**No.**

IN THE
# Supreme Court of the United States

AMERICAN CABLE 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


ROSS J. LIEBERMAN
AMERICAN CABLE ASSOCIATION
2415 39th Place, NW
Washington, D.C. 20007
(202) 494-5561

BARBARA S. ESBIN
CINNAMON MUELLER
1875 Eye Street, NW
Suite 700
Washington, D.C. 20006
(202) 872-6811

JEFFREY A. LAMKEN
*Counsel of Record*
RAYINER I. HASHEM
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

*Counsel for American Cable Association*



WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

## QUESTIONS PRESENTED

The questions presented are:

1. Whether the FCC has statutory authority under the Telecommunications Act of 1996 to impose common-carrier regulation on Internet access service.

2. Whether the FCC's order below was arbitrary, capricious, an abuse of discretion, or undertaken without observance of the procedures required by law.

## PARTIES TO THE PROCEEDINGS BELOW

Petitioner American Cable Association ("ACA") is a trade association of small and medium-sized providers of cable television and Internet access service. On behalf of its members, ACA sought review of the FCC's 2015 Order *Protecting and Promoting the Open Internet* in the United States Court of Appeals for the District of Columbia Circuit.

Respondents are the FCC and the United States.

The following parties participated in the proceedings before the FCC and were petitioners-intervenors in the proceedings before the court of appeals: AT&T, Inc.; CTIA - The Wireless Association; NCTA – The Internet & Television Association; Wireless Internet Service Providers Association; Daniel Berninger; Alamo Broadband, Inc.; FullService Network; Sage Telecommunications; Telescape Communications; and TruConnect Mobile.

The following parties participated in the proceedings before the FCC and were intervenors in the proceedings before the court of appeals: Ad Hoc Telecommunications Users Committee; Akamai Technologies, Inc.; Scott Banister; Wendell Brown; CARI.net; Center for Democracy & Technology; Cogent Communications, Inc.; ColorOfChange.org; COMPTEL; Credo Mobile, Inc.; Demand Progress; DISH Network Corp.; Etsy, Inc.; Fight for the Future, Inc.; David Frankel; Free Press; Charles Giancarlo; Independent Telephone & Telecommunications Alliance; Kickstarter, Inc.; Level 3 Communications, LLC; Meetup, Inc.; National Association of Regulatory Utility Commissioners; National Association of State Utility Consumer Advocates; Netflix, Inc.; New America's Open Technology Institute; Public Knowledge; Jeff Pulver; TechFreedom; Tumblr, Inc.; Union Square Ventures, LLC; Vimeo, LLC; and Vonage Holdings Corporation.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner American Cable Association states that it is a trade association. It has no parent company, and no publicly held company owns 10 percent or more of its stock.

TABLE OF CONTENTS



[*] See the three-volume Petition Appendix with the caption "*AT&T Inc.* v. *FCC*," which has been submitted on behalf of all petitioners filing certiorari petitions seeking review of the judgment below.

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

# Supreme Court of the United States

AMERICAN CABLE 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

American Cable Association ("ACA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-187a) is published at 825 F.3d 674 (D.C. Cir. 2016).[1] The order denying petitions for rehearing en banc (Pet. App. 1354a-1468a) is published at 855 F.3d 381 (D.C. Cir. 2017). The FCC's Order (Pet. App. 188a-1126a) is published at 30 FCC Rcd. 5601 (2015).

[1] Citations to "Pet. App. __a" are to the multi-volume appendix filed by AT&T Inc. on behalf of all parties filing certiorari petitions seeking review of the judgment below.

## STATEMENT OF JURISDICTION

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

## STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, as amended by the Telecommunications Act of 1996, are set forth in the Appendix (Pet. App. 1469a-1475a).

## PRELIMINARY STATEMENT

Telecommunications services, like plain-old phone service, have long been subject to a different regulatory regime than enhanced or information services that include computer processing and other features that enable users to store, access, retrieve, and process information. Telecommunications services are subject to traditional common-carrier regulation—a regime adapted from regulation of the large railroad monopolies of the 1880s—under Title II of the Communications Act. Carriers subject to "common-carrier" regulation thus are required to charge "just and reasonable" rates, may face liability for not doing so, and are subject to a host of other regulatory requirements regarding the terms and conditions of their offerings. Peter W. Huber *et al.*, *Federal Telecommunications Law* §§ 3.11-3.14 (2d ed. Supp. 2017).

