No.

IN THE
Supreme Court of the United States

NCTA – THE INTERNET AND TELEVISION ASSOCIATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

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

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QUESTIONS PRESENTED

The Telecommunications Act of 1996 imposes common-carrier regulation on providers of "telecommunications service[s]," but not on providers of "information service[s]." 47 U.S.C. §§ 153(24), (50), (51). For decades, the Federal Communications Commission promoted investment and innovation by classifying broadband Internet access service as an "information service"—*i.e.*, a service that offers the "capability for generating … retrieving … or making available information via telecommunications." *Id.* § 153(24). In 2015, the Commission reclassified broadband as a "telecommunications service," thereby subjecting broadband providers to utility-style regulations designed for the Depression-era telephone monopoly.

The Questions Presented are:

(1) Whether it was arbitrary and capricious for the Commission to reverse long-standing policy without identifying and substantiating any actual changed circumstances or accounting for broadband providers' massive reliance interests.

(2) Whether the Commission violated the Administrative Procedure Act by failing to give adequate notice of key aspects of the final Order.

(3) Whether the Commission exceeded its statutory authorization by reclassifying broadband as a "telecommunications service."

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, petitioners in the consolidated proceedings below were USTelecom (Nos. 15-1063 & 15-1086); Alamo Broadband Inc. (Nos. 15-1078 & 15-1164); CTIA (No. 15-1091); AT&T (No. 15-1092); ACA (No. 15-1095); CenturyLink (No. 15-1099); WISPA (No. 15-1117); Daniel Berninger (No. 15-1128); and Full Service Network, TruConnect Mobile, Sage Telecommunications LLC, and Telescape Communications, Inc. (No. 15-1151).

Respondents in these consolidated cases were the Federal Communications Commission and the United States of America.

Intervenors in these consolidated proceedings were ACA (in No. 15-1151 only); Ad Hoc Telecommunications Users Committee; Akamai Technologies, Inc.; AT&T (in No. 15-1151 only); Scott Banister; Wendell Brown; CARI.net; Center for Democracy & Technology; CenturyLink (in No. 15-1151 only); Cogent Communications, Inc.; ColorOfChange.org; COMPTEL; Credo Mobile, Inc.; CTIA (in No. 15-1151 only); 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; NCTA (in No. 15-1151 only); Public Knowledge; Jeff Pulver; TechFreedom; Tumblr, Inc.; Union Square Ventures, LLC; USTelecom (in No. 15-1151 only); Vimeo, Inc.; Vonage Holdings Corporation; and WISPA (in No. 15-1151 only).

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner NCTA – The Internet & Television Association has no parent corporation, and no publicly held company holds 10 percent or more of its stock.

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[*] The three-volume Petition Appendix referenced here has been separately filed by the petitioner in *AT&T Inc.* v. *FCC*.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner NCTA – The Internet & Television Association 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 opinion of the court of appeals (App. 1a[1]) is reported at 825 F.3d 674. The court of appeals' order denying rehearing en banc (App. 1356a) is reported at 855 F.3d 381. The Federal Communication Commission's final order and declaratory ruling (App. 188a) are available at 80 Fed. Reg. 19738. The Commission's Notice of Proposed Rulemaking (App. 1127a) is available at 79 Fed. Reg. 37447.

JURISDICTION

The court of appeals filed its judgment on June 14, 2016, App. 1a, and denied a timely petition for rehearing en banc on May 1, 2017, *id.* 1356a. On July 20, 2017, Chief Justice Roberts extended the time for filing a petition for a writ of certiorari until September 28, 2017. No. 17A54. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reproduced in the Petition Appendix at 1469a-1479a.

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[1] All "App." cites reference the Petition Appendix filed in *AT&T Inc.* v. *FCC*.

STATEMENT

This case concerns one of the most consequential telecommunications rulemakings in American history. For decades, the Internet flourished under a deregulatory approach mandated by Congress and endorsed by the Commission. In 2015, however, the Commission reversed course, subjecting broadband Internet access service ("broadband") providers to utility-style regulation under Title II of the Communications Act of 1934—a provision enacted 80 years ago to regulate the telephone monopoly. A divided panel of the D.C. Circuit denied NCTA's petition for review, and the court of appeals denied rehearing en banc over the dissents of Judges Kavanaugh and Brown.

1. Title II imposes utility-style rules on providers of "interstate or foreign communication by wire or radio" operating as "common carrier[s]." 47 U.S.C. § 201(a); *id.* §§ 201-261. Until the proceeding below, Title II had never applied to retail broadband Internet access services.

a. Internet access service grew out of early computer-based services, which combined data processing on remote computers with data transport over telephone networks.

In 1980, to promote competition and investment in such emergent data-processing services, the Commission distinguished between "basic" and "enhanced" services. Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C.2d 384, ¶¶ 90, 123 (1980) ("*Computer II*"). Basic services—which were subject to Title II—were "plain old telephone service" and other services

offering "a pure transmission capability over a communications path." *Id.* ¶¶ 90, 96. Such services entailed only data transport, with "*no* computer processing or storage of the information" other than that needed to convert the message into electronic form and back into ordinary language for transmittal over the network. *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 976 (2005) (emphasis added). Enhanced services—which were not subject to Title II at all—included "any offering over the telecommunications network which is *more* than a basic transmission service." *Computer II*, ¶¶ 97 (emphasis added), 119.

A substantively identical distinction between Title II and non-Title II services was drawn by the district court that broke up the Bell telephone monopoly in 1982. *United States* v. *AT&T Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982). The court's Modification of Final Judgment (MFJ) imposed Title II requirements on "telecommunications services"—*i.e.*, basic transmission—but not on "information services," which were those services that offered "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications." *Ibid.*

In the early days of the Internet, the "functions and services associated with Internet access" were "consistently classed" as non-Title II services. Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 11501, ¶ 75 (1998) ("*Stevens Report*"). For example, in 1988, the Commission concluded that the precursors to the Internet—"gateway services," which "allow[ed] a customer with a personal

computer … to reach an array" of "databases providing business, … investment, … and entertainment information"—were "enhanced" services. Memorandum Opinion and Order, *Bell Atl. Tel. Cos.*, 3 FCC Rcd. 6045, ¶¶ 3, 7 & n.8 (Com. Car. Bur. 1988). And gateway services were also "information services" under "any fair reading" of the MFJ. *United States* v. *W. Elec. Co.*, 673 F. Supp. 525, 587 & n.275 (D.D.C. 1987).

b. Congress codified this regulatory framework, including the distinction between basic and enhanced services, in the Telecommunications Act of 1996.

