ORAL ARGUMENT SCHEDULED FOR FEBRUARY 1, 2019

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 18-1051 (AND CONSOLIDATED CASES)

MOZILLA CORPORATION, ET AL.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties and amici.

The petitioners are Mozilla Corp.; Vimeo, Inc.; Public Knowledge; Open Technology Institute; the States of New York, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota, Mississippi, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, and Washington; the Commonwealths of Kentucky, Massachusetts, Pennsylvania, and Virginia; the District of Columbia; the National Hispanic Media Coalition; NTCH, Inc.; the Benton Foundation; Free Press; the Coalition for Internet Openness; Etsy, Inc.: the Ad Hoc Telecom Users Committee; the Center for Democracy and Technology; the County of Santa Clara and the Santa Clara County Central Fire Protection District; the California Public Utilities Commission; and INCOMPAS. The intervenors supporting petitioners are the Internet Association; the Computer & Communications Industry Association; the Entertainment Software Association; Writers Guild of America, West, Inc.; the City and County of San Francisco; the National Association of Regulatory Utility Commissioners; and the National Association of State Utility Consumer Advocates. The respondents are the Federal Communications Commission and the United States of America. The intervenors supporting respondents

are CTIA—The Wireless Association; NCTA—The Internet & Television Association; USTelecom—The Broadband Association; the American Cable Association; the Wireless Internet Service Providers Association; and Leonid Goldstein. There is one intervenor in support of neither side: the Digital Justice Foundation.

The following parties have filed amicus briefs in support of petitioners: American Council on Education; Accreditation Council for Pharmacy Education; American Association of Colleges for Teacher Education; American Association of Colleges of Nursing; American Association of Community Colleges; American Association of State Colleges and Universities; American Library Association; Association of American Universities; Association of College & Research Libraries; Association of Jesuit Colleges and Universities; Association of Public and Land-grant Universities; Association of Research Libraries; College and University Professional Association for Human Resources; Consortium of Universities of the Washington Metropolitan Area; EDUCAUSE; Middle States Commission on Higher Education; National Association for Equal Opportunity in Higher Education; National Association of Independent Colleges and Universities; Student Affairs Administrators in Higher Education; Thurgood Marshall College Fund; Center for Media Justice; Color

of Change; Common Cause; Greenlining Institute; 18 Million Rising; Media Alliance; Media Mobilizing Project; Professors Michael Burstein, James Ming Chen, Rob Frieden, Barbara van Schewick, Catherine Sandoval, Allen Hammond, IV, Carolyn Byerly, Anthony Chase, Scott Jordan, and Jon Peha; Consumers Union; eBay Inc.; Electronic Frontier Foundation; Engine Advocacy; Twilio Inc.; William Cunningham; the Cities of New York, NY, Alexandria, VA, Baltimore, MD, Boston, MA, Buffalo, NY, Chicago, IL, Gary, IN, Houston, TX, Ithaca, NY, Los Angeles, CA, Lincoln, NE, Madison, WI, Newark, NJ, Oakland, CA, San Jose, CA, Schenectady, NY, Seattle, WA, Somerville, MA, Springfield, MA, Syracuse, NY, Tallahassee, FL, and Wilton Manors, FL; Cook County, IL; the Town of Princeton, NJ; the Mayor of Washington, DC; the Mayor and City Council of Portland, OR; International Municipal Lawyers Association; California State Association of Counties; United States Senators Edward Markey, Charles Schumer, Ron Wyden, Maria Cantwell, Tammy Baldwin, Brian Schatz, Richard Blumenthal, Tammy Duckworth, Cory Booker, Sheldon Whitehouse, Angus King, Kirsten Gillibrand, Benjamin Cardin, Dianne Feinstein, Jack Reed, Kamala Harris, Tina Smith, Patrick Leahy, Margaret Hassan, Jeanne Shaheen, Gary Peters, Jeffrey Merkley, Patty Murray, Chris Van Hollen, Bernard Sanders, Sherrod Brown, and Elizabeth Warren; and the following

Members of Congress: Anna Eshoo, Nancy Pelosi, Frank Pallone, Michael Doyle, Janice Schakowsky, Peter Welch, Zoe Lofgren, Mark Takano Eleanor Holmes Norton, Ro Khanna, Jose Serrano, Adam Smith, Jared Huffman, Peter DeFazio, Maxine Waters, Pramila Jayapal, Jerry McNerney, Jamie Raskin, Tulsi Gabbard, Hakeem Jeffries, Mike Thompson, John Lewis, Yvette Clarke, Charlie Crist, Adriano Espaillat, James McGovern, Mark Pocan, Jacki Speier, Keith Ellison, Joe Courtney, Daniel Kildee, Betty McCollum, Stephen Lynch, David Price, Marcy Kaptur, Jimmy Panetta, Barbara Lee, Donald Beyer, Jr., Nydia Velazquez, Chellie Pingree, Sean Maloney, Lloyd Doggett, Raul Grijalva, Joseph Crowley, Jacky Rosen, Earl Blumenauer, Alan Lowenthal, Andre Carson, Joseph Kennedy III, Steve Cohen, Lucille Roybal-Allard, Albio Sires, Mark DeSaulnier, Rosa DeLauro, Gregorio Sablan Bill Pascrell, Jr., Suzanne Bonamici, Diana DeGette, Kathy Castor, John Yarmuth, Jerrold Nadler, Grace Meng, Doris Matsui, John Larson, Carolyn Maloney, Sheila Jackson Lee, Danny Davis, John Sarbanes, Richard Nolan, Seth Moulton, Michelle Grisham, Colleen Hanabusa, Carol Shea-Porter, Katherine Clark, William Keating, and David Cicilline.

2. Rulings under review.

Restoring Internet Freedom, 33 FCC Rcd 311 (2018) (JA___) (*Order*).

3. Related cases.

This case has not previously been before this Court or any other court. In the order on review, the FCC rescinded the service classifications and rules that this Court upheld in *United States Telecom Association v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (*USTA*), *pets. for reh'g en banc denied*, 855 F.3d 381 (D.C. Cir. 2017), *pets. for cert. pending*. Seven petitions for certiorari seeking review of the *USTA* decision are now pending before the Supreme Court. *See Berninger v. FCC*, No. 17-498; *AT&T v. FCC*, No. 17-499; *Am. Cable Ass'n v. FCC*, No. 17-500; *CTIA—The Wireless Ass'n v. FCC*, No. 17-501; *NCTA—The Internet & TV Ass'n v. FCC*, 17-502; *TechFreedom v. FCC*, No. 17-503; and *United States Telecom Ass'n v. FCC*, No. 17-504. The United States has also filed suit in United States District Court seeking to enjoin a recently enacted California Internet regulation law on the ground that it is preempted by the FCC order on review here. *United States v. California*, No. 2:18-CV-02660 (E.D. Cal. filed Sept. 30, 2018).

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GLOSSARY

Brand X	*Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)
DNS	Domain Name Service
FOIA	Freedom of Information Act
FTC	Federal Trade Commission
MFJ	Modification of Final Judgment; the consent decree governing the breakup of AT&T in 1982
NANP	North American Numbering Plan; the telephone numbering system for North America
Open Internet Order	*Preserving the Open Internet*, 25 FCC Rcd 17905 (2010)
Stevens Report	*Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501 (1998)
Title II Order	*Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015)
USTA	*United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *pets. for cert. pending*, Nos. 17-498 *et al.* (U.S.)
VoIP	Voice Over Internet protocol

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BRIEF FOR RESPONDENTS

INTRODUCTION

In the *Order* under review, the Federal Communications Commission restored the longstanding regulatory classification of broadband Internet access service as an "information service" under Title I of the Communications Act and returned to a light-touch regulatory framework. *Restoring Internet Freedom*, 33 FCC Rcd 311 (2018) (JA____-___) (*Order*). Bipartisan majorities of the Commission previously employed this approach for nearly two decades, during which investment and innovation in the Internet economy flourished. The Supreme Court affirmed this classification

in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) (*Brand X*).

In 2015, however, the Commission briefly departed from this historical consensus by reclassifying broadband as a Title II "telecommunications service" and imposing onerous, utility-style rules on broadband providers. A divided panel of this Court upheld that decision as a permissible exercise of the agency's discretion, but specifically recognized that, under *Brand X*, "classification of broadband as an information service was permissible." *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 704 (D.C. Cir. 2016) (*USTA*), *pets. for cert. pending*, Nos. 17-498 *et al.* (U.S.).

In 2017, after extensive public comment, the agency under new leadership restored the "information service" classification and light-touch regulatory framework, finding that this approach better comports with the text, structure, and purposes of the Act, and is separately supported by sound public policy. The Commission reasoned, consistent with *Brand X*, that the "information service" classification aligns with broadband's enhanced capabilities and functionalities and with consumer perceptions of Internet access service as a single, integrated offering.

In challenging the *Order*, Petitioners essentially attempt to relitigate *Brand X*, raising many of the same arguments that the Supreme Court

rejected. For example, Petitioners claim that the Commission failed to account for broadband providers offering fewer "add-on" applications and content today than they did at the advent of the Internet. Mozilla Br. 25. But the Supreme Court previously deemed reasonable the Commission's judgment that "[w]hen an end user accesses a third party's Web site, … he is equally using the information service provided by the cable company that offers him Internet access as when he accesses the company's own [services]." *Brand X*, 545 U.S. at 998-99. Petitioners also resort to ill-fitting metaphors about hotels and roads, even though *Brand X* admonished that "federal telecommunications policy in this technical and complex area [should] be set by the Commission, not by warring analogies." 545 U.S. at 992. *Brand X* forecloses Petitioners' challenges to the Commission's classification decision.

While the Commission's legal analysis alone suffices to support its return to an information service classification and repeal of the 2015 rules, the Commission also offered robust public policy support for its actions. It explained in detail how Title II classification and regulation hampered broadband innovation, investment, and deployment. The Commission accordingly adopted a light-touch approach that relies on transparency, market forces, and enforcement of existing antitrust and consumer protection

laws to protect against harmful conduct. This approach, the Commission reasoned, would foster innovation and investment in keeping with the dynamic and evolving nature of the Internet.

The legal and policy analysis presented in the *Order* easily fulfills the Commission's responsibility to explain its repeal of the 2015 order and its decision to restore the prior longstanding approach to broadband classification. Petitioners' objections to the *Order* under review are meritless. The petitions for review should be denied.

JURISDICTION

A summary of the *Order* was published in the Federal Register on February 22, 2018. 83 Fed. Reg. 7852. Petitioners filed timely petitions for review within 60 days. *See* 28 U.S.C. § 2344; 47 C.F.R. § 1.4(b)(1). This Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). As we explain below (Section V), petitioners lack standing to challenge the FCC's authority to adopt the transparency rule.

QUESTIONS PRESENTED

1. Whether the Commission reasonably classified broadband Internet access service as an information service under the Communications Act.

2. Whether the Commission reasonably classified mobile broadband Internet access service as a private mobile service under section 332 of the Act.

3. Whether the Commission reasonably replaced its former conduct rules with a light-touch regulatory framework that relies on disclosure requirements, market forces, and enforcement of existing antitrust and consumer protection laws.

4. Whether the Commission reasonably determined that state or local regulations inconsistent with the *Order* should be preempted.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in an addendum to this brief.

COUNTERSTATEMENT

A. Statutory And Regulatory Background

1. The Telecommunications Act Of 1996

The Telecommunications Act of 1996 (1996 Act) substantially amended the Communications Act of 1934 (the Act) in order "to promote competition and reduce regulation." Preamble, 1996 Act, Pub. L. No. 104-104, 110 Stat. 56. As amended, the Act distinguishes between "information services," which are lightly regulated, and "telecommunications services," which are subject to common carriage regulation under Title II of the Act.

The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(24). "[T]elecommunications," in turn, is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(50). And "telecommunications service" means "the offering of telecommunications for a fee directly to the public … regardless of the facilities used." *Id.* § 153(53). While Congress remains free to alter these definitions, they have not been changed since they were adopted in 1996.

A telecommunications carrier is "treated as a common carrier" subject to Title II "to the extent that it is engaged in providing telecommunications services." *Id.* § 153(51). Title II requires, among other things, that telecommunications carriers charge just, reasonable, and nondiscriminatory rates, *see id.* §§ 201(b), 202(a), and design their systems so that other carriers can interconnect with their networks, *see id.* § 251(a). Information service providers, by contrast, are not subject to common-carrier regulation.

2. The FCC's Longstanding Classification Of Broadband Internet Access Service As An Information Service

In 1998, the FCC submitted a report to Congress concerning implementation of certain provisions of the 1996 Act. *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501 (1998) (*Stevens Report*). The *Stevens Report* concluded that Internet access service should be classified as an information service, not a telecommunications service. *Id.* at 11536 ¶ 73. It based that conclusion on a finding that Internet access service "provides more than a simple transmission path; it offers users the capability for … 'acquiring, storing, transforming, processing, retrieving, utilizing, or making available information through telecommunications.'" *Id.* at 11538 ¶ 76 (quoting the Act's definition of "information service").

Consistent with that conclusion, the FCC in 2002 issued an order classifying cable modem service—broadband Internet access service provided over cable facilities—as an information service. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002). The Supreme Court affirmed that classification, holding that it was a permissible reading of the Act's definitional provisions. *Brand X*, 545 U.S. at 986-1000.

The *Brand X* Court rejected arguments that cable modem service must be classified as a Title II "telecommunications service" because the service

contained some element of data transmission. The Court instead held that the FCC could reasonably read the word "offering" in the definitional provisions "to mean a 'stand-alone' offering of telecommunications, *i.e.*, an offered service that, from the user's perspective, transmits messages unadulterated by computer processing." 545 U.S. at 989. In other words, the Commission is entitled to classify services as integrated "finished services"—such as "Internet access" and "telephone service"—rather than based on the "discrete components" of each service. *Id.* at 990-91.

Applying this test, the Court concluded that "the transmission component of cable modem service" is "sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated [information service] offering." *Id.* at 990. Consumers use transmission "always in connection with the information-processing capabilities provided by Internet access," including the capability "to access the World Wide Web." *Id.* at 988. And, the Court found, Internet access integrates transmission with such information processing capabilities as

Domain Name Service (DNS) and caching, which are used to facilitate consumers' access to third-party websites. *Id.* at 998-1000.[1]

In reaching this conclusion, the Court rejected an argument—advanced by petitioners here—that consumers use "pure transmission" when they use Internet service to access "content provided by parties other than the cable company." *Id.* at 998. The Court noted that users can reach third-party websites, "and browse their contents, [only] because [the cable modem] service provider offers the capability for … acquiring, [storing] … retrieving [and] utilizing … information." *Id.* at 1000 (quoting *Stevens Report*, 13 FCC Rcd at 11538 ¶ 76).

After *Brand X*, the FCC classified other forms of broadband as information services, including broadband provided over wireline facilities,

[1] DNS "matches the Web site address the end user types into his browser (or 'clicks' on with his mouse) with the IP address of the Web page's host server." 545 U.S. at 999. Caching "facilitates access to third-party Web pages" by storing "popular content on local computer servers." *Ibid.*

wireless networks, and power lines.[2] In classifying wireless broadband as an information service, the Commission also determined that wireless broadband was not a "commercial mobile service" subject to common carrier treatment under 47 U.S.C. § 332(c)(1)(A). *Wireless Broadband Order*, 22 FCC Rcd at 5919-21 ¶¶ 37-56.

3. The Commission's Initial Efforts To Promote Internet Openness Through Title I Authority

During the many years that broadband was classified as an information service, the Commission took various actions under Title I to prevent harmful conduct by broadband providers.

In 2005, to provide "guidance" regarding "its approach to the Internet and broadband," the FCC invoked its ancillary jurisdiction under Title I of the Act to adopt four principles "to preserve and promote the vibrant and open character of the Internet": Consumers are entitled to (1) "access the lawful Internet content of their choice"; (2) "run applications and use services of

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[2] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Order*), *pets. for review denied*, *Time Warner Telecom, Inc.* v. *FCC*, 507 F.3d 205 (3d Cir. 2007); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd 13281 (2006) (*BPL Broadband Order*); *Appropriate Framework for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd 5901 (2007) (*Wireless Broadband Order*).

their choice"; (3) "connect their choice of legal devices that do not harm the network"; and (4) "competition among network providers, application and service providers, and content providers." *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14986, 14987-88 ¶¶ 4-5 (2005). The Commission advised that it would incorporate these principles "into its ongoing policymaking activities." *Id.* at 14988 ¶ 5.

In 2008, after finding that Comcast had violated those principles by interfering with its customers' use of file-sharing networks, the FCC ordered Comcast to revise its network management practices. *Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd 13028 (2008). But in *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010), this Court vacated the FCC's order. Noting that the Commission had "acknowledge[d] that it has no express authority over" broadband providers' network management practices, *id.* at 644, the Court ruled that the agency had "failed to tie its assertion of ancillary authority over Comcast's Internet service to any 'statutorily mandated responsibility.'" *Id.* at 661 (citation omitted).

In the wake of *Comcast*, the Commission considered, but declined to adopt, proposals to classify broadband as a Title II service. Instead, invoking

Section 706 of the 1996 Act—which directs the FCC to encourage the deployment of "advanced telecommunications capability," 47 U.S.C. § 1302—the Commission in 2010 adopted three rules regulating broadband providers: (1) a transparency rule requiring providers to "publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services"; (2) an anti-blocking rule barring providers from blocking consumers' access to the Internet; and (3) an anti-discrimination rule prohibiting fixed (but not mobile) broadband providers from unreasonably discriminating in transmitting lawful Internet traffic. *Protecting and Preserving the Open Internet*, 25 FCC Rcd 17905 (2010) ("*Open Internet Order*"). The Commission also found authority for the transparency rule in Section 257 of the Communications Act, 47 U.S.C. § 257. *Id.* at 17980 n.444.

On review, this Court concluded that the anti-blocking and anti-discrimination rules imposed *per se* common carriage requirements on broadband providers and thereby violated the Act's prohibition on common-carrier regulation of information services. *Verizon v. FCC*, 740 F.3d 623, 649-59 (D.C. Cir. 2014). The Court nevertheless upheld the transparency

rule, which the Court said did not "constitute *per se* common carrier obligations." *Id.* at 659.

B. The *Title II Order*

In response to *Verizon*, the Commission initially proposed to pursue new rules based on Section 706. *Protecting and Promoting the Open Internet*, 29 FCC Rcd 5561 (2014). But instead of adopting this measured approach, the Commission reversed its longstanding classification of broadband Internet access and reclassified it as a telecommunications service subject to common carriage regulation under Title II. *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, 5757-77 ¶¶ 355-387 (2015) (*Title II Order*). The agency also reclassified mobile broadband Internet access as a "commercial mobile service," so that it (like fixed broadband) could be regulated as common carriage. *Id.* at 5778-90 ¶¶ 388-408.[3]

Relying on this reclassification, the Commission promulgated new rules governing broadband providers. Those rules prohibited providers from blocking or throttling lawful Internet content, *id.* at 5647-53 ¶¶ 111-124, or engaging in "paid prioritization" (that is, giving preferential treatment to

[3] The Commission attempted to ease the burden of reclassification by exercising its authority under 47 U.S.C. § 160 to forbear from applying "27 provisions of Title II" and "over 700 Commission rules and regulations" to broadband providers. *Title II Order*, 30 FCC Rcd at 5603 ¶ 5.

certain traffic either in exchange for consideration or to benefit an affiliated entity). *Id.* at 5653-58 ¶¶ 125-132. The Commission also adopted a general "Internet Conduct Standard" declaring that broadband providers may not unreasonably interfere with or unreasonably disadvantage users' ability to access the content, applications, and services of their choice, or the ability of "edge providers"—providers of Internet content, applications, and services—to access users. *Id.* at 5659-69 ¶¶ 133-153.

Commissioners Pai and O'Rielly dissented. They maintained that the FCC lacked authority to reclassify broadband Internet access service as a telecommunications service and that the substantial costs of Title II regulation—including disincentives to investment and innovation—outweighed any benefits. *Id.* at 5921-84 (dissenting statement of Commissioner Pai); *id.* at 5985-6000 (dissenting statement of Commissioner O'Rielly).

C. *USTA*

A divided panel of this Court upheld the *Title II Order*. *USTA*, 825 F.3d 674. Emphasizing its limited role in reviewing the Commission's judgment, the Court held that "the Commission has statutory authority to classify broadband as a telecommunications service," *id.* at 700, and that the reclassification was based on a permissible reading of ambiguous statutory

language, *id.* at 701-06. The Court declined to second-guess the Commission's policy or economic analysis, *see id.* at 697, and in light of conflicting evidence, deferred to the Commission's predictive judgments, *see id.* at 694-95.

