No. 17-

IN THE

Supreme Court of the United States

AT&T INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et. al,*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID R. MCATEE II
DAVID L. LAWSON
GARY L. PHILLIPS
CHRISTOPHER M. HEIMANN
AT&T, INC.
1120 20th Street, NW
Suite 1000
Washington, D.C. 20036
(202) 457-3055

PETER D. KEISLER*
C. FREDERICK BECKNER
KATHLEEN MORIARTY MUELLER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pkeisler@sidley.com

Counsel for Petitioner

* Counsel of Record

September 28, 2017

QUESTIONS PRESENTED

From the inception of the Internet until 2015, the Federal Communications Commission repeatedly determined that Internet access services are not "telecommunications services" within the meaning of the Communications Act and thus are not subject to common carrier regulation. In 2015, acquiescing to unprecedented White House pressure, the FCC repudiated its prior interpretation and subjected Internet access service to extensive common carrier regulation. The questions presented are:

1. Whether the FCC has statutory authority to reclassify fixed and mobile broadband Internet access service as a "telecommunications service" subject to common carrier regulation.

2. Whether the FCC has statutory authority to reclassify mobile broadband Internet access service as a "commercial mobile service" subject to common carrier regulation.

PARTIES TO THE PROCEEDING

The petitioner is AT&T Inc., one of many companies that sought review in the D.C. Circuit of the Federal Communications Commission's 2015 Order *Protecting and Promoting the Open Internet*.

Respondents (both here and in the D.C. Circuit) are the Federal Communications Commission, the United States.

The other parties in the D.C. Circuit were:

United States Telecom Association ("USTelecom");

National Cable & Telecommunications Association ("NCTA");

CTIA – The Wireless Association® ("CTIA");

American Cable Association ("ACA");

Wireless Internet Service Providers Association ("WISPA");

CenturyLink;

Alamo Broadband, Inc.;

Daniel Berninger;

Full Service Network;

TruConnect Mobile;

Sage Telecommunications, LLC;

Telescape Communications, Inc.;

Ad Hoc Telecommunications Users Committee;

Akamai Technologies, Inc.;

Scott Banister;

Wendell Brown;

CARI.net;

Center for Democracy & Technology;

Cogent Communications, Inc.

ColorOfChange.org;

COMPTEL;

Credo Mobile, Inc.;

DISH Network Corporation;

Demand Progress;

Etsy, Inc.;

Fight for the Future, Inc.;

David Frankel;

Free Press;

Charles Giancarlo;

Kickstarter, Inc.;

Independent Telephone & Telecommunications Alliance;

Level 3 Communications, LLC;

Meetup, Inc.;

National Association of Regulatory Utility Commissioners;

National Association of State Utility Consumer Advocates;

Netflix, Inc.;

New America's Open Technology Institute;

Public Knowledge;

Jeff Pulver;

TechFreedom;

Tumblr, Inc.;

Union Square Ventures, LLC;

Vimeo, Inc.;

Vonage Holdings Corporation

RULE 29.6 STATEMENT

AT&T Inc. is a publicly traded corporation. It has no parent company, and no publicly held company owns 10 percent or more of its stock.

TABLE OF CONTENTS

APPENDICES

VOLUME ONE:

VOLUME TWO:

VOLUME THREE:

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

AT&T respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 825 F.3d 674 and reproduced at Pet. App. 1a-187a. The court of appeals' order denying the petition for rehearing en banc and the opinions concurring in and dissenting from that order are reported at 855 F.3d 381 and reproduced at Pet. App. 1356a-1468a. The FCC's Order ("*Title II Order*") is reported at 30 FCC Rcd. 5601 (2015) and reproduced at Pet. App. 188a-1126a.

JURISDICTION

The court of appeals entered judgment on June 14, 2016, Pet. App. 1a, and denied rehearing on May 1, 2017, *id.* at 1354a-57a. On July 20, 2017, Chief Justice Roberts extended the time for filing a petition for a writ of certiorari to and including September 28, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves statutory provisions defining "information service," 47 U.S.C. § 153(24), "telecommunications service," *id.* § 153(53), and "commercial mobile service," *id.* § 332(d)(1), as well as related provisions of the Communications Act of 1934 as amended by the Telecommunications Act of 1996 ("1996 Act"). These provisions are reproduced at Pet. App. 1469a-1475a. Pertinent regulations implementing the Communications Act are reproduced at Pet. App. 1476a-1479a.

INTRODUCTION

In the Telecommunications Act of 1996, Congress distinguished between "telecommunications services," subject to common carrier regulation originally designed for telephone monopolies, and an emerging generation of "information services," exempt from such regulation. Congress provided that "information service[s] … includ[e] specifically" any "service … that provides access to the Internet." 47 U.S.C. § 230(f)(2). By exempting then-nascent Internet access services from common carrier regulation, Congress acted "to preserve the vibrant and competitive free market that presently exists for the Internet …, unfettered by Federal or State regulation." *Id.* § 230(b)(2).

For nearly two decades, the FCC followed that statutory directive by repeatedly confirming that Internet access is an "information service," and this Court affirmed that position in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005). In 2014, the FCC proposed new "net neutrality" rules that, as before, would have classified Internet access as an information service. But that classification ruled out the most extreme forms of net neutrality regulation. It thus displeased the White House, which held months of private meetings with interest groups seeking to reverse two decades of FCC consensus. G. Nagesh & B. Mullins, *Net Neutrality: How White House Thwarted FCC Chief*, Wall St. J., Feb. 4, 2015. The White House then issued an extraordinary presidential statement urging the FCC to reclassify Internet access as a telecommunications service to justify the "strongest possible [net neutrality] rules." *Id.*

This presidential directive "stunned officials at the FCC," but the Commission duly acquiesced in a 3-2 vote. *Id.* A D.C. Circuit panel upheld that FCC order

under *Chevron* deference principles, with Senior Judge Williams dissenting in part. Judges Kavanaugh and Brown then dissented from the court's denial of rehearing en banc.

