the United States.”²⁵⁰ And the even broader proposal in the FCC’s new NPRM is no different, and in fact is more consequential today.

2. Congress Has Not Clearly Authorized Title II Reclassification.

Because Title II reclassification would be a major rule, Congress must clearly authorize the FCC to adopt it. But here, Supreme Court precedent proves the opposite: Congress has *not* clearly authorized Title II classification of broadband. As explained above, it was common ground in *Brand X* that Internet access services are information services. And the *Brand X* majority even rejected the dissent’s limited position that Title II required the FCC to conclude that cable modem service involved both an information service and a separate, standalone telecommunications service. On that score, the Court held, the statute was ambiguous. Therefore, *at minimum*, Supreme Court precedent forecloses any argument that the FCC is *required* to classify broadband internet access as a Title II service. At most, the law is ambiguous.

This putative ambiguity in the statute “torpedoes” the FCC’s proposal under the major-questions doctrine.²⁵¹ A finding of ambiguity, after all, “by definition” “means that Congress has not clearly authorized the FCC” to classify broadband as a telecommunications service.²⁵²

²⁴⁹ *USTA II*, 855 F.3d at 402 (Kavanaugh, J., dissenting).

²⁵⁰ *Id.* at 417.

²⁵¹ *Id.* at 426.

²⁵² *Id.*

The Commission itself recognized this fatal ambiguity when defending the 2015 Title II Order, which established the “framework” the Commission “propose[s] to return to” now.²⁵³ The Communications Act, the Commission asserted then, “did not clearly resolve the question of how broadband should be classified.”²⁵⁴ That is “the end of the game” under the major-questions doctrine.²⁵⁵

When a statute is ambiguous, the major questions doctrine is not indifferent to what path the agency chooses. In *Brand X*, the Commission’s classification of “cable modem service” as an “information service”²⁵⁶ was the most natural application of the text of the 1996 Act, and “it followed the FCC’s longstanding course.”²⁵⁷ As a minimally-invasive classification, the choice of Title I presented no seismic political or economic question. The *Brand X* Court therefore “did not have to—and did not—consider whether classifying Internet service as a telecommunications service and imposing common-carrier regulation on the Internet would be consistent with the major rules doctrine.”²⁵⁸

But the Commission’s proposal here—to *break* from that longstanding course and impose utility-style regulations on the Internet—is different. As then-Judge Kavanaugh explained, *Brand X* was not a “*coup de grace* for any requirement of clear congressional authorization” such that it “allow[s] the FCC to reclassify broadband Internet access without any serious judicial scrutiny.”²⁵⁹ Rather, “[w]hen the statutory context and backdrop against which Congress passed the 1996 Act are considered, as they were in *Brand X*, the Supreme Court’s decision

²⁵³ NPRM ¶ 115.

²⁵⁴ *USTA II*, 855 F.3d at 425 (citing FCC Opposition Br. 9).

²⁵⁵ *Id.* (Kavanaugh, J., dissenting).

²⁵⁶ *Brand X*, 545 U.S. at 987.

²⁵⁷ *USTA II*, 855 F.3d at 395 (Brown, J., dissenting).

²⁵⁸ *Id.* at 425 (Kavanaugh, J., dissenting).

²⁵⁹ *Id.* at 403.

reinforces the need for FCC to show a textual assignment of authority before it can reclassify broadband Internet access as common carriage.”²⁶⁰

The FCC now attempts to overcome this problem by suggesting in the NPRM that “*Brand X* conclusively held that the Commission has the authority to determine the proper statutory classification of BIAS [i.e., broadband internet access service].”²⁶¹ In other words, the FCC suggests that, for major questions purposes, what matters is that Congress *clearly delegated* authority to the FCC to resolve the issue, rather than *clearly resolved* the issue itself.

But the problem, as Justice Kavanaugh recognized, is that Congress did not clearly resolve either “distinct species of ambiguity.”²⁶² The FCC’s theory that it has clear authorization to classify broadband however it wishes misreads *Brand X*, in which the Title I classification of Internet access service was “unchallenged.”²⁶³ The Court’s decision there can hardly be read to provide the FCC with boundless discretion on a question not even at issue in the case.²⁶⁴

The FCC’s position is also inconsistent with the Communications Act itself, whose definitional provisions hardly qualify as *clear* authorization for the Commission to choose whether to treat broadband as a Title I or Title II service. As shown above, the more natural reading of those provisions, coupled with the structure and purposes of the Act of the whole, support Title I classification of broadband. At minimum, Congress nowhere clearly states that the FCC can simply ignore the textual, contextual, and historical evidence that ordinarily informs statutory construction and instead decide in its sole discretion what regulatory regime should

²⁶⁰ *Id.* at 404.

²⁶¹ NPRM ¶ 81.

