Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Safeguarding and Securing the	)	WC Docket No. 23-320
Open Internet	)	
	)	
RIF Remand Order	)	WC Docket Nos. 17-108,
	)	17-287, 11-42

Reply Comments of TechFreedom

Berin Szóka, James Dunstan & Corbin Barthold

January 17, 2023

Summary

Classifying Basic Internet Access Service (BIAS) as a Title II common carrier service is undoubtedly a major question—a question of great economic and political significance. The Supreme Court has been increasingly consistent in recent years: Congress can delegate such questions for decision by an agency only by saying so clearly. Comments in this proceeding have demonstrated neither (a) that Title II reclassification is *not* a major question nor (b) that Congress clearly empowered the FCC to classify broadband as a Title II service.

Indeed, the Supreme Court has already found the 1996 Telecommunications Act ambiguous as to whether the terms "telecommunications" and "telecommunications service" apply to broadband. This ambiguity means Congress has not provided the clear statement necessary for the FCC to decide so major a question. Neither a textual authority to make classification decisions, nor the FCC's expertise, nor an invocation of policy findings will provide the clear statement required under the major questions doctrine.

Proponents of Title II argue that the major questions doctrine does not apply because *any* classification decision constitutes a major question. This is not how the Supreme Court has applied the doctrine. But if it were true, it would raise even more profound concerns under the nondelegation doctrine.

That Title II classification is inconsistent with the scheme Congress created is apparent both from several provisions of the Telecommunications Act and also from the FCC's discussion of "broad forbearance." On the one hand, the FCC concedes the need to forbear from nearly all aspects of Title II to, in particular, avoid deterring private investment in broadband. Yet on the other, the FCC would deliver only the *appearance* of forbearance, actually leaving in place the core of the heavy-handed statutory framework that the agency

concedes is unworkable for broadband. Title II supporters concede a key contested point: Title II will allow the FCC to impose price controls for broadband.

The Commission's invocation of the recent COVID pandemic will be as unsuccessful as such arguments have been in every other case the Supreme Court has considered. And none of the other non-textual arguments for Title II classification fares any better. They will not change the Court's analysis. Title II supporters simply have not grappled with the reality that broadband providers who wish to provide a non-neutral service can opt-out of the FCC's rules by fully disclosing the curated nature of their offering to consumers. Only on this basis was the FCC's 2015 reclassification of Broadband Internet Access Service (BIAS) upheld despite First Amendment challenge.

Meanwhile, no one has explained why the existing baseline of consumer protection law enforced by the Federal Trade Commission is inadequate. This would require explaining how the FCC might analyze marketing claims about a service to determine whether consumers understand it to be uncurated, and comparing such analysis to consumer protection law. Having failed to make any such comparison, there remains no evidence that Title II reclassification will benefit consumers in general, or public safety in particular. Arguments about the supposed "gatekeeper" power of ISPs do not justify Title II reclassification and would not suffice under a First Amendment challenge. Finally, clarifying the war powers of the President over the Internet raises additional major questions and is inherently dangerous.

Because the proposed rule is doomed to fail under the major questions doctrine, and because the Court may also soon roll back the deference it has previously granted on non-major questions under *Chevron*, we recommend that the Commission desist from any action

in the present proceeding—at least until the resolution of *Loper Bright Enterprises v. Raimondo*.

Table of Contents

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Safeguarding and Securing the Open Internet	)	WC Docket No. 23-320
	)	
	)	
RIF Remand Order	)	WC Docket Nos. 17-108, 17-287, 11-42

Comments of TechFreedom

Pursuant to Section 1.415 and 1.419 of the Commission's rules,[1] TechFreedom hereby files these reply comments in response to the Notice of Proposed Rulemaking ("Notice") released by the Commission on September 28, 2023.[2]

I. Introduction

We begin where the courts will begin in assessing the legality of the Commission's decision to reclassify BIAS as subject to Title II common carrier regulation: What has Congress said in this matter? The last comprehensive legislation related to communications was the 1996 Telecommunications Act.[3] There, Congress made major changes to the regulatory approach to the nation's communications network, including the relatively new network known as the Internet. Following decades of litigation aimed at dismantling the Bell

[1] 47 C.F.R. §§ 1.415 & 1.419.

[2] Safeguarding and Securing the Open Internet, WC Docket No. 23-320, 88 Fed. Reg. 75048 (proposed Nov. 3, 2023) (hereinafter NPRM). The NPRM set the reply comment date as January 17, 2024. These comments were timely filed.

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 *et seq.*).

Telephone monopoly and interjecting competition into the marketplace, the 1996 Telecommunications Act, at its core, was Congress's *deregulatory* approach to communications within the United States. And what did Congress specifically say about the Internet?

> It is the policy of the United States—(1) to promote the continued development of the Internet and other interactive computer services and other interactive media; (2) 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.[4]

The 1996 Act went into effect on Feb. 8, 1996. That was nearly 28 years ago, or over 10,200 days ago. For all but 1,095 days (from June 12, 2015, to June 11, 2018, the days when the 2015 Open Internet Order was in effect), BIAS has been treated as a Title I information service, not a highly regulated Title II common carrier telecommunications service. That's 89.3% of the period since passage of the 1996 Telecommunication Act.[5]

The 1996 Telecommunications Act is the last comprehensive statement Congress has made.[6] Note that Congress didn't caveat the findings above with language indicating that the FCC was free to disregard these policies if it determined that "fettering" the Internet with

---

[4] 47 U.S.C. § 230(b)(1) & (2).

[5] As noted *infra* at note 36 and associated text, the argument that the FCC's classification of Digital Subscriber Line (DSL) as a telecommunications service under Title II narrows that time gap is false, because the DSL service in question was *wholesale* DSL, specifically unbundled from retail BIAS. *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Notice of Proposed Rulemaking, FCC 02-42, released Feb. 15, 2002, ¶ 26 ("We also seek comment on our prior conclusion that an entity is providing a "telecommunications service" to "the extent that such entity provides only broadband transmission on a stand-alone basis, *without a broadband Internet access service.*" (emphasis added) (citing Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24029, ¶ 35 (1998)).

[6] While other statutes have been codified in Title 47 of the United States Code, the vast majority of these provisions were contained in appropriation bills that have lacked clear statutory findings or the type of legislative history—hearings, staff reports and floor debates—necessary to determine congressional intent. The 1996 Telecommunications Act thus stands as the last time Congress undertook a comprehensive review of communications law in the United States.

regulation would be a good thing. Nothing has changed in terms of the statutory framework that Congress established, notwithstanding the decades-long battle over the right approach to policing net neutrality.

