ORAL ARGUMENT SCHEDULED FOR FEBRUARY 1, 2019

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

Case No. 18-1051 (and consolidated)

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

BRIEF FOR *AMICUS CURIAE* TECHFREEDOM IN SUPPORT OF RESPONDENTS

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October 18, 2018

CERTIFICATE AS TO PARTIES, RULINGS, RELATED CASES, AND OF COUNSEL REGARDING NECESSITY OF SEPARATE *AMICUS CURIAE* BRIEF

A. Parties

Except for the following, all parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Respondents Federal Communications Commission and United States of America.

The following additional parties have filed either notice or motion for leave to participate as an *amici*, as of the date of this filing:

- The International Center for Law and Economics (ICLE)
- Phoenix Center for Advanced Legal and Economic Public Policy Studies
- Multicultural Media, Telecom and Internet Council (MMTC)
- Roslyn Layton

B. Rulings Under Review

The ruling under review is a promulgation of the Federal Communications Commission (FCC): *Restoring Internet Freedom*, Declaratory Ruling, Report, and Order, 33 FCC Rcd 311 (2018) (JA___) (*Order* or *RIFO*).

C. Related Cases

Related cases appear listed in the Brief for Respondents.

D. Necessity of Separate *Amicus Curiae* Brief

A separate brief from TechFreedom is necessary because TechFreedom is the only *amicus* to argue that the Major Questions doctrine precludes the imposition of common carrier regulation on broadband. TechFreedom's assertion of that position in the previous round of litigation was embraced by the dissenting judges in that case. Accordingly, this brief will help the Court to understand the appropriate standard of review in construing the FCC's statutory authority.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, *amicus curiae* TechFreedom is a not-for-profit, non-stock corporation organized under the laws of the District of Columbia with federal tax-exempt 501(c)(3) status. TechFreedom has no parent corporation. It issues no stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

GLOSSARY

1934 Act	Communications Act of 1934, Pub. L. No. 73- 416, 48 Stat. 1064 (1934)
1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)
2010 Order	*Protecting and Preserving the Open Internet*, Report and Order, 25 FCC Rcd. 17905 (2010)
2015 Order	*Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015)
Amicus	TechFreedom
BIAS	Broadband Internet Access Service
FTC	Federal Trade Commission
Gov't Pet'rs Br.	Brief for Government Petitioners
Non-Gov't Pet'rs Br.	Joint Brief for Petitioners Mozilla Corporation, Vimeo, Inc., Public Knowledge, Open Technology Institute, National Hispanic Media Coalition, NTCH, Inc., Benton Foundation, Free Press, Coalition for Internet Openness, Etsy, Inc., Ad Hoc Telecom Users Committee, Center for Democracy and Technology, and INCOMPAS
RIFO	*Restoring Internet Freedom, Declaratory Ruling*, Report and Order, and Order, 33 FCC Rcd. 311 (2018)

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE AS *AMICUS CURIAE*

Since launching in 2011, TechFreedom has been closely engaged in trying to resolve the debate over how to address "net neutrality" concerns. Our goal has always been to protect consumers and competition from real harms while avoiding regulatory responses that could stifle innovation or investment across the Internet ecosystem.

There has long been broad, bipartisan agreement on the fundamentals of net neutrality, beginning with Republican FCC Chairman Michael Powell's 2004 "Four Freedoms" speech.[1] BIAS providers themselves have insisted they will respect the core net neutrality principles. These promises were enforceable by the FTC, until the FCC's reclassified BIAS as a common carrier service in the *2015 Order*. *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015). With the passage of the *RIFO*, the FTC and states, enforcing their "Baby FTC" acts, can once again enforce these promises, and even without such promises, the FTC and state authorities would have broad authority to enforce promises implied by broadband marketing claims (such as promising "unlimited" data), punish material omissions, prosecute "unfair"

[1] Michael K. Powell, FCC, *Preserving Internet Freedom: Guiding Principles for the Industry*, Remarks at the Silicon Flatirons Symposium (Feb. 8, 2004).

(continued on next page)

practices, and enforce the antitrust laws against anti-competitive conduct.[2] We have supported, and will continue to support, federal legislation to codify net neutrality principles. Unfortunately, despite earnest legislative proposals from both sides of the aisle (Republicans in 2006, Democrats in 2010, and Republicans since 2014[3]), Congress has failed to resolve this issue. Rather than allowing existing laws to function, the FCC made three sweeping claims of power over the Internet—one in 2010 and two in 2015—each of which TechFreedom has opposed as dangerous and contrary to Congress's intentions to "promote competition and *reduce regulation* in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies,"[4] and "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(2).