²⁶² *USTA II*, 855 F.3d at 426 n.6.

²⁶³ *Brand X*, 545 U.S. at 987.

²⁶⁴ *See, e.g., Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 270 (2023) (declining to credit “precedent” on issue it “did not address”).

apply to broadband. There is no provision in the Communications Act that reads, for example, that “the FCC shall determine in its discretion whether Internet access services are Title I or Title II services.”

The Communications Act, therefore, lacks the clear delegation of broadband classification authority that the FCC claims it has. And such a broad delegation of authority, if it existed, would raise serious constitutional concerns. Under the Constitution’s Vesting Clauses, “important subjects” “must be entirely regulated by the legislature itself.”²⁶⁵ Because the question whether broadband receives targeted regulation versus common-carriage regulation indisputably is an important subject, arguably only Congress may decide it.

In any event, the judicial landscape has changed markedly since the Supreme Court’s decision in *Brand X*. As two former Solicitors General under President Obama recently put it, “the Supreme Court’s commitment to the major questions doctrine has intensified” in recent years, and therefore, “[f]ederal agencies can no longer expect to receive substantial deference from the courts when they interpret statutory provisions defining the nature and scope of their regulatory authority, particularly when they pursue expansive or creative interpretations of statutes to adopt rules of major consequence.”²⁶⁶ Given this new judicial landscape, there is every reason to believe the Court will adopt Justice Kavanaugh’s reasoning in *US Telecom* that Title II classification of broadband presents a major question and exceeds the Commission’s authority. The FCC should save the time and resources that will be spent inevitably to prove that point in Court, and instead retain the existing Title I classification.

²⁶⁵ *Wayman v. Southard*, 23 U.S. 1, 43 (1825); see also, e.g., *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., respecting denial of certiorari) (“major national policy decisions must be made by Congress”).

²⁶⁶ Verrilli & Gershengorn at 3; see also *id.* (“[T]he Supreme Court has not hesitated to invalidate agency actions that lower courts have upheld under *Chevron* when the Court concludes that agency’s course of action cannot be reconciled with the most straightforward reading of the relevant statute.”) (footnote omitted).

D. The Proposed Rule Violates the First Amendment.

Finally, subjecting Internet service providers to Open Internet rules violates the First Amendment. As then-Judge Kavanaugh explained, Internet service providers engage in protected expression when they “deliver content to consumers” and “decide what content they will transmit.”²⁶⁷

Although the FCC claims that “there are no First Amendment concerns” because it seeks to regulate “common carriers,”²⁶⁸ the FCC lacks constitutional “authority to strip an entity of its First Amendment rights merely by labeling it a common carrier.”²⁶⁹ And indeed, the Supreme Court has analogized similar entities, like “cable operators[,] to the publishers, pamphleteers, and bookstore owners traditionally protected by the First Amendment.”²⁷⁰

Because the proposed rules seek to regulate protected speech, they must at a minimum meet the standard articulated in *Turner*, which permits content-neutral restrictions only “if the service provider possesses ‘bottleneck monopoly power’ in the relevant geographic market.”²⁷¹ Here, because “the FCC has not shown that Internet service providers possess market power in a relevant geographic market,” it “may not tell Internet service providers how to exercise their editorial discretion about what content to carry or favor.”²⁷² To the contrary, as shown in section I above, competition in the market for broadband services is fierce and increasing. Thus, even

²⁶⁷ *USTA II*, 855 F.3d at 428 (Kavanaugh, J., dissenting).

²⁶⁸ NPRM ¶ 214.

²⁶⁹ *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1221 (11th Cir. 2022), cert. granted in part sub nom. *Moody v. Netchoice, LLC*, No. 22-277, 2023 WL 6319654 (U.S. Sept. 29, 2023).

²⁷⁰ *USTA II*, 855 F.3d at 428 (Kavanaugh, J., dissenting).

²⁷¹ *Id.* at 431 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661, 666-67 (1994); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997)). The FCC’s suggestion that it needs Title II authority in order to pursue national security goals such as mandating blocking and filtering of particular content raises the possibility that the Commission intends to do more than simply regulate in a content-neutral fashion; content-based regulations would be subject to far more stringent strict scrutiny.

²⁷² *Id.* at 432-35.

assuming they are content-neutral, the Commission’s proposed open internet rules are unconstitutional.

VI. The Commission Should Not Authorize State Regulation of Broadband.

The Chamber also strongly opposes any attempt by the Commission to empower states to adopt or maintain their own “mini-net neutrality” laws in addition to the Title II rules that the FCC proposes.