By contrast, the provision of information services has long been subject to a more flexible regime. For decades, the FCC understood Internet access service to be an "information" or "enhanced" service that could be regulated under a "light touch" framework that encouraged

investment and growth. Before the 1996 Telecommunications Act, the FCC held that Internet access services were "enhanced" services, not Title II common-carrier services. See *Fed.-State Joint Bd. on Universal Serv.*, 13 FCC Rcd. 11501, ¶75 (1998) ("*Universal Service Report*"); *Bell Operating Cos. Joint Petition for Waiver of Computer II Rules*, 10 FCC Rcd. 13758, ¶49 (1995). In the wake of the 1996 Act, the FCC "conclude[d] that Congress intended the 1996 Act to maintain" that framework. *Universal Service Report* ¶45. Providers of Internet access, the FCC repeatedly held, offer an "information service" exempt from common-carrier regulation. See *NCTA* v. *Brand X Internet Servs.*, 545 U.S. 967, 977-978 (2005).

This case arises from the FCC's about-face on that issue. In 2015, the FCC reversed itself, holding that Internet access service is a "telecommunications service" subject to common-carrier regulation under Title II. That reclassification of Internet access services was necessary, the FCC asserted, to sustain the "net neutrality" rules it wished to impose on broadband providers. See Pet. App. 500a-501a. The D.C. Circuit upheld the FCC's about-face, over a vigorous panel dissent and multiple dissents from the denial of rehearing en banc. See *id.* at 115a-187a (Williams, J., concurring in part and dissenting in part), 1381a-1429a (Brown, J., dissenting from denial of rehearing en banc), 1430a-1468a (Kavanaugh, J., dissenting from denial of rehearing en banc).

That decision has enormous economic implications—for the American public and providers of Internet access services alike. It raises important legal questions about the scope of the FCC's legal authority over the Internet. And it implicates fundamental questions regarding the scope and nature of judicial review of agency action re-

solving "major questions" under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *King* v. *Burwell*, 135 S. Ct. 2480 (2015), *Utility Air Regulatory Group* v. *EPA* ("*UARG*"), 134 S. Ct. 2427 (2014), and *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

## STATEMENT

### I. STATUTORY FRAMEWORK

The Communications Act of 1934 subjects certain communications services to common-carrier regulation under Title II of the Act. Title II regulation is extensive. See *NCTA* v. *Brand X Internet Servs.*, 545 U.S. 967, 975-976 (2005). Among other things, it requires providers' rates and practices to be "just and reasonable" and prohibits "unjust or unreasonable discrimination in charges [or] practices." 47 U.S.C. §§ 201, 202. Myriad filings to ensure obedience to those requirements are required, and a wealth of other common-carrier regulations are imposed. *Id.* §§ 201-261; 47 C.F.R. §§ 0.1 *et seq.* The Act also authorizes both FCC and private enforcement of various common-carrier provisions. 47 U.S.C. §§ 207, 208.

Wire and radio communications that are not common-carrier services under Title II can be regulated under the FCC's "ancillary jurisdiction" pursuant to Title I. The Communications Act provides that the FCC "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i); see *Am. Library Ass'n* v. *FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005). The FCC also has authority pursuant to § 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302, to promote broadband deployment. The FCC may impose common-carrier obligations, however, only pursuant to Title II. 47 U.S.C. § 152(b).

### A. The Classification of Internet Services Under the Communications Act of 1934

In the 1970s, the FCC began proceedings to determine the proper regulatory treatment of then-emerging telephony-based "data processing services," which featured "use of a [remotely located] computer for the processing of information." *Amendment of Section 64.702 of the Comm'n's Rules and Regulations*, 61 F.C.C.2d 103, ¶11 (1976). Those included, for example, "interactive information retrieval systems," "text editing," and "banking and point-of-sale processing." *Id.* ¶20.

By 1980, the FCC settled on a stable framework, distinguishing between "basic services," such as plain-old telephone service, and "enhanced services," which included computer-processing services offered over telephone lines. See *Amendment of Section 64.702 of the Comm'n's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, ¶1 (1980) ("*Computer II*"). Under *Computer II*, a "basic service" was the "common carrier offering of transmission capacity for the movement of information." *Id.* ¶93. In other words, it was a "communications path * * * for the analog or digital transmission of voice, data, video, etc." *Ibid.* By contrast, an "enhanced service * * * *combine[d]* basic service *with computer processing applications* that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." *Id.* ¶5 (emphasis added). Under *Computer II*, "Internet access services" were considered "enhanced services." *Bell Operating Cos. Joint Petition for Waiver of Computer II Rules*, 10 FCC Rcd. 13758, ¶49.

The "Modification of Final Judgment" ("*MFJ*") that governed the conduct of the Bell operating companies, see *United States* v. *AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), drew a similar distinction. It distinguished ordinary telecommunications services from "information services." *Id.* at 186. "Information services" included services offering a "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications." *Id.* at 229. Internet access service—"provision of gateways * * * to information services"—"fell squarely within the 'information services' definition." *Universal Service Report* ¶ 75.