The Act defines two "mutually exclusive categories": telecommunications services and information services. *Stevens Report* ¶ 43. A "telecommunications service" is "the offering of telecommunications for a fee directly to the public"; "telecommunications" is defined, in turn, as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content." 47 U.S.C. § 153(50), (53). The Act defines "information service" as the offering of "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," unless that "capability" is used only "for the management, control, or operation of a telecommunications system" or "management of a telecommunications service." *Id.* § 153(24). The Act excludes all information services from Title II. *Id.* § 153(51).

As the Commission contemporaneously explained, the category of "information services" includes "*all* of the services that the Commission ha[d] previously considered to be 'enhanced services.'" First Report and Order and Further Notice of Proposed Rulemak-

ing, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272*, 11 FCC Rcd. 21905, ¶¶ 102-03 (1996) (emphasis added). Consistent with the "policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet[,]" "unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(2), the Act clarifies that "information service[s] … includ[e] specifically a service … that provides access to the Internet," *id.* § 230(f)(2). Section 706 of the Act further provides that the Commission "shall encourage the deployment … of advanced telecommunications capability"—which includes Internet access service—"by utilizing … methods that remove barriers to infrastructure investment." *Id.* § 1302(a).

c. Following the 1996 Act, the Commission consistently held that Internet access service is an information service not subject to Title II.

In 1998, the Commission confirmed that, given the Act's text, history, and structure, Internet access service was properly classified as an information service. *Stevens Report*, ¶¶ 73-82. The Commission reasoned that "Internet access providers do not offer a pure transmission path," but rather "offe[r] the 'capability for … acquiring, … retrieving [and] utilizing … information'" by enabling subscribers to "retrieve files from the World Wide Web, and browse their contents." *Id.* ¶¶ 73, 76. Although "Internet access service involves data transport elements," the Commission concluded that it was "appropriately classed as an 'information service'" because "it offers end users information-service capabilities inextricably intertwined with data transport." *Id.* ¶ 80. This conclusion was "reinforced by the negative policy consequences" of

regulating Internet access service as a telecommunications service. *Id.* ¶ 82.

Applying this same analysis, in 2002 the Commission found that broadband offered over a cable provider's facilities is a single, integrated information service because it "combines the transmission of data with computer processing, information provision, and computer interactivity." Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798, ¶ 38 (2002) ("*Cable Broadband Order*"). The Commission explained that to "extract" the telecommunications component of broadband Internet access service and "make it a stand-alone offering to be regulated under Title II" would require "radical surgery" on the statute. *Id.* ¶ 43.

This Court affirmed that determination in *Brand X*, where all nine Justices agreed that a service providing Internet access "is an information service … because it provides consumers with a comprehensive capability for manipulating information using the Internet." 545 U.S. at 987-89; *see also id.* at 1009-11 (Scalia, J., dissenting) ("computing functionality" used for Internet access is an "information service"). The issue that divided the Court was whether the high-speed link between a customer's home and the cable company's computer-processing facilities—the so-called "last mile" of service—was a *separate* and distinct "offering" of telecommunications. *See id.* at 986. The majority rejected the argument that the high-speed "delivery" of Internet access service to a customer's home over this last mile was unambiguously a separate and distinct "offering" from Internet access service itself. *Id.* at 989-97.

The dissent disagreed, reasoning that because transmission over the last mile is "downstream from the [provider's] computer-processing facilities, there is no question it merely serves as a conduit for the information services that have already been 'assembled' by the cable company in its capacity as ISP." *Brand X*, 545 U.S. at 1010 (Scalia, J., dissenting). Thus, according to the dissent, "[w]hen cable-company-assembled information enters the cable for delivery to the subscriber, the information service is already complete," and "[a]ll that remains is for the information" that has already been manipulated "to be delivered (via telecommunications) to the subscriber." *Ibid.* Just as a pizzeria offers both pizza and delivery, the dissent analogized, broadband providers "offered" both an information service (Internet functionality) and a telecommunications service (last-mile transmission). *Id.* at 1007.

After *Brand X*, the Commission extended the same approach to other forms of Internet access offered via telephone wires, wireless technologies, and power lines, deeming each an information service not subject to Title II. *See* App. 9a. The Commission explained that this approach would "generate" "increased infrastructure investment," Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd. 14853, ¶ 83 (2005) ("*Wireline Broadband Order*"), and "provide the regulatory certainty needed to help spur growth and deployment of these services," Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd. 5901, ¶ 27 (2007) ("*Wireless Broadband Order*").

This "light-touch … framework" succeeded brilliantly in "facilitat[ing]" massive "investment and innovation." App. 196a. Providers, large and small, invested $800 billion in broadband from 2002 to 2013. *See* USTelecom, *Historical Broadband Provider Capex*, http://goo.gl/Uzg2Is (all Internet sites last visited Sept. 25, 2017).

2. In recent years, the Commission twice attempted unsuccessfully to impose "Open Internet" or "net neutrality" obligations on broadband providers. In *Comcast Corp.* v. *FCC*, 600 F.3d 642, 659 (D.C. Cir. 2010), the D.C. Circuit held that the Commission could not rely on § 706 of the Act to impose net neutrality rules because the Commission had previously concluded that § 706 "grants no regulatory authority," but merely directs the Commission to encourage the deployment of advanced telecommunications capability. After the Commission re-interpreted § 706 as an independent grant of Title I authority and adopted three new "open Internet" rules under § 706, the D.C. Circuit struck down two of those rules for unlawfully "subject[ing] broadband providers to common carrier treatment." *Verizon* v. *FCC*, 740 F.3d 623, 650, 655-59 (D.C. Cir. 2014). The court provided a blueprint for the Commission to adopt similar rules under § 706 that did not impose common-carrier regulations. *See id.* at 655-59.

3. In 2014, "respond[ing] directly to" *Verizon*, the Commission issued a new *NPRM* "propos[ing] to adopt" new rules "consistent with the court's opinion." App. 1145a. The *NPRM* proposed following "the blueprint" *Verizon* "offered," "rely[ing] on section 706." *Id.* 1131a. The great bulk of the *NPRM* was predicated on retaining broadband's settled information-service

classification. A handful of paragraphs invited comment on whether to reclassify broadband under Title II solely as a means of bolstering the legal basis for the proposed rules, but the *NPRM* offered no independent rationale or proposed factual basis for reclassification, much less any specific plan for how or to what extent the Commission might reclassify. *Id.* 1247a-1256a.

