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Nos. 15-1063 (and consolidated cases)

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

UNITED STATES TELECOM ASSOCIATION, et al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Respondents.

On Petition for Review from the Federal Communications Commission

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BRIEF FOR INTERVENORS FOR PETITIONERS TECHFREEDOM, CARI.NET, JEFF PULVER, SCOTT BANISTER, CHARLES GIANCARLO, WENDELL BROWN, AND DAVID FRANKEL

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August 6, 2015

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 26.1 and 28(a)(1), and Fed. R. App. P. 26.1, the undersigned counsel certifies as follows:

(A) Parties and Amici. Except for the following *amici*, all parties and intervenors appearing before the FCC and this Court are listed in the Joint Brief for Petitioners United States Telecom Association *et al.* In this Court, the following *amici* have been granted leave to participate:

- Richard Bennett;
- The Business Roundtable, Chamber of Commerce of the United States, and National Association of Manufacturers;
- The Center for Boundless Innovation in Technology;
- The Competitive Enterprise Institute;
- Harold Furchtgott-Roth and the Washington Legal Foundation;
- The Georgetown Center for Business and Public Policy, McDonough School of Business, Georgetown University;
- The International Center for Law and Economics and Affiliated Scholars;
- William J. Kirsch;
- Mobile Future;
- The Multicultural Media, Telecom, and Internet Council;
- The Phoenix Center for Advanced Legal and Economic Public Policy Studies;

- The Telecommunications Industry Association; and
- Christopher S. Yoo

(B) Rulings Under Review. The ruling under review is the FCC's Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015) ("Order") [JA ___].

(C) Related Cases. There are no other cases related to the consolidated petitions.

/s/ Adam J. White
August 6, 2015 Adam J. White

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rules 26.1 and 28(a)(1), Intervenors make the following disclosure:

TechFreedom is a nonprofit, non-stock corporation organized under the laws of the District of Columbia. TechFreedom has no parent corporation. It issues no stock.

CariNet, Inc., doing business as CARI.net, is a privately held California S-Corporation. It has no parent corporation, and no corporation holds any stock in it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulatory Materials

Miscellaneous

* *Authorities upon which we principally rely are designated by an asterisk.*

GLOSSARY

1934 Act	Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064
1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56
Commission	Federal Communications Commission
Computer II	Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Second Computer Inquiry*), 77 F.C.C.2d 384 (1980)
DSL	Digital Subscriber Line
FCC	Federal Communications Commission
FTC	Federal Trade Commission
NPRM	Notice of Proposed Rulemaking, *Protecting and Promoting the Open Internet*, 29 FCC Rcd. 5561 (2014)
Order	Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015)

INTRODUCTION

"Net neutrality" is a red herring; the issue before the Court is the FCC's claim of unprecedented power to regulate the Internet without congressional authorization. And the alternative to the FCC's unprecedented, unauthorized, and unchecked regulatory action is not a regulatory vacuum. The alternative, as Commissioner Pai observes,[1] is continued enforcement of generally applicable laws by general-purpose regulators, such as the FTC's enforcement of consumer protection and antitrust laws passed by Congress pursuant to the Constitution's checks and balances.

As Congress has long recognized, "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." 47 U.S.C. § 230(a)(4). To that end, "[i]t is 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." *Id.* § 230(b).

The Intervenors joining this brief have actively contributed to, and benefitted from, the flourishing of an Internet unfettered by excessive federal

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[1] *Wrecking The Internet To Save It? The FCC's Net Neutrality Rule: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. (2015) (statement of FCC Commissioner Ajit Pai), *available at* http://1.usa.gov/1Cc3X7w.

regulation: helping to develop some of the Internet's most significant communications technologies; providing "cloud" computing services; and advocating for the "light touch" regulatory environment that allowed those technologies to flourish. *See* Mot. to Intervene (June 8, 2015) [Doc. 1556317].

STATUTES AND REGULATIONS

The FCC's Order under review is found at 30 FCC Rcd. 5601 (Mar. 12, 2015) [JA ____]All applicable statutes and regulations are reproduced in the Addendum to the Joint Brief for Petitioners USTelecom *et al*.