**B. Information Services Under the 1996 Act**

In 1996, Congress amended the 1934 Communications Act by enacting the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. The 1996 Act largely replicated the dichotomy the FCC had long followed. It established a category of service it called "telecommunications services," which corresponded to *Computer II's* "basic services." *Brand X*, 545 U.S. at 977. Congress defined "telecommunications" to mean any service that offers "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. §§ 153(50), 153(53).

Congress recognized a second category, called "information services," that corresponded to the FCC's "enhanced services" category and the *MFJ*'s "information services" definition. *Brand X*, 545 U.S. at 977. Under the 1996 Act, the term "information services" was defined to include any service that provides "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via tel-

ecommunications." 47 U.S.C. § 153(24). A provider "shall be treated as a common carrier," Congress declared, "only to the extent that it is engaged in providing telecommunications services." *Id.* § 153(51).

Shortly after the 1996 Act's passage, the FCC considered how to classify Internet access service under the 1996 Act. "[L]ooking at the statute and the legislative history as a whole," the FCC "conclude[d] that Congress intended the 1996 Act to maintain the *Computer II* framework." *Universal Service Report* ¶ 45. "Congress," the FCC observed, "by distinguishing 'telecommunications service' from 'information service,' and by stating a policy goal of preventing the Internet from being fettered by state or federal regulation, [had] endorsed" the FCC's prior conclusion that the "Internet and other enhanced services * * * were not common carriers within the meaning of the Act." *Id.* ¶ 95. The FCC thus determined that Internet access services "are appropriately classified as information * * * services." *Id.* ¶ 73.

In 2002, the FCC applied similar reasoning to declare that Internet access through cable modems is an "information service" exempt from Title II. Cable Internet access, the FCC held, "is an offering of Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications." *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798, ¶ 38 (2002) ("*Cable Modem Decision*").

This Court affirmed the *Cable Modem Decision* in *Brand X*. In that case, the petitioners urged that cable Internet access service had to be regulated as a common-carrier "telecommunications service" under Title II because "companies providing Internet service necessarily

'offe[r]' the underlying telecommunications used to transmit that service." *Brand X*, 545 U.S. at 989 (alteration in original). In other words, they argued that Internet service *includes* a telecommunications service: While computer processing and computer interactivity are provided, they urged that carrying signals to and from the home over a cable or wire is a "telecommunications service" that must be separately regulated.

This Court rejected that argument. No one disputed that Internet access *apart* from mere wireline transmission is an "information service." Thus, no one disagreed with the FCC that the data processing activity at the provider's site is an "information service" that "enables users, for example, to browse the World Wide Web, to transfer files from file archives available on the Internet via the 'File Transfer Protocol,' and to access e-mail and Usenet newsgroups." *Brand X*, 545 U.S. at 987. But the Court held that the statute was ambiguous regarding "whether cable companies providing cable modem service are providing a 'telecommunications service' *in addition to* an 'information service.'" *Id.* at 986 (emphasis added). The Court therefore deferred to the FCC's interpretation that cable providers were not providing a separate "telecommunications service" (in addition to an "information service") that had to be regulated under Title II. *Id.* at 996-997.

## II. PROCEEDINGS BELOW

### A. The FCC's Notice of Proposed Rulemaking and "Open Internet Order"

In May 2014, the FCC issued a Notice of Proposed Rulemaking proposing so-called "net neutrality" rules designed to regulate Internet access providers' traffic-management practices and interconnection arrangements. *Protecting and Promoting the Open Internet*, 29

FCC Rcd. 5561, 5563 (2014) ("NPRM").[2] The D.C. Circuit twice struck down the FCC's earlier regulatory efforts—initially because the FCC had failed to demonstrate it had ancillary authority to regulate an Internet service provider's network management practices, and later because the FCC had imposed common-carrier obligations on Internet access service providers while admitting they are not common carriers. See *Comcast Corp.* v. *FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010); *Verizon* v. *FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014).

The NPRM "propose[d] to rely on section 706 of the Telecommunications Act of 1996"—not Title II—as authorization for the FCC's regulatory efforts. Pet. App. 1286a. After the close of the comment period, and in response to pressure from the White House, the FCC abandoned that plan.[3] The final Order—over the dissents of Commissioners Pai and O'Rielly, see *id.* at 941a-1126a—instead declared that "broadband Internet access service is a telecommunications service" subject to Title II common-carrier regulation like a plain-old voice circuit. *Id.* at 470a, 528a. The Order thus reversed the FCC's earlier determinations in the *Universal Service Report* and *Cable Modem Decision*.

