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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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REPLY BRIEF FOR INTERVENORS FOR PETITIONERS TECHFREEDOM, CARI.NET, JEFF PULVER, SCOTT BANISTER, CHARLES GIANCARLO, WENDELL BROWN, AND DAVID FRANKEL

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GLOSSARY

Commission	Federal Communications Commission
DSL	Digital Subscriber Line
FCC	Federal Communications Commission
FTC	Federal Trade Commission
Order	Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015)

INTRODUCTION

The FCC claims vast new authority over Internet services. To justify reclassifying all broadband under Title II, the Order reinterprets the Act's two most important terms: "telecommunications service" and "information service." To justify reclassifying wireless broadband, the Order also reinterprets the terms "public switched network" and "interconnected service." Those reinterpretations implicate a wide range of Internet services, well beyond just broadband Internet services. Through these reinterpretations, the FCC has opened a Pandora's Box of Internet regulation.

The Internet affects virtually all aspects of American life: our relationships, work, culture, politics, and economy. *See* FCC Br. at 1 (quoting *Order* ¶ 1 [JA ____]). FCC Chairman Tom Wheeler regularly insists that the Internet is "the most powerful network in the history of mankind." *See, e.g.*, Justin (Gus) Hurwitz, *Net Neutrality: Something Old; Something New*, 2015 MICH. ST. L. REV. 665, 685 (2015). Yet the FCC assumes that Congress would implicitly delegate vast control over it to an independent regulatory commission—indeed, to a mere three-commissioner majority.

The Internet is far too important for the Court to presume that the "statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*,

529 U.S. 120, 159 (2000)). And the powers and jurisdiction claimed by the FCC are far too broad—encompassing not just broadband *per se* but also edge services like voice and video—with the burdens of the FCC's new assertion of power falling on innovators such as those intervening here against the FCC. *See infra* pp. 6–7; *see also* TechFreedom Br. at 8–9.

And those burdens are exacerbated by the uncertainty inherent in the FCC's strategy of making up the law as it goes—of "tailoring" (or someday *not* tailoring) the law as it sees fit; of exercising "extensive forbearance" (or someday *un*forbearing) as a matter of its own discretion. *Order* ¶ 493 [JA ____]. Now that the FCC has invoked Title II, the agency will retain for itself the discretion to decide just how much of Title II to apply, and how to apply it, in an ongoing "multiyear voyage of discovery." *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2446 (2014) (hereinafter "*UARG*"). For the Court to "stand on the dock and wave goodbye," *id.,* would allow the FCC to dictate an answer to what may be the Digital Age's most significant question.

SUMMARY OF ARGUMENT

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress." *U.S. v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). In this case, Congress stated its intent clearly: "It is the policy of the United States . . . to

preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). Congress and the President established this national policy in order to continue fostering the conditions that had allowed the Internet to thrive in America: "The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." *Id.* § 230(a)(4).

The FCC should be trying to vindicate Congress's intent, not defeat it. Indeed, it would be "absurd" to presume "that Congress delegated authority [to the agency] to vitiate or disregard its intent." *Montana v. Clark*, 749 F.2d 740, 745 (D.C. Cir. 1984); *see also NACS v. Bd. of Governors of Fed. Reserve Sys.*, 746 F.3d 474, 483 (D.C. Cir. 2014) (stressing that "neither agencies nor courts have authority to disregard the demands of even poorly drafted legislation" and therefore the courts "must do our best to discern Congress's intent and to determine whether the [agency's] regulations are faithful to it"). Yet the FCC's Order and brief do not even acknowledge the clear statements of congressional intent quoted above.

Even if Congress had not stated its intent so plainly, the Order would still violate three general rules of statutory construction that assist courts in

divining congressional intent in light of fundamental principles of constitutional structure:

First, "courts should not lightly presume congressional intent to implicitly delegate decisions of major economic or political significance to agencies." *Loving v. IRS*, 742 F.3d 1013, 1021 (D.C. Cir. 2014) (citing *Brown & Williamson*, 529 U.S. at 160); TechFreedom Br. at 15–21, 30–31.

Second, if an agency claims vast power under a statute yet feels compelled to extensively "tailor" (or "forbear" from) the statutory framework in order to avoid harmful consequences, then "the need to rewrite clear provisions of the statute should [alert the agency] that it had taken a wrong interpretative turn." *UARG*, 134 S. Ct. at 2446; TechFreedom Br. at 21–25.

