FINAL VERSION

ORAL ARGUMENT SCHEDULED FOR FEBRUARY 1, 2019

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

No. 18-1051 (and consolidated cases)

MOZILLA CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

On Petitions for Review of an Order of the Federal Communications Commission

JOINT BRIEF FOR INTERVENORS USTELECOM, CTIA, NCTA, ACA, AND WISPA IN SUPPORT OF RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), intervenors USTelecom–The Broadband Association ("USTelecom"), CTIA–The Wireless Association® ("CTIA"), NCTA–The Internet & Television Association ("NCTA"), American Cable Association ("ACA"), and Wireless Internet Service Providers Association ("WISPA") certify as follows:

A. Parties and *Amici*

All parties, intervenors, and *amici* appearing before the Federal Communications Commission ("FCC" or "Commission") and in this Court are listed in the briefs for petitioners and respondents.

B. Ruling Under Review

The ruling under review is the FCC's Declaratory Ruling, Report and Order, and Order, *Restoring Internet Freedom*, 33 FCC Rcd 311 (2018) ("*Order*") (JA3358-896).

C. Related Cases

The *Order* has not previously been the subject of a petition for review in this Court or any other court. All petitions for review of the *Order* have been consolidated in this Court. Additional information regarding related cases appears in the briefs for petitioners and respondents.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, intervenors USTelecom, CTIA, NCTA, ACA, and WISPA submit the following corporate disclosure statements:

ACA: ACA has no parent corporation, and no publicly held corporation owns 10% or more of its stock, pays 10% or more of its dues, or possesses or exercises 10% or more of the voting control of ACA.

As relevant to this litigation, ACA is a trade association of small and medium-sized cable companies, many of which provide broadband Internet access service. ACA is principally engaged in representing the interests of its members before Congress and regulatory agencies such as the FCC.

CTIA: CTIA is a Section 501(c)(6) not-for-profit corporation organized under the laws of the District of Columbia that represents the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and Internet companies, and other industry participants. CTIA has not issued any shares or debt securities to the public, and CTIA has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public. No parent or publicly held company owns 10% or more of CTIA's stock.

NCTA: NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving nearly 80% of the nation's cable television customers, as well as more than 200 cable program networks. The cable industry is also a leading provider of residential broadband service to U.S. households. NCTA has no parent companies, subsidiaries, or affiliates whose listing is required by Rule 26.1.

USTelecom: USTelecom is a non-profit association of service providers and suppliers for the telecommunications industry. Its members provide broadband services, including retail broadband Internet access and new Internet Protocol-based services over fiber-rich networks, to millions of consumers and businesses across the country. USTelecom has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

WISPA: WISPA is a non-profit association that represents the interests of providers of fixed wireless broadband Internet access services. WISPA has no parent corporation, and no publicly held corporation owns 10% or more of its stock, pays 10% or more of its dues, or possesses or exercises 10% or more of the voting control of WISPA. There is no publicly held member of WISPA whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims WISPA is pursuing in a representative capacity.

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GLOSSARY

1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56
APA	Administrative Procedure Act
AT&T Comments	Comments of AT&T Services Inc., *Restoring Internet Freedom*, WC Docket No. 17-108 (FCC filed July 17, 2017)
Broadband	Broadband Internet access service
Comcast Comments	Comments of Comcast Corp., *Restoring Internet Freedom*, WC Docket No. 17-108 (FCC filed July 17, 2017)
Communications Act or Act	Communications Act of 1934
CTIA Comments	Comments of CTIA, *Restoring Internet Freedom*, WC Docket No. 17-108 (FCC filed July 17, 2017)
DNS	Domain Name Service
DOJ	U.S. Department of Justice
FCC or Commission	Federal Communications Commission
FOIA	Freedom of Information Act
FTC	Federal Trade Commission
ISP	Internet Service Provider
MFJ	Modified Final Judgment (*United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983))

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USTelecom Comments	Comments of USTelecom Association, *Restoring Internet Freedom*, WC Docket No. 17-108 (FCC filed July 17, 2017)
Verizon Comments	Comments of Verizon, *Restoring Internet Freedom*, WC Docket No. 17-108 (FCC filed July 17, 2017)
VoIP	Voice over Internet Protocol

Vonage Order	Memorandum Opinion and Order, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004)
Winter Park Order	Memorandum Opinion and Order, *Applications of Winter Park Telephone Company*, 84 F.C.C.2d 689 (1981)

STATUTES AND REGULATIONS

All applicable statutes and regulations have been reproduced in the Joint Brief for Petitioners Mozilla Corporation *et al*.

INTRODUCTION AND SUMMARY OF ARGUMENT

Intervenors and their members support an open Internet, which benefits their customers and thus the broadband businesses in which they collectively have invested hundreds of billions of dollars. Intervenors' members, on their own or through associations, have made public commitments to preserve core principles of Internet openness. The Commission's *Order* ensures that those commitments are transparent and enforceable, while also empowering the FTC to police the entire Internet marketplace for anticompetitive and anti-consumer conduct. This case, therefore, is not about whether the Internet will remain open. It will. Rather, it is about whether the Commission may conclude, as it has under both Democratic and Republican administrations, that broadband Internet access service ("broadband") should be subject to light-touch regulation. *Brand X* makes clear that the Commission may do so, and the *Order* demonstrates that the Commission's decision to follow that path was reasonable.

The Commission's brief amply justifies its return to the more modern, flexible Title I regime under which the Internet developed and flourished. We write separately to stress the following points.

I. Petitioners establish no distinction between the *Order*'s classification of broadband as an information service and the 2002 Commission decision reaching the same conclusion, which *Brand X* upheld. Indeed, the

Communications Act is best read to mandate that classification. At the very least, as *Brand X* holds, it is reasonable for the Commission to reach that result. As in *Brand X*, the Commission here properly classified broadband as an information service because it offers the capability to process information via telecommunications. Independently, broadband includes inextricably intertwined information-processing functions.

Petitioners also fail to refute the Commission's return to its prior classification of mobile broadband as a non-common-carrier, private mobile service. Mobile broadband is not interconnected with the telephone network and, thus, as the Commission again reasonably concluded, cannot be subject to common-carrier regulation under the Act. That decision reflects the best reading of the statute and, at a minimum, readily satisfies review under *Chevron* step two.[1]

II. Nor do petitioners show that the *Order* was arbitrary or capricious. The Commission concluded, after reviewing the extensive record, that the most effective and efficient means of protecting and promoting the open Internet is to return to the light-touch, transparency- and market-based approach that governed for decades. Petitioners disagree with that policy choice, but this Court, as it has emphasized time and again, does not substitute its policy judgment for the agency's. Petitioners identify no evidence of actual or even potential harms to the

[1] Only CTIA presents the arguments concerning mobile broadband.

open Internet that the Commission overlooked. And there is no serious argument that the Commission failed to weigh competing views or intelligibly explain its reasons for returning to its prior, decades-old light-touch regulatory approach.

III. Finally, the Commission lawfully preempted state and local regulation of broadband, which is a jurisdictionally interstate service. Under the Communications Act, States have always lacked authority to regulate interstate services such as broadband. And Government Petitioners here seek to regulate broadband in its entirety; they identify no severable intrastate component within broadband that could be subject to state regulation. Disparate state and local regulation of this inherently interstate service necessarily conflicts with federal policies favoring both national uniformity and light-touch regulation and is preempted for those reasons as well.

ARGUMENT

I. THE COMMISSION REASONABLY CLASSIFIED BROADBAND AS A NON-COMMON-CARRIER SERVICE

A. Broadband Is an Information Service

Classifying broadband as an information service is the best interpretation of the statute. *NCTA v. Brand X Internet Services*, 545 U.S. 967 (2005), establishes that, at a minimum, it is a reasonable one.