In 2010, the FCC reinterpreted Section 706, 47 U.S.C. § 1302, as a free-standing grant of authority to take any measure that the agency might claim would promote broadband deployment, unless specifically forbidden to do so. *Verizon v.*

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[2] 15 U.S.C. § 45; *see F.T.C. v. AT&T Mobility LLC*, 883 F.3d 848 (2018).

[3] Berin Szóka et al, Comments of TechFreedom, *In the Matter of Notice of Proposed Rulemaking Restoring Internet Freedom*, WC Docket No, 17-108, at 8, 15, 37 (Aug. 30, 2017), https://goo.gl/7DZW4R.

[4] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.) [hereinafter 1996 Act].

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FCC, 740 F.3d 623 (D.C. Cir. 2014).[5] Judge Silberman, in dissent, warned that this interpretation "grant[s] the FCC virtually unlimited power to regulate the Internet." *Id.* at 662. We led the first *amicus* brief, filed with the Sixth Circuit in 2015, explaining the impermissibility of this interpretation.[6]

In 2015, the FCC abandoned the longstanding classification of BIAS as an information service and re-classified it as a common carrier service, opening the door to, among other things, broadband price controls. *See 2015 Order* TechFreedom joined the legal challenge to the *2015 Order*, as lead Intervenors.[7] We represented distinguished pioneers in Voice over Internet Protocol (VoIP) service concerned that the FCC's third claim of authority—reclassifying mobile broadband providers as Title II common carriers by claiming that the "public switched network" meant not the telephone network but the Internet, *2015 Order* ¶ 48—had opened the door to common carrier regulation of any communications service using IP

[5] TechFreedom was the first organization to explain this warning to a mass audience. *See* Geoffrey Manne and Berin Szóka, *The Feds Lost on Net Neutrality but Won Control of the Internet*, Wired, (Jan. 16, 2014), https://goo.gl/hnwiFy.

[6] The FCC had invoked Section 706 as the basis for superseding how states govern the provision of broadband service by their municipal subdivision. Brief for TechFreedom as *Amici Curiae* supporting Petitioners, *Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016) (No.15-3291;15-3555) (*TechFreedom Sixth Circuit Brief)*, https://goo.gl/3rBfO9.

[7] Brief for Intervenors for Petitioners, *United States Telecom Ass'n v. FCC*, 825 F. 3d 674 (2016) (No. 15-1063), https://goo.gl/z5MyTf.

addresses—not just BIAS but potentially also VoIP or other voice-driven Internet services.

We alone raised the argument that would become central to the dissents from the *en banc* decision denying rehearing of the panel decision upholding the FCC's *2015 Order*: that the FCC's reclassification of broadband as a Title II service raised a "major question" that lies outside the proper scope of review under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*), requiring the court to interpret the statute *de novo*. Our petition for certiorari on these questions is currently pending before the Supreme Court. *TechFreedom v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *petition for cert. filed*, No. 17-503 586 U.S. __ (201_) (No. 17-503).

All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2); D.C. Cir. R. 29(b).

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money intended to fund the preparation or submission of this brief, and no person other than *Amicus* and its counsel contributed money intended to fund the preparation or submission of this brief.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in the Respondent's Brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Restoring Internet Freedom Order (*RIFO*) corrected all three of the FCC's previous mis-readings of its statute: (1) Section 706 is a directive to use other grants of authority to promote broadband deployment, not a free-standing grant of authority to do anything not specifically forbidden to the agency; (2) BIAS is an information service, not a common carrier telecommunications service; and (3) The "public switched network" means the telephone network, not the Internet. *Restoring Internet Freedom, Declaratory Ruling,* Report and Order, and Order, 33 FCC Rcd. 311 (2018). We believe all three of these interpretations are not merely permissible under *Chevron*, but the only valid constructions of the statute, which this court is obliged to accept under the Major Questions doctrine.

We urge the Court to resolve these questions definitively to put an end to the regulatory "ping pong" over the past three years that most likely will continue

indefinitely. Absent such a decision, or legislation on this issue, we fully expect the next Democratic FCC to revert to the *2015 Order*'s claims of unbridled power.

ARGUMENT

I. The Court Should Uphold the *RIFO*'s Return to Classifying Bias as an Information Service as Mandatory, Not Discretionary.

It is the *2015 Order*, not the *RIFO*, that is the outlier from a twenty-year arc of consistent legislative and regulatory policies that have enabled the creation of one of the greatest creations in human history, the modern Internet.

A. Since at Least *Brand X*, the Commission's Classification of BIAS as an Information Service Has Been on Solid Legal Ground.

