



Comments of

TechFreedom

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Notice of Proposed Rulemaking – Restoring Internet Freedom

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I. Introduction

Few policy questions have loomed larger in America over the last two decades than how to govern the Internet, which the Supreme Court recognized as early as 1998 as “a unique and wholly new medium of worldwide human communication.”⁴ The Internet has come to mean far more than the “network of networks” by which our computers — or even our mobile “phones” — access websites or load apps (call that the “Web”). The “Internet of Things” connects a myriad of devices that increasingly permeate our lives: from things we wear to vehicles we drive.⁵

1996 was effectively the last time Congress confronted the question of how to govern the Internet. No lawmaker could have imagined exactly what the Internet of 2017 would look like. Indeed, few really understood the Internet of 1996 — nascent and rapidly evolving as this “wholly new” medium still was.⁶ The Telecommunications Act of 1996 was a muddle of legislative compromise, a balance of interests that largely predated the Digital Revolution. It was, in key respects, obsolete even before President Clinton signed it. It badly requires updating.

Yet for all its confusion, its myopic fumbling at technocratic planning for a future it could not foresee, Congress was unmistakably clear on one crucial, overarching point: “the policy of the United States” would be “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[.]”⁷

Changing that policy to suit an agency’s assessment of the need for new Federal regulation is — however wisely crafted or necessary that regulation may be — a profoundly serious question that must be decided by Congress, the elected representatives of the American people, not by unelected bureaucrats.

⁴ *Reno v. ACLU*, 521 U.S. 844, 850 (1997).

⁵ See, e.g., Fed. Trade Comm’n, *Connected Cars: Privacy, Security Issues Related to Connected, Automated Vehicles* (June 28, 2017), <https://www.ftc.gov/news-events/events-calendar/2017/06/connected-cars-privacy-security-issues-related-connected>; *Internet of Things Before the H. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Hon. Darrell Issa, Chairman, H. Subcomm. on Courts, Intellectual Property, & the Internet) (noting that “the Internet of things, which broadly refers to a network of connected real world items able to exchange data with each other” includes “every light switch in your home, the watch you wear, and products throughout your home.”).

⁶ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

⁷ 47 U.S.C. § 230(b)(2).

A. Regulation of the Internet is a “Major Question”

When a federal agency recently asserted authority over the Internet under a 1930s statute, claiming the statute was ambiguous in a key respect, a federal appeals court rejected that claim, concluding:

Under these circumstances we think it is best to leave to Congress the task of expanding the statute if we are wrong in our interpretation. Congress is in a far better position to draw the lines that must be drawn if the [agency’s policy arguments are correct].⁸

One federal judge went further, arguing that the Court should not have gone so far as to ask, under the Supreme Court’s 1984 *Chevron* decision, whether (1) the statute was ambiguous or (2) whether the agency’s reading of it was reasonable. No, the court should have stopped at “*Chevron* Step Zero:”

Deference to an agency interpretation under the *Chevron* framework “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.” *King v. Burwell*, --- U.S. ----, 135 S.Ct. 2480, 2488, 192 L.Ed.2d 483 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)). There are “extraordinary cases,” however, where we should “hesitate before concluding that Congress has intended such an implicit delegation.” *Id.* at 2488–89 (quoting *FDA*, 529 U.S. at 159, 120 S.Ct. 1291).

In other words, there are times when courts should not search for an ambiguity in the statute because it is clear Congress could not have intended to grant the agency authority to act in the substantive space at issue. This is one of those extraordinary cases. Where, as here, Congress has not delegated authority to an agency, courts need not apply the *Chevron* framework to the agency’s interpretation of its governing statute. *See id.* at 2489.⁹

She continued:

The Internet is “arguably the most important innovation in communications in a generation.” *Comcast Corp. v. FCC*, 600 F.3d 642, 661(D.C.Cir.2010). If Congress intended for the Commission to regulate one of the most important

⁸ *Clearcorrect Operating, LLC v. Int’l Trade Comm’n*, 810 F.3d 1283, 1301 (Fed. Cir. 2015).

⁹ *Id.* at 1302.

aspects of modern-day life, Congress surely would have said so expressly. *Utility Air Regulatory Grp. v. EPA*, --- U.S. ----, 134 S.Ct. 2427, 2444, 189 L.Ed.2d 372 (2014) (rejecting EPA's vast expansion of its program of requiring clean air permits because such an expansion “would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization”). The Supreme Court has noted that “[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ we typically greet its announcement with a measure of skepticism.” *Id.* The Court further indicated that Congress must “speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’ ” *Id.* (quoting *FDA*, 529 U.S. at 160, 120 S.Ct. 1291).¹⁰

She concluded:

[T]he responsibility lies with Congress to decide how best to address these new developments in technology. See *Microsoft v. AT&T Corp.*, 550 U.S. 437, 458–59, 127 S.Ct. 1746, 167 L.Ed.2d 737 (2007) (“If the patent law is to be adjusted better to account for the realities of software distribution, the alteration should be made after focused legislative consideration.”)¹¹

The issue in this case was the claim made by the International Trade Commission that its authority to regulate the importation of specific “articles” under a 1930 statute included “electronic transmission of digital data” — *i.e.*, digital goods and services.¹² The opinion was written by the Chief Judge of the Federal Circuit, originally appointed by President George W. Bush, and the concurrence, arguing that the court should have stopped at Chevron Step Zero, was written by Judge O'Malley, first appointed to the district court bench by President Clinton in 1994 and elevated to the Federal Circuit by President Obama in 2010.¹³

B. The Major Questions Doctrine

That it was a Democratic appointee who insisted that regulators claiming broad power over the Internet deserved no deference from the courts should not be surprising. After all,

¹⁰ *Id.* at 1302-03.

¹¹ *Id.* at 1303.

¹² *In re Certain Digital Models*, Inv. No. 337-TA-833 at 55 (Apr. 3, 2014) (“*Final Comm’n Op.*”)

¹³ The United States Court of Appeals for the Federal Circuit, Biography of Judge Kathleen M. O'Malley (last visited Aug. 21, 2017), <http://www.cafc.uscourts.gov/judges/kathleen-m-omalley-circuit-judge>.

it was Justice Stephen Breyer who, as a law professor in 1978, first articulated what has come to be called the “Major Questions Doctrine.” As recently summarized by another federal appeals court judge:

In short, while the *Chevron* doctrine allows an agency to rely on statutory ambiguity to issue ordinary rules, the major rules doctrine prevents an agency from relying on statutory ambiguity to issue major rules.

Justice Breyer appears to have been the first to describe a dichotomy between ordinary and major rules and to articulate the major rules doctrine as a distinct principle of statutory interpretation. In an article written more than 30 years ago, he explained the principle this way: When determining “the extent to which Congress intended that courts should defer to the agency’s view of the proper interpretation,” courts should take into account the legislative reality that Congress may grant the Executive Branch the authority to resolve various “interstitial matters,” but Congress itself is “more likely to have focused upon, and answered, major questions.” Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986). Citing Justice Breyer’s 1986 article, the Supreme Court later explained that, in “extraordinary cases,” Congress could not have “intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159, 160 (2000).¹⁴

Perhaps unsurprisingly, it was also Justice Breyer’s insight that laid the groundwork for the Supreme Court’s recognition of a “step zero” to *Chevron* in *U.S. v. Mead*. There, the Supreme Court made clear that they “have recognized a very good indicator of delegation meriting *Chevron* treatment in *express congressional authorizations* to engage in the process of rule-making ... for which deference is claimed.”¹⁵ In making this assertion, the Court cited Justice Breyer’s dissent in *Christensen v. Harris County*, where he recognized that that “*Chevron*-type deference is inapplicable ... where one has doubt that Congress actually intended to

¹⁴ *United States Telecom Ass’n v. Fed. Commc’ns Comm’n*, 855 F.3d 381, 419-20 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (hereinafter *U.S. Telecom II*).

¹⁵ *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (citing *Christensen v. Harris County*, 529 U.S. 576, 596–597 (2000) (Breyer, J., dissenting) (where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is “inapplicable”) (emphasis added)).

delegate interpretative authority to the agency (an ‘ambiguity’ that *Chevron* does not presumptively leave to agency resolution).¹⁶

As Judge O’Malley noted:

Chevron “step zero” has been defined as “the initial inquiry into whether the Chevron framework applies at all.” See Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L.Rev. 187, 191 (2006). Some scholars believe this additional inquiry aids and streamlines review of administrative decision making. See, e.g., Thomas W. Merrill, Symposium, *Chevron at 30: Looking Back and Looking Forward: Step Zero After City of Arlington*, 83 Fordham L.Rev. 731, 744 (2014) (opining that the announcement of the Chevron step zero inquiry in *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) was a “positive” step forward in administrative law, and critiquing more recent developments in Chevron step zero jurisprudence).¹⁷

Democratic Justices joined their Republican-appointed colleagues in *FDA v. Brown & Williamson* (2000),¹⁸ and again in *Utility Air Regulatory Group v. EPA (UARG)* (2014), to reinforce the fact that Congress must give express authority to agencies before they may promulgate major rules.¹⁹ In *Brown & Williamson*, Justice O’Connor delivered the Majority opinion, which held that regulating cigarettes was a major economic and political action and the Court was “confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”²⁰ Similarly, in *UARG*, Justices Ginsburg, Sotomayor, Breyer, and Kagan (all Democratic appointees) concurred in the Court’s *unanimous* finding that the EPA lacked the requisite clear statutory authority to promulgate a rule subjecting millions of previously unregulated emitters of greenhouse gases to permitting regulations under the Clean Air Act.²¹ In vacating the relevant part of the rule, the majority stated: “When an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and po-

¹⁶ *Christensen v. Harris Cty.*, 529 U.S. 576, 596–97 (2000) (Breyer, J., dissenting).

¹⁷ *ClearCorrect Operating LLC v. ITC*, 810 F.3d 1283, 1312 n.1 (2015).

¹⁸ See *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

¹⁹ See *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014).

²⁰ *Brown & Williamson*, 529 U.S. at 160.

²¹ See generally *UARG*, 134 S. Ct. 2427.

litical significance.”²² Indeed, these Democratic-appointed Justices expressly stated in their opinion concurring in part and dissenting in part that the Clean Air Act’s language regarding which pollution emitters must obtain permits *should not* be read to include all pollution emitters.²³ This part of the decision was unanimous.

In short, the idea that Congress, not unelected bureaucrats, should decide “major questions” has long been supported by Justices across the political spectrum. Democratic accountability and the separation of powers are cornerstones of the American legal system, not simply talking points or legal weapons to be wielded by one party against the other in service of a partisan agenda. As the Supreme Court put it in *UARG*, in rebuking the EPA for asserting “newfound authority to regulate millions...on an ongoing basis and without regard for...Congress,” courts must not be “willing to stand on the dock and wave goodbye as [Agencies] embark[] on this multiyear voyage of discovery.”²⁴

C. The FCC’s Own “Voyage of Discovery” to Regulate the Internet

Enter the FCC. Despite Congress’ clear directive that the U.S. “preserve the vibrant and competitive free market that presently exists for the Internet”, and absent any congressional authorization to the contrary, the FCC has spent the last thirteen years grappling with the issue of an “Open Internet” or “net neutrality.”²⁵ The agency has been in litigation, or between litigations, at the D.C. Circuit for nine years,²⁶ resulting in *four* D.C. Circuit panel or *en banc* opinions. Absent the requisite express authority, it is no surprise that, in searching for authority over the Internet, the FCC has splattered the wall of that court with statutory spaghetti to see what would stick. Specifically, the Commission has made three broad claims of power.

²² *Id.* at 2444.

²³ *Id.* at 2452 (“I also agree with the Court’s point that “a generic reference to air pollutants” in the Clean Air Act need not ‘encompass every substance falling within the Act-wide definition’ that we construed in *Massachusetts*, § 7602(g).”).

²⁴ *Id.* at 2446.

²⁵ *United States Telecom. Ass’n v. Fed. Comm’n Comm’n*, 825 F.3d 674, 689 (D.C. Cir. 2016) (“For the third time in seven years, we confront an effort by the Federal Communications Commission to compel internet openness—commonly known as net neutrality—the principle that broadband providers must treat all internet traffic the same regardless of source.”) [hereinafter *U.S. Telecom I*].

²⁶ The FCC first asserted this broad power in a claim against Comcast in 2008. See *In the Matters of Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp.*, 23 F.C.C. Rcd. 13028, 13028 (2008).

First, in 2008, the Commission claimed broad power to take actions that it asserts are “reasonably ancillary” to no particular power granted to the agency by Congress.²⁷ Fortunately, this claim — denounced as a “Trojan Horse” for Internet regulation even by some of the staunchest advocates of net neutrality²⁸ — was blocked by the D.C. Circuit as both inconsistent with the Supreme Court’s doctrine of “ancillary jurisdiction” but also raising serious questions of the separation of powers: “Not only is [the FCC’s] argument flatly inconsistent with *Southwestern Cable*, *Midwest Video I*, *Midwest Video II*, and *NARUC II*, but if accepted it would virtually free the Commission from its congressional tether.”²⁹

Second, in 2010, after losing in its attempt to police net neutrality case-by-case based on ancillary jurisdiction and thereafter failing to persuade Congress to pass net neutrality legislation, the Commission issued its first net neutrality regulations premised on, *inter alia*, Section 706 of the Telecommunications Act.³⁰ Declared by the Commission back in 1998 to be “a ‘pro-competitive, deregulatory national policy framework’ for telecommunications”³¹, the Commission reinterpreted this provision as an open-ended grant of power unto itself, allowing the agency to effectively craft a new Communications Act within the one Congress wrote.³²

Third, in 2015, after the D.C. Circuit upheld the FCC’s reinterpretation of Section 706 on *Chevron* grounds, the FCC — after an unprecedented directive issued by President Obama³³ — decided broadband to be a common carrier service subject to Title II of the 1934 Com-

²⁷ *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 645 (D.C. Cir. 2010) (noting that, following a period of public comment, the Commission issued the order challenged here in 2008).

²⁸ Corryne McSherry, *Is Net Neutrality a FCC Trojan Horse?*, Electronic Frontier Foundation (Oct. 21, 2009), <https://www.eff.org/deeplinks/2009/09/net-neutrality-fcc-perils-and-promise>.

²⁹ *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 655 (D.C. Cir. 2010).

³⁰ *In the Matter of Preserving the Open Internet Broadband Indus. Practices*, 25 F.C.C. Rcd. 17905 (2010).

³¹ Memorandum Opinion and Order, And Notice of Proposed Rulemaking, *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012 (1998) [hereinafter *Advanced Services Order*].

³² See *Verizon v. F.C.C.*, 740 F.3d 623, 628 (D.C. Cir. 2014) (“For the second time in four years, we are confronted with a Federal Communications Commission effort to compel broadband providers to treat all Internet traffic the same regardless of source—or to require, as it is popularly known, “net neutrality.” In *Comcast Corp. v. FCC*, we held that the Commission had failed to cite any statutory authority that would justify its order compelling a broadband provider to adhere to open network management practices. After *Comcast*, the Commission issued the order challenged here—*In re Preserving the Open Internet*, 25 F.C.C.R. 17905 (2010) (“the *Open Internet Order*”) —which imposes disclosure, anti-blocking, and anti-discrimination requirements on broadband providers.”).

³³ See Alina Selyukh, *Obama pressures FCC for strong net neutrality rules*, Reuters (Nov. 10, 2014), <http://www.reuters.com/article/us-usa-internet-neutrality-idUSKCN0IU1I620141110>.

munications Act.³⁴ The “unique and wholly new medium of worldwide human communication” heralded by the Supreme Court seventeen years earlier,³⁵ the one Congress said should remain “unfettered by Federal or State regulation,” was now subject to a regulatory framework first crafted for railroads in the 1880s and then extended to the Ma Bell telephone monopoly — all by regulatory fiat.

Simultaneously, the Commission claimed vast discretion to “tailor” and “modernize” Title II through its forbearance power under 47 U.S.C. § 160 — *without* taking seriously the evidentiary requirements of that section—and, necessarily, any other part of the Title 47, Chapter 5 (i.e., nearly all of American communications law). The FTC substantially reinterpreted the 1934 Act to suit the Commission’s whims without actually satisfying the forbearance standard in the Act.

By fundamentally rearranging the basic structure of the 1996 Telecommunications Act, the FCC faced several possible paths forward:

First, it might have dedicated its expertise to informing the FTC—the primary “cop on the beat”—and to promoting broadband competition, as Congress directed it to do in Section 706 of the 1996 Telecommunications Act and the American Recovery and Reinvestment Act of 2009.³⁶

Second, the Commission might have dedicated itself to achieving legislative reform to support its policy preference. In fact, then-Chairman Genachowski was “pleased” in 2010 that “members of Congress [were] making a real effort to make progress on [such legislation]... . Our job is to be a resource, and we will be. I appreciate the effort, and I hope it succeeds.”³⁷

After expending so much time, effort, and taxpayer money on this issue, it is perplexing that the one thing the FCC has never done is to specifically ask Congress to squarely address this issue. Such a request would not be so unusual. The Federal Trade Commission, for example, did just that in 2000, asking Congress to pass comprehensive baseline privacy legislation. That the FTC did so two years after initially advising Congress that “a private sector response to consumer concerns... could afford consumers adequate privacy protections”

³⁴ Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015) (JA 3477-8876) [hereinafter Order].

³⁵ *Reno v. ACLU*, 521 U.S. at 850.

³⁶ Pub. L. No. 104-104, § 706, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 1302); Pub. L. No. 111-5, § 6001, 123 Stat. 115, 512 (2009) (codified at 47 U.S.C. § 1307).

³⁷ Larry Downes, *Leaked Net Neutrality Bill Threads Needle on Mobile*, CNET (Sep. 28, 2010), <http://goo.gl/FkvedX>. But Congress ultimately passed no such legislation.

simply bolsters the point: administrative agencies' first duty is to work within the authority Congress gave them.

On the regulation of broadband Internet services, conversely, the FTC has on multiple occasions advised Congress not to legislate on net neutrality — the purpose not being to defer to the FCC but rather, to avoid regulation altogether: the FTC's Internet Access Task Force issued two separate reports specifically on "broadband Internet connectivity and, in particular, so-called network neutrality regulation." In one such report, the FTC stated:

Federal Trade Commission's recent unanimous and bipartisan finding that there is no need for net neutrality regulations like the ones imposed today. Only one month ago, the FTC's Internet Task Force recommended that policymakers proceed "with caution before enacting broad, ex ante restrictions in [the] unsettled, dynamic environment" of broadband Internet access.³⁸

This climate of agency restraint should have guided the FCC to a third possible avenue—the Commission could have attempted to ground more modest "net neutrality" rules in ancillary authority tied to actual, specific grants of Title II and Title III authority. Or, relatedly, if it wanted to achieve such results without subjecting Internet services to the full suite of Title II "common carrier" requirements, the FCC could have continued treating these services as Title I information services, while imposing only limited common-carriage requirements on them. In 2012, the D.C. Circuit indicated that such an approach might be appropriate so long as the rules left room for "commercially reasonable" negotiations.³⁹ This would have focused on "net neutrality" concerns while allowing parties to negotiate over paid prioritization and other commercially reasonable matters. But the FCC disfavored this approach because it would preclude a per se ban on paid prioritization.⁴⁰

So instead, the FCC chose an unlawful fourth option, in its 2010 Open Internet Order. It attempted to codify its Policy Statement through a notice-and-comment rulemaking that reinterpreted Section 706 as an independent grant of authority to impose a version of net neutrality regulation, while continuing to classify broadband Internet access as an "information service" rather than a "telecommunications service."⁴¹ The D.C. Circuit rightly reversed in *Verizon*.

³⁸ FED. TRADE COMM'N, INTERNET ACCESS TASK FORCE, BROADBAND CONNECTIVITY COMPETITION POLICY FTC STAFF REPORT 9 (June 27, 2007).

³⁹ *Cellco P'ship v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012).

⁴⁰ See *Verizon v. FCC*, 740 F.3d 623, 645-46 (D.C. Cir. 2014) (describing the FCC's views).

⁴¹ Preserving the Open Internet Broadband Industry Practices, 25 FCC Rcd 17905, ¶¶ 117-23 (2010).

After losing the *Verizon* case, the FCC could have chosen one of the other available lawful options. Instead, it pursued a starkly different course. The FCC took upon itself, in the challenged 2014 Order, to “modern[ize]” Title II.⁴² Over two Commissioners’ strenuous objections, a bare majority of the FCC reclassified the entirety of broadband Internet access as a Title II telecommunications service. This course was entirely unforeseeable from the FCC’s notice of proposed rulemaking. And it has far-reaching implications for the entire Internet.

This was the most radical possible form of reclassification. The Order relies heavily on *Brand X*, claiming that the Court had said that “the Commission could return to that classification”—that is, the question whether the last-mile transmission component of broadband Internet access was a separately offered telecommunications service—“if it provided an adequate justification”.⁴³ Instead, the Order held that the entirety of broadband service is a telecommunications service,⁴⁴ an interpretation that not a single Justice in *Brand X*, not even the dissenters, suggested would be reasonable.

Furthermore, in order to reclassify mobile broadband, which the 1996 Act immunized “twice over” from common-carriage regulation,⁴⁵ the FCC reinterpreted the key term “public switched network,” in 47 U.S.C. § 332(d)(2), to mean the Internet itself.⁴⁶

These reinterpretations create a host of problems, which the FCC attempts to mitigate by “tailoring” or “modern[izing]” (mentioned seven times) the 1934 Act.⁴⁷ The FCC declared that it would use its “forbearance” authority under Section 10 to waive “the vast majority of rules adopted under Title II.”⁴⁸ But the FCC made clear that future Commissioners “retain adequate authority to” rescind such forbearance.⁴⁹

With Title II authority in place, the Internet would thus be subject to the vicissitudes of political or ideological winds: future Commissioners might not take such an expansive approach to forbearance; or they might forbear even further. Either way, with each new ap-

⁴² Order ¶ 37.

⁴³ *Id.* ¶ 43 (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 968 (2005)).

⁴⁴ *Id.* ¶ 356.

⁴⁵ See *Cellco*, 700 F.3d at 538.

⁴⁶ Order ¶ 391 (“[N]etworks that use standardized addressing identifiers other than [traditional telephone] numbers for routing of packets”).

⁴⁷ See, e.g., *id.* ¶¶ 37, 508, 512, 514.

⁴⁸ Order ¶ 51; see also *id.* ¶ 37 (“[O]ur forbearance approach results in over 700 codified rules being inapplicable.”).

⁴⁹ *Id.* ¶ 538.

pointment to the FCC, the “rules of the road” for those making multi-billion dollar investment decisions may shift, introducing constant market uncertainty.

Having untied its statutory moorings, the FCC set sail for waters unknown on a course starkly different from that intended by Congress.

II. Myth #1: The Courts Have “Blessed” the FCC’s Interpretations

Among the numerous myths regarding the legal contours of this debate, perhaps none is as pervasive or as pernicious as the belief that the courts have somehow “blessed” the FCC’s interpretations of its statutory authority.⁵⁰ The fallacy here should be obvious, even to a first year law student: each time a court has upheld the FCC’s claim of authority, whether under Section 706 or Title II, the decision has turned on the two-part deference test first developed in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁵¹. (In 2009, the Supreme Court held in *City of Arlington v. FCC* that deference is due to agency interpretation of ambiguous statutes, including for issues that speak to foundational authority⁵² — except, as we discuss below, for “major questions” and other circumstances in which a court ceases its analysis at “Step Zero.”⁵³) Under *Chevron*, courts do not “bless” any particular reading of the statute; they simply ask (1) whether the statute unambiguously addresses the issue before the court and, if not, (2) whether the agency’s interpretation is permissible — specifically, whether it is arbitrary, capricious, or manifestly contrary to the statute.⁵⁴ “Step Two” of *Chevron* analysis is highly deferential, setting the bar for the agency almost as low as it could possibly be set. Anything judges might say beyond this, to validate an agency’s reading of the statute, is pure dicta and not relevant to the holding of the decision and thus not binding in any way.⁵⁵

To say that a court, upholding an agency’s interpretation of a statute under *Chevron* has “blessed” that interpretation, is to either misunderstand *Chevron* or the word “bless” — or

⁵⁰ See, e.g., Hal Singer, *Court Lets FCC Ignore Economics In Net Neutrality Ruling; Congress Must Ensure That It Can’t Ever Again*, Forbes (June 15, 2016), available at <https://www.forbes.com/sites/halsinger/2016/06/15/in-open-internet-ruling-the-d-c-circuit-defers-to-an-economics-free-agency/#6caafbbe5068> (“In a 2-1 decision, the D.C. Circuit blessed the Federal Communication Commission’s reclassification scheme, which anachronistically treats modern-day Internet service providers (ISPs) as if they were monopoly-era common carriers.”).

⁵¹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

⁵² *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 (2013), found at https://www.supremecourt.gov/opinions/12pdf/11-1545_1b7d.pdf.

⁵³ See *infra* pp. 2-4 (discussing *Chevron* “step zero” analysis).

⁵⁴ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

⁵⁵ *Id.* at 843.

both. All courts applying *Chevron* do is bless the agency's *discretion* to decide the question. Confirming the agency's discretion to resolve the question is, in fact, the *opposite* of confirming a particular use of that discretion, because it means the court will "bless" either the current reading *or its opposite*.

In other words, saying that the FCC should not reverse the claims of legal authority made by the prior two Chairmen under Section 706 and Title II because the court has already "blessed" these claims, is entirely backwards.

The D.C. Circuit panel itself noted:

[O]ur "role in reviewing agency regulations . . . is a limited one." *Ass'n of American Railroads v. Interstate Commerce Commission*, 978 F.2d 737, 740 (D.C. Cir. 1992). Our job is to ensure that an agency has acted "within the limits of [Congress's] delegation" of authority, *Chevron*, 467 U.S. at 865, and that its action is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A). Critically, we do not "inquire as to whether the agency's decision is wise as a policy matter; indeed, we are forbidden from substituting our judgment for that of the agency." *Ass'n of American Railroads*, 978 F.2d at 740.⁵⁶

Simply put, the fact that the D.C. Circuit has upheld the FCC's claims of authority under the immensely deferential *Chevron* test tells us little, if anything, about what Congress really intended.

III. Myth #2: If the FCC Has the Discretion to *Disclaim* Authority over the Internet, It Has the Discretion to *Claim* that Authority, Too

In *Brand X v. FCC*, the Supreme Court clearly ruled that the FCC has the discretion, under *Chevron*, to decide *not* to apply Title II to broadband services.⁵⁷ Many have claimed that the converse must also be true, that the FCC must also have the discretion to apply Title II to broadband — and, by the same token, to claim that Section 706 empowers the FCC to do whatever it concludes will promote broadband deployment. This appears logical, since discretion, in general, cuts both ways. But *Chevron* does not always apply — or, to put it more precisely, just because a court proceeded through Steps One and Two to uphold agency interpretation A (*i.e.*, "grant deference") does not mean that a court will even proceed

⁵⁶ *United States Telecom Assoc. v. FCC*, 825 F.3d 674, at 696-97 (D.C. Cir. 2016).

⁵⁷ *Brand X Internet Services v. F.C.C.*, 345 F.3d 1120, 1133 (9th Cir. 2003).

through those two steps when approaching interpretation B. That's because *Chevron* has one prior step, the so-called "Step Zero."⁵⁸ As the Supreme Court said, declining to apply *Chevron* in *King v. Burwell*,

This approach "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."⁵⁹

To say that the Court's finding that the FCC has the discretion to *disclaim* authority over the Internet, somehow means that the Commission must also have the discretion to *claim* authority is not only a legally wrong, but illogical. That would be akin to a child claiming that, because its mother said it could *not* go outside without her permission, that it must also have permission to go outside without her permission. Clearly, the authority to *not* do something in no way equates to a grant of authority to do the inverse.

As the lead Intervenor against the Open Internet Order, TechFreedom has argued that this is just such a case, that the FCC's claims of legal authority present "major questions" to which *Chevron* simply does not apply.⁶⁰

IV. Myth #3: "Title II Is the Tool Congress Intended"

The FCC's reclassification of broadband providers as telecommunications services subject to Title II raises three major questions:

1. What did Congress intend, given the overall context of the 1996 Telecom Act?
2. Did Congress intend the FCC to resolve ambiguities that effect sea changes in the regulatory status of so large a portion of the U.S. economy?
3. What does the FCC's own admitted need to tailor the statute reveal about what Congress intended?

⁵⁸ Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006), found at http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=12203&context=journal_articles.

⁵⁹ *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015).

⁶⁰ See Brief for Intervenor for Petitioners at 30, *United States Telecom Ass'n v. FCC*, 825 F. 3d 674 (2016) (No. 15-1063); see also Reply Brief for Intervenor for Petitioners at 5, *United States Telecom Ass'n v. FCC*, 825 F. 3d 674 (2016) (No. 15-1063); Petition for Rehearing En Banc for Intervenor at 7, *United States Telecom Ass'n v. FCC*, 825 F. 3d 674 (2016) (No. 15-1063).