After the public comment period ended, White House staff, "[a]cting like a parallel version of the FCC," undertook "an unusual, secretive effort" to develop an entirely different approach "through dozens of meetings" with supporters of heavy-handed, public-utility regulation of broadband. Gautham Nagesh & Brody Mullins, *Net Neutrality: How White House Thwarted FCC Chief*, Wall St. J. (Feb. 4, 2015), http://tinyurl.com/q4unz4d. That campaign culminated in a public statement by President Obama "asking" the Commission to "reclassify consumer broadband service under Title II." The White House, *Net Neutrality: President Obama's Plan for a Free and Open Internet* (Nov. 10, 2014), https://obamawhitehouse.archives.gov/node/323681.

Without promulgating a new proposal, or even inviting further comment, the Commission followed the President's direction and, by a 3-2 vote, adopted the *Order* reclassifying broadband as a telecommunications service. App. 528a-534a, 942a. As relevant here, the *Order* reclassifies not a severable high-speed link to a customer's home that "delivers" the broadband provider's "information services" to the customer, *Brand X*, 545 U.S. at 1010 (Scalia, J., dissenting)—the so-called "last mile" portion of the service that had divided the Court in *Brand X*—but the entire end-to-end retail Internet access service that enables customers

to post pictures on Facebook, run searches on Google, or stream videos on YouTube. *See* App. 212a, 528a-536a. The *Order* also purports to create "a Title II tailored for the 21st century" by forbearing from applying over 30 Title II provisions, *id.* 195a-196a, 216a, while simultaneously retaining core Title II requirements and reinterpreting Sections 201 and 202 as "important statutory backstop[s]" for the very provisions from which the Commission forbore, *id.* 686a (discussing 47 U.S.C. §§ 201, 202).

To justify its policy reversal, the Commission asserted that *Brand X* found the 1996 Act ambiguous on whether broadband Internet access service is a telecommunications service or an information service, and that the Commission was therefore free "to revisit [its] prior interpretation." App. 524a-525a. The Commission further posited "[c]hanged factual circumstances" regarding consumers' use of the Internet and broadband providers' marketing practices that, according to the Commission, indicated that broadband was now viewed primarily as a transmission "link" separate from any information-service functions. *Id.* 521a-523a. The Commission similarly recast certain information-processing functions previously found integral to broadband's classification as an information service as mere "capabilit[ies] for the management of a telecommunications service," 47 U.S.C. § 153(24)—a statutory exception nowhere even hinted at in the *NPRM*. *See* App. 576a-592a. Finally, despite expressly inducing investment through its previous classification decisions, the Commission claimed that the classification of broadband had, "at most, an indirect effect … on investment," and that providers should not have relied on the Commission's prior policy in choosing to invest. *Id.* 561a-562a.

Commissioners Pai and O'Rielly each dissented, explaining that the Commission's new classification of broadband was unlawful, and that the Commission had failed to identify any relevant changes to the offered service, grapple with reliance interests, or provide notice of the approach it adopted. App. 981a-997a, 1002a-1005a, 1011a-1029a, 1034a-1036a, 1090a-1094a, 1102a-1107a, 1119a-1122a.

4. Eight broadband providers and trade associations, including NCTA, filed timely petitions for review. The D.C. Circuit consolidated the petitions, and a divided panel denied them. App. 1a-187a.

The panel majority acknowledged that the *Order* departs from the Commission's prior policy based on purported changes in consumer perception: whereas the Commission had previously found that "consumers perceived an integrated offering of an information service," it now found that "consumers perceive a standalone offering of transmission." App. 43a. The Commission had claimed that alleged changes in consumer conduct and broadband marketing practices supported this factual finding, but the majority declined to decide whether these asserted changes were "'really anything new,'" because the Commission admitted in a footnote that it would have reclassified even if no facts had changed. *Ibid.* (citation omitted). The majority further held that the Commission did not need to account for reliance interests because the "past regulatory treatment of broadband likely had a particularly small effect on investment." *Id.* 44a. And it concluded that commenters had sufficient notice of the *Order*'s rationale for reclassification based on open-ended questions in the *NPRM* about whether the Commission should reclassify broadband at all. *Id.* 25a-26a.

On the substantive issue of reclassification, the majority held (as relevant) that under *Brand X* the Commission could reasonably conclude that broadband Internet access service as a whole is a telecommunications service, App. 27a-33a, and that any information-service functions integral to that service fall within the telecommunications-management exception, *id.* 34a-36a.

Judge Williams dissented in part. App. 116a-187a. In his view, the Commission's "justification of its switch in classification of broadband … fails for want of reasoned decision-making." *Id.* 116a. "To the extent that the Commission relied on changed factual circumstances," he explained, "its assertions of change are weak at best and linked to the Commission's change of policy by only the barest of threads," and to "the extent [it] justified the switch on the basis of new policy perceptions, its explanation of the policy is watery thin and self-contradictory." *Ibid.* The Commission's "assessment of broadband providers' reliance on the now-abandoned classification," moreover, "disregards the record, in violation of its obligation under *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)." *Ibid.*

5. On May 1, 2017, the D.C. Circuit denied NCTA's timely petition for rehearing en banc over separate dissents by Judges Kavanaugh and Brown. App. 1356a-1357a. Judge Kavanaugh stressed that, because the Order was "one of the most consequential regulations ever issued," the Commission could not promulgate it without clear authorization from Congress—which there was not. *Id.* 1430a-1431a. As he explained, "the major rules doctrine *prevents* an agency from relying on statutory ambiguity to issue *major* rules." *Id.* 1434a. Judge Brown agreed, *see id.*

1399a-1411a, adding that, although "*Brand X* found the 'offering' of 'telecommunications service' ambiguous," "Congress prohibited the FCC from construing the 'offering' of 'telecommunications service' *to be* the 'information service' of Internet access," *id.* 1403a-1404a.

6. On May 23, 2017, the Commission initiated a new rulemaking proceeding that proposes to "end the utility-style regulatory approach" to broadband, which has "put at risk online investment and innovation." Notice of Proposed Rulemaking, *Restoring Internet Freedom*, 32 FCC Rcd. 4434, ¶¶ 4-5 (2017). The comment period closed on August 30, 2017, and the Commission received over 21 million comments. *See* Federal Communications Commission, *Filings and Proceedings*, https://www.fcc.gov/ecfs/search/filings?proceedings_name=17-108&sort=date_disseminated,DESC. The Commission has not yet issued any order.