Petitioners' describe the *RIFO* as a radical departure from prior administrative and legal precedent. Non-Gov't Pet'rs Br. at 22-23. The opposite is true. The *RIFO* restores the generation-old classification of BIAS as an information service, subject to a lighter touch regulatory approach. *RIFO* ¶ 1. This classification is wholly consistent with Congress' intent in the 1996 Telecommunications Act "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). The FCC first classified the early forms of BIAS as an information service, not a telecommunications service, in 1998. *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11536, ¶ 73 (1998) (*Stevens Report*). The

FCC similarly classified cable modem service (BIAS provided over cable facilities) as an information service in 2002. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002). This classification ultimately was upheld by the Supreme Court in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), which remains controlling.

Following *Brand X*, the Commission classified other forms of BIAS as information services, and such decisions, when challenged, were upheld by the courts. *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005), *pets. for review denied*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd 13281 (2006); *Appropriate Framework for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd 5901 (2007).

B. The *2015 Order*'s Vast Claims of Power over the Internet Are a "Major Question" to Which *Chevron* Does Not Apply.

The *2015 Order* broke sharply from this consistent approach, subjecting broadband providers to common carriage regulation. Despite promises to have "modernized" Title II of the 1934 Communications Act through "extensive

forbearance," *2015 Order* ¶ 461, which could be reversed easily,[8] the Order did *not* forbear from the core provisions of Title II, including in particular Sections 201 and 202, which together allow the FCC to impose price regulation. *2015 Order* ¶¶ 283-84, 538.

Reclassification raised serious issues under the "major questions" (or it is sometimes known, the "major rules") doctrine. The agency seemed to have admitted the "major" implications of what it was doing in acknowledging the need to extensively "tailor" (or "forbear" from) the statutory framework it adopted. As the Supreme Court has said, "the need to rewrite clear provisions of the statute should have alerted [the agency] that it had taken a wrong interpretive turn." *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2446 (2014) (*U.A.R.G.*).

If the Major Questions doctrine applies, courts may not accord *Chevron* deference to an agency's decision, but must instead undertake a *de novo* review, as the Supreme Court has explained:

> When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. This approach is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary

[8] TechFreedom warned then that "the prospect of easy unforbearance means that forbearance decisions will be, at best, temporary reprieves." Comments of TechFreedom & International Center for Law and Economics, *In the Matter of Protecting the Open Internet,* Docket No. 14-28 (July 17, 2014).

> cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.

King v. Burwell, 135 S.Ct. 2480, 2488 (2015).

As then-Judge Kavanaugh explained, there is no bright-line test that distinguishes major rules from ordinary rules, but the Supreme Court's cases identify a number of relevant factors, including "the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue." *United States Telecom Ass'n v. FCC*, 855 F. 3d 381, 422 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

By any of these measures, whether BIAS should be subjected to common carrier regulation is a "major question," as compared to other instances where the Major Questions doctrine has been invoked by courts. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (FCC regulation of cigarettes as "drugs" block based on finding "that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion"); *Gonzales v. Oregon*, 546 U.S. 243, 262 (2006) (blocking a rule issued by the Attorney General that physicians could not prescribe controlled substances for assisted suicides; to do so "would be anomalous for Congress to have so painstakingly described the Attorney General's limited authority to deregister a single physician or schedule a single drug, but to have given him, just by implication,

authority to declare an entire class of activity outside the course of professional practice").

Regulation of the Internet is even more significant, affecting virtually all aspects of American life: our relationships, work, culture, politics, and economy. *See* Gov't Pet'r Br. at 1 (quoting *2015 Order* ¶ 1). In attempting to justify Title II reclassification, FCC Chairman Tom Wheeler himself insisted 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). Indeed, the *Verizon* court recognized that "the question of net neutrality implicates serious policy questions, which have engaged lawmakers, regulators, businesses, and other members of the public for years." 740 F.3d at 634. In essence, this means the D.C. Circuit has "already characterized net neutrality regulation as a 'major question,'" *Telecom Ass'n*, 855 F. 3d. at 402 (Brown, J., dissenting), even if the Court as a whole has yet to recognize the full implications of that status — *i.e.*, that it precludes normal *Chevron* review.

At least one other circuit judge has acknowledged both the vast and unique importance of the Internet and has questioned whether it can be regulated through implicit delegation alone, effectively raising the Major Questions issue. *Clearcorrect Operating, LLC v. Int'l Trade Comm'n*, 810 F.3d 1283, 1301 (Fed. Cir. 2015) (O'Malley, J. concurring). "If Congress intended for the [International Trade]

Commission to regulate one of the most important aspects of modern-day life, Congress surely would have said so expressly." *Id.* at 1302. She concluded that "[t]he responsibility lies with Congress to decide how best to address these new developments in technology." *Id.* at 1303.