1. Broadband Offers All the Capabilities of an Information Service

a. Broadband offers each "capability" in the statutory definition of information service: "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(24); *see Order* ¶¶ 30-32 (JA3369-72). Broadband enables a customer to use, store, and retrieve information through a wide range of services, such as Facebook and YouTube. It also enables a customer to make information stored on her home computer or smartphone directly available over the Internet to others. *See Order* ¶¶ 30-31, 54, 167 (JA3369-71, 3390-91, 3457-58); FCC Br. 30-32. Providing these capabilities, the Commission found, is broadband's core purpose. *See Order* ¶ 30 (JA3369-70).

It makes no difference, the Commission explained, whether broadband customers use these information-processing capabilities to interact with third-party

content, rather than the broadband provider's own content offerings. *See id.* ¶ 31 (JA3370). The statute makes no such distinction: it speaks in terms of offering capabilities, not content. The statute also codified pre-existing definitions from the MFJ — the consent decree that dismantled the Bell Telephone system — which classified as information services offerings that, like broadband, offered the capability to access third-party content. *See United States v. Western Elec. Co.*, 673 F. Supp. 525, 587 n.275 (D.D.C. 1987), *aff'd in part, rev'd in part on other grounds, and remanded*, 900 F.2d 283 (D.C. Cir. 1990) (per curiam); *Order* ¶ 35 & n.112 (JA3374). *Brand X* confirms that the distinction between first- and third-party content is irrelevant to classification. It upheld the Commission's determination that, "[w]hen an end user *accesses a third-party's Web site, . . . he is equally using the information service provided by the cable company that offers him Internet access* as when he accesses the company's own Web site, its e-mail service, or his personal Web page." 545 U.S. at 998-99 (emphases added).

b. Mozilla argues (at 23-25, 37-38) that *Brand X* concerned only "walled garden" services and is thus irrelevant to "modern" broadband, which, Mozilla says (at 22-33), provides only "a conduit connecting user to third-party information services." But the petitioners in *Brand X* likewise argued that, "[w]hen a consumer goes beyond [walled garden] offerings and accesses content provided by parties other than the cable company, . . . the consumer uses 'pure transmission.'" 545

U.S. at 998. The Supreme Court squarely rejected that argument: "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 and omissions in original).

Contrary to Mozilla's claim (at 41), *Brand X* was not "focused on the [broadband] providers' add-on information services, such as *ISP-provided* email, file transfer services and Usenet newsgroups." Rather, the Court upheld the Commission's conclusion that broadband Internet "is an information service . . . because it provides consumers with a comprehensive capability for manipulating information using the Internet," "enabl[ing] users, for example, to browse the World Wide Web," among other applications. 545 U.S. at 987.

Beyond that, Mozilla ignores the Commission's extensive reliance on "the broader context of the statute as a whole," for which "reasonable statutory interpretation must account." *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014). As the Commission explains, § 230(f)(2) and § 231 confirm that Congress understood broadband to be an information service, and numerous Title II provisions make sense only when applied to telephone service. *See Order* ¶¶ 60-62, 64 (JA3396-99); FCC Br. 32-33.

c. *Brand X* forecloses Mozilla's contention (at 22-33) that this classification dispute can be resolved in its favor under *Chevron* step one. *Brand X* upheld the classification of broadband as an information service. And even the *USTelecom* majority held that "the Act left the matter to the agency's discretion" and that the Commission "did not *have*" "to treat broadband ISPs as common carriers." *USTA v. FCC*, 855 F.3d 381, 384 (D.C. Cir. 2017) (Srinivasan, J., joined by Tatel, J., concurring in denial of rehearing en banc).

Indeed, the only possible *Chevron* step one argument here supports the traditional "information service" classification. *See*, *e.g.*, AT&T Comments 59-90 (JA175-76); NCTA Comments 13-27 (JA1452-66).[2] In *Brand X* itself, there was no doubt that broadband at least *includes* an "information service." The *Brand X* petitioners were ISPs without last-mile facilities (such as EarthLink) that sought to require cable broadband providers to make last-mile, high-speed transmission available to them on regulated terms, just as then-current law required of telephone company ISPs.[3] Although these "non-facilities-based" ISPs wanted to buy that

[2] Although the *USTelecom* panel concluded that the statute is sufficiently ambiguous to classify broadband as a "telecommunications service," *USTA v. FCC*, 825 F.3d 674, 701-04 (D.C. Cir. 2016) ("*USTelecom*"), *cert. denied*, Nos. 17-498 to 17-504 (U.S. Nov. 5, 2018), intervenors preserve their argument that this issue is properly resolved in their favor at *Chevron* step one.

[3] However, a customer purchasing *only* high-speed transmission from those telephone company ISPs would have no access to the Internet. That "transmission service [did not] enable access to the Internet" but, instead, could be "use[d] in

transmission input as a "telecommunications service," they were not volunteering for Title II regulation. Everyone, including all nine Justices, agreed that the retail Internet access service offered by non-facilities-based ISPs was an information service. *See* 545 U.S. at 978, 987; *id.* at 1008-09 (Scalia, J., dissenting). The only point of disagreement was whether, *in addition to* that information service, a broadband ISP "offers" its customers a separate "telecommunications service" in the form of a last-mile, high-speed transmission. *Id.* at 992-93. Notably, petitioner Public Knowledge conceded below that "dial-up ISPs . . . are uncontroversially information services." Public Knowledge Comments 37 (JA2207). Broadband providers offer the same Internet access as dial-up ISPs, but at higher speeds.

d. Mozilla analogizes broadband to a road leading to hotels (edge providers) and claims that the Commission treated the road as though it were a hotel. As the *Brand X* Court noted when faced with a similar argument, "policy in this technical and complex area [should] be set by the Commission, not by warring analogies." 545 U.S. at 992. In any event, Mozilla's analogy is doubly flawed. First, edge providers are not like hotels, where users enjoy amenities after *leaving* the road — rather, users must stay on the road (broadband) at all times to enjoy the edge providers' offerings. Second, as the Commission found in both the decision that *Brand X* upheld and the *Order*, broadband is not merely a road

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conjunction with" a separately obtained Internet access service. *Order* ¶ 51 n.179 (JA3386-87).

(telecommunications); it also offers capabilities that allow the user to find the best hotel, store her belongings there, retrieve them at any time, and even become her own hotel (information-processing capabilities).

Mozilla's argument (at 36) that consumers perceive broadband "as offering them pure transmission *to* information services" likewise misses the mark. *Brand X* relied on consumer perceptions solely to answer the question whether consumers are offered *one* integrated service or *two* (or more) separate services. *See* 545 U.S. at 990-91. The Commission found, and Mozilla does not contest, that consumers perceive broadband as a single, integrated offering. *See Order* ¶¶ 45-47 (JA3382-84). Again, a service that customers perceive as providing the "capability" of accessing third-party information is by definition an information service.

Equally meritless is Mozilla's assertion (at 28) that, if the *Order* is upheld, ordinary phone service must also be classified as an information service. The *Order* reasonably rejects that logic based on the Commission's well-established understanding that broadband providers, unlike providers of traditional telephone service, "offer" transmission *only* in connection with information processing. *Order* ¶¶ 55-56 (JA3392-94); *see* FCC Br. 34-36. And *Brand X* rejected the same logic. *See* 545 U.S. at 988, 997-98.

e. Mozilla also wrongly conflates the statutory terms "telecommunications" and "telecommunications service." It asserts that the phrase "via telecommunications" in the information service definition means that "information services rely on the transmission path of *a telecommunications service*." Mozilla Br. 27 (emphasis added). That is false. A "telecommunications service" is the common-carrier offering of "telecommunications." 47 U.S.C. § 153(50), (53). Information services are provided via "telecommunications," but not necessarily via a common-carrier "telecommunications service." And *Brand X* holds that, even when the same provider offers both the information service and the telecommunications over which it is provided, the Communications Act is ambiguous as to whether that provider is offering a single service, or two separate services, one of which (the telecommunications) may be a common-carrier service. *See* 545 U.S. at 989-90.