Much has changed elsewhere, though. The Supreme Court has made clear, and soon may be making even clearer,[7] that administrative agencies don't have a roving commission to identify major policy problems—such as important political issues that Congress has hotly debated, but failed to pass legislation on—and solve them absent clear statutory authority.[8] And this is especially true where the basis of these new regulations was a claim that the COVID pandemic required regulatory action to protect the American public. The Court's increasing clarity on the limits of agency discretion has not stopped the FCC from invoking COVID (27 times in the NPRM) as the basis for the need to apply Title II common carrier regulation on BIAS, while spending just a few short paragraphs discussing whether this fundamental change in the regulatory approach to BIAS was supported by proper statutory authority or consistent with recent Supreme Court decisions.[9] As discussed below, Title II supporters attempt to wish away the current legal landscape by either arguing that the courts have already decided that BIAS classification is not a major question, or by arguing that because, at one point, BIAS was subject to Title II regulation (from 2015 to 2018), the question is somehow moot. It most certainly is not.

---

[7] *See* Loper Bright Enterp. v. Raimondo, 143 S. Ct. 2429 (2023) (mem.) (granting certiorari on the question of whether to continue to apply the *Chevron* Doctrine to appeals of administrative decisions). *See also* Alex Guillen & Josh Gerstein, *Conservative Justices Seem Poised to Weaken Power of Federal Agencies*, POLITICO (Jan. 17, 2024), https://www.politico.com/news/2024/01/17/conservative-justices-seem-poised-to-weaken-power-of-federal-agencies-00136112.

[8] *See* West Virginia v. Envtl. Prot. Agency, 142 S. Ct. 2587 (2022).

[9] NPRM ¶¶ 81-84.

II. Title II Reclassification Is a Major Question That Only Congress Can Decide

The Supreme Court has decided nine Major Questions doctrine cases since 2000; in eight, the government lost.[10] No one who has watched the Court closely can seriously expect the FCC to prevail in the inevitable litigation over Title II classification.

A. The COVID Pandemic Does Not Provide a Justification for Title II Regulation of BIAS

The NPRM cites the COVID pandemic as the primary justification for reimposing Title II regulation on BIAS providers:

> In the time since the RIF Order, propelled by the COVID-19 pandemic, BIAS has become even more essential to consumers for work, health, education, community, and everyday life. In light of this reality, we believe that looking anew at the classification of BIAS is necessary and timely given the critical importance of ensuring the Commission's authority to fulfill policy objectives and responsibilities to protect this vital service.[11]

The Supreme Court has recently considered, and rejected, such arguments in several cases. "It is indisputable that the public has a strong interest in combating the spread of the COVID-19 Delta variant," noted the Court in *Alabama Assn. of Realtors v. Department of Health and*

---

[10] *See* KATE R. BOWERS, CONG. RESEARCH SERV., IF12077, THE MAJOR QUESTIONS DOCTRINE (Nov. 2, 2022), https://crsreports.congress.gov/product/pdf/IF/IF12077 (citing Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001); Gonzalez v. Oregon, 546 U.S. 243 (2006); Util. Air Regul. Grp. v. Envtl. Prot. Agency, 573 U.S. 302 (2014); King v. Burwell, 576 U.S. 473 (2015); Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485 (2021) (per curiam); Nat'l Fed'n of Ind. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 142 S. Ct. 661 (2022) (per curiam); West Virginia v. Envtl. Prot. Agency, 142 S. Ct. 2587 (2022); Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497 (2007)).

[11] NPRM ¶ 16. *See also* NPRM ¶ 1 ("While Internet access has long been important to daily life, the COVID-19 pandemic and the rapid shift of work, education, and health care online demonstrated how essential broadband Internet connections are for consumers' participation in our society and economy."); ¶ 3 ("Our proposals to safeguard and secure the open Internet build on several other actions the Commission has taken since the onset of the COVID-19 pandemic to ensure that the public has access to broadband.").

Human Servs.[12] "But our system does not permit agencies to act unlawfully even in pursuit of desirable ends. It is up to Congress, not the CDC, to decide whether the public interest merits further action here."[13]

Likewise, in *Biden v. Nebraska*, the Court recently struck down the administration's cancellation of student loan debt, rejecting arguments based on the COVID pandemic:

> In a final bid to elide the statutory text, the Secretary [of Education] appeals to congressional purpose. "The whole point of" the HEROES Act, the Government contends, "is to ensure that in the face of a national emergency that is causing financial harm to borrowers, the Secretary can do something." And that "something" was left deliberately vague because Congress intended "to grant substantial discretion to the Secretary to respond to unforeseen emergencies." So the unprecedented nature of the Secretary's debt cancellation plan only "reflects the pandemic's unparalleled scope."[14]

But, responded Chief Justice Roberts:

> The question here is not whether something should be done; it is who has the authority to do it. Our recent decision in *West Virginia v. EPA* involved similar concerns over the exercise of administrative power. That case involved the EPA's claim that the Clean Air Act authorized it to impose a nationwide cap on carbon dioxide emissions. Given "the 'history and the breadth of the authority that [the agency] ha[d] asserted,' and the 'economic and political significance' of that assertion," we found that there was "'reason to hesitate before concluding that Congress' meant to confer such authority."[15]

---

[12] Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam) (striking down the Center for Disease Control's moratorium on rental housing evictions).

[13] *Id*. (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 582, 585–586 (1952) (concluding that even the Government's belief that its action "was necessary to avert a national catastrophe" could not overcome a lack of congressional authorization). *See also id.* ("Even if the text were ambiguous, the sheer scope of the CDC's claimed authority under §361(a) would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of "vast 'economic and political significance.'" Utility Air Regulatory Group v. EPA, 573 U. S. 302, 324 (2014) (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U. S. 120, 160 (2000)). That is exactly the kind of power that the CDC claims here.").

[14] Biden v. Nebraska, 143 S. Ct. 2355, 2372 (2023) (omitting citations to the government's brief).

[15] *Id.* at 2372.