Third, the courts must presume that Congress did not empower an agency to "impose enormous costs" on an industry without showing that such burdens are necessary to save the public from a "quantified," "significant" risk of harm, because to presume otherwise "would make such a sweeping delegation of legislative power that it might be unconstitutional under the Court's [nondelegation precedents.]" *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. (The Benzene Cases)*, 448 U.S. 607, 645–46 (1980) (citations and internal quotation marks omitted); TechFreedom Br. at 25–29, 31–32.

The FCC's brief ignores all of these principles. The Court should not.

ARGUMENT

I. Imposing common carrier regulation on the Internet is the quintessential "major question" that Congress did not implicitly delegate to the FCC to decide.

A. As we explain in our opening brief, the Internet's overwhelming economic and political importance cuts *against* the Order, not in favor of it.

The issue's extraordinary significance cuts against the FCC's statutory reinterpretations. The FCC claims vast authority over "the most powerful network in the history of mankind," *see supra* at 1 (quoting Chairman Wheeler), reaching beyond broadband Internet *per se* to other Internet services as well, *see infra* at 6–7. And the agency claims not merely vast prosecutorial discretion over these services but also the power to create a new regulatory framework out of whole cloth. The Court must not lightly presume that "Congress is likely to delegate a policy decision of such economic and political magnitude" to an agency's regulatory authority. *Brown & Williamson*, 529 U.S. at 133; TechFreedom Br. at 15–21.

The Internet's importance also cuts against the FCC's assertion that the Court should apply *Chevron*'s two-step approach to deference. On issues of such magnitude, implicating "billions of dollars in spending each year" and affecting "millions of people," it is the Court's job, not the agency's, "to

determine the correct reading of" the statute. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *see generally* TechFreedom Br. at 30–31.

B. The FCC attempts to downplay the Order's significance, insisting that it merely reverts to the *status quo* predating its 2005 decision to reclassify DSL service as a Title I information service. FCC Br. at 86–87. In fact, the FCC's pre-2005 treatment of DSL was limited to the last-mile, high-speed connection between an end user's premises and the Internet access provider's computer-processing functions. *See* USTelecom Reply Br. 20.

Moreover, the Order results in regulation of edge services directly—and opens the door to still more such regulation in the future—despite its rhetoric to the contrary. *See* ICLE Amicus Br. at 10. Specifically, the Order states that the FCC *does* have authority over interconnection. *See*, *e.g.*, Order ¶¶ 186–87 [JA ____–____] (defining Broadband Internet Access Service and stressing that its definition "encompasses arrangements for the exchange of Internet traffic"). And the Order *does* subject edge providers to Title II's common carrier rules. *Id.* ¶¶ 308, 338 [JA ____, ____]. Banning "paid prioritization" bars companies and entrepreneurs—such as the intervening innovators who join this brief—from buying a service that would benefit them and their customers, and in some cases, that is vital to their business models. *See* TechFreedom Mot. to Intervene at 4–6, 7, 9 (June 8, 2015) [Dkt. # 1556317]. Notably, Charles

Giancarlo's company offers consumers an *a la carte* wireless plan that could be cheaper and more flexible than traditional by-the-gigabyte data bundles. Yet this innovative business model is now subject to the FCC's hopelessly vague "general conduct" rule. *Id*. at 14–17.

Furthermore, the Order's reinterpretation of "public switched network" and "interconnected service" has erased the bright line that the FCC drew, in its 2004 *Pulver Order*, between the "core" (broadband) and the "edge" (services like voice and video). Memorandum Opinion and Order, *In re Petition for Declaratory Ruling that pulver.com's Free World Dialup Is Neither Telecommunications nor a Telecommunications Service*, 19 FCC Rcd. 3307 (2004); *see also* TechFreedom Mot. to Intervene, *supra*, at 10–13. Only through these momentous reinterpretations could the FCC overcome its own previous finding that, as this Court summarized it, "mobile-data providers are statutorily immune, perhaps twice over, from treatment as common carriers." *Cellco P'ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012)). "Congress," which clearly tried to *prevent* Title II treatment of wireless Internet services, "could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Brown & Williamson*, 529 U.S. at 160.

To avoid the direst consequences of Title II, the FCC has had to bend the statute to the point of breaking it. By the FCC's own (proud) admission, the Order effectively rewrites the Communications Act—to create a "Title II tailored for the 21st Century." *Order* ¶ 38 [JA ____]. Not even the FCC would presume that it could *permanently* suspend the Act that Congress gave it; the blanket forbearance so critical to the Order's "tailoring" (a term mentioned 77 times) is inherently impermanent. Only obliquely does the Order note the FCC's power to unforbear, in explaining why the Commission need not declare forbearance to be "interim or time-limited": "we retain adequate authority to modify our regulatory approach in the future, should circumstances warrant." *Order* ¶ 538 [JA ____]. Just how much of Title II the FCC will apply at any given moment, and in what way, will be up to the FCC to decide as it continues its "multiyear voyage of discovery." *UARG*, 134 S. Ct. at 2446.

