Nos. 15-1063 (and consolidated cases)

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

UNITED STATES TELECOM ASSOCIATION, et al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Respondents.

On Petition for Review from the Federal Communications Commission

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PETITION FOR REHEARING EN BANC FOR INTERVENORS TECHFREEDOM, JEFF PULVER, SCOTT BANISTER, CHARLES GIANCARLO, AND DAVID FRANKEL

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GLOSSARY

Add.	Addendum
Communications Act of 1934 or Communications Act	Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064
Dissenting Op.	Opinion of Williams, J., concurring in part and dissenting in part from the Panel Opinion (Add. C-116)
FCC	Federal Communications Commission
Order	Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015) (JA 3477-8876)
Panel Op.	Panel Opinion (June 14, 2016) (Add. C-1)
Telecommunications Act of 1996 or Telecommunications Act or 1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56

INTRODUCTION AND RULE 35(b) STATEMENT

In the Telecommunications Act of 1996, Congress determined that "the policy of the United States" would be "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation[.]" 47 U.S.C. § 230(b)(2); *see also id.* § 230(a)(4).

But the FCC's "Open Internet Order" takes the opposite approach. It claims vast discretion under Title II of the Communications Act of 1934—the very statute the 1996 Act modernized—to regulate broadband Internet access services as common carriers.

The FCC boasts that it has created a "Title II tailored for the 21st Century," a modernized, "'light-touch' approach" suitable for regulating broadband Internet access service. Order ¶¶ 37, 38 (JA 3488). Yet despite "extensive" forbearance (what the FCC calls "tailoring"), some of Title II's significant provisions continue to apply. Order ¶¶ 283-84 (JA 3600). And the FCC's assertion of Title II jurisdiction, combined with inherently ephemeral tailoring, *id.* ¶ 538 (JA 3741), represents a claim to both broad new powers *and* unfettered discretion to decide if and when to deploy them. *See id.* ¶ 538 (JA 3741). If the Order stands, then

broadband Internet access service providers will be subject to the type of regulatory framework that governed 19th century railroads, their only relief being that the FCC might be merciful and forbear, sometimes, from enforcing some parts of Title II.

This case merits rehearing *en banc* for two reasons:

First, the panel's decision runs squarely contrary to Supreme Court precedents. Under *King v. Burwell*, courts must not give *Chevron* deference to agencies on questions "of deep 'economic and political significance' that [are] central to [a] statutory scheme" without *explicit* congressional instruction to do so. 135 S. Ct. 2480, 2489 (2015). As here, where there is no such express delegation of interpretive authority, the Court must interpret the relevant provisions *de novo*, even if they are ambiguous. *Id.* at 2489. The panel, however, deployed *Chevron* deference to affirm the FCC's Order. Panel Op. 33. And the panel deferred despite radical statutory "tailoring" necessary to save the Order from certain invalidation, violating *Utility Air Regulatory Group v. EPA*. Dissenting Op. 61-62 (citing 134 S. Ct. 2427, 2446 (2014)).

Second, this case presents issues of extraordinary importance. The FCC is subjecting all broadband Internet access service to common

carrier regulation—a step unprecedented in the history of the Internet. The very first lines of the FCC's Order highlight the immense economic, cultural, and political importance of this issue: the Internet "drives the American economy and serves, every day, as a critical tool for America's citizens to conduct commerce, communicate, educate, entertain, and engage in the world around them." Order ¶ 1 (JA 3479). For that very reason, *en banc* rehearing is necessary.

BACKGROUND

The Order is the FCC's third attempt to impose a so-called "net neutrality" regulatory regime on broadband Internet access services. *See* Panel Op. 15-21. In the first, the FCC failed to root its effort in a proper source of regulatory authority. *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010). In the second, this Court again rebuffed the FCC on the ground that its rules improperly treated broadband Internet access service providers as *de facto* common carriers. *Verizon v. FCC*, 740 F.3d 623, 651-59 (D.C. Cir. 2014). Such regulation is appropriate only for "telecommunications"—*i.e.*, "the 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); *see generally Verizon*, 740 F.3d at 651-59. But the FCC had classified broadband Internet access service as an "information service"—*i.e.*, "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications[.]" *Id.* § 153(24).