STATEMENT OF THE CASE

The FCC's attempt to impose Title II regulation on the Internet marks the latest step in the Commission's decade-long regulatory "voyage of discovery." *Cf. Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2446 (2014) ("*UARG*"). For all of its tacking, the FCC has never seriously attempted to hew to the course charted by Congress.

I. 2005–2014: The FCC's First Multi-Year Voyage of Discovery through Ancillary Jurisdiction and Section 706

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

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

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. *See* Kevin Martin, FCC Chairman, *Comments on Commission Policy Statement* (Aug. 5, 2005), *available at* https://goo.gl/cB2tmq. In 2006, Congress considered legislation to authorize the FCC to enforce that policy, but declined to enact it. Communications Act of 2006, H.R. 5252, 109th Cong. (2006).

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.

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

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 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. 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).

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." 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.

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. *Cellco P'ship v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012). 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. *See Verizon v. FCC*, 740 F.3d 623, 645-46 (D.C. Cir. 2014) (describing the FCC's views).

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 re-interpreted 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." *Preserving the Open Internet*

Broadband Industry Practices, 25 FCC Rcd 17905, ¶¶ 117-23 (2010). The D.C. Circuit rightly vacated it in 2014. *Verizon*, 740 F.3d 623 (D.C. Cir. 2014).

After losing the *Verizon* case, the FCC could have chosen one of the other available *lawful* options. Instead, it pursued a starkly different course.

II. 2014–?: The FCC's Second Multi-Year Voyage of Discovery Through Title II, Forbearance and "Tailoring"

The FCC took upon itself, in the challenged 2014 Order, to "modern[ize]" Title II. Order ¶ 37 (heading) [JA ____]. 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. *See* USTA Br. 83-94. 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," Order ¶ 43 [JA ____] (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 968 (2005)). Instead, the Order held that

the *entirety* of broadband service is a telecommunications service, Order ¶ 356 [JA ____], 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, *see Cellco*, 700 F.3d at 538, the FCC reinterpreted the key term "public switched network," in 47 U.S.C. § 332(d)(2), to mean the Internet itself. Order ¶ 391 [JA ____] ("networks that use standardized addressing identifiers other than [traditional telephone] numbers for routing of packets").

These reinterpretations create a host of problems, which the FCC attempts to mitigate by "tailoring" (a term mentioned a whopping 77 times in the Order) or "modern[izing]" (mentioned seven times) the 1934 Act. *See*, *e.g.*, Order ¶¶ 37 (heading), 508, 512, 514.

The FCC declared that it would use its "forbearance" authority under Section 10 to waive "the vast majority of rules adopted under Title II." *Order* ¶ 51 [JA ____]; *see also id.* ¶ 37 [JA ____] ("[O]ur forbearance approach results in over 700 codified rules being inapplicable."). But the FCC made clear that future Commissioners "retain adequate authority to" rescind such forbearance.

Order ¶ 538 [JA ____].[2] 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 appointment to the FCC, the "rules of the road" for those making multi-billion dollar investment decisions may shift, introducing constant market uncertainty.

Moreover, the FCC reinterpreted what it means to be so sufficiently interconnected with the public switched network to qualify as a common carrier. No longer will a service need to connect to "all or substantially all" points on the public switched network to qualify; instead the FCC will analyze "whether the interconnected service is 'broadly available' … to 'the public' or to such classes of eligible users as to be effectively available 'to a substantial portion of the public.'" Order ¶ 402 [JA ____] (quoting 47 U.S.C. § 332(d)(1)). The FCC made this change to ensure that standard wireless voice remains a common carrier service, since it interconnects with only some of the now vastly expanded "public switched network" (*i.e.*, telephone numbers, but not

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[2] For example, it only temporarily forbore from Section 254(d), *Order* ¶¶ 488–89 [JA ____– ____], which requires that all telecommunications carriers pay Universal Service "fees." For now, the FCC has requested guidance on that politically fraught question, on the imposition of new broadband taxes, to the Federal-State Joint Board on Universal Service. *Order* ¶ 489 n.1471 [JA ____].

IP addresses). *Id*. But its new definition—a "broadly available" interconnected service—is expansive enough to implicate "edge" Internet services, such as Internet telephony, which are broadly-available IP-based services.