---

[2] ACA also incorporates by reference the statements and the reasons for granting the petitions in the petitions for writs of certiorari filed by AT&T, Inc. ("AT&T Pet."); National Cable and Telecommunications Association ("NCTA Pet."); and U.S. Telecom ("UST Pet.").

[3] See U.S. Senate Staff Report, *Regulating the Internet: How the White House Bowled Over FCC Independence* 5, 9-17 (Feb. 29, 2016), http://www.hsgac.senate.gov/download/regulating-the-internet-how-the-white-house-bowled-over-fcc-independence.

### B. The D.C. Circuit's Decision

The court of appeals affirmed, Pet. App. 1a-115a, with Judge Williams concurring in part and dissenting in part, *id.* at 115a-187a. The court of appeals rejected the argument that Internet access service is unambiguously an information service, not a telecommunications service subject to regulation under Title II. *Id.* at 33a-37a. In the court of appeals' view, this Court's decision in *Brand X* was dispositive. The court began with the premise that *Brand X* "established that the Communications Act is ambiguous with respect to the proper classification of broadband." *Id.* at 28a. The court of appeals therefore declared itself bound, under *Chevron*, to defer to the FCC's resolution of that alleged ambiguity. *Id.* at 29a. The court did not perform an extensive analysis of the statute's text, history, or purpose to determine whether the FCC had authority to resolve that issue, or whether Congress had resolved the issue for the FCC already; *Brand X* was taken as dispositive. *Id.* at 33a-36a.

The panel majority also held that the FCC had adequately explained its departure from decades of practice. Pet. App. 42a-44a. The panel acknowledged the need for heightened justification where a "'prior policy has engendered serious reliance interests.'" *Id.* at 42a (quoting *Perez* v. *Mort. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015)). The panel did not dispute the enormity of reliance interests at issue here—billions of dollars invested in services and equipment based on the FCC's pro-competitive, "light-touch" framework. But the panel majority ruled that the FCC's explanation for switching constructions, to deem Internet access a "telecommunications service" subject to common-carrier regulation, was satisfactory because it rested on a supposed change in consumer perception. "[A]lthough in 2002 the Commis-

sion found that consumers perceived" Internet access service to be "an integrated offering of an information service," the panel majority stated, "in the present order the Commission cited ample record evidence supporting its current view that consumers perceive a standalone offering of transmission." Pet. App. 43a. The panel majority declined to address whether the services themselves or other circumstances had actually changed. Instead, the panel majority accepted the FCC's assertion that it would have changed course even if "the facts regarding how [broadband service] is offered had not changed." *Ibid.* (quotation marks omitted).

Finally, the panel majority rejected arguments that the NPRM failed to give adequate notice that the Order would be based on Title II, not § 706. Pet. App. 24a-25a. The final Order was a "logical outgrowth" of the NPRM, the panel majority stated, because the NPRM had solicited comments on whether to re-categorize broadband as a Title II telecommunications service. *Id.* at 25a.

Judge Williams dissented in part. Pet. App. 115a-187a. He agreed that the FCC "may" have statutory authority to treat Internet access as a common-carrier "telecommunications service" under Title II. *Id.* at 119a. But he would have vacated the Order for want of reasoned decisionmaking. The Commission, he urged, had not adequately justified the change from its previous approach. *Ibid.* In particular, the FCC had failed to account for the serious reliance interests created by its prior rules, violating *FCC* v. *Fox Television Stations*, 556 U.S. 502 (2009). Pet. App. 120a-124a. Judge Williams also criticized the FCC for failing to point to new factual circumstances to support the conclusion that broadband service had transmogrified from an "information service"

into a "telecommunications service" like a plain-old voice line. *Id.* at 124a-125a.

### C. The Opinions on Denial of Rehearing En Banc

The court of appeals denied rehearing en banc. Pet. App. 1354a-1355a. Judges Brown and Kavanaugh dissented in lengthy opinions. *Id.* at 1381a-1429a (Brown, J., dissenting); *id.* at 1430a-1468a (Kavanaugh, J., dissenting). Judges Brown and Kavanaugh disagreed with virtually every significant ruling by the panel majority. They urged that the FCC lacked statutory authority to convert Internet access service, a quintessential "information service," into a common-carrier "telecommunications service." Reclassifying "broadband Internet access so as to subject it to common carrier regulation," Judge Brown urged, "upends the Act's core distinction between 'information service' and 'telecommunications service.'" *Id.* at 1398a. That "fundamental revision" of the statute defies the statute's clear terms and import. *Ibid.*

Under this Court's precedents, Judges Brown and Kavanaugh observed, agencies are not entitled to deference on "major questions" of fundamental importance. Pet. App. 1400a (Brown, J., dissenting); see *id.* at 1430a-1431a (Kavanaugh, J., dissenting). Agency deference is limited to "interstitial" issues where Congress would expect agencies to fill statutory gaps. *Id.* at 1400a-1401a (Brown, J., dissenting); see *id.* at 1435a (Kavanaugh, J., dissenting). For "major questions," by contrast, the law presumes an absence of agency authority. Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Id.* at 1400a-1401a (Brown, J., dissenting) (quotation marks omitted); see *id.* at 1430a (Kavanaugh, J., dissenting).