2. Broadband Integrates DNS, Caching, and Other Information-Processing Capabilities

The Commission concluded that broadband is an information service for an additional, independent reason: broadband is offered to consumers with integrated information-processing capabilities, including DNS and caching. *See Order* ¶ 33 (JA3372). Mozilla disputes (at 34-41, 46-47) that conclusion at both *Chevron* step one and step two, but *Brand X* refutes both arguments.

a. *Brand X* squarely forecloses Mozilla's *Chevron* step one challenge. The Court there affirmed the same Commission conclusion: that DNS and caching, quite apart from any "walled garden" features, independently justify an information service classification. *See* 545 U.S. at 998-1000.

Mozilla nonetheless argues (at 42-45) that DNS and caching necessarily fall within the "telecommunications management" exception in the information services definition. Yet *Brand X* held that it was "at least reasonable to think of DNS as a . . . part of the information service cable companies provide." 545 U.S. at 999. And in upholding the Commission's short-lived conclusion in the *Title II Order* that DNS and caching fall within the telecommunications-management exception, this Court similarly resolved the issue at step two. *See USTelecom*, 825 F.3d at 704-05.

b. *Brand X* also forecloses Mozilla's step two argument. The Court upheld the Commission's finding that DNS and caching are intertwined with the "service that Internet access providers offer to members of the public" and thus that such service was "not a transparent ability (from the end user's perspective) to transmit information." 545 U.S. at 1000. The Court explained that DNS offers information processing that is integral to broadband because "[a] user cannot reach a third-party's Web site without DNS, which (among other things) matches the Web site address the end user types into his browser (or 'clicks' on with his

mouse) with the IP address of the Web page's host server." *Id.* at 999. The Court likewise found reasonable the Commission's conclusion as to caching, stating that it "obviates the need for the end user to download anew information from third-party Web sites each time the consumer attempts to access them, thereby increasing the speed of information retrieval." *Id.* at 999-1000.

All of that still holds true. *See* FCC Br. 36-37, 42-47. DNS is as much "a must" today as it was in *Brand X*. 545 U.S. at 999. The record shows not only that DNS remains an essential feature of broadband offerings, but also that modern DNS is far more sophisticated and offers even more information processing to consumers, such as parental controls and protection against phishing sites. *See Order* ¶ 34 (JA3372-74); AT&T Comments 74-75 (JA190-91); USTelecom Comments 34-36 (JA1915-17); Comcast Comments 15-16 (JA430-31); NCTA Comments 14-15 & n.56 (JA1453-54).

So too with caching, without which "broadband Internet access service would be a significantly inferior experience for the consumer." *Order* ¶ 42 (JA3380). Caching "depends on complex algorithms to determine what information to store where and in what format" to enhance customers' abilities to acquire information. *Id.* ¶ 41 (JA3379); *see* NCTA Comments 14-15 & n.55 (JA1453-54); Comcast Comments 16-17 (JA431-32); CTIA Comments 36-39

(JA653-66). This is not mere "transmission, between or among points specified by the user." 47 U.S.C. § 153(50).

The Commission also properly concluded that DNS and caching fall outside the "telecommunications management" exception to the "information service" definition. That conclusion follows directly from the statute's MFJ antecedent, which confined the "management" exception to "internal [network] operations" rather than functions that consumers find useful, such as DNS. *Order* ¶ 36 (JA3375-76). Supporting the same conclusion, broadband providers allow their customers to use third-party DNS, as Mozilla itself notes (at 46), even though "the vast majority of ordinary consumers rely upon [their ISP's] DNS functionality." *Order* ¶ 34 (JA3373). Broadband providers thus do not use DNS for the "management" of their services, as providers would not allow independent third parties to assume that role. Nor is caching the management of a telecommunications service. As the Commission found, caching is "highly comparable" to legacy storage-and-retrieval functions that also fell outside the MFJ's "management" exception. *Id.* ¶ 43 (JA3380); *see also* FCC Br. 38-42.

B. The Commission's Classification of Mobile Broadband Was Lawful

The Commission correctly classified mobile broadband as an "information service" under the Communications Act. *See* 47 U.S.C. § 153(24).[4] The Commission also properly concluded that mobile broadband is independently immune from common-carrier regulation. The Act permits common-carrier regulation of only "commercial mobile services." *Id.* § 332(c)(1)-(2), (d). For a mobile service to be "commercial," it must provide "interconnected service," which is a "service that is interconnected with the public switched network." *Id.* § 332(d)(1)-(2). For decades before the *Title II Order*, the Commission defined an "interconnected service" to mean a service that "gives subscribers the capability to communicate . . . [with] all other users on the public switched network." 47 C.F.R. § 20.3 (1994). And the Commission had always interpreted "the public switched network" to mean the telephone network. *See id.* ("Any common carrier switched network . . . that use[s] the North American Numbering Plan [i.e., 10-digit numbers] in connection with the provision of switched services."). Applying those

[4] Multiple aspects of mobile broadband render it an information service. Mobile broadband networks *generate* and *process* authentication keys, *generate* multiple IP addresses for a single device, and *process* and encrypt IP packets — doing much more than simple point-to-point transmission. *See* Verizon Comments 40 (JA1960).

definitions, the Commission in 2007 found that mobile broadband is not a "commercial mobile service." *Mobile Broadband Declaratory Ruling* ¶ 41.

The *Order* lawfully restores the Commission's prior regulatory treatment of mobile broadband. *Order* ¶¶ 74-85 (JA3402-09). Its determination follows from the unambiguous meaning of the statute. At a minimum, the Commission reasonably exercised its express authority to define the relevant terms and to apply them to mobile broadband. *See* FCC Br. 48-57.[5]

1. The *Order* restored the definition of "the public switched network" to its pre-2015 — correct — meaning: the public telephone network. *Order* ¶¶ 75-76 (JA3402-03). The Commission's reinstatement of that well-established meaning of the term is reasonable.

The phrase "the public switched network" was a term of art well understood to refer to the public telephone network before the *Title II Order* radically expanded its meaning to include the Internet. Both the Commission and this Court had for decades consistently used "public switched network" to mean the *telephone* network. *See*, *e.g.*, *Winter Park Order* ¶ 2 n.3 ("[T]he public switched network

[5] Although this Court held that the Commission had authority to classify mobile broadband as a "commercial mobile service," it nowhere held the statute unambiguously *compelled* that result. *See USTelecom*, 825 F.3d at 715-16 (*Title II Order* decision was "reasonable"). In any event, CTIA preserves its argument that the classification of mobile broadband is properly resolved in its favor at *Chevron* step one.

interconnects all telephones in the country."); *Ad Hoc Telecomms. Users Comm. v. FCC*, 680 F.2d 790, 793 (D.C. Cir. 1982) (public switched network is "the same network over which regular long distance calls travel"); *see* FCC Br. 51-52. Congress then codified that meaning when it enacted § 332 in 1993. *See McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) ("Congress intend[s] [a term of art] to have its established meaning.").

Mozilla contends (at 79) that the public telephone network *and* the Internet *together* constitute "the public switched network." That is implausible. The public telephone network is organized by telephone numbers. The Internet is organized by entirely distinct IP addresses. It would be a linguistic anomaly and factually incorrect to refer to two separate networks organized by fundamentally different address and routing systems as a single unit: "*the* public switched network." *See Delaware Dep't of Nat. Res. & Envtl. Control v. EPA*, 895 F.3d 90, 99 (D.C. Cir. 2018) ("It is 'well established' that 'the' 'particularizes the subject which it precedes' and acts as a 'word of limitation.'").

Further, Congress has explicitly distinguished between the public switched network and the Internet. *See* 47 U.S.C. § 1422(b)(1) (providing for public-safety network that "provides . . . connectivity" to "the public Internet or the public switched network, or both"). *Every other* use of "the public switched network" in the U.S. Code refers exclusively to the telephone network. *See id.* §§ 259,

769(a)(11). "[T]hese subsequently enacted provisions confirm that [the phrase] is a term of art." *Northeast Hosp. Corp. v. Sebelius*, 657 F.3d 1, 9 (D.C. Cir. 2011). Congress's decision to leave the agency's interpretation since 1994 undisturbed is further "persuasive evidence that the interpretation is the one intended by Congress." *CFTC v. Schor*, 478 U.S. 833, 846 (1986).