Thus, the FCC's reinterpretation of "public switched network" blurs the bright-line distinction that the FCC drew between Title II services and "edge" Internet services in its seminal "Pulver Order," 19 FCC Rcd. 3307 (2004), exposing to Title II regulation the very services that the FCC claims to protect. Order ¶ 1 [JA ____]. It prevents innovators such as Jeff Pulver and his fellow Intervenors from knowing, before investing substantial resources, what ultimately would be subject to this regulation.

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

III. Congress Declined to Enact Broadband Regulatory Legislation, Even While Enacting Other Internet-Related Laws

The 1996 Telecommunications Act codified the longstanding distinction between "basic services" (defined as "a pure transmission capability over a communications path") and "enhanced services" (comprising "any offering over the telecommunications network which is more than a basic transmission service"). *See Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Second Computer Inquiry*), 77 F.C.C.2d 384, ¶¶ 96–97 (1980)

("*Computer II*"); *see also Verizon*, 740 F.3d at 630. Congress adopted the terms used by the district court that broke up the AT&T monopoly: "telecommunications services" and "information services." *United States v. AT&T*, 552 F. Supp. 131, 139, 167 (D.D.C. 1982). Thus, the 1996 Act drew a bright line between Title II and the Internet—leaving the Internet subject to laws of general application, such as consumer protection and antitrust laws. Congress reinforced this distinction with its statement of policy. 47 U.S.C. § 230(b)(2).

Congress's enactment of the 1996 Act was but the most prominent part of a consistent history of legislation in which Congress has withheld regulatory authority from the FCC. In the intervening years, Congress has passed significant legislation regarding the Internet. It 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. It prohibited broadband taxes and discriminatory Internet-specific taxes, repeatedly extending the Internet Tax Freedom Act of 1998.

When Congress passed broadband-specific legislation, it was to fund broadband deployment in rural areas, *see* Pub. L. No. 110-234, 122 Stat. 923 (2008); to promote broadband deployment by enhancing access to relevant federal data, *see* Pub. L. No. 110-385, 122 Stat. 4096 (2008); and to have the

FCC prepare *recommendations* for policymakers at all levels of government in a National Broadband Plan, Pub. L. No. 111-5, 123 Stat. 115 (2009). Nowhere did Congress grant the FCC any new powers to regulate the Internet, nor did it suggest that Title II was an appropriate regulatory framework for Internet services.

Congress's express goal in the 1996 Act was marketplace competition, not onerous regulation—"to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). Congress has enacted no subsequent legislation detracting from that approach.

SUMMARY OF ARGUMENT

The FCC's assertion of Title II authority over Internet services contradicts at least three fundamental principles of statutory construction.

First, it presumes that Congress delegated to the FCC power to unilaterally decide a question of utmost "economic and political significance," despite the lack of clearly expressed statutory authorization and despite subsequent legislative history indicating that Congress did not intend the FCC to regulate broadband Internet services. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147 (2000).

Second, the FCC's statutory reinterpretations force it to mitigate the practical impact of those same interpretations, through the use of "extensive forbearance," Order ¶ 51 [JA ____], which the FCC also calls "tailor[ing]," *id.* ¶ 506 [JA ____]. That exigency, entirely of the FCC's own making, "should have alerted [the agency] that it had taken a wrong interpretative turn" in the first place. *See UARG*, 134 S. Ct. at 2446.

And third, by claiming immense regulatory power without first demonstrating that such regulation is necessary to prevent an actual "significant risk" to the public, 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. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.* (*The Benzene Cases*), 448 U.S. 607, 645, 646 (1980).

Moreover, even if the pertinent statutory language were merely ambiguous as to the FCC's authority over Internet services, this Court should still interpret the statutes *de novo*. *Chevron*'s deferential framework is inapplicable, for at least two reasons:

First, Congress cannot be presumed to have delegated interpretive authority, regarding a matter of such "economic and political significance," to the FCC instead of the courts. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

Second, because the FCC's interpretation of Title II raises significant nondelegation questions, the Court must interpret the statute *de novo*. Proper application of the nondelegation canon "is a question for the courts, and an agency's voluntary self-denial," through forbearance or tailoring, "has no bearing upon the answer." *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001).

ARGUMENT

"In our federal system, the National Government possesses only limited powers[.]" *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014). And within that limited government, federal agencies are even *more* limited, because they can exercise only those powers that Congress has chosen to further delegate to them. Thus the FCC, like any other agency, has "literally . . . no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

Thus, while courts do preserve agencies' discretion for the "formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress," *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984), the courts are also obligated to 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," *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1874 (2013).