Here, imposing common-carrier regulation on Internet access service—by redefining it to be a telecommuni-

cations service under Title II—was a "major" question. Pet. App. 1399a (Brown, J., dissenting); *id.* at 1430a (Kavanaugh, J., dissenting). But Congress had nowhere granted the FCC authority to do that. *Id.* at 1405a (Brown, J., dissenting); *id.* at 1430a (Kavanaugh, J., dissenting). Judges Brown and Kavanaugh, moreover, flatly disagreed with the panel's reading of this Court's decision in *Brand X*. See *id.* at 1403a (Brown, J., dissenting); see *id.* at 1447a-1448a (Kavanaugh, J., dissenting).

Judge Srinivasan and Judge Tatel responded at length, concurring in the denial of rehearing en banc. Pet. App. 1357a-1380a. Among other things, they questioned whether the "major questions" doctrine exists, at least in the form articulated by Judges Kavanaugh and Brown. *Id.* at 1365a-1366a. And they urged that, even if it does, *Brand X* establishes that the FCC has authority to classify Internet access service under Title II. *Ibid.*

## REASONS FOR GRANTING THE PETITION

This case's importance is hard to miss. The number and identity of the petitioners, the range of parties and *amici* participating below, and the vigor of the opinions supporting and dissenting from rehearing en banc all attest to its practical importance. The case's legal implications are important as well. They extend beyond the scope of the FCC's authority to regulate the Internet, an important question in its own right. They extend beyond serious questions surrounding whether and when an agency can reverse course on its reading of a statute—adopting a diametrically opposed construction—upsetting decades of reliance on the agency's prior interpretation. This case also raises fundamental questions about how this Court and the lower federal courts must approach questions of statutory construction in "major questions" cases like this one.

**I.** Those big issues have particularly dramatic impacts on the smallest participants. For example, ACA's members—750 small and medium-sized cable providers—sometimes serve as few as 50 customers, often in rural and sparsely populated regions. While providing personalized and innovative services, such smaller entities are singularly ill-positioned to bear the burdens imposed by the FCC's wholesale re-interpretation of the scope of its regulatory authority. For decades, those providers invested in upgrading their networks, improving their capacity, and expanding their offerings to better serve otherwise difficult to reach businesses and individuals. They were able to do so because, under the FCC's construction of the statute, their Internet access services were not "telecommunications" or "basic" services subject to onerous common-carrier regulations. Instead, they were "enhanced" or "information" services exempt from those impositions.

The FCC's about-face here, however, subjects these services to common-carrier regulation better suited to 19th century railroad monopolies than to small Internet service providers. While the FCC purported to create a "Modern Title II," forbearing from some statutory requirements, Pet. App. 216a-220a, many of the most onerous requirements remain. The FCC did not forbear from §201 or §202 of the Communications Act, which subjects carriers to FCC review of rates and practices to determine whether they are "unjust or unreasonable," raising the specter of rate regulation. 47 U.S.C. §§201, 202. Nor did it forbear from §207 or §208, which potentially subjects providers to enforcement actions or private damages actions for allegedly unjust or unreasonable rates or practices. And it did not forbear from §222 or §225, which imposes a web of compliance requirements.

As Judges Williams and Brown pointed out, the resulting regulatory uncertainty and burdens destroy the environment that previously fueled the explosive growth in the performance and availability of Internet access services. Pet. App. 137a (Williams, J., dissenting in part); *id.* at 1397a (Brown, J., dissenting from denial of rehearing en banc). The burden of complying with that complex regulatory framework—which spans hundreds of pages of the Code of Federal Regulations—is enormous. Since the FCC's order was issued, smaller providers' legal expenses have increased dramatically. Comments of ACA at 10, *Restoring Internet Freedom*, WC No. 17-108 (FCC July 17, 2017). ACA members have been forced to shift limited staff from customer service to regulatory compliance. *Id.* at 13-14. Often operating with no legal departments or small ones, ACA members have also been forced to shift limited monetary resources from infrastructure development and upgrades to retaining outside regulatory consultants and counsel. *Id.* at 7. And uncertainty resulting from Title II regulation has made it difficult for smaller providers to obtain viable financing for new and upgraded infrastructure. See *id.* at 16-17, 23. As a result, ACA members have deferred fiber deployment and cable-plant upgrades. *Id.* at 23-25. The burdens of Title II regulation are sufficiently onerous that even the largest industry participants are crying foul. See AT&T Pet. 28-29; NCTA Pet. 24-25; UST Pet. 19-23. The impact on the smallest providers is graver still.