By the same token, the Supreme Court has declared it was "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion." *MCI Telecomms. Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994). Notwithstanding the FCC's limited grant of forbearance in the *2015 Order*, classifying BIAS as a Title II telecommunications service allows the FCC to rate-regulate BIAS under Section 201(b) ("All charges [and] practices … shall be just and reasonable"), from which section the FCC did *not* forbear.

For all these reasons, as Judge Kavanaugh concluded, the *2015 Order*'s reclassification of broadband was unlawful, as courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Id.* (citing *U.A.R.G.*, 134 S. Ct. at 2444 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160).

C. Returning to the Classification Found Within the FCC's Discretion in *Brand X* Does not Pose a Major Question, so *Chevron* Applies.

In *Brand X*, the Supreme Court recognized that *Chevron* applied to the ordinary question of whether the FCC could choose *not* to impose burdensome common carrier status on a part of broadband networks. *Brand X*, 545 U.S. 967. In returning to this light-touch regulatory regime, and thus lifting the economic burdens and regulatory uncertainty, those "major rules" have now been reversed, and the Major Questions doctrine is no longer implicated, as the vast 'economic and political significance' of the rules no longer exist. To be sure, discretion usually cuts both ways. But there is a monumental difference between an agency deciding that it lacks the power to impose massive and burdensome regulation on an industry sector and that same agency deciding that good public policy dictates that it should ignore clear congressional language and impose an 1880s railroad-type regulatory regime on a sector that had for decades remained relatively unshackled. "Where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is 'inapplicable,'" *United States v. Mead*, 533 U.S. 218, 229 (2001) (quoting *Christensen v. Harris County*, 529 U.S. 576, 596-597 (2000) (Breyer, J., dissenting)).

II. THE 2015 REINTERPRETATION OF "PUBLIC SWITCHED NETWORK" RAISED A SECOND MAJOR QUESTION: COMMON CARRIER REGULATION OF NON-BIAS INTERNET SERVICES.

The *2015 Order* claimed authority to regulate "a single network comprised of all users of public IP addresses and [traditional telephone] numbers." ¶ 396 (JA ____). This claim effectively reversed the distinction first drawn between the public switched network and enhanced services (then called data processing services) by the FCC dating back over 50 years. *RIFO* ¶ 6 (JA ____), citing *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services*, Notice of Inquiry, 7 FCC 2d 11 (1966) (*Computer I*). In *Computer II*, the FCC clarified this distinction further, concluding that an enhanced service is:

> any offering over the telecommunications network which is more than a basic transmission service. In an enhanced service, for example, computer processing applications are used to act on the content, code, protocol, and other aspects of the subscriber's information.

Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Docket No. 20828, Final Decision, 77 FCC 2d 384, 420, ¶ 97 (1980).

Moreover, the *2015 Order's* reinterpretation of "public switched network" blurs the bright-line distinction that the FCC drew between Title II services and "edge" Internet enhanced services in its seminal "Pulver 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). This opens the door for the FCC to impose common carriage regulation on any services that connect to the Internet using public IP addresses. Most obviously, this could include VoIP services that do not interconnect with the telephone network (such as Apple's Facetime or Snapchat), and equivalent voice chat function built into other services, such as real-time, multi-player gaming. But it could also include *any* application using IP addresses to transport data across the Internet, either between users, or between the app and a remote server for processing.

We fully support the FCC's logic for reversing this interpretation as a far superior reading of the statute. Furthermore, we believe that reversal is mandated by the Major Questions doctrine, and we urge the court to say so. If anything, this question is even *more* "major" than the FCC's reclassification of BIAS, because it affects a far broader range of Internet services—and potentially, the entire Internet.

III. THE FCC'S EXPRESS PREEMPTION STATEMENT SHOULD BE UPHELD, REGARDLESS OF ANY PROCEDURAL CHALLENGE TO THE *RIFO*.

Federal agencies' authority "to preempt state laws to the extent … that such action is necessary to achieve its purpose" is derived from the Supremacy Clause of the Constitution, which "encompasses … federal regulations."[9] *City of New York v.*

[9] Many thanks to our Legal Fellow Graham Owens, whose detailed research of why state net neutrality regulations are unconstitutional was invaluable to this

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FCC, 486 U.S. 57, 63 (1988). Indeed, "[i]t has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies." *id*. at 64. "Where this is true, the Court has cautioned that even in the area of pre-emption, if the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *id.* (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961). Agencies' decisions to preempt conflicting state and federal policies deserve "weight," as the agency "has a 'thorough understanding of its own [regulatory framework] … and is uniquely qualified to comprehend the likely impact of state requirements.'" *Minnesota Pub. Util. Comm'n*, 483 F.3d 570, 580 (8th Cir. 2007) (*Minnesota PUC*) (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000)).