C. The FCC offers no response on the "major questions" doctrine. Instead, it attempts to distinguish *King* on altogether different grounds: claiming that the Supreme Court refused to apply *Chevron* merely because the relevant agency lacked requisite "expertise." The FCC describes itself, by contrast, as "the congressionally delegated expert in communications policy." *See* FCC Br. at 46.

That misreads *King*. The Supreme Court's refusal to apply *Chevron* owed not to the nature of the particular agency, but to the constitutional relationship between Congress and agencies in general. Applying *Brown & Williamson*'s major questions doctrine, the Court found the issue at hand—health insurance subsidies and penalties—to be "a question of deep economic and political significance," so "central to this statutory scheme," that it would be implausible to "conclud[e] that Congress has intended such an implicit delegation" of interpretive authority to the agency. *King*, 135 S. Ct. at 2488–89 (quoting *Brown & Williamson*, 529 U.S. at 159, 160) (internal quotation marks omitted). "[H]ad Congress wished to assign that question to an agency," the Court concluded, "it surely would have done so expressly." *Id.* at 2489 (citing *UARG*, 134 S. Ct. at 2444).

The Court in *King* made passing reference to that particular agency's lack of expertise only as further confirmation of the point that the Court had already made—that Congress could not plausibly have implicitly delegated such a momentous issue to an agency, rather than deciding the matter itself through legislation. *See id.* at 2489 (noting, after applying *Brown & Williamson*, that "[i]t is *especially* unlikely that Congress would have delegated this decision to the *IRS*" (first emphasis added)). Similarly, in *Brown & Williamson*, the FDA's "expertise" was not the reason the Supreme Court rejected the agency's

assertion of regulatory power over tobacco; it was the significance of tobacco *per se*. 529 U.S. at 159–60.

In the other cases cited in our opening brief, to which the FCC does not respond, courts rejected the suggestion that Congress had implicitly delegated to an agency significant power or discretion over a matter of major economic or political importance, without regard to the agency's expertise:

In *MCI*, when the Supreme Court found it "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion," the Court's doubts were not assuaged by the FCC's abundant expertise in rate regulation, either generally or of long-distance carriers in particular. *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994).

Similarly, in *ABA v. FTC*, when this Court rejected the FTC's attempt to regulate lawyers as "financial institutions" under the Graham-Leach-Bliley Financial Modernization Act, the Court's "seriou[s] doubt" that Congress actually delegated such power to the FTC had nothing to do with the FTC's expertise regarding financial institutions. 430 F.3d 457, 469 (D.C. Cir. 2005).

And in *IRS v. Loving*, when this Court rejected the IRS's attempt to regulate tax-preparers, it invoked *Brown & Williamson*'s "major questions" doctrine not because the IRS lacked relative expertise on tax preparation, but

because it strained credulity to suggest that Congress had, *sub rosa*, empowered the IRS "to regulate hundreds of thousands of individuals in the multi-billion dollar tax preparation industry." 742 F.3d 1013, 1021 (D.C. Cir. 2014).

The problem in these cases was not a lack of agency expertise. The problem in each case was the lack of express delegation of regulatory power by Congress and the major economic or political ramifications of the agency's power grab. So too in this case: because common-carrier regulation of the Internet would have such profound economic, political, and cultural ramifications, the Court must not presume that Congress implicitly delegated that regulatory power to the FCC—regardless of the Commission's self-professed expertise.

D. Even if the FCC's expertise *were* relevant, the FCC exaggerates its case. The FCC's traditional modes of regulation bear little resemblance to the seven factors that the FCC states will guide case-by-case enforcement of its Internet Conduct Standard. *See Order* ¶¶ 138–45 [JA ____–____]. Those factors are so "complex" that even the FCC's *amici*, the Electronic Frontier Foundation and the American Civil Liberties Union, worry that the Standard retains such "significant discretion" for the FCC that the EFF and the ACLU urge that the factors should be reduced to just one general factor: "free

expression." EFF Amicus Br. at 28–29. The FCC can claim no special "expertise" on the requirements of the First Amendment.

II. The FCC's recognition that Title II must be "carefully tailored" to avoid disastrous overregulation of the Internet belies an implicit delegation of authority by Congress to the FCC.