When the FCC Chair announced her plan to reinstate Title II classification, one of her principal justifications was to “[e]stablish a uniform national standard rather than a patchwork of state-by-state approaches, benefiting consumers and Internet Service Providers.”²⁷³ The initial public draft of the NPRM reflected this commitment.²⁷⁴ However, following a meeting with state regulatory advocates, the final adopted version of the NPRM was changed to suggest that broadband should be governed “primarily” by a nationwide framework, including a “uniform floor of ISP conduct rules,” but not necessarily a “ceiling.”²⁷⁵ This distressing change means that, in addition to the onerous and unlawful federal Title II framework, broadband providers could continue to be subject to supplemental state-law regimes that apply even more restrictive rules on their business practices.

Even the Chair appears to recognize the risk that this change poses. As she acknowledged in her statement accompanying the NPRM, even after it was modified, “[w]hen you are dealing with the most essential infrastructure in the digital age, come on, it’s time for a

²⁷³ See *Fact Sheet: FCC Chairwoman Rosenworcel Proposes to Restore Net Neutrality Rules*, FCC (Sept. 26, 2023), <http://tinyurl.com/mryurjuf>.

²⁷⁴ *Safeguarding and Securing the Open Internet*, Notice of Proposed Rulemaking, Public Draft, WC Docket No. 23-320, FCC-CIRC2310-01, ¶¶ 93-96 (rel. Sept. 28, 2023) <http://tinyurl.com/38wwz9vt>.

²⁷⁵ NPRM ¶¶ 94-97.

national policy.”²⁷⁶ The Chair rightfully called for a “uniform legal framework [that] applies to the whole country,” rather than policies that are “coming from Sacramento and places like it.”²⁷⁷

The risk is not merely hypothetical. Seven states have passed net neutrality laws or resolutions,²⁷⁸ and nearly a dozen states introduced net neutrality legislation in 2022 alone.²⁷⁹ For example, the State of California adopted SB-822, which codified the FCC’s 2015 net neutrality rules at the state level, and included an even more restrictive Internet Conduct Standard than had been adopted at the federal level.²⁸⁰ Broadband trade associations, supported by the Chamber as *amicus*, sued to enjoin this state law as inconsistent with the federal judgment that broadband should be regulated under a Title I framework, and therefore preempted. The Ninth Circuit upheld the law, concluding that the FCC had “abandon[ed] its regulatory authority with respect to net neutrality,” and thus could not prevent states from “stepping into the breach to enact [their] own net neutrality protections.”²⁸¹

The Ninth Circuit’s decision respectfully failed to account for how “any state regulation of an information service conflicts with the federal policy of nonregulation” of Title I services,²⁸² and thus how SB-822 imposed duties that “stood as an obstacle” to the targeted framework that the FCC “deliberately imposed.”²⁸³ But even if the Ninth Circuit were correct about the FCC’s

²⁷⁶ NPRM at 135 (Statement of Chairwoman Jessica Rosenworcel).

²⁷⁷ *Id.*

²⁷⁸ Emily Washburn, *What is Net Neutrality and Why is it So Controversial?*, Forbes (Apr. 13, 2023), <https://tinyurl.com/29ddkn2r>. These states include California, Colorado, Maine, New Jersey, Oregon, Vermont, and Washington. *Id.*

²⁷⁹ Heather Morton, *Net Neutrality 2022 Legislation*, National Conference of State Legislatures (May 4, 2022), <https://tinyurl.com/bdh9vp57>. States that introduced net neutrality legislation include California, Georgia, Illinois, Kentucky, Massachusetts, Minnesota, Missouri, New Jersey, New York, Rhode Island, and South Carolina. *Id.*

²⁸⁰ See Cal. Civ. Code §§ 3101(a)(5), (a)(6).

²⁸¹ *ACA Connects-Am. ’s Commc ’ns. Ass’n v. Bonta*, 24 F.4th 1233, 1236 (9th Cir. 2022).

²⁸² *Charter Advanced Servs. (MN), LLC v. Lange*, 903 F.3d 715, 718 (8th Cir. 2018).

²⁸³ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000).

limited ability to preempt under Title I, the Commission would have no excuse not to preempt contrary state net neutrality laws if it returns to a Title II framework, which contains numerous sources of affirmative rulemaking authority and express preemption provisions.²⁸⁴

Indeed, should the FCC decline to preempt laws like California's, it would further undermine any case the FCC could possibly make that the purpose of Title II classification is to restore uniform, national open internet protections across the United States. Because broadband networks are inherently interstate—indeed, national—in scope, providers “would be forced to comply with the state’s more stringent requirements, or choose not to offer” the service at all.²⁸⁵ Without strong preemption protections, states would be free to engage in a race to regulate, in which providers would have to comply with whatever ended up being the most restrictive state regime. Because California’s current SB-822 is even *more* demanding than the FCC’s current proposal, it would set the de facto nationwide standard for broadband conduct rules, at least until another state displaced it. This standard would impact not only large providers with California operations, but also smaller providers with no presence in California that must interconnect to nationwide networks.