The *Biden* Court rejected the dissent's inference that Congress, enacting the HEROES Act to address certain aspects of the pandemic, must also have intended to grant sweeping new powers to administrative agencies to combat the pandemic:

> The sharp debates generated by the Secretary's extraordinary program stand in stark contrast to the unanimity with which Congress passed the HEROES Act. The dissent asks us to "[i]magine asking the enacting Congress: Can the Secretary use his powers to give borrowers more relief when an emergency has inflicted greater harm?" The dissent "can't believe" the answer would be no. But imagine instead asking the enacting Congress a more pertinent question: "Can the Secretary use his powers to abolish $430 billion in student loans, completely canceling loan balances for 20 million borrowers, as a pandemic winds down to its end?" We can't believe the answer would be yes. Congress did not unanimously pass the HEROES Act with such power in mind. "A decision of such magnitude and consequence" on a matter of "'earnest and profound debate across the country'" must "res[t] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body." *West Virginia*, 597 U. S., at ___, ___ (slip op., at 28, 31) (quoting *Gonzales v. Oregon*, 546 U. S. 243, 267–268 (2006)).[16]

"Student loans are," the dissent insisted, "in the Secretary [of Education]'s wheelhouse."[17] But "in light of the sweeping and unprecedented impact of the Secretary's loan forgiveness program," declared the majority, "it would seem more accurate to describe the program as being in the 'wheelhouse' of the House and Senate Committees on Appropriations."[18]

Courts will review the FCC's decision in this proceeding with a similarly skeptical analysis. When the justification for regulation is the COVID pandemic, courts have been consistent, regardless of whether the subject matter was student loans,[19] moratoriums on

---

[16] *Id.* at 2373 (internal citations omitted).

[17] *Id.* at 2398 (Kagan, J., dissenting).

[18] *Id.* at 2374.

[19] *Id*.

evictions,[20] vaccine mandates for federal contractors,[21] or vaccine mandates for national guard members.[22]

---

[20] Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485, 2489 (2021).

[21] Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 142 S. Ct. 661, 664 (2022) (internal citations omitted):

> Applicants are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate. Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided. The Secretary has ordered 84 million Americans to either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense. This is no "everyday exercise of federal power." It is instead a significant encroachment into the lives—and health—of a vast number of employees. "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." There can be little doubt that OSHA's mandate qualifies as an exercise of such authority.
>
> The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not. The Act empowers the Secretary to set workplace safety standards, not broad public health measures. Confirming the point, the Act's provisions typically speak to hazards that employees face at work. And no provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise.

See also Georgia v. President of United States, 46 F.4th 1283, 1295-96 (11th Cir. 2022) (internal citations omitted):

> Our analysis is also informed by a well-established principle of statutory interpretation: we "expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." That doctrine has been applied in "all corners of the administrative state," and this case presents no exception. As the Supreme Court has emphasized, requiring widespread Covid-19 vaccination is "no everyday exercise of federal power." Including a Covid-19 vaccination requirement in every contract and solicitation, across broad procurement categories, requires "clear congressional authorization."

[22] Abbott v. Biden, 70 F.4th 817, 821 (5th Cir. 2023) ("In this case, President Biden imposed and then repealed a mandate requiring State militiamen to take the COVID-19 vaccine. And now that the President has rescinded the vaccine requirement, he wants to retain the power to punish militia members who refused to get the shots while the mandate was in effect—all without calling them into national service. We reject the President's assertion of power because it would undermine one of the most important compromises in the Constitution."). The only instance in which courts have upheld COVID-inspired new regulations have related to vaccine mandates specifically for health care workers. In *Biden v. Missouri*, the Court held:

Thus, even though communications technology is within the FCC's "wheelhouse," the Commission cannot use the COVID pandemic to justify sweeping Title II regulations. Make no mistake: the powers the FCC seeks in this rulemaking go far beyond the 2015 Order. Title II proponents complain that, under Title I, the FCC lacked the power to compel BIAS providers to provide free service to members of the public economically disadvantaged by the pandemic.[23] But just like the eviction moratorium in *Biden v. Nebraska*, courts cannot accept COVID as justification for sweeping new powers; they must instead thoroughly examine what Congress did in response to COVID, and whether the agency's implementation of COVID relief measures squares with congressional action.

> we agree with the Government that the Secretary's rule falls within the authorities that Congress has conferred upon him.
>
> Congress has authorized the Secretary to impose conditions on the receipt of Medicaid and Medicare funds that "the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services." COVID-19 is a highly contagious, dangerous, and-especially for Medicare and Medicaid patients-deadly disease. The Secretary of Health and Human Services determined that a COVID-19 vaccine mandate will substantially reduce the likelihood that healthcare workers will contract the virus and transmit it to their patients. He accordingly concluded that a vaccine mandate is "necessary to promote and protect patient health and safety" in the face of the ongoing pandemic.

Biden v. Missouri, No. 21A240, at 3-4 (Jan. 13, 2022) (internal citations omitted). But the direct safety of medical workers and the patients they interact with is a far cry from claiming that the need for people to have access to broadband for work or education warrants imposition of vast regulatory burdens on providers of broadband services.

[23] Comments of Public Knowledge at 8 ("For example, the Commission could not prevent ISPs from terminating subscriptions when newly unemployed subscribers could not pay their monthly bills and was therefore forced to rely on a voluntary pledge . . . Other ISPs took advantage of the circumstances to raise fees and impose new caps at a time when customer use of broadband dramatically increased to compensate for the lockdown—effectively price gouging during the crisis.").

Here, Congress has spoken clearly: The ways the FCC may address the negative impacts of COVID are to provide federal funding to expand broadband deployment,[24] and to provide individual subscriber subsidies under the Affordable Connectivity Program.[25] Congress manifestly did not tell the FCC to reclassify BIAS under Title II so that the Commission could force ISPs to provide free service, or otherwise regulate BIAS rates and service offerings. If Congress had meant to command reclassification, it could have done so in any number of laws enacted during the COVID pandemic. It did not, and the FCC is not free to claim that the impacts of COVID can be used as an excuse for usurping broad new powers.

B. The Major Questions Doctrine Applies Despite Reclassification and Equally on Remand

Public Knowledge claims that the major questions doctrine "is inapplicable where the Commission grants a Petition for Reconsideration and restores the *status quo ante*."[26] This makes a general claim about how the doctrine works and a specific claim about how it applies here. Both claims are mistaken.

Public Knowledge asserts that major questions can arise only "when an agency claims a new power [or] reverses a long-standing interpretation of statute . . . ."[27] But this confuses a sufficient condition with a necessary one. When an agency "claim[s] to discover in a long-extant statute an unheralded power," there is good "reason to hesitate before concluding that

---

[24] Infrastructure Investment and Jobs Act, § 60102, Pub. L. No. 117-58, 135 Stat. 429 (2021 Infrastructure Act).