This Court's intervention is now needed. First, the practical stakes are immense. In Judge Kavanaugh's words, the FCC's decision to regulate Internet access as a common carrier service "fundamentally transforms the Internet," with "staggering" effects on "investment in infrastructure." Pet. App. 1442a-43a. Second, Congress never gave the FCC discretion to chart this regrettable course in the first place, and the panel majority concluded otherwise only because it misread this Court's decision in *Brand X*. Indeed, all nine Justices in that case presupposed that the position adopted by the FCC here—that Internet access *itself* is a "telecommunications service"—was wrong.

As noted below, the FCC has now opened a new proceeding to revisit these issues. If the FCC fails to act within a reasonable timeframe, or if it reaffirms its current erroneous position, this Court should grant plenary review of the questions presented in this petition. If instead the FCC reinstates its pre-2015 statutory interpretation, the questions presented in this petition may become moot. If that occurs, we will submit a further brief explaining why the Court should grant the petition and vacate the decision below under well-established mootness principles.

STATEMENT OF THE CASE

A. The 1996 Act and Its Antecedents.

The Communications Act of 1934, as amended by the 1996 Act, draws a sharp distinction between two types of services. "[T]elecommunications service[s]" are what conventional telephone companies provide: "the

offering of telecommunications"—*i.e.*, "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content"—"for a fee directly to the public … regardless of the facilities used." 47 U.S.C. § 153(50), (53). Because telephone companies were historically monopolists, telecommunications services have long been subject to common carrier regulation under Title II of the Communications Act, *id.* §§ 201 *et seq.* Such regulation vests the FCC with great discretion to permit or prohibit business practices on the basis of highly subjective judgments. For example, under sections 201 and 202, the FCC can hold any telecommunications carrier liable for damages if it concludes that the carrier's service terms are not "just and reasonable," *id.* § 201, or constitute "unjust or unreasonable discrimination," *id.* § 202.

In contrast, "information service[s]" are what participants in the Internet marketplace offer: "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," except where that "capability" is used solely "for the management, control, or operation of a telecommunications system or the management of a telecommunications service." *Id.* § 153(24). Because Congress wished to keep "the vibrant and competitive free market that presently exists for the Internet … unfettered by Federal or State regulation," *id.* § 230(b)(2), it categorically immunized information services from common carrier regulation, *id.* § 153(51).

Congress was not writing on a blank slate when it defined these two mutually exclusive service categories. Instead, it modeled them on parallel concepts derived from (1) a 1982 antitrust consent decree that

broke up the Bell System and governed the Bell operating companies until 1996 ("Bell decree") and (2) an FCC regulatory regime known as "*Computer II*."

First, Congress pulled the terms "telecommunications service" and "information service" *and their definitions* nearly verbatim from the Bell decree. See *Federal-State Joint Bd. on Universal Serv.*, 13 FCC Rcd. 11501, ¶ 39 (1998) ("*Universal Service Report*"). The decree was designed to keep the Bell companies, which then monopolized local telephone markets, from impeding competition in adjacent markets. As relevant here, the decree prohibited the Bell companies from offering "information services" except by obtaining a waiver from the decree court. *United States v. AT&T Co.*, 552 F. Supp. 131, 186, 189-90, 194-95 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). The decree court expansively construed the "information services" definition to encompass not only "the individual providers of information," but also "gateway functions" that provide an "interface or connection point between consumers and [third party] information service providers." *United States v. W. Elec. Co.*, 673 F. Supp. 525, 592, 595 (D.D.C. 1987).

The latter category of "gateway[]" services provided the same "functions and services associated with Internet access." *Universal Service Report* ¶ 75. For example, the Bell companies sought a waiver from the "information services" line-of-business restriction so that they could "transmi[t] … information services generated *by others*" (*e.g.*, third-party "teleshopping" and "electronic mail"). *W. Elec.*, 673 F. Supp. at 587 (emphasis added). Some parties argued that no waiver was necessary on the theory that gateway services were "telecommunications services" and the decree already "permit[ted] the [Bell companies] to transmit information services" provided by others. *Id.* at 587

n.275. But the court held that this "construction must be rejected" "in view of the breadth of the information services definition … and the inclusion therein of such terms as 'acquiring,' 'transforming,' 'processing,' 'utilizing,' and 'making available.'" *Id.*

Second, Congress also intended the definitions of "telecommunications service" and "information service" to "parallel the definitions of 'basic service' and 'enhanced service' developed in [the FCC's] *Computer II* proceeding." *Universal Service Report* ¶ 21; *see also Brand X*, 545 U.S. at 976. A "'basic' service (like telephone service)" offered only "'a pure transmission capability'" and was subject to common carrier regulation. *Brand X*, 545 U.S. at 976 (quoting *Second Computer Inquiry*, 77 F.C.C.2d 384, ¶ 96 (1980) ("*Computer II*")). In contrast, an "[e]nhanced service" used "computer processing" that "'act[ed] on the content, code, protocol, and other aspects of the subscriber's information,'" and included services "such as voice and data storage." *Brand X*, 976 U.S. at 976-77 (quoting *Computer II* ¶ 97). As such, "enhanced services" included "any offering over the telecommunications network which [wa]s more than a basic transmission service," *Computer II* ¶ 97, and such services "were themselves not to be regulated under Title II of the Act, *no matter how extensive their communications components*," *Universal Service Report* ¶ 27 (emphasis added); *see also Computer II* ¶¶ 115-123.

This distinction was part of a larger FCC regime designed to keep then-monopoly telephone companies from impeding competition in adjacent markets while exempting enhanced services themselves from any common carrier regulation. See *Brand X*, 545 U.S. at 996-97. In particular, the "*Computer II* unbundling rule" allowed telephone companies to offer *unregulated* "enhanced services" only if they made *regulated*

"basic services" available to unaffiliated enhanced service providers on certain terms.