I. The FCC's Statutory Interpretations Violate Fundamental Principles of Statutory Construction

In imposing an unprecedented regulatory program on broadband Internet infrastructure, the FCC undertook several major statutory reinterpretations. It reclassified fixed and mobile broadband Internet access as "telecommunications services" (and thus providers as "common carriers") under Titles II and III of the Communications Act. *See*, *e.g.*, Order ¶¶ 355–56 [JA ____–____]. To support its reclassification, the FCC reinterpreted the statutory term "telecommunications service" to cover broadband Internet service. *See id.* ¶¶ 331–35 [JA ____–____].

Furthermore, in order to classify mobile broadband Internet access as an "interconnected service" subject to Title II, the FCC reinterpreted "public switched network" to include not just common carriers using the telephonic North American Numbering Plan in connection with switched services, but also those using "public IP addresses" in connection with switched services. *Id.* ¶ 391 [JA ____].

We agree with Petitioners that the FCC's reclassifications and reinterpretations are unlawful, arbitrary, and capricious. We write separately to

elaborate further upon fundamental principles of statutory construction that belie the FCC's statutory reinterpretations underlying its tectonic change in Internet regulation.

A. The FCC is Attempting to Regulate a Matter of Utmost "Economic and Political Significance" Without Congress's Clearly Expressed Authorization

Congress could not have been clearer: "It is 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*[.]" 47 U.S.C. § 230(b)(2) (emphasis added). And lawmakers took care to specify Internet "access" service as one of the unfettered "interactive computer services." *Id.* § 230(f)(2).

Congress based its policy on legislative findings highlighting the Internet's extraordinary importance, such as the "rapidly developing array of Internet and other interactive computer services available to individual Americans," which "represent an extraordinary advance in the availability of educational and informational resources to our citizens." *Id.* § 230(a)(1). As Congress stressed, the "Internet and other interactive computer services have flourished, to the benefit of all Americans, *with a minimum of government regulation*." *Id.* § 230(a)(4) (emphasis added); *cf. Reno v. ACLU*, 521 U.S. 844, 868–69 (1997) ("Neither before nor after [1996] have the vast democratic

forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry.").

Needless to say, as significant as the Internet was in 1996, it is exponentially more significant today. And thus the FCC correctly observes, in the Order's first paragraph, that 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." Order ¶ 1 [JA ____].

But the Internet's utmost national and international importance does not *support* the FCC's regulatory program—it *undermines* the vast claim of power behind it. The Internet is of "such economic and political magnitude" that courts must not lightly conclude that Congress committed Internet regulation to the discretion of an agency without specific, express authorization. *Brown & Williamson*, 529 U.S. at 133. Congress made no such authorization here.

The Supreme Court's analysis in *Brown & Williamson* demonstrates the skepticism with which courts must evaluate agencies' sudden discoveries of immense, dormant powers in longstanding statutes. The Court began by observing, in reviewing an agency's attempt to expand dramatically its powers under a 1938 statute, that "we 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." *Id.* (emphasis added). The Court analyzed the relevant statutory language not in isolation, but in light of the "overall statutory scheme," *id.*, and in light of Congress's longstanding legislative approach to the matter at hand (namely, tobacco), *id.* at 143.

In *Brown & Williamson*, as here, Congress had stressed that the challenged regulations' subject matter had an extraordinary place in our society and economy. "A provision of the United States Code currently in force," the Court explained, "states that '[t]he marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare." *Id.* at 137 (quoting 7 U.S.C. § 1311(a)). Congress's appraisal of the tobacco industry's national importance, which illuminated legislative "inten[t] to exclude tobacco products from the FDA's jurisdiction," *id.* at 142, pales in comparison to the aforementioned statements of congressional policy in favor of an Internet "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

And there, as here, Congress's historical legislative approach was instructive. In *Brown & Williamson*, the Court 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. 529 U.S. at 143. Congress had rejected bills that would have given the FDA the regulatory authority that the agency later claimed for itself. *Id.* at 147–48. Similarly, Congress has enacted significant legislation regarding regulation of the Internet, from the 1996 Act onward, and it has rejected legislation giving the FCC authority to directly regulate the broadband Internet access services. *See supra* pp. 4, 9–11.