Each of these questions must be examined under *Chevron* Step Zero. The D.C. Circuit erred by skipping that step entirely and proceeding to Step One.

A. The Context of What Congress Intended

In the Telecommunications Act of 1996, Congress determined that “the policy of the United States” would be “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[.]”⁶¹ Congress expressly included Internet access services in the meaning of “interactive computer service.”⁶² After much research into the legislative history of Section 230, Law Professor Danielle Citron and the Brookings Institute’s Benjamin Wittes write:

Although [Section 230(b)(2)] has been invoked to support the proposition that no rules should constrain the Internet, a close reading shows it refers to the marketplace of services, not the figurative marketplace of ideas. Congress did not want the FCC or the states to regulate Internet access fees.⁶³

But the FCC’s “Open Internet Order” takes the opposite approach. It claims vast discretion under Title II of the Communications Act of 1934—the very act modernized by the 1996 Act—to regulate broadband Internet access services as common carriers.

The FCC boasts that it has created a “Title II tailored for the 21st Century,”⁶⁴ “a ‘light-touch’ approach” suitable for a modernized Title II.⁶⁵ Despite “extensive” forbearance (what the FCC calls “tailoring”), however, some of Title II’s significant provisions continue to apply.⁶⁶ And the mere fact that the FCC is asserting Title II jurisdiction, combined with the fact the FCC’s tailoring is inherently ephemeral,⁶⁷ means that the FCC is asserting both massive new powers and unfettered discretion to decide if and when to deploy them.⁶⁸ If the FCC’s Order stands, then broadband Internet access service will be subject to very type of regulatory framework that governed nineteenth century railroads — subject to the FCC’s whims as to

⁶¹ 47 U.S.C. § 230(b)(2).

⁶² 47 U.S.C. § 230(f)(2).

⁶³ Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, *Fordham Law Review*, Forthcoming, U of Maryland Legal Studies Research Paper No. 2017-22, (2017) note 35, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007720

⁶⁴ Order ¶ 38.

⁶⁵ *Id.* ¶ 37.

⁶⁶ Order ¶¶ 283-84.

⁶⁷ *Id.* ¶ 538.

⁶⁸ *See id.* ¶ 538.

(a) its prosecutorial discretion in using the vast powers it retains under Section 201(b), 202(a) and 208 and (b) unforbearance from other provisions of Title II.

The FCC's attempt to impose Title II regulation on the Internet marked the latest step in the Commission's decade-long regulatory "voyage of discovery."⁶⁹ For all of its tacking, the FCC has never seriously attempted to hew to the course charted by Congress.

Given the lack of express statutory authority, it is no surprise that the FCC's early efforts on "net neutrality" ranged widely in their statutory foundations. In 2005, the FCC brought and settled its first "net neutrality" enforcement action against Madison River, a small telephone company accused of blocking Internet telephony calls, citing a provision of Title II of the 1934 Communications Act.⁷⁰ Later that year, the FCC ruled that phone-based DSL broadband Internet access service is, like cable modem broadband Internet access service, a Title I "information service," not a Title II "telecommunications service."⁷¹

On the same day, the FCC issued an "Open Internet Policy Statement" that outlined Commissioners' "core beliefs" on "net neutrality" while taking care to disclaim any actual regulatory effect.⁷² In 2006, Congress considered legislation to authorize the FCC to enforce that policy, but declined to enact it.⁷³

In 2008, the FCC re-conceived the Policy Statement as *de facto* regulation. Specifically, the FCC sanctioned Comcast for allegedly "throttling" (*i.e.*, limiting) Internet traffic involving BitTorrent, a file-sharing service. Rather than leaving the matter to the FTC's jurisdiction over unfair and deceptive trade practices, the FCC claimed "ancillary jurisdiction" to enforce its Policy Statement against Comcast and other Title I broadband carriers.⁷⁴ This Court vacated the FCC's order because its claim of vague ancillary jurisdiction, "if accepted[,] would virtually free the Commission from its congressional tether."⁷⁵

At that point, the FCC faced several possible paths forward. First, it might have dedicated its expertise to informing the FTC—the primary "cop on the beat"—and to promoting broad-

⁶⁹ *Cf. Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2446 (2014) [hereinafter *UARG*].

⁷⁰ *Madison River Commc'n LLC*, 20 FCC Rcd. 4295, ¶ 1 (2005) (citing 47 U.S.C. § 201(b)).

⁷¹ *Appropriate Framework For Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd. 14853, ¶ 14 (2005).

⁷² See Kevin Martin, FCC Chairman, *Comments on Commission Policy Statement* (Aug. 5, 2005), available at <https://goo.gl/cB2tmq>.

⁷³ Communications Act of 2006, H.R. 5252, 109th Cong. (2006).

⁷⁴ *Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd. 13028, ¶¶ 15, 16 (2008).

⁷⁵ *Comcast Corp v. FCC*, 600 F.3d 642, 655 (D.C. Cir. 2010).

band competition, as Congress directed it to do in Section 706 of the 1996 Telecommunications Act and the American Recovery and Reinvestment Act of 2009.⁷⁶

Second, the Commission might have dedicated itself to achieving legislative reform to support its policy preference. In fact, then-Chairman Genachowski was “pleased” in 2010 that “members of Congress [were] making a real effort to make progress on [such legislation] Our job is to be a resource, and we will be. I appreciate the effort, and I hope it succeeds.”⁷⁷

Third, the Commission might have attempted to ground more modest “net neutrality” rules in ancillary authority tied to actual, specific grants of Title II and Title III authority. Or, relatedly, if it wanted to achieve such results without subjecting Internet services to the full suite of Title II “common carrier” requirements, the FCC could have continued treating these services as Title I information services, while imposing only *limited* common-carriage requirements on them. This Court indicated in 2012 that such an approach might be appropriate so long as the rules left room for “*commercially reasonable*” negotiations.⁷⁸ This would have focused on “net neutrality” concerns while allowing parties to negotiate over paid prioritization and other commercially reasonable matters. But the FCC disfavored this approach because it would preclude a *per se* ban on paid prioritization.⁷⁹

Instead, the FCC chose an unlawful fourth option, in its 2010 Open Internet Order. It attempted to codify its Policy Statement through a notice- and-comment rulemaking that reinterpreted Section 706 as an independent grant of authority to impose a version of net neutrality regulation, while continuing to classify broadband Internet access as an “information service” rather than a “telecommunications service.”⁸⁰ The D.C. Circuit rightly vacated it in 2014.⁸¹

While in *Verizon* the D.C. Circuit found that Section 706 generally gave the FCC the authority to enact open Internet rules, the court nonetheless “vacated the anti-blocking and anti-discrimination provisions because the Commission had chosen to classify broadband service as an information service under the Communications Act of 1934, which expressly

⁷⁶ Pub. L. No. 104- 104, § 706, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 1302); Pub. L. No. 111- 5, § 6001, 123 Stat. 115, 512 (2009) (codified at 47 U.S.C. § 1307).

⁷⁷ Larry Downes, *Leaked Net Neutrality Bill Threads Needle on Mobile*, CNET (Sep. 28, 2010), <http://goo.gl/FkvedX>. (But Congress ultimately passed no such legislation).

⁷⁸ *Cellco P’ship v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012).

⁷⁹ See *Verizon v. FCC*, 740 F.3d 623, 645-46 (D.C. Cir. 2014) (describing the FCC’s views).

⁸⁰ *Preserving the Open Internet Broadband Industry Practices*, 25 FCC Rcd 17905, ¶¶ 117-23 (2010).

⁸¹ *Verizon*, 740 F.3d at 623 (D.C. Cir. 2014).

prohibits the Commission from applying common carrier regulations to such services.”⁸² After the *Verizon* case, the FCC could have chosen one of the other available *lawful* options. Instead, it pursued a starkly different course.

Such regulation is appropriate only for “telecommunications”—*i.e.*, “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.”⁸³

Thus, in the 2015 Open Internet Order, the FCC purported to reclassify fixed and mobile broadband Internet access service as a “telecommunications service,”⁸⁴—a *volte-face* ostensibly removing the statutory barrier to common-carrier regulation of broadband Internet access services, and thus freeing the FCC to impose significant regulatory restrictions on those services, both bright-line rules and amorphous standards.⁸⁵

The FCC’s strategy of reclassifying all broadband Internet access services as telecommunications services required it to significantly reinterpret the Communications Act. First, the FCC had to conclude that broadband meets the definition of “telecommunications service” rather than meeting any of the eight factors that would, individually, require its continued classification as an information service.⁸⁶ Second, to reclassify *mobile* broadband as an information service, the FCC had to demonstrate that it is a service that is “interconnected with the public switched network”—*i.e.*, the telephone network.⁸⁷

The panel ultimately affirmed the FCC’s strategy. However, in doing so it brushed aside arguments that it should interpret the statute *de novo*. Instead, it determined that the FCC had cleared the low hurdle of *Chevron* Step Two, finding the term “telecommunications service” sufficiently capacious to permit the FCC to reinterpret it to encompass all broadband services.⁸⁸

⁸² *United States Telecoms. Ass’n v. F.C.C.*, 825 F.3d 674, 689 (D.C. Cir. 2016) (detailing the Circuit’s prior holding) [hereinafter *U.S. Telecom I*].

⁸³ 47 U.S.C. § 153(50).

⁸⁴ Order ¶ 331.

⁸⁵ *See, e.g., id.* ¶ 136.

⁸⁶ *Id.* ¶ 355-56; Panel Op. 32-33.

⁸⁷ 47 U.S.C. § 332(d)(2). *See* Panel Op. 57-62.

⁸⁸ *See U.S. Telecom I*, 825 F.3d at 704-706.

B. *Brand X* Affirmed the Commission’s Discretion *Not* to Apply Title II

In *Brand X*, the Court upheld the Commission’s decision to classify broadband Internet access delivered via cable modem as being only an “information service” and not a “telecommunications service,” rather than as being a combination of “information” and “telecommunications” services (akin to the distinction between “basic” and “enhanced” services under the Computer Inquiries line of reasoning used by the Commission before the passage of the 1996 Act).⁸⁹ The Court so held because the statutory definitions did not speak directly to the point, and because it was reasonable for the Commission to conclude that the information processing and transmission components of cable modem broadband Internet access services are so inherently intertwined that the Commission had to treat them as a combined service subject to Title I, rather than trying to parse out the separate components and apply different regulatory treatment to each.⁹⁰ Thus, since the statute was ambiguous as to the issue and the Commission’s interpretation was found to be reasonable, *Chevron* “require[d] [the Court] to accept the agency’s construction of the statute.”⁹¹

The reasoning upheld by the Court in *Brand X* was the same logic originally employed by the Commission in 1998,⁹² and which still holds true today: there is no logically coherent manner by which to separate the information processing and transmission components of broadband Internet access services that would not inevitably be either over- or under- inclusive. Regulations designed to govern only the last-mile of the Internet ecosystem, over which ISPs have direct control, may be subsequently interpreted and applied to cover the conduct of edge providers as well.⁹³ This is particularly

⁸⁹ See e.g., *Brand X Internet Servs.*, 545 U.S. at 986-989; *Verizon*, 740 F.3d at 631-633 (discussing the Court’s holding in *Brand X*); 1998 Universal Service Report, ¶ 21 (“Specifically, we find that Congress intended the categories of “telecommunications service” and “information service” to parallel the definitions of “basic service” and “enhanced service” developed in our Computer II proceeding, and the definitions of “telecommunications” and “information service” developed in the Modification of Final Judgment breaking up the Bell system.”).

⁹⁰ *Brand X Internet Servs.*, 545 U.S. at 989-91.

⁹¹ *Id.* at 980.

⁹² 1998 Universal Service Report, at ¶¶ 43-48 (“The language and legislative history of both the House and Senate bills indicate that the drafters of each bill regarded telecommunications services and information as mutually exclusive categories. ... We note that our interpretation of ‘telecommunications services’ and ‘information services’ as distinct categories is also supported by important policy considerations. An approach in which a broad range of information service providers are simultaneously classed as telecommunications carriers, and thus presumptively subject to the broad range of Title II constraints, could seriously curtail the regulatory freedom that the Commission concluded in *Computer II* was important to the healthy and competitive development of the enhanced-services industry.”).

⁹³ Richard Bennett, *Designed for Change: End-to-End Arguments, Internet Innovation, and the Net Neutrality Debate*, INFO. TECH. & INNOVATION FOUND. 34 (Sept. 2009), available at <http://www.itif.org/files/2009-designed-for-change.pdf> (“The problems with adapting the Web to the Internet illustrate a primary vulnerability of end-to-end networks, the fact that application programmers need to have quite detailed

true in light of the broad authority the Commission claims through its ancillary jurisdiction to go even beyond its direct (a/k/a “statutory”) jurisdiction in order to regulate areas that merely are “reasonably ancillary” to its statutory grants of authority.⁹⁴

C. The D.C. Circuit Failed to Consider Major Questions under Step Zero

In May 2017, the D.C. Circuit denied *en banc* review of their earlier decision in *U.S. Telecom Ass’n v. F.C.C.*, which upheld the FCC’s 2015 Open Internet Order, commonly referred to as the net neutrality rule.⁹⁵ However, two circuit judges, dissenting from the denial of rehearing *en banc*, argued that the FCC’s Order, and thus the panel decision sustaining it, “departs from controlling Supreme Court precedent requiring “clear congressional authorization for rules like the net neutrality rule,” which they contended was missing.⁹⁶

Specifically, Judge Kavanaugh argued that the FCC lacked “the requisite clear statutory authority” to issue net neutrality rule to begin with under the “major rules” doctrine, and the First Amendment “poses an independent bar to the FCC’s Order.”⁹⁷ Judge Brown, writing separately, more forcefully argued that “[t]he FCC’s statutory rewrite relegates the Constitution’s vital separation of power’s framework to ‘a mere parchment delineation of boundaries;’ a hollow guarantee of liberty.”⁹⁸

Invoking the “major questions” doctrine, Judge Kavanaugh argued that the FCC lacked statutory authority to promulgate the net neutrality rules in the first instance because “Congress has never enacted net neutrality legislation or clearly authorized the FCC to impose common-carrier obligations on Internet Service providers.”⁹⁹ According to Judge Kavanaugh, the “lack of clear congressional authorization matters,” because, under a series of

knowledge of the network’s traffic dynamics to avoid creating pathological conditions. In theory, functional layering is supposed to isolate network concerns from application design; in practice, new applications often produce dramatic side effects on network routers. Single-function layers are much more interdependent than independent.”).

⁹⁴ 47 U.S.C. § 154(i) (“The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”); see generally *Verizon*, 740 F.3d at 632 (“We have held that the Commission may exercise such ancillary jurisdiction where two conditions are met: ‘(1) the Commission’s general jurisdictional grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.’”) (citing *American Library Ass’n v. F.C.C.*, 406 F.3d 689, 691-92 (D.C. Cir. 2005)).

⁹⁵ *United States Telecom Ass’n v. F.C.C.*, 855 F.3d 381 (D.C. Cir. 2017) [hereinafter *U.S. Telecom II*].

⁹⁶ *Id.* at 382.

⁹⁷ *Id.* at 382, 388.

⁹⁸ *Id.* at 394 (Brown, J., dissenting).

⁹⁹ *Id.* at 417 (Kavanaugh, J., dissenting).

recent decisions, the Supreme Court requires “*clear* congressional authorization for major agency rules of this kind.”¹⁰⁰

In rejecting Judge Kavanaugh’s argument that the FCC lacked the clear statutory authority to promulgate the major net neutrality rule, the majority invoked *Brand X* and noted:

Brand X dictates rejecting our dissenting colleague’s argument based on the major rules doctrine. It is thus perhaps unsurprising that none of the petitioning parties, no member of the original panel (including our colleague who dissented in part at the panel stage), and neither of the dissenting Commissioners objected to the FCC’s Order as infringing any such doctrine. (We note, though, that a group of intervenors led by TechFreedom makes such an argument.) The major rules doctrine is said to promote separation-of-powers principles by assuring that Congress has delegated authority to an Executive agency to decide a major matter of policy. See *infra* at 3-5 (Kavanaugh, J., dissenting). But in light of *Brand X*’s recognition of the FCC’s congressionally delegated authority to decide whether to regulate ISPs as common carriers, it would disserve—not promote—the separation of powers to deny the agency the authority conferred on it by Congress.

In the end, the major rules doctrine, as articulated by our colleague, affords no basis for invalidating the net neutrality rule. The Supreme Court decisions ostensibly giving rise to that doctrine lie far afield from this case. They involve, per our colleague’s description, “regulating cigarettes, banning physician-assisted suicide, eliminating telecommunications rate-filing requirements, or regulating greenhouse gas emitters.” The Court’s decision in *Brand X*, by contrast, involved the same statute (the Communications Act), the same agency (the FCC), the same factual context (the provision of broadband internet access), and the same issue (whether broadband ISPs are telecommunications providers, and hence common carriers, under the Act). *Brand X* unambiguously recognizes the agency’s statutorily delegated authority to decide that issue.¹⁰¹

Of particular import was the majority’s reliance on *Brand X* in rejecting the dissents’ arguments — and its failure to acknowledge the Supreme Court decisions following *Brand X* relied upon by Judge Kavanaugh, which collectively show a trend by the Court to give greater

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 387.

consideration to the “major questions” doctrine first articulated by Justice Breyer over 30 years ago.¹⁰² Specifically, the D.C. Circuit’s failure to consider these recent cases and how such holdings might affect the *Brand X* decision’s application to the Open Internet Order raises two additional issues about the FCC’s authority to promulgate the rule to begin with:

1. Under the Supreme Court’s articulation of the “major questions” doctrine in *UARG*—namely that “decisions of vast ‘economic and political significance’” require “clear” congressional authorization—everything the FCC says about the vital importance of the order makes it clear that the Order — *i.e.*, both the rules and the underlying claims of legal authority — would be both “politically and economically significant” to the point of requiring clear congressional authorization under *Chevron* Step Zero. Indeed, this latter point is only bolstered under the D.C. Circuit’s own characterization of the rule and noted frustration with their seemingly endless review of it.
2. Recent Supreme Court decisions—namely, *Utility Air Regulatory Group v. EPA* (*UARG*),¹⁰³ *FDA v. Brown & Williamson*,¹⁰⁴ and *Michigan v. EPA*¹⁰⁵—all suggest that the Court is no longer willing to apply the deferential standard of *Chevron* to “major questions” absent “clear” congressional authorization.

Thus, subsequent holdings by the Court consistently indicate that *Brand X*, while remaining good law on the FCC’s discretion *not* to apply Title II to the Internet, does not control the converse question of the FCC’s discretion to apply Title II to the Internet — because the Court simply was not confronted with a major question that requires Step Zero analysis.

D. About the Major Questions Doctrine

Central to both Judge Kavanaugh and Judge Brown’s dissents in *U.S. Telecom Association* was the “Major Rule” doctrine, or “Major Questions” doctrine as referred to generally and by Judge Brown. Under either name, this doctrine requires “Congress to speak clearly if it wishes to assign to an agency, decisions of vast ‘economic and political significance.’”¹⁰⁶

¹⁰² See *U.S. Telecom II*, 855 F.3d at 419 (Kavanaugh, J., dissenting) (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986)).

¹⁰³ *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427 (2014).

¹⁰⁴ *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

¹⁰⁵ *Mich. v. E.P.A.*, 135 S. Ct. 2699, 2706–07 (2015) (“Even under the deferential standard of *Chevron* ... which directs courts to accept an agency’s reasonable resolution of an ambiguity in a statute that the agency administers ... EPA strayed well beyond the bounds of reasonable interpretation in concluding that cost is not a factor relevant to the appropriateness of regulating power plants.”).

¹⁰⁶ *U.S. Telecom II*, 855 F.3d at 417.

Stated differently, the Supreme Court requires *clear* congressional authorization in order for an agency to issue a major rule, even if a statute grants the agency some ambiguous authority. Thus, “[i]f a statute only ambiguously supplies authority for the major rule, the rule is unlawful.”¹⁰⁷ Justice Breyer, who first articulated the Major Question doctrine and who notably was far from a “right-wing” activist, believed that “Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.”¹⁰⁸ Justice Breyer went on to add that a court should “consider the extent to which the answer to the legal question will clarify, illuminate or stabilize a broad area of the law[,]” and “whether the agency can be trusted to give a properly balanced answer.”¹⁰⁹

Applying Justice Breyer’s words, the Supreme Court has described a “major rule” or “major question” as an agency action of “vast ‘economic and political significance,’” that courts are required to meet with “a measure of skepticism”¹¹⁰ In reviewing whether a “major question” exists, the Court has held that there is no clear rule, but rather courts “must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.”¹¹¹

Judge Kavanaugh clearly articulated this doctrine as follows:

[I]n a narrow class of cases involving major agency rules of great economic and political significance, the Supreme Court has articulated a countervailing canon that constrains the Executive and helps to maintain the Constitution’s separation of powers. For an agency to issue a major rule, Congress must clearly authorize the agency to do so. If a statute only ambiguously supplies authority for the major rule, the rule is unlawful. The major rules doctrine (usually called the major questions doctrine) is grounded in two overlapping and reinforcing presumptions: (i) a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch,¹¹² and (ii) a presumption that Congress intends to make

¹⁰⁷ *Id.* at 417 (Kavanaugh, J., dissenting).

¹⁰⁸ Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

¹⁰⁹ *Id.* at 371.

¹¹⁰ *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014) (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

¹¹¹ *Brown & Williamson*, 529 U.S. at 133 (citing *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994)).

¹¹² See *Industrial Union Department, AFLCIO v. American Petroleum Institute*, 448 U.S. 607, 645-46 (1980) (opinion of Stevens, J.)

major policy decisions itself, not leave those decisions to agencies. In short, while the Chevron doctrine allows an agency to rely on statutory ambiguity to issue ordinary rules, the major rules doctrine prevents an agency from relying on statutory ambiguity to issue major rules.¹¹³

Judge Brown aptly identified the major question at issue:

Reclassifying broadband Internet access so as to subject it to common carrier regulation upends the Act's core distinction between "information service" and "telecommunications service," and it rewrites the statutory prohibition on treating mobile broadband providers as common carriers. *Distinguishing "enhanced service," like Internet access, from "basic services" subjected to public utility regulation is not some trivial matter, nor is it resolved simply by whether Congress authorized FCC to have some degree of regulatory authority over the Internet. Drawing this distinction is "the essential characteristic" of the 1996 Act.*¹¹⁴ "What we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of" common carrier regulation for telecommunications services, to common carrier regulation of information service when that service merely has telecommunications services among its component parts. Cf. *id.* "That may be a good idea, but it was not the idea Congress enacted into law in 19[96]." See *id.* at 232. Therein lies the problem.¹¹⁵

And:

[T]he Court has already characterized "net neutrality" regulation as a "major question," even without the distinct salience brought by implementing "net neutrality" through reclassifying broadband Internet access. See *Verizon*, 740 F.3d at 634 ("Before beginning our analysis, we think it important to emphasize that . . . the question of net neutrality implicates serious policy questions, which have engaged lawmakers, regulators, businesses, and other members of the public for years Regardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress

¹¹³ *U.S. Telecom II*, 855 F.3d at 419 (Kavanaugh, J., dissenting).

¹¹⁴ Cf. *MCI Telecomms. Corp.*, 512 U.S. at 231.

¹¹⁵ *Id.* at 401-02 (emphasis added).

enacted into law.”). The problem here is the Court’s analysis—it ignores the legal consequences flowing from the “major question” determination.

What is abundantly clear from both Judge Kavanaugh and Judge Brown’s dissents is that the Order constitutes a major rule, raising several major questions. Yet, to date, every decision upholding the FCC’s jurisdiction to promulgate the Order improperly failed to begin its analysis at *Chevron* Step-Zero, and instead started by simply searching for ambiguity in a statute rather than determining whether *Chevron* should even apply. This vital step is not inconsequential either. As Professor Sunstein noted in his seminal article discussing Step Zero, failing to begin the analysis at Step Zero “raises doubts about an array of judicial decisions.”¹¹⁶

E. UARG and the Supreme Court’s Reaffirmation of the Major Questions Doctrine

Among the recent Supreme Court cases dealing with the major questions doctrine, particularly apposite here is *Utility Air Regulatory Group v. E.P.A. (UARG)*.¹¹⁷ As Professor Sunstein noted in his article on “*Chevron* Step Zero,” “[u]nder *Chevron*, the EPA would appear to have the power to regulate greenhouse gases if it chooses to do so.”¹¹⁸ Yet the Court held that it is Congress, not the EPA, that should decide whether the EPA has such authority to regulate greenhouse gases — because this is a “major question. The Court, starting its analysis at *Chevron* Step Zero, rejected the EPA’s vast expansion of its program of requiring clean air permits, and its claim to deference in reinterpreting the statute. because such an expansion “would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.”¹¹⁹ Indeed, in reaching this conclusion, the Court was specifically informed by the Major Questions doctrine and actually cited Judge Kavanaugh in confirming “the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”¹²⁰ Critically, it was also Judge Kavanaugh who dissented from the D.C. Circuit’s en banc decision to uphold the Open Internet order, arguing that the FCC lacked the authority to issue the Internet Order under the Major Questions doctrine.¹²¹

¹¹⁶ Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 242 (2006).

¹¹⁷ *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427 (2014).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 2444.

¹²⁰ *Id.* at 2446 (quoting *Coal. for Responsible Regulation, Inc. v. E.P.A.*, No. 09-1322, 2012 WL 6621785, at *16 (D.C. Cir. 2012) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

¹²¹ *U.S. Telecom II*, at 417-18 (Kavanaugh, J., dissenting).

Justice Scalia, delivering the Majority opinion in *UARG*, stated:

The fact that EPA's greenhouse-gas-inclusive interpretation of the PSD and Title V triggers would place plainly excessive demands on limited governmental resources is alone a good reason for rejecting it; but that is not the only reason. EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," *Brown & Williamson*, 529 U.S., at 159, 120 S.Ct. 1291, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency, decisions of vast "economic and political significance."¹²²

That the Supreme Court relied on Judge Kavanaugh's articulation of the Major Questions doctrine only three years ago should signify that his dissent in *U.S. Telecom* holds significant weight in predicting how the Court will resolve confusion over *Chevron* Step Zero. First, Judge Kavanaugh's opinion cited in *UARG* at the appellate stage was also a dissent, yet was nonetheless found so persuasive as to be the *sole* reference by the Court to the appellate decision. Second, it is easily conceivable that, were the Supreme Court to decide the question of whether the FCC has the authority today, the Justices might again agree with Judge Kavanaugh in finding no statutory authority for so major a question as net neutrality or the "regulatory status of broadband."¹²³ Indeed, since *Brand X*—where the Court admitted "*the entire question* is whether the products here are functionally integrated or functionally separate"—the Supreme Court has yet to address whether the FCC's categorization of broadband Internet access is reasonable, let alone whether the agency even has the authority to promulgate the major rule to begin with.

Following *UARG* (2014) and *Michigan v. EPA* (2015)—both cases where the Court refused to concede to an agency's interpretation of a statute—it seems highly likely that the Court would not be so quick to assume the FCC has the authority to promulgate the Open Internet Order. Indeed, as the Court said in *Microsoft v. AT&T*, "the responsibility lies with Congress to decide how best to address these new developments in technology."¹²⁴

¹²² *Util. Air Regulatory Grp.* at 2444.

¹²³ See *American Bar Ass'n v. FTC*, 430 F. 3d 457, 469 (D.C. Cir. 2005).

¹²⁴ See *Microsoft v. AT&T Corp.*, 550 U.S. 437, 458–59 (2007).

1. The FCC's Admitted Need for Extensive, "Unprecedented" "Tailoring" Reveals the Disconnect from what Congress Intended

To accord *Chevron* deference to a major question of significant economic and political import runs squarely counter to the Supreme Court precedent in *King v. Burwell*, which required the Court to start at *Chevron* Step Zero in the absence of express Congressional delegation of interpretive authority.¹²⁵ In the presence of a major question that warrants greater regard to the fundamental constitutional principle of separation of powers, a court must interpret the relevant statutory provisions *de novo*—even if an ambiguity exists—rather than ceding to agency interpretations under the low hurdle of *Chevron* deference.¹²⁶

King thus incorporated the “major questions” doctrine into *Chevron* Step Zero. This was a natural outgrowth of another Supreme Court precedent, *FDA v. Brown & Williamson*,¹²⁷ where the “inquiry into whether Congress has directly spoken to the precise question at issue [was] shaped, at least in some measure, by the nature of the question presented.”¹²⁸ Through these decisions, the Supreme Court has firmly cemented into constitutional law that courts should hesitate¹²⁹ to infer implicit delegation from a statutory ambiguity if the question at issue encompasses a major regulatory arena with “extraordinary”¹³⁰ practical consequences. As Justice Breyer articulated in *Judicial Review of Questions of Law and Policy*, 38 Admin. L.Rev. 363, 370 (1986), it is unmistakably within the Court’s prerogative to ask whether the legal question is “an important one,¹³¹” considering that “Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.¹³²”

The D.C. Circuit and the Supreme Court have consistently applied this doctrine to stop agencies from resolving questions of major economic or political significance absent express delegation from Congress to do so.¹³³ The foundation of *Chevron* Step Zero rests on both doctrinal constitutional law grounds and recognition of serious political considerations. This could not be more evident from *UARG*’s reiteration of judicial caution against

¹²⁵ *King v. Burwell*, 759 F.3d 358, 367-68 (4th Cir. 2014).