The Court likewise upheld the FCC's reclassification of mobile broadband as a "commercial mobile service." *Id.* at 713-24. It observed that "Congress expressly delegated to the Commission the authority to define" the "key definitional components" of commercial mobile service. *Id.* at 717 (citing 47 U.S.C. § 332(d)). And it held that "the Commission acted permissibly in reclassifying mobile broadband as a commercial mobile service subject to common carrier regulation" because the agency reasonably determined that mobile broadband "can be considered an interconnected service." *Id.* at 723.

Judge Williams dissented in part, finding that the FCC failed to justify its change in policy. Among other things, he concluded that, absent a finding of market power, the Commission could not subject broadband providers to burdensome common carrier regulation that would have an "unambiguously negative" effect on investment. *Id.* at 748-56.

D. The Order On Review

Following a change in leadership, the Commission issued an NPRM proposing "to reinstate the information service classification of broadband Internet access service" and the determination that mobile broadband "is not a commercial mobile service." *Restoring Internet Freedom*, 32 FCC Rcd 4434, 4441 ¶ 24 (2017) (JA___, ___) (*NPRM*). It also proposed to "re-evaluat[e] the Commission's existing rules and enforcement regime to analyze whether *ex ante* regulatory intervention in the market is necessary." *Id.* ¶ 70 (JA___).

After reviewing the voluminous record, the Commission decided to "restore broadband Internet access service to its Title I information service classification." *Order* ¶ 2 (JA___). The Commission determined that this classification, which had been "affirmed as reasonable" in *Brand X*, "best comports with the text and structure of the Act." *Id.* ¶ 2 (JA___). It also concluded that a return to the "light-touch information service framework will promote investment and innovation better than" imposing "costly and restrictive" common-carrier requirements on broadband providers. *Ibid.*

1. Restoring The Information Service Classification

The Commission concluded that broadband is best classified as an information service because broadband "has the capacity or potential ability to be used to engage in the activities within the information service

definition." *Order* ¶ 30 (JA___). As the Commission explained, broadband is used in (1) "'*generating*' and '*making available*' information to others … through social media and file sharing"; (2) "'*acquiring*' and '*retrieving*' information from sources such as websites and online streaming and audio applications, gaming applications, and file sharing applications"; (3) "'*storing*' information in the cloud and remote servers, and via file sharing applications"; (4) "'*transforming*' and '*processing*' information such as by manipulating images and documents, online gaming use, and through applications that offer the ability to send and receive email, cloud computing and machine learning capabilities"; and (5) "'*utilizing*' information by interacting with stored data." *Ibid.* (JA___-___).

The Commission further determined, consistent with *Brand X*, that DNS and caching "are integrated information processing capabilities offered as part of broadband Internet access service to consumers today." *Order* ¶ 33 (JA___). "Without DNS," the Commission explained, "a consumer would not be able to access a website by typing its advertised name (*e.g.*, fcc.gov or cnn.com)." *Id.* ¶ 34 (JA___). Similarly, caching "enables and enhances consumers' access to and use of information online" by "storing third party content" on local servers. *Id.* ¶ 42 (JA___-___).

The Commission concluded that broadband providers "are best understood as offering a service that inextricably intertwines … information processing capabilities … and transmission." *Order* ¶ 45 (JA___). The Commission found record evidence that "consumers perceive the offer of broadband … to include more than mere transmission," and that "consumers highly value the capabilities their [broadband providers] offer to acquire information from websites, utilize information on the Internet, retrieve such information, and otherwise process such information." *Id.* ¶ 46 (JA___). In addition to considering "the consumer's perspective," the Commission found that "as a factual matter," broadband providers "offer a single, inextricably intertwined information service." *Id.* ¶ 49 (JA___).

The Commission also amended its rules for mobile services by reinstating the original definitions of "public switched network" as referring to the public switched telephone network and "interconnected service" as a service that provides users with the capability to communicate with all other users on the network. *Order* ¶¶ 74-78 (JA___-___). It concluded that those earlier definitions "reflect the best reading of the Act." *Id.* ¶ 74 (JA___). It then determined that under these definitions, mobile broadband is not a commercial mobile service or its functional equivalent, and therefore is not

subject to common carrier regulation under 47 U.S.C. § 332. *Id.* ¶¶ 79-85 (JA___-___).

While this legal analysis sufficed to support the *Order*'s classification decisions, the Commission also found that "public policy arguments advanced in the record and economic analysis reinforce that conclusion." *Id.* ¶ 86 (JA___-___). For example, the Commission noted, the regulatory burdens (including the heavy-handed conduct rules and regulatory uncertainty) created by the *Title II Order* decreased broadband investment and prevented the development of innovative new services. *Id.* ¶¶ 86-108 (JA___-___).

2. Adopting A Light-Touch Regulatory Framework

Having determined that broadband is properly classified as an "information service," the Commission concluded that it lacked statutory authority to maintain the 2015 conduct rules. *Order* ¶¶ 267-296 (JA___-___). Independently, the Commission reasoned that those rules were contrary to sound public policy. *Id.* ¶¶ 246-266 (JA___-___). It observed that "[t]he Internet thrived for decades under the light-touch regulatory regime in place before the *Title II Order*," and that the *Title II Order*'s conduct rules "appear to have been a solution in search of a problem." *Id.* ¶¶ 87, 109 (JA____, ___). The record in this proceeding, the Commission found, "demonstrates

that the costs of these rules to innovation and investment outweigh any benefits they may have." *Id.* ¶ 4 (JA____). The Commission instead determined that a "light-touch," market-based framework can protect against harmful conduct "more effectively and at lower social cost" than heavy-handed conduct rules. *Id.* ¶ 208 (JA___).

As the centerpiece of this light-touch approach, the Commission retained the transparency rule adopted in 2010 "with slight modifications." *Ibid.* The Commission anticipated that disclosure of broadband providers' practices under that rule would allow "public scrutiny and market pressure" to guard against harmful conduct. *Id.* ¶ 243 (JA___).

In addition, the Commission found, "[o]ther legal regimes—particularly antitrust law and the FTC's authority under Section 5 of the FTC Act to prohibit unfair and deceptive practices—provide protection for consumers," and "transparency amplifies the power of antitrust law and the FTC Act to deter and where needed remedy behavior that harms consumers." *Id.* ¶¶ 140, 244 (JA____-__, ___); *see id.* ¶¶ 140-154 (JA___-___). Given these other protections, the Commission concluded that "the substantial

costs" of the former conduct rules are "not worth the possible benefits." *Id.* ¶ 245 (JA___).[4]

Finally, to ensure that its light-touch regulatory framework would not be undermined by inconsistent state and local regulations, the Commission "preempt[ed] any state or local measures that would effectively impose rules or requirements" that the FCC had "repealed or decided to refrain from imposing" in the *Order* "or that would impose more stringent requirements for any aspect of broadband service" addressed in the *Order*. *Order* ¶ 195 (JA___). The Commission explained that "allowing state or local regulation of broadband … could impair the provision of [broadband] by requiring each [broadband provider] to comply with a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which it operates." *Id.* ¶ 194 (JA___). The Commission also found that state or local adoption of "common-carriage requirements akin to those found in Title II … could pose an obstacle to or place an undue burden on the provision of

[4] Following adoption of the *Order*, the Commission and the FTC signed a renewed Memorandum of Understanding enabling the agencies to share information facilitating the FTC's ability to administer these protections. *Restoring Internet Freedom Memorandum of Understanding* (Dec. 14, 2017), https://www.ftc.gov/system/files/documents/cooperation_agreements/fcc_fcc_mou_internet_freedom_order_1214_final_0.pdf.

broadband" and "conflict with the [FCC's] deregulatory approach." *Id.* ¶ 195 (JA___).

SUMMARY OF ARGUMENT

The *Order* embodies the Commission's considered judgment that restoring the prior, longstanding light-touch framework for broadband regulation reflects the best reading of the Communications Act and accords with Congress's goal that the Internet remain "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). It is amply supported by the Commission's legal analysis, public policy concerns, and the extensive record in this proceeding. While it reflects different judgments than the Commission made in 2015, the Commission had ample discretion, following a "change in administrations," to reevaluate its policies. *Brand X*, 545 U.S. at 981.

I. The Commission reasonably classified broadband Internet access as an information service because, among other things, it offers users the "capability" for "'*acquiring*' and '*retrieving*' information" from websites and applications "and '*utilizing*' information by interacting with stored data." *Order* ¶ 30 (JA___-___) (quoting 47 U.S.C. § 153(24)). The Supreme Court held in *Brand X* that it was reasonable for the Commission to conclude that Internet access is an information service, given that "subscribers can reach third-party Web sites via 'the World Wide Web, and browse their contents,

[only] because their [broadband] provider offers the capability for … acquiring, [storing] … retrieving [and] utilizing … information.'" 545 U.S. at 1000 (citation omitted). The agency made the same reasonable finding here.

As an independent ground for reclassification, the Commission found that broadband service inextricably intertwines high-speed transmission with the information processing capabilities provided by Domain Name Service (DNS) and caching. That reasonable conclusion—which the Supreme Court likewise upheld in *Brand X*, 545 U.S. at 999-1000—further justified the classification of broadband as an information service.

The Commission also reasonably concluded that broadband providers do not make a stand-alone offering of telecommunications. Although broadband and other information services are provided "via telecommunications," 47 U.S.C. § 153(24), broadband providers generally market and provide information processing capabilities and transmission together as a single service, and consumers perceive that service to include more than mere transmission. The Commission therefore disagreed with the *Title II Order* and found that broadband subscribers "expect to receive (and pay for) a finished, functionally integrated service that provides access to the

Internet"—not a separate and "distinct transmission service." *Order* ¶ 47 (JA___).

In any event, regardless of consumer perception, the Commission found that broadband providers *in fact* offer a single, inextricably intertwined information service. Because information processing must be combined with transmission for users to reach the Internet, the Commission reasonably determined that the information processing capabilities are an integral part of the service and make broadband an information service under the Act. Finally, the Commission found that public policy considerations, including the costs of Title II regulation compared to its uncertain benefits, supported the Commission's classification decision.

II. The Commission also reasonably determined that mobile broadband Internet access service is not a "commercial mobile service" subject to common carrier regulation under 47 U.S.C. § 332, but is instead a "private mobile service" immune from such regulation. That conclusion reflects a reasonable reading of the Act and ensures that mobile broadband is not regulated differently from fixed broadband.

A mobile service qualifies as a "commercial mobile service" only if it "makes interconnected service available" to the public. 47 U.S.C. § 332(d)(1). Section 332 defines "interconnected service" as "service that is

interconnected with the public switched network (as such terms are defined by regulation by the Commission)." *Id.* § 332(d)(2). The Commission's decision to restore its original definition of "the public switched network" as the public switched telephone network falls well within its discretion and comports with the ordinary meaning of that term. The Commission then reasonably concluded that mobile broadband does not provide "interconnected service" because it does not enable broadband users to communicate with all users of the public switched telephone network.

The Commission also reasonably determined that mobile broadband is not the "functional equivalent" of commercial mobile service because mobile broadband is not a close substitute for mobile voice service; the two services have different service characteristics and intended uses.

III. Given these classification decisions, the Commission determined that the Communications Act does not endow it with legal authority to retain the former conduct rules. As this Court held in *Verizon*, Section 3(51) of the Act forbids common-carriage regulation of information services, and Section 332(c)(2) further forbids common-carriage treatment of private mobile services. *Verizon* further confirms that the *Title II Order*'s conduct rules effectively require broadband providers to operate as common carriers. Maintaining the conduct rules would therefore contravene the Act.

The Commission also independently determined that the conduct rules are unwarranted. The transparency rule, market forces, and preexisting antitrust and consumer protection laws provide substantial protection against harmful conduct, and they do so at considerably less cost than rigid *ex ante* prohibitions or the vague Internet Conduct Standard. The Commission found that any incremental benefit of the conduct rules is outweighed by the substantial costs they would impose on Internet innovation and investment.

IV. While the Commission's legal analysis suffices to uphold the *Order*, the Commission also reasonably considered the *Order*'s impact on investment, competition, reliance interests, and government services. The Commission reasonably found that the record is consistent with its determination that Title II regulation discourages broadband investment and deployment. It also reasonably determined that broadband providers face competitive constraints that, together with preexisting antitrust and consumer protection laws, limit their ability to engage in harmful conduct under a light-touch regulatory framework. And the Commission found edge providers' claims of reliance on past Commission regulation unpersuasive because the record did not show how they reasonably relied on any particular Commission action.

V. Finally, the Commission reasonably determined that any state or local efforts to impose more stringent requirements on broadband service should be preempted. Broadband is a predominantly interstate service and should therefore be governed by uniform federal regulation rather than a patchwork of separate state and local requirements. While Section 2 of the Act preserves state jurisdiction over *intrastate* communications, Congress did not afford states any authority over *interstate* communications, which are instead governed principally by federal law. And permitting state regulation of broadband would directly undermine Congress's goal of ensuring that the Internet remain free from "Federal *or State* regulation." 47 U.S.C. § 230(b)(2) (emphasis added).

STANDARD OF REVIEW

Review of the FCC's interpretation of the statutes it administers is governed by *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Where a "statute is silent or ambiguous" with respect to a specific issue, "the question" for the Court is whether the agency has adopted "a permissible construction of the statute." *Id.* at 843. If so, the Court must "accept the agency's construction of the statute, even if the agency's reading differs from what the [Court] believes is the best statutory interpretation." *Brand X*, 545 U.S. at 980.

An agency is free to change its interpretation of an ambiguous statute so long as it "adequately explains the reasons for a reversal of policy." *Brand X*, 545 U.S. at 981. The agency need not show "to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *USTA*, 825 F.3d at 707 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). "[I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Fox*, 556 U.S. at 515. An agency's change in course can be based not only on changed circumstances, but also on a re-weighing of policies resulting from a "change in administrations." *Brand X*, 545 U.S. at 981; *see Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012) (*NAHB*).

The *Order* must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard "is particularly deferential" in proceedings like this one, "which implicate competing policy choices, technical expertise, and predictive market judgments." *Ad Hoc Telecomm. Users Comm. v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009). The Court "is not to ask whether [the challenged] regulatory decision is the best one possible or even whether it is

better than the alternatives." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). To prevail, "[t]he Commission need only articulate a 'rational connection between the facts found and the choice made.'" *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)).

ARGUMENT

I. THE COMMISSION REASONABLY CLASSIFIED BROADBAND INTERNET ACCESS SERVICE AS AN INFORMATION SERVICE.

Based on substantial record evidence, the Commission reasonably concluded that broadband Internet access service is a single, integrated information service that does not include a separate offering of telecommunications. *Order* ¶¶ 26-57 (JA___-___). In doing so, the Commission restored the classification that it had applied as far back as the 1998 *Stevens Report*, through several classification orders, until 2015. The Commission's decision to repeal the short-lived *Title II Order* plainly fulfilled its obligation to "display awareness that it *is* changing position" and "show that there are good reasons for the new policy." *Fox*, 556 U.S. at 515. The agency's determination that broadband Internet access is an information service is grounded in a careful consideration of the text, structure, and purposes of the Act as well as the nature of broadband service, both as

perceived by consumers and as offered by providers. As the Supreme Court held in *Brand X*, this classification of broadband as a single, integrated "information service" is entirely within the agency's discretion.

Contrary to Mozilla's arguments (Br. 22-50), nothing in this Court's decision in *USTA* forecloses that determination. In *USTA*, this Court rejected the contention that "broadband is unambiguously an information service." *USTA*, 825 F.3d at 701. But it nowhere precluded the Commission from finding that broadband can reasonably be classified as an information service. On the contrary, this Court noted that, under *Brand X*, "classification of broadband as an information service was permissible." *USTA*, 825 F.3d at 704.

A. The Commission Reasonably Concluded That Broadband Internet Access Is An Information Service.

1. Broadband Internet Access Provides A Capability For "Acquiring," "Retrieving," And "Utilizing" Information, Among Other Things.

The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(24). The Commission reasonably determined that broadband service offers users the capability to engage in a wide range of "activities within the information service definition." *Order* ¶ 30 (JA___). There is no

question, for example, that broadband gives users the capability of "*acquiring*" or "*retrieving*" information from websites and applications and "*utilizing*" information by interacting with stored data. *Ibid.* (JA___-___). "These are not merely incidental uses." *Ibid.* (JA___). Consumers purchase Internet access primarily so that they can "interact[ ] with information … offered by third parties." *Id.* ¶ 31 (JA___).

Unlike the *Title II Order*, which broke sharply from the agency's past practice, the *Order* is firmly rooted in Commission precedent. "From [its] earliest decisions classifying Internet access service, the Commission recognized that even when [broadband providers] enable subscribers to access third party content and services," such access "can constitute 'a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.'" *Order* ¶ 32 (JA___). As far back as the 1998 *Stevens Report*, the Commission emphasized that "[s]ubscribers can retrieve files from the World Wide Web, and browse their contents, because their [broadband] service provider offers the 'capability for … acquiring, … retrieving [and] utilizing … information.'" 13 FCC Rcd at 11538 ¶ 76. The Commission reaffirmed that finding in the *Wireless Broadband Order*, 22 FCC Rcd at 5910 ¶ 25 (the capability for "interaction with … web pages"

falls within the definition of information service), the *BPL Broadband Order*, 21 FCC Rcd at 13286 ¶ 9 (the capability for "web-surfing" meets the information service definition), and the *Wireline Broadband Order*, 20 FCC Rcd at 14860 ¶ 9 (the definition of information service includes the capability of broadband users "to access web pages" and "retrieve files from the World Wide Web").

Other provisions of the Act support the Commission's classification of broadband as an information service. Most significantly, section 230(f)(2) defines the term "interactive computer service" to include "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, *including specifically a service or system that provides access to the Internet*." 47 U.S.C. § 230(f)(2) (emphasis added). Section 231 of the Act "similarly lends support" to the FCC's determination. *Order* ¶ 62 (JA___). It differentiates between "a telecommunications carrier engaged in the provision of a telecommunications service," 47 U.S.C. § 231(b)(1), and "a person engaged in the business of providing an Internet access service," *id.* § 231(b)(2). Section 231 also defines "Internet access service" (for purposes of that section) to exclude "telecommunications services." *Id.* § 231(e)(4).

Finally, section 230(b)(2) of the Act states that the policy of the United States is "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." 47 U.S.C. § 230(b)(2). Common carrier regulation of broadband under Title II would conflict with that policy. *Order* ¶ 58 (JA___).

Even if these provisions do not show that Congress *mandated* that the Commission classify broadband as a Title I service, *see USTA*, 825 F.3d at 703, they firmly support the Commission's conclusion that classifying broadband as an "information service" *better* reflects congressional intent. *Order* ¶¶ 59-61 (JA___-___).

Mozilla contends that the Communications Act "distinguishes services that generate or process information—like web sites, search engines, and email—from the telecommunications conduits that deliver the information," Br. 23-24, and that the Commission has confused "the road" with "the destination," *id.* at 16. Mozilla's contention is untethered from the text of the Act. The statute defines information service to include the offering of a capability not only for "generating," "transforming," and "processing" information, but also for "acquiring," "retrieving," and "utilizing" information. 47 U.S.C. § 153(24). A service that offers a capability to

generate and process information is an information service, but a service, like broadband, that offers a capability to acquire, retrieve, and utilize information is also an information service.

The Supreme Court made this clear in *Brand X*. It expressly affirmed as "reasonable" the Commission's conclusion that "[w]hen an end user accesses a third-party's Web site, … he is equally using the information service provided by the [broadband provider] as when he accesses [the provider's] own Web site, its e-mail service, or his personal Web page." 545 U.S. at 998-99. The Court upheld the FCC's finding that "subscribers can reach third-party Web sites via 'the World Wide Web, and browse their contents, [only] because their service provider offers the capability for … acquiring, [storing] … retrieving [and] utilizing … information.'" *Id.* at 1000 (quoting *Stevens Report*, 13 FCC Rcd at 11538 ¶ 76).