Furthermore, as stressed in *Brown & Williamson*, the sheer importance of the policy matter at hand demanded judicial skepticism of the agency's power grab. The agency was "assert[ing] jurisdiction to regulate an industry constituting a significant portion of the American economy," *id.* at 159, and one with a "unique place in American history and society," *id.*, but *without* anchoring its regulatory program in clear congressional authorization to regulate that industry. "[W]e are confident," the Supreme 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." *Id.* at 160; *see also MCI Telecommc'ns Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994).

The FCC's claim of such cryptically delegated powers, with respect to the Internet, deserves equal 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." *Brown & Williamson*, 529 U.S. at 161.

This Court, too, has applied similar scrutiny to agency assertions of broad new powers. In *American Bar Association v. FTC*, 430 F.3d 457 (D.C. Cir. 2005), the Court rebuffed the FTC's "attempted turf expansion" over the legal industry, which the agency had attempted to justify by reference to a broad statute empowering the agency to regulate institutions that "engag[ed] in financial activities." *Id.* at 467. Even if the statute were ambiguous, the Court explained, "[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." *Id.* at 469. To accept the FTC's self-aggrandizing statutory interpretation would require the conclusion that Congress "had hidden a rather large elephant in a rather obscure mousehole." *Id.* "Such a dramatic rewriting of the statute is not mere interpretation." *Id.* at 470.

Similarly, when this Court rejected the IRS's assertion of authority over tax-preparers, the Court characterized 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." *Loving v. United States*, 742 F.3d 1013, 1021 (D.C. Cir. 2014). The Court's skepticism was reinforced by the agency's belated assertion of regulatory power under its longstanding statute: "we find it rather telling," the Court observed, "that the IRS had never before maintained that it possessed this authority." *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)).

The FCC's statutory reinterpretations deserve the same measure of skepticism. Even more than federal regulatory jurisdiction over tax-preparers and the legal profession, the FCC's unilateral assertion of Title II regulatory authority over the Internet directly implicates broadband, an industry that serves 85% of Americans[3] (and that, between 1996 and 2013, invested a

[3] Monica Anderson & Andrew Perrin, *15% of Americans Don't Use the Internet. Who Are They?*, Pew Research Center (July 28, 2015), http://goo.gl/03ksSO.

staggering $1.3 trillion of private capital in broadband infrastructure,[4] making it the largest source of private investment.[5]

The FCC newly finds these regulatory powers in a longstanding statute after decades of the agency claiming no such powers. *See Computer II*, 77 F.C.C.2d 384, ¶ 7; *see also* Report to Congress, Federal-State Joint Board on Universal Service, CC Docket No. 96–45, ¶ 21 (Apr. 10, 1998), *available at* https://goo.gl/h2mNKc. And the FCC's assertion of these powers squarely contradicts Congress's express policy statement in Section 230. This Court should not conclude that Congress delegated a question of such economic and political magnitude to the FCC's unilateral policymaking discretion.

B. The FCC's Resort to "Expansive Forbearance"—or "Tailoring"—to Mitigate the Harmful Impacts of Its Own Statutory Interpretations Demonstrates the Incoherence of Those Interpretations

When the FCC found itself compelled to exercise such "extensive "forbearance," Order ¶ 461 [JA ____], for no reason other then to make

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[4] Patrick Brogan, USTelecom, Latest Data Show Broadband Investment Surged In 2013 (Sept. 8, 2014), *available at* http://goo.gl/Cpo9hc.

[5] White House Office of Science and Technology Policy & Nat'l Economic Council, Four Years of Broadband Growth 5 (2013), *available at* http://goo.gl/f72B2s ("[J]ust two of the largest U.S. telecommunications companies account for greater combined stateside investment than the top five oil/gas companies, and nearly four times more than the big three auto companies combined.").

workable its sweeping reinterpretation of the 1934 Act, the FCC should have recognized it for what it was: a red flag signaling the untenability of the interpretation itself.