¹²⁶ *Id.* at 365.

¹²⁷ 529 U.S. 120, 159-60 (2000).

¹²⁸ *Id.* at 159.

¹²⁹ *Id.* at 123.

¹³⁰ *Id.* at 159.

¹³¹ *Id.*

¹³² *Id.*

¹³³ See, e.g., *Am. Bar Ass’n v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005); *Loving v. U.S.*, 742 F.3d 1013, 1021 (D.C. Cir. 2014).

interpretive deference to administrative agencies where Congress would not have delegated with room for doubt in a major question.¹³⁴ Accordingly, the FCC cannot ensnare broadband Internet services into its regulatory domain, no matter how slow Congressional action is in addressing new technologies, as “it is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated.”¹³⁵

The D.C. Circuit’s deference to the FCC’s reclassification of broadband under *Chevron* violated *UARG* in presuming that Congress had delegated unilateral decision-making authority to the FCC on Internet services, despite the radical statutory “tailoring” necessary to save the Order from absurd extrapolations.

Further concerns arise from the FCC’s resort to “expansive forbearance” or “tailoring” through the glaring red flag of a “regulate but mitigate” approach, where the agency purports to mitigate the harmful impacts of its own sweeping reinterpretation of the 1934 Act. The FCC’s preemptive forbearance from significant portions of Title II signals the untenability of the interpretation itself, akin to the EPA’s recent use of the Clean Air Act to impose permitting requirements on greenhouse gas emissions—a statutory interpretation that required similarly extensive “tailoring” of the resulting regulatory framework. The Supreme Court rejected that interpretation last year for that very reason in *UARG*.¹³⁶ For the FCC, like the EPA in *UARG*, “the need to rewrite clear provisions of the statute should have alerted [the agency] that it had taken a wrong interpretative turn.”¹³⁷

So, the “major question” in this case is not whether the FCC can impose this initially “tailored” version of Title II, but whether it can assert Title II authority *per se*. The FCC purports to “forbear” initially from applying many Title II requirements.¹³⁸ But that forbearance is inherently temporary—the FCC can “un-forbear” just as swiftly as it forbore.¹³⁹ The FCC cannot “adopt ... unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness.”¹⁴⁰ The sheer extent of forbearance necessary to prevent ruinous impacts on the industry (and consumers),¹⁴¹ makes

¹³⁴ *Util. Air Regulatory Grp.* at 2446.

¹³⁵ *Id.* at 2449.

¹³⁶ 134 S. Ct. 2427.

¹³⁷ *Id.* at 2446.

¹³⁸ See Order ¶ 382.

¹³⁹ See *id.* ¶ 538, see also *infra* at p. 58.

¹⁴⁰ *Coalition for Responsible Regulation, Inc. v. E.P.A.*, 2012 WL 6621785 (2012) at 16.

¹⁴¹ See Order ¶¶ 495–96.

clear that the FCC itself believes that its underlying statutory interpretation is far from what Congress intended. As Judge Brown notes:

as Judge Williams noted in his opinion here, “the Commission’s massive forbearance [came] without findings that the forbearance is justified” under the statute’s conditions.¹⁴² Both the FCC and the Court found reclassifying Internet access as a “telecommunications service,” coupled with forbearance, would be within FCC’s power even without a change in the underlying factual circumstances of Internet access.¹⁴³ In other words, the Court concludes the FCC’s forbearance need not have anything to do with factual findings—the Commission is free to rewrite statutory terms as it sees fit. Used in this way, forbearance usurps the exclusively-legislative function of lawmaking because, “[i]n both legal and practical effect, the [FCC] has amended [an] Act[] of Congress by repealing [or amending] a portion.”¹⁴⁴

The need to expansively “tailor” the statute to make it work should have caused the panel to recognize that the FCC’s decision to regulate broadband Internet access services under Title II resulted from “a wrong interpretive turn.”¹⁴⁵ Yet the panel dismissed *UARG* entirely, noting only that, unlike in *UARG*, the FCC has authority to “forbear from applying any regulation or provision.”¹⁴⁶

The fact that the FCC has forbearance authority while the EPA did not is a red herring. *UARG* turned not on the property of the EPA’s “tailoring” as such, but what it said about what Congress intended: Agencies may not adopt “unreasonable” statutory interpretations—such as “telecommunications service”—and then “edit other statutory provisions to mitigate the [resulting] unreasonableness.”¹⁴⁷ The FCC’s forbearance authority is not unlimited, and its need to tailor Title II so aggressively reveals the deep flaws in its underlying interpretation.¹⁴⁸ *U.S. Telecom* sidesteps the most important constitutional issue: not “reclassification” as such, but permissibility

¹⁴² See Concurring & Dissenting Op. 62; see also *Id.* at 62–69.

¹⁴³ See Order ¶ 360 n.993; Op. 47.

¹⁴⁴ See *Clinton*, 524 U.S. at 438; see also *UARG*, 134 S. Ct. at 2446 n.8 (I am “aware of no principle of administrative law that would allow an agency to rewrite such [] clear statutory term[s], and [I] shudder to contemplate the effect that such a principle w[ill] have on democratic governance”).

¹⁴⁵ *UARG*, 134 S. Ct. at 2446.

¹⁴⁶ Panel Op. at 41 (quoting 47 U.S.C. § 160(a)).

¹⁴⁷ *UARG*, 134 S. Ct. at 2444–46.

¹⁴⁸ *U.S. Telecom I*, 825 F.3d at 727.

of the statutory reinterpretations underlying it, given their broad implications for the breadth of the FCC’s authority.

Judge Brown continues:

The FCC’s use of its forbearance authority confirms this Order is “an enormous and transformative expansion [of its] regulatory authority without clear congressional authorization” and, thus, “unreasonable.”¹⁴⁹ By the FCC Chairman’s own admission, the Act’s common carrier regulations do not contemplate broadband Internet access. So, the Order cannot merely reclassify broadband Internet access, it must also “modernize Title II, tailoring it for the 21st century.”¹⁵⁰ As the Chairman conceded, this required “taking the legal construct that once was used for phone companies and pairing it back to modernize it.” FCC Proposes Treating All Internet Traffic Equally.¹⁵¹

The Order acknowledges its tailoring of the Act’s common carrier requirements so as to capture broadband Internet access is “extensive,” “broad,” “[a]typical,” and “expansive”—including at least 30 Title II provisions and 700 rules promulgated under them.¹⁵² It also says this level of forbearance results in a modernization of Title II “never” before contemplated. See *id.* ¶¶ 37, 38. The Court’s Opinion and the Order disregard the nature of forbearance.¹⁵³

In both *UARG* and the FCC’s Order, the agencies “tailored” to solve problems created by their own gratuitously aggressive interpretations of ambiguous statutory provisions.¹⁵⁴ True, the FCC had more statutory raw material at hand than EPA to cobble together its fix-it tool. But its self-inflicted need to fashion such a tool—to invoke “extensive forbearance,” grounded in novel rationales—is no less strong a signal that the underlying statutory interpretation is unlawful. Judge Brown concludes:

UARG cited generally-applicable tenets of administrative law and the separation of powers—not some Clean Air Act novelty—when it said “[a]n agency

¹⁴⁹ *UARG*, 134 S. Ct. at 2444 n.8.

¹⁵⁰ Tom Wheeler, *FCC Chairman Tom Wheeler: This is How We Will Ensure Net Neutrality*, WIRED (Feb. 4, 2015, 11:00 AM), <https://www.wired.com/2015/02/fcc-chairmanwheeler-net-neutrality/>.

¹⁵¹ PBS NEWSHOUR (PBS television broadcast Feb. 4, 2015, 6:35 PM), <http://www.pbs.org/newshour/bb/fcc-proposes-treating-allinternet-traffic-equally>.

¹⁵² See Order ¶¶ 37, 51, 438, 461, 493, 508, 512, 514.

¹⁵³ *United States Telecomms. Ass’n v. FCC*, 855 F.3d 381, 408 (D.C. Cir. 2017) (Brown, J., dissenting).

¹⁵⁴ See *UARG*, 134 S. Ct. at 2430, *American Bar Ass’n v. FTC*, 430 F. 3d at 465.

has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.”¹⁵⁵ The Court blithely ignores its “severe blow to the Constitution’s separation of powers” by reading the FCC’s forbearance authority to expand, rather than lessen, common carrier regulation at the legislature’s expense. See *id.* at 2446. The Court provides no answer to the problems of public accountability and individual liberty with its mere assertion of forbearance being a “statutory mandate.” Compare *Op. 41* with *Clinton*, 524 U.S. at 451–52 (Kennedy, J., concurring).

If the FCC is to possess statutory forbearance authority, it should conform to forbearance’s statutory conditions and the overall statutory scheme. Neither is the case here. The FCC’s abuse of forbearance amounts to rewriting the 1996 Act in the bowels of the administrative state, when it should petition Congress for these purportedly-necessary changes.¹⁵⁶

To avoid the direst consequences of Title II, the FCC has had to bend the statute to the point of breaking it. By the FCC’s own (proud) admission, the Order effectively rewrites the Communications Act—to create a “Title II tailored for the 21st Century.”¹⁵⁷ Not even the FCC would presume that it could permanently suspend the Act that Congress gave it; the blanket forbearance so critical to the Order’s “tailoring” (a term mentioned 77 times) is inherently impermanent. Only obliquely does the Order note the FCC’s power to unforbear, in explaining why the Commission need not declare forbearance to be “interim or time-limited”: “we retain adequate authority to modify our regulatory approach in the future, should circumstances warrant.”¹⁵⁸ Just how much of Title II the FCC will apply at any given moment, and in what way, will be up to the FCC to decide as it continues its “multiyear voyage of discovery.”¹⁵⁹ But Courts must not “wave goodbye” as an agency “embarks on [a] multiyear voyage of discovery” of how to regulate a major engine of the modern economy,¹⁶⁰ as to do so would allow agencies to transform ordinary statutory terms into unlimited delegations of legislative power.

In sum, the FCC has run afoul of *UARG* by going well beyond the scope of its tailoring authority. The powers and jurisdiction claimed by the FCC are too broad—encompassing not

¹⁵⁵ 134 S. Ct. at 2445.

¹⁵⁶ *U.S. Telecom v. FCC*, 855 F.3d at 409.

¹⁵⁷ Order ¶ 38.

¹⁵⁸ Order ¶ 538.

¹⁵⁹ *UARG*, 134 S. Ct. at 2446.

¹⁶⁰ *Id.*

just broadband per se but also edge services like voice and video—with the burdens of the FCC’s new assertion of power falling on innovators such as those intervening here against the FCC. And those burdens are exacerbated by the uncertainty inherent in the FCC’s strategy of making up the law as it goes—of “tailoring” (or someday not tailoring) the law as it sees fit; of exercising “extensive forbearance” (or someday unforbearing) as a matter of its own discretion.¹⁶¹

An analogy illustrates the point: A customer asks his tailor to make a jacket fit him comfortably, not tightly. If the tailor concludes that the jacket will be too tight unless he cuts off both sleeves, then the jacket obviously was never meant for the customer’s body in the first place. The customer did not order a vest. So too here: Congress allows the FCC to “tailor” Title II to fit it to telecommunications services, but broadband is not such a service, and the “extensive” cutting needed to “fit” Title II to broadband proves it.

2. The Court Must Remedy the Significant Nondelegation Problems Inherent in the FCC’s Simultaneous Power Grab and Expansive Forbearance

The FCC imputes to the statute a “sweeping delegation of legislative power”—a statutory construction that the Supreme Court instructs courts and agencies to avoid, especially in the absence of a necessity to prevent an actual and “significant risk” to the public.¹⁶²

The Supreme Court held in *Benzene* that if an agency interprets a statute to expand regulation even though no significant risks are present that would be eliminated or lessened by the agency’s regulatory program, then that statute “would make such a sweeping delegation of legislative power that it might be unconstitutional under the Court’s reasoning in” its nondelegation precedents.¹⁶³ “A construction of the statute that avoids this kind of open-ended grant should certainly be favored.”¹⁶⁴

The D.C. Circuit, too, has applied that approach, construing a statute’s grant of regulatory power narrowly in order to avoid nondelegation problems raised by the agency’s preferred interpretation.¹⁶⁵ the agency’s view that it could impose any restriction it chose “so long as it was feasible” was so broad as to be unreasonable, in violation of constitutional nondelegation principles. This Court raised the issue of nondelegation as a matter of construction,

¹⁶¹ Order ¶ 493.

¹⁶² *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645, 646 (1980) [hereinafter *Benzene*].

¹⁶³ 448 U.S. at 646.

¹⁶⁴ *Id.*

¹⁶⁵ See *Int’l Union v. OSHA*, 938 F.2d 1310, 1315–21 (D.C. Cir. 1991).

citing *Synar v. United States*,¹⁶⁶ and scrutinizing the agency's "claimed power to roam between the rigor of § 6(b)(5) standards and the laxity of unidentified alternatives¹⁶⁷" which, coupled with the immense regulatory scope "encompassing all American enterprise¹⁶⁸" raised a serious need for precise standards¹⁶⁹ lest it fall afoul of the nondelegation doctrine. Aptly, the FCC's uncalculated swaying of expanding regulation over broadband Internet services all the while retreating to the laxity of forbearance and un-forbearance amounts to "delegation run[] riot."¹⁷⁰

As the FCC claims not only the vast prosecutorial discretion over broadband Internet services but moreover the power to create a wholly new regulatory framework without express Congressional approval, the Court must not lightly presume that "Congress is likely to delegate a policy decision of such economic and political magnitude" to an agency's regulatory authority.¹⁷¹ The FCC's Order would go further than EPA's in *UARG*: to explore strange new issues, to seek out new jurisdiction and new powers, to boldly go where no regulator has gone before. It disregards Congress' findings and expressly stated policy against Internet regulation, and the constrained, workable regulatory structure that Congress enacted in 1996 and has maintained since, with rare exceptions, in furtherance of the policy that the Internet should remain "unfettered by Federal or State regulation."¹⁷²

The first nondelegation issue in the Order is that the FCC is attempting to regulate a matter of utmost "economic and political significance" without Congress' clearly expressed authorization. This presents a nondelegation question where the Court must assess the economic consequences of the Order. Subjecting *all* broadband Internet access service to common carrier regulation is a step unprecedented in the history of the Internet. Indeed, the very first lines of the FCC's Order highlight the immense economic, cultural, and political importance of this issue: the Internet "drives the American economy and serves, every day, as a critical tool for America's citizens to conduct commerce, communicate, educate, entertain, and engage in the world around them."¹⁷³ The Order encroaches on regulating a ubiquitous industry that implicates "billions of dollars in spending each year" and affects "millions of people", and leaves the door ajar to more regulation in the future—without due judicial as-

¹⁶⁶ *Synar v. United States*, 626 F.Supp. 1374, 1384 (D.D.C.1986).

¹⁶⁷ 938 F. 2d at 1317.

¹⁶⁸ *Id.*

¹⁶⁹ *Synar*, 626 F.Supp. at 1386.

¹⁷⁰ *Schechter*, 295 U.S. at 553, 55 S.Ct. at 853.

¹⁷¹ *Brown & Williamson*, 529 U.S. at 133; TechFreedom Br. at 15–21.

¹⁷² 47 U.S.C. § 230(b)(2).

¹⁷³ Order ¶ 1.

assessment of what economic and political consequences are at stake. The FCC’s assertion of power to implement unprecedented regulation of broadband Internet infrastructure, without first showing that such regulations are necessary to avert a “significant risk” to the public, raises significant constitutional concerns under the nondelegation doctrine.¹⁷⁴

In fact, the Order made no attempt to satisfy this standard. (And the FCC’s brief, yet again, makes no attempt to respond to this argument.) The Order alludes vaguely to broadband Internet service providers’ general “incentives” or “ability” to interfere with Internet traffic.¹⁷⁵ And to lend credence to its speculation, the FCC alludes to two alleged examples of misconduct: Madison River and Comcast-BitTorrent.¹⁷⁶ But neither of these cases bears the enormous weight that the FCC places upon them.

First, while the *Madison River* case began with FCC allegations,¹⁷⁷ the case ended with a consent decree expressly stating that it did “not constitute either an adjudication on the merits or a factual or legal finding,” and which was executed by the parties not as a demonstration of guilt but rather to “avoid the expenditure of additional resources that would be required to further litigate the issues raised in the Investigation.”¹⁷⁸ This was not a demonstration of significant risk to the public then, let alone a demonstration of risk to the public today.

Second, the Comcast-BitTorrent case also began with allegations of misconduct but ended with a voluntary agreement announced by the parties as part of their “collaborative effort” to “more effectively address issues associated with rich media content and network capacity management.”¹⁷⁹ Indeed, the parties themselves urged that “these technical issues can be worked out through private business discussions without the need for government intervention.”¹⁸⁰ This, too, is not a demonstration of significant risk to the public—not in 2008, and not today.

Thus, the FCC’s interpretation of Title II, particularly in light of the Major Questions doctrine as applied in *UARG* and the red flag of extensive forbearance, should alert the canon of nondelegation under the separation of powers, requiring the courts to review *de novo* any

¹⁷⁴ See Reply Brief for Intervenors for Petitioners at 5, *United States Telecom Ass’n v. FCC*, 825 F.3d 674 (2016) (No. 15-1063).

¹⁷⁵ See TechFreedom Br. at 25.

¹⁷⁶ FCC Br. at 19–21.

¹⁷⁷ See *id.* at 19.

¹⁷⁸ Consent Decree, *In re Madison River Comm’cns LLC*, 20 FCC Rcd. 4295, ¶¶ 4, 10 (2005)).

¹⁷⁹ See TechFreedom Br. at 26–27 (quoting press release).

¹⁸⁰ See *id.* at 26 (quoting press release).

significant question directed to the judiciary that cannot be delegated to the agency. Because the FCC's construction of the statute raises serious constitutional concerns, the agency is entitled to no interpretive deference in deciding how to construe the statute in order to avoid those nondelegation problems.

This is so, even if the FCC caveats its interpretation of Title II with expansive forbearance. “The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to [the Court] internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would itself be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts.”¹⁸¹ Therefore, the FCC's voluntary self-denial through forbearance or tailoring “has no bearing upon the answer.”¹⁸² It conversely illuminates the very unsustainable and strained nature of its own reinterpretation of the 1934 Act.

Stemming from this nondelegation issue, which must be addressed by the courts, the FCC's statutory construction also triggers the canon of constitutional avoidance,¹⁸³ where “[i]f an otherwise acceptable construction of a statute would raise serious constitutional problems... and where an alternative interpretation of the statute is ‘fairly possible,’” the statute should be construed “to avoid such problems.”¹⁸⁴ The court must not defer, as the agency is not entitled to then decide itself how to construe the statute in order to avoid contravening the nondelegation doctrine.

As the D.C. Circuit held in *Rural Cellular Ass'n v. FCC*,¹⁸⁵ “[b]ecause the ‘canon of constitutional avoidance trumps *Chevron* deference,’” the Court “will not accept the Commission's interpretation of an ambiguous statutory phrase if that interpretation raises a serious constitutional difficulty.” Courts must interpret such statutes for themselves. In resolving perhaps the most important question presented in the Digital Age thus far, with boundless economic and political impacts, it would be wholly inappropriate for the Court to fast-forward to *Chevron* deference and skip over Step Zero, when the FCC's assertion of the Order is premised on untenable statutory construction and a glaring constitutional issue in nondelegation.

¹⁸¹ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001).

¹⁸² *Id.*

¹⁸³ See Brief of Texas Oil & Gas Association et al. as Amici Curiae Supporting Petitioners, *Utility Air Regulatory Group v. Environmental Protection Agency*, 2013 WL 6673695 (2013) (No. 12-1146).

¹⁸⁴ *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001).

¹⁸⁵ 685 F.3d 1083, 1090 (D.C. Cir. 2012) (considering nondelegation challenge).

F. Courts' Clear Frustration with Title II Debate: Lessons Learned from Political Question Doctrine

In arguing that the net neutrality rule was a major rule requiring express congressional authorization, Judge Kavanaugh understandably focused his analysis on the vast economic significance of a net neutrality rule that will essentially “affect every Internet service provider, every Internet content provider, and every Internet consumer.”¹⁸⁶ Indeed, when the Internet Economy is alone responsible for an estimated \$966.2 billion and over three million jobs, its only logical to focus on the economic significance of the rule.¹⁸⁷ Thus, as Judge Kavanaugh rightfully noted, “[t]he financial impact of the rule—in terms of the portion of the economy affected, as well as the impact on investment in infrastructure, content, and business—is staggering.”¹⁸⁸

However, the Court’s articulation of a major rule not only encompasses economically significant rules, but also those of “vital... *political* significance,”¹⁸⁹ and this is where, as even the D.C. Circuit has seemingly indicated, the proposed net neutrality rule is a uniquely more significant rule than those the Court has already reviewed under the Major Questions doctrine.

Although, as outlined above, the D.C. Circuit has generally deferred to the Commission’s broad claims of authority to enact open Internet rules, its decisions have expressed exceptional frustration with the FCC — starting with *Comcast v. FCC* (2010), where the court blasted the FCC’s reading of the statute:

the Commission maintains that congressional policy by itself creates “statutorily mandated responsibilities” sufficient to support the exercise of section 4(i) ancillary authority. Not only is this argument flatly inconsistent with *Southwestern Cable*, *Midwest Video I*, *Midwest Video II*, and *NARUC II*, but if accepted it would virtually free the Commission from its congressional tether.¹⁹⁰

Last year, the D.C. Circuit panel in *U.S. Telecom* opened its opinion on a note of clear frustration: “[f]or the third time in seven years, we confront an effort by the [FCC] to compel in-

¹⁸⁶ *U.S. Telecom II*, 855 F.3d at 417 (Kavanaugh, J. Dissenting).

¹⁸⁷ See Stephen E. Siwek, *Measuring the U.S. Internet Sector*, INTERNET ASSOCIATION (Dec. 10, 2015), <https://cdn1.internetassociation.org/wp-content/uploads/2015/12/Internet-Association-Measuring-the-US-Internet-Sector-12-10-15.pdf>.

¹⁸⁸ *U.S. Telecom II*, 855 F.3d at 423 (Kavanaugh, J. Dissenting).

¹⁸⁹ *Brown & Williamson*, 529 U.S. at 133.

¹⁹⁰ *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 655 (D.C. Cir. 2010).

ternet openness.”¹⁹¹ The full D.C. Circuit’s decision to deny *en banc* review of the FCC’s 2015 Open Internet Order turned on the fact that the FCC had already announced its decision to, yet again, reconsider the rule. As the court stated, “[e]n banc review would be particularly unwarranted” in light of the fact that “[t]he agency will soon consider adopting a Notice of Proposed Rulemaking that would replace the existing rule with a markedly different one,” which could mean “the en banc court could find itself examining, and pronouncing on, the validity of a rule that the agency had already slated for replacement.”¹⁹² Such frustration clearly indicates that the D.C. Circuit—having heard the same arguments from two politically charged sides *ad nauseum*—recognizes the inherently political nature of the net neutrality debate. This political nature, highlighted by both the court’s frustration and external indicators, makes clear that the net neutrality rule is of “vital ... political significance” that requires clear congressional authorization under the major questions doctrine.

The conclusion that the net neutrality rule is a major rule for political reasons, while highlighted by the D.C. Circuit’s understandable frustration with having to regularly rehear the same issue, is affirmed when this factor is considered in conjunction with the sheer attention Congress, the Executive Branch, and the public has given the issue. First, Congress has, and continues, to debate net neutrality almost entirely along party lines.¹⁹³ Indeed, U.S. Representative Greg Walden, Chairman of the House Energy and Commerce Committee, recently scheduled a full committee hearing on the issue.¹⁹⁴

In *Brown & Williamson*, the Court also noted that Congress had “enacted six separate pieces of legislation since 1965 addressing the problem of tobacco use and human health,” but never authorized the FDA to take such drastic action.¹⁹⁵ Congress rejected several bills that would have given the FDA the authority the agency later claimed.¹⁹⁶

Similarly, Congress has enacted significant Internet-related legislation from the 1996 Act onward. From 2007 on, Congress considered, but did not enact, legislation that would have

¹⁹¹ *U.S. Telecom I*, 825 F.3d at 689.

¹⁹² *U.S. Telecom II*, 855 F.3d at 382.

¹⁹³ See Amir Nasr, *Battle for Net Neutrality Heats Up in Congress*, Morning Consult (May 3, 2017). While 11 Republican Senators collectively introduced legislation to nullify the net neutrality rule, Senator Brian Schatz of Hawaii, ranking Democrat of the Senate Commerce Committee’s Subcommittee on Communications, Technology, Innovation, & the Internet called Chairman Pai’s decision to reconsider the net neutrality rule “really alarming. *Id.*

¹⁹⁴ See Jon Brodtkin, *Net Neutrality faceoff: Congress summons ISPs and websites to hearing*, ARSTECHNICA (July 25, 2017), <https://arstechnica.com/tech-policy/2017/07/facebook-alphabet-amazon-and-netflix-called-to-testify-on-net-neutrality/>.

¹⁹⁵ *Brown & Williamson*, 529 U.S. at 143.

¹⁹⁶ *Id.* at 146–47.

authorized the FCC to preempt state laws governing broadband deployment,¹⁹⁷ and to regulate “net neutrality.”¹⁹⁸ The 1996 Act was but the most prominent part of a “consistent history of legislation,” in which Congress withheld broad regulatory authority over Internet services from the FCC—preferring, instead, to craft narrow grants of authority to address specific issues.¹⁹⁹ For instance, Congress passed child-protection laws (the Communications Decency Act of 1996, the Child Online Protection Act of 1998, and the Children’s Online Privacy Protection Act of 1998), and prohibited broadband taxes and discriminatory Internet-specific taxes by repeatedly extending the Internet Tax Freedom Act of 1998. When Congress *did* pass broadband-specific legislation, it was to fund broadband deployment in rural areas;²⁰⁰ to promote broadband deployment by enhancing access to relevant federal data;²⁰¹ and to have the FCC prepare *recommendations* for policymakers at all levels of government in a National Broadband Plan.²⁰² Nowhere did Congress grant the FCC any new powers to *govern* the Internet. Earlier this year, Congress “disapproved” an FCC Rule on Privacy of Customers for broadband services.²⁰³

Most notably, in 2008 Congress amended Section 706—the very statute the FCC claims to derive the authority to promulgate the net neutrality rule—to require the FCC to conduct customer surveys of broadband use in urban, suburban, and rural markets.²⁰⁴ Of note, the bill was passed out of Committee a month prior to the FCC publishing the Order, leaving those in Congress unaware of the FCC’s attempt to claim broad authorization under Section 706.²⁰⁵

¹⁹⁷ See, e.g., Community Broadband Act of 2007, S. 1853, 110th Cong. (2007).

¹⁹⁸ See, e.g., Restoring Internet Freedom Act, S. 993, 115th Cong. (2017) (attempting to nullify the net neutrality rule); Communications Act of 2006, H.R. 5252, 109th Cong. (2006).

¹⁹⁹ Cf. *MCI Telecommc’ns Corp. v. AT&T Co.*, 512 U.S. 218, 233 (1994).

²⁰⁰ See Pub. L. No. 110-234, 122 Stat. 923 (2008).

²⁰¹ See Pub. L. No. 110-385, 122 Stat. 4096 (2008).

²⁰² See Pub. L. No. 111-5, 123 Stat. 115 (2009).

²⁰³ See, e.g., S.J. Res. 34, 115th Cong. (2017) (entitled “Disapproving the Federal Communications Commission’s Rule on Privacy of Customers of Broadband Services”); Eric A. Fischer, Federal Laws Relating to Cybersecurity: Overview of Major Issues, Current Laws, and Proposed Legislation, CONGRESSIONAL RESEARCH SERVICE (2014), <https://fas.org/sgp/crs/natsec/R42114.pdf>.

²⁰⁴ See Broadband Data Improvement Act of 2008, Pub. L. No. 110-385, 122 stat. 4096 (codified at 47 U.S.C. § 1303), <https://www.gpo.gov/fdsys/pkg/PLAW-110publ385/html/PLAW-110publ385.htm>; see also Tanya Irwin, *Congress Passes Broadband Data Improvement Act*, Online Media Daily (Sept. 30, 2008), <https://www.mediapost.com/publications/article/91769/congress-passes-broadband-data-improvement-act.html>.