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brief. *See* Graham Owens, *Federal Preemption, the Dormant Commerce Clause & State Regulation of Broadband: Why State Attempts to Impose Net Neutrality Obligations on Internet Service Providers Will Likely Fail*, TECHFREEDOM (July 19, 2018, last updated Oct. 18, 2018) (Owens, *Federal Preemption*), https://goo.gl/hQeFWk.

A. Congress Sanctioned the FCC's Preemption Determination.

The 1934 Act "authorized the Commission 'to regulate all aspects of interstate communication by wire or radio,'" 47 U.S.C. §§ 151-52, a phrase which includes the Internet. *See Verizon*, 740 F.3d 623, 629 (the Internet "falls comfortably within the Commission's jurisdiction over 'all interstate and foreign communications by wire or radio'"). *See generally* Owens, *Federal Preemption*. Congress gave the FCC broad authority to "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).

This authority "extends to all regulatory actions 'necessary to ensure the achievement of the Commission's statutory responsibilities.'" *City of New York*, 486 U.S. at 60 (citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984)). Courts, including this one, have long recognized that Congress intended for "all regulatory actions" to include preemption. *See, e.g.*, *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC.*, 525 F.2d 630, 646 (D.C. Cir. 1976) (upholding as "within its broad discretion" the Commission's claim of authority to preempt state certification requirements for mobile radio operators as inconsistent with the free-market, competitive environment the FCC determined was necessary"). Specifically, the *City of New York* Court affirmed the D.C. Circuit's finding that "Congress intended federal regulations like [cable television technical standards] to supersede local law

and that the Commission acted within the broad confines of the pre-emptive authority delegated to it by Congress when it adopted the regulations." 486 U.S. at 63.

B. FCC Did Not Arbitrarily Determine That States Cannot Constitutionally Impose Economic Regulations Upon Inherently Interstate Services Like BIAS.

Regarding preemption, courts "will set aside the decision only when it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Minnesota PUC*, 483 F.3d at 577 (quoting 5 U.S.C. § 706(2)(A)). The FCC determined that the "impossibility exception" to state jurisdiction preempts all state regulation of BIAS because it is impossible or impractical to separate the service's intrastate and interstate components, and any state regulation would interfere with the *RIFO*'s light-touch regulatory policy. *RIFO* ¶ 198 (JA ____). Since "[t]he impossibility exception, if applicable, is dispositive of the issue of whether the FCC has authority to preempt state regulation of [BIAS]," *Minnesota PUC*, 483 F.3d at 578, the preemption issue here is determined in the first instance by whether the FCC arbitrarily determined BIAS is an inherently interstate service that cannot be regulated at the state level without interfering with federal policies, and secondarily by the regulatory silo BIAS is placed into.

In this way, the Government Petitioners' argument is completely backwards. They claim that the Commission can only preempt state attempts to regulate

broadband if it is a Title II telecommunications service. Gov't Pet'rs Br. at 39, 42 n.25. In fact, the reverse is true: the FCC can preempt *any* state regulation of BIAS if it is a Title I information service. *See, e.g.*, *Charter Advanced Servs. (MN), LLC v. Lange*, No. 17-2290, slip op. at 4 (8th Cir. Sept. 7, 2018) (recognizing that "'any state regulation of an information service conflicts with the federal policy of nonregulation,' so that such regulation is preempted by federal law," quoting *Minnesota PUC*, 483 F.3d at 580).

Determining whether state regulation of a Title II common carrier is preempted, in contrast, requires the FCC to undergo an analysis of whether the component of the service being regulated is predominantly interstate or intrastate. If interstate, state regulation is preempted — because the FCC alone regulates interstate communications. If intrastate, the FCC still can preempt under the impossibility exception, even though the Communications Act authorizes states to regulate the predominantly intrastate components of a telecommunications service, and the ordinary principles of conflict preemption still apply. *Minnesota PUC*, 483 F.3d at 578. This is precisely why the *2015 Order*'s preemption section had to be so carefully crafted.

However, not only is Government Petitioners' argument backwards, it fails to recognize the Commission's authority to preempt any state regulation of interstate services, regardless of the service's regulatory classification. *Minnesota PUC*, 483

F.3d at 581 (holding that "the FCC did not arbitrarily or capriciously determine state regulation of VoIP service would interfere with valid federal rules or policies" regardless of whether it was "classified as an information service or a telecommunications services"). Further, even "[i]n the absence of direct guidance from the FCC explicitly classifying … services," courts have "interpreted the Act with reference to prior FCC orders, and concluded that [VoIP] was an information service" thus "requiring preemption of state regulation." *Charter Advanced Servs. (MN)*, No. 17-2290, slip op. at 5.