While Section 10 allows the Commission to "forbear" from applying the statute or regulations to telecommunications services in limited circumstances, 47 U.S.C. § 160(a), the FCC concedes that its assertion of regulatory jurisdiction over the Internet here requires the FCC to go well beyond "typical forbearance proceedings," Order ¶ 438 [JA ____]. Instead of fully imposing Title II and then waiting for affected parties to petition for forbearance (and to carry the requisite burden of proof), *id.*, the FCC immediately and preemptively forbears from significant portions of Title II, in order to "provide the regulatory certainty necessary to continued investment and innovation" in broadband Internet technology. *Id.* at ¶ 419 [JA ____]; *see also id.* ¶ 499 [JA ____] ("avoiding additional regulations that do not appear required at this time and that risk needlessly detracting from providers' broadband investments").

This is not run-of-the-mill forbearance. Rather, as the FCC acknowledges, its waiver of vast swaths of Title II regulation is "extensive forbearance," *id.* ¶ 461 [JA ____], "broad forbearance," *id.* ¶ 438 (heading) [JA ___], or even "expansive forbearance," *id.* ¶ 493 [JA ____].

This approach to "tailoring" Title II in order to accommodate the FCC's Internet regulation policy echoes a similar regulate-but-mitigate approach: 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*, 134 S. Ct. 2427.

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." *Id.* at 2446. The sheer extent of forbearance necessary to prevent ruinous impacts on the industry (and consumers), *see* Order ¶¶ 495–96, simply affirms that the agency's underlying statutory interpretation is wrong.

While the current FCC Chairman says that the Order creates a "modernized version of Title II,"[6] he does not and cannot promise that his successors will continue the FCC's initial forbearance of Title II's most onerous requirements. Instead, as the Order repeatedly notes, it will "proceed

[6] Statement of FCC Chairman Tom Wheeler, Protecting and Promoting the Open Internet, GN Docket No. 14-28, *available at* https://www.fcc.gov/article/fcc-15-24a2.

incrementally,"[7] exercising forbearance merely "at this time,"[8] while "retain[ing] adequate authority to modify our regulatory approach in the future, as circumstances warrant."[9] Such a self-aggrandizing regulatory approach, no less than the EPA's "tailoring," requires the courts and the public to commit far too much discretion to regulators.

So long as the FCC can regulate the Internet through Title II, the possibility of "unforbearance" will cast a shadow across broadband providers' long-term decisions. The FCC exacerbates this regulatory uncertainty by characterizing its forbearance discretion in the broadest possible terms, calling Section 10 a merely "ambiguous statutory provision" that sets no bright-line rules but instead frees the FCC to exercise "significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband." Order ¶¶ 438, 437 [JA ____, ____].

The *UARG* Court stressed that the EPA's initial intention to restrain itself did not mitigate the harm done by the underlying statutory misinterpretation; the Court would not "stand on the dock and wave goodbye as [the agency] embarks on this multiyear voyage of discovery." *UARG*, 134 S.

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7 *See*, *e.g.*, Order ¶ 458 [JA ____].

8 *See*, *e.g.*, *id.* ¶ 495 [JA ____].

9 *See*, *e.g.*, *id.* ¶ 538 [JA ____].

Ct. at 2446. Nor should this Court—especially when the threat of "unforbearance" will persist years after this case is decided.

C. The FCC Is Imposing Immense Regulatory Burdens Without Demonstrating That They Are Actually Necessary to Prevent a "Significant Risk" of Harm to the Public

While the FCC announced that its new Internet-regulation policy would be promptly implemented, *see* Order ¶ 584 [JA ____], it cast the alleged threat to the public, to which it was purportedly responding, in much more conjectural terms. Instead of identifying a concrete, present threat to the public, the FCC claims merely that "broadband providers continue to have the *incentives* and *ability* to engage in practices that pose a threat to Internet openness[.]" *See*, *e.g.*, *id.* ¶ 2 [JA ____] (emphasis added).

The FCC nowhere explains why its regulatory program is necessary to guard the public against a significant risk of harm—especially given the presence of other "cops on the beat," most notably the FTC. Instead, the FCC invokes just two specific examples of alleged public harm; neither bears the weight that the agency places upon it.