Moreover, adopting Mozilla's definition of "the public switched network" would create absurd results. "The public switched network" would include "billions of IP endpoints that can never be dialed over a telephone line," such as IP-enabled Kindle E-readers, thermostats, and household appliances. Verizon Comments 48 (JA1968). One cannot make voice calls to "smart" washing machines. Under Mozilla's definition, even mobile voice service would no longer be an "interconnected service" — and therefore would not be a commercial mobile service — because mobile voice users simply cannot communicate with "all" Internet endpoints. *See* 47 C.F.R. § 20.3. Such a bizarre result underscores why Mozilla's reading of the phrase contravenes Congress's intent and is patently unreasonable.

2. The Commission also correctly and reasonably concluded that mobile broadband is *not* an "interconnected service" because it does not give "subscribers the capability to communicate to or receive communication from *all* other users on

the public switched network." 47 C.F.R. § 20.3 (emphasis added); *see Order* ¶¶ 77-78 (JA3403-05); FCC Br. 53-55.

Mozilla wisely does not challenge the Commission's decision to restore the pre-2015, decades-long definition of "interconnected service" by inserting the word "all" before "other users." *See* 47 C.F.R. § 20.3 (1994). The requirement that all users be able to communicate with one another is inherent in the statutory use of "interconnected." 47 U.S.C. § 332(d)(2). Users who cannot communicate with each other are simply not "interconnected" in any plausible sense. *See Merriam-Webster's Collegiate Dictionary* 609 (10th ed. 1997) (interconnected system provides "internal connections between the parts or elements"). But even if the statute were ambiguous — and it is not — reinstatement of the traditional definition is eminently reasonable.

Mozilla instead contends (at 76-77) that mobile broadband users have the "capability" to communicate with "all other users," including landline telephone users, because third-party apps used in connection with mobile broadband — such as Skype or Google Voice — may be able to reach public telephone numbers.

That conflates web-based applications with mobile broadband. Mobile broadband does not — "'in and of itself'" — allow subscribers to make telephone calls. *Order* ¶ 79 (JA3405) (quoting *Mobile Broadband Declaratory Ruling*

¶ 45).[6] To use VoIP technology to reach or receive calls from traditional telephone subscribers, consumers must subscribe to a separate VoIP service, or download a separate app, and in many instances pay a separate fee.[7] As the Commission observed, it is implausible to suggest that Congress intended for the classification of mobile broadband to depend on which device or apps consumers have (or have not) chosen. *Id.* ¶ 80 & n.298 (JA3405-06).[8] VoIP apps cannot transform the provider's data service into a telephone service any more than the Uber app transforms it into a car-and-driver service. The Commission thus correctly focused "on the characteristics of the offered mobile service itself," not the devices or apps that employ mobile broadband. *Id.* ¶ 80 (JA3405).

Nor does VoIP, as a factual matter, merge the telephone and broadband networks. When a VoIP user calls another VoIP user, the call travels over the Internet and may never traverse the public telephone network at all. And when

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[6] Contrary to Mozilla's claim (at 74), the Commission never implied that mobile broadband guarantees the capability to "communicate with all [telephone network] users." Instead, the Commission expressly found the opposite. *See Order* ¶ 79 (JA3405).

[7] Notably, even where offered by mobile broadband providers, so-called Wi-Fi calling or Voice-over-LTE are separate services altogether. *See Order* ¶ 81 n.302 (JA3406).

[8] "[E]ven if the applications are pre-installed in the mobile device offered by the provider," mobile broadband should not be "regulated in a disparate fashion based on what applications a particular provider chooses to install in their offered devices." *Order* ¶ 80 n.298 (JA3405).

a VoIP user calls a landline telephone user, the VoIP provider hands the call to a local exchange carrier, and *that* carrier — *not* the VoIP provider *or* the broadband provider — interconnects with the telephone network to deliver the call. *See Vonage Order* ¶ 8; *cf. Charter Advanced Servs. (MN) LLC v. Lange*, 903 F.3d 715, 719 (8th Cir. 2018) (holding that wireline VoIP is an "information service" because of this transformation).

Mozilla argues (at 75) that the Commission's rationale undermines the classification of mobile voice as an interconnected service because software is typically required to make traditional mobile voice calls. That is a non-sequitur. Unlike the case with traditional mobile voice service, a broadband consumer orders an altogether different service from a different provider when it downloads or subscribes to a third-party VoIP app. But the statute requires that the relevant "service" — here, mobile broadband — itself be "interconnected with the public switched network." 47 U.S.C. § 332(d)(2). Third-party VoIP service may be interconnected with the telephone network, but the underlying broadband platform is not.

In all events, even if Mozilla were correct that (1) VoIP apps should be considered in the interconnected service analysis; and (2) the public switched network includes the Internet, its position would still be flawed and unreasonable. Again, neither VoIP apps, mobile voice, nor traditional telephone service can dial

all Internet endpoints: *e.g.*, a smart washing machine. Thus, those various things would not be "interconnected with the public switched network," and Mozilla's theory collapses on itself. *Id.*; *see also* 47 C.F.R. § 20.3.

3. Mozilla next argues (at 80) that mobile broadband is "the functional equivalent of a commercial mobile service because it . . . allow[s] subscribers to call anyone a mobile voice subscriber could." But when the *services* offered by mobile providers themselves are viewed side by side, mobile broadband is not the functional equivalent of mobile voice. *See* 47 U.S.C. § 332(d)(3). The Commission defined "functional equivalence" based on its traditional test, which includes factors such as "whether the service is closely substitutable . . . [and] whether changes in price . . . would prompt customers to change from one service to the other." *Order* ¶ 83 (JA3407).[9] As the Commission explained, there is no evidence that consumers will suddenly switch to mobile broadband if mobile voice prices go up. Instead, consumers generally subscribe to both services, as even Mozilla notes (at 80-81), because they employ them for different purposes. *Order* ¶ 85 (JA3408-09). The Commission's rejection of a functional equivalence claim was entirely reasonable. *See* FCC Br. 56-57.

[9] Petitioners do not challenge the Commission's decision to return to its prior functional equivalence test, which was well within its statutory discretion. *See Order* ¶¶ 83-84 (JA3407-08).

II. THE *ORDER* IS NOT ARBITRARY OR CAPRICIOUS

"For decades, the lodestar of the Commission's approach to preserving Internet freedom was a light-touch, market-based approach." *Order* ¶ 207 (JA3481-82). In the *Order*, the Commission "reaffirm[ed] . . . this longstanding, bipartisan commitment by adopting a light-touch framework." *Id.* The Commission concluded — after reviewing the relevant history and the exhaustive record generated in this proceeding — that a modified transparency rule, market forces, and pre-existing federal protections were "not only sufficient to protect Internet freedom, but will do so more effectively and at lower social cost than the *Title II Order*'s conduct rules." *Id.* ¶ 208 (JA3482); *see also id.* ¶¶ 240-266 (JA3496-517) (discussing Commission's findings regarding the costs and benefits of the general conduct rules and three "bright-line" rules).[10]

Petitioners and intervenors argue that the repeal of the conduct rules violated the APA, but their "arbitrary-and-capricious challenge boils down to a policy disagreement" with the Commission that provides "no basis" for overturning the *Order*. *Public Citizen, Inc. v. NHTSA*, 374 F.3d 1251, 1263 (D.C. Cir. 2004).

[10] The modified transparency rule requires broadband providers to "publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient to enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain Internet offerings." *Order* ¶ 215 (JA3485); 47 C.F.R. § 8.1(a).

Although the Commission arguably had discretion to rely on modified conduct rules that did not impose common-carrier treatment, *see*, *e.g.*, *Verizon v. FCC*, 740 F.3d 623, 656-58 (D.C. Cir. 2014); AT&T Comments 101-06 (JA217-22); Comcast Comments 54-61 (JA469-76), it reasonably opted instead for a regime predicated on transparency, market forces, and *ex post* regulation.