Mozilla claims (Br. 31) that under the FCC's interpretation, "calls on plain old phones" would be "information services," and no services would remain subject to Title II. The Commission reasonably rejected this assertion. The Commission has always understood traditional telephone service "to provide basic transmission—a fact not changed by its incidental use, on occasion, to access information services." *Order* ¶ 56 (JA____-___). But broadband Internet access service is invariably used "to generate, acquire,

store, transform, process, retrieve, utilize, and make available information" on the Internet. *Ibid*. For that reason, broadband—unlike traditional telephone service—is "designed with advanced features, protocols, and security measures so that it can integrate directly into electronic computer systems and enable users to electronically create, retrieve, modify and otherwise manipulate information stored on servers around the world." *Ibid.* (JA___) (internal quotation marks omitted).[5]

Furthermore, the voice network, which is "largely static" and designed to convey transparent point-to-point transmissions over a single dedicated path, is "fundamentally different" from "[t]he dynamic network functionality" used to provide broadband Internet access. *Order* ¶ 56 (JA___) (internal quotation marks omitted). "Unlike the conventional circuit-switched network, which uses a single end-to-end path for each [telephone call], the Internet is a distributed packet-switched network, which means that

[5] According to Mozilla (Br. 28), "[t]he record suggests that modern telephones are designed with 'advanced features' and the fundamental purpose of accessing information processing." If some versions of "modern" telephone service have changed so fundamentally, it is possible that they may no longer fit the definition of telecommunications service. *See, e.g.*, *Charter Advanced Servs. (MN), LLC v. Lange*, 2018 WL 4260322 (8th Cir. Sept. 7, 2018) (noting that the Commission has not classified Voice over Internet Protocol telephone service and determining that, in the absence of further guidance from the Commission, that service is an information service).

information is split up into small chunks or packets that are individually routed through the most efficient path to their destination." *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 4 (D.C. Cir. 2000) (internal quotation marks omitted).

Finally, unlike traditional telephone service, broadband Internet access service includes "information processing capabilities" such as caching. *Order* ¶ 56 (JA___). Thus, there is no basis for Mozilla's claim that under the approach adopted in the *Order*, "any telephone service would be an information service." *Ibid.*

2. DNS And Caching Are Information Services Inextricably Intertwined With Broadband Internet Access

"[E]ven if 'capability' were understood as requiring more of the information processing to be performed by the classified service itself," the Commission reasonably classified broadband as an information service because broadband providers "offer end users the capability to interact with information online" by means of "functionally integrated information processing components," such as DNS and caching, "that are part and parcel of the broadband Internet access service offering itself." *Order* ¶ 33 (JA___).

DNS "allows 'click through' access from one web page to another, and its computer processing functions analyze user queries to determine which

website (and server) would respond best to the user's request." *Order* ¶ 34 (JA___) (internal quotation marks omitted). Because DNS translates a website's name into the appropriate numerical IP address that computers can process, "it is indispensable to ordinary users as they navigate the Internet." *Ibid.* (citation omitted).

Caching, too, is "a functionally integrated information processing component of broadband Internet access service." *Order* ¶ 41 (JA___). "When [broadband providers] cache content from across the Internet, they are … storing third party content they select in servers in their own networks to enhance [their subscribers'] access to information." *Id.* ¶ 42 (JA___). Caching thus involves the "storing" and "retrieval" of information—capabilities included in the Act's definition of information service. *Ibid.*; *see* 47 U.S.C. § 153(24).

In *Brand X*, the Supreme Court concluded that it was reasonable for the FCC to find that DNS and caching justify the information service classification. *See Brand X*, 545 U.S. at 999 (it is "reasonable to think of DNS as a capability for … acquiring, … retrieving, utilizing, or making available Web site addresses") (internal quotation marks omitted); *id.* at 999-1000 (caching facilitates "information retrieval" from third-party websites by offering the capability "to store … popular content"). Here, as in *Brand X*, it

was reasonable for the Commission to find that DNS and caching are information processing "functions provided as part and parcel of" broadband. *Order* ¶ 42 (JA___).[6]

Mozilla maintains (Br. 42-45) that DNS and caching fall within the "telecommunications management" exception to the definition of information service, which excludes information processing capabilities that are used "for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(24). The Commission reasonably disagreed. It explained that DNS is used principally "to help [end users] navigate the Internet," not "to help [a broadband provider] 'manage' its network." *Order* ¶ 36 (JA___). Similarly, the Commission found that "caching does not merely 'manage' [a broadband

[6] Because the Court in *Brand X* had already concluded that Internet access constituted a capability for acquiring, storing, and retrieving information—*i.e.*, an "information service"—it had no occasion to consider whether DNS fell within the telecommunications management exception, which presupposes a "telecommunications service." *Brand X*, 545 U.S. at 1000 n.3. Mozilla claims that this footnote confirms that the Court based its decision on the "add-on" capabilities of Internet service providers. Br. 42. As explained above, that is incorrect: The Court, in the very discussion to which the footnote is appended, explained that broadband is an information service *regardless* of whether the capability is used to access third-party content or the provider's own services. *Brand X*, 545 U.S. at 998-1000.

provider's] network, it enables and enhances consumers' access to and use of information online." *Id.* ¶ 42 (JA___).

The Commission based its interpretation of the exception on an identical exception in the consent decree that dismantled the Bell Telephone monopoly (Modification of Final Judgment or MFJ). *Order* ¶ 36 & n.116 (JA___) (citing *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983)). Both the court implementing the MFJ and the Department of Justice understood that this "exception was directed at internal operations, not at services for customers or end users." *United States v. Western Elec. Co.*, 1989 WL 119060, *1 (D.D.C. Sept. 11, 1989) (*1989 MFJ Memorandum*).

Under the MFJ, services resembling DNS and caching were considered information services. For example, when analyzing "gateway" functionalities by which Bell companies would provide end users with access to third party information services, the MFJ court found that "address translation"—translation of "an abbreviated code or signal" used by the consumer "to access the information service provider" without dialing the provider's telephone number—rendered gateways information services. *United States v. Western Elec. Co.*, 673 F. Supp. 525, 593 & n.307 (D.D.C. 1987), *aff'd in part and rev'd in part on other grounds*, 900 F.2d 283 (D.C. Cir. 1990)).

This "'address translation' gateway function appears highly analogous" to DNS. *Order* ¶ 35 (JA___).[7] Another functionality "recognized as an information service by the MFJ court" appears "highly analogous to caching." *Order* ¶ 43 (JA___). That functionality "involved [Bell company] provision of 'storage space in their gateways for databases created by others.'" *Ibid.* (quoting *United States v. Western Elec. Co.*, 714 F. Supp. 1, 19 (D.D.C. 1988)).

Mozilla argues (Br. 42) that this Court in *USTA* "agreed" with the *Title II Order*'s finding that the telecommunications management exception applies to DNS and caching. This argument misreads *USTA*, which simply held that the FCC could reasonably so interpret the exception, not that it was bound to do so. *See USTA*, 825 F.3d at 705. In the *Title II Order*, 30 FCC Rcd at 5766-67 ¶ 367, the Commission construed the exception to cover functions (including DNS and caching) that satisfied the "adjunct-to-basic"

[7] Claiming that directory assistance is "a service like DNS," Br. 44, Mozilla makes much of the fact that the MFJ court "allowed the regional companies to provide directory assistance to their own customers pursuant to [the telecommunications management] exception." *See 1989 MFJ Memorandum*, 1989 WL 119060, at *1 n.7. But the MFJ court made clear that it treated "a communication between two end users" differently from directory assistance, which entailed communication between an end user and her telephone service provider. *Ibid.* DNS, like address translation, does not involve communication between the customer and her service provider.

standard. This Court upheld that interpretation as reasonable because no party challenged it and the Court had no "reason to believe that the Commission's application of [that] standard was unreasonable." *Ibid*. Here, however, the Commission concluded that the *Title II Order* improperly relied on "loose analogies to certain functions described as adjunct-to-basic," *Order* ¶ 37 (JA___), and unduly expanded the "narrow scope" of the telecommunications management exception. *Id.* ¶ 38 (JA___). It was at least as reasonable for the present Commission to apply precedent arising under the MFJ as it was for the prior Commission to argue by analogy to pre-1996 Act "adjunct-to-basic" services.

Contrary to Mozilla's contention (Br. 45), the FCC's revised interpretation of the telecommunications management exception is not "incompatible" with its previous application of the exception to speed dialing, call forwarding, and computer-provided directory assistance. The exception applied to those functions because their purpose was "narrowly focused on facilitating bare transmission." *Order* ¶ 38 & n.135 (JA___).[8] By contrast,

[8] *See, e.g.*, *N. Am. Telecomm. Ass'n*, 101 FCC 2d 340, 360 ¶ 26 (1985) (speed dialing, call forwarding, and directory assistance are adjunct to basic service because their sole purpose is to facilitate the use of basic telephone service; by contrast, "an offering of access to a data base" for most purposes (other than directory assistance) "is the offering of an enhanced service").

the purpose of DNS and caching is to facilitate broadband users' ability to acquire, retrieve, and utilize information on the Internet.

Mozilla insists (Br. 46) that even if DNS and caching are information services, they are not "inextricably intertwined with the transmission component of broadband" because they are not "indispensable" to consumers. But even if users "can easily configure" their computers "to use a third-party DNS server" (Mozilla Br. 46), the record shows that "the vast majority of ordinary consumers rely upon the DNS functionality provided by their [broadband provider]." *Order* ¶ 34 (JA___). Thus, without the provision of DNS by broadband providers, the online experience "would fundamentally change" for most consumers because they "would not be able to access a website by typing its advertised name (*e.g.*, fcc.gov or cnn.com)." *Ibid.*; *see also Brand X*, 545 U.S. at 990 ("DNS is essential to providing Internet access").

Likewise, although Mozilla asserts that "content can be delivered even without caching" (Br. 46), the record indicated that "without caching," broadband "would be a significantly inferior experience for the consumer, particularly for customers in remote areas, requiring additional time and

network capacity for retrieval of information from the Internet." *Order* ¶ 42 (JA___).[9]

Finally, Mozilla maintains that DNS and caching are not "inextricably intertwined" with the transmission component of broadband because they are not the "focus" of consumer attention and are not a predominant aspect of the service. Br. 46-47. But whether a particular function is integral to a service does not depend on its "dominance" or "relative importance." While the typical broadband subscriber may know little or nothing about DNS or caching, that subscriber would keenly feel the absence of those functions because they are essential to ensuring that broadband subscribers get what they pay for—a service that enables them quickly and efficiently to acquire, retrieve, and utilize information on the Internet. *See Order* ¶¶ 34, 42 (JA___, ___).

[9] Mozilla argues that the delivery of content without caching "is increasingly required because caching cannot be used when users employ encryption." Br. 46. As the Commission pointed out, however, "truly pervasive encryption on the Internet is still a long way off," and "many sites still do not encrypt." *Order* n.147 (JA___-___) (internal quotation marks omitted). Therefore, caching remains "a vital part of broadband Internet access service offerings." *Ibid.* (JA___).

B. Broadband Providers Do Not Make A Standalone Offering Of Telecommunications

Under the Communications Act, an "information service" is provided "via telecommunications." 47 U.S.C. § 153(24). Consequently, as this Court recognized in *USTA*, the relevant inquiry for purposes of classification is whether the information service provider "make[s] a standalone offering of telecommunications." 825 F.3d at 702. Or, as *Brand X* put it, the question is "whether the transmission component" of the information service "is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering." 545 U.S. at 990.

The Commission reasonably concluded in the *Order* that broadband providers "are best understood as offering a service that inextricably intertwines … information processing capabilities … and transmission." *Order* ¶ 45 (JA___). Consumer perceptions of broadband support this conclusion. Broadband subscribers "perceive the offer of broadband … to include more than mere transmission." *Id.* ¶ 46 (JA___). They "expect to receive (and pay for) a finished, functionally integrated service that provides access to the Internet" and "highly value the capabilities their [broadband providers] offer to acquire information from websites" and to "utilize …, retrieve …, and otherwise process" information on the Internet. *Id.* ¶¶ 46-47

(JA____-__) (internal quotation marks omitted). These capabilities fall within the Act's definition of information service. *Id.* ¶ 30 (JA___).

Mozilla contends that when *Brand X* was decided, consumers perceived broadband as a functionally integrated information service that bundled "transmission with [broadband providers'] own information offerings." Br. 37. Mozilla maintains that broadband providers do not now typically offer their own "add-on [information] services," *ibid.*, and that consumers today view broadband "as offering them pure transmission *to* information services" provided by third parties. *Id.* at 36. The Commission reasonably disagreed. It found that consumers view "a reliable and fast Internet connection … as a means of enabling … capabilities to interact with information online," not as an end in itself. *Order* ¶ 46 (JA___) (citation omitted).

Moreover, *Brand X* flatly rejected the argument that "the 'information-service' offering of Internet access" consists "only of access to a [broadband provider's] e-mail service, its Web page, and the ability it provides consumers to create a personal Web page." *Brand X*, 545 U.S. at 998. The Court explained that a broadband subscriber does not necessarily use "'pure transmission'" to access "content provided by parties other than the [broadband provider]." *Ibid.* Instead, the Court upheld as "reasonable" the

FCC's conclusion that a consumer cannot access "a third-party's Web site" without using "the information service provided by the [broadband provider]." *Id.* at 998-99.

Today, just as when *Brand X* was decided, "'[t]he 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." *Brand X*, 545 U.S. at 1000 (quoting *Stevens Report*, 13 FCC Rcd at 11539 ¶ 79). As the Supreme Court recognized, Internet access—unlike pure transmission—offers subscribers "the 'capability for … acquiring, [storing] … retrieving [and] utilizing … information.'" *Ibid.* (quoting *Stevens Report*, 13 FCC Rcd at 11538 ¶ 76). Mozilla concedes that "[o]f course" consumers perceive the integrated product that broadband providers offer as Internet access. Br. 36. Under *Brand X*, that is all the Commission need show to classify broadband internet access as an information service.

Wholly apart from consumer perceptions, the FCC found that broadband providers in fact "offer a single, inextricably intertwined information service." *Order* ¶ 49 (JA___). Broadband subscribers use high-speed transmission "always in connection with the information-processing capabilities provided by Internet access," including the capability "to access the World Wide Web." *See Brand X*, 545 U.S. at 988. Information

processing functions such as DNS and caching "must be combined with transmission in order for broadband Internet access service to work." *Order* ¶ 49 (JA___); *see also id.* ¶¶ 34, 42 (JA___-___, ___-___). Given the "integrated character" of consumers' use of the service, the Commission had good reason to conclude that broadband does not involve "a 'stand-alone,' transparent offering of telecommunications." *See Brand X*, 545 U.S. at 988.

C. The Commission's Classification Decision Was Supported By Sound Public Policy Considerations

As this Court has observed, the *Brand X* analysis turns on the Commission's analysis of what service is, in fact, "offered" and need not consider extra-statutory factors (such as competitive conditions). *USTA*, 825 F.3d at 708. Accordingly, the Commission deemed its legal analysis "sufficient grounds" for its classification decision. *Order* ¶ 86 (JA___) But the Commission's decision was also "reinforce[d]" by "public policy arguments advanced in the record and economic analysis," including the regulatory burdens and uncertainty associated Title II regulation, however it might be tailored. *Ibid.* In this regard, the Commission noted that the mere threat of Title II regulation in 2010, even apart from the announcement of any particular conduct rules, was associated with a decrease in billions of dollars in Internet investment (while no such decline accompanied the announcement of the principles to promote an open Internet under Title I in 2005). *Id.* ¶ 95

(JA___). The Commission also attributed diminished broadband investment and innovation after the adoption of the *Title II Order* to the possibility of *ex post* price regulation and other forms of "regulatory creep." *Id.* ¶ 101 (JA___). The Commission's reasonable public policy judgments as to the relative costs and benefits of Title II classification, which are discussed in further detail in Part IV *infra*, further support its determination that an information service classification was warranted as a matter of law.

II. THE COMMISSION REASONABLY CLASSIFIED MOBILE BROADBAND INTERNET ACCESS SERVICE AS A PRIVATE MOBILE SERVICE.

The Commission also reasonably returned to its prior classification of mobile broadband service as a private mobile service, and thus avoided any conflict between its treatment of fixed and mobile broadband services.

Section 332 of the Act mandates that any "commercial mobile service" be treated as common carriage, 47 U.S.C. § 332(c)(1)(A), but prohibits common carrier treatment of any "private mobile service," *id.* § 332(c)(2). Section 332 defines a "commercial mobile service" as any for-profit mobile service that "makes interconnected service available" to the public. *Id.* § 332(d)(1). "Interconnected service," in turn, means "service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission)." *Id.* § 332(d)(2). A "private mobile

service," by contrast, is any mobile service "that is not a commercial mobile service" or its "functional equivalent." *Id.* § 332(d)(3).

Originally, the FCC's rules defined "public switched network" as "[a]ny common carrier switched network … that use[s] the North American Numbering Plan [*i.e.*, telephone numbers] in connection with the provision of switched services." 47 C.F.R. § 20.3 (2014).[10] They further defined "interconnected service" as a service "that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network." 47 C.F.R. § 20.3 (2014). Under those rules, mobile broadband was not an "interconnected service"—and therefore not a "commercial mobile service"—because it does "not use the [NANP] to access the Internet, which limits subscribers' ability to communicate to or receive communications from *all* users [on] the public switched network." *Wireless Broadband Order*, 22 FCC Rcd at 5917-18 ¶ 45.

In the *Title II Order*, the Commission amended 47 C.F.R. § 20.3 to broaden the definition of "public switched network" to include any network that uses "the [NANP], *or public IP addresses*, in connection with the

[10] The North American Numbering Plan (or NANP) is the "telephone numbering system for North America." *Sprint Corp. v. FCC*, 331 F.3d 952, 954 (D.C. Cir. 2003).

provision of switched services." *Title II Order*, 30 FCC Rcd at 5779 ¶ 391 (emphasis added). It then concluded that mobile broadband is a commercial mobile service because "it interconnects" with the redefined "public switched network" by means of add-on applications that use IP addresses. *Id.* at 5785 ¶ 398. This Court upheld that redefinition as a "reasonable interpretation of the statute." *USTA*, 825 F.3d at 717.

In this proceeding, the Commission reevaluated its treatment of mobile broadband, determined that its original definitions of "public switched network" and "interconnected service" reflected "the best reading of the Act," and amended 47 C.F.R. § 20.3 to readopt those prior definitions. *Order* ¶ 74 (JA___); *see id.* ¶¶ 75-78 (JA___-___). Under those restored definitions, the Commission reasonably concluded that mobile broadband is not a commercial mobile service because it does not give subscribers the ability to communicate with all users of the public switched telephone network, *id.* ¶ 79 (JA___), and is not the functional equivalent of a commercial mobile service because "mobile broadband … and traditional mobile voice services have different service characteristics and intended uses," *id.* ¶ 85 (JA___).

The Commission also noted that the *Order*'s reclassification of mobile broadband avoided "an internal contradiction within the statutory framework." *Order* ¶ 82 (JA___). As the Commission recognized, it would

make no sense to classify mobile broadband as both an information service exempt from common carrier regulation and a commercial mobile service subject to such regulation. *Ibid.* By reclassifying mobile broadband, the *Order* ensured that mobile broadband would not be regulated more stringently than fixed broadband. *Ibid.*; *see USTA*, 825 F.3d at 724.

A. The Commission Adopted A Reasonable Definition Of "Public Switched Network."

Mozilla contends that the Commission's interpretation of the term "public switched network" is unreasonable. Br. 78-79. But Section 332 expressly grants the Commission authority to define the term "public switched network." *USTA*, 825 F.3d at 717; *see* 47 U.S.C. § 332(d)(2) ("the term 'interconnected service' means service that is interconnected with the public switched network (*as such terms are defined by regulation by the Commission*)") (emphasis added). The definition that the agency adopted in 1994 and reinstated in the *Order* is well grounded in the language of the statute and the FCC's prior use of the term "public switched network."

Historically, both the Commission and this Court used the phrase "public switched network" to "refer to the traditional public switched telephone network." *Order* ¶ 75 (JA___); *see id.* nn.276-278 (JA___) (citing prior FCC orders); *Pub. Util. Comm'n of Texas v. FCC*, 886 F.2d 1325, 1327, 1330 (D.C. Cir. 1989) (using the terms "public switched telephone network"

and "public switched network" interchangeably); *Ad Hoc Telecomm. Users Comm. v. FCC*, 680 F.2d 790, 793 (D.C. Cir. 1982) (the "long distance telephone network" is "known as the public switched network"). The Commission's decision to restore that traditional understanding was consistent with "the fundamental canon of statutory construction that 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'" *Ibid.* (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

There is no merit to Mozilla's claim (Br. 78-79) that this Court's decision in *USTA* precludes the FCC from restoring the earlier definition of "public switched network." *USTA* merely rejected an argument that the Act *compelled* the Commission to define "public switched network" to mean "public switched telephone network." *See* 825 F.3d at 717-18. Nothing in *USTA* suggested that the Act mandated the *Title II Order*'s expansive reading of "public switched network." To the contrary, the Court observed that Congress "invited the Commission to define the term, rather than simply setting out [the term's] fixed meaning in the statute." *Id.* at 718.