REASONS FOR GRANTING THE PETITION

The divided panel decision in this case upheld a Commission order that claims unprecedented authority to regulate the Internet. That order—one of the most consequential rulemakings in American history—was not the culmination of a deliberate process and reasoned decision-making. Rather, it was the result of an agency scrambling to comply with the President's preferences and invent post hoc justifications for rewriting a congressional statute, reversing the agency's own long-standing policy, and contradicting real-world facts.

Congress never entrusted the Commission with the extraordinary authority to subject broadband providers to Title II of the Communications Act of 1934.

For decades, the Commission (correctly) concluded, instead, that broadband Internet access service cannot be regulated as a public utility. Deliberately touting this "light-touch" approach, the Commission succeeded in its aim of "facilitat[ing] the tremendous" "investment" in broadband essential for the Internet to flourish. App. 195a-196a. After suffering two appellate reversals in its bid to impose "open Internet" rules, the Commission proposed to follow the D.C. Circuit's "blueprint" and continue regulating broadband under Title I. App. 1131a. But following the President's unexpected intervention, the Commission abruptly reversed course and—without issuing a new proposed rulemaking or seeking additional comment—reclassified broadband providers as Title II common carriers and imposed a wide swath of utility-style regulation.

The Commission's rushed decision transgressed fundamental boundaries constraining agency action. An agency always "must give adequate reasons for its decisions," *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016), and must tender an even "more substantial justification" if its "'new policy rests upon factual findings that contradict those which underlay its prior policy,'" or undermines "'reliance interests'" that its own "'prior policy has engendered.'" *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) (quoting *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). Despite claiming that "[c]hanged factual circumstances" warranted a new approach, App. 521a, the Commission never identified any real, relevant *change* to the service being offered or how customers perceive it. The Commission admitted, moreover, that the facts *were irrelevant to its decision* when it "clarif[ied] that," even if the facts "had not changed," it would have reclassified anyway. *Id.* 564a

n.993. And far from accounting for reliance interests that its prior policy invited but the *Order* upends, the Commission implausibly denied that reliance interests *exist*. Compounding the *Order*'s illegality, its drastic overhaul of Internet regulation bears no resemblance to the modest proposal the Commission published for public comment a year earlier.

Instead of rebuking the agency's multiple failures, the panel majority endorsed them in a decision that eviscerates core APA requirements. Over Judge Williams's forceful dissent, the majority blessed the Commission's abandonment of its settled policy—disclaiming any duty to decide whether the supposedly changed facts the Commission cited were "'really … new,'" based on the *Order*'s remarkable assertion that the Commission would have taken the same course *even if* its claims of factual change were *false*. App. 43a-44a. The majority further held that the Commission's breezy assertion that there were no reliance interests excused it from any obligation to account for such interests. And the majority concluded that the Commission gave commenters sufficient notice of the *Order*'s wholesale transformation of Internet regulation based on a handful of paragraphs in the *NPRM* (out of hundreds) that merely asked open-ended questions about how to put the proposed Open Internet rules on solid legal footing.

The panel majority further contravened this Court's precedents in upholding the Commission's Title II reclassification decision. The panel reasoned that the statute is ambiguous and, accordingly, that Congress had implicitly delegated to the Commission the decision whether broadband should be regulated as a public utility. But as this Court held in *National Cable & Telecommunications Association* v. *Brand X*

Internet Services, 545 U.S. 967 (2005), any statutory ambiguity pertains only to whether the last-mile delivery of the arguably finished information service is a *separate* and additional Title II service—not whether the entire end-to-end service that gives customers the ability to access the Internet and all of its applications is *itself* a Title II service. Moreover, Congress must "speak clearly"—not ambiguously—if it wishes to delegate to the agency a decision of such "'vast economic and political significance.'" *Util. Air Regulatory Grp.* v. *EPA* ("*UARG*"), 134 S. Ct. 2427, 2444 (2014) (citation omitted).

These holdings contradict this Court's precedents and leave in place an *Order* that radically reshapes federal law governing a massive sector of the economy—which flourished due to massive investment made in reliance on the policy the *Order* abruptly abandons. This evisceration of the APA's standards—by the appellate court that reviews more agency action than any other—will embolden the Commission and other agencies to ignore these constraints in the future. Certiorari is warranted to correct the panel majority's glaring errors.

I. THE QUESTIONS PRESENTED ARE OF EXCEPTIONAL NATIONAL IMPORTANCE.

Certiorari is warranted because the Questions Presented are of exceptional importance to the national economy and administrative state.

A. The issues presented in this case are undeniably important. Even the Commission acknowledges that the Internet is "a critical tool for America's citizens to conduct commerce, communicate, educate, entertain, and engage in the world around them." App.

194a. Reflecting the Internet's importance, "broadband providers have invested over $1.125 *trillion* in their networks" since 1996, *id.* 1035a, and Internet-based services in the app and gig economies have exploded. Small wonder, then, that the Commission received nearly 4 million comments in its 2014 proposed rulemaking, *id.* 196a, and over 21 million in its current rulemaking.

The scope of the Commission's reclassification decision is similarly vast. By regulating broadband as if it were a utility, the Commission has established itself as the "Department of the Internet," and arrogated to itself massive new powers not just to regulate broadband providers, but even to "decide where the Internet should be built and how it should be interconnected." App. 948a-949a. As Judge Kavanaugh explained, "[t]he rule will affect every Internet service provider, every Internet content provider, and every Internet consumer." *Id.* 1430a. Truly, "[t]he financial impact of the [*Order*] … is staggering." *Id.* 1442a-1443a.

Even beyond the extraordinary significance of the Commission's order, the decision below threatens to entrench a toothless version of judicial review of agency action. According to the panel majority, judicial review entails little more than restating the agency's findings along with a conclusion that they are reasonable. If that watered-down version of judicial review takes root, the APA's standards will become all but a nullity. Certiorari is therefore warranted to ensure proper application of telecommunications and administrative law.

B. The Commission appears poised to repeal the *Order* and thereby moot this case. Should it do so, the Court should grant this petition, vacate the judgment

below, and remand with instructions to dismiss NCTA's petition for review as moot.

This Court has repeatedly affirmed that "[w]hen a civil case becomes moot pending appellate adjudication, 'the established practice in the federal system is to reverse or vacate the judgment below and remand with a direction to dismiss.'" *Arizonans for Official English* v. *Arizona*, 520 U.S. 67, 71 (1997) (citation, brackets, and ellipses omitted). In particular, when an intervening amendment to a challenged law or regulation renders a case moot, this Court typically vacates the judgment below and remands. *See*, *e.g.*, *Lewis* v. *Cont'l Bank Corp.*, 494 U.S. 472, 478 (1990) (case moot when statutory amendments eliminated plaintiff's stake in litigation); *U.S. Dep't of Treasury* v. *Galioto*, 477 U.S. 556, 560 (1986) (same). The Court adheres to this established practice because "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994).