A. The Commission's Return to Light-Touch Regulation Was Reasonable

1. The Commission repealed the conduct rules because it concluded that "the costs of each rule outweigh its benefits." *Order* ¶ 239 (JA3497). Mozilla is thus incorrect when it asserts (at 51) that the Commission "recognize[d] the continuing existence of the problem targeted by" conduct rules but nevertheless ignored that problem. Far from recognizing any "problem," the Commission viewed the "regulations promulgated under the Title II regime" as "a solution *in search of a problem.*" *Order* ¶ 87 (JA3410) (emphasis added). And contrary to Mozilla's assertion (at 52-53) that the Commission failed to determine whether blocking or throttling "must be prohibited to fulfill the Act's objectives," the Commission expressly found that the conduct rules were "unnecessary," *Order* ¶ 263 (JA3514), because there was "scant evidence that end users, under different legal frameworks, have been prevented by blocking or throttling from accessing the content of their choosing," *id.* ¶ 265 (JA3516); *see also id.* ¶ 87 (JA3410). Rather, it found that "providers have voluntarily abided by no-blocking practices

even during periods where they were not legally required to do so." *Id.* ¶ 265 (JA3516); *see also Title II Order* ¶ 112 (JA3944) (similar). Given the Commission's finding that providers have strong "market incentives" not "to deviate from th[e] consensus against blocking and throttling," it was not arbitrary and capricious to conclude that no conduct rules at all are needed. *Order* ¶ 265 (JA3516-17).

Petitioners and intervenors identify *no* evidence of open Internet harms that the Commission overlooked. In fact, Government Petitioners concede (at 18) that the record contains "relatively minimal evidence" of broadband providers engaging in "harmful practices," but contend that it was "the Commission's long-standing enforcement of open Internet policies that *compelled* [broadband] providers to refrain from harmful practices." They cite no record evidence substantiating that assertion, however. And, besides, the Commission did not abandon its "long-standing . . . policy" of protecting Internet openness. *Order* ¶ 265 (JA3515). Instead, it reasonably concluded that, in light of competitive market forces, its revised transparency rule — coupled with FTC enforcement of anticompetitive and deceptive conduct — "increases the likelihood that broadband providers will abide by open Internet principles." *Id.* ¶ 240 (JA3497).

In short, the Commission did not depart from its "prior policy *sub silentio*," but rather offered "good reasons for [its] new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see Order* ¶¶ 109-154 (JA3422-50)

(discussing evidence that broadband providers are constrained from harming Internet openness by market forces and existing laws).

Mozilla further complains (at 53) that the *Order* failed to specify "when blocking and throttling can be tolerated" or to spell out the "circumstances" in which "paid prioritization may be acceptable." However, the Commission was not required to provide case-by-case discussions of hypothetical practices that broadband providers may never employ and, as with blocking and throttling, they have expressly disclaimed. *See FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 784 (2016) (agency need only "weigh[] competing views," select an approach "with adequate support in the record," and "intelligibly explain[] the reasons for making that choice"). The Commission reasonably concluded that blocking and throttling were unlikely to occur and that "eliminating the ban on paid prioritization will help spur innovation[,] . . . experimentation, [and] network investment." *Order* ¶ 253 (JA3504); *see also id.* ¶¶ 253 n.914, 255 (JA3504-06).

Mozilla is also incorrect (at 61) that the Commission ignored its prior findings that ISPs have incentives to harm Internet openness. While acknowledging that those incentives may exist, the Commission reasonably found that the prior Commission had understated the effect of market forces and that any such incentives are "typically outweigh[ed]" by ISPs' "strong incentives to preserve Internet openness." *Order* ¶ 117 (JA3425-26).

2. The Commission reasonably concluded that, even if broadband providers were inclined to engage in conduct that harms Internet openness, "the transparency rule . . . , in combination with the state of broadband Internet access service competition and the antitrust and consumer protection laws, obviates the need for conduct rules by achieving comparable benefits at lower costs." *Order* ¶ 239 (JA3497); *see* FCC Br. 62-75.

a. Mozilla contends (at 53) that the Commission's reliance on antitrust law was unreasonable because providers could, theoretically, "engage in tacit coordination" to escape a finding of collusion under the antitrust laws or "discriminat[e] on the basis of [users'] political expression." But there is scant evidence that broadband providers have ever engaged (or are likely to engage) in such conduct, and the Commission was not obligated to address speculative scenarios. *See Verizon*, 740 F.3d at 643.

Mozilla further contends (at 52) that, by relying on the FTC and the DOJ to police blocking and throttling practices *ex post*, the Commission improperly delegated its responsibility to "'encourage the deployment' of broadband." But the Commission reached its own reasonable conclusions as to what regime will best "encourage" the deployment of broadband. Presuming, as part of that predictive judgment, that other agencies will fulfill their *own* obligations is not an improper delegation of power. Moreover, given the Commission's finding that providers

have strong "market incentives" not "to deviate from th[e] consensus against blocking and throttling," its conclusion that "such practices can be policed *ex post* by antitrust and consumer protection agencies" was reasonable. *Order* ¶ 265 (JA3516-17).

b. Mozilla also disputes (at 54-55) the Commission's conclusion that the transparency rule is adequate to protect Internet openness. However, as the Commission observed, "transparency requirements" have been "in place since 2010, and there have been very few incidents in the United States since then that plausibly raise openness concerns," while the "two most-discussed incidents" of purported open Internet harms "occurred *before* the Commission had in place an enforceable transparency rule." *Order* ¶ 241 (JA3498) (emphasis added). Nor was there "an epidemic or even uptick of blocking or degradation of traffic" after the Commission's previous attempts to impose conduct rules were vacated. *Id.* ¶ 243 (JA3498-99).

Mozilla speculates (at 54) that a broadband provider may block or throttle so long as it "candidly disclose[s]" its intent to do so. *See also* Gov't Pet'rs Br. 19 (similar). But the Commission found that "numerous ISPs, including the four largest fixed ISPs, have publicly committed not to block or throttle the content that consumers choose," and it was reasonable to conclude that they will not lightly renege on those promises given that they undisputedly would face "fierce

consumer backlash." *Order* ¶ 264 (JA3514); *see also id.* ¶ 142 n.511 (JA3442-43) (listing public commitments by dozens of ISPs). Although Mozilla suggests (at 54) that any such backlash would be futile due to an alleged lack of competition, the Commission reasonably concluded that there is adequate competition to constrain broadband providers from engaging in such conduct. *See infra* Part II.B.4.[11]

c. The Commission also reasonably concluded that a transparency rule would impose fewer costs than Title II regulation. *See Order* ¶ 239 (JA3497). The Commission extensively canvassed "economic theory, empirical studies, and observational evidence," and it reasonably concluded that "the balance of the evidence indicates that Title II discourages investment by ISPs." *Id.* ¶¶ 87, 93 (JA3410, 3413). Specific indicia of this conclusion were that aggregate broadband investment had "decreased since the adoption of the *Title II Order*," empirical comparisons of pre- and post-*Title II Order* investment also suggested a decline, as did "analyses attempting to assess the predicted causal effects of Title II regulation." *Id.* ¶¶ 90, 93-97 (JA3411-15). Similar analyses showed that "Title II stifled network innovation" and "had particularly deleterious effects on small

[11] In addition, if broadband providers did attempt to block or throttle content notwithstanding their contrary public statements, the FTC and state attorneys general have authority to take enforcement action against broadband providers that engage in deceptive conduct. *See Order* ¶¶ 140-142, 234 (JA3440-43, 3495).

ISPs" and the "often rural and/or lower-income" communities they serve. *Id.* ¶¶ 99, 103 (JA3415-16, 3418); *see* FCC Br. 80-82.