²⁰⁵ See Broadband Data Improvement Act of 2008, S. 1492, 110th Cong. (2008), <https://www.govtrack.us/congress/bills/110/s1492> (providing timeline of bill’s consideration and passage).

Further, as Judge Kavanaugh noted in his dissent, the 2015 net neutrality rulemaking received more comments (by far) than any other rule undertaken by the FCC before, ultimately totaling approximately 4 million comments.²⁰⁶ However, that *was* the record. This very rulemaking has received over 20 million comments to date, far surpassing the previous record before the final submission deadline.²⁰⁷ This politically-charged public attention has only been exacerbated as of late, with advocacy groups going so far as to utilize tactics often reserved for political elections. Most notably, billboards attacking Members of Congress who “oppose” net neutrality—despite the Open Internet Order being promulgated by the FCC, not Congress—have been erected across the country,²⁰⁸ and numerous media outlets have regularly published articles tracking who is “winning” the proceeding.²⁰⁹ Finally, even former-President Obama and President Trump²¹⁰ both felt it necessary to weigh in on net neutrality, which, as Judge Kavanaugh astutely recognized is “an unusual presidential action when an independent agency is considering a proposed rule.”²¹¹

Collectively, the immense political debate around net neutrality—from the President to Congress—clearly underscores the immense political significance of the issue. And while it’s clear that such political significance requires express congressional authorization under the Major Questions doctrine, it is perhaps even more important to understand *why* this is

²⁰⁶ See *U.S. Telecom II*, 855 F.3d at 423 (Kavanaugh, J. Dissenting) (Noting that “when the issue was before the FCC, the agency received some 4 million comments on the proposed rule.”); see also Elise Hu, *3.7 Million Comments Later, Here’s Where Net Neutrality Stands*, NPR (September 17, 2014), available at <http://www.npr.org/sections/alltechconsidered/2014/09/17/349243335/3-7-million-comments-later-heres-where-net-neutrality-stands>.

²⁰⁷ See *Nomination Hearing – FCC Before the S. Comm. on Commerce, Science, and Transportation* 115th Cong. (2017) (statement of Brendan Carr, General Counsel, Federal Communications Comm’n) (confirming the record number of comments submitted).

²⁰⁸ See, e.g., *Net Neutrality advocates release more crowdfunded billboards exposing key lawmakers who are supporting the FCC’s net neutrality repeal*, FightfortheFuture (Aug. 29, 2017), <https://www.fightforthefuture.org/news/2017-08-29-net-neutrality-advocates-release-more-crowdfunded/>.

²⁰⁹ See, e.g., Margaret Harding McGill, *Telecom group claims net neutrality comment victory*, PoliticoPro (Aug. 30, 2017), <https://www.politicopro.com/technology/story/2017/08/telecom-group-claims-net-neutrality-comment-victory-161214>; Tony Romm & Rani Molla, *Many of the FCC’s record-breaking 21 million net neutrality comments are duplicates — or come from suspicious sources: A telecom-backed study admits that net neutrality has the most support, but the origins of the comments raise questions*, RECODE (Aug. 30, 2017), <https://www.recode.net/2017/8/30/16223210/net-neutrality-fcc-21-million-record-comments-duplicates-suspicious-data>.

²¹⁰ See, e.g., Dominik Bosnjak, *Trump Officially Supports the FCC’s Net Neutrality Repeal*, AndroidHeadlines (July 19, 2017), <https://www.androidheadlines.com/2017/07/trump-officially-supports-the-fccs-net-neutrality-repeal.html>.

²¹¹ *U.S. Telecom II*, 855 F.3d at 423-24 (Kavanaugh, J. Dissenting) (citing Statement on Internet Neutrality, 2014 DAILY COMP. PRES. DOC. 841 (Nov. 10, 2014)).

so. Fortunately, a legal doctrine far older than the Major Questions doctrine sheds a bright light on the need for express congressional approval to enact major rules.

Implicit in the inclusion of issues of political significance under the major rules doctrine lies the equally important political question doctrine, which speaks “to an amalgam of circumstances in which courts properly examine whether a particular suit is justiciable.”²¹² Similar to the Major Questions doctrine, the political question “doctrine is ‘essentially a function of the separation of powers,’ which recognizes the limits that Article III imposes upon courts and accords appropriate respect to the other branches’ exercise of their own constitutional powers.”²¹³ Thus, both doctrines require the Judiciary to consider carefully the Constitution’s vital separation of powers framework when exercising their Article III authority.

Since the political question doctrine was first plainly articulated in *Baker v. Carr*, the Supreme Court has seemingly broken the political question doctrine into two categories: (1) political questions which require a court’s abstention due to lack of authority, and (2) political questions that make deciding an issue inappropriate for reasons of “prudence.”²¹⁴ It is the latter category that requires a closer examination, particularly in light of the political nature of the Open Internet Order.

Just as the Major Questions doctrine makes “a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch,”²¹⁵ the prudential prong of the political question doctrine “counsel[s] against a court’s resolution of an issue” where doing so would express a “lack of respect due coordinate branches of government.”²¹⁶ Though rare, such cases may “present an ‘unusual case’ requiring judicial abstention, which “accommodates considerations inherent in the separation of powers and the limitations envisioned by Article III.”²¹⁷ To illustrate, the Supreme Court has held that it may be appropriate for courts to abstain from deciding cases “con-

²¹² *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 202 (2012) (Sotomayor, J. concurring).

²¹³ *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

²¹⁴ See generally Political Questions, Public Rights, and Sovereign Immunity, 130 HARV. L. REV. 723 (2016) (discussing political question doctrine’s origin and application generally).

²¹⁵ *U.S. Telecom II*, 855 F.3d at 419 (Kavanaugh, J. Dissenting) (citing *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980)).

²¹⁶ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

²¹⁷ *Zivotofsky*, 566 U.S. at 205-207 (Sotomayor, J. concurring) (quoting *Baker*, 369 U.S. at 218).

cerning the distribution of political authority between the coordinate branches until a dispute is ripe, intractable, and incapable of resolution by the political process.”²¹⁸

Ultimately, what the Political Question and Major Question doctrines make clear is that courts must exercise caution in deciding issues that call into question the Constitution’s separation of powers restraints. Assuming, as the majority did in *U.S. Telecom*, that Congress granted the FCC the immense authority to regulate “every Internet service provider, every Internet content provider, and every Internet consumer,”²¹⁹ even while the debate raged on in both Chambers of Congress, is exactly the type of judicial intervention both doctrines suggest requires judicial prudence in order to “accord appropriate respect to the other branches’ exercise of their own constitutional powers.”²²⁰

However, despite this clear constitutional guidance, the D.C. Circuit in no way met the Commission’s claim of authority to promulgate the net neutrality rule with the “skepticism” required by the Major Question doctrine. Nor did it consider whether the issue raised prudential considerations under the Political Question doctrine. Instead, it failed to pay the requisite respect due to coequal branches *despite* having already recognized that “the question of net neutrality implicates serious policy questions,” which precludes the FCC from exercising its “authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.”²²¹ While this issue may become moot through Congressional authorization, the point remains clear: courts should not be so cavalier in assuming agency authority to enact such major rules. This requires courts to start the *Chevron* analysis from the true first step, Step Zero.

G. Section 230 of the Communications Decency Act’s Coverage of ISPs

The 1996 Telecommunications Act codified the FCC’s pre-existing distinction between “basic” and “enhanced” services as “information” and “telecommunications” service, defining the latter as common carriers subject to Title II and the former as non-common carrier services subject to Title I.²²² Section 230(f)(2), part of the 1996 Act, clearly envisions Internet service providers being “information services:”

²¹⁸ *Id.* at 206 (citing *Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring)).

²¹⁹ *U.S. Telecom II*, 855 F.3d at 417 (Kavanaugh, J. Dissenting).

²²⁰ *Id.* at 202; *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014) (“When an agency claims to discover in a long-extant statute an unheralded power to regulate “a significant portion of the American economy,” we typically greet its announcement with a measure of skepticism.”).

²²¹ *Verizon*, 740 F.3d at 634.

²²² Telecommunications Act of 1996, 1996 Enacted S. 652, 104 Enacted S. 652, 110 Stat. 56, 104 P.L. 104, 1996 Enacted S. 652, 104 Enacted S. 652

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.²²³

Petitioners cited these provisions as confirming that “Congress understood Internet access to be an information service.” Ironically, in dismissing this argument, the D.C. Circuit agreed with the FCC that this was a major question requiring clear congressional guidance. Specifically, the court found:

According to US Telecom, this definition of “interactive computer service” makes clear that an information service “includes an Internet access service.” US Telecom Pet’rs’ Br. 33. As the Commission pointed out in the Order, however, it is “unlikely that Congress would attempt to settle the regulatory status of broadband Internet access services in such an oblique and indirect manner, especially given the opportunity to do so when it adopted the Telecommunications Act of 1996.” 30 FCC Rcd. at 5777 ¶ 386; see *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 468 (2001) (“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”)²²⁴

The court itself calls the “regulatory status of broadband Internet access service” an elephant. Q.E.D.

1. The Unexamined Relevance of Section 230 to *Chevron* Step Zero

The majority of both the panel and full circuit sitting *en banc* ignored Section 230(b)(2), which declares that “the policy of the United States” would be “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive com-

²²³ In the 1998 Internet Tax Freedom Act, Congress took a similar approach:

(D) INTERNET ACCESS SERVICE. —The term “Internet access service” means a service that enables users to access content, information, electronic mail, or other services offered over the Internet and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services.

Internet Tax Freedom Act, PL 115-51, approved 8/18/17, with a gap of PL 115-50 (1998).

²²⁴ *United States Telecomms. Ass’n v. FCC*, 825 F.3d 674, 703 (D.C. Cir. 2016).

puter services, unfettered by Federal or State regulation.”²²⁵ But all three dissenting judges recognized the importance of this provision in understanding the overall intention of Congress in passing the 1996 Act. As Judge Brown said in opening her dissent: “its meaning could not be clearer.”

The Cox-Wyden amendment, “Online Family Empowerment, as Section 230 was initially known, established prevention of ISP liability.”²²⁶ The House-Senate conference committee report clearly states that “Section 104 of the House amendment protects from civil liability those providers and users of interactive computer services for actions to restrict or to enable restriction of access to objectionable online material.”²²⁷ Representative Cox, one of the provision's authors, has emphasized this aspect when describing the purpose of the bill.²²⁸ The Cox-Wyden amendment initially contained the following language: “FCC Regulation of the Internet and Other Interactive Computer Services Prohibited - Nothing in this Act shall be construed to grant any jurisdiction or authority to the Commission with respect to economic or content regulation of the Internet or other interactive computer services.”²²⁹ This language was eventually removed by the Committee — with no explanation in the record other than that the deletion of this language was a “minor modification.”²³⁰ The only explanation for this account is that the Committee believed that the Act, as a whole, conferred no such authority anyway — that there was no need to make this point even more clear by retaining the deleted language. In other words, the Committee believed that the 1996 Act overall, and because of Section 230 in particular, settled the “regulatory status of broadband” as well as of the overall Internet. Indeed, Rep. Cox later described the goal of the legislation that became Section 230 as keeping the FCC from “regulating prices of computer services offered over the Internet.”²³¹ Furthermore, he regularly expressed fears about the

²²⁵ 47 U.S.C. § 230(b)(2).

²²⁶ 141 Cong. Rec. H8468 (daily ed. Aug. 4, 1995).

²²⁷ S. Rep. No. 104-230, at 194 (1996) (Conf. Rep.).

²²⁸ See 146 Cong. Rec. H6067 (daily ed. July 17, 2000) (statement of Rep. Cox); see also Christopher Cox, Chairman, U.S. Sec. & Exch. Comm’n, Electronic Shareholder Forum Rules; Codification of Interpretation of Rule 14(a)(8)(i)(8) (Nov. 28, 2007), available at <http://www.sec.gov/news/speech/2007/spch112807cc.htm> (explaining that the bill “enhanced free speech on the Internet by making it unnecessary for internet service providers to unduly restrict customers’ actions for fear of being found legally liable for their conduct”).

²²⁹ See Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong. § 230(d) (1995).

²³⁰ H.R. Rep. No. 104-458, at 194 (1996) (Conf. Rep.).

²³¹ Press Release, Rep. Cox, Sen. Wyden to Unveil Highly-Touted Bill to Keep the Internet Free from Taxes (Mar. 12, 1997) (on file with author) (“Rep. Cox has been a longtime supporter of the Internet. His Internet Freedom and Family Empowerment Act approved by the U.S. House of Representatives in the summer of 1995, called on the Federal Communications Commission to stay [away] from regulating prices of computer services offered over the Internet.” (emphasis omitted)).

FCC turning into a "Federal Computer Commission" by engaging in direct regulation of Internet-based services.²³² How prescient he was!

Nowhere has the D.C. Circuit addressed an even more fundamental point about Section 230: Congress created broad immunity from civil liability (and state criminal prosecution) for "interactive computer services" — again, explicitly including Internet Service Providers in that term²³³ — precisely to encourage them to be non-"neutral":

(2) Civil liability No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected;²³⁴

Surely this clear statement of Congressional intent should have alerted the FCC that it had "taken an interpretive wrong turn"²³⁵ in arriving at an interpretation of both Title II and Section 706 to support rules that would bar such "Good Samaritan" policing — specifically, the no-blocking rule. It certainly should have given the *U.S. Telecom* court pause before declaring that "the role of broadband providers is analogous to that of telephone companies: they act as neutral, indiscriminate platforms for transmission of speech of any and all users."²³⁶ The D.C. Circuit called "indiscriminate, neutral transmission of any and all users' speech ... characteristic of common carriage."²³⁷ Yet this is clearly *not* what Congress for Internet Service Providers, whom it intended to be non-"neutral."

The D.C. Circuit failed to consider what this disconnect meant at *Chevron* Step Zero. Instead, the court focused on two questions relevant here: First, did Section 230, through its reference to "a service or system that provides access to the Internet" as one of many kinds of "information service"²³⁸ definitively resolve the definition of "information service." This is a Step One question. Second, did the Open Internet Order violate the First Amendment by

²³² See, e.g., Congressmen Decry the "Federal Computer Commission", Tech L.J., Mar. 31, 1998, <http://www.techlawjournal.com/telecom/80331fcc.htm>

²³³ 47 U.S.C. § 230(f)(2).

²³⁴ 47 U.S.C. § 230(c)(2).

²³⁵ *Utility Air Regulatory Group v. E.P.A.*, 134 S.Ct. 2427, 2446 (2014).

²³⁶ *United States Telecomms. Ass'n v. FCC*, 825 F.3d 674, 743.

²³⁷ *Id.* at 742.

²³⁸ 47 U.S.C. § 230(f)(2).

forcing common carrier status, and the Order’s specific rules, upon broadband providers? After a lengthy discussion of common carrier status, the court concluded:

If a broadband provider nonetheless were to choose to exercise editorial discretion—for instance, by picking a limited set of websites to carry and offering that service as a curated internet experience—it might then qualify as a First Amendment speaker. But the Order itself excludes such providers from the rules. The Order defines broadband internet access service as a “mass-market retail service”—i.e., a service that is “marketed and sold on a standardized basis”—that “provides the capability to transmit data to and receive data from all or substantially all Internet endpoints.” 2015 Open Internet Order, 30 FCC Rcd. at 5745–46 ¶ 336 & n.879. That definition, by its terms, includes only those broadband providers that hold themselves out as neutral, indiscriminate conduits. Providers that may opt to exercise editorial discretion—for instance, by offering access only to a limited segment of websites specifically catered to certain content—would not offer a standardized service that can reach “substantially all” endpoints. The rules therefore would not apply to such providers, as the FCC has affirmed. See FCC Br. 81, 146 n.53.

In other words, broadband providers may opt-out of the rules entirely. The court does not explain exactly what such an opt-out would look like. Determining the adequacy of such an opt-out would necessarily fall to the Commission. Would it suffice for a broadband provider to note, in its marketing claims, that it reserves the right to block highly objectionable content? Note here that, according to the FCC’s argument, affirmed by the court, once a broadband provider ceases to “hold[] [its]self out to serve the public indiscriminately” — the “basic characteristic” of common carriage²³⁹ — *all* of the rules would not apply, not merely the no blocking rule. This is necessarily the case because the FCC would, under its own argument, lack the legal authority to treat such broadband providers as common carriers under Title II or to impose common-carriage-like requirements on them via Section 706.

But suppose broadband providers followed the lead of Cloudflare, which refused to provide DDOS protection service to the neo-Nazi website TheDailyStormer.com, and Google and GoDaddy, which refused to provide domain name registration services to that site — and declared their intention to begin blocking that and other neo-Nazi websites, either by domain name or IP address. Would this suffice as an “opt-out” from the rules and common carrier status under Title II? Would it matter how the ISP went about announcing its new policy?

²³⁹ *U.S. Telecom* 740 F.3d at 651 (quoting *Verizon*).

Here, we focus on the application of Section 230 as an indication of what Congress intended — and whether, at Step Zero of *Chevron*, it was proper for the court to assume that the FCC’s interpretation of Section 706 and Title II did not raise a “major question,” And thus proceed to Step One.

The application of Section 230 in this situation is straightforward. Again:

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected;

Subsection (f)(2) clearly defines broadband providers as “interactive computer services.”²⁴⁰ There is no doubt that ISP that provides Internet search technology to Internet users, is an “interactive computer service” rather than “information content provider.” In *Doe v. GTE Corp*, the court treated broadband providers as Interactive computer services, emphasizing that “[r]emoving the risk of civil liability may induce web hosts and other informational intermediaries to take more care to protect the privacy and sensibilities of third parties.”²⁴¹

It is not difficult to see what would happen in dispute over whether a broadband provider’s opt-out from the rules was sufficient, or whether blocking a single sites, or a handful of sites, was sufficient to mean that the broadband provider no longer “provides the capability to transmit data to and receive data from all or substantially all Internet endpoints.”²⁴² If the FCC tried to enforce, say, its no-blocking rule, the broadband provider would win. Period. Because Section 230(c)(2) clearly bars any imposition of civil liability on the broadband provider for “restrict[ing] access to or availability of material that the provider ... considers to be ... excessively violent, harassing, or otherwise objectionable.” It would not matter if the broadband provider had, for example, previously expressed an absolute tolerance of all speech on its platform, disclaiming any possibility of ever blocking even neo-Nazi content. Section 230(c)(2) would still bar any and all civil liability — at least, so long as the broadband provider was acting “in good faith.”

²⁴⁰ 47 U.S.C.S. § 230.

²⁴¹ *Doe v. GTE Corp.*, 347 F.3d 655, 661 (7th Cir. 2003).

²⁴² 47 C.F.R. § 8.2 (2015).

In summary, Congress intended to give “interactive computer services,” including broadband, the discretion to act as the kind of neutral conduits the FCC wants them to be *or the opposite, to block content whenever they see fit*. First, how can could such a service possibly be treated as a common carrier? At a minimum, this question should have “alerted [the agency] that it had taken a wrong interpretive turn”²⁴³ and caused the court to carefully consider the “major question” of common carrier treatment of broadband providers at *Chevron* Step Zero. The FCC cannot “adopt ... unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness.”²⁴⁴

2. “Good Faith” Requirement

As discussed below, analysis of Section 230 also suggests that the ability of the FTC or the states to enforce promises not to block or throttle content, or to bring other causes of action for blocking, will turn on whether such blocking was done “in good faith” — as required by Section 230(c)(2). In brief, this likely means that the FTC would have to show that blocking or throttling content was done for purely anti-competitive reasons, not as an exercise of editorial discretion. The courts have applied Section 230 broadly to protect the exercise of editorial discretion. In *E360insight, LLC b Comcast Corp.*, the court held that the Good Samaritan provision of Section 230 protected the broadband provider for restricting availability of material (spam emails) that provider found objectionable.²⁴⁵ In *Holomaxx Technologies v. Yahoo!*, the court found that Section 230 did not specifically impose any duties on providers, such as responding to, or complying with, requests to unblock materials.²⁴⁶

Since Section 230 gives ISPs immunity when they make decision to restrict any of the content on their networks, then, based on the complete derogation doctrine, a court should not read another statute to allow an agency to limit their ability restrict content. Particularly, in *Department of Revenue of Ore. v. ACF Industries, Inc.*, the Court ruled that “the 1933 Act, like every Act of Congress, should not be read as a series of unrelated and isolated provisions. Only last Term we adhered to the “normal rule of statutory construction” that “identical words used in different parts of the same act are intended to have the same meaning.”²⁴⁷

²⁴³ *Utility Air Regulatory Group v. E.P.A.*, 134 S.Ct. 2427, 2246 (2014).

²⁴⁴ *Coalition for Responsible Regulation, Inc. v. E.P.A.*, 2012 WL 6621785 (2012) at 16.

²⁴⁵ *E360insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605.

²⁴⁶ *Holomaxx Techs. v. Yahoo!, Inc.*, 783 F. Supp. 2d 1097, 1105 (N.D. Cal. Mar. 11, 2011).

²⁴⁷ *Department of Revenue of Ore. v. ACF Industries, Inc.*, 510 U.S. 332, 342, 114 S.Ct. 843, 849, 127 L.Ed.2d 165 (1994) (internal quotation marks and citations omitted); see also *Brooke Group Ltd. v. Brown & William-*

Hence, if read together as the Court requires, Sections 706 and 230 simply cannot be reconciled under the FCC's interpretation. To say that Congress expressly granted ISPs the right to "restrict access to or availability of material," which Section 230 does expressly, yet somehow also said the FCC has the authority to say they cannot restrict access would constitute a complete derogation of Section 230. Indeed, such a reading of Section 706 would derogate Section 230 again, by directly dismissing Congress' clear policy directive "(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."²⁴⁸

Enforcing a general no-blocking rule will require legislation to overcome Section 230. But even such a statute would still face the same the First Amendment issue discussed by the *U.S. Telecom* court.

3. The Section 230(c)(1) Immunity May Also Protect "Conduits"

It is also possible that broadband providers may claim a second immunity for non-"neutral" conduct under Section 230 — one not tied to a good faith requirement. Section 230(c)(1) provides a safe harbor for websites and ISPs, declaring that they "shall [not] be treated as the publisher or speaker of any information provided by another information content provider."²⁴⁹ This immunity, like the other immunities conferred by Section 230, applies so long as they do not "create or develop" the content at issue.²⁵⁰

Of course, if the FCC were trying to enforce net neutrality rules against a broadband provider raising a broad Section 230(c)(1) immunity, the Commission would no doubt argue that was not treating the broadband provider as the "publisher" of user material — that the provider was being held liable not for the material it carried, but for the material it *refused* to carry.

But courts have rejected attempts to define the immunity narrowly — to exclude "distributors." In *Zeran v. Am. Online, Inc.*, 129 F.3d 332 (4th Cir. 1997), the Fourth Circuit acknowledged that distributors are ordinarily subjected to a different liability standard in defamation law, but held that, since any party involved in a defamation action necessarily is

son Tobacco Corp., 509 U.S. 209, 230, 113 S.Ct. 2578, 2591, 125 L.Ed.2d 168 (1993); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433, 52 S.Ct. 607, 609, 76 L.Ed. 1204 (1932).

²⁴⁸ 47 U.S.C.S. § 230(b)(2).

²⁴⁹ CDA § 230(c)(1).

²⁵⁰ CDA § 230(c)(1).

charged with "publication," the term "publisher" in Section 230(c)(1) must include both publishers and distributors.²⁵¹

The FCC views broadband providers as "conduits" — which essentially the same thing as "distributors." "An ISP, like a telephone company, is merely a conduit."²⁵² As *de facto* "distributors" of the content, broadband providers would be shielded by Section 230 (c)(1) — regardless of whether they act in good faith or not. Put differently, Section 230(c)(1) has been held to protect online intermediaries exercising editorial discretion, *including* curation — i.e., deciding which content to carry or not carry.²⁵³

Even if the FCC succeeds in convincing a court that selective blocking of content otherwise carried by a broadband provider should, as in the *E360insight, LLC* case (selective blocking of spam emails) be covered by the more limited Good Samaritan immunity of Section 230(c)(2) rather than Section 230(c)(1), the FCC may still run into the Section 230(c)(1) on the margins, in trying (absent legislation) to enforce net neutrality rules against, for example, new and innovative services that look less like selective blocking.

Consider, for example, how soon-to-be-deployed 5G networks may handle video traffic. Among the key advantages of 5G wireless architectures is that the small cells (smaller and far more numerous than today's 4G antennas) will include caching of frequently accessed content as well as computational power. Pushing these elements closer to the user will allow the network to deliver, in particular, high-quality video streaming. But it also creates scarcity: there will be only so much caching and computational capacity in each small cell. So suppose a 5G carrier launches its new network carrying only the video content of an affiliate, arguing that this is a specialized service not subject to the rules. Next assume that the FCC brings a net neutrality enforcement action, insisting that the carrier is attempting to circumvent the rules and that the new service is the "functional equivalent" of traditional wireless carriers. The carrier would have a strong argument to broad immunity under Section 230(c)(1) because it is, in fact, being held liable the content it carries — i.e., the fact of carrying only that one video provider's content or the exercise of editorial/business judgment in carrying that content. In other words, the immunity may defeat the FCC's attempts to enforce the rules.

²⁵¹ *Zeran v. Am. Online, Inc.*, 129 F.3d 332 (4th Cir. 1997).

²⁵² *Lunney v. Prodigy Servs. Co.*, 723 N.E. 2d 539, 542 (N.Y. 1999).

²⁵³ *Klayman v. Zuckerberg*, 753 F. 3d 1354, 1359 (D.C. Cir. 2014) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 332 (4th Cir. 1997)).

In any event, the possibility that Section 230(c)(1) may protect broadband providers, without any "good faith" exception, is all the more reason that this debate can only be resolved by Congress.

V. Myth #4: "Title II Lite" or the Limits of Forbearance

Section 10 of the 1996 Act²⁵⁴ authorizes the Commission to forbear from applying provisions of Title II that it deems unnecessary, as Justice Scalia noted in his Brand X dissent.²⁵⁵ Many of those advocating Title II have cited Scalia's dissent in asserting that forbearance will allow the Commission to avoid adverse consequences of Title II.²⁵⁶ The FCC insists that it has addressed concerns about Title II through "unprecedented" and "broad" forbearance.

A. The FCC's Discretion under Section 10 and Ability to Change Course on Forbearance

Prior to the Order, the FCC had made forbearance very difficult. After the Republican-led FCC used forbearance to clear regulatory barriers — most notably to fiber deployment — the FCC under Democrat Julius Genachowski reversed course, and raised the bar considerably for forbearance. Specifically, the FCC denied Qwest's forbearance petition because it concluded that the market for voice services in the Phoenix area, after discounting competition from wireless only households who had cut-the-cord, was a cable-telco duopoly and that was inadequate to protect consumers.²⁵⁷ But under *Qwest*, if wireless broadband were not considered a competitor and no account were taken of new entrants like Google Fiber,

²⁵⁴ 47 U.S.C. § 160 provides: "Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest."

²⁵⁵ Brand X, 545 U.S. at 1012 (Scalia, J., dissenting).

²⁵⁶ See, e.g., Austin Schlick, A Third-Way Legal Framework for Addressing the Comcast Dilemma, 3 (May 6, 2010), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf; Tim Wu & Tejas N. Narechania, Sender Side Transmission Rules for the Internet, Columbia Public Law Research Paper No. 14-400, 19 (June 6, 2014) (publication forthcoming in Fed. Comm. L.J.), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2447107.

²⁵⁷ *Qwest Corp. v. FCC*, 689 F. 3d 1214 (10th Cir. 2012) [*Qwest*].

the FCC could not grant significant forbearance in the nearly 70% of markets in which Americans have two or fewer ISP choices according to FCC data.²⁵⁸

The Order significantly lowered the bar on forbearance. The D.C. Circuit deferred to each aspect of the FCC's interpretation of its forbearance authority under Section 160. Most notably, the court rejected arguments that the FCC was also required to satisfy the requirements of Section 251 by performing the analysis required by Section 160 "for each regulation, provision and market."²⁵⁹ This was critical to the "broad" forbearance the FCC itself thought was necessary to "modernize" Title II.

The court did not, of course, consider the question of unforbearance, since that question was not before it, but did grant broad *Auer* deference to the agency on another issue not addressed by the FCC's forbearance current rules: must the FCC follow its own rules for forbearance petitions when granting forbearance *sua sponte*?