Nor is the Commission foreclosed from interpreting the Act this way simply because Congress used the term "public switched network" in Section 332(d)(2) and the more precise term "public switched telephone network"

elsewhere. Congress's use of the more general term is entirely consistent with its decision to allow the *Commission* to define it. At most, Congress's omission of the word "telephone" simply gives the Commission discretion to define the term as some other appropriate network, but does not compel it to do so.

B. The Commission Reasonably Concluded That Mobile Broadband Is Not An "Interconnected Service."

Mozilla also contends that mobile broadband is an interconnected service even under the Commission's definition of "public switched network." Br. 74-78. But under Section 332, a service cannot qualify as a "commercial mobile service" unless it "makes interconnected service available." 47 U.S.C. § 332(d)(1). And under the FCC's revised rules, an interconnected service "gives subscribers the capability to communicate to or receive communication from *all* other users on the public switched network." 47 C.F.R. § 20.3 (emphasis added). The Commission reasonably concluded that mobile broadband "does not meet [that] regulatory definition of 'interconnected service'" because mobile broadband "in and of itself does not provide the capability to communicate with all users of the public switched network," as it does not use the NANP to enable subscribers to reach NANP telephone numbers. *Order* ¶ 79 (JA_____) (quoting *Wireless Broadband Order*, 22 FCC Rcd at 5917-18 ¶ 45).

The *Title II Order* concluded that mobile broadband "meets the definition of interconnected service" because mobile broadband users can "communicate with NANP numbers using their broadband connection through the use of VoIP applications" such as Skype or Google Voice. 30 FCC Rcd at 5786 ¶ 400.[11] In this proceeding, the Commission reasonably disagreed, construing its rules to require that a service "must *itself* provide interconnection to the public switched network using the NANP to be considered an interconnected service." *Order* ¶ 80 (JA___) (emphasis added). This interpretation of "interconnected service" is consistent with the language of Section 332, which "focus[es] on the functions of the service itself rather than whether the service allows consumers to acquire other services that bridge the gap to the telephone network." *Id.* ¶ 80 (JA___) (internal quotation marks omitted). Simply put, "the relevant service must itself be an 'interconnected service,' and not merely a capability to acquire interconnection" through separate applications or services. *Id.* n.298 (JA___).

Mozilla argues that "even mobile voice … would not be an interconnected service" under the FCC's definition because a mobile voice

[11] VoIP (or Voice over Internet Protocol) is voice telephone service provided via Internet Protocol.

subscriber "generally uses third-party software"—that is, Android or iOS—to complete calls to NANP users. Br. 75. But in the case of mobile voice service, the Commission explained, "the function of interconnection is provided by the purchased mobile service itself," not by any other devices or services. *Order* n.298 (JA___). Users of mobile voice can use any cell phone, out of the box, to make telephone calls. Users of mobile broadband, in contrast, cannot reach NANP telephone numbers without the aid of a separate service or application.

There is nothing "elusive" about the *Order*'s "distinction between (i) mobile broadband alone enabling a connection, and (ii) mobile broadband enabling a connection through use of an adjunct application such as VoIP." Mozilla Br. 76 (quoting *USTA*, 825 F.3d at 721). If mobile broadband service itself enabled users to reach NANP telephone numbers, it would be an interconnected service. But because a separate application or service is needed to obtain interconnection, mobile broadband is not an interconnected service. While nothing in Section 332 "compels the Commission" to make this distinction, *see USTA*, 825 F.3d at 721, neither does the statute foreclose this approach as an exercise of the Commission's sound discretion.

C. The Commission Reasonably Concluded That Mobile Broadband Is Not The Functional Equivalent Of Commercial Mobile Service.

Finally, Mozilla argues that even if mobile broadband is not commercial mobile service, it is "at least" its "functional equivalent." Br. 80-81. The Commission reasonably disagreed. It found significant "functional differences between traditional commercial mobile services like mobile voice" and mobile broadband services. *Order* ¶ 85 (JA___). Consumers purchase mobile broadband "to access the Internet, on-line video, games, search engines, websites, and various other applications," but they purchase mobile voice service "solely to make calls to other users using NANP numbers." *Ibid*. (JA___-___).

The record also shows that "voice-only mobile services tend to be much less expensive than mobile broadband Internet access services"[12] and that mobile voice services are "targeted to consumers who seek low-cost mobile service." *Order* ¶ 85 (JA____). This pricing and marketing

[12] This conclusion is based on the voice-only contracts offered by smaller mobile carriers such as Cricket and Republic Wireless. *See Order* n.317 (JA___). As Mozilla points out (Br. 80-81), the large national carriers do not offer separate contracts for mobile voice and mobile broadband. But the mere fact that those carriers bundle the two services in their smartphone plans does not undermine the FCC's conclusion that consumers do not regard them as fungible.

information supports the Commission's conclusion that mobile voice and mobile broadband "have different service characteristics and intended uses and are not closely substitutable for each other." *Ibid.* The Commission drew further support from the very different ways in which consumers use mobile voice and mobile broadband – the former to make calls using NANP numbers and the latter to access the Internet and other applications. *Ibid.* (JA___-___). This market evidence simply confirmed that consumers do not regard mobile voice and mobile broadband as close substitutes for each other. *Ibid.* (JA___).

III. THE COMMISSION REASONABLY ESTABLISHED A LIGHT-TOUCH, MARKET-BASED FRAMEWORK AND REPEALED THE FORMER CONDUCT RULES.

Having determined that broadband Internet access is best classified as an information service (and that mobile broadband should be classified as a private mobile service), the Commission proceeded to restore the "longstanding, bipartisan ... framework" that successfully governed for over a decade before the *Title II Order* and adopted "a light-touch, market-based approach" to regulating Internet access. *Order* ¶ 207 (JA____). The Commission concluded that this light-touch framework "will pave the way for additional innovation and investment that will facilitate greater consumer access to more content, services, and devices, and greater competition." *Ibid.*

Consistent with this approach, and following a comprehensive reexamination of its previous rules, the Commission decided to repeal the former conduct rules—the *ex ante* prohibitions on blocking, throttling, and paid prioritization and the vague Internet Conduct Standard—for two independent reasons.

First, in light of the Commission's reasonable determination that broadband Internet access is best classified as an information service, the Commission determined that the Communications Act does not endow it with the legal authority to maintain the former conduct rules. *See Order* ¶¶ 267-296 (JA____-__). That alone suffices to justify the repeal.

Second, the Commission reasonably concluded that "the transparency rule ... in combination with [market forces] and the antitrust and consumer protection laws" would "obviate[] the need for conduct rules by achieving comparable benefits at lower cost." *Id.* ¶ 239 (JA____); *see id.* ¶¶ 240-266 (JA____). "To the extent that the conduct rules lead to any marginal deterrence ... the substantial costs—including the costs to consumers in terms of lost innovation as well as monetary costs to [broadband providers]—[are] not worth the possible benefits," and thus, the Commission concluded, the former conduct rules are unwarranted as a matter of public policy. *Id.* ¶ 245 (JA____).

Petitioners offer no substantial reason to second-guess the Commission's decision to eliminate rules that the agency has determined are both unlawful and unwise.

A. The Commission Reasonably Concluded That It Lacks Legal Authority To Retain The Conduct Rules.

The Commission first determined that—having decided that broadband Internet access service is properly classified as an information service and that mobile broadband should similarly be classified as a private mobile service—the agency lacked "any source of legal authority that could justify the comprehensive conduct rules governing [broadband providers] adopted in the *Title II Order*." *Order* ¶ 4 (JA____).

Section 3(51) of the Act directs that a telecommunications provider "shall be treated as a common carrier ... *only to the extent* that it is engaged in providing telecommunications services," 47 U.S.C. § 153(51) (emphasis added). It thereby "forbids any common-carriage regulation ... of information services." *Order* ¶ 203 (JA____). Indeed, this Court deemed it "obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers" if Internet access is not classified as a telecommunications service. *Verizon*, 740 F.3d at 650. "Likewise, because the Commission has classified mobile broadband service as a 'private' mobile service ... treatment of mobile broadband providers as

common carriers would violate section 332" of the Act. *Ibid.*; *see* 47 U.S.C. § 332(c)(2) ("A person engaged in the provision of ... a private mobile service shall not ... be treated as a common carrier ....").

Mozilla challenges (Br. 47-50) the Commission's conclusion that Section 706 of the 1996 Act, 47 U.S.C. § 1302, is "not ... an independent grant of regulatory authority," *Order* ¶ 270 (JA____); *see id.* ¶¶ 268-283 (JA____-__). But even if Section 706 were read as a grant of regulatory authority, this Court has held that the Commission cannot use Section 706 to overcome the Act's statutory prohibitions on common-carrier treatment of any information service or private mobile service. *Verizon*, 740 F.3d at 650. And this Court further held that imposing anti-blocking and anti-discrimination rules on such providers would amount to illegally treating them as common carriers. *Id.* at 655-59. Thus, even if Section 706 were read as a source of regulatory authority, it would not provide the agency with a basis for retaining the conduct rules. *Cf.* Mozilla Br. 49 (conceding that the

Commission "could not have [maintained rules] identical to those in" the *Title II Order*).[13]

In any event, Mozilla has not shown that the *Order*'s interpretation of Section 706 was impermissible. Section 706(a) provides that the Commission "shall encourage the deployment [of broadband service] by utilizing ... price cap regulation, regulatory forbearance, measures that promote competition in the local communications market, or other regulating methods that remove barriers to infrastructure investment," and Section 706(b) states that the agency "shall take immediate action" if this goal is not being met "in a timely fashion." 47 U.S.C. § 1302(a)-(b). In the *Order*, the Commission reasonably concluded that these provisions simply "exhort[] the Commission to exercise market-based or deregulatory authority granted under other statutory provisions," rather than constituting independent "grants of regulatory authority." *Order* ¶¶ 268-270 (JA____-__); *see also id.* ¶¶ 271-283 (JA____-__). While this Court in *Verizon* held that the Commission could reasonably read Section 706 as a grant of authority, it also recognized

[13] To the extent that Section 706 could potentially have authorized the Commission to adopt some other (unspecified) rules without running afoul of the prohibitions on common-carrier treatment, Petitioners do not explain what rules those could be, and the Commission also "separately" found that "conduct rules are not otherwise justified by the record here." *Order* ¶ 283 (JA____).

that Section 706 can reasonably be read (as the Commission did here) as "simply setting forth a statement of congressional policy, directing the Commission to employ 'regulating methods' already at the Commission's disposal in order to achieve the stated goal[.]" 740 F.3d at 637. By contrast, reading Section 706 as a freestanding grant of regulatory authority would create considerable uncertainty for regulated entities, as Section 706 "nowhere identif[ies] the providers or entities whose conduct could be regulated," *Order* ¶ 271 (JA____), and is not restrained by any of the "limitations or constraints present in [other] Communications Act provisions," *id.* ¶ 276 (JA____); *see also id.* ¶ 272 (JA____) (whereas the Commission's other powers are "limited in scope to address the actions of particular, defined entities and [are] triggered in particular, defined circumstances," Section 706 is "largely unbound by that tailoring"). The Commission reasonably returned to its original modest and bounded interpretation here.

B. The Commission Reasonably Determined That Transparency, Market Forces, And Preexisting Antitrust And Consumer Protection Laws Are Preferable To Conduct Rules.

The Commission independently determined that, apart from its lack of legal authority, the former conduct rules are unwarranted as a matter of public policy, because "preexisting federal protections[,] alongside the transparency

rule," are "sufficient to protect Internet freedom" and "will do so more effectively and at lower social cost than the *Title II Order*'s conduct rules." *Order* ¶ 208 (JA____). As the Commission found, transparency, market forces, and preexisting antitrust and consumer protection laws collectively provide adequate protection against any harmful conduct evidenced in the record, and they do so at considerably less cost to innovation and investment than rigid *ex ante* rules or the vague Internet Conduct Standard.

1. The Transparency Rule, Market Forces, And Preexisting Antitrust And Consumer Protection Laws Provide Substantial Protection Against Any Harmful Conduct.

The Commission reasonably found that "the transparency rule ..., coupled with existing consumer protection and antitrust laws, will significantly reduce the likelihood that [broadband providers] will engage in actions that would harm consumers or competition." *Order* ¶ 116 (JA____). Given these protections, the Commission reasonably relied on market conditions and market-oriented policies to help fulfill its regulatory responsibilities. *See, e.g.*, *Ad Hoc*, 572 F.3d at 908; *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 766 (D.C. Cir. 2000); *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 578-81 (8th Cir. 2007) (*Minnesota PUC*).

The transparency rule's disclosure requirements discourage broadband providers from engaging in harmful practices by reducing their incentives and

ability to do so; moreover, by bringing harmful practices to light, the rule allows the market to prompt broadband providers to take corrective measures. *Id.* ¶¶ 209, 216-218, 237, 240-244 (JA____, ____-__, ____, ____-__). The rule also promotes competition by ensuring that consumers can make informed choices when purchasing broadband service and that entrepreneurs and edge providers can evaluate the risks and benefits of new projects and successfully bring innovative products and services to market. *Id.* ¶¶ 209, 216-18, 237 (JA____, ____-__, ____).

The record reveals that "almost no incidents of harm to Internet openness have arisen" since the Commission first adopted a transparency rule in 2010. *Id.* ¶ 242 (JA ___). In the Commission's view, "public scrutiny and market pressure, not the threat of heavy-handed Commission regulation, best explain the paucity of issues and their increasingly fast [provider]-driven resolution." *Id.* ¶ 243 (JA____).

The Commission also recognized that "[o]ther legal regimes—particularly antitrust law and the FTC's authority under Section 5 of the FTC Act to prohibit unfair and deceptive practices—provide protection for consumers." *Id.* ¶ 140 (JA____-__). "These long-established and well-understood consumer protection laws are well-suited to addressing any openness concerns, because they apply to the whole of the Internet

ecosystem, including edge providers...." *Id.* ¶ 140 (JA____). The transparency rule also "amplifies the power of antitrust law and the FTC Act to deter and where needed remedy behavior that harms consumers." *Id.* ¶ 244 (JA____).

Under Section 5 of the FTC Act, the FTC has "authority to enforce any commitments made by [broadband providers] regarding their network management practices," including the representations and disclosures that providers must make under the transparency rule. *Id.* ¶ 141 (JA____-__). The FTC previously "has used its Section 5 authority to enjoin some of the practices at issue in this proceeding, such as throttling," and it has indicated that a broadband provider that blocks, throttles, or otherwise discriminates among edge providers without notifying consumers may violate the FTC Act. *Ibid.*; *see* FTC Chairman Comments at 10-11 (JA____-__); FTC Staff Comments at 22-23 (JA____). Similarly, "all states have laws proscribing deceptive trade practices" that allow state authorities or private plaintiffs to pursue relief if a broadband provider fails to fully disclose relevant practices as required by the transparency rule or fails to comply with its commitments and disclosures. *Order* ¶ 142 (JA____).

"The antitrust laws, particularly Sections 1 and 2 of the Sherman Act," likewise provide ample protection against a range of "hypothetical

anticompetitive harms." *Id.* ¶ 143 (JA____). Under Section 1 of the Sherman Act, "[i]f [broadband providers] reached horizontal agreements to unfairly block, throttle, or discriminate against Internet content or applications, these agreements likely would be … illegal." *Ibid.* And under Section 2, any provider that "possesses or has a dangerous probability of achieving monopoly power" is prohibited from engaging in exclusionary conduct. *Id.* (JA____-__). As the Commission observed, where there is not effective competition, "Section 2 makes it unlawful for a vertically integrated [broadband provider] to anticompetitively favor its own content or services over unaffiliated edge providers' content or services." *Id.* (JA____); *see* FTC Staff Comments at 26-28 (JA____-__).

The Commission rejected claims that "*ex post* antitrust and FTC remedies were not designed to address the harms to consumers, investment, and innovation that arise in the net neutrality context." *E.g.*, Internet Ass'n Br. 14. On the contrary, the Commission observed that "[m]ost of the examples of net neutrality violations discussed in the *Title II Order* could have been investigated as antitrust violations." *Order* ¶ 145 (JA____); *accord* FTC Chairman Comments at 9 (JA____). Moreover, as the Commission pointed out, "the antitrust laws recognize the importance of protecting innovation," and "the FTC has pursued several cases in recent

years where its theory of harm was decreased innovation." *Order* ¶ 150 (JA____); *see also* FTC Staff Comments at 24-25, 29 (JA____-__, ____). Indeed, the Commission noted, antitrust law is particularly well suited for "the dynamic Internet economy" precisely because "case-by-case analysis, coupled with the rule of reason, allows for innovative arrangements to be evaluated based on their real-world effects, rather than a regulator's *ex ante* predictions." *Order* ¶ 50 (JA____).[14]

2. Given These Other Protections, The Commission Reasonably Found *Ex Ante* Conduct Rules Unnecessary And Unjustified.

Given the substantial protections already provided by transparency, market forces, and preexisting antitrust and consumer protection laws, the

[14] Mozilla criticizes the *Order* for not conclusively addressing "whether (or when) blocking, throttling, or paid prioritization would fail the 'rule of reason' under antitrust law or be held 'unfair' under the [FTC Act]." Br. 53. But these are highly fact-dependent standards that have long been given content through their application in individual cases; beyond the well-developed body of case law and administrative guidance from the Federal Trade Commission and the Department of Justice, the FCC need not spell out here what the precise outcome would be in every hypothetical case involving every conceivable set of facts. And given the risk that prophylactic rules could stifle valuable innovation, the Commission reasonably rejected arguments (*e.g.*, Mozilla Br. 72-73) that "the case-by-case nature of antitrust enforcement makes it inherently flawed" or that "antitrust moves too slowly and is too expensive." *Order* ¶¶ 149-150 (JA____-__); *cf. POM Wonderful, LLC v. FTC*, 777 F.3d 478, 497 (D.C. Cir. 2015) (noting that agencies have broad discretion in choosing between rulemaking and case-by-case adjudication).

Commission reasonably found that "the substantial costs" of the *Title II Order*'s *ex ante* conduct rules—"including costs to consumers in terms of lost innovation as well as monetary costs to" broadband providers—are "not worth the possible benefits." *Order* ¶ 245 (JA____). Flexible case-by-case analysis under the antitrust and consumer protection laws, the Commission stated, "allows a balancing of pro-competitive benefits and anticompetitive harms" and "will allow new innovative business arrangements to emerge as part of the ever-evolving Internet ecosystem." *Id.* ¶¶ 146, 148 (JA ___, ___). By contrast, rigid *ex ante* rules would foreclose "the 'permissionless innovation' that made the Internet such an important part of the U.S. economy" and "are more likely to inhibit innovation before it occurs." *Id.* ¶¶ 147, 149 (JA ___, ___); *see also* FTC Chairman Comments at 12 (JA____). Examining the particular *ex ante* rules imposed under the *Title II Order*, the Commission found that banning paid prioritization has hindered the introduction of innovative new services and has discouraged greater investment in broadband infrastructure, *Order* ¶¶ 246-262 (JA____-__), and that prohibitions on blocking and throttling are unnecessary because any harms they seek to prevent can be better addressed by other mechanisms at lower cost, *id.* ¶¶ 263-266 (JA____-__).

Paid Prioritization. The Commission reasonably determined that a categorical ban on paid prioritization impedes innovation, impairs economic efficiency, and reduces network investment. *See Order* ¶¶ 253-260 (JA____-__). These costs "are likely significant" and, the Commission concluded, "outweigh any incremental benefits." *Id.* ¶ 253 (JA____-__); *see also id.* ¶¶ 319-321 (JA____).