A. As we explain in our opening brief, the FCC's assertion that its multiple statutory reinterpretations are consistent with congressional intent is belied by the FCC's admitted need to immediately and dramatically "tailor" Title II to avoid ruinous consequences. By its own admission, the FCC found it necessary not to merely "forbear" from enforcing small parts of Title II regulation, but to waive broad swaths of it in the form of "extensive forbearance," Order ¶ 461 [JA ____], "broad forbearance," *id.* ¶ 493 (heading) [JA ____], or even "expansive forbearance," *id.* ¶ 493 [JA ____]. But as the Supreme Court explained just a year ago, "the need to rewrite clear provisions of the statute should have alerted [the agency] that it had taken a wrong interpretive turn" in the first place. *UARG*, 134 S. Ct. at 2427; *see* TechFreedom Br. at 21–25.

The FCC's brief does not attempt to respond to this argument.

B. Instead, the FCC sidesteps *UARG*'s entire discussion of what the need for radical "tailoring" says about the permissibility of an agency's statutory construction; the FCC presents *UARG* as merely as a case in which

an agency implausibly discovered previously "unheralded power" in a longstanding statute. FCC Br. at 47. Even on this tangential point, the FCC obscures the real issue: not "reclassification" as such, but permissibility of the statutory reinterpretations underlying it, given their broad implications for the breadth of the FCC's authority. *See supra* 6–8.

III. To assume that Congress empowered the FCC to impose these heavy regulations, without the agency showing an actual, significant risk of harm to the public, would raise serious nondelegation concerns.

As we explain in our opening brief, the Supreme Court requires that an agency seeking to impose "enormous" costs on society must first show that the regulation is necessary to prevent a "quantified," "significant" risk of harm to the public. *The Benzene Cases*, 448 U.S. at 645–46, *cited in Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001). To allow otherwise—to presume that Congress vested an agency with "power to impose enormous costs that might produce little, if any, discernible benefit"—would "make such a sweeping delegation of legislative power that it might be unconstitutional under" the Supreme Court's nondelegation precedents. 448 U.S. at 646. "A construction of the statute that avoids this kind of open-ended grant [of power]," the Supreme Court urged, "should certainly be favored." *Id.*; *see* TechFreedom Br. at 25–29. And the nondelegation problem is not something

that can be fixed by deferring to the agency's attempt to restrain itself (in this case, through forbearance so sweeping that it rewrites Title II). *Id.* at 31–32.

The Order made no attempt to satisfy this standard. (And the FCC's brief, yet again, makes no attempt to respond to this argument.) The Order alludes vaguely to broadband Internet service providers' general "incentives" or "ability" to interfere with Internet traffic. *See* TechFreedom Br. at 25. And to lend credence to its speculation, the FCC alludes to two alleged examples of misconduct: Madison River and Comcast-BitTorrent. FCC Br. at 19–21.

But as we explain in our opening brief, neither of these cases bears the enormous weight that the FCC places upon them. First, while the *Madison River* case began with FCC allegations, *see id.* at 19, the case ended with a consent decree expressly stating that it did "not constitute either an adjudication on the merits or a factual or legal finding," and which was executed by the parties not as a demonstration of guilt but rather to "avoid the expenditure of additional resources that would be required to further litigate the issues raised in the Investigation." *See* TechFreedom Br. at 25–26 (quoting Consent Decree, *In re Madison River Comm'cns LLC*, 20 FCC Rcd. 4295, ¶¶ 4, 10 (2005)). This was not a demonstration of significant risk to the public then, let alone a demonstration of risk to the public today.

Second, the Comcast-BitTorrent case also began with allegations of misconduct but ended with a voluntary agreement announced by the parties as part of their "collaborative effort" to "more effectively address issues associated with rich media content and network capacity management." *See* TechFreedom Br. at 26–27 (quoting press release). Indeed, the parties themselves urged that "these technical issues can be worked out through private business discussions *without the need for government intervention*." *See id.* at 26 (quoting press release). This, too, is not a demonstration of significant risk to the public—not in 2008, and not today. Moreover, this case fell squarely within the authority of the Federal Trade Commission—and so would other "net neutrality" cases but for the FCC's reclassification of broadband, since the FTC has authority to regulate (essentially) everything *except* common carriers, TechFreedom Br. at 27 n.10.

CONCLUSION

We end where our opening brief begins. In this case, "net neutrality" is a red herring. The issue before this Court is the FCC's claim of unprecedented power to regulate the Internet without explicit congressional authorization—far beyond anything the Commission has ever done before. For the reasons set forth above and in our opening brief, we respectfully request that the Court vacate the FCC's Order in its entirety.

Respectfully submitted,

/s/ Adam J. White

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because the brief contains 3,363 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Adam J. White
October 5, 2015 Adam J. White

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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
October 5, 2015 Adam J. White