"[W]e review an agency's interpretation of its own regulations with 'substantial deference.'" *In re Sealed Case*, 237 F.3d 657, 667 (D.C. Cir. 2001) (quoting *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994)). The agency's interpretation "will prevail unless it is 'plainly erroneous or inconsistent' with the plain terms of the disputed regulation." *Everett v. United States*, 158 F.3d 1364, 1367 (D.C. Cir. 1998) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

The Commission's interpretation of its regulations easily satisfies this standard. By their own terms, the regulations apply to "petitions for forbearance," and nowhere say anything about what happens when, as here, the Commission decides to forbear without receiving a petition. See 47 C.F.R. § 1.54. To the extent this silence renders the regulations ambiguous in the circumstance before us, the Commission's interpretation is hardly "plainly erroneous." *Everett*, 158 F.3d at 1367 (internal quotation marks omitted).²⁶⁰

By the same logic, in the absence of any rules on reversing forbearance decisions, the Commission will enjoy *very* broad discretion to reverse previous grants of forbearance —

²⁵⁸ Indus. Analysis & Tech. Div. Wireline Competition Bureau, Internet Access Services: Status as of December 31, 2012, 9 (Dec. 2013), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db1224/DOC-324884A1.pdf (showing 64% of American households having access to two or fewer ISPs capable of delivering fixed-broadband with speeds at least 6 Mbps downstream and at least 1.5 Mbps upstream).

²⁵⁹ *U.S. Telecom I*, 825 F.3d at 85-94.

²⁶⁰ *United States Telecomms. Ass'n v. FCC*, 825 F.3d 674, 727 (D.C. Cir. 2016).

such as those in the order itself. The Order itself acknowledges that promises to forbear “do not have the force of a legal rule that prevents [the Commission] from [applying Title II’s more onerous provisions] in the future.”²⁶¹ This likely means that unforbearance would be subject to *Skidmore*²⁶² deference, rather than *Chevron*. As the Supreme Court said in 2000, “[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference.”²⁶³

B. Forbearance Today, Unforbearance Tomorrow

Making forbearance easier, at least when done *sua sponte* by the Commission, is a double-edged sword: On the one hand, making forbearance easier was essential to the FCC’s “tailoring” of Title II to avoid the most obviously disastrous consequences of Title II. But on the other hand, simplifying and expediting forbearance would have the same effect on unforbearance — and the same claims to deference would apply in both cases. To that extent, changing the forbearance process undermined the regulatory certainty provided by forbearance, making it less effective as a policy tool for neutralizing the negative consequences of Title II on investment and therefore less capable of helping the Commission fulfill its statutory mandate under Section 706 to promote broadband deployment or address the reliance interests predicated on Title I.

C. The FCC *Did* Apply the Core of Title II

While trumpeting its “broad” forbearance, the FCC concluded that “sections 201 and 202 of the Act, along with section 208 and certain fundamental Title II enforcement authority, necessary to ensure just and reasonable conduct by broadband providers and necessary to protect consumers...”²⁶⁴ As the Order notes, “The Commission has found that sections 201 and 202 “lie at the heart of consumer protection under the Act.”²⁶⁵ Nowhere, of course does the Commission stop to consider one simple question: what can the Commission do under

²⁶¹ See 30 FCC Rcd at 5656 (¶ 127), and nn. 301, 302.

²⁶² *Skidmore v. Swift & Co.*, 65 S.Ct. 161 (1944).

²⁶³ *Christensen v. Harris County*, 529 U.S. 576 (2000).

²⁶⁴ 25 FCC Rcd. 17905 (2010) ¶ 440.

²⁶⁵ Report and Order on Remand, Declaratory Ruling, and Order, *In re Protecting and Promoting the Open Internet*, 29 FCC Rcd 5561 ¶ 441 (2015) (quoting Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for Forbearance for Broadband Personal Communications Services et al., WT Docket No. 98-100, GN Docket No. 94-33, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, 16865, ¶ 15 (1998)).

the parts of Title II that it forbore from that it cannot do under Sections 201 and 202, the ‘heart’ of the Communications Act?

Commissioner O’Rielly’s dissent hits the nail squarely on the head: “the majority seems to be comfortable with suggesting that they can forbear from parts of Title II because section 201 does it all anyway.”²⁶⁶ For example, the Commission recently declared, in the *Terracom* enforcement action, that 201(b) covers data security practices of telecommunications carriers.²⁶⁷ Commissioner O’Rielly declares, “if data protection falls within the ambit of 201(b), then I can only imagine what else might be a practice ‘in connection with’ a communications service.”²⁶⁸

To this, we would merely add that Congress took the text of Sections 201 and 202 from the heart Interstate Commerce Act of 1887, for example, Section 1:

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every **unjust and unreasonable charge for such service is prohibited and declared to be unlawful.**

And Section 2:

Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, **such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.**

²⁶⁶ 25 FCC Rcd. 17905 (2010) ¶ 396.

²⁶⁷ *TerraCom, Inc. and YourTel America, Inc., Apparent Liability for Forfeiture*, File No.: EB-TCD-13-00009175, 29 FCC Rcd 13325 (2014), https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-173A1_Rcd.pdf.

²⁶⁸ 25 FCC Rcd. 17905 (2010) ¶ 399.

Simply put, the FCC’s “fauxbearance,” as Commissioner O’Rielly puts it, leaves in place not merely the heart of Title II, but the same basic provisions crafted to govern railroads in the 1880s.

VI. Myth #5: “Section 706 Is an Independent Grant of Authority”

One of the underlying issues before the Commission is its claim of sweeping power and its essentially unchecked discretion to govern the Internet, including the supposed power to preempt decisions made by elected state lawmakers—without Congressional authorization. While we explore the preemption issues in greater detail in joint comments filed in this docket with the American Legislative Exchange Council, here we will address the constitutional and legal issues arising from the FCC’s improper claim that Section 706 of the Telecommunications Act of 1996 is an independent grant of authority.

To reject the FCC’s reinterpretation of Section 706 as an independent grant of authority is not to say that nothing more need be done to promote broadband deployment and competition—but to affirm two facts about the Telecommunications Act of 1996 (“1996 Act”). First, Congress intended Section 706 as a command to the FCC to use the abundant authority granted to it elsewhere in the 1934 Communications Act (“1934 Act”) to promote broadband deployment to all Americans. As the FCC said in 1998:

After reviewing the language of section 706(a), its legislative history, the broader statutory scheme, and Congress’ policy objectives, we agree with numerous commenters that section 706(a) does not constitute an independent grant of forbearance authority *or of authority to employ other regulating methods*. Rather, we conclude that *section 706(a) directs the Commission to use the authority granted in other provisions*, including the forbearance authority under section 10(a), to encourage the deployment of advanced services. *Advanced Services Order*, ¶ 69 (emphasis added).

Second, rejecting the FCC’s reinterpretation means affirming that Congress intended “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.”²⁶⁹

The FCC has done much to promote broadband deployment and competition in the past, relying on Section 706 to justify its interpretation of *other* grants of authority. Notably, in 2003, the FCC declined to require telephone companies (“telcos”) to unbundle new “Fiber-

²⁶⁹ 47 U.S.C. § 230(b)(2); *see also* 47 U.S.C. § 230(a)(5) (“The Internet and other interactive computer services have flourished, . . . with a minimum of government regulation.”).

to-the-Home” networks to encourage telcos to invest in fiber upgrades for their traditional copper infra- structure. This decision was arguably essential to Verizon’s deployment of its all-fiber FiOS network as a powerful alternative to cable broadband—precisely the progress Congress contemplated in Sections 230 and 706.²⁷⁰

In 2004, the D.C. Circuit upheld the FCC’s decision on these grounds: “the FCC may weigh the ‘costs of unbundling’ (*e.g.*, investment disincentives) against the ‘benefits of removing this barrier to competition.’”²⁷¹ After the FCC extended this approach to other elements of telcos’ networks, for the same reasons, the D.C. Circuit again upheld the FCC’s reliance on Section 706 as a policy preference, referring to it as “set[ting] forth the following overarching direction,” and simply quoting its text.²⁷²

In 2008, the FCC began to tack a new course: claiming Section 706 as one of several statutory policy statements that conferred on the agency ancillary authority to enforce the FCC’s 2005 Internet Policy Statement.²⁷³ In 2010, the D.C. Circuit struck down this order, holding the FCC to its 1998 decision that Section 706(a) was not a grant of authority.²⁷⁴ The court warned that the FCC’s reliance on statements of Congressional policy as bases for ancillary jurisdiction would, “if accepted[,] . . . virtually free the Commission from its congressional tether.” *Id.* at 656. Because the FCC had not officially reinterpreted Section 706, the court did not opine on the meaning of that provision.²⁷⁵

In the 2010 Open Internet Order, the FCC reinterpreted Section 706 as a grant of authority, reversing its 1998 interpretation—instead of seeking clear legislative authority from Congress to enact its “net neutrality” rules.²⁷⁶ The FCC claimed that reading the provision as a source of authority was “consistent with” its 1998 statement that Section 706 “‘gives this Commission an affirmative obligation to encourage the deployment of advanced services’ using its existing rulemaking, forbearance and adjudicatory powers, and stressed that ‘this

²⁷⁰ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 ¶ 3 (2003).

²⁷¹ *Earthlink, Inc. v. FCC*, 462 F.3d 1, 6 (D.C. Cir. 2006) (citing *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 579 (D.C. Cir. 2004)).

²⁷² *Id.* at 5–6.

²⁷³ Memorandum Opinion and Order, *In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd 13028 ¶ 18 (2008).

²⁷⁴ *Comcast Corp. v. FCC*, 600 F.3d 642, 658–59 (D.C. Cir. 2010).

²⁷⁵ *See id.* at 659.

²⁷⁶ Report and Order, *In re Preserving the Open Internet*, 25 FCC Rcd 17905 ¶ 118 (2010).

obligation has substance.”²⁷⁷ The FCC asserted that “Congress necessarily invested the Commission with the statutory authority to carry out” the tasks enumerated in Section 706(a).²⁷⁸

The FCC’s interpretation of Section 706 contradicts three fundamental principles of statutory construction and raises three of the same major questions as to the FCC’s reclassification of broadband carriers: (1) the immense economic and political significance of the Open Internet Rule requires that Congress expressly grant the FCC authorization to enact it, (2) Congress never intended, nor even alluded to, Section 706 providing the FCC with such an independent grant of authority, and (3) in order to avoid non-delegation problems, the Commission must construe Section 706 narrowly.

A. The FCC Incorrectly Presumed that Congress Granted it the Power to Decide a Question of Significant “Economic and Political Significance” Without the Requisite Express Statutory Authority to Do So

Underlying our entire constitutional republic is the separation of powers doctrine, which divides power among three coequal branches of the National government, and was viewed by the Founding Fathers as necessary to protect liberty.²⁷⁹ Under this system, the Constitution vests Congress with the power to make laws,²⁸⁰ the Executive branch with the responsibility to “take Care that the Laws be faithfully executed,”²⁸¹ and the Judiciary with the power “to determine whether the Executive has acted consistently with the Constitution and states” passed by Congress.²⁸² Put differently, Congress makes the laws, and the Executive does not “possess a general, free-standing authority to issue binding legal rules.”²⁸³ Thus the FCC, like any other agency, has “literally . . . no power to act . . . unless and until Congress confers power upon it.”²⁸⁴

²⁷⁷ *Id.* ¶ 119 (quoting Memorandum Opinion and Order, And Notice of Proposed Rulemaking, *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012 ¶ 74 (1998)).

²⁷⁸ *Id.*

²⁷⁹ See, e.g., George Washington, Farewell Address (Sept. 19, 1796), in *THE FOUNDERS’ CONSTITUTION* (Philip B. Kurland & Ralph Lerner eds., University of Chicago Press 1987) (“The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the guardian of the public weal against invasions by the others, has been evinced by experiments ancient and modern, some of them in our country and under our own eyes.”).

²⁸⁰ U.S. CONST. art. I, § 1.

²⁸¹ U.S. CONST. art. II, § 1, cl. 1.

²⁸² *U.S. Telecom II*, 855 F.3d at 418.

²⁸³ *Id.* at 419.

²⁸⁴ *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

Although courts respect agencies' discretion as to the "formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress,"²⁸⁵ courts also must preserve Congress's constitutional power and duty to define the scope of agency discretion, by "taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority."²⁸⁶ As discussed above, when an agency action involves a major question of "economic and political significance," courts must be even more diligent in applying statutory limits on agencies' authority, since "Congress itself is 'more likely to have focused upon, and answered, major questions.'"²⁸⁷

The FCC argues that Congress—despite no legislative history other than a passing reference in a Senate committee report—embedded, in a scant 182 words, a grant of authority that allows the FCC to do *anything* regarding "communications" that is not specifically prohibited by the other 46,290 words of the 1996 Act or the 16,900 words of the 1934 Act (or the Constitution). The FCC neglects to mention that this committee report language was dropped from the final Conference Report.²⁸⁸ The FCC's claim grows even more incredible still, considering that the 1996 Act did not initially place Section 706 in the 1934 Act, instead leaving Section 706 to be appended as a mere note to a preexisting Communications Act section—and that, when Congress finally codified Section 706 in 2008, it placed it *outside* the Communications Act.

Among the endless imaginable ways the FCC could, under its interpretation, use Section 706, it would be difficult to find a policy objective less consistent with 47 U.S.C. § 230 than the one here: to impose sweeping regulations on the Internet. The 1996 Act makes the intention of Congress plain: "to preserve the vibrant and competitive free market for [broadband]," yet the FCC has attempted to regulate "every Internet service provider, every Internet content provider, and every Internet consumer"²⁸⁹—the very antithesis of a "free market."

The absurdity of the FCC's claim of authority was articulated particularly well by none other than former FCC Commissioner Michael O'Rielly, who sat on the Commission when the interpretation was adopted. O'Rielly—a staff member with the House Energy and Commerce Commission at the time the Telecommunications Act of 1996 was being drafted—once recounted his view of the law's drafting process with Randolph May, the Founder and

²⁸⁵ *Chevron*, 467 U.S. at 843.

²⁸⁶ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013).

²⁸⁷ *U.S. Telecom II*, 855 F.3d at 419 (Kavanaugh, J., dissenting).

²⁸⁸ H.R. Rep. No. 104-458, at 210 (1996).

²⁸⁹ *U.S. Telecom II*, 855 F.3d at 419 (Kavanaugh, J., dissenting).

President of the Free State Foundation.²⁹⁰ During this exchange, former Commissioner O’Rielly recounted that, in order to accept the FCC’s interpretation of what Section 706 means, you would have to make some “pretty wild assumptions.”²⁹¹ Namely, he noted:

You would have to believe that a Republican Congress with a deregulatory mandate inserted very vague language into the statute to give complete authority over the Internet and broadband to the FCC, but then didn’t tell a soul. It didn’t show up in the writings, it didn’t show up in the summaries. It didn’t show up in any of the stories at the time.

You would have to believe that the conference committee intended to codify Section 706 outside of the Communications Act, thereby separating it from the enforcement provisions of the Act, Title V, but somehow we still expected it to be enforced. [The Communications Act was not amended to include Section 706.]

You would have to believe that the congressional committees that went on to do an extensive review of FCC authority afterwards, and even proposed legislation to rein it in, in terms of FCC reauthorization legislation, that they went through that effort, but at the same time they had provided a secret loophole to the Commission to regulate.

You would have to believe that when Congress is having extensive debates over the ability to regulate, or the ability to give the Commission authority to regulate net neutrality, at the same time they had already given the Commission this authority.²⁹²

As former Commissioner O’Rielly concluded, “[i]t’s mindboggling to believe that all of those assumptions, and there are many more, are true. You would have to suspend your rational thought to get to that point.”²⁹³ While his recounting of the legislative process is certainly not legislative history, it nonetheless highlights the absurdity of the FCC’s interpretation of Section 706 as an independent grant of authority, and just how far afield it is from what was widely understood to be Section 706’s original meaning. Indeed, as discussed below,

²⁹⁰ See, e.g., *Interview with Michael O’Rielly*, C-Span (March 18, 2014), <https://www.c-span.org/video/?318351-4/interview-michael-orielly>; The Free State Foundation, *Section 706, Wild Assumptions, and Regulatory Restraint* (Mar. 31, 2014), <http://freestatefoundation.blogspot.com/2014/03/section-706-wild-assumptions-and.html> (discussing interview).

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

this was the FCC’s *own* understanding of Section 706 until it drastically changed course following *Comcast Corp. v. FCC*.

What this collectively makes clear is two-fold: not only has Congress never clearly granted the FCC the authority to regulate “every Internet service provider, every Internet content provider, and every Internet consumer,”²⁹⁴ but, in fact, the one thing Congress did make clear was that the FCC could *not* do so — since such a rule would clearly “preserve [a] vibrant ... free market unfettered by Federal ... regulation[.]”²⁹⁵

1. Supreme Court Precedent Shows the FCC’s Reinterpretation Must Be Met with Immense Skepticism

As the Supreme Court has made clear to the FCC before, this lack of clear statutory authority prevents major agency actions, because it is “highly unlikely that Congress would leave the determination of whether an industry will be entirely, *or even substantially*, rate-regulated to agency discretion.”²⁹⁶ Similarly, in *Brown & Williamson*, the agency was “assert[ing] jurisdiction to regulate an industry constituting a significant portion of the American economy,” but without anchoring its regulatory program in clear congressional authorization to do so.²⁹⁷ “[W]e are confident,” the Court concluded, “that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”²⁹⁸

Section 706 is equally cryptic and the FCC’s reinterpretation of it deserves equal—if not greater—skepticism. Even if an agency’s policy aims are sound, the agency’s good intentions are no substitute for the constitutional requirement that the agency’s policy “must always be grounded in a valid grant of authority from Congress.”²⁹⁹

In *American Bar Association v. FTC*, the D.C. Circuit rebuffed the FTC’s “attempted turf expansion” over the legal industry, based on a broad statute empowering the agency to regulate institutions that “engag[ed] in financial activities.”³⁰⁰ Even if the statute were ambiguous, the Court explained,

²⁹⁴ *U.S. Telecom II*, 855 F.3d at 417 (Kavanaugh, J., dissenting).

²⁹⁵ 47 U.S.C. § 230(b)(2).

²⁹⁶ *MCI Telecomm’s Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994).

²⁹⁷ *Brown & Williamson*, 529 U.S. at 159.

²⁹⁸ *Id.* at 160.

²⁹⁹ *Id.* at 161.

³⁰⁰ *American Bar Association v. FTC*, 430 F.3d 457, 467 (D.C. Cir. 2005).

[w]hen we examine a scheme of the length, detail, and intricacy of the one before us, we find it difficult to believe that Congress, by any remaining ambiguity, intended to undertake the regulation of the profession of law—a profession never before regulated by “federal functional regulators”—and never mentioned in the statute.³⁰¹

To accept the FTC’s self-aggrandizing statutory interpretation would have required the conclusion that Congress “had hidden a rather large elephant in a rather obscure mousehole.”³⁰² “Such a dramatic rewriting of the statute is not mere interpretation.”³⁰³

The D.C. Circuit similarly rejected the IRS’s assertion of authority over tax-preparers, characterizing it as a decision “of major economic or political significance,” because the agency “would be empowered for the first time to regulate hundreds of thousands of individuals in the multi-billion-dollar tax preparation industry.”³⁰⁴ “[W]e find it rather telling that the IRS had never before maintained that it possessed this authority.”³⁰⁵

The FCC’s reinterpretation of Section 706 raises the same economic concerns. To say that the FCC’s assertion of Section 706 authority over the Internet— indeed, all “communications”—directly implicates regulation of a “significant portion of the economy” is an immense understatement. 85% of Americans rely upon the Internet every day.³⁰⁶ Between 1996 and 2013, private broadband providers invested a staggering \$1.3 trillion in private capital in broadband infrastructure,³⁰⁷ making them the largest source of private investment over that timeframe.³⁰⁸ These numbers do not even include the ubiquitous Internet services that run on top of America’s broadband infrastructure.

What makes the FCC’s interpretation of Section 706 even more concerning than both the IRS’ assertion of authority over taxpayers and the FTC’s assertion over the legal industry is the immense political significance of the Order. As discussed above, over 20 million com-

³⁰¹ *Id.* at 469.

³⁰² *Id.*

³⁰³ *Id.* at 470.

³⁰⁴ *Loving v. United States*, 742 F.3d 1013, 1021 (D.C. Cir. 2014).

³⁰⁵ *Id.*; see also *UARG*, 134 S. Ct. at 2444 (“When an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ we typically greet its announcement with a measure of skepticism.”) (citation omitted).

³⁰⁶ Thom File & Camille Ryan, U.S. Census Bureau, *Computer and Internet Use in the United States: 2013*, at 2 (Nov. 2014), available at <http://goo.gl/usqJk>.

³⁰⁷ Patrick Brogan, U.S. Telecom, *Latest Data Show Broadband Investment Surged In 2013* (Sept. 8, 2014), available at <http://goo.gl/Cpo9hc>.

³⁰⁸ Nat’l Economic Council, *Four Years of Broadband Growth*, 5 (2013), available at <http://goo.gl/f72B2s>.

ments have been filed in the current proceeding—far surpassing the previous record, which was set by the previous net neutrality rulemaking—political opponents have erected billboards attacking Members of Congress for their position on the issue, and numerous media outlets have regularly published articles tracking who is “winning” the proceeding.³⁰⁹ For these reasons, it is hard to imagine an agency action that would be more representative of the types of rules of “vital... *political* significance” that demands clear congressional authorization by the Supreme Court.³¹⁰

The FCC’s reinterpretation of Section 706 would give it essentially unfettered power to govern every aspect of the communications sector of the U.S. economy, which comprises an unquantifiable and rapidly growing amount of economic value. And it would do so based on new found authority in a longstanding statute after many years of the agency disclaiming such powers.³¹¹ The FCC’s assertion of these powers squarely contravenes Congress’s express policy statement in Section 230—both its warning against regulation and its preference for “preserv[ing] the . . . free market[.]” This Court should not conclude that Congress delegated a question of such economic and political magnitude to the FCC’s discretion based solely on the agency’s contorted reading of a mere 182 words that are not even codified in the Communications Act.

B. Read in Context of the Whole Act, Congress Did Not Intend Section 706 to Provide the FCC With Any New Authority

The Whole Act Rule, a long-standing canon of statutory construction, mandates that courts read statutes in their entirety and, “every Act of Congress should not be read as a series of unrelated and isolated provisions.”³¹² It does not take a lawyer to understand the rationale for this “normal rule of statutory construction:” courts should presume that Congress acts coherently.³¹³

Read in context of the “whole act” (the 1996 Act), the meaning of Section 706 is plain: the FCC “shall” use its many *other* sources of authority to promote deployment and competition

³⁰⁹ See *supra* at 34-40 (discussing political significance of Order); see also Margaret Harding McGill, *Telecom group claims net neutrality comment victory*, PoliticoPro (Aug. 30, 2017), <https://www.politicopro.com/technology/story/2017/08/telecom-group-claims-net-neutrality-comment-victory-161214>.

³¹⁰ *Brown & Williamson*, 529 U.S. at 133.

³¹¹ Memorandum Opinion and Order, And Notice of Proposed Rulemaking, *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012 ¶ 69 (1998).

³¹² *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995).

³¹³ *Id.* (citing *Department of Revenue of Ore. v. ACF Industries, Inc.*, 510 U.S. 332, 342 (1994)).

in the broadband (“advanced tele- communications”) market.³¹⁴ This commandment does not *empower* the FCC to do anything it otherwise could not; indeed, it *constrains* the FCC by allowing other parties to “compel agency action unlawfully withheld or unreasonably delayed.”³¹⁵

However, despite the requirement, reviewing courts in accepting the FCC’s interpretation have failed to read the Act as a whole, and instead simply accepted the FCC’s self-deputization of authority because “[a]s the Commission put it in the Open Internet Order, one might reasonably think that Congress” intended to do so.³¹⁶ In doing just that, the *Verizon* court created—and rejected, based on *Chevron* deference—a straw man: “that Congress could never have intended [Section 706] to set forth anything other than a general statement of policy.”³¹⁷ But in the context of the “whole act,” the meaning of Section 706 is plain: it is a commandment that the FCC “shall” use its many *other* sources of authority for the purposes of promoting broadband deployment and competition. As Commissioner Pai noted in his dissent from the Order on review, each of the terms used in Section 706 correlates to a specific grant of authority elsewhere in the act.³¹⁸

Section 706 does not *empower* the FCC to do anything it could not have done otherwise. Instead, it forces the FCC to give great weight to the goal of encouraging broadband deployment in all its decision-making and it *constrains* the FCC—by allowing other parties to obtain a writ of *mandamus* from a federal court to “compel agency action unlawfully withheld or unreasonably delayed” under the Administrative Procedure Act.³¹⁹ That is the “fail-safe” contemplated by the 1996 Senate Committee report, upon which the FCC places so much weight,³²⁰ and the “affirmative obligation . . . that has substance” cited by the FCC in 1998.³²¹

³¹⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 153, as modified by the Broadband Data Improvement Act, Pub. L. No. 110-385, Title I, 122 Stat. 4096 (2008) (codified at 47 U.S.C. § 1302).

³¹⁵ 5 U.S.C. § 706(1).

³¹⁶ *Verizon*, 740 F.3d at 639–40.

³¹⁷ *Id.*

³¹⁸ Memorandum Opinion and Order, *In re City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq., The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601*, 30 FCC Rcd 2408, 2516 (2015).

³¹⁹ 5 U.S.C. § 706(1).

³²⁰ Memorandum Opinion and Order, And Notice of Proposed Rulemaking, *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012 ¶ 119 (1998).

³²¹ *Id.* ¶ 74.

The FCC’s alternative interpretation—that this brief section gives it the authority to do anything regarding any form of “communications” that is not expressly forbidden to the agency—is the epitome of unreasonable statutory interpretation foreclosed by the Court’s mandate that “identical words used in different parts of the same act are intended to have the same meaning.”³²²

1. Section 706 Is Ineligible for *Chevron* Review Because Congress Deliberately Placed It Outside the 1934 Act

That Congress deliberately placed Section 706 *outside* the 1934 Act, and therefore outside of the Commission’s general rulemaking authority, makes the FCC’s interpretation of Section 706 even more untenable. *Chevron* applies only when “a court reviews an agency’s construction of the statute it administers.”³²³ Further, the agency must have “express congressional authorization . . . to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”³²⁴

Whenever the FCC interprets a provision of the 1934 Act, “the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the [1934] Act through rulemaking and adjudication, and the agency interpretation was promulgated in the exercise of that authority.”³²⁵ These preconditions were *not* present when the FCC reinterpreted Section 706 in the 2010 Open Internet Order, as it is not part of the 1934 Act.

The 1934 Act is codified in Chapter 5 of Title 47 of the United States Code.³²⁶ Chapter 5 has seven subchapters, or “titles,” that comprise the 1934 Act.³²⁷ Title I created the FCC and empowered it to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [C]hapter [5], as may be necessary in the execution of its functions.”³²⁸ Congress inserted many, but not all, of the provisions of the 1996 Act into Chapter 5.³²⁹ Some provisions of the 1996 Act amended preexisting chapters of the U.S.

³²² *Gustafson*, 513 U.S. at 570.

³²³ *Chevron*, 467 U.S. at 842.

³²⁴ *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

³²⁵ *City of Arlington*, 133 S. Ct. at 1874.

³²⁶ 47 U.S.C. § 609.

³²⁷ Report and Order, *In re Preserving the Open Internet*, 25 FCC Rcd 17905 ¶ 79, n.248 (2010).

³²⁸ 47 U.S.C. § 154(i).

³²⁹ See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 1(b) (“[W]henever . . . an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the [1934] Act”).

Code,³³⁰ others were “freestanding enactment[s].”³³¹ One such freestanding enactment was Section 706.

The Office of the Law Revision Counsel initially published Section 706 as a note to Section 157 of Chapter 5.³³² In 2008, after Congress enacted the Broadband Data Improvement Act, Section 706 was codified at 47 U.S.C. § 1302, alongside several new broadband provisions.³³³ Congress “expressly directed” that the “local-competition provisions” of the 1996 Act be inserted into Title II of the 1934 Act.³³⁴ However, Congress did not refer to Section 706 as an “amendment to, or repeal of, a section or other provision” of the 1934 Act. Nor did Congress specifically direct that Section 706 be inserted into the 1934 Act. Consequently, the FCC’s general rulemaking authority does not encompass Section 706.

Congress explicitly limited the FCC’s rulemaking authority to prescribing “such rules and regulations as may be necessary in the public interest to carry out the provisions of [Chapter 5].”³³⁵ Congress plainly established the bounds of Chapter 5—that is, the 1934 Act—as marking a “clear line” circumscribing the FCC’s rulemaking authority.³³⁶ The FCC crossed that line when it claimed that Section 706 authorized the 2010 Open Internet Order. As the FCC concluded in 1998,³³⁷ and reiterated in 2010, Section 706 is not part of the 1934 Act.³³⁸

When it crafted Section 706, Congress knew that the provisions of the 1996 Act it enacted “as an amendment to, and hence a *part of*, [the 1934] Act,” were subject to the FCC’s authority under Section 201(b) to prescribe rules to “carry out the provisions of [the] Act.”³³⁹ It also knew that the FCC’s exercise of “the general grant of rulemaking authority contained within the [1934] Act” does not extend to a “freestanding enactment” such as Section

³³⁰ See, e.g., *id.*, §§ 103, 508.