As the Commission observed, "the record demonstrates that the ban on paid prioritization agreements has had ... a chilling effect on network innovation" and has prevented "innovative forms of service differentiation and experimentation." *Id.* ¶ 254-255 (JA____-__). In particular, it has hindered development of services that require "high quality-of-service (QoS) arrangements" (*i.e.*, guarantees regarding speed, latency, and the like) because it "den[ies] network operators the ability to price these services, an important tool for appropriately allocating resources in a market economy." *Id.* ¶ 254 (JA____). Banning paid prioritization may also inhibit "the entry of new edge providers into the market" because paying for prioritization "could allow small and new edge providers to compete on a more even playing field against large edge providers." *Id.* ¶ 255 (JA____-__); *accord id.* ¶ 133 (JA____) ("[S]maller edge providers may benefit from tiered pricing, such as paid prioritization, as a means of gaining entry.").

Banning paid prioritization may also be economically inefficient. *Id.* ¶ 256 (JA____-__). Some edge services use greater bandwidth or require lower latency than others; if broadband providers can charge these edge providers for the increased demands they place on the network, and edge providers recoup these costs from their users, then the costs will be borne by the users who cause them. *Ibid.* Without paid prioritization, broadband providers must recover all costs solely through subscriber fees, and may be less able to "target[] [these costs] at the relevant users" who cause them. *Ibid.* As a result, if paid prioritization is banned, "[c]ustomers who do not cause these costs must pay for them, and end users who do cause these costs to some degree free-ride, inefficiently distorting usage of both groups." *Ibid.*[15]

In addition, "[t]he economic literature and the record both suggest that paid prioritization can increase network investment" by making "incremental investment … more profitable." *Id.* ¶ 257 (JA____). As a result, allowing paid prioritization "leads to higher investment in broadband capacity." *Ibid.*

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[15] By effectively requiring all customers to subsidize the costs of the most demanding users, "ban[ning] paid prioritization imposes a regressive subsidy" by "forcing the poor to support high-bandwidth subscription services skewed toward the wealthier." *Order* ¶ 260 (JA____). By contrast, permitting broadband providers to charge edge providers who place heavy demands on their networks could benefit average users by reducing the base price for broadband service. *Id.* ¶ 259 (JA____); *accord* FTC Broadband Policy Report at 90, 158 (JA____, ____).

And this further encourages "greater innovation on the edge provider side of the market" by "inducing congestion-sensitive edge providers to enter the market." *Ibid.*

Insofar as paid prioritization can be used in anticompetitive ways, the Commission reasonably found that these concerns are better addressed by antitrust law than through a rigid *ex ante* ban on paid prioritization. *See id.* ¶ 261 (JA____). A categorical ban on paid prioritization would harm consumers by inhibiting innovation, investment, and efficiency in all the ways described above, whereas antitrust law's rule of reason "is ideally situated to determine whether a specific arrangement, on balance, is anti-competitive or pro-competitive." *Ibid.* While "it is difficult to determine on an *ex ante* basis which paid prioritization agreements are anticompetitive," the "case-by-case, deliberative nature of antitrust" appropriately ensures that paid prioritization is precluded "only when it harms competition, for example, by inappropriately favoring an affiliate or partner in a way that ultimately harms economic competition in the relevant market." *Ibid.*; *see also id.* ¶ 262 (JA____).

Blocking and Throttling. The Commission likewise found that "the no-blocking and no-throttling rules are unnecessary to prevent the harms they were intended to thwart" and that transparency, market forces, and antitrust

and consumer protection laws can "achiev[e] comparable benefits at lower cost." *Order* ¶¶ 263-264 (JA____-__).

The Commission explained that these rules are largely unnecessary because providers are unlikely to block or throttle content and applications that their customers want to access. *Id.* ¶¶ 263-265 (JA____-__). On the contrary, "most attempts by [broadband providers] to block or throttle content will likely be met with a fierce consumer backlash." *Id.* ¶ 264 (JA____). Indeed, "[s]takeholders from across the Internet ecosystem oppose the blocking and throttling of lawful content," reflecting strong market pressure against these practices. *Id.* ¶ 265 (JA____). Given these market incentives, "numerous [broadband providers], including the four largest fixed [providers], have publicly committed not to block or throttle the content that consumers choose." *Id.* ¶ 264 (JA____). Other providers are likely to make similar commitments under the transparency rule's requirement to disclose their policies on blocking and throttling, and those commitments are enforceable under the FTC Act and state consumer protection laws. *Ibid.*; *see id.* ¶ 142 (JA____) (the transparency rule "should allay any concerns about the ambiguity of [broadband provider] commitments").

More generally, broadband providers have an economic incentive not to block, throttle, or otherwise impair Internet content, because Internet

content and Internet access are economic complements. *Id.* ¶ 117 (JA____). Broadband providers "recognize that their businesses depend on their customers' demand for edge content" and that "content and applications produced by edge providers often complement the broadband Internet access service sold by" broadband providers. *Ibid.* Broadband providers "have good incentives to encourage new entrants that bring value to end users, both because new entrants directly increase the value of the platform's services, and because they place competitive pressure on other edge providers, forcing lower prices, again increasing the value of the platform's services." *Id.* ¶ 133 (JA____); *see also id.* ¶¶ 171, 264 & n.970 (JA____, ____).

To be sure, an incentive to discriminate may exist in the special case of a vertically integrated broadband provider dealing with an edge provider that competes against one of its affiliated businesses.[16] *See Verizon*, 740 F.3d at 645-46. If so, however, that problem is best addressed by market forces or, if competition is insufficient, by antitrust law. *See, e.g.*, *Order* ¶ 145 (JA____) ("If [a broadband provider] that also sells video services degrades the speed or quality of competing 'Over the Top' video services ... that conduct could be challenged as anticompetitive foreclosure."); *id.* ¶ 172 (JA____-__)

[16] But even in such a case, a provider would have "conflicting incentives" to provide a more open platform to consumers, who expect unfettered access to the Internet. *See* FTC Broadband Policy Report at 157 (JA____).

(similar). In all other circumstances—that is, when a broadband provider does not directly compete with an edge provider or does not have market power—a provider's economic incentives will cut *against* blocking or throttling any lawful content or applications that its customers want to access.

The record reveals "scant evidence that end users … have been prevented by blocking and throttling from accessing the content of their choosing." *Id.* ¶ 265 (JA____-__). And "in the event that any stakeholder were inclined to deviate from" this apparent consensus against blocking and throttling, the Commission reasonably concluded that "consumer expectations [and] market incentives"—and, where applicable, "the deterrent threat of enforcement actions ... by antitrust and consumer protection agencies"—"will constrain such practices" at lower cost than *ex ante* conduct rules. *Ibid.*

The Commission recognized that affirmatively banning blocking or throttling could "create some compliance costs" because "when considering new approaches to managing network traffic, [a provider] must apply due diligence in evaluating whether the practice might be perceived as running afoul of the rules." *Id.* ¶ 322 (JA____). The Commission thus reasonably "determined that replacing the prohibitions on blocking and throttling with a transparency rule implements a lower-cost method of ensuring" that any

harms "are exposed and deterred by market forces, public opprobrium, and enforcement of the consumer protection laws." *Id.* ¶ 323 (JA____).

3. The Commission Reasonably Eliminated The Vague Internet Conduct Standard.

The Commission also reasonably decided to repeal the *Title II Order*'s "vague Internet Conduct Standard" and thereby "reduce regulatory uncertainty and promote network investment and service-related innovation." *Order* ¶ 249 (JA____). The Internet Conduct Standard sought "to prohibit practices [the Commission] determines unreasonably interfere with or unreasonably disadvantage the ability of consumers to reach the Internet content, services, and applications of their choosing." *Id.* n.883 (JA___). A "non-exhaustive" list of seven factors was to be considered when applying this Standard, but the *Title II Order* made no effort to explain how these factors (let alone any unenumerated considerations) would be weighed against one another or how a provider could know in advance what practices violate the rule. *See NPRM* ¶¶ 72-72 (JA____-__).[17]

Because "the [S]tandard and its implementing factors do not provide carriers with adequate notice of what they are and are not permitted to do,"

[17] The *Title II Order* established an advisory opinion process, 30 FCC Rcd at 5706-09 ¶¶ 229-239, but the Commission found that this process was "too uncertain and costly" to offer meaningful relief and that it risked "indefinitely delay[ing]" innovative offerings, *Order* ¶ 252 (JA____).

the Commission observed, it "created regulatory uncertainty in the marketplace hindering investment and innovation." *Order* ¶ 247 (JA____). The record in this proceeding shows that broadband providers "have [forgone] … innovative service offerings or different pricing plans that benefit consumers" because of this uncertainty. *Id.* ¶ 249 (JA____-__); *see also id.* ¶ 99 (JA____-__) (citing projects that Charter, Cox, and Comcast have delayed or canceled due to regulatory uncertainty). In addition, the Standard creates significant compliance costs, which "will likely be passed onto consumers via higher prices and/or limited service offerings and upgrades." *Id.* ¶ 251 (JA____) (internal quotation marks omitted).

Compared to these significant costs, the Internet Conduct Standard offers little incremental benefit over preexisting antitrust and consumer protection laws, the Commission found. *Id.* ¶ 317 (JA____). The FTC, the Department of Justice, and other agencies "already have significant experience protecting against the harms to competition and consumers that the Internet Conduct Standard purports to reach." *Id.* ¶ 248 (JA____). Unlike the Internet Conduct Standard, the antitrust and consumer protection laws draw "guidance from [an] ample body of precedent" that "appl[ies] across industries." *Id.* ¶ 246 & n.892 (JA____). In addition, antitrust law is guided by a well-defined "consumer welfare standard defined by economic

analysis," in contrast to the "non-exhaustive grab bag" of "broad[] and haz[y]" considerations under the Internet Conduct Standard. *Id.* ¶ 246 (JA____). For these reasons, the Commission concluded, antitrust and consumer protection laws can address any harmful conduct at far less cost than the Internet Conduct Standard. *Ibid.*[18]

4. The Commission Reasonably Performed A Qualitative Cost-Benefit Analysis.

The *Order* presents a "qualitative cost-benefit analysis" that "organiz[es] the relevant economic findings made throughout the *Order* into a cost-benefit framework." *Order* ¶¶ 304-305 (JA____). That cost-benefit analysis concludes that undoing the Title II classification of broadband service and repealing each of the former conduct rules will have net benefits and increase overall economic welfare. *Id.* ¶¶ 304-323 (JA___-___).

Because "cost-benefit analyses epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency," this Court reviews them "deferentially." *NAHB*, 682 F.3d at 1040. Mozilla nonetheless argues that the Commission erred in conducting a qualitative cost-benefit

[18] Because of the significant body of precedent applying these well-established laws, Mozilla is incorrect (Br. 54) that "the alleged vagueness of the general conduct standard" is no different than "the necessarily generic nature of the antitrust and consumer laws."

analysis because, it claims, (1) "the *NPRM* ... stated that [the Commission] would conduct a [cost-benefit analysis] pursuant to [OMB] Circular A-4" and (2) "[t]he Circular requires ... a *quanti[tative]*" cost-benefit analysis. Br. 72. Neither premise is correct.

To begin with, the *NPRM* did not commit the agency to conduct a quantitative analysis or to follow all of the Circular's guidelines. Although the *NPRM* tentatively "proposed to follow the guidelines in" the Circular, it at the same time "s[ought] comment on following Circular A-4 generally" and "on any specific portions of Circular A-4 where the Commission should diverge" from its guidelines. *NPRM* ¶ 107 (JA____); *see also ibid.* (inviting comment on "why particular guidance in Circular A-4 should not be followed in this circumstance"); *cf.* INCOMPAS Comments at 84-86 (JA____-__) (arguing that the *NPRM* did not resolve whether to conduct a cost-benefit analysis or what methodologies to use). An NPRM's proposals are just that—proposals—and an agency may reasonably reconsider its initial proposals following public comment and examination of the record. *See Agape Church, Inc. v. FCC*, 738 F.3d 397, 422 (D.C. Cir. 2013).

In any event, the Commission's ultimate decision to conduct a *qualitative* analysis was entirely consistent with the Circular. The Circular specifically instructs that, "where no quantified information on benefits,

costs, and effectiveness can be produced, the regulatory analysis *should present a qualitative discussion* of the issues and evidence." Office of Mgmt. and Budget, Circular A-4, at 10 (2003) (emphasis added). Indeed, the Circular warns that "[w]hen important benefits and costs cannot be expressed in monetary units," attempting a quantitative cost-benefit analysis "can even be misleading, because the calculation of net benefits in such cases does not provide a full evaluation of all relevant benefits and costs." *Id.* at 10.

Consistent with the Circular, after finding that "the record provides little data that would allow [the agency] to quantify the magnitude of many of" the costs and benefits, the Commission reasonably proceeded "to conduct[] a qualitative cost-benefit analysis." *Order* ¶ 304 (JA____); *cf. Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1094, 1140 (D.C. Cir. 1984) (faced with "a problem about which no reliable data was available," the FCC may "rely on its historical experience and expertise to employ a system of conservative estimates"). Notably, Mozilla nowhere disputes that it was infeasible to conduct a quantitative analysis here (nor attempts to present a quantitative analysis of its own); nor has it identified any basis for overturning the comprehensive qualitative analysis performed by the Commission, *see Order* ¶¶ 304-323 (JA____-__).

IV. THE COMMISSION REASONABLY CONSIDERED THE *ORDER*'S EFFECT ON INVESTMENT, COMPETITION, RELIANCE, AND GOVERNMENT SERVICES.

While the Commission did not need to support its classification decision with empirical analysis (*see* Part I.C), it nevertheless examined the *Order*'s impact on investment, competition, reliance interests, and government services and reasonably concluded that these considerations support returning to a light-touch regime. Petitioners' arguments that the Commission failed to adequately consider these factors are unavailing.

A. The Commission Reasonably Determined That The Order Would Remove Barriers To Investment.

The Commission first considered the *Title II Order*'s effect on investment. As a matter of economic theory, "regulatory burdens ... can deter investment by regulated entities" because regulation typically decreases returns on investment, *Order* ¶ 88 (JA____), and regulatory uncertainty and the threat of regulatory creep can likewise discourage investment and innovation, *id.* ¶¶ 99-102 (JA____-__). Based on a thorough review of the record, the Commission reasonably found that "the balance of the evidence" is "consistent with economic theory" that Title II regulation "discourages investment by [broadband providers]." *Id.* ¶ 93 (JA____); *accord id.* ¶ 88 (JA____).

The Commission observed that recent trends in the Internet marketplace are consistent with Title II regulation depressing broadband investment. Total capital investment by broadband providers increased each year from 2009 to 2014; began to decrease when the *Title II Order* was enacted in 2015; and fell again in 2016—even though the economy as a whole continued growing. *Id.* ¶ 90 (JA____-__). Multiple submissions in the record likewise show that, after adjusting for investments unaffected by the *Title II Order*, investment fell by about 3 percent in 2015 and by another 2 percent in 2016. *Id.* ¶¶ 91-92 (JA____). Though not conclusive, "these comparisons are consistent with other evidence in the record that indicates that Title II adversely affected broadband investment." *Id.* ¶ 92 (JA____).

The *Order* also examined a study by economist George Ford finding "that [the Commission's] 2010 announcement of a framework for reclassifying broadband under Title II ... was associated with a $30 billion-$40 billion annual decline in investment." *Id.* ¶ 95 (JA____); *see* George S. Ford, *Net Neutrality, Reclassification, and Investment: A Counterfactual Analysis*, Phoenix Ctr. Perspectives No. 17-02 (Apr. 25, 2017) (Ford Study), http://www.phoenix-center.org/perspectives/Perspective17-02Final.pdf. That announcement presented "a credible increase in the risk of reclassification that surprised financial markets." *Order* ¶ 95 (JA____); *see* Ford Study at 4-

5. Dr. Ford compared investment in broadcasting and telecommunications against four control groups.[19] *Id.* at 2-7. His analysis found that the mere *threat* of Title II regulation produced "investment effects [that] [we]re consistently negative, large, and statistically significant." *Id.* at 8. These findings "suggest that news of impending Title II regulation is associated with a reduction in [broadband] investment over a multi-year period." *Order* ¶ 95 (JA_____).[20]

The Commission acknowledged a competing study commissioned by the Internet Association. *Id.* ¶ 97 (JA____). That study examined several variations on two basic economic models and failed to detect statistically significant evidence that telecommunications investment changed as a result

[19] The Internet Association questions (Br. 24) one of the four control groups used by Dr. Ford, but fails to acknowledge that Dr. Ford used standard empirical methods to identify the most appropriate controls and that "the pre-treatment trend" in the control groups is a close match for broadcasting and telecommunications. *See* Ford Study at 5-6 & fig.2. It also overlooks that a robustness check excluding that control group produced comparable results. *Id.* at 8 & tbl.5. The Internet Association speculates that other "confounding factors [could] exist" (Br. 24), but offers nothing to substantiate this.

[20] When the Commission in 2005 adopted principles to protect an open Internet *without* invoking Title II, "no similar decline" in investment occurred, which suggests that the declines in 2010 and 2015 were specific to Title II regulation. *Order* ¶ 92 (JA____).

of the 2010 or 2015 rules.[21] But the Commission observed that each model had significant flaws. *Ibid.* The first model compared U.S. investment to investment in other countries—but due to data limitations, the study "relie[d] partially on forecast rather than actual data, which likely lessens the possibility of finding an effect." *Id.* (JA____). The second model used an approach that "eliminat[ed] the use of a separate control group to identify the effect" and therefore was "unlikely to yield reliable results." *Ibid.*[22]

Mozilla also points (Br. 69) to general statements by some broadband executives that Title II "hasn't hurt" their companies or that their business plans "fit[] within those rules." As the *Order* explains, these selective quotations are "susceptible to multiple interpretations" and do not address whether these companies would have increased investment in their networks

[21] Of course, absence of statistically significant evidence does not necessarily demonstrate the absence of any effect; it may simply mean that the study or available data are insufficient to reach firm conclusions.

[22] The Internet Association's claim that the Commission failed to address other significant analyses in the study (Br. 18, 19-20) is mistaken. The other analyses consist of variations on the same basic models, "robustness checks" that are not presented as independent analyses, or analyses of regulation's effects on matters other than investment. And given the Internet Association's position here that any "attempt to identify and quantify direct causal impacts of the 2015 Order ... inevitably would be marred by a lack of data" and "essentially a pointless exercise" (Br. 18), it cannot contend that its own such study successfully refutes the Commission's conclusions.

in "the relevant counterfactual scenario in which Title II regulation had not been adopted." *Order* ¶ 102 (JA____).[23]

In addition to broadband provider investment, the Commission also considered the *Title II Order*'s effect on edge provider investment. *Id.* ¶ 107 (JA____). It ultimately found, however, that "the record does not suggest a correlation between edge provider investment and Title II regulation, nor does it suggest a causal relationship that edge providers have increased their investments as a result of the *Title II Order*." *Ibid.* "In fact," the Commission observed, "[i]n many cases, the strongest growth for a firm or industry predates the *Title II Order*," so "one could argue that in the absence of Title II regulation, edge providers would have made even higher levels of investment than they undertook." *Id.* ¶ 108 (JA____). And while one commenter submitted evidence purporting to show that edge investment has increased since the *Title II Order*, it made no attempt to "estimate ... what would have happened in the absence of Title II regulation (e.g., analysis

[23] Mozilla also points (Br. 70) to a single study finding "little direct effect" of the *Title II Order* on broadband providers' stock prices. Stock prices are not a measure of investment, so that study sheds no light on that issue. But in any event, the Commission explained, this finding may simply "reflect the forward-looking, predictive capabilities of market players." *Order* n.346 (JA____). If the market anticipated that the prior Commission would impose regulation on broadband providers, then those expectations could already have been factored into stock prices before the *Title II Order* was adopted.

following the methods employed [by Dr.] Ford)," so "the evidence presented does not show [that] the imposition of Title II regulation ... *caused* recent edge provider investment." *Ibid.* (emphasis added).

At bottom, though Petitioners may disagree with the FCC's assessment of the competing evidence, the Commission may "exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion." *USTA*, 825 F.3d at 694-95 (quoting *State Farm*, 463 U.S. at 52); *see also id.* at 697 (this Court "do[es] not sit as a panel of referees on a professional economics journal, but as a panel of generalist judges obliged to defer to a reasonable judgment by an agency" (internal quotation marks omitted)). "[T]he FCC may rationally choose which evidence to believe among conflicting evidence in its proceedings, especially when predicting what will happen in the markets under its jurisdiction." *Citizens Telecomms. Co. of Minn., LLC v. FCC*, 901 F.3d 991, 1011 (8th Cir. 2018). Petitioners offer no basis to disturb the Commission's reasonable determination that the Order's elimination of heavy-handed common-carriage regulation and conduct rules is likely to remove barriers to investment in the Internet marketplace.