Thus, in the 2015 Order, the FCC purported to reclassify all broadband Internet access service as a "telecommunications service," Order ¶ 331 (JA 3619-20)—a *volte-face* that ostensibly removed the statutory barrier to common-carrier regulation of broadband Internet access services. So liberated, the FCC then imposed significant restrictions on those services, both bright-line rules and amorphous standards. *See*, *e.g.*, *id.* ¶ 136 (JA 3536).

The FCC's strategy of reclassifying all broadband Internet access services as telecommunications services required it to significantly reinterpret the Communications Act. First, the FCC had to conclude that broadband meets the definition of "telecommunications service" rather than any of the eight factors that would, individually, require its continued classification as an information service. *Id.* ¶ 355-56 (JA

3633); Panel Op. 32-33. Second, to reclassify *mobile* broadband as an information service, the FCC had to demonstrate that it is "interconnected with the public switched network"—*i.e.*, the telephone network. 47 U.S.C. § 332(d)(2); 47 C.F.R. § 20.3 (defining "public switched network" as the North American numbered telephone system); Panel Op. 55-57. The FCC had to overturn previous statutory and regulatory interpretations to shoehorn mobile broadband into its common carrier framework. *See* Panel Op. 57-62.

The panel affirmed the FCC. It brushed aside arguments that it should interpret the statute *de novo*. Instead, it determined that the FCC had cleared the low hurdle of *Chevron* Step Two, finding the terms "telecommunications service" and "public switched network" to be sufficiently capacious to permit the FCC's reinterpretations. *Id.* 33, 62.

ARGUMENT

I. The panel's decision conflicts with Supreme Court precedent.

A. *King v. Burwell* prohibits *Chevron* deference in this case involving questions of utmost "economic and political significance."

A court cannot apply *Chevron*'s well-known two-step framework without first ascertaining whether Congress actually intended to

delegate interpretive authority to the agency. *U.S. v. Mead Corp.*, 533 U.S. 218, 229-30 (2001); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). This is "*Chevron* Step Zero," a "threshold question as to whether *Chevron* deference even applies at all." *Pharm. Res. & Mfrs. of Am. v. HHS*, 43 F. Supp. 3d. 28, 36 (D.D.C. 2014) (citation omitted).

The Court identified a key Step Zero inquiry in *King*: "In extraordinary cases," there "may be reason to hesitate before concluding that Congress has intended such an implicit delegation" of interpretive gap-filling authority to the agency. 135 S. Ct. at 2488-89. When a case presents "a question of deep 'economic and political significance' that is central to [a] statutory scheme," courts cannot presume that Congress silently committed the issue to the agency's interpretive authority; "had Congress wished to assign that question to an agency, it surely would have done so *expressly*." *Id.* at 2489 (emphasis added). Absent Congress's express delegation to the agency, courts must interpret statutes—even ambiguous statutes—*de novo*. *Id.*

King thus incorporated the "major questions" doctrine into Step Zero. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000). This Court and the Supreme Court have consistently applied

that doctrine to stop agencies from resolving questions of major economic or political significance absent express delegation from Congress to do so. *Id.*; *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005); *Loving v. U.S.*, 742 F.3d 1013, 1021 (D.C. Cir. 2014).

There is no doubt this case involves a major question. The Supreme Court has already recognized as "major" the question of *how* to regulate a common carrier. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994). As the Court determined, it "is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion." *Id.* It is *even more* unlikely that Congress would delegate to the FCC interpretive power to decide the even *more* significant, antecedent question of whether broadband Internet can be newly designated a common carrier.[1] Because Congress did not expressly commit the issue to the FCC's interpretive authority, the panel erred by

[1] The "major question" in this case is not whether the FCC can impose this initially "tailored" version of Title II, but whether it can assert Title II authority *per se*. The FCC purports to "forbear" initially from applying many Title II requirements. *See* Order ¶ 382 (JA 3651). But that is temporary—the FCC can "un-forbear" just as swiftly as it forbore. *See id.* ¶ 538 (JA 3741).

granting *Chevron* deference to the FCC's self-aggrandizing interpretations of the Communications Act of 1934 and the Telecommunications Act of 1996. *See King*, 135 S. Ct. at 2489.