Throughout the pre-1996 period, the Commission defined this category of unregulated "enhanced services" as expansively as the Bell decree court defined the parallel category of "information services." Any offering was an "enhanced service" if it "involve[d] subscriber interaction with stored information." 47 C.F.R. § 64.702(a); *see also Computer II* ¶ 97. Thus, any "gateway" functionality designed to give end users access to third-party databases was deemed an "enhanced service," with a narrow "adjunct-to-basic" exception for computerized functionalities designed merely to facilitate the completion of voice telephone calls.[1] In the Commission's words, "[a]n offering of access to a data base for the purpose of obtaining telephone numbers may be offered as an adjunct to basic telephone service; an offering of access to a data base for most other purposes is the offering of an enhanced service."[2]

The FCC ultimately lifted the monopoly-era *Computer II* unbundling rule after telephone companies began confronting robust competition from broadband rivals such as cable companies, which in fact dominated broadband Internet access in the late 1990s. See generally *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007). What retains enduring significance

---

[1] Memorandum Opinion and Order, *Bell Atl. Tel. Cos. Offer of Comparably Efficient Interconnection to Providers of Gateway Servs.*, 3 FCC Rcd. 6045, ¶ 7 (1988).

[2] Memorandum Opinion and Order, *N. Amer. Telecomm. Ass'n*, 101 F.C.C.2d 349, ¶ 26 (1985); *see generally Computer II* ¶ 98; First Report and Order, *Implementation of the Non-Accounting Safeguards of Sections 271 & 272*, 11 FCC Rcd. 21905, ¶ 107 (1996).

from the *Computer II* regime, however, is the Commission's antecedent decision to define a very broad class of retail "enhanced services" that are not themselves subject to Title II common carrier regulation. As discussed below, that broad definition—coupled with the similarly expansive definition of "information services" under the Bell decree—inform how courts must interpret the parallel statutory category under the 1996 Act.

B. The FCC's Classification Decisions.

Two years after passage of the 1996 Act, the FCC concluded in a report to Congress that Internet access is an information service, not a telecommunications service, because "Internet access providers do not offer a pure transmission path." *Universal Service Report* ¶ 73. In particular, such services combine "telecommunications inputs" (*e.g.*, the telephone lines used for "dial-up connections," or "dedicated circuits over wireline, wireless, cable or satellite networks") with "computer processing, information storage, protocol conversion, and routing" to "enable users to access Internet content and services." *Id.* ¶¶ 63, 66-68. For example, when subscribers retrieve webpages, they are "interacting with stored data, typically maintained on the facilities of either their own Internet service provider (via a Web page 'cache') or on those of another. Subscribers can retrieve files from the World Wide Web, and browse their contents, because their service provider offers the 'capability for … acquiring … retrieving [and] utilizing … information.'" *Id.* ¶ 76 (omissions and alterations in original).

In 2002, the FCC formalized that analysis and confirmed that cable companies provide only an information service, with no separable telecommunications service, when they offer high-speed Internet access

over their cable systems.[3] This Court upheld that determination in *Brand X*. The Commission then issued a serious of orders reaffirming that broadband Internet access is an "information service" exempt from common carrier regulation no matter what broadband infrastructure—*e.g.*, telephone lines or cellular data networks—the provider uses to reach its subscribers.[4] As discussed below, the FCC further concluded in 2007 that a different set of provisions in Title III of the Communications Act *independently* exempts mobile broadband services from common carrier regulation. *See Mobile Broadband Order* ¶¶ 41, 45, 56; 47 U.S.C. § 332(c)(2).

C. Proceedings Below.

In 2014, the D.C. Circuit remanded certain FCC net neutrality rules because they impermissibly treated information services—*i.e.*, broadband Internet access—as common carriage in violation of 47 U.S.C. § 153(51). *Verizon v. FCC*, 740 F.3d 623, 657-58 (D.C. Cir. 2014). In its ensuing NPRM, the FCC proposed to follow what it called the D.C. Circuit's "blueprint" for reinstating core net neutrality rules while preserving an "information service" classification.[5]

---

[3] Declaratory Ruling, *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities*, 17 FCC Rcd. 4798, ¶ 38 (2002) ("*Cable Broadband Order*").

[4] *See*, *e.g.*, Report and Order, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14853 (2005) (telephone company facilities), *aff'd sub nom. Time Warner Telecomm. v. FCC*, 507 F.3d 205 (3d Cir. 2007); Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd. 5901 (2007) ("*Mobile Broadband Order*") (mobile wireless networks).

[5] Pet. App. 1131a (¶ 4); *see also id.* at 1200a, 1203a-04a (¶¶ 89, 93).

That move angered regulatory activists who wished to use the D.C. Circuit's decision as a pretext for subjecting broadband providers not only to core net neutrality rules, but also to full-blown public utility regulation. Working behind the scenes, those activists persuaded the President to issue an extraordinary statement pressuring the FCC—an independent agency—"to reclassify Internet service under Title II of a law known as the Telecommunications Act." Pet. App. 1415a (Brown, J., dissenting from the denial of reh'g en banc).

By a 3-2 vote, the FCC bowed to this political pressure, abandoned nearly two decades of bipartisan consensus, and classified Internet access for the first time as a telecommunications service subject to common carrier regulation. Invoking Title II, the FCC's *Title II Order* subjected broadband providers not only to certain "bright-line" prohibitions, but also to an amorphous case-by-case ban on "unreasonable" conduct not captured by those prohibitions. Pet. App. 330a-39a (¶¶ 138-145). (It announced that, in applying that "Internet Conduct Standard," the FCC would consider a "non-exhaustive list" of seven open-ended factors (such as "end-user control," "consumer protection," and "effect on innovation"). *Id.* The *Order* described this nominal "standard" as an "interpretation of sections 201 and 202 in the broadband Internet access context." *Id.* at 329a-30a (¶ 137). The *Order* also reversed the FCC's prior ruling that Title III imposes an independent barrier to such common carrier regulation for mobile broadband services. *Id.* at 479a-81a (¶¶ 285-287); see *infra* pp. 21-27.