[25] 2021 Infrastructure Act, § 60502(a), 47 U.S.C. § 1752(a)(7).

[26] Comments of Public Knowledge at 12, .

[27] *Id.*

Congress meant to confer on [the agency] the authority it claims."[28] But the reason for hesitating is that the "discovery" of a new power is one sign that the agency is attempting to make a decision of great "economic and political significance" without clear congressional authority to do so.[29] In *West Virginia v. EPA*, the Supreme Court *first* laid out a major questions test, the North Star of which is the principle that "extraordinary grants of regulatory authority"—that is, grants of power to decide matters of great economic and political significance—are usually given only through "clear congressional authorization."[30] Meeting that test is what's *necessary* to trigger major questions analysis. Only *then* did the Court go on to say that the "discover[y]" of a new power was—along with some other factors—*sufficient*, in *that instance*, to invalidate the law.[31] Other factors, in other instances, could do the trick equally well—and have done so.[32]

Public Knowledge's specific claim—that Title II classification is not novel—is also mistaken. The FCC applied Title II to BIAS for the first time in its 2015 Open Internet Order.[33] True, the FCC did apply Title II to some broadband transport-only services prior to 2005,[34] but this was "*wholesale* DSL transmission, which incumbent telephone companies

---

[28] West Virginia v. Envtl. Prot. Agency, 142 S. Ct. 2587, 2608 (2022).

[29] *Id.* at 2605.

[30] *Id.* at 2609.

[31] *Id.* at 2610 ("*Given these circumstances* . . ." (emphasis added)).

[32] *See, e.g.*, King v. Burwell, 576 U.S. 473, 485-86 (2015) (applying major questions *solely* because of the presence of a matter of deep "economic and political significance").

[33] Protecting and Promoting the Open Internet, Report and Order, GN Docket No. 14-28, FCC 15-24 (Feb. 26, 2015), https://docs.fcc.gov/public/attachments/FCC-15-24A1.pdf [hereinafter 2015 Order]. *See also* TechFreedom at 15-16, https://techfreedom.org/wp-content/uploads/2023/12/TechFreedom-Title-II-Comments-12.14.23.pdf.

[34] 2015 Order ¶ 39 ("wireline DSL was regulated as a common-carrier service until 2005").

historically offered to ISPs such as AOL or Earthlink as a telecommunications service unbundled from Internet access."[35] This is akin to what we now call the "middle mile" for the Internet—and the issue there revolved around what wholesale carriers charge retail ISPs for that component of the transmission of data.[36] Neither BIAS, a category created by the 2010 Open Internet Order to cover all "mass-market retail" broadband service provided by whatever technology,[37] nor any of the technology-specific services subsumed within that umbrella, had been subject to Title II prior to the 2015 Order. Title I, not Title II, is the relevant status quo ante. Under Title I, the baseline of consumer protection law operates as it does for nearly every other industry. (Indeed, for almost 90 percent of the time since Congress enacted the 1996 Telecommunications Act, BIAS has been a Title I service.[38]) Any change from Title I classification necessitates a major-questions analysis.

More importantly, the Supreme Court never had the opportunity to review Title II reclassification; the 2018 RIF Order reversed the 2015 Open Internet Order, thus mooting petitions for certiorari then pending before the Supreme Court.[39] The only "status quo ante"

---

[35] Comments of NCTA at 37.

[36] *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Notice of Proposed Rulemaking, FCC 02-42, ¶ 26 (Feb. 15, 2002) ("We also seek comment on our prior conclusion that an entity is providing a 'telecommunications service' to the extent that such entity provides only broadband transmission on a stand-alone basis, without a broadband Internet access service." (citing Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24029, ¶ 35 (1998)).

[37] Preserving the Open Internet & Broadband Industry Practices, GN Docket No. 09-191 & WC Docket No. 07-52, FCC 10-201, ¶ 44 (Dec. 21, 2010), https://docs.fcc.gov/public/attachments/FCC-10-201A1.pdf [hereinafter 2010 Order].

[38] *See supra* note 5 and associated text.

[39] *See* U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381, 417-18 (D.C. Cir. 2017); Restoring Internet Freedom, WC Docket No. 17-108, FCC 17-166, ¶ 88 (Jan. 4, 2018), https://docs.fcc.gov/public/attachments/FCC-17-166A1.pdf (hereinafter 2018 Order).

that matters, in other words, is that before the 2015 Order. The *Mozilla* court did not consider the major question of Title II reclassification because, as in *Brand X*, the court was reviewing a decision to classify BIAS under Title I, not Title II.[40]

Public Knowledge seems to argue that Title II reclassification can't now be a major question if a court didn't declare it so in the past—essentially some form of *res judicata* argument. But if there were any *res judicata* argument to be raised here, PK would have done so directly. Instead, the group retreats to pointing out that, when *U.S. Telecom* came its way, the "Court declined to either grant certiorari or vacate the decision."[41] This non-action is a meaningless fact, given that the "denial of certiorari . . . import[s] no expression of opinion on the merits."[42]

C. The Major Questions Doctrine Applies Where the Agency Would Impose Substantial New Regulations

Some commenters also argue that the major-questions analysis is the same whether the agency enacts new regulations or takes actions that reduce the regulatory burden on industry.[43] This manifestly is not the case, especially where the statutory underpinnings established by Congress favored a lessened regulatory approach, which is true of the Telecommunications Act of 1996. As much as Title II proponents may dislike this inherent asymmetry, it certainly exists, both in common sense and the law. Then-Judge Kavanaugh explained why:

---

[40] *See infra* § I.C.

[41] Comments of Public Knowledge at 31.

[42] Sunal v. Large, 332 U.S. 174, 181 (1947).

[43] Comments of Tejas N. Narechania at 5-6; Comments of Public Knowledge at 32.

> One might wonder whether it was a major step for the FCC to impose even light-touch "information services" regulation on Internet service providers. The answer is no . . . . The FCC's light-touch regulation did not entail common-carrier regulation and was not some major new regulatory step of vast economic and political significance. The rule at issue in *Brand X* therefore was an ordinary rule, not a major rule. As a result, the *Chevron* doctrine applied, not the major rules doctrine.[44]

Kavanaugh's analysis applies equally to the analysis in *Mozilla*, where the D.C. Circuit affirmed the 2018 Restoring Internet Freedom Order's (RIF Order or RIFO) deregulatory return of BIAS to Title I classification and thus did not consider the major question of Title II reclassification.[45] Thus, in the past 28 years, the present proceeding represents only the second time that significant regulatory burdens have been proposed for BIAS providers. The first major-questions challenge was rendered moot by the RIF Order. Ironically, the best the FCC can hope for is that—as happened in 2018—the next FCC will reclassify BIAS as a Title I service before the Supreme Court can take the case, so the agency can avoid a full challenge to its authority under the major questions doctrine.