³³¹ See, e.g., *id.* §§ 307, 552, 601, 602, 708; see also *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.5 (1999).

³³² See Report, *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd 2398 ¶ 1, n.1 (1999).

³³³ See Notice of Inquiry, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 24 FCC Rcd 10505, ¶ 1, n.1 (2009).

³³⁴ *AT&T*, 525 U.S. at 377.

³³⁵ 47 U.S.C. § 201(b); *id.* § 303(r) (the FCC may make “such rules and regulations . . . , not inconsistent with law, as may be necessary to carry out the provisions of this [C]hapter [5]”).

³³⁶ *City of Arlington*, 133 S. Ct. at 1874.

³³⁷ Memorandum Opinion and Order, And Notice of Proposed Rulemaking, *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012 ¶¶ 73–77 (1998) [hereinafter *Advanced Services Order*].

³³⁸ See *2010 Open Internet Order*, ¶ 79, n.248.

³³⁹ *AT&T*, 525 U.S. at 378 n.5.

706.³⁴⁰ By *not* inserting Section 706 into the 1934 Act, Congress acted deliberately, declining to empower the FCC to prescribe rules to carry out the provisions of Section 706.

Thus, courts should apply, and the FCC should respect, rigorously the statutory limits that Congress explicitly placed on the FCC's rulemaking authority.³⁴¹ In deference to Congress' "consistent judgment" to deny the FCC the authority to regulate Internet services by rulemaking, the FCC should once again properly interpret Section 706 to "not constitute an independent grant of authority."³⁴²

C. The FCC's Reinterpretation of Section 706 Raises Constitutional Concerns

By claiming immense regulatory authority without an intelligible limiting principle, the FCC imputed to the statute a "sweeping delegation of legislative power"—a statutory construction the Supreme Court instructs courts and agencies to avoid.³⁴³ Because the FCC's reinterpretation of Section 706 raises significant constitutional questions concerning the separation of powers—namely non-delegation and political questions—any court reviewing this reinterpretation must interpret the statute *de novo* to "accord appropriate respect to the other branches' exercise of their own constitutional powers."³⁴⁴ However, before addressing these issues directly, an understanding of how the FCC came to its improper interpretation is essential.

1. The FCC's Reinterpretation of Section 706

In the 1998 Advanced Services Order,³⁴⁵ the Commission found that Section 706 is *not* an independent grant of authority:

After reviewing the language of section 706(a), its legislative history, the broader statutory scheme, and Congress' policy objectives, we agree with numerous commenters that section 706(a) does not constitute an independ-

³⁴⁰ *Id.*

³⁴¹ See *City of Arlington*, 133 S. Ct. at 1874.

³⁴² *Verizon*, 740 F.3d at 636 (quoting *Advanced Services Order*, 13 F.C.C.R. at 24047 ¶ 77).

³⁴³ *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) [*"Benzene"*].

³⁴⁴ See *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 473 (2001); see also *UARG*, 134 S. Ct. at 2444 ("When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," we typically greet its announcement with a measure of skepticism.").

³⁴⁵ Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, FCC Docket No. 98-147 (1998) [Advanced Services Order], available at http://transition.fcc.gov/Bureaus/Common_Carrier/Orders/1998/fcc98188.pdf.

ent grant of forbearance authority or of authority to employ other regulating methods. Rather, we conclude that section 706(a) directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services.³⁴⁶

In the 2010 Order, the FCC summarized its earlier interpretation as follows:

The Commission accordingly concluded that Section 706(a) did not give it independent authority—in other words, authority over and above what it otherwise possessed—to forbear from applying other provisions of the Act. The Commission’s holding thus honored the interpretive canon that “[a] specific provision . . . controls one[] of more general application.”

While **disavowing a reading of Section 706(a) that would allow the agency to trump specific mandates of the Communications Act**, the Commission nonetheless affirmed in the Advanced Services Order that Section 706(a) “gives this Commission an affirmative obligation to encourage the deployment of advanced services” using its existing rulemaking, forbearance and adjudicatory powers, and stressed that “this obligation has substance.”³⁴⁷

But the Commission added the following:

The Advanced Services Order is, therefore, consistent with our present understanding that Section 706(a) authorizes the Commission (along with state commissions) to take actions, within their subject matter jurisdiction and not inconsistent with other provisions of law, that encourage the deployment of advanced telecommunications capability by any of the means listed in the provision.

In directing the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance,

³⁴⁶ Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188 (rel. August 7, 1998) ¶ 69.

³⁴⁷ Report and Order, *In re Preserving the Open Internet*, 25 FCC Rcd 17905 ¶¶ 118-19 (2010) [hereinafter *2010 Open Internet Order*].

measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment,”³⁷¹ Congress necessarily invested the Commission with the statutory authority to carry out those acts. Indeed, the relevant Senate Report explained that the provisions of Section 706 are “intended to ensure that one of the primary objectives of the [1996 Act]—to accelerate deployment of advanced telecommunications capability—is achieved,” and stressed that these provisions are “a necessary fail-safe” to guarantee that Congress’s objective is reached. It would be odd indeed to characterize Section 706(a) as a “fail-safe” that “ensures” the Commission’s ability to promote advanced services if it conferred no actual authority. Here, under our reading, Section 706(a) authorizes the Commission to address practices, such as blocking VoIP communications, degrading or raising the cost of online video, or denying end users material information about their broadband service, that have the potential to stifle overall investment in Internet infrastructure and limit competition in telecommunications markets.³⁴⁸

As the FCC itself correctly concluded in the 1998 Advanced Services Order, “section 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods.”³⁴⁹ This conclusion, despite the Commission’s later reinterpretation, is not only proper, but constitutionally required in order to avoid the multitude of constitutional questions raised by the FCC’s reinterpretation.³⁵⁰ Specifically, by claiming immense regulatory authority under Section 706 without any intelligible limiting principle, the FCC imputed to the statute a “sweeping delegation of legislative power”—a statutory construction the Supreme Court instructs courts and agencies to avoid.³⁵¹ This reinterpretation of Section 706 raises significant constitutional questions concerning the separation of powers—namely non-delegation and political questions—which, under the canon of constitutional avoidance, require courts reviewing this reinterpretation to interpret the

³⁴⁸ *Id.*

³⁴⁹ Advanced Services Order ¶ 69.

³⁵⁰ See *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring); see also Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1012 (1994) (describing Brandeis’s concurrence as “the most significant formulation of the avoidance doctrine”).

³⁵¹ *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) [“Benzene”].

statute *de novo*. In doing so, the reviewing court must also, if at all possible, avoid passing on questions of constitutionality.³⁵²

2. Courts and the FCC Improperly Interpreted Section 706 To Raise, Not Avoid, Constitutional Questions

As Justice Felix Frankfurter wrote over 70 years ago, “[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of constitutionality ... unless such adjudication is unavoidable.”³⁵³ This doctrine of constitutional avoidance was perhaps most clearly articulated in Justice Brandeis’ concurrence in *Ashwander v. TVA*,³⁵⁴ in which he “listed seven different loosely related rules that allow a court to avoid issuing broad rulings on matters of constitutional law.”³⁵⁵ The seventh, and most relevant, ruling provided:

When the validity of an act of the Congress is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.³⁵⁶

Here, the FCC’s interpretation of Section 706—that it gives it the authority to regulate anything regarding any form of “communications” that is not expressly forbidden to the agency—raises two constitutional questions that, if maintained, would seriously call into question the “validity of an Act of Congress.” For this reason—and because there are other constructions of Section 706 that avoid this concern (including the reading the FCC themselves adopted initially)—such a reading of the statute cannot be maintained under the “cardinal principle” of constitutional avoidance.

First, under its reinterpretation of Section 706, the FCC imputes to the statute a “sweeping delegation of legislative power” despite Congress not providing the FCC with any “intelligible principle” on which to base its regulations—a statutory construction that the Supreme

³⁵² *Id.*; see also Christine Bateup, *The Dialogic Promise Assessing The Normative Potential of Theories of Constitutional Dialogue*, 71 Brooklyn L. Rev. 1109, 1133 (2006) (arguing that “judicial minimalism is quite successful in responding to the countermajoritarian difficulty.”).

³⁵³ *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 103 (1944).

³⁵⁴ *Ashwander*, 297 U.S. at 345-48 (Brandeis, J., concurring).

³⁵⁵ Andrew Nolan, *The Doctrine of Constitutional Avoidance: A Legal Overview*, Congressional Research Service (2014), <https://fas.org/sgp/crs/misc/R43706.pdf>.

³⁵⁶ *Ashwander*, 297 U.S. at 483 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

Court instructs courts and agencies to avoid, especially in the absence of a necessity to prevent an actual and “significant risk” to the public.³⁵⁷

As discussed earlier, the Supreme Court held in *Benzene* that, because “such an interpretation might be unconstitutional under the Court’s reasoning in” its non-delegation precedents, “[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored.”³⁵⁸ Not only is such a result avoidable, but the FCC itself avoided interpreting Section 706—and in turn avoided questioning the validity of an Act of Congress—when it recognized that Section 706 is in no way an independent grant of authority.

Indeed, Section 706 does not *empower* the FCC to do anything it could not have done otherwise. Instead, it forces the FCC to give great weight to the goal of encouraging broadband deployment in all its decision-making and it *constrains* the FCC—by allowing other parties to obtain a writ of *mandamus* from a federal court to “compel agency action unlawfully withheld or unreasonably delayed” under the Administrative Procedure Act.³⁵⁹ That is the “fail-safe” contemplated by the 1996 Senate Committee report, upon which the FCC places so much weight,³⁶⁰ and the “affirmative obligation . . . that has substance” cited by the FCC in 1998.³⁶¹

Second, given the immense political nature of the Order outlined above,³⁶² the prudential prong of the political question doctrine should “counsel[s] against a court’s resolution of the issue” since doing so would express a “lack of respect due coordinate branches of government.”³⁶³

Ultimately, because interpretations which raise constitutional questions must be avoided to “accord appropriate respect to the other branches’ exercise of their own constitutional powers,” the serious political questions raised by the FCC’s interpretation clearly show that

³⁵⁷ *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645-46 (1980) [*The Benzene Cases*].

³⁵⁸ *Id.* at 646.

³⁵⁹ 5 U.S.C. § 706(1).

³⁶⁰ Memorandum Opinion and Order, And Notice of Proposed Rulemaking, *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012 ¶ 119 (1998).

³⁶¹ *Id.* ¶ 74.

³⁶² See *supra* at 34-40 (discussing political nature of Order).

³⁶³ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

the agency took a wrong turn.³⁶⁴ Indeed this is only bolstered given that a “construction of the statute that avoids this kind of open-ended grant is both available and legally required.

D. All Judicial Analysis of Section 706 Has Been Dicta or Otherwise Non-Controlling

“In our federal system, the National Government possesses only limited powers[.]”³⁶⁵ Federal courts’ power and limitations are set forth in Article III of the Constitution, which restricts federal courts’ jurisdiction to only “cases” and “controversies.”³⁶⁶ While this doctrine is generally referred to as a limitation on *who* may invoke the courts’ jurisdiction, it equally limits the courts, who may not answer legal questions except for those which are derived from the “controversies” before the court.³⁶⁷ Thus, as the distinguished Second Circuit Judge Henry Friendly put it, “[a] judge’s power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word ‘hold.’”³⁶⁸ When judges attempt to create binding law through dicta disguised as a legally binding holding, they are unconstitutionally exercising power not available to them. As another Second Circuit judge recently explained:

We judges regularly undertake to promulgate law through utterance of dictum made to look like a holding-in disguise, so to speak. When we do so, we seek to exercise a lawmaking power that we do not rightfully possess. Also, we accept dictum uttered in a previous opinion as if it were binding law, which governs our subsequent adjudication. When we do so, we fail to discharge our responsibility to deliberate on and decide the question which needs to be decided.³⁶⁹

³⁶⁴ *Id.* at 202; *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014) (“When an agency claims to discover in a long-extant statute an unheralded power to regulate “a significant portion of the American economy,” we typically greet its announcement with a measure of skepticism.”).

³⁶⁵ *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014).

³⁶⁶ U.S. CONST. art. III, § 2, cl. 1.

³⁶⁷ *See, e.g., Valley Forge Christian Coll. V. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (requiring the plaintiff to “show that he personally ... suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant’ and that the injury ‘fairly can be traced to the challenged action’ and ‘is likely to be redressed by a favorable decision.’”).

³⁶⁸ *United States v. Rubin*, 609 F.2d 51, 69 (2d Cir. 1979) (Friendly, J. concurring); *see also* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249 (2006) [hereinafter Leval, *Dicta About Dicta*].

³⁶⁹ Leval, *Dicta About Dicta* at 1250.

Though dicta is a natural creature of case law, the issue exists when a court relies on the non-binding dicta—rather than the *holding*—to support its decision. Courts have a duty to decide cases in accordance with the law, and where established law governs the question, courts are bound to follow the established precedent. However, where the court faces a question of first impression, or where the established law is inconclusive, the “court is obligated in the discharge of its constitutional duties to adjudicate the questions—to wrestle with the issue and reach its own conclusion.”³⁷⁰ Yet, here, the only court to even attempt to wrestle with the issue of whether Section 706 can permissibly be read to confer vast regulatory power upon the FCC and certain State PUCs over the Internet, was the *Verizon* court, who did so despite not being petitioned to address that issue. Indeed, the majority opinion expressly recognized that “Verizon filed a petition for review of “*the* Open Internet Order”—meaning only the individual 2010 Order—on the grounds that “the Commission lacked affirmative statutory authority to promulgate the rules.”³⁷¹ Thus, because “[a] judge’s power to bind is limited to the issue that is before him” and the question of whether Section 706 can possibly be read to confer upon the FCC the authority to promulgate *any* Open Internet Rule, or even just the 2015 Order, was never before the *Verizon* court, any discussion of that question is mere dicta.³⁷² Further, because the transparency rule was the only part of the 2010 Open Internet Order actually upheld by the *Verizon* court and that individual Order was the only issue before the court, any reliance upon *Verizon* as legal precedent supporting Section 706 as granting the FCC anything but the authority to issue *that* specific transparency rule would be an unconstitutional judicial exercise of power.

1. The *Verizon* Court Erred by Grounding its Holding in Section 706

The *Verizon* court had no need to expound upon the meaning of Section 706 in order to uphold the Open Internet Order’s transparency rule because Verizon did not challenge that rule and the court could have upheld that rule on simpler, clearer statutory grounds — as the Judge Silberman noted in his dissent:

I do think that the transparency rules rest on firmer ground. The Commission is required to make triennial reports to Congress on “market entry barriers” in information services, 47 U.S.C. § 257, and requiring disclosure of network

³⁷⁰ *Id.* at 1252 (citing *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 402 (noting that the lead opinion, in giving its reasons for its decision, explained that “[t]he history of our nation, coupled with repeated dicta from the [Supreme] Court respecting the constitutionality of the Pledge guides our exercise of that legal judgment in this case.”)).

³⁷¹ *Verizon v. FCC*, 740 F.3d 623, 634 (D.C. Cir. 2014) (“Verizon filed a petition for review of the Open Internet Order.”) (emphasis added).

³⁷² *Rubin*, 609 F.2d at 69 (Friendly, J. concurring).

management practices appears to be reasonably ancillary to that duty. I also agree with the majority's conclusion that the disclosure rules are severable from the antidiscrimination and anti-blocking rules.³⁷³

This was not merely speculation on Judge Silberman's part. The FCC had made this argument as one of many possible justifications for the transparency rule in its brief:

Specifically, Congress directed the Commission to report triennially on "market entry barriers" in services including information services. 47 U.S.C. § 257; see Order n.444. Similarly, "to perform the duties and carry out the objects for which it was created" the Commission may "inquire into the management of the business" of any common carrier and its affiliates. 47 U.S.C. § 218. That provision allows the Commission "to require the provision of information such as that covered by the transparency rule." Order ¶137. In *Comcast*, this Court "readily accepted" that "disclosure requirements" like the transparency rules "could be 'reasonably ancillary' to the Commission's statutory responsibility to issue a report to Congress." 600 F.3d at 659. The transparency rule fits that description.³⁷⁴

Since the transparency rule was the only part of the Open Internet Order actually upheld by the *Verizon* court, the majority's analysis of Section 706 was not necessary for the holding of the case. Yet the *U.S. Telecom* panel insisted this discussion was *not* dicta:

we upheld the Commission's transparency rule as a permissible and reasonable exercise of its section 706 authority, one that did not improperly impose common carrier obligations on broadband providers. See *id.* at 659. Because our findings with regard to the Commission's 706 authority were necessary to our decision to uphold the transparency rule, those findings cannot be dismissed as dicta. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.")³⁷⁵

³⁷³ *Verizon v. FCC*, 740 F.3d 623, 668, n.9 (D.C. Cir. 2014) (Silberman, J. dissenting).

³⁷⁴ Brief for Respondent, at 59-60, *Verizon v. FCC*, 740 F.3d 623 (2014), (No. 11-1355), found at https://apps.fcc.gov/edocs_public/attachmatch/DOC-316186A1.pdf.

³⁷⁵ *U.S. Telecom I*, note 25, 825 F.3d at 733.

In a normal situation, we might agree with this analysis. We do not argue that any path of logic that leads a majority of judges to a holding would be *dicta* if it is not the simplest possible path.³⁷⁶ That would, of course, be an unadministrable rule.

But suppose the court had simply written its opinion from the bottom up, beginning by asking what bases were available to uphold the transparency rule (Section 257), and then proceeding to ask what bases might have sufficed to uphold the other two rules (Section 706). The court's foray into Section 706 would clearly have been *dicta* because the other two rules failed *as applied* under Section 706 anyway.

But should the majority have had the discretion to make this decision about how to write its decision? Was this merely harmless error? No and no. The majority's analysis of Section 706 raised fundamental constitutional concerns that reliance upon Section 257 alone would not have raised. It was judicial error for the court *not* to have (1) started with Section 257 as the basis for upholding the transparency rule, (2) explained why, even if Section 706 *were* an independent grant of authority, the other two rules would *still* fail, and then (3) stopped, making clear that its discussion of how to interpret Section 706 was not necessary to any holding and therefore *dicta*.

This is simply an application of the canon of avoiding constitutional questions, which generally holds that, when "a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."³⁷⁷ Suppose the following:

- An agency has cited two possible statutory bases for an order containing Rules 1-3: Statutes A and B;
- The court finds Statute A inapplicable to support Rules 1-2 but sufficient for Rule 3. and
- Statute B appears to be uncontroversial as a basis for Rule 3.

Where the agency's interpretation of Statute A raises serious constitutional questions but its interpretation of Statute B does not, the canon of constitutional avoidance means that it would be judicial error for the court to rely upon Statute A rather than Statute B the basis

³⁷⁶ See generally Michael Abramowicz, *Defining Dicta*, 57 STAN. L. REV. 953, (2005), http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1201&context=faculty_publications, 103-09; see *id.* at 107 ("We know of no rule that suggests that the holding of a split appeals court panel is expressed in that opinion that resolves the case on the narrowest grounds when the remaining two jurists agree to an alternative, albeit broader, rationale.").

³⁷⁷ *Harris v. United States*, 536 U. S. 545, 555 (2002).

for upholding Rule 3. Further, the court’s analysis of Statute A should be considered dicta, whether the majority intended it to be or not.

The FCC’s interpretation of Section 706 raises at least two sets of constitutional questions. The first speaks to the separation of powers between the Executive and Legislative branches of the federal government. For all the reasons explained below, we believe the FCC’s reading of Section 706 raises serious non-delegation concerns.³⁷⁸

The FCC’s reading of Section 706(a) raises three serious federalism concerns. First, if that section is, indeed, an independent grant of authority, it confers power not only upon the FCC, but upon “each State commission with regulatory jurisdiction over telecommunications services.”³⁷⁹ Consider the full text of this provision:

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.³⁸⁰

In effect, the FCC is arguing that Congress, *sub silentio*, conferred massive and previously unrecognized power upon state regulatory commissions — vast discretion to decide what “regulating methods [might] remove barriers to infrastructure investment.”³⁸¹ This would come as a great surprise to state legislatures, who would object greatly to this belated activation of a provision of federal law which has the effect of rewriting the allocation of power as between state legislatures and state regulatory commissions. It is also unconstitutional without a clear statement from Congress of its intent to do so.

Second, the FCC’s interpretation of Section 706 raises serious dormant commerce clause questions over the exact scope of the powers purportedly conferred by Section 706(a) upon State PUCs. Even if *some* applications of that power might be constitutional, many will not, and the court’s acceptance of the FCC’s interpretation necessarily opened the door to

³⁷⁸ See *infra* at 75-82.

³⁷⁹ 47 U.S.C. § 706(a).

³⁸⁰ *Id.*

³⁸¹ *Id.*

great uncertainty about the scope of state PUC regulation premised upon Section 706 — the very kind of constitutional question courts are supposed to avoid when there are simpler means to reach their holding that do not raise such questions.

Finally, in conferring upon state PUCs a duty to act, the FCC’s interpretation of Section 706(a) commandeering state officials — which is unconstitutional without a “clear statement” by Congress.

The D.C. Circuit, of course, discussed none of these constitutional issues. We explore these issues in greater detail in joint comments filed in this docket with the American Legislative Exchange Council.³⁸²

2. Tenth Circuit’s Discussion of Section 706 Was Unquestionably Dicta

The Tenth Circuit’s discussion of Section 706 is a much simpler form of dicta, and unquestionably without any binding legal effect. The court discussed Section 706 only as an alternative basis for extending Universal Service Fund subsidies to broadband.³⁸³

3. The *U.S. Telecom* Panel Decision’s Discussion Was Dicta

The D.C. Circuit’s 2016 panel decision discussed Section 706 at some length in reciting the history of the case, and offered a discussion as to why the majority believed the *Verizon* opinion’s discussion of Section 706 was not dicta, but no further discussion of the permissibility of interpreting Section 706 as an independent grant of authority. Even if it had done so, this would clearly have been dicta, as the majority upheld the rules based squarely on Title II, leaving no part of the holding relying on Section 706.

It is telling that the D.C. Court had nothing of substance to say about its interpretation of Section 706 in *Verizon*, jumping from a single sentence on *whether* Section 706 conferred independent authority to an analysis of *how* the Commission had justified its use of that authority:

In *Verizon*, we upheld the Commission’s conclusion that section 706 provides it authority to promulgate open internet rules. According to the Commission, such rules encourage broadband deployment because they “preserve and facilitate the ‘virtuous circle’ of innovation that has driven the explosive growth of the Internet.” *Verizon*, 740 F.3d at 628. Under the Commission’s

³⁸² TechFreedom & The American Legislative Counsel, Comments in the Matter of Notice of Proposed Rule-making – Restoring Internet Freedom, WC Docket № 17-108, (August 30, 2017).

³⁸³ *Direct Communs. Cedar Valley, LLC v. F.C.C.*, 753 F.3d 1015, 1054 (10th Cir. 2014).

“virtuous circle” theory, “Internet openness . . . spurs investment and development by edge providers, which leads to increased end-user demand for broadband access, which leads to increased investment in broadband network infrastructure and technologies, which in turns leads to further innovation and development by edge providers.” *Id.* at 634. Reviewing the record, we concluded that the Commission’s “finding that Internet openness fosters . . . edge-provider innovation . . . was . . . reasonable and grounded in substantial evidence” and that the Commission had “more than adequately supported and explained its conclusion that edge-provider innovation leads to the expansion and improvement of broadband infrastructure.”³⁸⁴

4. The U.S. Telecom En Banc Decision

The full D.C. Circuit said nothing about Section 706.

5. The Sixth Circuit Did Not Reach the Meaning of Section 706

In early 2015, the FCC took another major action premised on Section 706: preempting parts of state laws governing deployment of broadband networks owned by municipal governments.³⁸⁵ TechFreedom led an amicus brief, joined by the Competitive Enterprise Institute, urging the Sixth Circuit to reject the FCC’s reading of the statute.³⁸⁶ The court struck down the FCC’s order but did so purely on federalism grounds — and therefore did not reach our arguments about Section 706. (Indeed, if the court had discussed our arguments, any such discussion would have been dicta.)

As noted in our joint comments with ALEC, the Sixth Circuit decision *does* raise further questions about the plausibility of the FCC’s interpretation of Section 706. If Section 706(a) is not sufficiently clear to constitute a grant of authority for the FCC to preempt state laws, what *is* it sufficiently clear about in the powers it supposedly grants to — and the duty it imposes upon — state PUCs? The less clear it is that Section 706(a) satisfies the constitution’s standard for conferring any such powers, the less plausible the FCC’s reading of Section 706 is. If Section 706(a) is not sufficiently clear to confer any powers or duties upon

³⁸⁴ *Verizon*, 740 F.3d at 644.

³⁸⁵ re: FCC 15-25, Memorandum Opinion and Order, In the Matter of City of Wilson, North Carolina, Petition for Preemption of North Carolina General Statute Secs. 160A-340 *et seq.*; In the Matter of the Electric Power Board of Chattanooga, Tennessee, Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601, *found at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-25A1_Rcd.pdf.

³⁸⁶ Brief for Petitioner for The State of Tennessee, et. al, *Tennessee v. F.C.C.*, 832 F.3d 597 (2016) (No. 15-3291; 15-3555) (2015), *found at* http://docs.techfreedom.org/TechFreedom_Amici_Brief_Section706.pdf.

state PUCs, the FCC's interpretation would render it a nullity — suggesting that the FCC's interpretation is simply wrong.³⁸⁷

E. Purported Limits on Section 706, According to the FCC

The *Verizon* court dedicated five pages of its decision to the meaning of Section 706, but most of this is spent reciting the FCC's arguments. The critical part is exceedingly brief:

we might well hesitate to conclude that Congress intended to grant the Commission substantive authority in section 706(a) if that authority would have no limiting principle. . . . But **we are satisfied that the scope of authority granted to the Commission by section 706(a) is not so boundless as to compel the conclusion that Congress could never have intended the provision to set forth anything other than a general statement of policy.** [*Verizon*, 740 F.3d at 639–40.] The Commission has identified at least two limiting principles inherent in section 706(a). See Open Internet Order, 25 F.C.C.R. at 17970 ¶ 121. First, **the section must be read in conjunction with other provisions of the Communications Act**, including, most importantly, those limiting the Commission's subject matter jurisdiction to "interstate and foreign communication by wire and radio." 47 U.S.C. § 152(a). Any regulatory action authorized by section 706(a) would thus have to fall within the Commission's subject matter jurisdiction over such communications—a limitation whose importance this court has recognized in delineating the reach of the Commission's ancillary jurisdiction. See *American Library Ass'n*, 406 F.3d at 703–04. Second, **any regulations must be designed to achieve a particular purpose**: to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." 47 U.S.C. § 1302(a). Section 706(a) thus gives the Commission authority to promulgate only those regulations that it establishes will fulfill this specific statutory goal—a burden that, as we trust our searching analysis below will demonstrate, is far from "meaningless." Dissenting Op. at 7.³⁸⁸

More specifically, the FCC's 2010 Order identified three limits to the agency's new interpretation of Section 706:

³⁸⁷ See, e.g., Ronald J. Scalise, Jr., *Rethinking the Doctrine of Nullity*, Louisiana Law Review, Vol. 74, No.3 (Spring 2014), available at <http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6458&context=lalrev>.

³⁸⁸ 740 F.3d at 639.

This reading of Section 706(a) obviates the concern of some commenters that our jurisdiction under the provision could be “limitless” or “unbounded.” To the contrary, our Section 706(a) authority is limited in three critical respects. First, our mandate under Section 706(a) must be read consistently with Sections 1 and 2 of the Act, which define the Commission’s subject matter jurisdiction over “interstate and foreign commerce in communication by wire and radio.” As a result, our authority under Section 706(a) does not, in our view, extend beyond our subject matter jurisdiction under the Communications Act. Second, the Commission’s actions under Section 706(a) must “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” Third, the activity undertaken to encourage such deployment must “utilize[e], in a manner consistent with the public interest, convenience, and necessity,” one (or more) of various specified methods. These include: “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” Actions that do not fall within those categories are not authorized by Section 706(a). Thus, as the D.C. Circuit has noted, while the statutory authority granted by Section 706(a) is broad, it is “not unfettered.”³⁸⁹

To those three, the D.C. Circuit added a fourth: the FCC may not use Section 706 to contravene a prohibition in statute, such as the prohibition on imposing common carrier status on non-common carriers, explored by the court in *Cellco*.³⁹⁰

The “limits” asserted by the FCC and *Verizon* court do precious little to constrain the FCC’s power under Section 706, to mitigate the non-delegation problem created by the FCC’s interpretation, or to help the FCC survive *Chevron* Step Zero.