The court of appeals affirmed by a vote of 2-1, with Judge Williams dissenting in part. Pet. App. 1a-187a. As relevant here, the panel majority held that this Court had essentially authorized the FCC's about-face

on the theory that *Brand X* (1) "established that the Communications Act is ambiguous with respect to the proper classification of broadband" and (2) "recognized that Congress, by leaving a statutory ambiguity, had delegated to the Commission the power to regulate broadband service" as either a telecommunications service or an information service. *Id.* at 27a-33a. And the panel majority separately affirmed the Commission's reinterpretation of Title III to permit common carriage treatment of mobile broadband services, although on grounds that the Commission's lawyers had abandoned on appeal. *Id.* at 51a-75a.

The court of appeals then denied the ensuing petitions for rehearing en banc. Pet. App. 1356a-468a. Judge Srinivasan and Judge Tatel (the authors of the panel opinion) wrote an opinion concurring in the denial, *id.* at 1357a-80a, while Judge Brown and Judge Kavanaugh wrote dissenting opinions, *id.* at 1381a-468a. Judge Brown concluded that the *Title II Order* contradicts both "the 1996 Act's deregulatory policy and the statute's more specific definitions." *Id.* at 1427a. And Judge Kavanaugh would find the *Title II Order* unlawful because (*inter alia*) the statutory scheme nowhere authorizes the FCC to impose regulation with such "staggering" economic and political significance. *Id.* at 1442a-43a.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS BASED ITS ANALYSIS ON A FUNDAMENTAL MISREADING OF *BRAND X*.

Broadband Internet access is an "information service" because, by its nature, it necessarily offers the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47

U.S.C. § 153(24). Any broadband Internet service provider ("ISP") offers precisely those "capabilities": interacting with data is the defining characteristic of Internet access.

That point is both inarguable and dispositive. The D.C. Circuit panel majority nevertheless upheld the Commission's contrary determination that broadband Internet access is a "telecommunications service" because it concluded that this Court had somehow authorized that outcome. In the majority's view, *Brand X* "established that the Communications Act is ambiguous with respect to the proper classification of broadband." Pet. App. 28a. And the majority concluded that "by leaving [this supposed] statutory ambiguity," Congress had "delegated to the Commission the power to regulate broadband service" as either an information service or a telecommunications service. *Id.* at 33a.

That holding turns *Brand X* on its head. To the extent that *Brand X* perceived any ambiguity in this statutory scheme, it affirmed the FCC's discretion only to decide whether a broadband ISP can be said to "offer" consumers (1) *only* an information service (Internet access bundled with broadband transmission) or (2) *both* an information service (Internet access) *and* a separate telecommunications service connecting the end user to the ISP facilities (broadband transmission). But either way, Internet access itself is an information service exempt from common carrier regulation, and broadband Internet access service at least includes that information service. Nothing in *Brand X* even suggests that the FCC has discretion to conclude, as it did here, that Internet access *itself* is a telecommunications service subject to common carrier regulation. To the contrary, all nine Justices decided the case on the premise that the statutory language forecloses that conclusion—as indeed it does.

1. In *Brand X*, this Court and all litigants assumed that the Internet access functionality offered by broadband ISPs is an "information service"; the only question was whether ISPs could also be said to "offer" a separate telecommunications service in the form of "last mile" broadband transmission to individual homes and offices. See 545 U.S. at 989. ISPs *without* last-mile broadband transmission facilities such as Earthlink had claimed that the Commission should answer that question in the affirmative. These "non-facilities-based" ISPs did not themselves seek to be classified as "telecommunications service" providers. Instead, they wanted a regulatory entitlement to buy last mile broadband transmission from cable ISPs as an input to their own competing information services—*i.e.*, broadband Internet access service. See *Cable Broadband Order* ¶¶ 39, 42. To that end, they argued that the Commission should find that "inherent in the provision" of broadband Internet access is a "distinct 'telecommunications service'" that the FCC could force cable providers to offer on regulated wholesale terms. *Id.* ¶ 39 & n.154.

The FCC rejected those arguments. As noted, "telecommunications service" is defined in relevant part as "the offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(53). The FCC found that broadband ISPs "offered" only a unitary information service, that transmission over last-mile facilities was "part and parcel" of that service, and that broadband ISPs thus had not "made a stand-alone offering of transmission for a fee directly to the public." See *Cable Broadband Order*¶¶ 38-40, 42.

This Court affirmed. Like the parties, all nine Justices assumed that Internet access itself is an information service.[6] For example, the majority agreed with the FCC that the "'service that Internet access providers offer to members of the public is Internet access, *not* a transparent ability (from the end user's perspective) to transmit information." *Brand X*, 545 U.S. at 1000 (emphasis added, citation omitted); *see also id.* at 1008-09 (Scalia, J., dissenting).

The Court then turned to the central question: whether broadband ISPs should be understood to offer only that service or, in addition, a separate and additional "telecommunications service": broadband transmission. The Court held that the term "'offe[r]' as used in the definition of telecommunications service" is "ambiguous about whether it describes only the offered finished product, or the product's discrete components as well." *Id.* at 989-90. And the Court found that the broadband "transmission component" is "sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering" rather than two separate services. *Id.* at 990-91.

The dissenting Justices, in contrast, would have held that the broadband "telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as being" a separate "offer," just as a pizzeria's offer of delivery is separate from the pizza it bakes. *Id.* at 1007-08. But even the dissent conceded that the "Internet functionality" needed for "Internet access service … is an enhanced [*i.e.*, information] service provided by an ISP." *Id.* at 1008 (Scalia, J., dissenting).