B. The Commission Reasonably Determined That Broadband Providers Face Competitive Constraints.

The *Order* also devoted eleven pages to a comprehensive review of the Internet marketplace and reasonably concluded that broadband providers face

competitive constraints, which supports the Commission's adoption of a light-touch, market-based framework. *See Order* ¶¶ 123-138 (JA____-__).[24]

Mobile Broadband. Mobile broadband service is generally characterized by competition among multiple large carriers. The Commission found that "[m]obile wireless [providers] face competition in most markets, with widespread and ever extending head-to-head competition between four major carriers." *Order* ¶ 129 (JA____). "Even in rural areas," the Commission found, "at least four service providers cover[] approximately 69 percent of the population." *Ibid.*

Fixed Broadband. The market for fixed broadband is more concentrated, but—as the Commission explained—fixed broadband providers "frequently face competitive pressures that mitigate their ability to exert market power." *Order* ¶ 123 (JA___). "[A]mong wireline service providers," the record reflects that there is "less, but still widespread, competition," with more than two-thirds of all Americans having a choice of

[24] When taking competitive conditions into account as part of its public interest analysis, the FCC is informed in part by antitrust policy concerns, but need not apply the same standards that govern under antitrust law. *See McLean Trucking Co. v. United States*, 321 U.S. 67, 79-86 (1944); *Citizens Telecomms.*, 901 F.3d at 998-99, 1010 (upholding a competitive markets test that is informed by, but differs from, antitrust law).

providers at lower broadband speeds and nearly half of all Americans having a choice of providers at higher speeds. *Id.* ¶ 125 (JA____).

Competitive pressures among fixed broadband providers are even more robust when one accounts for intermodal competition. If terrestrial and satellite fixed-wireless providers are included, nearly half of all Americans have a choice of three or more providers offering high-speed broadband, and roughly 95% have a choice of three or more providers offering lower or medium speeds. *Id.* ¶ 124 (JA____-__). Similarly, with "increasing numbers of Internet access subscribers ... relying on mobile services only," fixed broadband providers increasingly face competitive pressure from mobile providers. *Id.* ¶ 130 (JA____). And "[w]ith the advent of 5G technologies promising sharply increased mobile speeds in the near future, the pressure mobile exerts in the broadband marketplace will become even more significant." *Ibid.* (JA____); *cf.* Scott Moritz, *Verizon Planning Launch of 5G Internet and TV Service in October*, Bloomberg, Sept. 11, 2018, https://bloom.bg/2xbHWKX.

Other factors increase the competitive pressures faced by fixed broadband providers. The Commission determined that, because the economic structure of fixed broadband service is characterized by "substantial sunk costs" and low incremental costs, "competition between

even two [providers] is likely to be relatively strong." *Order* ¶ 126 (JA____-__). That is because when "the cost of adding another customer ... is relatively low," a broadband provider "has strong incentives, even when facing a single competitor, to capture customers" and "may be willing to cut prices to as low as the incremental cost of supplying a new customer." *Ibid.*; *see Citizens Telecomms.*, 901 F.3d at 1010 (upholding similar FCC determination "that duopolies can sufficiently increase competition to make regulation unnecessary" when "sunk costs … are high while the incremental costs of supplying new customers are low"). "[I]n this industry," the Commission found, "even two active suppliers in a location can be consistent with a noticeable degree of competition." *Order* ¶ 126 (JA___).

Moreover, the Commission found that although providers may offer different pricing or service tiers in different areas, economic, technical, and reputational constraints may still require them to follow uniform business practices across their entire service area, so if a broadband provider "fac[es] competition broadly," then even in uncompetitive areas it "will tend to treat customers that do not have a competitive choice as if they do." *Id.* ¶ 127 (JA____).

Mozilla asserts (Br. 58) that the *Order* "dismisse[d] previous FCC determinations" of market power in the provision of broadband Internet

access. Not so. The Commission has *never* found that broadband providers possess market power. On the contrary, the *Title II Order* "explicit[ly] refus[ed] to take a stand on whether broadband providers ... have market power." *See USTA*, 825 F.3d at 744 (Williams, J., dissenting).

Absent a finding of market power, Mozilla relies (Br. 58) on a past Commission determination "that churn from one [broadband] provider to another is low." *See Title II Order*, 30 FCC Rcd at 5641 ¶ 98. The Commission declined to reaffirm that finding here, however, because the record in this proceeding contains "substantial, quantified evidence" challenging that premise. *Order* ¶ 128 (JA____-__); *see also USTA*, 825 F.3d at 752 (Williams, J., dissenting) (observing that "the rate of turnover actually looks quite substantial"). But in any event, the Commission explained, "low churn rates do not *per se* indicate market power," because they may instead "reflect competitive actions ... to retain existing customers, such as discounts and bonus offers." *Order* ¶ 128 (JA____-__). Indeed, the record shows that broadband providers "often tak[e] aggressive actions to convince subscribers seeking service cancellation to continue to subscribe, often at a discount"—evidence that is "indicative of competition." *Ibid.* Because evidence of low churn rates (even if supported by the record) could be entirely consistent with

a competitive market, it would offer no reason to reject the Commission's analysis.

Service to Edge Providers. The Commission also reasonably considered competition in edge providers' access to end users. *Order* ¶¶ 131-138 (JA____-__). It found limited evidence of conventional market power in this market, which the record shows to be only moderately concentrated. *Id.* ¶ 132 (JA____). The largest wireline provider has only a quarter of the market, and edge providers can be viable in the long term by "offer[ing] service to three quarters of broadband subscribers." *Id.* ¶¶ 132-133 (JA_____). In addition, as discussed above, broadband providers in many circumstances "have good incentives to encourage new entrants" because this increases the value of their broadband access service," and "smaller edge providers may benefit from ... paid prioritization[] as a means of gaining entry." *Id.* (JA____-__).

The Commission also reasonably considered claims that, even in the absence of market power, broadband providers have a "terminating access monopoly" over their customers. *Id.* ¶¶ 135-137 (JA____-__). The Commission identified substantial doubts about whether such a terminating monopoly actually exists, since "from the perspective of many edge providers, end users ... subscribe to more than one platform (e.g., one fixed

and one mobile) capable of granting the end user effective access to the edge provider's content." *Id.* ¶ 136 (JA____); *accord id.* ¶ 133 (JA____) ("edge providers can reach end users at locations other than their homes, such as at work[] or through a mobile [provider]"). Nor does this theory support rigid *ex ante* regulation of all—or even most—broadband providers, since the Commission found "[i]t is unlikely that any [provider] except the very largest" would control enough customers to threaten an edge provider's viability. *Ibid.* And even when the theory applies, it does not address "the extent to which the resulting prices are economically inefficient," and there likewise "is no substantial evidence in the record that demonstrates how different efficient prices to edge providers would be from the prices that would emerge" in the absence of regulation. *Id.* ¶ 137 (JA____). Absent any sound theoretical or empirical support for this theory, the Commission reasonably concluded that such speculation does not "outweigh the harmful effects of Title II regulation." *Id.* ¶ 138 (JA____).

C. The Commission Reasonably Considered The Reliance Interests Of Participants In the Broadband Marketplace.

Petitioners contend (Mozilla Br. 71; State Br. 29-32) that the Commission failed to account for the reliance by edge providers and state and local governments on the Commission's prior regulatory regime. To the

contrary, the *Order* specifically acknowledged these concerns, but found them unpersuasive for two reasons. *See Order* ¶ 159 (JA____).

First, to the extent Petitioners claim that edge providers have made investments in reliance on the prior Commission's regulatory regime, they "do not meaningfully attempt to attribute particular portions of that investment to any reliance on the *Title II Order*," nor to any other specific Commission action. *Ibid.* That there have been "billions of dollars in edge investment over the past decade," Mozilla Br. 71, does not establish that this investment was made *in reliance on* any Commission action or would not have been made but for that action. *Order* ¶ 159 (JA____) (dismissing similar "[a]ssertions in the record regarding absolute levels of edge investment"). Petitioners nowhere demonstrate a link between any particular investment and any specific Commission action.[25]

Second, "given the lengthy prior history of information service classification of broadband Internet access," Petitioners have not shown that any reliance placed on the rules eliminated by the *Order* was reasonable. *Ibid.* Those rules were in place for barely three years—indeed, barely two

[25] Similarly, Santa Clara County asserts that "in reliance on the open Internet, [it] invested more than a million dollars in its medical records system and is investing hundreds of thousands of dollars in its telemedicine system," State Br. 31, but nowhere claims that it would have acted differently had it anticipated the *Order*.

years before the Commission proposed to repeal them—and they were under sustained and substantial challenge in litigation throughout that time. The State Petitioners gesture vaguely to "rules and enforcement actions taken by the Commission" in the years *before* the *Title II Order* (Br. 30), but aside from the 2010 transparency rule, the Commission's efforts were under constant (and successful) assault. *See Comcast*, 600 F.3d 642; *Verizon*, 740 F.3d 623. There could be no significant reliance on Commission initiatives that were repeatedly challenged and invalidated upon judicial review.

D. The Commission Reasonably Considered Arguments About Government Services.

State Petitioners argue (Br. 22-28) that Title II regulation is needed because government entities increasingly rely on the Internet to provide various government services. The Commission supports the use of broadband technology to improve the delivery of government services, but disagrees that heavy-handed Title II regulation is the best or proper means to achieve that end. Instead, the Commission determined that a light-touch, market-based framework "is more likely to encourage broadband investment and innovation, furthering [the] goal of making broadband available to all Americans and benefitting the entire Internet ecosystem." *Order* ¶ 86 (JA____). And it likewise concluded that "lower[ing] the cost of Internet access service" is likely to drive greater investment and innovation at the

edge—including government-provided edge services. *See, e.g.*, *id.* ¶ 120 (JA____).

State Petitioners speculate (Br. 23) that, without comprehensive conduct rules, broadband providers will seek to block or throttle government services unless first responders pay for prioritization. That contention is groundless. Petitioners do not explain why it would make any business sense for a broadband provider to intentionally impair public safety. The Commission's transparency rule would require providers to disclose these practices, at which point "public opprobrium" and "fierce consumer backlash" would inevitably ensue. *Order* ¶¶ 264, 323 (JA____, ____); *see also id.* ¶ 265 (JA____-__) ("[I]n the event any stakeholder were inclined to deviate from th[e] consensus against blocking and throttling, we fully expect that consumer expectations [and] market incentives ... will constrain such practices.").

State Petitioners point (Br. 23) to a single incident in which Verizon allegedly limited the speed of wireless broadband service being used by Santa Clara firefighters battling a California wildfire. They concede, however, that the application-agnostic throttling at issue (apparently instituted because the fire department had exceeded the monthly data allowance in its wireless plan)

would not have violated the 2015 rules, and thus would not be redressed even were they to prevail here. *See* State Br. 23 n.13.

Nor does it appear to be Verizon policy to limit data speeds to first responders in such circumstances. Verizon represents that it "ha[s] a practice to remove data speed restrictions when contacted in emergency situations" and "ha[s] done that many times, including for emergency personnel"—but made an isolated "customer service mistake" in misapplying that practice here.[26] Furthermore, prompted by public reaction, the company responded by "introducing a new plan [for public safety customers] that will feature unlimited data, with no caps [and] priority access."[27] Far from demonstrating a problem with light-touch rules, this incident illustrates that transparency and market forces work—without the need for heavy-handed rules.

Finally, State Petitioners object (Br. 22, 24) that the *Order* does not separately discuss public-safety issues. But the issues State Petitioners raise about government services are issues that apply to all edge providers, public and private. Because Petitioners did not raise any issues in this proceeding

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[26] Press Release, *Verizon Statement on California Fire Allegations* (Aug. 21, 2018), https://www.verizon.com/about/news/verizon-statement-california-fire-allegations.

[27] Press Release, *Verizon Statement on California Wildfires and Hurricane Lane in Hawaii* (Aug. 24, 2018), https://www.verizon.com/about/news/verizon-statement-california-wildfires-and-hurricane-lane-hawaii.

that were distinct to public safety, there was no need for the *Order* to separately discuss public safety concerns.[28]

V. PETITIONERS LACK STANDING TO CHALLENGE THE COMMISSION'S DECISION TO RETAIN A TRANSPARENCY RULE, WHICH WAS IN ANY EVENT LAWFUL.

Mozilla and Intervenor Internet Association challenge the Commission's authority to retain a transparency rule. (Mozilla Br. 55; Internet Ass'n Br. 30). But these parties lack standing to raise their challenge, and their arguments are in any event unavailing. Indeed, this Court pointed to Section 257 as a possible source of authority for disclosure requirements, *see Comcast*, 600 F.3d at 659, and the Commission subsequently relied on Section 257 as a basis for imposing disclosure requirements in 2010, *see Open Internet Order*, 25 FCC Rcd at 17980 n.444.

Mozilla and the Internet Association lack standing to contest the FCC's authority to adopt the transparency rule because they have not shown that the rule injures them. First, neither disagrees with the purpose or effect of the

[28] State Petitioners also briefly suggest (Br. 36-37) that the *Order* could restrict states' authority over utility pole attachments. But the Communications Act specifically permits any state to opt out of the federal pole attachment rules and to adopt its own regulations governing "rates, terms, and conditions" for pole attachments, 47 U.S.C. § 224(c), and as State Petitioners elsewhere acknowledge (Br. 38-39), the *Order* makes clear that it does not disturb state pole attachment rules, *Order* ¶ 196 & n.735 (JA____).

rule, standing alone. Instead, they contend that "without the transparency rule," the rest of the *Order*—with which they disagree—"cannot stand." Mozilla Br. 55. *See* Internet Ass'n Br. 30, 39-41. Mozilla and the Internet Association assert no injury owing to the transparency rule itself. They provide no legal basis for asserting standing to challenge a rule that does not harm them solely because that rule derivatively supports other rules. "[S]tanding is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996).

Second, Petitioners challenge the legal authority on which the Commission relies for the transparency rule—Section 257. But Petitioners do not argue that the Commission lacks authority to adopt the transparency rule. To the contrary, they contend that the agency had regulatory authority to promulgate the rule under section 706 of the 1996 Act. *See* Mozilla Br. 47-50; Internet Ass'n Br. 29-30; *Verizon,* 740 F.3d at 635-49, 659 (holding that the FCC had authority under section 706 to adopt the 2010 transparency rule). Mere disagreement with "the Commission's legal reasoning" underlying a rule cannot establish "injury cognizable for standing purposes" because "it is uncoupled from any injury in fact caused by" the rule. *Telecomm. Research & Action Ctr. v. FCC*, 917 F.2d 585, 588 (D.C. Cir. 1990) (internal quotation marks omitted).

In any event, the challenge to the transparency rule is insubstantial. Section 257(a) of the Communications Act directed the FCC to complete a proceeding within 15 months after enactment of the 1996 Act "for the purpose of identifying and eliminating" barriers to market entry for small businesses "in the provision and ownership of telecommunications services and information services." 47 U.S.C. § 257(a). Section 257(c) directed the Commission, "triennially thereafter, to report to Congress on such marketplace barriers and how they have been addressed by regulation or could be addressed by recommended statutory changes." *Order* ¶ 232 (JA___) (citing 47 U.S.C. § 257(c)).

As it did in 2010, *see Open Internet Order*, 25 FCC Rcd at 17980 n.444, the Commission reasonably interpreted its "statutory mandate to 'identify' the presence of market barriers" to include a grant of "direct authority to collect evidence to prove that such barriers exist," *Order* n.847 (JA___), and "to require disclosures from those third parties who possess the information necessary" for the agency to identify such barriers, *id.* ¶ 232 (JA___).

The Commission also reasonably found that it could employ its rulemaking authority under 47 U.S.C. §§ 154, 201(b), and 303(r) to impose disclosure requirements on broadband providers because such requirements

are reasonably ancillary to the agency's obligation under Section 257 to report to Congress. *Order* n.847 (JA___). This Court has recognized that the FCC may permissibly exercise its ancillary rulemaking authority to require the disclosure of information it needs to prepare the statutorily mandated reports. *Comcast*, 600 F.3d at 659 ("disclosure requirements" imposed "on regulated entities" would "be 'reasonably ancillary' to the Commission's statutory responsibility to issue a report to Congress" because such requirements would enable the agency "to gather data needed for such a report").

Mozilla asserts that the Commission cannot rely on section 257(c) because that provision "was repealed before the *Order* became effective." Br. 55; *see also* Internet Ass'n Br. 34-36. This argument is a red herring. While Congress repealed the triennial reporting requirement of Section 257(c) earlier this year, it replaced that provision with a practically identical biennial reporting requirement codified at 47 U.S.C. § 163. *See* RAY BAUM'S Act of 2018, Pub. L. No. 115-141, Div. P, §§ 401, 402(f), 132 Stat. at 1087-89. Like the now-repealed Section 257(c), Section 163 continues to require the Commission to report to Congress periodically on "market entry barriers for entrepreneurs and small businesses in the communications marketplace." 47 U.S.C. § 163(d)(3).

Congress thus recodified the reporting requirement of Section 257(c) under another provision of the Communications Act. And a savings clause in the legislation confirmed that "[n]othing in this title or the amendments made by this title shall be construed to expand or contract the authority of the Commission." Pub. L. No. 115-141, Div. P, § 403, 132 Stat. at 1090. As a result, there was no lapse in the FCC's authority to adopt a transparency rule so that the agency can collect the information it needs to perform its statutory duty to report to Congress on market entry barriers.

Mozilla contends that Section 257 "provide[d] no authority for any rule because it gives the FCC the authority to 'identify[] and eliminat[e]' market entry barriers 'by regulations pursuant to its authority under this chapter (*other than this section*).'" Br. 55 (quoting 47 U.S.C. § 257(a)); *see also* Internet Ass'n Br. 31-34. The Commission, however, reasonably construed the word "regulations" in Section 257(a) to refer only to regulations for *eliminating* barriers, not rules designed to help identify barriers.

Section 257(a) directs the FCC to conduct a proceeding "for the purpose of identifying and *eliminating, by regulations* pursuant to its authority under this chapter (other than this section), market entry barriers." 47 U.S.C. § 257(a) (emphasis added). The Commission reasonably concluded that the phrase "by regulations" modified "eliminating" (the word

immediately preceding the phrase).[29] Under that interpretation, the parenthetical phrase "(other than this section)" simply means that Section 257 does not authorize regulations for eliminating market entry barriers. Consistent with that reasonable reading of the statute, the Commission did "not interpret section 257 as an over-arching grant of authority to eliminate any … barriers [it] might identify." *Order* n.853 (JA___-___). The objective of the transparency rule is simply to help identify barriers—not to eliminate them. The Commission's "reliance on section 257 as authority for the transparency rule" was based solely on "the need for that rule to identify barriers and report to Congress in that regard." *Ibid.* (JA___).

Finally, there is no basis for the claim that "the FCC failed to give adequate notice of the statutory authority upon which it ultimately relied in imposing the transparency rule." *See* Mozilla Br. 55; Internet Ass'n Br. 36-38. At the outset of this proceeding, when the FCC sought comment on its legal authority to adopt rules if it reclassified broadband as an information service, the agency solicited comment on "the Communications Act authority

[29] The Supreme Court has declared that "a limiting clause or phrase" in a statute "should ordinarily be read as modifying the noun or phrase that it immediately follows." *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016) (internal quotation marks omitted). This Court has held that agencies may apply this rule when interpreting an ambiguous statute. *See Alabama Educ. Ass'n v. Chao*, 455 F.3d 386, 394-95 (D.C. Cir. 2006).

cited by the Commission in its *Open Internet Order*." *NPRM* ¶ 103 (JA___). That order had cited Section 257 as a source of authority for the 2010 transparency rule. *Open Internet Order*, 25 FCC Rcd at 17980-81 n.444. The Commission thus served notice that it might rely on Section 257 as authority for a transparency rule.