The *RIFO* properly determined that the intrastate and interstate aspects of BIAS cannot be separated, *RIFO* ¶ 196 (JA ____) ("Because both interstate and intrastate communications can travel over the same Internet connection (and indeed may do so in response to a single query from a consumer), it is impossible or impracticable for ISPs to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance"). Thus, the preemption determination must stand unless the decision is "so implausible that it could not be ascribed … the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The Internet—described by the Supreme Court in 1997 as a "wholly new medium of *worldwide* human communication," *Reno v. ACLU*, 521 U.S. 844, 850 (1997), and defined by the *2015 Order* as "jurisdictionally interstate for regulatory

purposes" *2015 Order* ¶ 431—naturally extends beyond the boundaries of any state. "Typically, states' jurisdictional limits are related to geography; geography, however, is a virtually meaningless construct on the Internet." *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997). Given the high level of deference courts must grant the FCC's determination that it is impractical or impossible to separate the intrastate and interstate components of BIAS, *see Geier*, 529 U.S. at 883, the FCC did not arbitrarily or capriciously determine that the impossibility exception applied. In short, states simply have no basis to argue that a Title I reclassification authorizes them to regulate the intrastate component of BIAS, because, by definition, *there is no such component*.

C. The FCC Did Not Disclaim Regulatory Authority Over BIAS by Classifying It as an Information Service.

State petitioners incorrectly argue that the FCC "deem[ed] itself to lack statutory authority to regulate" BIAS by returning the service to its pre-2015 Title I classification. Gov't Pet'rs Br. at 39. But classifying BIAS as an information service does not waive regulatory authority over such services. The 1996 Act codified the FCC's long-standing distinction between "enhanced" and "basic" services — categories that differ only in the ***extent*** to which each is regulated, not ***whether*** the FCC retains regulatory authority. "[T]he [1934] Act, as amended by the [1996 Act], defines two categories of *regulated* entities relevant to these cases:

telecommunications carriers and information-service providers." *Brand X*, 545 U.S. at 975; *see also Minn. P.U.C.*, 483 F.3d at 580 (upholding the FCC's conclusion that, "[a]lthough the Commission has clear authority to do so, it has rarely sought to regulate information services using its Title I ancillary authority") (quoting *In the Matter of Vonage Holdings Corp.*, 19 FCC Rcd 22404, 22415 ¶ 21, n. 78 (2004)). Thus, in expressly authorizing the FCC to regulate "all aspects of interstate communications," Congress clearly intended the Commission to retain fundamental regulatory authority, regardless of a particular service's classification under Title I or Title II.

Furthermore, nothing in the *RIFO* indicates the FCC intended to disclaim jurisdiction over broadband. The FCC clearly maintains regulatory authority to enforce the transparency requirements first set forth in the 2010 Order through the Commission's long-held "existing informal complaint procedures." *RIFO* ¶¶ 297-300 (JA ____-__). The *RIFO* also expressly recognizes its authority to regulate broadband in other contexts, regardless of the classification of BIAS. *See, e.g., id.* ¶ 205 (JA ____) (discussing disability access).

IV. SECTION 706 CANNOT BE INTERPRETED AS AN INDEPENDENT GRANT OF AUTHORITY.

The *RIFO* correctly concludes that Section 706 of the 1996 Act, 47 U.S.C. § 1302, is "not ... an independent grant of regulatory authority," *RIFO* ¶ 270 (JA ____), as the FCC previously had concluded in the *2010 Order* 25 ¶ 118. The 2010 claim

violates fundamental cannons of statutory construction, and no more deserves *Chevron* deference than do the FCC's 2015 interpretations of Title II. The *Verizon* court, in applying *Chevron* to the FCC's 2010 interpretation of Section 706, failed to consider the Major Questions doctrine and, in any event, had no need to do so to reach its holding.

A. The *Verizon* Decision's Reliance on Section 706 Was *Dicta*.

The D.C. Circuit had no need to expound upon the meaning of Section 706 in order to uphold the *2010 Order's* transparency rule because Verizon did not challenge that rule and, as the dissent noted, the court could have upheld that rule on much clearer statutory grounds. *Verizon*, 740 F.3d at 668, n.9 (Silberman, J. dissenting). Similarly, the Tenth Circuit discussed Section 706 only as an alternative basis for applying Universal Service Fund subsidies to broadband. *In re FCC 11-161*, 753 F.3d 1015, 1054 (10th Cir. 2014).