---

[6] *See Brand X*, 545 U.S. at 987 (service that "enables users ... to browse the World Wide Web" is information service); *see also id.* at 1008-09 (Scalia, J., dissenting).

In the *Title II Order*, the Commission purported to revisit the "ambiguity" identified in *Brand X*. See Pet. App. 524a-27a (¶¶ 332-334). Yet the Commission actually addressed quite a different issue. It did not reconsider whether broadband Internet access service involves the dual offering of an information service (Internet access) and an independent and severable telecommunications service (broadband transmission). Indeed, had the FCC reconsidered its prior approach, it could not have issued its expansive net neutrality rules: those rules are generally directed to the "Internet access" component of the service, which (in this hypothetical scenario) would remain an information service exempt from common carrier regulation. Instead, therefore, the Commission resorted to reclassifying the entirety of broadband Internet access, *including Internet access itself*, as a "telecommunications service."[7] Nothing in *Brand X* even suggests that the Commission retains discretion to make that finding.

---

[7] The Title II Order defined "broadband Internet access service" as everything an ISP does to enable its customers to transmit to and receive data from the Internet. Pet. App. 210a-11a (¶ 25). This includes data storage (caching) and data processing functions associated with the Domain Name System ("DNS"), which matches plain-language web addresses with numerical IP addresses. *Id.* at 576a-92a (¶¶ 366-375). In sharp contrast, the FCC argued in Brand X and this Court agreed that, because of such features, the "service that Internet access providers offer to members of the public" is more than "pure transmission" and thus "not a transparent ability (from the end user's perspective) to transmit information." *Brand X*, 545 U.S. at 998, 1000 (quoting *Universal Service Report* ¶ 79). That service is thus by definition not a "telecommunications service." *See also* FCC Reply Br. at 6 n.2, *Brand X*, No. 04-277 (U.S. Mar. 18, 2005) ("[I]nformation-processing capabilities such as the DNS and caching are not used 'for the management, control, or operation' of a telecommunications network, but instead are used to facilitate the information retrieval capabilities that are inherent in Internet access.").

To this, the panel majority responded only that *Brand X* "focused on the nature of the functions broadband providers offered to end users, not the length of the transmission pathway." Pet. App. 28a. That is true, but it proves our point. Again, in focusing on "functions," *Brand X* assumed that Internet access (the making of the pizza) is an "information service" and that any transmission component (pizza delivery) would qualify as a "telecommunications service" *only* if it could be viewed as its own distinct "offering." That core holding indeed applies whether "the length of the transmission pathway" (*id.*) is one yard or ten thousand miles. But that one-service/two-services issue is not the issue here; the issue is whether Internet access *itself*—pizza making, not just delivery—is a "telecommunications service." And the *Title II Order*'s affirmative answer to that question contradicts the negative answer presupposed in *Brand X*.

2. The court of appeals' misunderstanding of *Brand X* distorted its entire analysis. Even apart from the definitions of "information service" and "telecommunications service," several additional provisions of this statutory scheme confirm that Internet access is an information service. Yet the court discounted those provisions, too, on the ground that they do not overcome the "ambiguity" supposedly identified in *Brand X*.

a. First, the court of appeals discounted two distinct subsections of section 230. Subsection 230(b) affirms "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). And subsection 230(f) defines the "interactive computer service[s]" that must be un-

fettered by regulation to include "*any information service*, … including specifically a service … that provides *access to the Internet*." *Id.* § 230(f)(2) (emphases added). Because these provisions were enacted with the general definitions of "information service" and "telecommunications service,"[8] they confirm that "access to the Internet" is an "information service" and should remain "unfettered" by common carrier regulation. See *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986) ("[t]he normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning").

The panel majority rejected this argument on the theory that Congress would not have "'settle[d] the regulatory status of broadband Internet access" in such "an oblique" manner. Pet. App. 30a. But it is hardly "oblique" for Congress to confirm that Internet access should be classified as an unregulated information service in the same legislation that elsewhere defines an "information service" as a service that offers the very "capability" provided by Internet access: interaction with stored data via telecommunications. 47 U.S.C. § 153(24). The court missed that point only because it misconstrued *Brand X* to hold that "the regulatory status" of Internet access was otherwise *not* "settled" by the statutory language.

Congress further confirmed the proper regulatory classification of Internet access when enacting section 231 in October 1998—approximately seven months after the FCC found in the *Universal Service Report* that

---

[8] *See* Telecommunications Act of 1996, Pub. L. No. 104-104 § 3(a), 110 Stat. 56, 58-60 (amending definitions in 47 U.S.C. § 153); *id.* at tit. V, sec. 509, § 230, 110 Stat. at 137-39 (adding 47 U.S.C. § 230).

Internet access is an information service.[9] Section 231 states: "The term 'Internet access service' [as used in this section] means a service that enables users to access content, information, electronic mail, or other services offered over the Internet …. Such term does *not* include telecommunications services." *Id.* § 231(e)(4) (emphasis added). This language, too, confirms that Congress agreed with the conclusion of the just-issued *Universal Service Report* that an Internet access service is an "information service," not a "telecommunications service," within the meaning of the Act's general definitions.

b. The court of appeals' misreading of *Brand X* further distorted its analysis of those definitions' regulatory antecedents, which Congress "substantially incorporated" into the 1996 Act. *Brand X*, 545 U.S. at 992. As discussed, precedents applying the Bell decree and the FCC's *Computer II* rules broadly construed the "information service"/"enhanced service" category to encompass "gateway" services, which provided the same core functions as the most pared-down Internet access services available today. See *supra* pp. 5-6; see also *Universal Service Report* ¶75. Those precedents further confirm that, like other gateway services, Internet access falls within the parallel statutory category of "information services" because, when Congress uses terms "obviously transplanted from another legal source, … it brings the old soil with it." *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013); *see also Brand X*, 545 U.S. at 976-77, 993.