D. *Brand X* Does Not Support the NPRM and *Loper Bright* May Doom the NPRM's Approach

Contrary to what the NPRM's supporters argue, *Brand X* cuts against a Title II classification for broadband. The decision shows that, when it comes to the Internet, the term "telecommunications service" is ambiguous[46]—and thus that no "clear statement" exists, in the Communications Act, empowering the FCC to resolve the major question of whether broadband should be regulated as a telecommunications service. Those who support the

---

[44] U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

[45] *See* Mozilla Corp. v. Fed. Commc'ns Comm'n, 940 F.3d 1 (D.C. Cir. 2019).

[46] National Cable Telecomms. Assn. v. Brand X Internet S, 545 U.S. 967, 992 (2005).

NPRM, meanwhile, argue that *Brand X* cuts in favor of a Title II classification, because *Brand X* confirms that that same ambiguity allows empowers the FCC to make Title I/Title II classifications for Internet services. The Supreme Court is now considering, in *Loper Bright v. Raimondo*, whether to overturn *Chevron*.[47] Before turning to how the NPRM's supporters misread *Brand X*, let's take a look at the asymmetry of this posture, for the two sides contesting the NPRM.

Regardless of the outcome in *Loper Bright*, *Brand X* will continue to show that no clear statement permits the FCC to classify broadband as a telecommunications service. Today, if a court finds that a statute is unclear, *Chevron* tells that court what to do next: defer to the agency's interpretation of the statute (if reasonable). Without *Chevron,* the answer is: keep going until you reach the best interpretation of the statute you can find. In *Brand X*, the Court found the statute unclear, and then headed for the *Chevron* offramp, deferring to the FCC's decision to classify cable modem service under Title I. Even if *Chevron* dies, it will *remain the case* that *Brand X* found the statute unclear—meaning that there is no clear statement supporting the resolution of the major question that exists here.

Conversely, overturning *Chevron* (and with it, *Brand X*'s application of *Chevron*) would be a disaster for the NPRM's supporters. "By *Brand X*'s own telling, . . . a judicial declaration of [an ambiguous] law's meaning in a case or controversy before it is not 'authoritative,' but is instead subject to revision by a politically accountable branch of government."[48] This

---

[47] *See* Amy Howe, *Supreme Court to hear major case on power of federal agencies*, SCOTUSBLOG (Jan. 16, 2024), https://www.scotusblog.com/2024/01/supreme-court-to-hear-major-case-on-power-of-federal-agencies/.

[48] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1150 (10th Cir. 2016) (Gorsuch, J., concurring) (quoting *Brand X*, 545 U.S. at 983).

because, under the *Chevron* doctrine,[49] a court should "infer from any statutory ambiguity Congress's 'intent' to 'delegate' its 'legislative authority' to the executive to make 'reasonable' policy choices."[50] If the *Chevron* doctrine goes down,[51] therefore, it calls into question both *Brand X* narrowly and the entire scheme of agencies enjoying the discretion to toggle between possible approaches to their statutes more generally. "*Can* Congress really delegate its legislative authority—its power to write new rules of general applicability—to executive agencies?"[52] *Chevron*'s "whole point and purpose seems to be exactly that—to delegate legislative power to the executive branch."[53] And so, if *Chevron* is overturned, the validity of such delegations—especially those as broad as the FCC's Title I/Title II discretion—is open to grave doubt.

Indeed, given that proponents of the NPRM have announced their heavy reliance on *Brand X* (and thus *Chevron*), the FCC should pause these proceedings. Not until the Supreme Court resolves *Loper Bright* will we know whether the agency's purported power to classify is built on sand. Even a mixed outcome of that case may require the Commission to revise its proposal and seek additional comment.

---

[49] Our brief in *Loper Bright* distinguishes between *Chevron*, Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), and the doctrine lower courts have built upon it. Brief of Tech-Freedom as Amicus Curiae Supporting Petitioners, Loper Bright Enterprises v. Raimondo, No. 22-451, https://www.supremecourt.gov/DocketPDF/22/22-451/272431/20230720091857380_tsac%20TechFreedom%20No.%2022-451.pdf. It is, technically, the doctrine we think the Court should, and will, overturn, not the case. Here, for simplicity, we refer to the doctrine as "*Chevron*" without making this distinction.

[50] *Gutierrez-Brizuela* at 1153 (Gorsuch, J., concurring) (quoting *Chevron,* 467 U.S. at 843–44).

[51] *Id.*

[52] *Id.*

[53] *Id.* at 1154.

E. The *Brand X* Court Simply Did Not Assess Title II Classification under *Chevron* Step Zero

Some commenters question Kavanaugh's analysis, noting that *Brand X* did not "even cite *MCI Telecomms v. AT&T* or otherwise invoke the major questions doctrine."[54] But a court determines whether a major question is present as part of what is now known as *Chevron* "Step Zero:" "the initial inquiry into whether the *Chevron* framework applies at all."[55] Only if *no* major question is present does a court move on to "Step One" (whether the statute is ambiguous) and "Step Two" (whether the agency's interpretation is "permissible"). *Brand X* is, fundamentally, not a Step Zero case—no one contested the point. Rather, *Brand X* turned on ambiguity at Step One and deference at Step Two.

It is hardly surprising, therefore, that the *Brand X* majority did not discuss *MCI*—or the case decided in between the two decisions, *Brown & Williamson* (2000), which struck down a rule promulgated by the Food & Drug Administration aimed at curbing tobacco use because the rule was based on an "extremely strained understanding of 'safety' as it is used throughout the [Food and Drug] Act" and implied the power to ban tobacco entirely.[56] In both *MCI* and *Brown & Williamson*, the Court concluded, "that Congress could not have

---

[54] Comments of Tejas N. Narechania at 5 (citing MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994)).

[55] Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 190-91 (2006), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?httpsredir=1&article=12203&context=journal_articles.