Moreover, interested parties understood that Section 257 was among the sources of authority the Commission was considering. As the Commission pointed out, several commenters identified Section 257 as a possible source of authority for a transparency rule. *See Order* n.843 (JA___). Indeed, an intervenor supporting petitioners filed comments citing Section 257 as "information collection authority that provides support for the transparency rule." Entertainment Software Association Comments at 17 & n.57 (JA___). Thus, even assuming that the FCC would have been required to refer expressly to Section 257 in the *NPRM*, the Commission's failure to do so "was not fatal" because petitioners were not "prejudiced" by the

omission. *See Trans-Pacific Freight Conf. v. Federal Maritime Comm'n*, 650 F.2d 1235, 1259 (D.C. Cir. 1980).[30]

VI. PETITIONERS' OTHER CHALLENGES TO THE *ORDER* LACK MERIT.

Petitioners raise various other scattershot challenges to the *Order*'s analysis. Each misses the mark.

A. The Commission Properly Denied The Procedural Motions Filed By NHMC And INCOMPAS.

Section 4(j) of the Communications Act empowers the FCC to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j). Section 4(j) thus vests broad discretion in the Commission "to make ad hoc

[30] Intervenor Digital Justice Foundation agrees that the Commission has authority to maintain a transparency rule, but argues that the Commission should have retained certain enhancements to the rule. *Compare* Br. 1-5 *with id*. at 6-13. Because these issues have not been raised by petitioners, Digital Justice "is procedurally barred from arguing them." *United States Tel. Ass'n v. FCC*, 188 F.3d 521, 530 (D.C. Cir. 1999). "An intervening party may join issue only on a matter that has been brought before the court by another party." *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990). In addition, given Digital Justice's concession that this issue "did not arise until *after* the Order was released" (Br. 6 n.3), the Communications Act precludes review because Digital Justice did not first present those claims to the FCC in a petition for reconsideration. *See In re Core Commc'ns, Inc.*, 455 F.3d 267, 276-77 (D.C. Cir. 2006) ("even when a petitioner has no reason to raise an argument until the FCC issues an order that makes the issue relevant, the petitioner must file 'a petition for reconsideration' with the Commission before it may seek judicial review") (quoting 47 U.S.C. § 405(a)).

procedural rulings" in specific proceedings. *FCC v. Schreiber*, 381 U.S. 279, 289 (1965). The Commission reasonably exercised this broad authority when it denied motions filed by NHMC and INCOMPAS.

NHMC Motion. The Commission reasonably declined NHMC's request to incorporate into the record nearly 70,000 pages of records that NHCM had obtained from the agency under the Freedom of Information Act (FOIA). *Order* ¶¶ 339-343 (JA___-___). Those records included informal consumer complaints filed with the Commission. It was "exceedingly unlikely," the Commission found, that those complaints raised any issue that was not already identified in "the voluminous record in this proceeding." *Id.* ¶ 342 (JA___) (internal quotation marks omitted). The Commission explained that "the overwhelming majority" of the complaints "do not allege wrongdoing under the Open Internet rules." *Ibid.* [31]

[31] NHMC was free to—but did not—submit into the record "the full universe of consumer complaints it received under the FOIA request." *Order* ¶ 341 (JA___). Instead, less than two weeks before the *Order* was adopted, NHMC submitted the full set of informal complaints and related documents by means of a USB drive. *See* Letter from Carmen Scurato, NHMC, to Marlene Dortch, FCC, December 1, 2017 (JA___). Although "standard practices" thus precluded incorporating those materials into the electronic docket in this proceeding, they were "made available for in-person review at the Commission." *Order* n.1164 (JA___).

Even after reviewing those complaints, NHMC could not identify—and still has not identified—a single issue raised in them that had not already been discussed in the comments and accompanying material that had been submitted in the record in this proceeding. Indeed, the complaints that NHMC deemed most relevant—the ones it submitted into the record along with an "Expert Analysis," *see Order* ¶ 341 (JA___)—corroborated the Commission's finding that the informal complaints generally were unrelated to the *Title II Order*'s conduct rules. Those complaints discussed "a wide range of issues beyond the scope" of those rules. *Id.* n.1170 (JA___). There is thus no basis for Mozilla's claim (Br. 65) that the FCC excluded "relevant information" from the record by declining to include all of the informal complaints.

Ultimately, in a massive administrative proceeding like this one, "[s]omeone must decide when enough data is enough. In the first instance that decision must be made by the Commission…, not by the parties to the proceeding, and not by the courts." *United States v. FCC*, 652 F.2d 72, 90 (D.C. Cir. 1980). The FCC here reasonably decided not to include largely unverified consumer complaints in the record.

INCOMPAS Motion. INCOMPAS asked the Commission to "modify the protective orders" in four recent proceedings reviewing corporate

transactions involving Internet service providers "to allow confidential materials submitted in those dockets to be used in this proceeding." *Order* ¶ 324 (JA___). Under the terms of the orders, the confidential materials in question may not be used in any other regulatory proceeding. *See id.* ¶ 325 (JA___). The Commission declined to permit the use of those materials in this proceeding for multiple reasons.

First, "much of the material" sought by INCOMPAS was "several years old." *Order* ¶ 328 (JA___). Second, because the information sought by INCOMPAS concerned only a "few industry participants," not "the entire industry," it would offer at best an "incomplete picture of industry practices" and would not "meaningfully improve the Commission's analysis." *Id.* ¶ 329 (JA___). Third, the Commission found that it would be "costly" and "administratively difficult" to gather this information. *Id.* ¶ 330 (JA___); *see id.* n.1140 (JA___). Finally, "the materials . . . were provided pursuant to express assurances against their use in future proceedings," *id.* ¶ 331 (JA___), and disclosure of such information would undermine parties' reasonable expectations that the protective orders governing their submissions would "not be changed years later." *Id.* ¶ 325 (JA___).

Mozilla speculates that because the material sought by INCOMPAS involved "the practices of three major [broadband] providers," that

information "might have well established that rules were necessary in light of the conduct of these providers." Br. 63. As the Commission explained, however, the "targeted and flexible approach" it used to address potential harms related to specific transactions involving those providers was "not transferable to a permanent, one-size-fits-all approach in this rulemaking applicable to hundreds" of broadband providers. *Id.* ¶ 334 (JA___).

Given the doubtful relevance of confidential material from unrelated proceedings completed years ago, the Commission reasonably declined to permit the use of such material here. *See SBC Commc'ns Inc. v. FCC*, 56 F.3d 1484, 1496 (D.C. Cir. 1995) (the Commission "is fully capable of determining which documents are relevant to its decision-making," and is not "bound to review every document deemed relevant by the parties").[32]

[32] Amicus Administrative Law Professors argue that the Commission erred by not addressing claims that some comments were allegedly filed under false identities. Because no petitioner raises this issue, the Court need not address it. In any event, the *Order* explains that the Commission fully complied with its APA obligations by considering all significant comments in the record. *Order* ¶¶ 344-345 (JA___-___).

B. The Commission Reasonably Declined To Address Data Roaming Rates.

One petitioner, NTCH, complains that the *Order* failed to address "data roaming" rates charged by broadband providers. Mozilla Br. 66-68. The Commission had no reason to address that issue in this proceeding.

"Data roaming" occurs when wireless subscribers travel outside the range of their own carrier's network and use another carrier's network to access the Internet through their phones. *See Cellco P'ship v. FCC*, 700 F.3d 534, 537 (D.C. Cir. 2012). In 2011, the FCC adopted a rule requiring mobile broadband providers "to offer data roaming agreements to other such providers on commercially reasonable terms and conditions." *Id.* at 540 (internal quotation marks omitted). This Court held that the rule was permissible under the Act because it did not impose common carrier requirements on providers of mobile broadband (which was then classified as an information service). *Id.* at 544-49.

When the FCC reclassified mobile broadband as a telecommunications service in 2015, it forbore from applying Title II common carrier regulation to data roaming, finding that Title II regulation of roaming was "not necessary at this time" and opting instead to continue enforcing the "commercially reasonable" rule. *Title II Order*, 30 FCC Rcd at 5857-58 ¶ 526. The agency stated that it would hold "a separate proceeding to revisit

the data roaming obligations" of mobile broadband providers "in light of" the Title II reclassification. *Id.* at 5858 ¶ 526. But once the FCC reinstated the classification of mobile broadband as an information service, Title II no longer applied to mobile broadband, and the application of Title II to data roaming became moot.

NTCH argues that the FCC disregarded its comments regarding the need for Title II regulation of data roaming. Mozilla Br. 67. But the Commission "need not address every comment" it receives; it must only respond to "those [comments] that raise significant problems." *Sprint Corp.*, 331 F.3d at 960 (internal quotation marks omitted). NTCH's comments did not raise a significant issue. Although NTCH claimed that Title II regulation was needed to bring down data roaming rates, its only evidence of unreasonably high rates was its own complaint against Verizon. *See* NTCH Comments 9-11 (JA___-___). Nor does NTCH assert any additional substantive argument against the *Order*'s information service classification of broadband Internet access service. Even if NTCH had shown more of an impact on data roaming rates, it nowhere explains why such an impact would provide a reason to overturn the Commission's decision to classify broadband Internet access as an information service. Given the FCC's reasonable reclassification of mobile broadband as an information service exempt from

Title II regulation, the agency had no good reason to consider imposing Title II regulation on data roaming rates.

C. The Commission Reasonably Deferred Consideration Of Broadband Support Under The Lifeline Program.

State Petitioners argue (Br. 33-35) that the *Order* failed to address concerns about whether standalone broadband service plans remain eligible for financial support under the Lifeline universal service program. The *Order* acknowledged these concerns and explained that the Commission has proposed to address them in a separate proceeding seeking to comprehensively reform and modernize the Lifeline program. *Order* ¶ 193 (JA____) (citing *Bridging the Digital Divide for Low-Income Consumers*, 32 FCC Rcd 10475 (2017) (*2017 Lifeline NPRM*)).

The Commission's determination falls well within its "broad discretion" to "defer consideration of particular issues to future proceedings." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004). As this Court has held, "the Commission need not address all problems in one fell swoop." *Ibid.* (internal quotation marks omitted).

Although the Lifeline reform proposal is still under consideration, the Commission has identified potential sources of authority to address State Petitioners' concerns in that proceeding. The Tenth Circuit has already identified one potential way for the Commission to support broadband under

the Lifeline program, *see In re FCC 11-161*, 753 F.3d 1015, 1044-48 (10th Cir. 2014), and the Commission's Lifeline reform proposal discusses other options and invites commenters to make further suggestions, *2017 Lifeline NPRM*, 32 FCC Rcd at 10502-03 ¶¶ 77-79. And states would likewise be able to support standalone broadband service under their own universal service programs so long as these state programs are consistent with the federal Lifeline rules. 47 U.S.C. § 254(f).[33]

VII. THE COMMISSION REASONABLY DETERMINED THAT INCONSISTENT STATE AND LOCAL REGULATION SHOULD BE PREEMPTED.

In the *Order*, the Commission substituted a light-touch regulatory regime under Title I for the utility-style Title II regulations that had been adopted in 2015. In so doing, the Commission recognized that its "calibrated federal regulatory regime," *Order* ¶ 194 (JA____), could be upset by inconsistent state or local regulatory efforts, "pos[ing] an obstacle to or plac[ing] an undue burden on the provision of broadband Internet access

[33] State Petitioners also suggest that classifying broadband Internet access as an information service could affect universal service contributions. Br. 34. That is incorrect. As this Court has recognized, the FCC's authority to require universal service contributions from "provider[s]" of telecommunications, 47 U.S.C. § 254(d), is not limited to telecommunications *carriers*, and can reach companies that provide information services via their own transmission facilities. *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1238-39 (D.C. Cir. 2007).

service." *Id.* ¶ 195 (JA____). To ensure that the regime adopted in the *Order* is not disrupted by state or local regulation, the Commission "preempt[ed] any state or local measures that would effectively impose rules or requirements that [the *Order*] repealed or decided to refrain from imposing … or that would impose more stringent requirements for any aspect of broadband service." *Ibid.*; *see id.* ¶¶ 194-196 (JA____-__). The State Petitioners' challenges to this effort to prevent state and local jurisdictions from interfering with the federal regulatory scheme lack merit.

A. Broadband Internet Access Is An Interstate Service That Should Be Subject To Uniform Regulation.

Internet traffic consists substantially of interstate communications that travel seamlessly across state or national boundaries. The Commission thus has repeatedly recognized that broadband Internet access is a predominantly interstate service. *Order* ¶ 199 (JA____-__). And because the Internet is predominantly an interstate service, the *Order* explains, broadband Internet access "should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements." *Id.* ¶ 194 (JA____-__).

Allowing separate state or local regulation of broadband Internet access service could seriously impede interstate communications by "requiring each [broadband provider] to comply with a patchwork of separate

and potentially conflicting requirements across all of the different jurisdictions in which it operates." *Ibid.* For example, if one state forbids prioritizing any class of Internet traffic, but a neighboring state requires providers to prioritize certain types of traffic (such as traffic to government websites), what rules govern Internet communications between the two states? If a broadband provider uses overlapping physical transmission facilities to supply Internet service to consumers in each state, how can it simultaneously comply with both laws? (This is a particularly acute problem for mobile broadband providers, since wireless signals do not obey jurisdictional lines.) And even if it were theoretically possible to comply with different rules in different jurisdictions, tracking and adhering to this patchwork of local requirements would pose a daunting practical obstacle for broadband providers. As a result, the Commission found, "allowing every state and local government to impose separate regulatory requirements … would impose an undue burden on [broadband providers] that could inhibit broadband investment and deployment and would increase costs to consumers." *Id.* n.727 (JA____).

The Commission's determination that broadband Internet access should be governed by uniform federal law, rather than a patchwork of state and local regulation, comports with Congress's division of federal and state

regulatory authority in the Communications Act. Section 2(b) of the Act expressly preserves state jurisdiction over *intrastate* communications, subject to any federal rules authorized under certain other provisions of the Act. *See* 47 U.S.C. § 152(b) ("[C]harges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service" fall under state jurisdiction, "[e]xcept as provided" under certain other provisions). By contrast, Congress did not reserve any state authority over *interstate* communications, which are instead governed by federal law. *See id.* § 152(a) (granting the FCC jurisdiction over "all interstate and foreign communication" and "all persons engaged … in such communication").[34]

Against this backdrop, the *Order*'s determination that the Communications Act is best read not to authorize federal public-utility regulation of the Internet amounts to a determination that Congress wanted broadband Internet access to remain free from *any* public-utility regulation, state or federal. "Nothing in the Act suggests"—as the State Petitioners

[34] Because Congress has specifically addressed the division of federal and state authority in Section 2—and "the Supreme Court has interpreted [the Act] to authorize the Commission to supersede state law in many respects," *Order* n.749 (JA____)—no presumption against preemption applies here. *Ibid.*; *see Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (once Congress has decided to preempt state law, "we do not invoke any presumption against pre-emption" in disputes over the *scope* of preemption).

apparently would have it—"that Congress intended for state or local governments … to possess any greater authority over broadband Internet access service than that exercised by the federal government." *Order* ¶ 204 (JA____). On the contrary, Section 2 reflects Congress's understanding that federal law is preeminent with respect to interstate communications.

In addition, to the extent the Commission could have read any ambiguous provisions of the Communications Act to give it authority to retain the former rules, the Commission's decision not to do so—a decision independently justified by the *Order*'s determination that the conduct rules were unwise and unwarranted as a matter of public policy, *see supra* Part III.B—supports preemption of state or local efforts to reinstate those requirements. Indeed, under Section 10(e) of the Act, a formal Commission decision to forbear from exercising authority granted to it by Congress may preempt any contrary state regulatory efforts.[35] 47 U.S.C. § 160(e). "It

[35] The State Petitioners' assertion that the "forbearance provision does not authorize preemption" (Br. 47) does not withstand scrutiny. Section 10(e) prohibits states from "continu[ing] to apply or enforce any provision of [the Communications Act] that the Commission has determined to forbear from applying." 47 U.S.C. § 160(e). This would be meaningless if states could nonetheless continue to apply obligations from which the Commission has forborne simply by adopting the very same requirements under state law. This Court has thus described Section 10(e) as providing "preemption authority." *Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

would be incongruous if state and local regulation were preempted when the Commission decides to forbear from a provision that would otherwise apply … but not preempted when the Commission determines that a requirement does not apply in the first place." *Order* ¶ 204 (JA____).

B. The *Order*'s Preemption Of Inconsistent State And Local Regulation Is Lawful.

The *Order* identified two independent bases of authority for the Commission to affirmatively preempt state law: (1) the impossibility exception to state jurisdiction, and (2) the federal policy of nonregulation for information services. *Order* ¶¶ 198-203 (JA____-__). In addition, as the State Petitioners acknowledge (Br. 48-56), even absent any affirmative determination to preempt, (3) any inconsistent state or local regulations would be automatically preempted under ordinary principles of conflict preemption.

1. The Impossibility Exception

It is well established that, under Section 2 of the Communications Act, the Commission "may preempt state law when (1) it is impossible or impracticable to regulate the intrastate aspects of a service without affecting interstate communications and (2) the Commission determines that such regulation would interfere with federal regulatory objectives." *Order* ¶ 198 (JA____); *see Minnesota PUC*, 483 F.3d at 578 ("the 'impossibility

exception' of 47 U.S.C. § 152(b) allows the FCC to preempt state regulation" when "federal regulation is necessary to further a valid federal regulatory objective, i.e., state regulation would conflict with federal regulatory policies"). This doctrine allows the FCC to preempt local measures that would impermissibly interfere with the federal government's preeminent authority over interstate communications. Notably, no petitioner has challenged the *Order*'s conclusion that inconsistent state or local regulation of broadband Internet access would necessarily interfere with interstate traffic. *See Order* ¶ 200 & n.744 (JA___).

The Supreme Court recognized this impossibility exception in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) (*Louisiana PSC*). There, the Court approved of cases "in which FCC pre-emption of state regulation was upheld where it was *not* possible to separate the interstate and intrastate components" of a communications service. *Id.* at 375 n.4; *see Order* n.738 (JA____). And the exception has been applied by the federal courts of appeals to uphold preemption of state law in circumstances analogous to this case. For example, in *Minnesota PUC*, the court upheld the Commission's broad preemption of state efforts to regulate a form of VoIP service because state regulation would interfere with federal policies, including the FCC's "market-oriented policy allowing providers of

information services to burgeon and flourish … without the need for and possible burden of rules, regulations and licensing requirements." 483 F.3d at 578-81 (internal quotation marks omitted). Similarly, in *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), the court upheld the Commission's preemption of state structural-separation requirements that "would negate the FCC's goal of allowing [carriers] to develop efficiently a mass market for enhanced services for small customers" and "defeat the FCC's more permissive policy of integration." *Id.* at 932-33.

This Court has recognized that "providing interstate [communications] users with the benefit of a free market and free choice" is a "valid goal" and that "[t]he FCC may preempt state regulation … to the extent that such regulation negates the federal policy of ensuring a competitive market." *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 430, 431 (D.C. Cir. 1989) (*NARUC III*). The impossibility exception thus allows the FCC to preempt state law when state or local regulation "would 'negate[] the exercise by the FCC of its own lawful authority' because regulation of the interstate aspects of the matter cannot be 'unbundled' from regulation of the intrastate aspects." *Pub. Serv. Comm'n of Md. v. FCC*, 90 F.2d 1510, 1515 (D.C. Cir. 1990) (*Maryland PSC*) (quoting *NARUC III*, 880 F.2d at 431). The same should likewise hold when state regulation would interfere with the FCC's

determination that Congress *withheld* authority to subject broadband Internet access and other interstate information services to public-utility regulation. In both situations, "a direct effort by a state to impose costs on interstate services that the FCC believes are unwarranted seems rather clearly within the FCC's authority to prevent." *Id.* at 1516.