---

[9] Pub. L. No. 105-277, tit. XIV, sec. 1403, § 231(e)(3), 112 Stat. 2681, 2681-738 (1998); *see generally ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008) (holding that section 231 violates the First Amendment).

The court of appeals brushed that conclusion aside on the theory that it "would conflict with the Supreme Court's holding in *Brand X* that classification of broadband 'turns … on … questions *Chevron* leaves to the Commission to resolve in the first instance.'" Pet. App. 31a (quoting *Brand X*, 545 U.S. at 991). Again, that position misreads *Brand X*, which found that the FCC had discretion only to determine whether broadband Internet access involves the offering of one service or two, not to conclude that Internet access itself is a regulated "telecommunications service."

The court also noted that "nothing in the [1996] Act suggests that Congress intended to freeze in place the Commission's existing classifications of various services" despite changes in "the factual particulars of how Internet technology works and how it is provided." Pet. App. 31a (quoting *Brand X*, 545 U.S. at 991). That is a non-sequitur. No one argues that the FCC should ignore the "factual particulars" of changed technologies. Our point instead is that Congress codified the pre-1996 *legal standards* for determining whether a service is an information/enhanced service or a telecommunications/basic service. And those legal standards, reflected in precedents under the Bell decree and *Computer II* regime, leave no doubt about the proper classification of gateway services such as Internet access.

Moreover, the "changes" the FCC cited as the basis for reclassifying broadband service have no bearing on the ultimate regulatory status of Internet access. For example, the FCC found that customers now view cloud storage and email as services separate from Internet access rather than part of an integrated service bundle. Pet. App. 593a-98a (¶¶ 376-381). But even if that were so, *cf.* Petition For Writ of Certiorari at 20-21, *NCTA v. FCC* (Sept. 28, 2017), it would cast no

doubt on the status of Internet access itself because the key "gateway" attributes that make Internet access an "information service" are the same today as they were in 2005.

c. In short, the statutory language, purpose, and context all confirm that Internet access is an information service exempt from common carrier regulation. Any lingering doubt on that point should be resolved by the "major questions" doctrine.

> When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," [this Court] typically greet[s] 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."

Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014) ("*UARG*") (citation omitted) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159, 160 (2000)).

Here, the FCC's decision to regulate Internet access as common carriage for the first time undoubtedly has "vast economic and political significance." First, "[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." Pet. App. 1442a-43a (Kavanaugh, J., dissenting from the denial of reh'g en banc). Whether ISPs should be regulated as public utilities is also obviously an issue of "vast … political significance." For example, Congress has "considered (but never passed) a variety of bills relating to net neutrality and the imposition of common carrier regulations on Internet service providers." *Id.* at 1443a. And the FCC reclassified

broadband Internet access service only after the extraordinary intervention of the President, acting in response to "intensive interest group pressure from groups closely aligned with a few large content providers, who worked with a shadow FCC operating inside the White House."[10]

In short, the appropriate judicial response to the *Title II Order* is one of "skepticism," not deference. *UARG*, 134 S. Ct. at 2444. Here, too, the panel majority rejected that point only because it misconstrued *Brand X*'s central holding. Again, it misread *Brand X* to hold that Congress had left room for debate about the proper regulatory classification of Internet access itself and thus "had delegated to the Commission the power to regulate broadband service." Pet. App. 33a. As discussed, however, *Brand X* held that the statute is ambiguous as to whether broadband Internet access consists of one integrated information service or an information service (Internet access) plus a separate telecommunications service (broadband transmission). *Brand X* did not suggest, let alone hold, that the FCC may regulate *Internet access itself* as a telecommunications service. And *that* is the "'major question' of deep economic and political significance" for which "an implicit authorization is insufficient" under this Court's precedents. *Id.* at 1400a (Brown, J., dissenting from denial of reh'g en banc).

II. TITLE III INDEPENDENTLY FORECLOSES COMMON CARRIAGE TREATMENT OF MOBILE BROADBAND INTERNET ACCESS.

For the reasons discussed, any broadband Internet access service—fixed or mobile—is an information ser-

---

[10] Larry Downes, *After net neutrality vote, an uncertain future for the Internet*, The Wash. Post, Feb. 27, 2015.

vice and is thus immune from common carrier regulation under the general definitional provisions of the Communications Act. Any *mobile* broadband service is also subject to an independent source of immunity from common carrier treatment: it is not a "commercial mobile service" and thus, under Title III of the Act, may not be regulated as a common carrier service. 47 U.S.C. § 332(c)(1), (2). The panel majority concluded otherwise only by adopting a legal rationale that the FCC's own appellate lawyers deemed too frivolous to defend.

Section 332 lays out two mutually exclusive categories of mobile service. A "commercial mobile service" is a mobile service that "makes interconnected service available" to the public. 47 U.S.C. § 332(d)(1). In turn, an "interconnected service" is a "service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission)." *Id.* § 332(d)(2). A "private mobile service" is any mobile service "that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission." *Id.* § 332(d)(3). *Only* a commercial mobile service (or its "functional equivalent") may be regulated as common carriage. In contrast, the provider of "a private mobile service shall not … be treated as a common carrier for any purpose under [the Communications Act]." *Id.* § 332(c)(2). That prohibition, combined with the more general ban on common carrier treatment of information services, *id.* § 153(51), makes mobile broadband services immune "twice over" from common-carrier regulation. *Cellco P'ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012).