[56] Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000); *see also* Daniel J. Gifford, *The Emerging Outlines of A Revised* Chevron *Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 818 (2007), https://www.administrativelawreview.org/wp-content/uploads/2014/04/The-Emerging-Outlines-of-a-Revised-Chevron-Doctrine-Congressional-Intent-Judicial-Judgment-and-Administrative-Autonomy.pdf ("in both Brown & Williamson and MCI, the Court took the extensive regulatory change that would have resulted from the agency's interpretation of a succinct statutory term as effectively raising a presumption against that interpretation").

intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[57] *MCI* and *Brown & Williamson* are *Chevron* Step Zero cases, and *Brand X* is not.

In *MCI*, Congress had already decided that telephony would be a common carrier service.[58] The case turned not on the question of classification, but rather the FCC's ability to suspend application of core common carrier regulations to carriers already subject to Title II. The FCC tried to suspend the tariffing provision of Section 203 of the Communications Act, an "essential characteristic" of common carriage regulation.[59] Section 203(b)(2) authorized the FCC to "modify any requirement made by or under" that section,[60] but the Court held that this could not include a "radical or fundamental change in the Act's tariff filing requirement"[61] because the modification power did not include the power to make fundamental changes.[62] While *MCI*'s analysis of the lack of ambiguity in the word "modify" appeared, "[a]t first glance," to be "a straightforward [*Chevron*] Step One question," the Court's discussion of the "the enormous importance to the statutory scheme of the tariff-filing provision," shows that this was really "a kind of Step Zero inquiry . . . , one that raised

---

[57] *Id.* at 160.

[58] Such was clear from the Communications Act's definition of "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy." Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 153). There was no doubt whether Congress had addressed this question: telephony was, and remains, the quintessential Title II telecommunications service.

[59] *MCI Telecomms. Corp.*, 512 U.S. at 230.

[60] 47 U.S.C. § 203(b)(2).

[61] *MCI Telecomms. Corp.*, 512 U.S. at 219.

[62] *Id.* at 228 ("'Modify,' in our view, connotes moderate change . . . . We have not the slightest doubt that is the meaning the statute intended.").

a question whether Congress intended to delegate this 'enormous' question to a regulatory agency."[63]

The Telecommunications Act of 1996 made one "decision of [great] economic and political significance" even as it punted on another. Congress gave the FCC precisely the explicit forbearance power found lacking in *MCI*.[64] At last, the FCC had clear authority to suspend even "essential" common carriage obligations. But Congress also added a layer of significant complexity not found in the original Communications Act: a thinly sketched out distinction between telecommunications services (Title II common carriers) and information services (Title I non-common carriers). It was simply not clear which category broadband would fall into. By 2002, the FCC had subjected the transmission component of Digital Subscriber Line service, provided over the telephone networks, to Title II, like all other aspects of telephony,[65] but the FCC had never classified cable modem service—or, indeed, any other cable service—under Title II. In 2002, the FCC classified cable modem service, for the first time, as a Title I information service.[66] In *Brand X*, the Court upheld this classification under *Chevron* Step One and Step Two, because it found the

---

[63] SUNSTEIN, *supra* note 55, at 237 (2006).

[64] 47 U.S.C. § 160.

[65] *See* Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri, CC Docket No. 01-194, Memorandum Opinion and Order, 16 FCC Rcd 20719, 20759-60, ¶¶ 81-82 (2001) (SBC MO/AR 271 Order).

[66] Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) https://docs.fcc.gov/public/attachments/FCC-02-77A1.pdf.

Telecommunications Act's new definitions of "telecommunications" and "telecommunications service" ambiguous with respect to broadband.[67]

It's not hard to see why the *Brand X* majority did not discuss either of these earlier cases. In *MCI*, Congress had clearly decided the question at issue: operators of telephone networks would be common carriers; as such, they would have to file tariffs with the FCC; and it was not for the FCC to decide otherwise. In *Brown & Williamson*, the Court found that Congress had made essentially the opposite decision in a very different context: "Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area."[68] *Brown & Williamson* turned on Step Zero analysis more clearly than *MCI* had:

> our inquiry into whether Congress has directly spoken to the precise question at issue [*i.e.*, Step One] is shaped, at least in some measure, by the nature of the question presented. Deference under *Chevron* to an agency's construction of a statute that it administers 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 cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation [*i.e.*, Step Zero].[69]

---

[67] Nat'l Cable & Telecomms. Assn. v. Brand X Internet Serv., 545 U.S. 967, 970 (2005). Justice Antonin Scalia's dissenting opinion made a passing reference to *MCI* in its opening paragraph, accusing the majority of rewriting the statute, but said nothing more about the case, and nothing at all about *Brown & Williamson*. 545 U.S. at 1005 ("The [FCC] . . . has once again attempted to concoct 'a whole new regime of regulation (or of free-market competition)' under the guise of statutory construction. MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 234 (1994). Actually, in these cases, it might be more accurate to say the Commission has attempted to establish a whole new regime of *non*-regulation, which will make for more or less free-market competition, depending upon whose experts are believed. The important fact, however, is that the Commission has chosen to achieve this through an implausible reading of the statute, and has thus exceeded the authority given it by Congress.") (Scalia, J., dissenting).

[68] Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-60 (2000).

[69] *Id.* (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 844 (1984)).

Title II classification is much like the FDA's claim of authority over tobacco: both would give the agency vast powers. Just as the FDA's interpretation would allow it to regulate every aspect of tobacco use, even to ban tobacco products completely[70] (had the Court not struck it down), Title II classification would allow the FCC to regulate every aspect of broadband service.[71]

The situation in *Brand* X, by contrast, was completely different from *Brown & Williamson*. There, no one urged the Court to "hesitate" before assuming that the "delegation" at issue existed and was proper. "No one," *Brand X* states, "questions that the order is within the Commission's jurisdiction."[72] In other words, no one raised the Step Zero question. The Court easily concluded the statute was ambiguous (Step One) and moved on to the question of deference (Step Two).[73]

In *U.S. Telecom*, Judges Srinivasan and Tatel claimed that in *Brand X*, "the Supreme Court definitively" declared that, even if Title II classification were a "major rule," the "agency clearly has authority under the Act to make that [classification] choice."[74] But as should by

---

[70] *Id.* at 123.

[71] *See* Comments of TechFreedom at 10 (citing then-Commissioner Ajit Pai's dissent from the 2015 Order: "[I]f the FCC decides that it does not like how broadband is being priced, Internet service providers may soon face admonishments, citations, notices of violation, notices of apparent liability, monetary forfeitures and refunds, cease and desist orders, revocations, and even referrals for criminal prosecution." Dissenting Statement of Commissioner Ajit Pai at 52-57, Protecting and Promoting the Open Internet, GN Docket No. 14-28, https://docs.fcc.gov/public/attachments/FCC-15-24A5.pdf).