Mozilla (at 68-69) and the Internet Association (at 20-25) contend that the Commission improperly discounted other metrics of "aggregate investment totals" and relied on flawed economic studies. This Court, however, "properly defers to policy determinations invoking the Commission's expertise in evaluating complex market conditions." *Gas Transmission Nw. Corp. v. FERC*, 504 F.3d 1318, 1322 (D.C. Cir. 2007). The Commission explained why it discounted petitioners' preferred metrics and studies, and it discounted every study challenged here as only "suggest[ing]" or "suggestive" of trends "consistent with other evidence in the record." *Order* ¶¶ 92-93, 95 (JA3412-14). While no one study, on either side, perfectly analyzed broadband investment or "[wa]s dispositive," *id.* ¶ 93 (JA3413), this Court may not "second guess" the Commission's detailed and reasonable assessment, *Gas Transmission*, 504 F.3d at 1322.

The Internet Association (at 18-19) asserts that the Commission relied on incomplete data about the causal effects of the *Title II Order*. But the Commission was only required to "use[] the evidence before it to make a reasonable prediction about the likely present and future effects" of the *Title II Order* — which it did. *NCTA v. FCC*, 567 F.3d 659, 669 (D.C. Cir. 2009). The Association also fails to explain how any analyses the Commission did not specifically discuss were

qualitatively better or more significant. *See Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 550 (D.C. Cir. 2006) (an agency need address only comments "that raise significant problems"). Finally, contrary to the Association's assertion (at 19), there is no contradiction in the Commission's reasonable discounting of one study that purported to estimate *actual* investment based on "forecast" data, while crediting another that used projections only to calculate a "counterfactual estimate" of investment in a non-Title II scenario to provide a benchmark for comparison. *Order* ¶¶ 95, 97 (JA3414-15).

B. The Commission Considered All Important Factors

Petitioners and *amici* contend that the *Order* is arbitrary and capricious for failure to consider various aspects of the problem. These challenges fail because the *Order* is "based on a consideration of the relevant factors" and contains no "clear error of judgment." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

1. Reliance Interests

When an agency changes course and "its prior policy has engendered serious reliance interests," those interests "must be taken into account." *Fox*, 556 U.S. at 515. But while the agency cannot "ignore" reliance interests, *id.*, "the extent to which an agency is obliged to address reliance will be affected by the thoroughness of public comments" asserting such reliance. *Mingo Logan Coal Co. v. EPA*, 829

F.3d 710, 722 (D.C. Cir. 2016) (alterations omitted). Here, the Commission reasonably accounted for the asserted reliance interests of edge providers and public entities, explaining that — unlike with broadband providers — the evidence about "absolute levels of edge investment" in the record did "not meaningfully attempt to attribute particular portions" to reliance on the *Title II Order*, and any such reliance would not "have been reasonable" given the short-lived tenure of Title II regulation and the conduct rules. *Order* ¶ 159 (JA3454). Notably, no one challenges these conclusions.

Mozilla (at 70-71) and Government Petitioners (30-31) argue, instead, that they relied on the Commission's broad commitment to open Internet principles. But the Commission reaffirmed those principles, *see Order* ¶ 240 (JA3497), and reasonably concluded that the revised approach would achieve comparable effects as conduct rules. *See supra* Part II.A. The Commission thus reasonably found that the *Order* would not upend any asserted reliance interests.

Petitioners and the Internet Association also complain that the Commission required commenters to *specify* how much they invested in reliance on the *Title II Order*. In fact, commenters "ha[d] an obligation . . . to supply sufficient information about [their] costs to allow the [agency] to consider them." *Mingo Logan*, 829 F.3d at 723. Petitioners' vague assertion that they spent "[m]illions of dollars" was not enough. *Id.* And because the Commission required the same specificity

from broadband providers, *see Order* ¶¶ 89-98 (JA3411-15), its consideration of reliance interests was not remotely arbitrary or capricious.

2. Consumer Complaints and Comments

The Commission "individually analyzed" *millions* of form comments and standard or unique comments, while following the recommendations of the Administrative Conference of the United States for "systematic" review of the remaining comments. *Order* ¶ 345 n.1182 (JA3551). No one faults this process, which was reasonable under the circumstances.

Mozilla argues (at 63-65) that the Commission also should have considered informal consumer complaints that were never entered into the record. But it was unnecessary to incorporate such informal complaints into the record because the "overwhelming majority" of the complaints did not assert open Internet harms, most had "not been verified," and it was "exceedingly unlikely" that they would identify a problem not previously raised in the 23 million record comments. *Order* ¶ 342 (JA3549-50); *see also Chamber of Commerce v. SEC*, 412 F.3d 133, 142 (D.C. Cir. 2005) (agency not required to supplement the record where it can rely on other evidence).

Contrary to Mozilla's assertions (at 65), the public was able to "test [the] accuracy" of the Commission's conclusions; indeed, the National Hispanic Media Coalition entered into the record an expert report and consumer complaints from

the "nearly 70,000 pages" of documents that the Commission produced in response to a FOIA request. *Order* ¶¶ 340-343 (JA3548-50). As the Commission explained — and Mozilla does not challenge — those complaints only "support[ed]" the Commission's conclusion because they discussed issues "beyond the scope of" the conduct rules. *Id.* ¶ 342 & n.1170 (JA3550); *see* FCC Br. 104-05.

Amici Administrative Law Professors complain (at 14, 17-18) that the "*Order* contains few citations to [express] comments," but fail to identify any express comment that "raise[d] significant problems" not already identified in the record and addressed by the Commission. *Covad*, 450 F.3d at 550. And because the Commission undisputedly considered "the relevant factors," its "general statement" that it had considered express comments "to the extent appropriate" was sufficient. *Texas Mun. Power Agency v. EPA*, 89 F.3d 858, 876 (D.C. Cir. 1996) (per curiam).

3. Universities and Libraries

Amicus American Council on Education ("ACE") argues (at 27-31) that the Commission failed to consider the *Order*'s impact on universities and libraries. In fact, the Commission considered and rejected ACE's comments, explaining that the *Order*'s efficiency benefits "could lead to lower prices" and thus "benefit[] . . . non-profits." *Order* ¶ 253 n.914 (JA3504). The Commission also reasonably rejected ACE's claims that third-party paid-prioritization arrangements would degrade university and library services, finding that "[l]ast-mile access is not a

zero-sum game," "prioritizing the packets for latency-sensitive applications will not typically degrade other applications sharing the same infrastructure," and non-profits are "less likely to need [Quality of Service] guarantees." *Id.* ¶ 258 (JA3509-10) (first alteration in original).

4. Competition

The *Order* "promote[s] competition in the local telecommunications market." 47 U.S.C. § 1302(a). As the Commission explained at length, broadband providers "frequently face competitive pressures" — "even when facing a single competitor" — that "often have spillover effects" to the small percentage of households where there is less competition. *Order* ¶¶ 123-127 (JA3429-32). Based on empirical research not challenged here, the Commission reasonably found that competition between as few as two broadband competitors "is likely to be relatively strong" due to "substantial sunk costs" and the "material impact" on competition the presence of another provider generates. *Id.* ¶ 126 & n.462 (JA3431). That broadband providers "engage in a significant degree of advertising" to convince customers to switch providers, the Commission reasoned, "indicates material competition for customers regardless of [actual] churn levels." *Id.* ¶ 128 (JA3432-34). This Court refrains from "second guess[ing]" such factual determinations regarding "complex market conditions." *Gas Transmission*, 504 F.3d at 1322.