Until 2015, the Commission repeatedly concluded that a mobile broadband service is not a "commercial mobile service" because it is not "interconnected" with

"the public switched network." First, before 2015, the Commission always defined "interconnected service" as a service that "gives subscribers the capability to communicate [with] *all* other users on the public switched network." 47 C.F.R. § 20.3 (2014) (emphasis added). And before 2015, the Commission had always interpreted "the public switched network" to mean the telephone network—*i.e.*, the "common carrier switched network ... that use[s] the North American Numbering Plan [*i.e.*, ten-digit phone numbers]." *Id.* Under these definitions, mobile broadband is obviously not a commercial mobile service "because it is not an 'interconnected service.'" *Mobile Broadband Order* ¶ 41. Mobile broadband uses Internet Protocol addresses, not the North American Numbering Plan, and it does not connect *at all* with the telephone network. *Id.* ¶ 45. Mobile broadband also cannot be the "functional equivalent" of a service that *is* "interconnected with the public switched network" because no one would view the two as remotely interchangeable.[11]

But when the FCC reclassified Internet access as a telecommunications service, it turned handstands to reverse each of these long-established findings one by one. The FCC admitted that it had reinterpreted these Title III provisions to avoid what it called the "statutory contradiction that would result" if mobile broadband service were a telecommunications service but

---

[11] A mobile service that does not meet the statutory definition of "commercial mobile radio service" is "presumed to be a private mobile radio service" exempt from common carrier regulation. 47 C.F.R. § 20.9(a)(14)(i). As the FCC found until 2015, a service can overcome that presumption only if it is "closely substitutable for a commercial mobile radio service"—*i.e.*, only if, based on "market research," changes in price "would prompt customers to change from one service to the other." *Id.* § 20.9(a)(14)(ii)(B). No one seriously contends that broadband Internet access and voice telephone services are "closely substitutable" in this sense.

not a commercial mobile service. Pet. App. 630a-31a (¶ 403). The FCC explained that, once Internet access is reclassified as a telecommunications service under Title II, "the Act requires that [it] be treated as common carri[age]" but still "prohibits common carrier treatment of *mobile* services that do not meet the definition of commercial mobile service." *Id.* (emphasis added). Yet the FCC's new Title III analysis was completely implausible, as discussed below. Thus even if there were some statutory "tension" between Titles II and III, the only reasonable way to avoid it is to maintain the pre-2015 consensus that Internet access is neither a telecommunications service nor a commercial mobile service.

To classify mobile broadband as a "commercial mobile service," the Commission had to find that it is a "service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission)." 47 U.S.C. § 332(d)(2). Although the parenthetical clause gives the Commission some discretion, it does not give the FCC carte blanche to define this language however it likes to achieve whatever policy goal it contrives. First, Congress phrased the term "the public switched network" in the singular and with a definite article. It thus made clear that it meant to address a single, unified network. In addition, when Congress enacted the relevant provisions in 1993, "the public switched network" had become a term of art that referred exclusively to the *telephone* network.[12] By incorporating this term of art

---

[12] The FCC found, for example, that "the public switched network interconnects all telephones in the country." Memorandum Opinion and Order, *Applications of Winter Park Tel. Co.*, 84 F.C.C.2d 689, ¶ 2 n.3 (1981). And the D.C. Circuit defined the public switched network as "the same network over which regular long distance calls travel." *Ad Hoc Telecomms. Users Comm. v.*

into section 332, Congress intended it to "have its established meaning." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991).

The FCC, however, defined the term to encompass *two* distinct networks—the telephone network that uses the North American Numbering Plan and the Internet that uses IP addresses. See Pet. App. 607a-10a (¶ 391). This is untenable. It not only ignores the accepted meaning of this term of art in 1993, but flouts basic linguistic principles: no conversant English speaker uses the formulation "the X" to mean "multiple distinct X's." Cf. *Reid v. Angelone*, 369 F.3d 363, 367 (4th Cir. 2004) ("because Congress used the definite article 'the,'" there "is only one order").

In any event, even if "the public switched network" could somehow be defined to include both the Internet and the telephone network, mobile broadband Internet access still would not qualify as a "commercial mobile service" because broadband services are not "interconnected" with telephone services. 47 U.S.C. § 332(d)(1), (2). The *Title II Order* papered over this problem by redefining "interconnected service" to include any service that connects to "*some*" end points on the public switched network—rather than "*all*" endpoints, as the Commission had always required. Pet. App. 628a-30a (¶ 402); *compare* 47 C.F.R. § 20.3 (2015), *with id.* (2014). That sleight of hand defies the plain language of the statute by robbing the word "interconnected" of

---

FCC, 680 F.2d 790, 793 (D.C. Cir. 1982); *see also Pub. Util. Comm'n v. FCC*, 886 F.2d 1325, 1327, 1330-31 (D.C. Cir. 1989) (using "public switched network" and "public switched telephone network" interchangeably). Other statutory provisions further confirm that "the public switched network" cannot be the Internet. *See*, *e.g.*, 47 U.S.C. § 1422(b)(1)(B)(ii) (referencing "the public Internet or the public switched network, or both").

its clear meaning. Components of a system are "interconnect[ed]" only if they "connect mutually or with one another." *Webster's Third New International Dictionary* 1177 (1993). Two services cannot be "interconnected" if users of one cannot connect to users of the other, as is the case with the Internet and the telephone network.

Unsurprisingly, the D.C. Circuit panel majority refused to embrace the FCC's tortured statutory logic on this point. It assumed that mobile broadband can be an "interconnected service" (and thus a "commercial mobile service") only if it "'gives subscribers the capability to communicate to or receive communication from *all* other users on the public switched network' as redefined to encompass devices using both IP addresses and telephone numbers." Pet. App. 63a-64a (emphasis added). Instead, the majority adopted an alternative rationale that the FCC had included in its *Title II Order* but then abandoned on appeal. Under this resurrected rationale, a mobile broadband Internet access service *itself* enables subscribers to reach *all* users on both the Internet and the telephone network because such subscribers can download, install, and use VoIP applications from third parties like Skype that have made the interconnection arrangements needed for Internet users to speak with users of the telephone network. *Id.*

This position does not withstand scrutiny, as the FCC's own lawyers evidently concluded when they declined to defend it. As the FCC always recognized before 2015, section 332 does not define "interconnected service" in terms of the service provided by third parties whose *apps* end users can download onto their *smartphones*. It defines "interconnected service" in terms of the *mobile service* and whether that service

itself "is interconnected with the public switched network." 47 U.S.C. § 332(d)(2).[13] Thus, a mobile broadband provider does not provide telephone service merely because its customers can download the Skype app and enter into a contract with Skype, any more than it becomes a video provider because its customers can download the Netflix app and enter into a contract with Netflix.