1. Purported Limit #1: The Object of FCC’s Power Under Section 706

The *Verizon* court accepted the FCC’s first purported limit on its power under Section 706:

First, the section must be read in conjunction with other provisions of the Communications Act, including, most importantly, those limiting the Commission’s subject matter jurisdiction to “interstate and foreign communication by wire and radio.” 47 U.S.C. § 152(a). Any regulatory action authorized by section 706(a) would thus have to fall within the Commission’s subject

³⁸⁹ 2010 Open Internet Order ¶ 121.

³⁹⁰ *Cellco P’ship v. FCC*, 700 F.3d 534 (D.C. Cir. 2012).

matter jurisdiction over such communications—a limitation whose importance this court has recognized in delineating the reach of the Commission’s ancillary jurisdiction. See *American Library Ass’n*, 406 F.3d at 703–04.³⁹¹

That the Commission may regulate only “interstate and foreign communication by wire and radio,”³⁹² is a tautology. The FCC’s reading of Section 706 would be not sweeping even if it did not give the FCC subject matter jurisdiction over technologies it did not previously have jurisdiction over, but merely because it gives the FCC vast and nearly unchecked discretion within its previous jurisdiction — as explained below. In short, the FCC’s reading leaves the FCC free to regulate the entire Internet and any other form of “communications” — a huge swathe of the U.S. economy.

Tellingly, the *Verizon* court seemed to hesitate on this point, suggesting that it actually read some additional limit into Section 706:

As we have previously acknowledged, “in proscribing . . . practices with the statutorily identified effect, an agency might stray so far from the paradigm case as to render its interpretation unreasonable, arbitrary, or capricious.” *National Cable & Telecommunications Ass’n v. FCC*, 567 F.3d 659, 665 (D.C. Cir. 2009). Here, Verizon has given us no reason to conclude that the Open Internet Order’s requirements “stray” so far beyond the “paradigm case” that Congress likely contemplated as to render the Commission’s understanding of its authority unreasonable. *The rules ... apply directly to broadband providers, the precise entities to which section 706 authority to encourage broadband deployment presumably extends....*³⁹³

It is quite understandable that the court should want to read Section 706 in this manner. Indeed, nearly all the discussion of Section 706 since *Verizon* has presumed that the Commission could wield its newfound Section 706 powers only over broadband providers. But neither Section 706(a) nor Section 706(b) actually includes any such limit; neither section specifies the object to which the FCC should apply its powers. Section 706(a) says only that the FCC and certain state PUCs “shall encourage the deployment” of broadband using various regulatory “measures” and Section 706(b) says that the FCC “shall take immediate action to accelerate deployment of [broadband] by removing barriers to infrastructure in-

³⁹¹ *Verizon*, 740 F.3d at 640.

³⁹² 47 U.S.C. § 152(a).

³⁹³ *United States Telecom Ass’n*, 855 F.3d at 382, 388.

vestment and by promoting competition in the telecommunications market.”³⁹⁴ The *Verizon* court is simply reading limits into Section 706 that are not there to make the FCC’s assertion of power seem less startling.

Nowhere does the court, or has any court since, asked the obvious question: what does the absence of such limits, of any specified object for the Commission’s powers say about what Congress intended with Section 706? If it was “odd indeed to characterize Section 706(a) as a ‘fail-safe’ that ‘ensures’ the Commission’s ability to promote advanced services if it conferred no actual authority,”³⁹⁵ it is downright bizarre to believe that Congress included a hidden power for the FCC (and state PUCs) to do anything that they asserted would promote broadband deployment to any form of “communications.” It is more bizarre still for the court to assure us that this general outer boundary to the FCC’s jurisdiction constituted a meaningful limit upon the FCC’s authority, only to then vaguely assert that the FCC’s reading of the statute was not arbitrary or capricious because the FCC had, in this particular case, used its newfound powers over broadband providers, and that this was the “the ‘paradigm case’ that Congress likely contemplated.”³⁹⁶

It is far, far more likely that the absence of any specific object for the Commission’s use of Section 706 reflects the fact that Congress *did not intend this provision to confer independent regulatory authority at all*. Otherwise, surely Congress would have specified an object. This is not merely a *Chevron* Step Two question (though it could be that as well); it is a *Chevron* Step Zero question, about whether it is reasonable to think that Congress intended the agency or the courts to resolve the ambiguity at issue. Ultimately, allowing agencies to police the limits of their regulatory authority is like letting “foxes ... guard henhouses,” and, without this necessary “intelligible principle” is foreclosed by the non-delegation doctrine.³⁹⁷

The *Verizon* court ignored yet another “odd” fact about Section 706 that suggests that Congress did not intend it to be an independent grant of authority at all. The Commission and the Court assert that the FCC’s jurisdiction under Section 706 “must be read in conjunction with other provisions of the Communications Act, including, most importantly, those limiting the Commission’s subject matter jurisdiction to “interstate and foreign communication

³⁹⁴ 47 U.S.C. § 706(a-b).

³⁹⁵ 25 FCC Rcd. 17905 (2010) ¶ 120.

³⁹⁶ See *supra* 28, at 32.

³⁹⁷ Nathan A. Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Jurisdiction, Agency Deference, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1533 (2009).

by wire and radio.”³⁹⁸ But the 1996 Telecom Act does *not* place Section 706 into the 1934 Communications Act at all, as the FCC itself noted in the 2010 Open Internet Order.³⁹⁹ So why must Section 706 be read “in conjunction with *other* provisions of the Communications Act?”

Why does the fact that Congress placed Section 706 outside the 1934 Communications Act not mean that the FCC has authority under that section to regulate *anything* (however unrelated to “communications”) that might affect broadband deployment? This is, of course, an absurd idea, but neither the Commission nor the Court ever confronted this fact in their rush to confirm *some* authority for the FCC to issue net neutrality rules.

2. Purported Limit #2: That the FCC’s Use of Section 706 Must Encourage Broad Deployment

Second, the requirement that whatever the FCC does “must be designed to [encourage broadband deployment],”⁴⁰⁰ does little, if anything, to limit the FCC’s discretion. Despite claiming to perform “searching analysis,” the D.C. Circuit simply deferred to the FCC’s vague “triple-cushion shot” theory, by which regulating broadband providers would *increase* investment in broadband. The court made quite clear just how low the FCC’s burden of proof was:

Verizon attacks the reasoning and factual support underlying the Commission’s “triple-cushion shot” theory, advancing these arguments both as an attack on the Commission’s statutory interpretation and as an APA arbitrary and capricious challenge. Given that these two arguments involve similar considerations, we address them together. In so doing, “we must uphold the Commission’s factual determinations if on the record as a whole, there is such relevant evidence as a reasonable mind might accept as adequate to support [the] conclusion.” *Secretary of Labor, MSHA v. Federal Mine Safety & Health Review Comm’n*, 111 F.3d 913, 918 (D.C. Cir. 1997) (internal quotation marks omitted); see 5 U.S.C. § 706(2)(E).⁴⁰¹

“Searching” would be the very last adjective one could use to describe this analysis. The FCC’s assertion that regulating broadband will actually lead to *more* investment in broad-

³⁹⁸ 47 U.S.C. § 152(a).

³⁹⁹ 25 FCC Rcd. 17905 (2010) ¶ 79, n.248.

⁴⁰⁰ *Verizon*, 740 F.3d at 640.

⁴⁰¹ *Id.* at 33

band is not only deeply counter-intuitive; it is also contradicted by economic analysis.⁴⁰² That a court would accept such a cockamamie claim as adequate justification for a particular use of Section 706 merely demonstrates how little constraint the courts would apply to future uses of Section 706 — and the lack of an intelligible principle by which the courts can meaningfully constrain how the FCC’s asserted authority under Section 706.

3. Purported Limit #3: The FCC Cannot Violate the Communications Act

Another tautology: because “[a] specific provision . . . controls one[] of more general application,”⁴⁰³ the FCC may not use Section 706 to do something forbidden by another provision of law. The *Verizon* court held that the 2010 Order had violated a provision of the Communications Act,⁴⁰⁴ but nowhere did the court explain how the Communications Act can limit the FCC’s use of Section 706 since, as the FCC itself argued in the 2010 Order, Section 706 is not part of the Communications Act:

In adopting the rule against unreasonable discrimination, we rely, in part, on our authority under section 706, which is not part of the Communications Act. Congress enacted section 706 as part of the Telecommunications Act of 1996 and more recently codified the provision in Chapter 12 of Title 47, at 47 U.S.C. § 1302. The seven titles that comprise the Communications Act appear in Chapter 5 of Title 47. Consequently, even if the rule against unreasonable discrimination were interpreted to require common carriage in a particular case, that result would not run afoul of section 3(51) because a network operator would be treated as a common carrier pursuant to section 706, not “under” the Communications Act.⁴⁰⁵

In other words, the FCC argued that the FCC may use Section 706 to do things that are very explicitly prohibited by the Communications Act — an “odd” reading indeed! One might think this would have caused the *Verizon* court to do some truly “searching” analysis of the FCC’s assertion that Section 706 is an independent grant of authority. Instead, the *Verizon* court simply ignored this argument, preferring instead to assume that Section 706 was “part” of the Communications Act and must therefore be limited by it.⁴⁰⁶

⁴⁰² See Brief of Amici ICLE, et al., *USTA v. FCC*, No. 15-1063, at 28–32 (D.C. Cir. 2015), available at <http://goo.gl/LDyUdX>.

⁴⁰³ 25 FCC Rcd. 17905 (2010) at ¶¶ 118–19 (quoting *Bloate v. United States*, 559 U.S. 196, 207 (2010)).

⁴⁰⁴ *Verizon*, 740 F.3d at 659.

⁴⁰⁵ 25 FCC Rcd. 17905 (2010) ¶ 79, n.248.

⁴⁰⁶ *Verizon*, 740 F.3d at 650.

Setting aside this inconvenient statutory issue, it would hardly be reassuring that express prohibitions in the Communications Act would constrain the FCC's use of Section 706, because the FCC's reading of Section 706 would still give the FCC vast discretion to invent a new regulatory approach over a huge percentage of the U.S. economy. As we warned in our 2014 comments:

In this reading, Section 706 is not merely a “failsafe” (the word the D.C. Circuit picks out of the scant legislative history of this section) but, in fact, essentially a new Communications Act, to be created by the FCC out of whole cloth.⁴⁰⁷

4. Purported Limit #4: Limited Regulatory “Methods”

The FCC's final purported limit upon the power conferred under its reading of Section 706 was the following:

the activity undertaken to encourage such deployment must “utilize[e], in a manner consistent with the public interest, convenience, and necessity,” one (or more) of various specified methods. These include: “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” Actions that do not fall within those categories are not authorized by Section 706(a).⁴⁰⁸

To start, note that this limit would apply only to Section 706(a), not to Section 706(b), which simply says the Commission “shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.” But in any event, Section 706(a) contains nearly the same broad language, in saying the Commission or state PUCs may use one of a specific list of methods or *any other* “regulating methods that remove barriers to infrastructure investment.” In other words, in both subsections, the kind of regulatory method used is not a separate limit at all; it is merely a repetition of the other asserted limit, that the Commission must in some way tie its use of its powers to some claim about promoting broadband deployment. As discussed above, this is no real limit at all, given the exceedingly low bar set by the courts in reviewing such factual assertions.

⁴⁰⁷ Brief for TechFreedom et al. as Amici Curiae Supporting Appellant, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (No. 11-1355).

⁴⁰⁸ 47 U.S.C. § 706.

F. The FCC's Reading of Section 706 Opens the Door to Great Abuse

Writing in *WIRED* days after the *Verizon* decision, TechFreedom President Berin Szóka and Geoffrey Manne of the International Center for Law and Economics were the first to sound the alarm about the implications of the FCC's newfound power under Section 706:

The Electronic Frontier Foundation has long supported net neutrality but nonetheless warned that it could be a Trojan Horse for broader internet regulation. Judge Silberman's dissent said much the same, noting that Section 706 "grant[s] the FCC virtually unlimited power to regulate the Internet."

That can't be good, no matter how much you want net neutrality regulation...

In his dissent, Silberman calls [the] limitations [proposed by the FCC and accepted as adequate by the majority] "illusory." Most notably, if Section 706 justifies "any regulation that, in the FCC's judgment might arguably make the Internet 'better'" — what limit is there?

And the last regulatory method authorized by 706 ("other regulating methods...") is a catch-all, with the first listed as "price cap regulation." So... the FCC could start setting not only broadband prices but VoIP prices as well. Why not tablet prices, too?

This starts to look a lot like common carriage regulation by another name. Indeed, it's not clear why the FCC couldn't regulate any information services or, say, interconnected aspects of smart washing machines or Nest-like thermostats. The FCC would just need a plausible argument that it was boosting broadband demand.

Congress intended Title I as a light-touch approach to promote investment and innovation in "information services" while allowing public safety regulations like e911. Now, through Section 706, the FCC can impose economic regulation, too, so long as it doesn't amount to common carriage — which may be no limitation at all. That's cause for concern.⁴⁰⁹

⁴⁰⁹ Berin Szoka & Geoffrey Manne, *The Feds Lost on Net Neutrality, but Won Control of the Internet*, *Wired* (Jan. 16, 2014), <https://www.wired.com/2014/01/one-talking-comes-net-neutrality>.

VII. Myth #6: The FCC Could Not Have Used Section 706 to Reissue the 2010 Rules

Much as we object to the FCC's reading of Section 706 as an independent grant of authority, we must also debunk the arguments made in 2014 to justify the drive to Title II reclassification that Section 706, assuming it were the sweeping grant of authority the FCC claimed it to be, could not have sufficed to reissue the rules the 2010 rules. Chairman Wheeler acknowledged that *Verizon* court had given the FCC a "roadmap" to reinstate rules that achieve the goals of the 2010 Order⁴¹⁰ — yet quickly abandoned that roadmap. Here, we analyze what that roadmap might have looked like — assuming, *arguendo*, that Section 706 conferred any independent regulatory authority, but also insofar as the FCC might consider using other sources of authority to issue new rules.

A. Transparency Rule

As noted above, the FCC argued that ancillary jurisdiction grounded in Section 257 provided an alternative basis for the 2010 transparency rule.⁴¹¹ We would support maintenance of the current rule on this basis, as noted below.⁴¹²

B. Non-Discrimination Rule

D.C. Circuit struck down the no-blocking and non-discrimination rules contained in the FCC's 2010 Open Internet Order because it found that the non-discrimination rule amounted to common carriage and that the Commission had failed to explain until too late in the litigation process why the same was not true of the no-blocking rule.⁴¹³ The Commission has accordingly attempted to craft rules that do not amount to common carriage by allowing room for individualized negotiation. Doing so would, according to the D.C. Circuit in *Verizon*, mean that the new rules would not amount to imposing common carriage status on broadband providers, which Section 3 of the Act bars the Commission from doing to any information service regulated under Title I.⁴¹⁴

⁴¹⁰ See Notice of Proposed Rulemaking, FCC 14-61, 29 FCC Rcd. 5561, 5647 (2014) (statement of Chairman Tom Wheeler).

⁴¹¹ See *infra* p. 98

⁴¹² *Id.*

⁴¹³ See *Verizon*, 740 F.3d at 658-59.

⁴¹⁴ See 47 U.S.C. § 153(51) ("A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services[.]"); 47 U.S.C. § 153(53) (defining "telecommunications service").

C. No Blocking Rule

A baseline "no-blocking" rule is purportedly "essential to the Internet's openness and to competition in adjacent markets. such as voice communications and video and audio programming[,] "⁴¹⁵ because, the FCC alleges, ISPs have an incentive to block—or substantially degrade—online services that compete with the ISPs' service offerings or those of an affiliate, most notably, to prevent consumers from "cutting the cord" and dropping their old telephone and cable TV packages for broadband-only offerings.⁴¹⁶

Even if this were true, ISPs have a strong incentive to encourage more intensive use of their data services because of the profitability of getting consumers to upgrade their speed packages, which the FCC's own data show consumers have continued to do at significant rates in current years. Indeed, examples of an ISP actually blocking a competitive application/service from accessing its last-mile network are remarkably few, and those few instances have been widely publicized, each resulting in the ISP soon relenting once consumers shone the news spotlight upon the controversial practice.⁴¹⁷ There are already millions of tech-savvy Americans on the web, and the tools necessary to detect a blocking or serious degradation of service are widely available, so there is every reason to suspect that any future instances of such blocking will also be detected. If they are truly nefarious (i.e., the ISP is blocking a legal service/application that its customers are trying to access),⁴¹⁸ then public outcry by the affected subscribers should likely be sufficient to convince the ISP to change

⁴¹⁵ 4 FCC, Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking, GN Docket No. 14-28 (May 15, 2014) ["NPRM"] at 89, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0515/FCC-14-61A1.pdf.

⁴¹⁶ Shalini Ramachandran, Evidence Grows on TV Cord-Cutting, WALL ST. J. (Aug. 7, 2012), available at <http://online.wsj.com/news/articles/SB10000872396390443792604577574901875760374>.

⁴¹⁷ See, e.g., Stephen Lawson, Vonage CEO Slams VoIP Blocking, PCWORLD (Mar. 8, 2005), available at <http://www.pcworld.com/article/119919/article.html>; Phil Goldstein, Confirmed: AT&T Enables FaceTime Over Cellular for iPhone 5 Customers with Unlimited Data, FIERCEWIRELESS (June 18, 2013), available at <http://www.fiercewireless.com/story/confirmed-att-enables-facetime-over-cellular-iphone-5-customers-unlimited-d/2013-06-18>.

⁴¹⁸ Of course, ISP subscribers do not have the right to access any and all content they want on the Internet, as there are separate laws in place that compel ISPs to block access to sites known to host illegal content, such as child pornography, see 47 U.S.C. § 231 ("Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communications for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than \$50,000, imprisoned not more than 6 months, or both."), and that protect ISPs for preemptive blocking whenever it is done in good faith to block certain forms of speech, see 47 U.S.C. § 230(c)(2) ("No provider or user of an interactive computer service shall be held liable on account of ... any action voluntarily taken in good faith to restrict access to or availability of material [considered] to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.").

its practices, rather than bear the brunt of public backlash, in hopes of pleasing its customers (and its investors).

This dynamic could only be bolstered by FCC's transparency rule. The Commission should seriously consider whether disclosure alone is enough to allow market forces and existing laws to govern net neutrality concerns. In the alternative, the FCC should explain how the blocking and non-discrimination rules might be scaled back as the disclosure rule expands— or else explain what justifies issuing new rules that are, collectively, more burdensome than those issued under the Open Internet Order, two of which were, of course, struck down in court.

But nearly all of the discussion of the decision presumed that Title II was also necessary to justify re-issuance of the FCC's no-blocking rule. This is simply not the case. In fact, the court made clear that it was striking down the no-blocking rule not because it necessarily constituted a common carriage requirement, but simply because the FCC had failed to ask to rebrief the case after the D.C. Circuit handed down its decision in *Cellco Partnership v. FCC* in December 2012. The FCC's *Verizon* briefs, filed months earlier,⁴¹⁹ simply failed to anticipate how the Court would analyze common carriage. And the FCC's reply brief, filed in January 2013, includes only a brief discussion of *Cellco*.⁴²⁰ In September 2013, at oral argument, the FCC mounted a much better reasoned case as to why the no-blocking rule fell short of common carriage, in response to *Cellco*, but by then, it was too late.

The *Verizon* court summarized the FCC's improvised, belated defense as follows:

At oral argument, however, Commission counsel asserted that “[i]t’s not common carriage to simply have a basic level of required service if you can negotiate different levels with different people.” Oral Arg. Tr. 86. This contention rests on the fact that under the anti-blocking rules broadband providers have no obligation to actually provide any edge provider with the minimum service necessary to satisfy the rules. If, for example, all edge providers’ “content, applications [and] services” are “effectively usable,” Open Internet Order, 25 F.C.C.R. at 17943 ¶ 66, at download speeds of, say, three mbps, a broadband provider like Verizon could deliver all edge providers’ traffic at speeds of at least four mbps. Viewed this way, the relevant “carriage” broadband providers furnish might be access to end users more generally, not the

⁴¹⁹ Brief for Appellant, *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014) (No. 11-1355).

⁴²⁰ re: FCC Surreply Brief for Respondents, *Verizon v. FCC* (No. 11-1355), *found at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-318262A1.pdf.

minimum required service. In delivering this service, so defined, the anti-blocking rules would permit broadband providers to distinguish somewhat among edge providers, just as Commission counsel contended at oral argument. For example, Verizon might, consistent with the anti-blocking rule—and again, absent the anti-discrimination rule—charge an edge provider like Netflix for high-speed, priority access while limiting all other edge providers to a more standard service. In theory, moreover, not only could Verizon negotiate separate agreements with each individual edge provider regarding the level of service provided, but it could also charge similarly-situated edge providers completely different prices for the same service. Thus, if the relevant service that broadband providers furnish is access to their subscribers generally, as opposed to access to their subscribers at the specific minimum speed necessary to satisfy the anti-blocking rules, then these rules, while perhaps establishing a lower limit on the forms that broadband providers’ arrangements with edge providers could take, might nonetheless leave sufficient “room for individualized bargaining and discrimination in terms” so as not to run afoul of the statutory prohibitions on common carrier treatment. *Cellco*, 700 F.3d at 548.⁴²¹

But the court also explained that the FCC had forfeited this argument:

Whatever the merits of this view, the Commission advanced nothing like it either in the underlying Order or in its briefs before this court. Instead, it makes no distinction at all between the anti-discrimination and anti-blocking rules, seeking to justify both types of rules with explanations that, as we have explained, are patently insufficient. We are unable to sustain the Commission’s action on a ground upon which the agency itself never relied. *Lacson v. Department of Homeland Security*, 726 F.3d 170, 177 (D.C. Cir. 2013); see also *United States v. Southerland*, 486 F.3d 1355, 1360 (D.C. Cir. 2007) (“argument[s] . . . raised for the first time at oral argument [are] forfeited”). Nor may we defer to a reading of a statutory term that the Commission never offered. *Shieldalloy Metallurgical Corp. v. Nuclear Regulatory Comm’n*, 624 F.3d 489, 495 (D.C. Cir. 2010).⁴²²

In *U.S. Telecom*, the D.C. Circuit summarized all this by saying: “We nonetheless vacated the anti-blocking and antidiscrimination rules because they unlawfully subjected broadband

⁴²¹ *Verizon*, 740 F.3d at 652.

⁴²² *Id.* at 658.

providers to per se common carrier treatment.”⁴²³ It should be obvious how inaccurate this 2016 paraphrase of the 2014 decision was: the *Verizon* court actually said that the FCC had failed to explain, *in its briefs*, why the anti-blocking rule did not amount to a common carriage requirement.

This passage from *Verizon* was, indeed, a roadmap — not just for how to rewrite the no-blocking rule and ground it under Section 706 alone, without violating *CellCo*’s prohibition on imposing common carriage requirements on non-common carriers and thus without the need for Title I, but for conceiving of how to craft a no-blocking rule more generally — including how Congress should craft such a rule.

The only effective way to prohibit blocking across the board is through legislation, since Section 230(c)(2)(A) clearly immunizes broadband providers for blocking content “in good faith” and Section 230(c)(1) may confer broader immunity, regardless of good faith.⁴²⁴

VIII. Myth #7 Broadband Companies Are Just Waiting to Kill Net Neutrality

While on the subject of the *Verizon* decision, we must shatter one further myth: that Verizon’s counsel let slip the company’s evil plan to kill net neutrality in oral arguments before the D.C. Circuit in 2013. Helgi Walker’s statement that “but for these rules we would be exploring those commercial arrangements,” has been regularly cited as evidence that Verizon wasn’t *really* suing because of the implications of the FCC’s legal claims under Section 706.

Here’s what Walker actually said, in its full context:

Well, as I was saying to Judge Silberman, what the Agency has done here is shut down and prevent the development of a two-sided market with respect to Internet services. There is evidence in the record that edge providers are contracting with broadband providers where actually they demand payment, ESPN has a website that is so popular that ESPN demands and receives payments from broadband providers in order to allow those subscribers to access the ESPN content. So, the markets they are certainly in that regard, and I’m authorized to state by my client today that but for these rules we would be exploring those commercial arrangements, but this order prohibits those,

⁴²³ *U.S. Telecom I*, 825 F.3d at 689.

⁴²⁴ *See supra* at 41-49.

and in fact would shrink the types of services that will be available on the Internet.⁴²⁵

Walker had been asked, effectively, whether Verizon had standing to sue. Without being able to articulate some concrete injury, Verizon's challenge would have been tossed out. The example Walker gave is precisely the *opposite* of the example net neutrality activists fear: rather than "extorting tolls" from web companies, as has been so often alleged, the shoe might very well be on the other foot: large content companies like ESPN have the real market power, not the ISPs, and want to be paid *by the ISP* (in addition to being paid by consumers) for putting their premium content up on the Internet.

In fact, all major U.S. broadband companies have already promised to abide by net neutrality rules.⁴²⁶

IX. Myth #8: "We Need a Catch-all to Protect Consumers — Which *Has* to Be the FCC"

The first part of this claim is true: we *do* need a catch-all standard to protect consumers from practices not covered by core net neutrality rules. But it simply does not follow that this standard must be the general conduct standard adopted by the FCC — or, in fact, that it requires any role for the FCC at all.

In effect, we already have a "general conduct standard" covering such issues across nearly the entire economy: Section 5 of the FTC Act. As the Commission explained in its 1980 Unfairness Policy Statement:

The present understanding of the unfairness standard is the result of an evolutionary process. The statute was deliberately framed in general terms since Congress recognized the impossibility of drafting a complete list of unfair trade practices that would not quickly become outdated or leave loopholes for easy evasion. The task of identifying unfair trade practices was therefore assigned to the Commission, subject to judicial review, in the expectation that the underlying criteria would evolve and develop over time. As the Supreme Court observed as early as 1931, the ban on unfairness "belongs to that class of phrases which do not admit of precise definition, but the meaning and ap-

⁴²⁵ TechFreedom, "The Jury is Still Out on Paid Prioritization," March 31, 2015, *available at* <http://techfreedom.org/post/115179001959/the-jury-is-still-out-on-paid-prioritization>.

⁴²⁶ See the American Legislative Exchange Council, Comments in Support Proposed Rulemaking of Restoring Internet Freedom, WC Docket № 17-108 at 3.

plication of which must be arrived at by what this court elsewhere has called 'the gradual process of judicial inclusion and exclusion.'"⁴²⁷

Section 5 gives the FTC broad latitude to protect consumers *without* ex ante rules.

X. Myth #9: We Can't Rely on the FTC Because of the Common Carrier Exception

Reclassifying broadband as a Title II service terminated the FTC's jurisdiction over broadband, because the FTC Act excludes common carriers from the FTC's otherwise near-general jurisdiction over American businesses. As former FTC Commissioner Josh Wright quipped on Twitter, the FCC stole the FTC's "jurisdictional lunch money."⁴²⁸

Yet now the common carrier exception is being used as a reason to justify maintaining the common carrier classification of broadband providers. There are, in fact, two arguments being made here. The first is circular: we can't undo reclassification because the FTC currently lacks authority over broadband. This ignores the obvious: re-reclassifying broadband providers as non-common carriers would, instantaneously and by necessity, revive the FTC's jurisdiction.

The second argument deserves serious attention: that returning to Title I would not be enough, that it would not exactly return us to the 2015 *status quo ante* because of the intervening Ninth Circuit panel decision in *AT&T Mobility*.⁴²⁹ In that decision, the panel rejected the FTC's long-standing reading of the common carrier exception as depending upon the activity in which a company was engaged, in favor of a status-based understanding. Under the FTC's prior reading of the statute, a company that provided both a non-common carrier service and common carrier service would be subject to the FTC Act to the extent it provided the former, but *not* to the extent it provided the latter. But the panel decision appeared to hold that such a company would not be subject to FTC jurisdiction at all. If so, this could indeed mean that there would be, immediately upon re-reclassification, a regulatory gap over broadband companies which also provide telephony.

⁴²⁷ Federal Trade Commission, *FTC Policy Statement on Unfairness* (December 17, 1980), found at <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.

⁴²⁸ Twitter Statement of Joshua Wright (January 21, 2015), *available at* <https://twitter.com/profwrightgmu/status/558091115581419520?lang=en>.

⁴²⁹ *FTC v. AT&T Mobility LLC*, No. 15-16585 (9th Cir. 2016), *found at* <https://cdn.ca9.uscourts.gov/datastore/opinions/2016/08/29/15-16585.pdf>.

A. The Ninth Circuit Has Vacated the Decision Raising This Concern

Fortunately, in May, the Ninth Circuit vacated the panel decision, designating the case for rehearing by the full circuit *en banc*.⁴³⁰ The Ninth Circuit's rehearing status page indicates that the court will start hearing arguments sometime during the week of September 18, 2017. Under Ninth Circuit rules, a majority of judges was required to grant rehearing.⁴³¹ Furthermore, of the three-judge panel, one was a Senior Judge, Judge Richard Clifton, and one was a District Judge hearing the case by designation, Judge William Q. Hayes. Thus, while the panel was unanimous in its holding, there may be only one active status judge who actually shares this view. These facts, taken together along with the general rarity of rehearing panel decisions, strongly suggest that the court is likely to reverse the panel decision — and restore the FTC's status-based interpretation of the common carrier exclusion. If so, there will be no gap at all; the FCC will simply give the FTC back its "jurisdictional lunch money." Of course, it *is* possible, if unlikely, that the full court might uphold the panel decision, or, more likely, that there could be some kind of middle ground between the two outcomes.