[72] *Brand X*, 545 U.S. at 981.

[73] 545 U.S. at 989 ("We have held that where a statute's plain terms admit of two or more reasonable ordinary usages, the Commission's choice of one of them is entitled to deference. . . . The term 'offe[r]' as used in the definition of telecommunications service, § 153(46), is ambiguous in this way.").

[74] U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381, 385 (D.C. Cir. 2017) (quoting *Brand X* , 545 U.S. at 989).

now be clear, *Brand X* says no such thing. It simply did not assess Title II classification under *Chevron* Step Zero.

F. Whether Title I Classification Is a Major Question Is Not the Issue Here

Public Knowledge dismisses arguments that Title II classification is a question of "significant economic or political importance" as a "red herring," arguing that "*any* classification of broadband"—be it as a Title II service, a Title I service, or otherwise—triggers the major questions doctrine.[75] But whether *keeping* broadband in Title I is a major question is, quite simply, not the issue here. If Public Knowledge wants to argue that moving BIAS to Title I is a major question, it must take that up the next time (if any) the FCC tries to move broadband to Title I.

Title I regulation of BIAS requires no "forbearance" or other bureaucratic contortions to make the statute work as written. Only a Title II classification requires the FCC to, as the 2015 Order conceded, effectively rewrite the Communications Act through extensive and sweeping forbearance of nearly all provisions of Title II.[76] "What we have," with a Title II classification, "in reality, is a fundamental revision of the statute."[77] A *speculative* claim that a Title I classification triggers major questions is irrelevant to, and simply distracts from, the *obvious* point—and the only point that matters *here and now*: that a Title II classification *is* a major question.

---

[75] Comments of Public Knowledge at 32.

[76] *See* Comments of TechFreedom at 22-23.

[77] MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994).

G. If All Classifications Decide Major Questions, the Nondelegation Doctrine Applies

Even if the NPRM's supporters succeed in establishing that all forms of broadband classification entail major questions, they may not get the policy result they want. "If the [nondelegation rule's] intelligible principle standard means anything, it must mean that a total absence of guidance is impermissible under the Constitution."[78] Accordingly, a federal court of appeals recently found that the nondelegation rule is violated when an agency has "exclusive authority and absolute discretion to decide whether to bring . . . enforcement actions within the agency instead of in an Article III court."[79] Yet the constitutional defect here—if the NPRM's supporters are to be believed—would be even worse: the FCC would have "exclusive authority and absolute discretion" to classify broadband even though its decision, *either way*, qualifies as a *major question*.

In saying "It's all major questions," in short, the NPRM's supporters are jumping from the major questions frying pan into the nondelegation fire. Consider *Clinton v. City of New York*, in which the Supreme Court struck down the Line Item Veto Act.[80] Under the Act, the president could "cancel" certain tax or spending provisions, in newly passed statutes, if he decided that doing so would (a) reduce the federal budget deficit, (b) not impair any essential government function, and (c) not harm the national interest. The Court struck the Act down, finding that it violated the Constitution's presentment clause. In other words, the Act

---

[78] Jarkesy v. Sec. Exch. Comm'n, 34 F.4th 446, 462 (5th Cir. 2022), cert. granted, No. 22-859 (U.S., June 30, 2023).

[79] *Id.*

[80] 524 U.S. 417 (1998).

effectively gave the president power to repeal pieces of law—a power not granted to the president under the Constitution.

Clinton, however, is "a non-delegation case masquerading as a bicameralism and presentment case."[81] Indeed, the "Act was ripe for invalidation under the nondelegation doctrine."[82] If the case had been decided by today's Court, that's almost certainly the route the Court would have taken.[83] Now, notice the similarity between the Line Item Veto Act and the Telecommunications Act's classification authority. Based on his or its "own policy reasons," as modestly confined by the Line Item Veto Act or the Telecommunications Act, the president or the FCC could, in "practical effect," change the text of a statute.[84] If the FCC could plausibly argue that, in exercising the classification authority, it is merely "fill[ing] up the details"[85] of the statutory scheme, the Commission could defuse the accusation that what it's

---

[81] Steven Calabresi, *Separation of Powers and the Rehnquist Court: The Centrality of* Clinton v. City of New York, 99 NW. U. L. REV. 77, 85 (2004).

[82] Steven F. Huefner, *The Supreme Court's Avoidance of the Nondelegation Doctrine in* Clinton v. City of New York: *More than 'A Dime's Worth of Difference*,*'* 49 CATH. U. L. REV. 337, 339 (2000).

[83] Gundy v. United States, 139 S. Ct. 116 (2019), is the Supreme Court's most recent statement on how much authority Congress may delegate to executive agencies. *Gundy* upholds an "intelligible principle" test, under which Congress's power to delegate authority is broad indeed. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989). Only eight justices heard the case, however, and only four justices endorsed the regnant standard. In a brief concurrence, Justice Alito expressed his "support" for "reconsider[ing] th[at] approach," if and when a majority of the Court wishes to do so. 139 S. Ct. at 2131 (concurring opinion). Justice Kavanaugh, who did not participate in *Gundy*, has expressed just such a willingness. Paul v. United States, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting denial of certiorari). And Justice Ginsburg, one of the four justices to stand by the "intelligible principle" standard in *Gundy*, has been replaced by Justice Barrett, who has called the "intelligible principle" standard "notoriously lax." Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 318 (2014). Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, urged the Court to end its "intelligible principle misadventure." *See Gundy*, 139 S. Ct. at 2141.

[84] *Clinton*, 524 U.S. at 438, 445. Interestingly, both the Line Item Veto Act and the Telecommunications Act were enacted in 1996. The Congress that created the FCC's classification scheme proceeded unaware of the teachings of *Clinton*, handed down two years later.

[85] Gundy v. United States, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

doing is *making* law. But the NPRM's supporters have now come out and said that, *whenever* the FCC classifies broadband, *in any direction*, it is addressing not details but major questions. And that makes this case *exactly* like the president unilaterally making big taxing and spending decisions in *Clinton*.