B. The panel erred in concluding that *Brand X* controls over *King*.

The panel ignored *King* because it believed *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 986-89 (2005), controlled. Panel Op. 32-38. *Brand* X, however, does not control because it lacks "direct application" to this case. *See*, *e.g.*, *U.S. v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1201 (D.C. Cir. 2005).

In *Brand X*, the Court interpreted "offering"—as in an "*offering* of telecommunications"—in the definition of "telecommunications service." 47 U.S.C. § 153(53). All nine justices understood that cable Internet service has two parts: the pure "transmission" of the "last mile"—the data stream between service providers and consumers—and everything upstream of that. *Brand X*, 545 U.S. at 998-99; *id.* at 1009-11 (Scalia, J., dissenting). And they all further recognized the upstream component as an information service. *Id.* at 998-99; *id.* at 1009-11 (Scalia, J., dissenting). The question, then, was whether cable companies made an "offering" to consumers of simply the last mile's pure transmission or

whether they made an integrated "offering" of the last mile and everything upstream. If the former, the offering would be a "telecommunications service"; if the latter, an "information service." The FCC chose the latter and the Court deferred. *Id.* at 997-99.

This case presents entirely different interpretive questions. First, can "telecommunications service" encompass everything upstream from the last mile—the component that all nine Justices agreed was an information service? 47 U.S.C. § 153(24). Second, for mobile broadband, what is "the public switched network?" *Id.* § 332(d)(2). *Brand X* did not say that the FCC is entitled to *Chevron* deference on those questions of major economic and political significance. And *King* holds that it is not.

That said, even the panel opinion stops short of concluding that *Brand X* actually involved *precisely* the same interpretive issues now before the Court; instead, it concluded that it had "no need to resolve [the] dispute" over whether *Brand X* involved just the last mile, because *Brand X* addressed an interpretive question sufficiently analogous to the issue at hand. Panel Op. 33. But that is an admission that *Brand X* does *not* have "direct application" to the issue at hand. *King* requires this Court to assess the FCC's interpretations *de novo*.

C. *Utility Air Regulatory Group v. EPA* prohibits the FCC's rewrite of the Communications Act.

The Order *rewrites* Title II. The FCC acknowledges 77 times that, to fit Title II to broadband and avoid a flood of negative consequences caused thereby, it had to engage in "extensive," "broad," "[a]typical," and "expansive" tailoring, lopping off 30 Title II provisions and 700 rules adopted thereunder. Order ¶¶ 37, 51, 438, 461, 493, 508, 512, 514 (JA 3488, 3492, 3682-83, 3696, 3714, 3722-23, 3725, 3727-28). As the FCC admits, it had "never" before applied Title II in this way. Order ¶ 38 (JA 3488). And it boasts that its statutory ingenuity has enabled it to "modernize" the Communications Act and bring it into "the 21st century." *Id.* ¶¶ 37, 38 (JA 3488).

The need to expansively "tailor" the statute to make it work should have caused the panel to recognize that the FCC's decision to regulate broadband Internet access services under Title II resulted from "a wrong interpretive turn." *UARG*, 134 S. Ct. at 2446. Yet the panel dismissed *UARG* entirely, noting only that, unlike in *UARG*, the FCC has authority to "'forbear from applying any regulation or provision.'" Panel Op. at 41 (quoting 47 U.S.C. § 160(a)).

UARG, however, is not so readily confined. *See* Dissenting Op. 61-62. Agencies may not adopt "unreasonable" statutory interpretations—such as "telecommunications service"—and then "edit other statutory provisions to mitigate the [resulting] unreasonableness." *UARG*, 134 S. Ct. at 2444-46. The FCC's tailoring authority is not unlimited, and its need to tailor Title II so aggressively reveals the deep flaws in its underlying interpretation. Dissenting Op. 61-62.

UARG is materially indistinguishable from this case. *See* Dissenting Op. 62. In both cases, the agencies "tailored" to solve problems born of their own gratuitously aggressive interpretations of ambiguous statutory provisions. *Id.* True, the FCC had more statutory raw material at hand than EPA to cobble together its fix-it tool. But its self-inflicted need to fashion such a tool—to invoke "extensive forbearance," grounded in novel rationales—is no less strong a signal that the underlying statutory interpretation is unlawful.