Here, it is likely that the adoption of a new rule will moot the case. On May 23, 2017, the Commission released a Notice of Proposed Rulemaking that proposes to repeal the *Order* and reclassify broadband as an information service. *Restoring Internet Freedom*, 32 FCC Rcd. 4434 (2017). Because the deadline for reply comments was August 30, 2017, the Commission could issue a new order at any time. If the Commission repeals the *Order* while this petition is pending, events wholly out of petitioner's control will have deprived petitioner of any possibility of review of clearly cert-worthy questions that underlie a fundamentally flawed judgment. In these circumstances, *vacatur*

would be appropriate, and the Court should grant the petition, vacate the judgment, and remand with instructions to dismiss.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS REQUIRING AGENCIES TO JUSTIFY POLICY REVERSALS.

Certiorari is necessary to restore the meaningful arbitrary-and-capricious review that the APA and this Court's cases require, but which the decision below flouts.

A. Agency action is "arbitrary and capricious" if the agency has "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

This Court held in *Fox* that an agency must provide "a more detailed justification" when "its new policy rests upon factual findings that contradict those which underlay its prior policy; *or* when its prior policy has engendered serious reliance interests that must be taken into account"—"it would be arbitrary or capricious to ignore such matters." 556 U.S. at 515 (emphasis added). In *Perez*, the Court "underscore[d]" that an agency must offer a "more substantial justification" when changed factual circumstances or reliance interests are in play. 135 S. Ct. at 1209. The Court affirmed the point once again in *Encino Motorcars,* holding that "conclusory statements" that an agency's new policy was "reasonable" and "appropriate" were inadequate "[i]n light of the serious reliance interests at stake." 136 S. Ct. at 2127.

In sum, under *Fox*, *Perez*, and *Encino Motorcars*, an agency's obligation to provide reasoned explanation is heightened—that is, the agency's explanation must be "more detailed" and "more substantial"—when the agency relies on changed factual circumstances *or* upsets reliance interests in reversing a prior policy. The Commission's *Order*, which reversed the long-standing information-service classification, expressly relied on changed factual circumstances *and* upset reliance interests. Yet the panel majority did not require the Commission to provide a more substantial justification on either point. To the contrary, the decision below endorsed the Commission's perfunctory treatment of both issues.

B. The *Order* explicitly relied on "changed factual circumstances" to justify its upheaval of the well-established information-service classification. App. 521a. However, as Judge Williams recognized in dissent, *id.* 124a-125a, the Commission failed to identify *any* meaningful change to broadband Internet access service since the 2002 *Cable Broadband Order*.

1. The Commission asserted that consumers now "rely heavily on third-party services, such as e-mail and social networking sites," and that in marketing their services broadband providers "emphasize speed and reliability of transmission separately from and over the extra features of the service packages they offer." App. 522a-523a. These supposed changes led the Commission to conclude that, "[t]oday, broadband providers are offering stand-alone transmission capacity," *id.* 223a—a finding that squarely conflicted with the findings that underlay the Commission's previous classification of broadband as an information service: namely, that broadband providers offer a

"'single, integrated service'" that includes "'data processing capabilities,'" *id.* 514a-515a (citation omitted).

As Judge Williams explained, however, the two supposed changes the Commission relied on were "nothing new." App. 124a. The Commission itself recognized "well over a decade ago" that consumers relied on third-party services. *Ibid.* And broadband providers "ha[d] been advertising speed for decades." *Ibid.* Indeed, Justice Scalia recognized in *Brand X* that broadband providers "advertis[e] quick delivery" as an "advantag[e] over competitors." 545 U.S. at 1007 n.1 (Scalia, J., dissenting). Nor did the Commission "seriously try to quantify these alleged changes," much less "explain why" they "would make application of Title II more appropriate as a policy matter now." App. 125a.

The Commission thus not only failed to provide the "more substantial" justification required by this Court's cases, but failed to provide any *meaningful* justification at all. *Perez*, 135 S. Ct. at 1209.

2. The panel majority believed that the Commission's reliance on changed circumstances to justify reclassification merited little scrutiny because the Commission asserted that it would have reclassified *regardless* of changed circumstances. App. 43a-44a. In particular, the Commission asserted in footnote 993 (of 1777) that, "even assuming, *arguendo*, that the facts regarding how [broadband] is offered had not changed, … we find that the provision of [broadband] is best understood as a telecommunications service." *Id.* 564a n.993.

But far from buttressing the agency's decision, this purported alternative ground for the Commission's abrupt change in policy shows it to be wholly

indefensible. Apart from the fact that one "conclusory statemen[t]" in a footnote of a 400-page order cannot possibly satisfy the APA's "basic … requiremen[t]" that the agency "give adequate reasons for its decision," *Encino Motorcars*, 136 S. Ct. at 2125, 2127, the Commission never explained—in that footnote or elsewhere—*what*, if not changed facts, justified its drastic policy reversal. If anything, an agency's admission that it would discard its long-standing framework for regulating a massive sector of the economy *even if* its stated justification were false reflects a single-minded desire to reach a preordained outcome regardless of the facts or the law—a textbook example of arbitrary decision-making.[2]

Absent changed facts, reclassification could be justified only by a change in the Commission's view of the law. Yet the Commission also indicated its view that the relevant legal standard for classification turned on "how consumers perceive" the service offered. App. 539a-540a. By acknowledging that it would still have reclassified even if consumer perception had *not* changed—and there was no record evidence that it had—the Commission tacitly admitted that the *Order* was the product of political pressure, not reasoned decision-making.

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[2] Even the Commission's central policy justification for imposing Open Internet rules—that broadband providers act as "gatekeepers" with sufficient motive and market power to block certain content while favoring others, App. 254a-265a—was smoke and mirrors. As Judge Williams explained, the Commission's "gatekeeper" theory did not "rest on any evidence or analysis," *id.* 148a, but was conjured from "projections" based on "irrelevan[t]" studies, *id.* 164a. And regardless, the Commission never explained why following the D.C. Circuit's "blueprint" and adopting rules under § 706 would be insufficient to address this alleged threat.