First is the aforementioned Madison River case. *See* Order ¶ 79 n.123 [JA ____]; *see also* Notice of Proposed Rulemaking, *Protecting and Promoting the Open Internet*, GN Docket No. 14–28, ¶ 17 (May 15, 2014) [JA ____]. But the circumstances of that 2005 investigation hardly evince a risk of public harm

today. The FCC's investigation of Madison River's alleged blocking of Internet telephony traffic resulted in nothing more than a consent decree intended to "avoid the expenditure of additional resources that would be required to further litigate the issues raised in the Investigation"; it did "not constitute either an adjudication on the merits or a factual or legal finding." *Madison River Comm'cns LLC*, 20 FCC Rcd. 4295, ¶¶ 4, 10 (2005). Madison River "agree[d] to make a voluntary payment" of merely $15,000 to the United States. *Id.* ¶ 4.

The FCC's second example is the aforementioned Comcast-BitTorrent case, Order ¶ 79 n.123 [JA ____], in which Comcast was alleged to have "interfer[ed] with its customers' use of peer-to-peer applications," NPRM ¶ 18 [JA _____]. But that episode, which itself occurred nearly a decade ago, was resolved when Comcast and BitTorrent reached an agreement to manage Internet traffic, leaving the FCC no remedy other than limited disclosure obligations. *See Comcast*, 600 F.3d at 645. Indeed, BitTorrent and Comcast announced a "collaborative effort with one another and with the broader Internet and ISP community to more effectively address issues associated with rich media content and network capacity management," and urged that "these technical issues can be worked out through private business discussions *without the need for government intervention*." Press Release, *Comcast and BitTorrent Form*

Collaboration to Address Network Management, Network Architecture and Content Distribution (Mar. 27, 2008), https://goo.gl/UaXzi3 (emphasis added).

Thus, while the FCC alleges that all broadband companies face "strong incentives" (Order ¶ 79 [JA ____]) to disrupt Internet traffic in ways that harm the public, the only wireline broadband examples it can muster are a 2005 episode in which the provider paid a few thousand dollars to avoid litigation and which resulted in no actual findings of fact or law, and a 2007 episode that was amicably settled, in which the parties themselves urged that government regulation would be a mistake.[10]

The Supreme Court and this Court both require much more when an agency attempts to implement such a burdensome regulatory framework. In the *Benzene Cases*, the Supreme Court stressed that allowing an agency "to impose enormous costs that might produce little, if any discernable benefit," would raise serious constitutional concerns. 448 U.S. at 645; *cf. Michigan v.*

[10] Indeed, even if the dispute between Comcast and BitTorrent arose from genuinely inappropriate conduct on Comcast's part, the FCC offers no explanation why that case and others could not be resolved by the FTC, pursuant to its authority under 15 U.S.C. § 45(b) to punish "unfair or deceptive acts or practices"—authority the FCC has usurped by reclassifying broadband under Title II. *See* 15 U.S.C. § 45(a)(2) (excluding "common carriers" from FTC's jurisdiction); *see also Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 405–06 (2004) (limiting antitrust remedies against common carriers).

EPA, 135 S. Ct. 2699, 2707 (2015) ("One would not say that it is even rational . . . to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.")

Specifically, the Court held in *Benzene* that if an agency interprets a statute to allow it to regulate 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. 448 U.S. at 646 (quotation marks omitted).[11] "A construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Id.*

This Court, 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. *See generally Int'l Union v. OSHA*, 938 F.2d 1310, 1315–21 (D.C. Cir. 1991).

[11] This analysis is found in Justice Stevens's four-justice plurality opinion. Justice Rehnquist, concurring in the judgment, concluded similarly that the nondelegation doctrine forbade the agency from attempting to impose its regulatory standards in contexts lacking a "material" threat to public health. *Id.* at 687–88.

In this case, the statutory reinterpretations undergirding the FCC's reclassification decision effectively presume that Congress has empowered it to impose immense costs and burdens on Internet access providers (and, very likely, other Internet companies, and consumers) without demonstrating that these decisions are necessary to avoid an actual, significant risk of harm. Here, as in the *Benzene Cases*, a "construction of the statute that avoids this kind of open-ended grant should certainly be favored." 448 U.S. at 646.

II. The Court Should Afford No *Chevron* Deference to the FCC's Assertion of Immense Regulatory Power

While the "major question" doctrine, *UARG*'s excessive-tailoring doctrine, and the "significant risk" doctrine each reiterates why the FCC's statutory reinterpretations are untenable, the substantive question of how to interpret the statute is accompanied by the more procedural question of *who* should interpret the statute. That is, the Court must decide whether Congress delegated interpretative authority to the agency to "fill in the statutory gaps," triggering *Chevron* deference; or whether, instead, the Court remains obligated to interpret the law *de novo*. *King*, 135 S. Ct. at 2488–89.