Mozilla's arguments about competition ultimately rely on unfounded and misleading assertions. The Commission did not "simply disregard" its "prior findings on churn in the broadband marketplace." Mozilla Br. 59. It rejected them based on "substantial, quantified evidence" of high churn rates that Mozilla does not challenge. *Order* ¶ 128 (JA3432-33). Nor did the Commission reject "without explanation" its prior finding of a terminating monopoly, Mozilla Br. 59; it explained that "this position is not credible" because, for example, many customers have multiple options (fixed, mobile, and Wi-Fi) for accessing edge-provider content, *Order* ¶¶ 136-139 (JA3438-40). The Commission also did not find that mobile broadband "is an adequate substitute for wireline [broadband]," Mozilla Br. 59, but recognized critical "differen[ces]" between the two and concluded only that mobile broadband "exerts" "pressure" on the supply of broadband, *Order* ¶ 130 (JA3434-35). That conclusion was reasonable, given the "increasing numbers" of consumers who "rely[] on mobile services only" for Internet access. *Id.*

5. Public Safety

The Commission also fulfilled its mandate to regulate interstate wire communications "for the purpose of the national defense . . . [and] of promoting safety," 47 U.S.C. § 151, by "consider[ing]" public safety and national security and "weigh[ing]" them against other considerations, *Nuvio Corp. v. FCC*, 473 F.3d 302, 307-08 (D.C. Cir. 2006). The Commission reasonably concluded that there

was "scant evidence" of threats to public safety, *Order* ¶ 265 & n.978 (JA3515-16); States could "'continue to play their vital role'" in advancing public safety, *id.* ¶ 196 & n.737 (JA3476) (quoting *Vonage Order* ¶ 1); any national security concerns raised were "vague and lack any substantiation whatsoever," *id.* ¶ 258 n.943 (JA3510); and "any remaining unaddressed harms" were "small relative to the costs of implementing more heavy-handed regulation," *id.* ¶ 116 (JA3425). Government Petitioners rely heavily on extra-record allegations about a single incident involving a particular service plan to which Santa Clara subscribed. But both the *Title II Order* and the *Order* permitted this type of service plan, and, as Government Petitioners concede (at 23 n.13), these allegations do not involve "net neutrality."[12] *See* FCC Br. 94-95.

6. Data Roaming Rates

The Commission demonstrates (at 108-10) that petitioner NTCH's data roaming argument is meritless. Indeed, NTCH fails entirely to demonstrate the significance of this issue. Its brief points (at 66) to a single Commission proceeding that was not cited in NTCH's comments to the Commission, *see* NTCH Comments 9-11 (JA1588-90), and that found "*no evidence*" of unreasonable rates, *NTCH v. Cellco* ¶ 15 (emphasis added).

[12] *See* Letter from Kathleen M. Grillo, Verizon, to Senator Dianne Feinstein & Senator Kamala Harris (Sept. 13, 2018) (Add. 1-3).

III. FEDERAL LAW PREEMPTS STATE AND LOCAL REGULATION OF BROADBAND

A. States Cannot Regulate Interstate Broadband

Finding that state and local regulation of broadband would "significantly disrupt" its "calibrated federal regulatory regime," the Commission expressly "preempt[ed] any state or local measures" that would subvert the Commission's determinations. *Order* ¶¶ 194-195 (JA3474-75). The Court should uphold that decision.[13]

Government Petitioners and their *amici* nowhere dispute the Commission's finding that broadband is a "jurisdictionally *interstate* service." *Id.* ¶ 199 (JA3477). Nor could they. This Court has repeatedly upheld that conclusion. *See USTelecom*, 825 F.3d at 730-31; *Core Commc'ns, Inc. v. FCC*, 592 F.3d 139, 144 (D.C. Cir. 2010); *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000).

Nor do they dispute the Commission's finding that it is "impossible" for providers to separate broadband into intrastate and interstate components. *Order*

[13] Government Petitioners' notice argument, made in a footnote (at 39 n.24), is waived. *See*, *e.g.*, *Tramont Mfg., LLC v. NLRB*, 890 F.3d 1114, 1121-22 (D.C. Cir. 2018). It is also meritless. The Commission sought comment on the effect of its classification of broadband "as an interstate information service . . . [on] jurisdiction," *NPRM* ¶ 69 (JA25), and Commissioner O'Rielly explained that this classification would "foreclose[] [States] from regulating" broadband, *NPRM*, 32 FCC Rcd at 4508 (JA75). Multiple parties urged the Commission to preempt on that ground. *See*, *e.g.*, CTIA Comments 54-58 (JA671-75); NCTA Comments 63-68 (JA1502-07).

¶ 200 (JA3477). Unlike traditional telephone service providers, broadband providers do not offer separate "local" and "long-distance" broadband services. And broadband users do not separately visit "local" and "long-distance" websites; indeed, each webpage request may retrieve content from multiple geographically dispersed servers. *See id.* ¶¶ 199-200 (JA3477). Broadband service is thus not merely predominantly interstate but, for all practical purposes, *exclusively* interstate as it lacks an intrastate component that could be separately regulated. *See American Booksellers Found. v. Dean*, 342 F.3d 96, 103-04 (2d Cir. 2003). In addition, broadband providers are not "required to . . . distinguish[] between interstate and intrastate communications merely to provide state commissions with an intrastate communication they can then regulate." *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 578 (8th Cir. 2007).

The interstate nature of broadband precludes state and local "net neutrality" regulation. "Interstate communications are totally entrusted to the FCC." *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (citing 47 U.S.C. § 151); *see Ivy Broad. Co. v. AT&T Co.*, 391 F.2d 486, 491 (2d Cir. 1968) ("states are precluded from acting" "with respect to interstate communications service[s]"). Congress's longstanding decision to grant a federal agency exclusive authority over interstate

communications itself preempts state regulation of broadband. *See Western Union Tel. Co. v. Boegli*, 251 U.S. 315, 316 (1920).[14]

Government Petitioners seek to regulate the same interstate broadband service the Commission addressed in the *Order*.[15] Yet they neither address the longstanding federal prohibition on state regulation of interstate communications services nor identify any federal statute granting States authority over this area. That alone is sufficient to preempt state and local regulation of broadband: a service that provides access to "all or substantially all Internet endpoints," worldwide. *Order* ¶ 21 (JA3365-66).

Contrary to Government Petitioners' claims (at 40-41), Congress's decision to shield that interstate service from common-carrier regulation "cannot be interpreted as an invitation to the States to impose additional regulations." *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 422-23 (1986). That is particularly true here, where the Commission has "decided

[14] Therefore, contrary to the claims of Government Petitioners (at 51-52), there was no state authority over interstate communications services for the 1996 Act's savings clauses to preserve. *See* FCC Br. 128-29.

[15] *See* Gov't Pet'rs Br. 8-9 & nn.7-8. State governments have asserted authority over the entire broadband offering. *See*, *e.g.*, Cal. Civ. Code § 3100(b) (2018). The United States and four Association intervenors have sued to enjoin California's law. *See* FCC Br. 133 n.40; *American Cable Ass'n v. Becerra*, No. 2:18-cv-2684-JAM-DB (E.D. Cal.).

that no such requirement[s] should be imposed at all." *United States v. Locke*, 529 U.S. 89, 110 (2000) (finding preemption).

B. State Regulation of Broadband Conflicts with Federal Law

Even if States and localities *were* seeking to regulate only a hypothetical "intrastate" broadband service, both the "impossibility exception" and standard principles of conflict preemption would prevent such efforts.

1. Government Petitioners and their *amici* do not challenge the Commission's finding that "it would not be possible for [one State] to regulate the use of a broadband Internet connection for *intrastate communications* without also affecting the use of that same connection for *interstate communications*." *Order* ¶ 200 & n.744 (JA3477-78). That is sufficient to invoke the impossibility exception, which recognizes the Commission's authority to "preempt state regulation of an intrastate matter" where state regulation necessarily undermines federal regulation of an interstate service. *Public Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510, 1514-15 (D.C. Cir. 1990).