The Ninth Circuit's *California* decisions, on which the State Petitioners seek to rely, in fact support the Commission's authority to preempt state law under Section 2(b) and its impossibility exception to state jurisdiction. There, as here, the state petitioners' "principal contention [was] that the FCC may preempt state action only when it is acting pursuant to specified regulatory duties under Title II of the Act," and that "no preemption authority exists" when "the FCC's action is intended to implement the more general goals of Title I." *California III*, 39 F.3d at 932. "That position must be rejected," the court ruled, because "[t]he Supreme Court's opinion in *Louisiana* is not so narrowly restricted." *Ibid.* Instead, the court concluded, "the impossibility exception applies to FCC preemption action designed to achieve [its] regulatory goals" regardless of whether the Commission is implementing

specific regulatory mandates for telecommunications services under Title II or a light-touch approach for information services under Title I. *Ibid.*[36]

The State Petitioners' insistence that some further grant of authority is required to preempt inconsistent state or local regulation of interstate communications is likewise at odds with the Eighth Circuit's decision in *Minnesota PUC*. That decision held that "the FCC may preempt state regulation" under Section 2 and the impossibility exception "if (1) it is not possible to separate the interstate and intrastate aspects of the service, and (2) federal regulation is necessary to further a valid federal regulatory objective." 483 F.3d at 578. It then upheld a Commission order preempting state regulation of a form of VoIP service under the impossibility exception,

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[36] The State Petitioners' belief that the Ninth Circuit supports their position apparently rests on dictum in the third paragraph of a footnote addressing an unrelated argument in an earlier decision in the case. *See* Br. 41, 42 n.25 (citing *California v. FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990) (*California I*)). That decision vacated the FCC's initial attempt to preempt state structural-separation requirements, but solely because the Commission had not adequately shown that all such requirements would necessarily interfere with interstate communications. *California I*, 905 F.2d at 1243-44. As noted above, the Commission has made that showing here. *See Order* ¶ 200 & n.744 (JA____). Absent any concerns about the *scope* of preemption, the Ninth Circuit's subsequent decision in *California III* holds that the FCC may preempt state or local regulation of Title I information services just as it may preempt regulation of Title II telecommunications services. *California III*, 39 F.3d at 932; *see also ibid.* ("The difficulty [in *California I*] was the FCC's failure to justify the breadth of preemption in that order, not its jurisdiction to order preemption.").

reasoning that "[c]ompetition and deregulation are valid federal interests the FCC may protect through preemption of state regulation." *Id.* at 580-81. Nowhere did the court suggest that the FCC was required to invoke some more specific grant of regulatory authority to preempt state regulation of interstate communications. Indeed, the decision makes *no mention* of either Title II or ancillary authority, finding that "the 'impossibility exception' of 47 U.S.C. § 152(b)" itself suffices to support preemption. 483 F.3d at 578.

Nor do the State Petitioners find any support in *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) (*NARUC II*). *NARUC II* held that Section 2(b)'s reservation of state authority over intrastate communications "seems to bar the Commission's assertion of a general pre-emptive power over" private two-way communications over cable systems' leased access channels because, given the capabilities of the rudimentary technology at issue, "the substantial bulk of [these] communications will be … intrastate." *Id.* at 611; *see also id.* at 621 (the "intrastate … transmissions" at issue "fall within the clear bar to Commission jurisdiction of 47 U.S.C. § 152(b)"). Faced with a *predominantly intrastate* service, the court held that "a residual delegation" of federal authority over communications technology was insufficient to overcome Section 2(b) and preempt state authority over intrastate communications. *Id.* at 611; *accord id.*

at 620-21. Here, in contrast to the intrastate service in *NARUC II*, the Internet is a *predominantly interstate* service. Few, if any, Internet communications are certain not to cross state lines, particularly given that "both interstate and intrastate communications can travel over the same Internet connection … in response to a single query[.]" *Order* ¶ 200 (JA____). Because the Internet falls outside Section 2(b)'s reservation of state authority over purely intrastate communications, and instead is a predominantly interstate service that Congress expected to be governed by uniform federal law, *NARUC II*'s holding that a more specific grant of authority is necessary to overcome Section 2(b) is inapplicable.[37]

Finally, the *Order* here in no way conflicts with *Comcast*, 600 F.3d 642. *Comcast* held that when the Commission seeks to fashion new regulatory obligations under Section 4(i) of the Act, 47 U.S.C. § 154(i), those new obligations must be tied to some affirmative grant of authority. *Id.* at 644, 645-47. Here, by contrast, the Commission determined that Congress

[37] That a concurring opinion in *NARUC II* would have held the regulations at issue invalid without reaching "the question of whether the F.C.C. is deprived of jurisdiction under 47 U.S.C. § 152(b) because these activities … are solely intrastate in character," 533 F.2d at 621 (Lumbard, J., concurring), only underscores that the principal opinion turned on the fact that the case involved intrastate—rather than interstate—communications technology. *See also id.* at 634 (Wright, J., dissenting) ("To the extent [a] service involve[s] … interstate communications, Section 152(b) is clearly inapplicable.").

withheld authority to regulate broadband Internet access—a point naturally evidenced by the *absence* of any specific grant of authority. Whereas in *Comcast* the absence of specific regulatory authority undercut the Commission's attempt to impose regulatory requirements, here the absence of authority supports the Commission's decision to eliminate regulations. And whereas in *Comcast* the Commission relied solely on the general grant of rulemaking authority under Section 4(i), here the Commission relied on Section 2 as independent support for preempting state and local regulation of broadband Internet access: Given Congress's division of federal and state authority in Section 2, it would be anomalous to allow states to exercise greater authority over interstate communications than that exercised by the federal government. *Comcast* therefore has no bearing on this case.

2. The Federal Policy of Nonregulation

Separate from the impossibility exception, the *Order* also explains that "the Commission has independent authority to displace state and local regulations in accordance with the longstanding federal policy of nonregulation for information services." *Order* ¶ 202 (JA____). Because the Commission reasonably determined that broadband service is best understood as an information service, the *Order* concluded that the federal policy of nonregulation preempts state public-utility regulation of that service. *Ibid.*;

see id. ¶ 195 & n.730 (JA____-__); *accord Charter Advanced Servs. (MN), LLC v. Lange*, 2018 WL 4260322, at *2 (8th Cir. Sept. 7, 2018) ("[A]ny state regulation of an information service conflicts with the federal policy of nonregulation." (quoting *Minnesota PUC*, 483 F.3d at 580)).

The State Petitioners contend (Br. 12-13, 39-45) that the Commission's determination that broadband Internet access is an information service not only divested it of the power to impose common carrier regulations, but also deprived it of the power to preempt contrary state regulations. That does not follow.

For more than a decade prior to Congress's enactment of the 1996 Act, the Commission consistently, repeatedly, and emphatically preempted state regulation of information services. *Order* ¶ 202 & n.748 (JA___). When Congress then embraced the Commission's regulatory framework in the 1996 Act—including its central distinction between telecommunications services, which are regulated under Title II, and information services, which are exempt from public-utility regulation—it adopted and ratified the Commission's longstanding policy of preempting state laws that conflict with the federal policy of nonregulation for information services. *Id.* ¶ 202 (JA____).

That Congress did not explicitly codify the federal policy of nonregulation for information services in ratifying that longstanding regulatory framework does not make that policy any less authoritative. Indeed, the Commission's assertion of preemption authority under this theory directly tracks the Supreme Court's reasoning in *City of New York v. FCC*, 486 U.S. 57 (1988); *see Order* n.749 (JA____). In that case, the Court upheld the Commission's authority to preempt state or local regulation of cable television signal quality, even though the provisions of the Cable Communications Policy Act of 1984 codifying the Commission's authority to regulate cable television do not directly authorize the Commission to preempt these laws. *See* 486 U.S. at 66-70. The Court relied on the fact that, for more than ten years before Congress adopted the Cable Act, the Commission repeatedly issued orders preempting all state and local regulation of cable television signal quality. *Id*. at 59-61, 66-67. Thus, "[w]hen Congress enacted the Cable Act in 1984, it acted against a background of federal pre-emption on this particular issue." *Id.* at 66. The Court then reasoned that "[i]n the Cable Act, Congress sanctioned in relevant respects the regulatory scheme that the Commission had been following" and sought to "mirror[] the state of the regulatory law before the Cable Act was passed." *Id.* at 67. And the Court observed that "nothing in the Cable Act or its legislative history

explicitly disapproved" of the Commission's past preemption of state or local signal-quality regulation. *Ibid.* The Court therefore concluded that, although nothing in the Cable Act explicitly authorized preemption, Congress's adoption of the Commission's regulatory framework embraced and effectively ratified the Commission's longstanding authority to preempt these laws. *Id.* at 66-70.

City of New York's reasoning applies with full force here: For more than a decade prior to the 1996 Act, the Commission consistently preempted state regulation of information services; in the 1996 Act, Congress adopted in relevant respects the Commission's longstanding regulatory framework; and there is no indication that Congress disapproved of the Commission's consistent preemption of state or local regulation of information services under that framework. The *Order* thus reasonably concluded that Congress embraced the Commission's longstanding federal policy of nonregulation for information services. *Order* ¶¶ 202-203 (JA____-__).

Remarkably, the State Petitioners insist (Br. 44-45) that *City of New York* somehow supports their view that the Commission must "identif[y] a specific statutory provision" that directly authorizes it to preempt state law. In fact, the Supreme Court expressly held precisely the opposite: "[A] pre-emptive regulation's force does not depend on express congressional

authorization to displace state law." *City of New York*, 486 U.S. at 64 (quoting *Fid. Fed. Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 154 (1982)); *see also Louisiana PSC*, 476 U.S. at 375 n.4 (recognizing implicit FCC preemption authority under the impossibility exception). "[I]f the agency's choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute," the Court explained, it "should not [be] disturb[ed] … unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *City of New York*, 486 U.S. at 64 (internal quotation marks omitted).

Other provisions of the 1996 Act support the *Order*'s conclusion that Congress understood and incorporated the longstanding federal policy of nonregulation for information services. *See Order* ¶ 203 (JA____). Section 230(b)(2) of the Communications Act, added by the 1996 Act, declares it to be "the policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services"—including "any information service"—"unfettered by Federal *or State* regulation." 47 U.S.C. § 230(b)(2), (f)(2) (emphasis added). Similarly, by directing that a communications provider "shall be treated as a common carrier under [the Communications Act] only to the extent that it is

engaged in providing telecommunications services," Section 3(51)—also added by the 1996 Act—forbids any common-carriage regulation, whether federal or state, of information services.[38] *Id.* § 153(51).

The State Petitioners point (Br. 52) to Section 601(c) of the 1996 Act, but that provision only reinforces the Commission's reasoning here. Section 601(c)(1) of the 1996 Act states that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided." 1996 Act § 601(c)(1), 110 Stat. at 143, *reprinted at* 47 U.S.C. § 152 note. By providing that the 1996 Act does not impliedly alter prior "Federal … law," Section 601(c)(1) precludes any construction of the 1996 Act that would divest the FCC of its preexisting power to preempt state law under the federal policy of nonregulation for

[38] The State Petitioners attempt (Br. 43) to dismiss Section 3(51) as "a definitional statute" that "limits only the agency's authority to act and says nothing about state authority," but they are wrong on both points. Section 3(51) states that a "telecommunications carrier shall be treated as a common carrier under [the Act] only to the extent that it is engaged in providing telecommunications services." 47 U.S.C. § 153(51). This provision is not written as a limitation on only the Commission's authority; rather, it prohibits the Act's common-carriage requirements from being applied to non-telecommunications services by *any* regulator—federal, state, or local. State and local governments have no greater authority to impose such requirements on information services than the FCC does. And despite the State Petitioners' effort to brush this provision aside as merely definitional, this Court made clear in *Verizon* that it operates as a substantive limitation on government authority to regulate information services. *See* 740 F.3d at 650.

information services. *Cf. City of New York*, 486 U.S. at 56-57 (statement that "Congress did not intend to 'affect the authority of a franchising authority' to set standards" indicated support for the FCC's preexisting policy of preempting local regulation). Likewise, Section 601(c)'s statement that the 1996 Act does not impliedly supersede state or local law poses no obstacle to the Commission preempting state law under its preexisting authority, because the clause applies only to provisions of "this Act"—that is, the 1996 Act.

Finally, the State Petitioners maintain (Br. 41-43) that "policy statements" cannot authorize preemption. But time and again, the Commission has identified the federal policy of nonregulation as a substantive rule that precludes public-utility regulation of information services. *See Order* ¶ 202 & n.748 (JA___). And because Congress ratified this authority by adopting the Commission's longstanding regulatory framework in the 1996 Act, it now amounts to statutory authority for the Commission to preempt state regulation of information services. That it is commonly referred to as a federal "policy" of nonregulation is of no moment; this and other courts have recognized that so-called "policy" is a valid basis for preempting state law if it has the force of law. *See*, *e.g.*, *Maryland PSC*, 909 F.2d at 1516 ("preventing state encroachment on federal interstate telecommunications policy" is a valid basis for preemption); *NARUC III*, 880

F.2d at 431 ("The FCC may preempt state regulation" that "negates the federal policy of ensuring a competitive market."); *Minnesota PUC*, 483 F.3d at 580-81 ("the FCC may preempt state regulation to promote a federal policy of fostering competition"); *California III*, 39 F.3d at 933 (the FCC may "preempt[] state structural separation requirements" that conflict with "the FCC's more permissive policy of integration").

3. Conflict Preemption

Even absent any affirmative determination to preempt, inconsistent state and local regulation would be preempted by the *Order* under ordinary principles of conflict preemption.[39] "Under ordinary conflict pre-emption principles[,] a state law that 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of a federal law is preempted." *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 330 (2011) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). And a federal decision to deregulate preempts contrary state regulatory efforts just the same as a federal decision to regulate. *Bethlehem Steel Co. v. N.Y. State Labor Relations Bd.*, 330 U.S. 767, 774 (1947) (state regulation preempted "where failure of the

[39] The *Order*'s affirmative preemption of state regulation "does not foreclose (through negative implication) any possibility of implied conflict pre-emption." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000) (internal quotation marks and alteration omitted).

federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate"); *see also Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 383 (1983) ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate."); *Minnesota PUC*, 483 F.3d at 580-81 ("[D]eregulation" is "a valid federal interest[] the FCC may protect through preemption of state regulation.").

Applying these principles, the Supreme Court has "f[ound] conflict and pre-emption where state law limited the availability of an option that the federal agency considered essential to ensure its ultimate objectives." *Geier*, 529 U.S. at 882. The Court has likewise applied conflict preemption where state law "present[s] an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 881. And it has confirmed that "an agency could base a decision to pre-empt on its cost-benefit judgment." *Williamson*, 562 U.S. at 335.

While courts do not "require[] a specific, formal agency statement identifying conflict to conclude that such a conflict in fact exists," *Geier*, 529 U.S. at 884, here the Commission's *Order* leaves no doubt that "a significant

objective" was to "give [ISPs] a choice" about how to provide Internet access in a way that best suits their customers, *Williamson*, 562 U.S. at 330 (emphasis omitted); *see also Geier*, 529 U.S. at 883 (courts "place some weight upon [the government's] interpretation of [its] objectives"). The *Order* seeks to "eliminate burdensome regulation that stifles innovation and deters investment, and empower Americans to choose the broadband Internet access service that best fits their needs." *Order* ¶ 1 (JA____). It explains that eliminating the constraints imposed by the *Title II Order* "will help spur innovation and experimentation, encourage network investment, and better allocate the costs of infrastructure, likely benefitting consumers and competition." *Id.* ¶ 253 (JA____). And it likewise finds that "the costs of [the former] rules to innovation and investment outweigh any benefits they may have." *Id.* ¶ 4 (JA____). Given these objectives, "any state or local measures that would effectively impose rules or regulations that [the *Order*] repealed or decided to refrain from imposing … or that would impose more stringent requirements for any aspect of broadband service" necessarily conflict with the *Order*. *Id.* ¶ 195 (JA____).

The State Petitioners cannot dispute that any state or local requirements that conflict with the *Order* are preempted. Instead, they argue that any consideration of conflict preemption is "premature" because it "requires

review of the specific state statute or regulation under review." Br. 48-49. To be sure, whether a given state or local law *falls within the scope* of what the *Order* preempts may need to be examined in an individual case. But whether the Commission *has the authority* to displace state and local requirements is a subject properly addressed in the *Order* and on direct review. Indeed, as the State Petitioners recognize (Br. 29), because the Hobbs Act vests "exclusive jurisdiction … to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" an FCC order in the court of appeals sitting in direct review of that order, 28 U.S.C. § 2342(1), the parties to any collateral action challenging an individual state or local law will be precluded from challenging the *Order*'s assertion of legal authority to displace state law. In any event, even if the State Petitioners were correct that the issue of preemption is not fit for judicial resolution at this time, the appropriate remedy would not be to vacate or disturb that part of the *Order*, but instead to dismiss their challenges for want of ripeness. *See, e.g.*, *AT&T Corp. v. FCC*, 349 F.3d 692, 699-704 (D.C. Cir. 2003).[40]

[40] In this regard, we note that the State of California recently enacted a law purporting to regulate broadband access providers, and the United States has sued to enjoin that law. *See United States v. California*, No. 2:18-cv-02660 (E.D. Cal. filed Sept. 30, 2018).

CONCLUSION

The petitions for review should be denied.

Respectfully submitted,

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Statutory Addendum

15 U.S.C.A. § 1
§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C.A. § 2
§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C.A. § 45

§ 45. Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The [Federal Trade] Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

47 U.S.C.A. § 152
§ 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A.

(b) Exceptions to Federal Communications Commission jurisdiction

Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

47 U.S.C.A. § 153
§ 153. Definitions

* * * *

(24) Information service

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

* * * *

(50) Telecommunications

The term "telecommunications" 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.

* * * *

(51) Telecommunications carrier

The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

* * * *

(53) Telecommunications service

The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

47 U.S.C.A. § 163
§ 163. Communications marketplace report

(a) In general

In the last quarter of every even-numbered year, the Commission shall publish on its website and submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report on the state of the communications marketplace.

(b) Contents

Each report required by subsection (a) shall--

(1) assess the state of competition in the communications marketplace, including competition to deliver voice, video, audio, and data services among providers of telecommunications, providers of commercial mobile service (as defined in section 332 of this title), multichannel video programming distributors (as defined in section 602 of this title), broadcast stations, providers of satellite communications, Internet service providers, and other providers of communications services;

(2) assess the state of deployment of communications capabilities, including advanced telecommunications capability (as defined in section 1302 of this title), regardless of the technology used for such deployment;

(3) assess whether laws, regulations, regulatory practices (whether those of the Federal Government, States, political subdivisions of States, Indian tribes or tribal organizations (as such terms are defined in section 5304 of Title 25), or foreign governments), or demonstrated marketplace practices pose a barrier to competitive entry into the communications marketplace or to the competitive expansion of existing providers of communications services;

(4) describe the agenda of the Commission for the next 2-year period for addressing the challenges and opportunities in the communications marketplace that were identified through the assessments under paragraphs (1) through (3); and

(5) describe the actions that the Commission has taken in pursuit of the agenda described pursuant to paragraph (4) in the previous report submitted under this section.

(c) Extension

If the President designates a Commissioner as Chairman of the Commission during the last quarter of an even-numbered year, the portion of the report required by subsection (b)(4) may be published on the website of the Commission and submitted to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate as an addendum during the first quarter of the following odd-numbered year.

(d) Special requirements

(1) Assessing competition

In assessing the state of competition under subsection (b)(1), the Commission shall consider all forms of competition, including the effect of intermodal competition, facilities-based competition, and competition from new and emergent communications services, including the provision of content and communications using the Internet.

(2) Assessing deployment

In assessing the state of deployment under subsection (b)(2), the Commission shall compile a list of geographical areas that are not served by any provider of advanced telecommunications capability.

(3) Considering small businesses

In assessing the state of competition under subsection (b)(1) and regulatory barriers under subsection (b)(3), the Commission shall consider market entry barriers for entrepreneurs and other small businesses in the communications marketplace in accordance with the national policy under section 257(b) of this title.

47 U.S.C.A. § 230

§ 230. Protection for private blocking and screening of offensive material

* * * *

(b) Policy

It is the policy of the United States--

(2) 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;

* * * *

(f) Definitions

As used in this section:

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

47 U.S.C.A. § 257 (2017)
§ 257. Market entry barriers proceeding

(a) Elimination of barriers

Within 15 months after February 8, 1996, the Commission shall complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this chapter (other than this section), market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services.

(b) National policy

In carrying out subsection (a) of this section, the Commission shall seek to promote the policies and purposes of this chapter favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.

(c) Periodic review

Every 3 years following the completion of the proceeding required by subsection (a) of this section, the Commission shall review and report to Congress on--

(1) any regulations prescribed to eliminate barriers within its jurisdiction that are identified under subsection (a) of this section and that can be prescribed consistent with the public interest, convenience, and necessity; and

(2) the statutory barriers identified under subsection (a) of this section that the Commission recommends be eliminated, consistent with the public interest, convenience, and necessity.

47 U.S.C.A. § 332
§ 332. Mobile services

*** * * ***

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that--

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among

providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

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

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

* * * *

(d) Definitions

For purposes of this section--

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

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

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

CERTIFICATE OF FILING AND SERVICE

I, Thomas M. Johnson, Jr., hereby certify that on October 11, 2018, I filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/ Thomas M. Johnson, Jr.

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