**II.** Review is warranted wholly apart from those practical economic impacts. The legal issues are of amply sufficient importance to justify review.

**A.** *First*, this case raises critical questions concerning the scope of the FCC's authority to subject Internet access—which flourished into a $150 billion industry under

the FCC's prior approach—to common-carrier regulation. The Telecommunications Act of 1996 adopted a clear approach. It created a class of services, "information services," and exempted them from Title II common-carrier regulation. The 1996 Act defined those "information services" broadly to include any service offering a "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. §153(24). That precisely describes Internet access service. Moreover, the Act's definition of "Internet access service" is almost indistinguishable from its definition of "information service." See 47 U.S.C. §231(e)(4) ("Internet access service" means a "service that enables users to access content, information, electronic mail, or other services offered over the Internet"). Indeed, the Act states that "*information service* * * * include[s] specifically a service or system that provides *access to the Internet*." *Id.* §230(f)(2) (emphasis added).

The FCC had long categorized Internet access as an "enhanced service"—not a basic service. See *Access Charge Reform Price Cap Performance Review for Local Exch. Carriers Transp. Rate Structure & Pricing Usage of the Pub. Switched Network by Info. Serv. & Internet Access Providers*, 11 FCC Rcd. 21354, ¶284 (1996) (under *Computer II*, the "category of enhanced services * * * includes access to the Internet and other interactive computer networks"); *Bell Operating Cos.*, 10 FCC Rcd. 13758, ¶49 ("enhanced services" includes "Internet access services"); *Universal Service Report* ¶75 ("the functions and services associated with Internet access" have been "consistently classed * * * as 'enhanced services' under *Computer II*"). The Modification of Final Judgment likewise defined Internet access service as an "in-

formation service." See *Universal Service Report* ¶75 ("the functions and services associated with Internet access * * * fell squarely within the [MFJ's] 'information services' definition"); *United States* v. *W. Elec. Co.*, No. 82-0192, 1989 WL 21992, at *1 & n.3, *4 (D.D.C. Jan. 24, 1998) ("gateway" services, which allow "a useful and informative connection with the actual providers of information" are "information services"), aff'd 907 F.2d 160 (D.C. Cir. 1990).

The FCC determined, after the 1996 Act's passage, that "Congress intended the categories of 'telecommunications service' and 'information service' * * * to [be] like the definitions of 'basic service' and 'enhanced service' developed in [the FCC's] *Computer II* proceeding, and the definitions of 'telecommunications' and 'information service' developed in the Modification of Final Judgment." *Universal Service Report* ¶13. Because Internet access service was exempt from common-carrier regulation under those frameworks, the 1996 Act had "endorsed" the existing classification that the "Internet and other enhanced services * * * were not common carriers within the meaning of the Act." *Id.* ¶95.

The court of appeals sustained the FCC's about-face here based solely on its reading of this Court's decision in *Brand X*. The panel asserted that "*Brand X* established that the Communications Act is ambiguous with respect to the proper classification of broadband." Pet. App. 28a. The panel therefore held that, under *Chevron*, it was required to defer to the FCC. *Ibid.* That, however, misreads *Brand X*. In *Brand X*, there was no dispute that Internet access is an information service, because it "enables users, for example, to browse the World Wide Web, [and] to transfer files from file archives." 545 U.S. at 987. The *only* question—the only ambiguity—concerned

"whether cable companies providing cable modem service are providing a 'telecommunications service' *in addition to* an 'information service.'" *Id.* at 986 (emphasis added). In particular, the petitioners argued that one portion of Internet access service, which consisted of carrying signals across wires from the customer's home to the provider's facilities, was a "telecommunications service." This Court held that the FCC could treat that wire-transport component as part of the "information service" (as part of Internet access) rather than separately regulating it as a basic telecommunications service. But the Court nowhere held that the portion of Internet access that *is unambiguously* an "information service"—the processing at the provider's premises that affords customers the capability of "generating, acquiring, storing, * * * or making available information via telecommunications," 47 U.S.C. §153(24)—could be re-categorized into something other than an information service. See AT&T Pet. 12-16; USTA Pet. 30-32; NCTA Pet. 31-32.