3. At bottom, the decision below gives agencies a clear path to circumvent the heightened standard this Court established in *Fox* and reaffirmed in *Perez* and *Encino Motorcars*: An agency that seeks to reverse long-standing policy on the basis of supposed "changed factual circumstances" need only assert that it would have reversed its policy regardless and—voila!—the reviewing court will not scrutinize whether the agency's asserted justification was, in fact, reasonable. This Court should grant certiorari to prevent the APA's requirement of *reasoned* decision-making from becoming a nullity.

C. The rank arbitrariness of the decision below is further demonstrated by the Commission's casual dismissal of the massive reliance interests the Commission had itself invited and consistently relied upon in decisions supporting its prior policy.

As noted, an agency must give a "more detailed justification" for changing course when "its prior policy has engendered serious reliance interests." *Fox*, 556 U.S. at 515. Thus, in *Encino Motorcars*, this Court held that, "[i]n light of the serious reliance interests at stake, the [agency's] conclusory statements" in support of its new policy "d[id] not suffice to explain its decision." 136 S. Ct. at 2127.

1. Here, *the explicit aim* of the Commission's prior information-service classification was to induce investment. In the Commission's own words, "a minimal regulatory environment"—the keystone of which was the information-service classification—"promotes investment and innovation." *Cable Broadband Order* ¶ 5. The Commission noted that its prior classification of the transmission component of wireline broadband as a separate telecommunications service had "deter[red] broadband infrastructure investment,"

whereas reclassifying wireline broadband as a single, integrated information service would "promote infrastructure investment." *Wireline Broadband Order* ¶ 19. And when the Commission classified wireless broadband as an information service in 2007, the FCC Chairman asserted that "[t]oday's classification eliminates unnecessary regulatory barriers … and will further encourage investment and promote competition in the broadband market." *Wireless Broadband Order*, 22 FCC Rcd. at 5926 (Statement of Chairman Kevin J. Martin).

In reliance on the information-service classification, broadband providers invested more than $800 billion between 2002 and 2013. Historical Broadband Provider Capex, U.S. Telecom, http://goo.gl/Uzg2Is; *see*, *e.g.*, C.A.J.A 530 ("Comcast and other broadband providers have built their broadband networks in reliance on the Commission's consistent pledge that they would not be regulated as 'common carriers.'"); C.A.J.A. 638 ("broadband providers have invested more than $1.2 trillion [since 1996] in broadband infrastructure based on the reasonable understanding that the Commission would continue to treat broadband as a lightly regulated 'information service'").

Because subjecting broadband to heavy-handed Title II regulation undeniably upended these reliance interests, "[i]t would [have] be[en] arbitrary or capricious to ignore" them. *Fox*, 556 U.S. at 515. Yet the Commission did worse than "ignore" these reliance interests; it denied their existence altogether. The Commission blithely asserted that broadband's classification had only "an indirect effect" on investment, and that the "legal status" of the information-service classification had been "called into question too frequently

to have engendered such substantial reliance interests." App. 561a-564a.

Here again, the panel majority simply quoted the Commission's statements and uncritically accepted them. App. 44a-46a. That is not the review that this Court's precedents require. An agency "must be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account,'" *Encino Motorcars*, 136 S. Ct. at 2120 (citation omitted), and cannot pretend—contrary to a compelling record and the agency's own previous statements—that those interests do not exist. That is all the more true where, as here, the policy that the agency proposes to discard *explicitly* sought to *induce* that reliance. Yet both the Commission and the panel majority utterly failed to confront the Commission's own prior pronouncements that the information-service classification sought to "promote infrastructure investment," while a telecommunications-service classification would "deter broadband infrastructure investment." *Wireline Broadband Order* ¶ 19.

The decision below would give agencies *carte blanche* to deliberately induce hundreds of billions of dollars in investments through regulatory decisions and official policy pronouncements and then reverse course without meaningfully addressing such reliance interests. That cannot be the law. Regulated entities must be able to rely on agency pronouncements, and agencies cannot be permitted to treat these reliance interests as mere "inconvenient facts" that can be wished away when deciding to reverse course. *Fox*, 556 U.S. at 537 (Kennedy, J., concurring).

2. In support of its implausible argument that broadband providers invested hundreds of billions of dollars without regard to the applicable regulatory

structure, the Commission offered a few stray "anecdotes about what happened to stock prices and what corporate executives said about investment in response to Commission proposals for regulatory change." App. 121a. But these cherry-picked anecdotes neither disprove the existence of reliance interests nor outweigh the actual "evidence before the agency," *State Farm*, 463 U.S. at 43, which included numerous comments from broadband providers explaining that they invested in reliance on the prior policy, *see Encino Motorcars*, 136 S. Ct. at 2126 (relying on industry comments to show reliance). As Judge Williams explained, these anecdotes showed merely that "the threat of regulation was not so onerous as to precipitate radical stock market losses" and that corporate executives had an incentive to "take the most favorable view of a new policy" to reassure investors. App. 121a.

The Commission's further assertion that the regulatory status of broadband was always too uncertain to produce any reliance likewise defies both reality and common sense. The Commission had "assiduously" stood by its light-touch approach for years. App. 123a. Even accepting that there was uncertainty in the years between the *Cable Broadband Order* and *Brand X*, and again briefly in 2010 (when the Commission floated the possibility of reclassification), there remained more than a decade where the legal status was settled. And between *Brand X* and 2010 alone "broadband providers invested $343 billion." *Ibid.* Yet the Commission "ignore[d]" this substantial investment, and essentially decided to "give reliance interests zero weight." *Id.* 124a.

In upholding the *Order*, the D.C. Circuit allowed the Commission to skirt its obligation to explain in

"detai[l]" how the new policy produces benefits that justify upsetting deeply rooted reliance interests. *Fox*, 556 U.S. at 515. Had it confronted that standard, the Commission could not have satisfied it. In support of reclassification, the agency offered only vague generalities about the so-called "virtuous cycle" and the need to protect against hypothetical "[t]hreats to Internet openness." App. 196a-199a. While this sort of vague "summary discussion may suffice in other circumstances," here, "because of … industry reliance … the explanation fell short." *Encino Motorcars*, 136 S. Ct. at 2126.

The Commission's abject failure to grapple with the massive reliance interests that it expressly sought to induce—and on which it repeatedly relied in justifying the prior policy—demonstrates the absence of any reasoned basis for its decision. Certiorari is warranted to reaffirm that agencies must account for reliance interests before abandoning long-standing policies.

III. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUIT PRECEDENTS REQUIRING AGENCIES TO GIVE FAIR NOTICE.