B. The *Verizon* Decision Failed to Address the True Breadth of the FCC's 2010 Interpretation.

The D.C. Circuit in *Verizon* said that

> we might well hesitate to conclude that Congress intended to grant the Commission substantive authority in section 706(a) if that authority would have no limiting principle. . . . But we are satisfied that the scope of authority granted to the Commission by section 706(a) is not so boundless as to compel the conclusion that Congress could never have intended the provision to set forth anything other than a general statement of policy.

740 F.3d at 639–40. The court concluded: "To be sure, Congress does not . . . 'hide elephants in mouseholes.' But FCC regulation of broadband providers is no elephant, and section 706(a) is no mousehole." *Id*. at 639 (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). The court made three essential errors.

First, the Court seemed to read into the FCC's interpretation a limiting principle not contained in the statute itself: that Section 706 would allow the FCC only to regulate broadband providers. In fact, Section 706 specifies no object for the regulatory powers it references — only that they be used for the purpose of promoting broadband deployment. Thus, the FCC would, if Section 706 *were* an independent grant of authority, presumably be able to use that power to regulate any provider of "interstate and foreign communication by wire and radio," 47 U.S.C. § 152(a). This leaves the FCC free to regulate the entire Internet *and even non-Internet communications companies*.

Second, the court argued that because "[a] specific provision . . . controls one[] of more general application," *2010 Order* ¶¶ 118–19 (quoting *Bloate v. United States*, 559 U.S. 196, 207 (2010)), the FCC may not use Section 706 to do something forbidden by another provision of law. The *Verizon* court ultimately concluded that the *2010 Order* had violated a provision of the Communications Act, *Verizon*, 740 F.3d at 659, but nowhere did the court explain how the Communications Act can

limit the FCC's use of Section 706 since, as the FCC itself argued, *Section 706 is not part of the Communications Act*.[10]

Chevron applies only when "a court reviews an agency's construction of the statute it administers." *Chevron*, 467 U.S. at 842. Further, the agency must have "express congressional authorization . . . to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *Mead*, 533 U.S. at 229. Congress "expressly directed" that the "local-competition provisions" of the 1996 Act be inserted into Title II of the 1934 Act. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377 (1999). But Congress did not refer to Section 706 as an "amendment to, or repeal of, a section or other provision" of the 1934 Act. Nor did Congress specifically direct that Section 706 be inserted into the 1934 Act. Consequently, the FCC's rulemaking authority does not encompass Section 706, and the Commission can claim no *Chevron* deference for any action it takes under Section 706.

Finally, the requirement that whatever the FCC does "must be designed to [encourage broadband deployment]," *Verizon*, 740 F.3d at 640, does little, if anything, to limit the FCC's discretion. Despite claiming to perform "searching analysis," *id*. at 640, the D.C. Circuit simply deferred to the FCC's vague "triple-cushion shot" theory, *id*. at 643–44, by which regulating broadband providers would

[10] *See generally TechFreedom Sixth Circuit Brief, supra* note 6 at 24-34.

increase investment. If that theory can justify regulations as significant as those contained in the *2010 Order,* let alone the *2015 Order,* such a theory could authorize essentially *any* regulation of the Internet, defying the "hard stop" the *Verizon* Court read into Section 706. This Court should therefore revisit the issue and uphold the *RIFO's* conclusion that Section 706 is not an independent grant of authority.

C. The FCC's 2010 Reinterpretation of Section 706 Was Unlawful.

The *RIFO's* rejection of an expansive reading of Section hopefully will end the Commission's decade-long regulatory "voyage of discovery" of ways to increase its regulatory jurisdiction over the Internet. *U.A.R.G.*, 134 S.Ct. at 2446. The *RIFO* affirms that Congress intended Section 706 as a command to the FCC to use the abundant authority granted to it elsewhere in the 1934 Act to promote broadband deployment to all Americans, and nothing more. *RIFO* ¶ 2 (JA ____). As the FCC recognized in 1998:

> After reviewing the language of section 706(a), its legislative history, the broader statutory scheme, and Congress' policy objectives, we agree with numerous commenters that section 706(a) does not constitute an independent grant of forbearance authority ***or of authority to employ other regulating methods.*** Rather, we conclude that ***section 706(a) directs the Commission to use the authority granted in other provisions,*** including the forbearance authority under section 10(a), to encourage the deployment of advanced services.

Memorandum Opinion and Order, And Notice of Proposed Rulemaking, In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 FCC Rcd 24012, ¶ 69 (1998) (emphasis added).