If this Court's *Brand X* decision is somehow to be construed as having resolved that issue *sub silentio*—and it cannot be—that is a matter this Court (not a divided court of appeals) should determine. Whether the FCC could categorize the entirety of Internet access service as an "information service," notwithstanding its inclusion of a telecommunications component (the basic wireline-transmission portion), was sufficiently important for this Court to resolve it in *Brand X*. Whether the FCC can now re-characterize Internet access as a common-carrier telecommunications service—even though Internet access service falls squarely within the definition of "information service" and outside the definition of "telecommunications service"—is no less worthy of review.

**B.** *Second*, this case starkly presents questions concerning the scope and meaning of the "major questions" doctrine that has emerged from this Court's decisions, including *Utility Air Regulatory Group* v. *EPA*, 134 S. Ct. 2427 (2014), *King* v. *Burwell*, 135 S. Ct. 2480 (2015), *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and *MCI Telecommunications Corp.* v. *AT&T Co.*, 512 U.S. 218 (1994). As the other petitions explain, *e.g.*, USTA Pet. 23-30, this Court has precluded agencies from undertaking regulation of "vast economic and political significance" unless Congress provides clear statutory authority. *UARG*, 134 S. Ct. at 2444 (quotation marks omitted). That prohibition should have special force where "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'" *Ibid.*

That is what happened here. Under *Computer II* and the Modification of Final Judgment, Internet access service was classified as an "information" or "enhanced service"—not a "basic" or "telecommunications" service—and was excluded from common-carrier regulation. See pp. 5-6, *supra*. Congress then transplanted that distinction into the 1996 Act by using a definition of "information service" nearly identical to the one in the Modification of Final Judgment. See *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013) (where Congress uses language "obviously transplanted from another legal source * * * it brings the old soil with it" (quotation marks omitted)). And the FCC recognized what Congress had done. "Congress," the FCC held, had "distinguish[ed] 'telecommunications service' from 'information service'" to "endorse[ ]" the view that "Internet and other enhanced services * * * were not common carriers." *Universal Service Report* ¶95; see *id.* ¶13 ("Congress intended the

1996 Act to maintain the *Computer II* framework"); *id.* ¶95 (Congress intended to "prevent[] the Internet from being fettered by state or federal regulation"). Thus, when the FCC ruled that Internet access services were "appropriately classified as * * * information services" under the 1996 Act, it did so because it believed that Congress had intended that result. In the order below, however, the FCC suddenly discovered it had authority to impose common-carrier regulation on Internet access service nonetheless—by reclassifying the entirety of Internet access service as a telecommunications service—without even addressing its previous conclusion that Congress intended the 1996 Act to cement the previous treatment of Internet access into place.

There is enormous uncertainty about the major questions doctrine, its scope, and its application. Two judges, concurring in the judgment below, expressed doubts about "the existence" and "contours" of that doctrine—at least in the form articulated by Judges Brown and Kavanaugh—denying it had any application here. Pet. App. 1359a (Srinivasan, J., concurring). Two judges, dissenting from denial of rehearing en banc, expressed no doubt about the doctrine's scope and urged that it foreclosed the FCC's newfound assertion of authority here. Pet. App. 1402a (Brown, J.); *id.* at 1432a (Kavanaugh, J.). Confusion about the scope and meaning of the doctrine under this Court's cases extends well beyond this controversy. Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 Vand. L. Rev. 777, 785-799 (2017). This Court has not separately delineated the doctrine's scope, despite invoking it in substance to strike down rules regulating tobacco, *Brown & Williamson*, 529 U.S. at 133; air pollution, *UARG*, 134 S. Ct. at 2441; and tariff-filing obligations, *MCI*, 512 U.S. at 226. And there is sig-

nificant confusion concerning whether courts should apply the doctrine at the threshold, to determine whether *Chevron* applies, or whether it informs later analysis under *Chevron* Step 1 or Step 2. See Coenan, *supra*, at 787-796. That uncertainty resonates throughout the opinions below.[4]

**C.** *Third*, this case also raises important and recurring issues of administrative law. See NCTA Pet. 19-30. For example, in *Perez* v. *Mortgage Bankers Ass'n*, this Court held that "the APA requires an agency to provide more substantial 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.'" 135 S. Ct. at 1209 (quoting *FCC* v. *Fox Television Stations*, 556 U.S. 502, 515 (2009)). That rule could not be more squarely implicated than here, where more than a trillion dollars was invested by providers large and small in reliance on the FCC's prior rules.