As EPA did in *UARG*, the FCC turns to tailoring in an attempt to save its regulation from invalidation. The Order represents an "enormous and transformative expansion" of regulatory authority without clear congressional authorization. *UARG*, 134 S. Ct. at 2444.

Forbearance, which can be revoked, does not allay the "skepticism" that would ordinarily greet such a regulation. *Id.* Courts must not "wave goodbye" as an agency "embarks on [a] multiyear voyage of discovery" of how to regulate a major engine of the modern economy, *UARG*, 134 S. Ct. at 2446; to do so would allow agencies to transform ordinary statutory terms into unlimited delegations of legislative power.[2]

Further, absent tailoring, the FCC's Order would be "incompatible" with the Communications Act. Without tailoring, Title II's application to broadband would lack even an aura of plausibility in light of Congress's clear preference for a "competitive free market" "unfettered by . . . federal regulation." 47 U.S.C. § 230(b)(2); *see also id.* at § 230(a)(4). Indeed, there is simply a mismatch between "the statutory provisions naturally flowing from reclassification" and the "issues posed by broadband access service." Dissenting Op. 62

Ultimately, even the FCC's extensive tailoring cannot mask the Order's illegality. Instead, it exposes an "unwillingness to apply the

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[2] The FCC may not invoke "expansive" forbearance to address problems of its own making because administrative power not tied to a "significant risk" of harm constitutes an unconstitutional delegation of legislative authority. *See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.* 448 U.S. 607, 645-46 (1980) (plurality).

statutory scheme" and "infects" the decision to apply Title II to broadband. Dissenting Op. 62-63. On one hand, regulating broadband under Title II rests on a finding of insufficient competition in that market. Dissenting Op. 67. On the other, forbearance depends upon competition in that market. *Id.*; 47 U.S.C. § 160(b). Even if the statute admits of such a "sweet spot"—where competition is both insufficient (Title II) and sufficient (broad forbearance)—the Order is irrational because the FCC does not define its contours. Dissenting Op. 67.

In sum, the FCC has run afoul of *UARG* by going well beyond the scope of its tailoring authority. An analogy illustrates the point: A customer asks his tailor to make a jacket fit him comfortably, not tightly. If the tailor concludes that the jacket will be too tight unless he cuts off both sleeves, then the jacket obviously was never meant for the customer's body in the first place. The customer did not order a vest. So too here: Congress allows the FCC to "tailor" Title II to fit it to telecommunications services, but broadband is *not* such a service, and the "extensive" cutting needed to "fit" Title II to broadband proves it.

II. This case presents issues of exceptional importance.

The opening lines of the FCC's Order establish that imposing common carrier regulations on broadband Internet is a quintessential major question under *King*. The Internet "drives the American economy and serves, every day, as a critical tool for America's citizens to conduct commerce, communicate, educate, entertain, and engage in the world around them. The benefits of an open Internet are undisputed." Order ¶ 1 (JA 3479).

Congress agrees: "The rapidly developing array of Internet and other interactive computer services available to individual Americans represent[s] an extraordinary advance in the availability of educational and informational resources to our citizens," and they "offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(1), (3). That is why Congress found that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." *Id.* § 230(a)(4).

What was true in 1996 is exponentially truer today. The Internet, today's most important platform for economic, political, and social life is

at least as important as the tax treatment of certain health insurance plans (*Halbig v. Burwell*, No. 14-1518), or whether EPA can impose its greenhouse-gas policy on States and companies (*West Virginia v. EPA*, No. 15-1363)—issues that this Court elected to hear *en banc*.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request the Court grant the petition for rehearing *en banc*.

Respectfully submitted,

/s/ Adam J. White

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July 29, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure and Circuit Rule 35, this petition for rehearing *en banc* has been prepared in 14-point Century Schoolbook font, and does not exceed fifteen pages (excluding the material not counted under Rule 32).

/s/ Adam J. White
July 29, 2016 Adam J. White

CERTIFICATE OF SERVICE

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

/s/ Adam J. White

July 29, 2015 Adam J. White