The decision below independently eviscerated the APA—in conflict with multiple decisions from the D.C. Circuit and other circuits—by excusing the Commission's utter failure to provide "fair notice" of its planned regulatory overhaul. *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 174 (2007).

A. The APA requires an agency to "make its views known to the public in a concrete and focused form" *before* adopting a rule. *Home Box Office, Inc.* v. *FCC* (*HBO*), 567 F.2d 9, 36 (D.C. Cir. 1977) (per curiam). The Commission here disregarded that command and

pulled precisely the sort of "surprise switcheroo" that the APA's notice requirement was designed to prevent. *Envtl. Integrity Project* v. *EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

The *NPRM* proposed to adopt the *Verizon* court's "blueprint" for adopting Open Internet rules under § 706—a Title I provision—and suggested the possibility of reclassification (if at all) only as a possible source of legal authority for those rules. App. 1131a, 1240a-1241a, 1247a-1252a. Indeed, the portions of the *NPRM* that alluded to Title II asked only open-ended questions—such as "whether the Commission should rely on its authority under Title II" or "whether the Commission should revisit its prior classification decisions." *Id.* 1247a, 1250a. It did not even attempt to present any particular basis, much less a framework, for reclassification.

But after the White House's shadow process—which involved input from Title II proponents—the Commission adopted an *Order* that looked nothing like the proposed blueprint that had been shared with the public. Rather than adopt a few open-Internet rules grounded in § 706, for example, the Commission purported to create an altogether new and extensive regulatory regime applicable only to broadband—in the Commission's own words, a "Modern Title II" "tailored for the 21st century." App. 195a-196a. Nor could commenters have foreseen the substance of the *Order*. In reclassifying broadband, the *Order* concluded that several information-processing functions that are integral to broadband fell within the obscure telecommunications-management exception to the definition of "information service." *Id.* 594a-595a. Yet the *NPRM* did not even *mention* that statutory exception. Similarly, the *NPRM* nowhere suggested that the

Commission was considering reclassifying not merely some putative severable high-speed link over the last mile, but the *entire* broadband Internet access service, including the information-processing functions that had been exempt from common-carrier regulation since *Computer II*. Nor could commenters have foreseen that the *Order* would tackle such complex topics as "interconnection," which involves the linking of networks for traffic exchange, because the *NPRM* and Chairman made clear that that topic was off the table. *See id.* 1169a n.113, 1326a.

The Commission thus failed to broadcast its views "in a concrete and focused form" prior to the final *Order*. *HBO*, 567 F.2d at 36.

B. The D.C. Circuit nevertheless blessed the Commission's bait-and-switch, reasoning that the *NPRM* had put these issues in play by generally "'ask[ing] for comments' on whether the Commission should reclassify broadband." App. 25a (citation omitted). That conclusion conflicts with well-established precedent.

The D.C. Circuit itself long ago recognized that an agency cannot merely offer "general notice that a new standard will be adopted" without any guidance as to what form the "ultimate standard" would take. *Horsehead Res. Dev. Co.* v. *Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (per curiam). Yet the *NPRM* gave no concrete guidance on the *what* or *how* or *why* of reclassification: The Commission merely asked a string of open-ended questions amounting to, "Should we reclassify? Why or why not?" *See* App. 1248a-1252a. As now-Chairman Pai described it, the *NPRM* "'ask[ed] the public to shadowbox with itself.'" *Id.* 1002a (citation omitted). If vague, open-ended questions or lists of general topics for regulation sufficed, an agency

"could issue broad NPRMs 'only to justify *any* rule it might be able to devise.'" *CSX Transp., Inc.* v. *Surface Transp. Bd.*, 584 F.3d 1076, 1082 (D.C. Cir. 2009) (citation omitted).

The panel majority's contrary view—that an agency need only announce an intent to adopt *some* regulation touching a field, and then all bets are off—renders the APA's notice safeguards hollow. By refusing to correct the panel's decision through the *en banc* process, the D.C. Circuit has effectively abandoned its previous view and henceforth will review agency action toothlessly.

Meanwhile, the well-established jurisprudence that the panel majority discarded remains the law in other circuits. For example, the Third Circuit has held that "general and open-ended" sentences do not "fairly appris[e] the public" of an agency's views, *Prometheus Radio Project* v. *FCC*, 652 F.3d 431, 453 (3d Cir. 2011), and has vacated a Commission order that "had not so much as hinted" that "the objective of the rulemaking" was to fundamentally alter the regulatory landscape, *Council Tree Commc'ns, Inc.* v. *FCC*, 619 F.3d 235, 253-54 (3d Cir. 2010). And the Second Circuit has vacated a Commission order where the Commission's general solicitation of comments on whether to adopt "rules" to address a particular problem "did not specifically indicate that the FCC was considering adopting" the particular rule it ultimately adopted. *Time Warner Cable, Inc.* v. *FCC*, 729 F.3d 137, 170-71 (2d Cir. 2013).

Under the standard applied in these decisions, the *NPRM*'s vague, open-ended questions about reclassification failed to provide sufficient notice. Review is therefore warranted to clarify the APA's requirement that an agency give fair notice of its proposed action.

IV. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS ON THE SCOPE OF THE COMMISSION'S AUTHORITY.

Certiorari is further warranted because the decision below conflicts with this Court's decisions on the scope of the Commission's authority to decide the classification of broadband and other "major questions."

A. The court of appeals' holding that broadband Internet access service, *in its entirety*, can be defined as a telecommunications service cannot be reconciled with *Brand X*, in which all nine Justices agreed that a service enabling customers to interact with stored data on the Internet is, *at a minimum*, an information service.

In *Brand X*, it was settled that a service that provides "consumers with a comprehensive capability for manipulating information using the Internet"—*i.e.*, Internet access—is an "information service." 545 U.S. at 987-89; *see also id.* at 1009-11 (Scalia, J., dissenting) ("computing functionality" used to access the Internet is an information service). As the Court explained, "subscribers can reach third-party Web sites via 'the World Wide Web, and browse their contents, [only] because their service provider offers the "capability for … acquiring, [storing] … retrieving [and] utilizing … information."'" *Id.* at 1000 (alterations in original) (citation omitted). Neither the *Order* nor the decision below grapples with the dispositive fact that broadband continues to meet the statutory definition of an information service by offering a capability for acquiring and manipulating information using the Internet. *See* 47 U.S.C. § 153(24).

The panel majority reasoned instead that, because *Brand X* found the statute ambiguous, the Commission was free to conclude that broadband is a telecommunications service. App. 27a-33a. But the ambiguity identified in *Brand X* did *not* concern whether broadband is an information service or a telecommunications service; it concerned whether the high-speed delivery over the last mile to a customer's home of the information service that broadband unquestionably provides is a separate and "addition[al]" telecommunications service. 545 U.S. at 986.