---

[4] For example, Judges Srinivasan and Tatel urged that, even if the major questions doctrine exists (and assuming that the Order is a major rule), the FCC had "clear congressional authorization to issue the rule" because this Court said so in *Brand X*. Pet. App. 1359a-1360a. Even under the court of appeals' reading of that case, however, the most *Brand X* said is that the statute is ambiguous, so the FCC may fill the gaps. If the existence of a statutory ambiguity is "clear congressional authorization to issue the rule," then there is no major questions doctrine at all. As Judges Kavanaugh and Brown explained, the doctrine's central teaching is that, where major questions are concerned, a clear statement of authority is required; ambiguity is the opposite and cannot suffice. Pet. App. 1402a; *id.* at 1447a. The debate between Judges Srinivasan and Tatel on the one hand, and Judges Brown and Kavanaugh on the other, underscores the need for this Court to address the doctrine's scope and proper application here.

The court of appeals found that the Order met the *Fox* standard based on the following assertion: "[A]lthough in 2002 the Commission found that consumers perceived [Internet access to be] an integrated offering of an information service, in the present order the Commission cited ample record evidence supporting its current view that consumers perceive a standalone offering of transmission." Pet. App. 43a. The court of appeals, however, refused to address "whether there [was] really anything new," invoking the FCC's assertion—in a conclusory footnote—that it would have reached the same result even if "the facts regarding how [broadband service] is offered had not changed." Pet. App. 43a-44a (citing Pet. App. 564a n.993). That reduces *Fox* to nothing. A rationale adequate to *support* the agency's decision is the bare *minimum* the APA requires when agencies decide issues in the first instance. An agency cannot avoid the greater justification required to upset settled expectations under *Fox* by declaring an intent to reach its chosen result regardless of what the evidence—or reasoned analysis—demonstrates. See NCTA Pet. 20-23.

In 1998, moreover, the FCC articulated what it believed *Congress* intended the 1996 Act to require. See *Universal Service Report* ¶45 ("Congress intended the 1996 Act to maintain the *Computer II* framework."); *id.* ¶95 ("Congress, by distinguishing 'telecommunications service' from 'information service,' and by stating a policy goal of preventing the Internet from being fettered by state or federal regulation, endorsed" the view that "Internet and other enhanced services * * * were not common carriers within the meaning of the Act."). But it then reversed course 15 years later, without any meaningful change to the statute or its meaning. If an agency is to revise its understanding of statutory *text*, it must

give a reason for that change. Cf. *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1150 (10th Cir. 2016) (Gorsuch, J., concurring). That never happened here.

Finally, the FCC's decision raises significant notice issues. NCTA Pet. 27-30. The court of appeals found that the Order's re-characterization of Internet access services, and the consequent change in regulation, was a "logical outgrowth" of the agency's Notice of Proposed Rulemaking—even though the final rule invoked a fundamentally different source of authority (Title II) than what the notice proposed (47 U.S.C. § 706). Pet. App. 24a-25a. The public had adequate notice, the court of appeals stated, because the notice included a few open-ended questions soliciting comments on whether the agency should consider reclassification under Title II. *Id.* at 49a. That runs afoul of precedent requiring rulemaking notices "to make [the agency's] views known to the public in *a concrete and focused form*." *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (emphasis added). Given the D.C. Circuit's unique role in reviewing administrative agency actions, erroneous holdings could have far-reaching effects. This Court's review is warranted.

**III.** In view of the above, the FCC has now begun a rulemaking to consider revisiting the FCC order that spawned this litigation. See Notice of Proposed Rulemaking, *Restoring Internet Freedom*, WC Docket No. 17-108, No. 17-60 (FCC May 18, 2017). The FCC has not yet reached a decision, and the Order remains in force. But there is a significant possibility that the FCC will revert to its traditional regulatory approach and alter the nature of the current controversy—or moot it entirely—before this Court has the opportunity to resolve it.

If that were to occur, the appropriate course might be to grant the petition, vacate the judgment below as moot,

and remand the case. Cf. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 41 (1950); *U.S. Bancorp Mort. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 29 (1994). That is certainly warranted where, as here, the underlying issues would otherwise warrant this Court's review. Stephen M. Shapiro *et al.*, *Supreme Court Practice* 357-358 (10th ed. 2013). It remains to be seen, however, whether the FCC will in fact reverse course and whether it will moot or sufficiently alter the controversy. When the FCC acts, petitioners will apprise the Court both of the FCC's actions and how, in their view, that affects the appropriate disposition of these petitions.

## CONCLUSION

The petition should be granted.

Respectfully submitted.

ROSS J. LIEBERMAN
AMERICAN CABLE ASSOCIATION
2415 39th Place, NW
Washington, D.C. 20007
(202) 494-5561

BARBARA S. ESBIN
CINNAMON MUELLER
1875 Eye Street, NW
Suite 700
Washington, D.C. 20006
(202) 872-6811

JEFFREY A. LAMKEN
*Counsel of Record*
RAYINER I. HASHEM
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

*Counsel for American Cable Association*

September 2017