Ideally, Congress would solve this problem by passing legislation to, at a minimum, clearly restore the FTC's status-based interpretation of the exception. Or, in the alternative, legislation might repeal the common carrier exception altogether. Either way, Congress could remove any doubt through legislation clarifying the FTC's jurisdiction over broadband companies, thus ensuring that the nation's consumer protection watchdog and (along the Department of Justice) competition enforcer could exercise clear and comprehensive authority online.

As important we believe it is to rescind the broad claims of legal power the FCC has made over the Internet, and that there is a pressing need to do so, we also believe it critical that there be a seamless transition back to the layered model of online consumer protection that preceded the FCC's 2015 reclassification of broadband. The FTC must be able to resume its function as the lead federal cop on the net neutrality beat.

It is possible that the Ninth Circuit will rule before the FCC is ready to issue a declaratory order in this docket. But in case the Ninth Circuit decision should takes longer, we urge the

⁴³⁰ See *FTC v. AT&T Mobility LLC*, Rehearing Order (May 9, 2017), available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2017/05/09/15-16585.pdf> ("The three-judge panel disposition in this case shall not be cited as precedent by or to any court of the Ninth Circuit.").

⁴³¹ See Federal Rules of Appellate Procedure, Ninth Circuit Rules, Circuit Advisory Committee Notes, Rule 22-4(d), <http://cdn.ca9.uscourts.gov/datastore/uploads/rules/rules.htm>.

FCC to take to the bully pulpit, joined by the FTC, to urge Congress to begin moving *now* on legislation to preempt any potential confusion over the common carrier exemption issue.

In principle, such legislation might be part of the larger legislative package that resolves the net neutrality debate once and for all — something we will address in reply comments in this docket. Indeed, the pressing need to resolve uncertainty around the FTC’s jurisdiction could well prove to be the impetus to forcing Congress to act on a larger legislative deal — without which, the question of the FCC’s authority under Title II and Section 706 will simply continue to ping-pong back and forth from election to election.

B. Our Recommendation: Legislation Clarifying the Common Carrier Exception

Unfortunately, there is all too much potential for political games to be played on both sides of the aisle — and all the more so if the FCC were to declare that it would wait for simply wait for either Congress or the Ninth Circuit to act. Given the uncertainty about the Ninth Circuit’s timeline, we propose that the FCC set a clear deadline for Congress to act — say, by the beginning of January or February. Specifically, the FCC would need to know by three weeks in advance of its open meeting at the end of January or February whether to put this item on the agenda for that meeting. This timeline would reflect the fact that the end of the year may be the most likely window for legislation to move anyway.

Absent some clear deadline, Democrats in Congress may choose to delay, especially in the Senate, in order to drag out this proceeding, which has clearly been a net political winner for their party.

The bare minimum viable bill, simply restoring the FCC’s activity-based interpretation of the common carrier exception, could be accomplished with a one-page — indeed, one-paragraph — bill. For all the dysfunction of Congress, there is simply no reason why Congress should not be able to pass so simple a bill. Who in Congress could possibly be against ensuring that the FTC has comprehensive jurisdiction to protect consumers — and that no company should fall into a regulatory no man’s land in between the FCC and FTC?

This timeline, while perhaps slightly longer than what the Commission might want, would serve another important purpose: allowing the Supreme Court time to decide whether to grant certiorari in this case. The Court has extended the filing deadline for the petitioners and us as intervenors to September 28.

XI. Other Purported Reasons for the Necessity of Title II

A number of arguments have been made as to why the FCC must apply Title II to broadband. None justify retaining the FCC's reinterpretation of terms leading to reclassification.

A. Privacy and Data Security

Until 2015, there was no crisis in online privacy. The Federal Trade Commission policed the privacy and data security practices of broadband providers, just as it policed all those practices of nearly all other companies in America. Undoing Title II reclassification will, as noted above, simply restore the FTC's jurisdiction over broadband providers as non-common carriers.

Earlier this year, Congress passed a Congressional Review Act resolution to disapprove the FCC's 2016 Broadband Privacy Order. This barred the FCC from reissuing that order and required the agency to police broadband privacy directly, as it had done since reclassification in 2015.⁴³² TechFreedom argued that the FCC should, until undoing reclassification, simply apply its statutory authority in a manner consistent with the FTC's longstanding approach under Section 5 of the FTC Act. Activists opposing the CRA claimed that the CRA, or the FTC approach, or both, would leave consumers vulnerable because broadband providers could sell their browsing history to third parties.⁴³³ This is simply not the case.

The FTC's 2012 Privacy Report, summarized the FTC's approach to past enforcement actions and its understanding of its Section 5. To start with, the Commission clearly required "affirmative, express consent" (opt-in) before making material retroactive changes to their privacy representations.⁴³⁴ On top of that, the Commission expressed its "strong concerns about the use of [Deep Packet Inspection] for purposes inconsistent with an ISP's interaction with a consumer, without express affirmative consent or more robust protection."⁴³⁵ Clearly, this would require opt-in for "sharing sensitive information with third parties" and "collecting sensitive data for certain purposes."⁴³⁶ In other words, the very practices that

⁴³² See generally Reply Comments of TechFreedom and CEI, In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, WC Docket No. 16-106 (July 6, 2016), available at https://cei.org/sites/default/files/tf_cei_reply_comments_fcc_privacy_nprm_7.6.2016.pdf.

⁴³³ Jacob Kastrenakes, "US Senate votes to let internet providers share your web browsing history without permission," The Verge (Mar 23, 2017).

⁴³⁴ Federal Trade Commission, 2012 Privacy Report, 57 (March 2012) available at <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>.

⁴³⁵ *Id.* at C-7.

⁴³⁶ *Id.* at 60.

privacy advocates were most concerned about will remain subject to an opt-in requirement when the FTC resumes responsibility for policing broadband by virtue of the FCC returning broadband to Title I. What will change is the enforcement mechanism, from ex ante rules to case-by-case enforcement guided by the FTC's Report. The Report also noted:

40: There appeared to be general consensus among the commenters that, based on the potential scope of the tracking, an ISP's use of DPI for marketing purposes is distinct from other forms of marketing practices by companies that have a first-party relationship with consumers, and thus at a minimum requires consumer choice.⁴³⁷

Note the distinction being drawn here: conducting DPI for marketing purposes would require notice but not necessarily opt-in — while sharing the information derived from DPI would continue to require opt-in. The latter will no doubt offend some, but as long as the notice is clear and conspicuous, what exactly is the problem?

B. Spending Universal Service Funds on Broadband

Commissioner Clyburn has claimed that the FCC must apply Title II to broadband because, without that, the FCC would not be able to spend Universal Service Fund moneys to support broadband deployment or consumption.⁴³⁸ In fact, the Tenth Circuit has already ruled on this precise question, rejecting arguments made to that effect by certain carriers and concluding thusly:

considering the Act as a whole, and in context of the realities of existing technology, we agree with the FCC that it was entirely reasonable for it to conclude that, “[s]o long as a provider offers some service on a common carrier basis, it may be eligible for universal service support as an [Eligible Telecommunications Carrier] under sections 214(e) and 254(e), even if it offers other services — including ‘information services’ like broadband Internet access — on a noncommon carrier basis.”⁴³⁹

This is well settled law. The FCC's ability to spend USF money on broadband will not be affected by returning broadband to Title I except, if ever, in the rare instance when a broad-

⁴³⁷ FTC Report ¶ 40.

⁴³⁸ *Communicators with Mignon Clyburn*, C-SPAN (July 1, 2017), <https://www.c-span.org/video/?430528-1/communicators-mignon-clyburn>.

⁴³⁹ See United States Court of Appeals For the Tenth Circuit, Petitions for Review of Orders Of the Federal Communications Commission (Nos. 11-161, 12-47) at 142, *available at* <https://www.ca10.uscourts.gov/opinions/11/11-9900.pdf>.

band provider does not also provide a telephony service, which will remain subject to Title II. We are not aware of any such service. Google Fiber, which made headlines for *not* offering a telephony service when it first launched in Kansas City and Austin,⁴⁴⁰ recently added such a service.⁴⁴¹

C. Taxing Broadband for Universal Service

There is, of course, a second question: may the FCC impose Universal Service Fund “fees” onto broadband bills?

In principle, applying Title II to broadband allows the FCC to tax broadband. And, if this were done in a revenue-neutral manner (dropping the contribution factor to reflect a larger tax base), this would make sense. In particular, it would avoid the perverse result that younger people, who are more likely to subscribe to broadband without separate telephone service might end up avoiding USF taxes altogether while older people continue to fund USF, paying higher contribution rates as the contribution base shrinks over time.

But there is also a strong argument that the largest expansion of the USF program’s funding base in its history should be made by Congress, as this decision presents a long-overdue opportunity to reconsider how the program works. TechFreedom has long objected to the basic structure of Universal Service Fund taxation — not only because these “fees” are taxes in all but name, imposed without the safeguards required by Article I of the U.S. Constitution, but also because these are perhaps the most regressive taxes in America.⁴⁴² It is economic and moral insanity to subsidize broadband service by taxing all broadband users at the same rate, such that the person just slightly above the eligibility threshold for broadband support suddenly pays an additional 17.1% tax on their broadband bill.⁴⁴³ A more rational and fairer system would be funded through progressive income taxation and kept accountable by Congress — the same way every other benefits program in America is run.

In any event, this is all rather beside the point, since the 2015 Open Internet Order simultaneously invoked the power to tax broadband for USF but also temporarily forbore from

⁴⁴⁰ T.C. Sottek, *Google Fiber coming to Austin by mid-2014*, <https://www.theverge.com/2013/4/9/4204902/google-fiber-coming-to-austin>.

⁴⁴¹ Chris Welch, *Google Fiber just announced a home phone service inspired by Google Voice*, The Verge (March 29, 2016), <https://www.theverge.com/2016/3/29/11325816/google-fiber-phone-announced>.

⁴⁴² See, e.g., TechFreedom Press Release, *Broadband Subsidies for Some, Broadband Taxes for Everyone*, (May 28, 2015), <http://techfreedom.org/post/120115561234/broadband-subsidies-for-some-broadband-taxes-for>.

⁴⁴³ See Universal Service Administrative Co, *Contribution factors* (last visited Aug. 30, 2017) (17.1% is the contribution rate for July – September 2017), <http://www.usac.org/cont/tools/contribution-factors.aspx>.

actually doing so.⁴⁴⁴ The Federal-State Joint Board on Universal Service has taken no action to ending that forbearance — perhaps because of the change in administrations, and the expiration of the term of Commissioner Rosenworcel, who had previously chaired the Board, or perhaps because of the political cost of being seen to raise taxes. Whatever the reason, the status quo, even with broadband subject to Title II, is that broadband is *not* taxed for USF (although, as noted above, the FCC *can* spend USF money to *support* broadband). Given this, it is difficult to see how the “need” to tax broadband to fund USF could be a compelling argument for maintaining the common carrier status of broadband service. If anything, it is argument for Congress to address the question of which services pay into USF — and how USF works more fundamentally — in legislation finally ending the threat of the FCC claiming broad powers over the Internet via Title II and Section 706, while also putting net neutrality on a firm but narrowly defined *statutory* footing.

D. Preempting Barriers to Broadband Deployment via Sections 253 & 332

Sections 253 and 332(b)(7)(B)(i) both ban certain state and local practices that affect the deployment of, either exclusively or primarily, common carrier services. Section 253(a) prohibits state or local regulation or other requirements that “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”⁴⁴⁵ Section 332 applies a similar legal prohibition, and a prohibition on “unreasonably discrimination among providers of functionally equivalent services,” to state and local laws and practices governing “personal wireless services,” which it defines “commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services.”⁴⁴⁶

The effect of undoing the application of Title II to broadband would be to render these two sections no longer directly applicable to state and local laws governing broadband services, with the very limited exception of broadband services using unlicensed spectrum — *i.e.*, Wi-Fi.⁴⁴⁷ This is indeed a problem Congress should remedy as part of a legislative package deal on Title II.⁴⁴⁸

⁴⁴⁴ 2015 Order ¶ 432.

⁴⁴⁵ 47 U.S.C.A. § 253(a).

⁴⁴⁶ 47 U.S.C.A. § 332(7)(C)(i).

⁴⁴⁷ Of course, essentially all residential wireline broadband services do also involve the use of an unlicensed wireless element within the user’s premises. This would clearly allow the FCC to continue to use Section 332 to preempt state and local laws governing such Wi-Fi service — but it is difficult to see how this statute could be used to govern the wireline service that brings connectivity to the point of the cable modem or DSL modem that either doubles as a Wi-Fi router or to which the Wi-Fi router is attached.

⁴⁴⁸ See *supra* at 92.

But we should be careful not to overstate this problem. All, or almost all, broadband networks are also used to deliver non-broadband services, most notably telephony, which will remain “telecommunications services” subject to Title II even after the FCC rescinds Title II reclassification. It is unclear why the FCC’s authority to use Section 332 and 253 would be affected by undoing reclassification to the extent that remains the case.

Again, Google Fiber did launch without a voice service offering, but added that in March 2016.⁴⁴⁹ Are other providers seriously considering abandoning a voice service offering altogether? Or would broadband providers feel they had to continue to offer a voice service that it would not otherwise make sense for them to offer simply to maintain the hook of Sections 253 and 332 over their services?

Absent such concerns, it is difficult to see what difference undoing reclassification would make — or that reclassification *did* make in 2015 — as a practical matter, given the particular wording of these statutes. Specifically, the operative term in Section 332(C)(7) is actually “personal wireless service facilities” rather than “personal wireless services,” and a wireless network infrastructure — whether 4G, 5G or any other kind — would clearly qualify as “personal wireless service facilities” so long as the network is used to deliver a Title II telephony service. On top of this, both Section 332(C)(7) use such broad language (“prohibit or have the effect of prohibiting the ability”) that it is difficult to see why the FCC would not prevail in attempting to apply these sections, in effect, “indirectly” to broadband networks, focusing on the Title II voice services they also carry alongside the broadband service that is soon to be, again, a Title I service.

XII. Our Recommendations

In debunking the myths commonly associated with the Commission’s Open Internet Orders, these comments should, above all, remind the FCC of one principal point that it seemingly has long-forgotten: Congress intended that it 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, unfettered by Federal or State regulation.”⁴⁵⁰ In furtherance of this policy, Congress intended to establish, through the 1996 Act, a “pro-competitive, deregulatory national policy framework” for telecommunications.⁴⁵¹

⁴⁴⁹ Chris Welch, *Google Fiber just announced a home phone service inspired by Google Voice*, The Verge (March 29, 2016), <https://www.theverge.com/2016/3/29/11325816/google-fiber-phone-announced>.

⁴⁵⁰ 47 U.S.C. § 230(b).

⁴⁵¹ Advanced Services Order ¶ 20 (quoting Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1996)).

By recognizing and respecting this principle and the underlying statutory framework established to implement it, the FCC allowed the United States to become a global trailblazer in developing the Internet and its related services. Inherent in this early success was, as Congress anticipated, the recognition that “[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.”⁴⁵²

Thus, above all, the Commission should return to the “light touch” regulatory environment that allowed the Internet and its underlying communications technologies to flourish. However, the Commission should additionally understand and accept that a return to this “light touch” regulatory environment is not merely a suggestion, but legally required under Congress’ current statutory framework. To this end, we have outlined below certain specific steps that would ensure the Internet continues to flourish unfettered by the excessive federal regulation Congress expressly proscribed.

A. Recommendation #1: Reverse Legal Claims re Section 706, Title II and Forbearance

Above all, the FCC should humbly acknowledge that the Internet is “arguably the most important innovation in communications in a generation,”⁴⁵³ and “[i]f Congress intended for the Commission to regulate one of the most important aspects of modern day life, Congress surely would have said so expressly.”⁴⁵⁴ As such, the FCC should once again recognize that Section 706 “does not constitute an independent grant of authority” to promulgate the rules governing broadband providers.⁴⁵⁵ The Commission should reverse each of the reinterpretations that effected the reclassification of broadband providers, both wireline and wireless, as common carriers subject to Title II. It should also disclaim its various reinterpretations of its forbearance powers.

In short, the FCC should, on these issues, to the extent it can, revert to the status quo ante the 2010 Order.

B. Recommendation #2: Maintain Transparency Rule

We support the rule first issued by the 2010 Order, left in place by the 2015 Order:

⁴⁵² 47 U.S.C. § 230(a)(4).

⁴⁵³ *Comcast*, 600 F.3d at 661.

⁴⁵⁴ *ClearCorrect*, 810 F.3d at 1302 (O’Malley, J. concurring).

⁴⁵⁵ See Advanced Services Order ¶ 77.

A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.⁴⁵⁶

C. Recommendation #3: The FCC Should Repeal the Other Open Internet Rules for Lack of Authority

The D.C. Circuit has twice, under *Chevron*, deferred to the FCC's claimed sources of authority for net neutrality rules: Section 706 in *Verizon* (2014) and Title II in *U.S. Telecom* (2016/2017). In each decision, the court stopped short of considering additional arguments made by the FCC in support of its rules — because these arguments were unnecessary to the holding of those cases, and thus any discussion of any other statutory basis would have been dicta, and thus both not binding and potentially inappropriate as an exercise in judicial speculation.⁴⁵⁷ Reversing the FCC's interpretations of Section 706 and Title II means the Commission will face a true fork in the road.

On the one hand, the Commission could revisit these earlier arguments to find legal authority for some new version of the net neutrality rules that will both fit within those sources of legal authority *and* pass constitutional muster. While these other sources of legal authority raise difficult legal questions, three things are absolutely clear:

1. Under *Cellco*, the FCC could not use them to impose legal requirements that impose common carrier status on what would be non common carrier services, which broadband would once be, after reversal of the 2015 Order's reclassification of broadband.
2. The FCC would spend at least two years in litigation over these claims of legal authority with broadband providers who, even if they would happily accede to the rules themselves, would necessarily *have* to challenge claims of legal authority that would inevitably have broader consequences for FCC regulation. While it is safe to say, under *Chevron*, that those challenging the FCC's discretion to reverse its position on Title II and Section 706 would lose, these challenges to *new* claims of legal authority are much less predictable. In the end, at most, the Commission would like-

⁴⁵⁶ 47 C.F.R. § 8.3 (2015).

⁴⁵⁷ But see *supra* at 69-75 (discussion of 706 Analysis as dicta).

ly succeed in grounding rules only over wireless services, based on Title III, that would not satisfy the

3. There will be no permanent solution to this debate, because, as long as the FCC continues trying, trying again, Congress will avoid confronting this issue.

On the other hand, the Commission could do what it should have done a decade ago:

1. Admit that the Commission lacks clear legal authority to police broadband;
2. Allow the issue of net neutrality to revert to the layered approach that deterred such problems prior to 2008 — an approach led by the Federal Trade Commission; and
3. Clearly ask Congress to resolve this issue once and for all.

This debate will never end until Congress legislates. We will continue to play regulatory ping-pong with the FCC's authority over the Internet with every change of administrations. The Commission will eventually have to call upon Congress to resolve the issue through legislation. The only question is whether that happens now or several administrations from now. An ancient Chinese proverb says: "The best time to plant a tree was 20 years ago. The second best time is now." So, too, with planting the seed for a clear foundation for Internet governance.

We harken back to what Commission McDowell said in his dissent from the FCC's 2010 Open Internet Order:

The FCC is not Congress. We cannot make laws. Legislating is the sole domain of the directly elected representatives of the American people. Yet the majority is determined to ignore the growing chorus of voices emanating from Capitol Hill in what appears to some as an obsessive quest to regulate at all costs.

....

[T]he Order desperately scours the Act to find a tether to moor its alleged Title I ancillary authority. As expected, the Order's legal analysis ignores the fundamental teaching of the Comcast case: Titles II, III, and VI of the Communications Act give the FCC the power to regulate specific, recognized classes of electronic communications services, which consist of common carriage telephony, broadcasting and other licensed wireless services, and multichannel video programming services. Despite the desires of some, Congress has not established a new title of the Act to police Internet network management, not even implicitly.

D. Recommendation #4: The FCC and FTC Should Conduct a Cost-Benefit Analysis to Inform Congress in Crafting Legislation

Disclaiming authority over broadband (other than the ancillary jurisdiction necessary to support the transparency rule) does not mean the FCC should simply do nothing. Indeed, the FCC has a vital role to play — in advising Congress in crafting legislation. There is no reason the Commission should not join forces with the Federal Trade Commission in conducting such a vital analysis.

In arguing that the net neutrality rule was a major rule requiring express congressional authorization, Judge Kavanaugh understandably focused his analysis on the vast economic significance of a net neutrality rule that will essentially “affect every Internet service provider, every Internet content provider, and every Internet consumer.”⁴⁵⁸ Indeed, when the Internet economy is alone responsible for an estimated \$966.2 billion and over three million jobs, it seems only logical to focus on the economic significance of the rule.⁴⁵⁹ Thus, as Judge Kavanaugh rightly noted, “[t]he financial impact of the rule—in terms of the portion of the economy affected, as well as the impact on investment in infrastructure, content, and business — is staggering.”⁴⁶⁰ Given the economic significance of the rule, the Commission should take the necessary, and responsible, step of conducting a cost-benefit analysis of the net-neutrality rule. Further, with U.S. Representative Greg Walden, Chairman of the House Energy and Commerce Committee, recently scheduling a full committee hearing on the issue, such an analysis would be particularly helpful as a means of guiding Congress as they, hopefully, finally tackle this issue.⁴⁶¹

In *Verizon v. FCC*, the D.C. Circuit — despite striking down key elements of the FCC’s Open Internet rules — agreed with the Commission’s arguments that Section 706 of the Communications Act, titled “Advanced Telecommunications Incentives,” gives the FCC authority to regulate broadband networks, including imposing net neutrality rules on Internet service providers.⁴⁶² However, Section 706 bestows the agency with such authority *only* after a

⁴⁵⁸ *U.S. Telecom II*, 855 F.3d at 417 (Kavanaugh, J. dissenting).

⁴⁵⁹ See Stephen E. Siwek, *Measuring the U.S. Internet Sector*, INTERNET ASSOCIATION (Dec. 10, 2015), <https://cdn1.internetassociation.org/wp-content/uploads/2015/12/Internet-Association-Measuring-the-US-Internet-Sector-12-10-15.pdf>.

⁴⁶⁰ *U.S. Telecom II* at 423 (Kavanaugh, J. Dissenting).

⁴⁶¹ See Jon Brodtkin, *Net Neutrality faceoff: Congress summons ISPs and websites to hearing*, arsTechnica (July 25, 2017), <https://arstechnica.com/tech-policy/2017/07/facebook-alphabet-amazon-and-netflix-called-to-testify-on-net-neutrality/>.

⁴⁶² *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014).

showing by the FCC that “advanced telecommunications capability” is not being deployed to Americans in a “reasonable and timely” manner.⁴⁶³

In light of the Supreme Court’s recent decision in *Michigan v. EPA*⁴⁶⁴—decided a year after *Verizon*—Section 706’s “reasonable and timely” language has become particularly relevant. There, the Court held that, despite deserving *Chevron* deference, the EPA’s interpretation was unreasonable “[e]ven under this deferential standard” because the EPA “unreasonably deemed cost irrelevant when it decided to regulate power plants.”⁴⁶⁵ As the Court stated:

We review this interpretation under the standard set out in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *Chevron* directs courts to accept an agency’s reasonable resolution of an ambiguity in a statute that the agency administers. *Id.*, at 842–843, 104 S.Ct. 2778. Even under this deferential standard, however, “agencies must operate within the bounds of reasonable interpretation.” *Utility Air Regulatory Group v. EPA*, 573 U.S. ----, ----, 134 S.Ct. 2427, 2442, 189 L.Ed.2d 372 (2014) (internal quotation marks omitted). EPA strayed far beyond those bounds when it read § 7412(n)(1) to mean that it could ignore cost when deciding whether to regulate power plants.⁴⁶⁶

Specifically, the Court found that cost considerations were required under the provision of the CWA that granted the EPA the authority to regulate power plants, because the EPA could only regulate such power plants if such regulation was “appropriate and necessary.”⁴⁶⁷ As the Court noted, Congress recognized that power plants would face various other regulatory requirements that might sufficiently reduce power plants’ hazardous-air-pollutant levels, and, as such, specifically included the “appropriate and necessary” language to instruct the EPA to take a “wait-and-see” approach. As the Court put it:

Congress modified that regulatory scheme for power plants. It did so because the 1990 amendments established a separate program to control power plant emissions contributing to acid rain, and many thought that just by complying with those requirements, plants might reduce their emissions of hazardous air pollutants to acceptable levels. See *ante*, at 2704 – 2705. That

⁴⁶³ 47 U.S.C. § 1302(a).

⁴⁶⁴ *Michigan v. E.P.A.*, 135 S. Ct. 2699 (2015).

⁴⁶⁵ *Id.*, 135 S. Ct. at 2706–07 (2015).

⁴⁶⁶ *Id.*

⁴⁶⁷ *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2707 (2015) (“In stark contrast, Congress instructed EPA to add power plants to the program if (but only if) the Agency finds regulation “appropriate and necessary.”).

prospect counseled a “wait and see” approach, under which EPA would give the Act’s acid rain provisions a chance to achieve that side benefit before imposing any further regulation. Accordingly, Congress instructed EPA to “perform a study of the hazards to public health reasonably anticipated” to result from power plants’ emissions after the 1990 amendments had taken effect. § 7412(n)(1)(A). And Congress provided that EPA “shall regulate” those emissions only if the Agency “finds such regulation is appropriate and necessary after considering the results of the [public health] study.” *Ibid.* Upon making such a finding, however, EPA is to regulate power plants as it does every other stationary source: first, by categorizing plants and setting floor standards for the different groups; then by deciding whether to regulate beyond the floors; and finally, by conducting the cost-benefit analysis required by Executive Order.⁴⁶⁸

Similarly, the “reasonable and timely” requirement of Section 706 should be viewed as a “wait-and-see” directive by Congress to ensure that the FCC not impose overly burdensome regulations without first ensuring that those steps were, in fact, necessary to further broadband deployment. While, admittedly, the FCC has produced Broadband Progress Report’s as is required under Section 706(b),⁴⁶⁹ the Commission has never, as with the EPA in *Michigan v. EPA*, undertaken any cost-benefit analysis to determine if broadband was not being deployed in a “reasonable and timely” manner, nor that the open Internet rules would actually advance telecommunications capabilities. Given the economic magnitude of the rule — which would govern the entirety of the digital economy — such a failure to determine the necessity of the regulation in the first instance is not only ill advised, but also not legal. Specifically, absent such an analysis, the authority the FCC invokes under Section 706 may not actually be available, or — at the very least — that this interpretation could not be considered “reasonable” under *Chevron* step-two absent a showing that by the FCC that “advanced telecommunications capability” is not being deployed to Americans in a “reasonable and timely” manner as is required under the Act.

E. Recommendation #5: Advise Congress on Legislation

The FCC should, after the economic study proposed above, make specific recommendations to Congress about how to resolve this torturous debate once and for all

⁴⁶⁸ *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2715–16 (2015).

⁴⁶⁹ *In the Matter of Protecting and Promoting Open Internet, Declaratory Ruling*, 30 FCC Rcd. 5601, 5985 (Mar. 12, 2015) (O’Rielly, Comm’r, dissenting)., https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-10A1.pdf.

- Resolving Legal Questions of Authority:
 - Clarify that Title II does not apply to broadband.
 - Clarify that Section 706 is not an independent grant of authority — this is particularly important because the FCC’s re-reinterpretation of Section 706 may not stop state PUCs from claiming the powers necessarily conferred upon them by the FCC’s 2010 reading of Section 706 as an independent grant of authority.
 - Resolve questions about the FTC’s common carrier exception once and for all.
- Clarify standard for forbearance and unforbearance — ideally, the same cost-benefit test that would apply to *all* FCC decision-making.
- Provide a firm, specific and narrow statutory basis for policing net neutrality concerns — something that, in our view, should be administered by the FTC, even if that means enshrining specific *ex ante* regulations in statute. In particular, this must include superseding Section 230’s immunity insofar as it would bar enforcement of such protections.

And the following items that, while not essential, would be part of an ideal legislative package:

- Reforming Sections 253 and 332 to clearly apply to information services, so that the FCC would be able to use these sections to preempt state and local barriers to broadband deployment more easily.
- Including broadband in the USF funding base.

We appreciate the opportunity to contribute these comments to the record and look forward to helping to resolve this painful debate once and for all.