The court of appeals appears to have resorted to this implausible rationale only because it "agree[d] with the Commission" that the statute should be interpreted to "avoid the contradictory result of classifying mobile broadband providers as common carriers under Title II while rendering them immune from common carrier treatment under Title III." Pet. App. 74a. But even if a statutory contradiction were possible, the way to avoid that contradiction is not to butcher the plain language of Title III; it is to correct the FCC's antecedent finding that Internet access is a telecommunications service.

III. THIS PETITION PRESENTS QUESTIONS OF GREAT IMPORTANCE TO A CRITICAL SECTOR OF THE AMERICAN ECONOMY.

The FCC's asserted authority to inflict public-utility regulation on Internet access presents a question of exceptional importance that requires this Court's intervention. The Internet plays a critical role in the U.S. economy and "serves, every day, as a critical tool for

---

[13] *See Mobile Broadband Order* ¶ 45; cf. Memorandum Opinion and Order, *Time Warner Cable Request for Declaratory Ruling*, 22 FCC Rcd. 3513, ¶¶ 15-16 (Wireline Comp. Bur. 2007) (holding, in the context of interconnection under Section 251 of the Communications Act, that the transmission of VoIP traffic "has no bearing" on the regulatory status of the entity "transmitting [the] traffic").

America's citizens to conduct commerce, communicate, educate, entertain, and engage in the world around them." Pet. App. 194a (¶ 1). Fully "87 percent of Americans now use the Internet," *id.* at 250a n.117 (¶ 76), and "Internet traffic is expected to grow substantially in the coming years," *id.* at 639a-40a (¶ 412). This growth has been possible only because "[o]ver the past two decades, the broadband industry has invested an average of $70 billion a year in our nation's wired and wireless broadband networks." *Id.* at 249a n.115 (¶ 76).

As Judge Williams explained, however, the *Title II Order* will have an "unequivocally negative" impact on broadband investment because (inter alia) it "increases uncertainty in policy, which both reason and the most recent rigorous econometric evidence suggest reduce investment." Pet. App. 137a (Williams, J., dissenting in part). A "major source of uncertainty is the Internet Conduct Standard," *id.*, which the FCC says represents its "interpretation of sections 201 and 202 in the broadband Internet access context," *id.* at 330a (¶ 137). As noted, that standardless "standard" is so vague that the "FCC itself is uncertain what the policy means, as indicated by the FCC Chairman's admission that even he 'd[idn't] really know' what conduct is proscribed." *Id.* at 137a-38a (Williams, J., dissenting in part); see *supra* p. 10.

It *is* clear, however, that such open-ended Title II regulation confers expansive authority on the FCC to regulate virtually anything a broadband ISP does and enables any individual or company to file a complaint alleging that any broadband innovation is in some sense "unfair" or "unreasonable." Pet. App. 696a-700a (¶ 455). The FCC has said, for example, that it could forbid a broadband provider to "zero-rat[e]" certain content (*i.e.*, exempt it from monthly data allowances)

on the theory that doing so is "unfair" to other content providers, *id.* at 343a-49a (¶¶ 151-153), even though zero-rating is equivalent to bundled discounts and is thus strongly pro-consumer. And it has claimed the authority to require a broadband ISP to upgrade infrastructure to handle large volumes of incoming traffic from content giants such as Netflix and to regulate the terms and conditions on which broadband providers interconnect with and exchange traffic with those providers. *Id.* at 396a-410a (¶¶ 199-205). The FCC has never before exercised such authority, which marks an extraordinary change from the "minimal regulatory environment" the FCC embraced for decades before 2015. See *Cable Broadband Order* ¶ 5.

This Court has granted certiorari in other cases in which a court of appeals sanctioned an agency's claim to have found a broad new regulatory authority over other industries in the absence of statutory authority. See, e.g., *UARG*, 134 S. Ct. at 2439 (reviewing EPA's assertion of authority to require stationary sources to obtain permits under the Clean Air Act based on their greenhouse gas emissions); *Brown & Williamson*, 529 U.S. at 131 (reviewing FDA's assertion of authority to regulate tobacco products). It should do the same here.

* * *

As noted in the Introduction, the FCC's new leadership has launched a proceeding to revisit the legal and policy decisions of the *Title II Order*. For example, it has sought comment on whether "to reinstate the information service classification of broadband Internet access service" and to return mobile broadband service "to its original classification as a private mobile service." See Notice of Proposed Rulemaking, Restoring Internet Freedom, 82 Fed. Reg. 25,568, 25,570, 25,575 (June 2, 2017).

The FCC is widely expected to address those issues within the next several months. If the FCC follows through on its proposal to eliminate common carriage regulation of Internet access, the questions presented in this petition may become moot. If that occurs, we will submit a further brief explaining why the Court should grant certiorari and vacate the court of appeals' decision under well-accepted mootness principles. But if the FCC does not act within a reasonable timeframe, or if it otherwise maintains its current scheme of common carrier regulation, this Court should grant plenary review of the questions presented in this petition.

CONCLUSION

The petition should be granted.

Respectfully submitted,

DAVID R. MCATEE II
DAVID L. LAWSON
GARY L. PHILLIPS
CHRISTOPHER M. HEIMANN
AT&T, INC.
1120 20th Street, NW
Suite 1000
Washington, D.C. 20036
(202) 457-3055

PETER D. KEISLER*
C. FREDERICK BECKNER
KATHLEEN MORIARTY MUELLER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pkeisler@sidley.com

Counsel for Petitioner

* Counsel of Record

September 28, 2017