Indeed, the decision below embraced a position that all nine Justices rejected in *Brand X*. To borrow Justice Scalia's analogy to pizzerias, where the *Brand X* dissenters saw two separate services—making pizza (Internet functionality) and delivering it (last-mile transmission)—the majority saw a single, functionally integrated pizza-making-and-delivery service. *No* Justice, however, endorsed the position taken by the Commission in this proceeding and endorsed by the decision below: that the "pizzeria" offers *only* delivery—and does not make pizza at all. Because such an unreasonable interpretation would require "radical surgery" on the statute, *Cable Broadband Order* ¶ 43, the Commission exceeded its statutory authority.

B. The ambiguity identified in *Brand X* thus is irrelevant because the *Order*'s reading goes beyond the scope of whatever ambiguity the statute contains. *See United States* v. *Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1846 n.1 (2012) (Scalia, J., concurring in part and in the judgment) ("It does not matter whether the word 'yellow' is ambiguous when the agency has interpreted it to mean 'purple.'"). But even assuming *arguendo* that the statute is ambiguous on

the relevant issue, Judge Kavanaugh correctly explained that the panel decision was "badly mistaken" to assume that statutory ambiguity could authorize the Commission to decide such a major question as whether broadband is subject to utility-style regulation under Title II. App. 1447a.

1. Deference to an agency's reasonable interpretation of an ambiguous statute is due only where that ambiguity reflects "an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). Although an ambiguity with respect to "'interstitial matters'" can imply such a delegation, *ibid.* (citation omitted), this Court "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance,'" *UARG*, 134 S. Ct. at 2444 (citation omitted). For example, in *King* v. *Burwell*, 135 S. Ct. 2480 (2015), the Court held that if Congress "wished to assign to the agency" the power to decide whether billions of dollars in tax credits would be available on Federal Exchanges it "surely would have done so expressly"—not through statutory ambiguity—because the question was one of "deep 'economic and political significance.'" *Id.* at 2489 (citation omitted).

2. In assuming that statutory ambiguity *authorized*—rather than barred—the Commission's decision to transform broadband providers into de facto public utilities, the decision below turned this Court's precedents on their head.

Whether broadband providers are subject to Title II, in addition to the generally applicable provisions of Title I, is undeniably a "major question." *See supra* Part I. In the words of Judge Brown, "any other conclusion would fail the straight-face test." App. 1399a.

Yet the statute "fails unambiguously to classify" broadband providers as telecommunications carriers. *Brand X*, 545 U.S. at 996-97. Indeed, far from blessing the Commission's quest to regulate every aspect of the Internet, Congress declared a national policy "to preserve the vibrant and competitive free market that presently exists for the Internet …, *unfettered by Federal or State regulation*." 47 U.S.C. § 230(b)(2) (emphasis added). The Commission thus lacked the clear mandate necessary to promulgate this "major" regulation.

Moreover, there is direct evidence that Congress explicitly *declined* to give the Commission authority to regulate broadband providers as common carriers. Congress has repeatedly considered (and declined to enact) bills that would impose common-carrier regulations on Internet service providers. *See* App. 1443a (Kavanaugh, J., dissenting) (listing thirteen such bills since 2006). In light of Congress's "consistent judgment to deny the [Commission] this power," the D.C. Circuit was "obliged to defer not to the agency's expansive construction" of the Act, but to Congress. *Brown & Williamson*, 529 U.S. at 159-60 (rejecting the FDA's attempt to classify tobacco as a "drug"-and-"device" combination in part because Congress had "squarely rejected proposals to give the FDA jurisdiction over tobacco"). The court of appeals turned this paradigm on its head by instead deferring to the agency's expansive interpretation.

3. Rather than persuading Congress to amend the Act to give it this sweeping power, the Commission inferred such authority from the 1934 and 1996 Acts. "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." *UARG*, 134 S. Ct. at 2444 (citation omitted). The panel majority, however, greeted the Commission's power-grab not with raised eyebrows, but a collective shrug.

UARG makes plain that the Commission could not arrogate such authority to itself without a clear command from Congress. Prior to *UARG*, this Court had held that the Clean Air Act authorized the EPA to regulate greenhouse gas emissions as air pollutants. *Massachusetts* v. *EPA*, 549 U.S. 497, 528 (2007). In response, the EPA promulgated a rule regulating *all* greenhouse gas emissions as air pollutants, including "millions of small sources—including retail stores, offices, apartment buildings, shopping centers, schools, and churches." *UARG*, 134 S. Ct. at 2446. Because of the rule's expansive sweep, the EPA "tailor[ed]" its rule by granting myriad exceptions so that only major emitters would be subject to its requirements. *Ibid.* This Court held that the EPA had "exceeded its statutory authority" by effecting "an enormous and transformative expansion in [its] regulatory authority" without "clear congressional authorization." *Id.* at 2444, 2449. The "need to rewrite clear provisions of the statute," the Court explained, "should have alerted EPA that it had taken a wrong interpretive turn." *Id.* at 2446.

So too here. Regulating broadband providers as common carriers is an "enormous and transformative expansion" of the Commission's powers that Congress has not "clearly" authorized. *UARG*, 134 S. Ct. at 2444. Indeed, the effects of reclassification are so vast that the Commission was compelled to create "a Title

II tailored for the 21st century" by forbearing from applying nearly 30 provisions of Title II and over 700 rules. *See* App. 195a-196a; *id.* 1412a (Brown, J., dissenting). That the Commission needed to rewrite Title II extensively should have alerted both the Commission and the court below that the agency had overstepped its bounds.[3]

Accordingly, certiorari is warranted to correct the conflict between the D.C. Circuit's opinion and this Court's precedents on the scope of the Commission's authority.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, in the event that the Commission reclassifies broadband Internet access service as an information service, the Court should grant this petition, vacate the judgment below, and remand this case to the D.C. Circuit with instructions to dismiss NCTA's petition for review as moot.

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[3] In fact, the Commission *further* rewrote the statute by reinterpreting sections 201 and 202 as "important statutory backstop[s]" for the very provisions from which the Commission had ostensibly forborne. App. 686a (discussing 47 U.S.C. §§ 201, 202). As Commissioner O'Rielly aptly observed, this "shell game" is the "height of arbitrary and capricious rulemaking." *Id.* 1118a.

Respectfully submitted,

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