In this case, *Chevron* deference is inappropriate for two reasons. First, the Court must not presume that Congress delegated to the agency interpretive authority on a question implicating such profound economic and political

significance. And second, the agency's interpretations raise nondelegation problems requiring *de novo* review. Thus, even if the statutes are merely ambiguous, the Court still should interpret them *de novo*.

A. The Court Should Not Presume that Congress Delegated this Legal Question of Immense Economic and Political Question to the FCC's Interpretative Authority

As explained above, the FCC's reinterpretations of "telecommunications service" and "public switched network" concern matters of "such economic and political magnitude" that the courts must not presume that Congress authorized the agency to make policy without an explicit, specific statutory mandate. *Brown & Williamson*, 529 U.S. at 160; *see supra* at Part I.A. That consideration does more than cast doubt on the agency's claim of substantive regulatory powers; it also casts doubt on the FCC's suggestion that Congress intended the agency to interpret the statute, and to receive *Chevron* deference for that interpretation, instead of leaving the courts responsible for interpreting the statute *de novo*.

As the Supreme Court explained recently in *King v. Burwell*, the deferential two-step framework of *Chevron* "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." 135 S. Ct. at 2488 (quoting *Brown & Williamson*, 529 U.S. at 159). But "[i]n extraordinary cases . . . there may be

reason to hesitate before concluding that Congress has intended such an implicit delegation" of interpretative authority. *Id.* at 2488–89.

In *King*, the Court held that Congress did *not* delegate that interpretive authority to the agency, because the statute at issue implicated "billions of dollars in spending each year" and affected "millions of people." *Id.* at 2489. Instead, the Court interpreted the statutory provision *de novo*, even though the statute's terms were ambiguous, *see id.* at 2489, 2492.

In this case, too, it strains credulity to presume that Congress intended to delegate interpretive authority over this issue to the FCC. Congress has made clear that it views the Internet as a matter of utmost public importance, 47 U.S.C. § 230(b), a question on which the FCC wholeheartedly agrees, Order ¶ 1 [JA ____]. It is, again, a decision implicating "billions of dollars," *id.* ¶ 360 [JA ____], and "hundreds of millions of consumers across the country and around the world," *Id.* ¶ 5 [JA ____].

In short, this is one of the "extraordinary cases" that calls for the Court to interpret the law *de novo*, not to defer to the agency. *King*, 135 S. Ct. 2488–89.

B. Only the Court—Not the FCC—Can Remedy the Significant Nondelegation Problems Inherent in the FCC's Power Grab

As noted above, the FCC's assertion of power to implement unprecedented regulation of broadband Internet infrastructure, without

showing that such regulations are necessary to avert a "significant risk" to the public, raises significant constitutional concerns under the nondelegation doctrine. *See supra* at Part III.C. But 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.

In *Whitman v. American Trucking*, for example, the Supreme Court stressed that "an agency's voluntary self-denial has no bearing upon" the question of whether the statute unconstitutionally delegates legislative power to the agency by failing to sufficiently limit its discretion. 531 U.S. at 473.

Rather, as this Court similarly explains, "[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." *Rural Cellular Ass'n v. FCC*, 685 F.3d 1083, 1090 (D.C. Cir. 2012) (considering nondelegation challenge). The Court must interpret the statutes for itself.

CONCLUSION

In *UARG*, the Supreme Court refused "to stand on the dock and wave goodbye as EPA embarks on its multiyear voyage of discovery." 134 S. Ct. at 2446. The FCC's Order would go still further: 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's findings and expressly stated policy against Internet regulation, and the constrained, workable regulatory structure that Congress enacted and maintained in furtherance of that legislative policy.

For the foregoing reasons, Intervenors respectfully request that the Court grant the petition for review and vacate the FCC's Order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because the brief contains 6,897 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Adam J. White
August 6, 2015 Adam J. White

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served today with a copy of this document via the Court's CM/ECF. All parties in this case are represented by counsel consenting to electronic service.

/s/ Adam J. White
August 6, 2015 Adam J. White