Without strong federal preemption, it would be even more plain that what the FCC envisions for Title II classification of broadband is not restoring a uniform nationwide “net neutrality” standard, but instead simply effecting unprecedented government control over the Internet.

²⁸⁴ See NPRM ¶ 95.

²⁸⁵ *California v. FCC*, 39 F.3d 919, 933 (9th Cir. 1994).

VII. The Proposed Internet Conduct Standard Is Vague and Unworkable.

Finally, the NPRM proposes to restore the 2015 General Conduct Standard, which placed a vague and uncertain obligation on broadband providers to “not unreasonably interfere with or unreasonably disadvantage” consumers’ ability to access the Internet content or applications of their choice or tech companies’ ability to make such content or applications accessible to consumers.²⁸⁶

As a legal matter, this standard “fails to provide a person of ordinary intelligence fair notice of what is prohibited.”²⁸⁷ The standard’s use of amorphous terms—like “unreasonably interfere” and “unreasonably disadvantage”—are “classic terms of degree,” which “in th[is] context . . . have no settled usage or tradition of interpretation in law.”²⁸⁸ Accordingly, regulated parties have “no principle for determining” when their conduct “pass[es] from the safe harbor . . . to the forbidden.”²⁸⁹ Making matters worse, the Commission proposes a “non-exhaustive list” of factors it will consider in determining whether a violation has occurred, including things like “end-user control,” “consumer choice,” “effect . . . on innovation, investment, or broadband deployment,” and “free expression.”²⁹⁰

This list of assorted factors is “so standardless that it authorizes or encourages seriously discriminatory enforcement.”²⁹¹ Accordingly, “basic policy matters” will be decided in enforcement actions brought “on an ad hoc and subjective basis.”²⁹²

²⁸⁶ NPRM ¶ 165.

²⁸⁷ *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (internal quotation marks omitted).

²⁸⁸ *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1049 (1991).

²⁸⁹ *Id.*

²⁹⁰ NPRM ¶ 166.

²⁹¹ *Fox Television Stations, Inc.*, 567 U.S. at 253.

²⁹² *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

The short and turbulent history of the 2015 General Conduct Standard illustrates its problems. Then, as now, the FCC proposed that popular, pro-consumer “zero rating” and “sponsored data” plans might run afoul of the Standard.²⁹³ Unable to articulate with precision why free data plans would constitute unreasonable interference with consumer access to the Internet, the FCC (through its Wireless Telecommunications Bureau) released a controversial report that set forth yet more amorphous criteria through which such plans would be evaluated.²⁹⁴ Those factors included whether the plan “create[s] exclusionary arrangements” between broadband and content providers, whether consumers had “easy alternatives for switching to other [broadband] providers with different zero-rating practices,” and whether “zero-rated traffic serve[s] a civic engagement purpose.”²⁹⁵ Under Chairman Pai, the FCC promptly rescinded this unworkable framework.²⁹⁶

The General Conduct Standard also served as part of the legal basis for the FCC’s *Broadband Privacy Rules*, which sought to apply sweeping disclosure mandates on broadband providers relating to privacy practices and alleged data breaches. As noted above, Congress itself abrogated that rule pursuant to the Congressional Review Act. The fact that Congress expressly disapproved of one prominent application of the General Conduct Rule under the 2015 order should give the Commission significant pause about readopting it.

²⁹³ NPRM ¶ 167. Zero-rating practices can have many consumer benefits, among them: helping to lower the costs of accessing data; bringing, and keeping, new consumers online; facilitating online work, learning, health care, and civic and social engagements; and expanding the diversity of content, applications, and services. Zero-rating gives consumers subject to a broadband subscription data cap the ability to consume data-heavy content, such as streaming video or music, without going over their cap. The FCC should continue to allow for these types of pro-consumer arrangements.

²⁹⁴ See *Wireless Telecommunications Bureau Report: Policy Review of Mobile Broadband Operators’ Sponsored Data Offerings for Zero-Rated Content and Services*, FCC (Jan. 11, 2017), <http://tinyurl.com/58m2tzya>.

²⁹⁵ *Id.* at 4-5.

²⁹⁶ See *Wireless Telecommunications Bureau Report: Policy Review of Mobile Broadband Operators’ Sponsored Data Offerings for Zero Rated Content and Services*, Order, 32 FCC Rcd 1093 (2017), <http://tinyurl.com/ndbywwtb>.

The Commission should decline to go down this same path once more, adopting a vague standard that provides no guidance as to what constitutes compliance, but provides license to the FCC to adopt controversial and anti-consumer rules and enforcement policies.

VIII. Conclusion

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

Respectfully submitted,



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December 14, 2023