This approach to interpreting Section 706 is buttressed by decades of Congressional action (and inaction) in this area. The 1996 Act was but the most prominent part of a "consistent history of legislation," *cf. MCI Telecommc'ns Corp. v. AT&T Co.*, 512 U.S. 218, 233 (1994), in which Congress withheld broad regulatory authority over Internet services from the FCC—preferring, instead, to craft narrow grants of authority to address specific issues. For instance, Congress passed child-protection laws (the Communications Decency Act of 1996, the Child Online Protection Act of 1998, and the Children's Online Privacy Protection Act of 1998), and prohibited broadband taxes and discriminatory Internet-specific taxes by repeatedly extending the Internet Tax Freedom Act of 1998. Were Section 706 to have granted the FCC broad regulatory authority over all aspects of the Internet, these tightly crafted additions to authority would have been unnecessary.

Congress's overriding goal in the 1996 Act was not onerous regulation (which the FCC's prior reinterpretation of Section 706 enabled) but to "promote competition and *reduce regulation*," 1996 Act at 1, and to preserve the "free market," 47 U.S.C. § 230(b)(2). Congress has not deviated from that goal in any subsequent legislation.

What the D.C. Circuit said about the FCC's 2008 reference to Section 706 as a basis for ancillary jurisdiction is also true of the FCC's 2010 reinterpretation of Section 706: "if accepted[,] . . . virtually free the Commission from its congressional tether." *Comcast Corp. v. FCC*, 600 F.3d 642, 656 (D.C. Cir. 2010). Either way, the FCC would be free to do essentially anything Congress had not specifically forbidden. This court should affirm the *RIFO's* return to a coherent interpretation of the limited scope of Section 706.

V. SANTA CLARA COUNTY'S PUBLIC SAFETY ARGUMENTS APPEAR CONTRIVED FOR LITIGATION PURPOSES.

Santa Clara County's claim that the FCC failed to address public safety concerns, and that this renders the *RIFO* arbitrary and capricious, is centered on an allegation that "a BIAS provider recently throttled the connection of a County Fire emergency response vehicle involved in the response to the largest wildfire in California history and did not cease throttling even when informed that this practice threatened public safety." Gov't Pet'rs Br. at 23. The FCC's response to these claims, FCC Br. at 94-96, is consistent with the detailed analysis of the County's claims we published shortly after the filing of its brief and supporting affidavit, that

this case involved confusion over the terms of a lawful data plan, not illegal throttling.[11]

What *is* clear is that the County's lawyers must have been aware of how the data plan worked. Last December, the County's lawyer filed comments with the FCC opposing the *RIFO*, citing, as an example of vital public safety uses that would be affected by repeal of Title II classification, the exact device at issue here, and prior to the most recent complaint about throttling. *See* Comments of County Counsel of Santa Clara, *In the Matter of Restoring Internet Freedom*, Docket No. 17-108 (Dec. 6, 2017). Thus, the County's lawyers could have avoided service disruption either by (i) ensuring that FPD personnel remembered to specifically invoke the special policy regarding suspension of the speed restriction or (ii) switching to a data plan

[11] Berin Szóka, Medium *False Alarm: Verizon's Fire Department Customer Service Fail Has Nothing to Do with Net Neutrality*, (Aug. 28, 2018), https://goo.gl/j3kTrX. Santa Clara Fire Prevention Department (FPD) personnel may well have been confused about the fact that their data plan offered slower speeds after the first 25 GB. Or, when the speed restriction was triggered again in the summer of 2018, they may simply have forgotten that the speed restriction had been waived only temporarily in December 2017. Clearly, it was a mistake for the FPD to buy such a plan for a critical public safety device instead of a pay-as-you-go plan with no speed restriction. Whether Verizon accurately communicated how these two options worked is a typical question of consumer protection law as policed by the FTC and does not require any special FCC rule. But the only confusion established by the FPD's affidavit concerned, on *both* sides, how Verizon would apply its generous, voluntary policy of suspending the speed restriction upon request during a specific emergency.

without a speed restriction. In short, this example appears contrived for litigation purposes.

CONCLUSION

For the reasons stated herein and in the Respondent's Brief, the Court should uphold the *RIFO*. In doing so, the Court should make clear that the *RIFO*'s reading of the statute is not merely permissible under *Chevron* but *required* under the Major Questions doctrine. Any procedural error the court might find would not justify vacating the *RIFO*, given the uncertainty that would be inflicted upon the Internet ecosystem.

Respectfully submitted,

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October 18, 2018

CERTIFICATE OF COMPLIANCE

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Charles Kennedy

October 18, 2018

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2018, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by 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.

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October 18, 2018