Government Petitioners and their *amici* concede that nearly all of the conditions for express preemption under the impossibility exception apply, arguing only that the Commission did not "exercise . . . its own lawful authority." *Id.* at 1515; *see* Gov't Pet'rs Br. 45-46; Communications Law Profs. *Amicus* Br. 11-18. But, as the Commission demonstrates, that claim fails. *See* FCC Br. 116-30. The

Commission has "authority to carry out the provisions of th[e] Act." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999). The Commission exercised such authority in adopting a transparency regime under § 257. *See* FCC Br. 98-101. And the Commission also exercised lawful authority "Congress ha[d] delegated" when it classified broadband as an information service and mobile broadband as a private mobile service. *Brand X*, 545 U.S. at 980 (citing 47 U.S.C. §§ 151, 201(b)); *accord USTelecom*, 825 F.3d at 717 (citing 47 U.S.C. § 332(d)). Those classifications have substantive regulatory consequences — including immunity from common-carrier regulation[16] — and the Commission justified its exercise of that statutory authority by reference to those consequences. *See Order* ¶¶ 86-87 (JA3409-11). Government Petitioners and their *amici* retort that these statutory provisions do not directly regulate the States. *See* Gov't Pet'rs Br. 43; Communications Law Profs. *Amicus* Br. 22-23. But that misconceives the impossibility exception, which authorizes preemption where state action frustrates the federal regime Congress and the Commission established.

2. Even apart from express preemption, conflict preemption applied once the Commission reclassified broadband. State-imposed common-carrier regulation would stand as an obstacle to Congress's determination that information services and private mobile services should be immune from common-carrier regulation,

[16] *See, e.g.*, *Cellco P'Ship v. FCC*, 700 F.3d 534, 537-38 (D.C. Cir. 2012).

see 47 U.S.C. §§ 153(51), 332(d), as well as its policy that the Internet should be "unfettered by Federal or State regulation," *id.* § 230(b)(2). It would also frustrate the Commission's light-touch regulatory approach and its recognition of the need for uniformity by subjecting broadband to a 50-state patchwork regulatory regime. *See* FCC Br. 130-33. That is why the Eighth Circuit has twice held that state efforts to regulate such services are "preempted by federal law" because they "conflict[] with the federal policy of nonregulation." *Charter*, 903 F.3d at 718; *see Minnesota PUC*, 483 F.3d at 580 (same).

Finally, while a "formal agency statement" is not necessary to find conflict preemption, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 884-85 (2000), agencies "have a unique . . . ability to make informed determinations about how state requirements may" conflict with federal law, *Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009). Courts applying conflict preemption regularly afford weight to the Commission's determination that state regulation poses an obstacle to federal policy. *See*, *e.g.*, *CallerID4u, Inc. v. MCI Commc'ns Servs. Inc.*, 880 F.3d 1048, 1064-65 (9th Cir. 2018); *Farina v. Nokia, Inc.*, 625 F.3d 97, 126-27 (3d Cir. 2010). Contrary to Government Petitioners' argument (at 48-49), it was not premature for the Commission to offer those views in the *Order*.

CONCLUSION

The Court should deny the petitions for review.

Respectfully submitted,

/s/ *Michael K. Kellogg*

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CIRCUIT RULE 32(a)(2) ATTESTATION

In accordance with D.C. Circuit Rule 32(a)(2), I hereby attest that all other parties on whose behalf this joint brief is submitted concur in the brief's content.

/s/ *Michael K. Kellogg*
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November 27, 2018

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the applicable type-volume limitation set forth in D.C. Circuit Rule 32(e)(2)(B), because it contains 9,033 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared using Microsoft Word 2013 in a proportionally spaced typeface (Times New Roman, 14 point).

/s/ *Michael K. Kellogg*
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November 27, 2018

ADDENDUM

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September 13, 2018

The Honorable Dianne Feinstein
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The Honorable Kamala Harris
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Dear Senator Feinstein and Senator Harris:

I am writing in response to your September 6, 2018, letter to Hans Vestberg about mobile broadband service purchased from Verizon by the Santa Clara Fire Department and Verizon's response to recent concerns about that service during the Mendocino Complex fire. Thank you for your letter and the opportunity to provide additional information. As we have said publicly, in this situation our process failed some of the first responders you represent, and we did not live up to the expectations we set for our own performance. We are making every effort to ensure this never happens again.

Government customers like the Santa Clara Fire Department typically purchase mobile broadband service via negotiated contracts between providers and the state. These are sophisticated contracts similar to other large agreements that government entities use to buy most goods and services on favorable terms for a fair price. Some states use master agreements negotiated by providers with nationwide purchasing organizations such as National Association of State Procurement Officials (NASPO). Others states – like California – enter into their own contracts that incorporate and supplement the terms of those master agreements. And sometimes, as is the case here, counties or smaller government entities also enter into contracts that incorporate the NASPO or state agreements. In all these cases, these agreements outline the plans, terms, rates, and conditions under which state agencies and organizations may purchase service.

These contracts offer a variety of plans and options that public safety customers may select depending on their specific needs. These include plans with different pricing and features for smartphones and other devices, mobile broadband access, and other things. For example,

some data plans charge a monthly fee for a set amount of data and then impose additional charges based on any extra data used. Other plans charge a set monthly fee for an unlimited amount of data but provide that data usage after a set tier may be at a slower speed. This choice of plan allows customers certainty as to their monthly bill. These types of tiered data speed plans have been in use for many years and are specifically permitted under both the old and new Federal Communications Commission rules.

First, you asked about Santa Clara's service plan. As you may have seen in press reports and public filings, for the device at issue, the Fire Department subscribed to a tiered data plan that included an unlimited amount of broadband data with a specified right for Verizon to limit the speed after the Department used a certain amount of data during the billing period. The plan description in Santa Clara County's contract (a contract that references larger state and national government contracts) states that the plan offers unlimited data and "[i]f usage on this plan exceeds 5 gigabytes per account line during any billing period, we reserve the right to reduce throughput speed to a maximum of approximately 200 kilobits per second for up to thirty days." Over time, we increased that threshold for speed restrictions to 25 gigabytes. We also had a practice to remove data speed restrictions when the customer contacted us in emergency situations.

In this instance, our practice to lift the speed restriction was not followed. When the Department contacted us during the fire, we should have promptly removed the speed restrictions. As remedy, and to mitigate the possibility of future human error in this type of situation, we introduced a new plan and instituted new processes and training. These changes are described below in response to your last question.

Second, you asked whether other public safety customers in California have purchased similar plans from Verizon. Yes, they have. These customers also will receive the benefit of the new plan and changes we made following this incident.

Third, you asked about accountability. The company takes responsibility for this situation. We take the commitment we make to our customers, especially to the brave first responders who literally put their lives on the line in service to others, very seriously. From our first public statement, the company immediately acknowledged that we made a mistake, apologized and put fixes in place within a few days, and within the same timeframe sent executives to the California legislature to testify at a public hearing.

Last, you asked about the specific steps we are taking to prevent this from happening again. We have rolled out a new plan for first responders (Law Enforcement, Fire Services, Emergency Medical Services) that have no speed restrictions at all – at no additional charge to their current mobile broadband plan. Under this plan, public safety customers that aren't first responders are allowed several months of data usage above the threshold that would trigger the agreed speed limits also at no additional charge. Any speed restrictions under this plan would be lifted (or not imposed) during times of declared emergency. We are working to modify our government contracts to incorporate the new plan and helping our customers to transition to it as quickly as possible.

For those public safety customers who have not transitioned to a new plan, we will automatically remove all speed cap restrictions in the event of another disaster. We already lifted all speed restrictions for first responders on the west coast and in Hawaii. And, for example, this week in light of Hurricane Florence, we lifted all speed restrictions for first responders in North Carolina, South Carolina, Virginia, Maryland, Georgia, Alabama, Florida, and Tennessee. We have also updated training for government call center representatives and account representatives to ensure that they are aware both of the new plan and of the need to promptly escalate and remove any speed restrictions during times of declared emergency for customers who haven't yet migrated.

We have long been the trusted provider of choice for public safety. And while we made a mistake here, we believe our commitment to fix it and to rededicate to these critical customers underscores the importance we place on them.

Please contact me if you need any additional information,

Very truly yours,

Kathleen M. Grillo

CERTIFICATE OF SERVICE

I hereby certify that, on November 27, 2018, I caused to be filed electronically the foregoing joint brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *Michael K. Kellogg*
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