H. A Further Nondelegation Problem

Public Knowledge tries to hack the major questions test by claiming that the test disappears when an agency must act, one way or the other.[86] But this is an arbitrary distinction—at best.[87] Actually, in its effort to find something, anything, that distinguishes this situation from other major questions cases, Public Knowledge unwittingly makes this situation (from its perspective) worse. Congress can't delegate a major question to an agency via a vague statutory provision by broadening the question even further. It would reveal Congress failing in its responsibility to legislate over not a *narrower*, but a *broader*, sweep of the policy landscape. Indeed, as discussed above, it quite possibly turns the case from a major questions case into a nondelegation case.[88]

---

[86] Comments of Public Knowledge at 37-38.

[87] Similarly, in *Biden v. Nebraska*, the government attempted to distinguish the case at hand by concocting an arbitrary distinction between cases involving "the power to regulate" and cases involving "the provision of government benefits." 143 S. Ct. 2355, 2374. That distinction was equally artificial—and equally unavailing. *Id*. at 2375 ("This Court has never drawn the line the Secretary suggests . . . That the statute at issue involve[s] government benefits . . . makes no difference here.").

[88] Public Knowledge's discussion of Massachusetts v. Envtl. Prot. Agency, 549 U.S. 498 (2007), changes nothing. That decision is silent about major questions and shouldn't be invoked for a point the Court never passed upon. To the extent it bears on major questions *sub silentio*, it is of minimal use because it predates the Supreme Court's decisions substantiating and clarifying how major questions works.

III. No Clear Statement Authorizes the FCC to Impose Title II on BIAS

To decide major questions, an agency "must point to 'clear congressional authorization' for the power it claims."[89] Public Knowledge identifies nothing in the text of the Communications Act that could qualify as a clear statement granting the FCC the authority to place BIAS under Title II. Instead, the group cites inconclusive extra-statutory sources. It cites decades-old decisions that (a) involve obsolete technology and a much smaller Internet market[90] and (b) contain no major questions analysis.[91] But it cites nothing in the Communications Act itself.

When it comes to the statute, Public Knowledge argues only that the FCC clearly has the power to classify *in general*. That's true enough, but neither of Public Knowledge's attempts take it from there (clear power to classify) to where it needs to go (clear power to take the *major* step of classifying BIAS as a Title II service).

A. Title II Classification of BIAS Is Different from Other Classification Decisions

Public Knowledge claims that the NPRM's opponents "have not explained why broadband is somehow different from any other exercise of classification performed by the Commission."[92] But as we said in our initial comments,[93] classifying BIAS under Title II is different because (a) it's a hugely significant economic and political decision and (b) there are several indications that the FCC was not authorized to make that decision.

---

[89] West Virginia v. Envtl. Prot. Agency, 142 S. Ct. at 2609 (Gorsuch & Alito, JJ., concurring).

[90] Comments of Public Knowledge at 42-43.

[91] *Id*.

[92] *Id.* at 38-39.

[93] Comments of TechFreedom § III, https://www.fcc.gov/ecfs/document/121524939586/1.

B. Title II Classification Would Deprive the FTC of Authority to Enforce Its Baseline Consumer Protection Authority

As our comments explain in detail, Title II classification and Title I classification are not two co-equal options available to the FCC. Title II classification is inconsistent not only with other provisions of the Telecommunications Act[94] but also with the Federal Trade Commission Act's allocation of authority: where the FDA shares jurisdiction with the FTC over food and drugs,[95] the FCC has exclusive jurisdiction over common carriers because the FTC Act excludes them from its otherwise-general jurisdiction.[96] Thus, while classification of tobacco as a drug meant merely adding heavy-handed regulation on top of the general baseline of consumer protection law enforced by the Federal Trade Commission, Title II classification of BIAS would mean removing the baseline of generally applicable consumer protection law now enforced by the FTC—and making the FCC the sole regulator of all aspects of the BIAS market. This is yet another sign that Congress did not "clearly" authorize the resolution of this major question. By contrast, Title I classification simply means allowing the FTC to enforce its baseline law as it does for nearly every other industry.

C. Other Provisions of the 1996 Telecommunications Act Must Be Ignored in Order to Reclassify BIAS as a Title II Service

Start with the text of the 1996 Telecommunications Act. Section 230(f)(2) defines an "interactive computer service" (ICS) as "any *information service,* system, or any information

---

[94] *See infra* §III.C.

[95] *See, e.g.*, Fed. Trade Comm'n, Memorandum of Understanding Between the Federal Trade Commission and the Food and Drug Administration, P914502 (May 1971), https://www.ftc.gov/legal-library/browse/cooperation-agreements/memorandum-understanding-between-federal-trade-commission-food-drug-administration.

[96] 15 U.S.C. § 45(a)(2).

service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet."[97] Similarly, Congress specified in Section 223(e)(6) that "[n]othing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers."[98] Two years later, in the Child Online Protection Act (COPA) of 1998, Congress repeated the point: "'For purposes of this subsection . . . The term 'Internet access service' … does not include telecommunications services."[99]

It is not necessary that these provisions "*settle* the regulatory status of broadband Internet access services," as the 2015 Order put it,[100] or as the U.S. Telecom court found unlikely.[101] These provisions are exactly the kind of interpretive cues the Court has looked to in major questions analysis.[102] All three would be strange things to say if Congress envisioned that the FCC had the power to classify some forms of Internet access service as telecommunications service—and stranger still if the FCC had the power to make effectively *all* forms of Internet access a telecommunications service.[103]

---

[97] 47 U.S.C. § 230(f)(2) (emphasis added).

[98] 47 U.S.C. § 223(e)(6).

[99] 47 U.S.C. § 231(e)(4).

[100] 2015 Order ¶ 386 (emphasis added).

[101] U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 825 F.3d 674, 702 (D.C. Cir. 2016).

[102] *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022) (using textual signals such as the statute's use of the word "occupational," and its discussion of hazards employees face at work, to conclude that the statute "empowers the Secretary to set *workplace* safety standards, not broad public health measures").

[103] The FCC's definition of BIAS anticipates that curated broadband services would not be included147, but the FCC and supporters of Title II also appear to believe that no broadband service could actually opt-out of BIAS status.

It is unclear whether, after Title II reclassification, BIAS would continue to qualify as an interactive computer service. Clearly, it would no longer be an "information service."[104] Would it qualify as an "access software provider" that "transmit[s] … content?"[105]

Or might it be a "system"—as distinct from an "interactive computer service"—that "provides access to the Internet?" The courts have not, heretofore, had to answer such difficult questions—nor can we here. Here, it suffices to note that that a full major questions analysis would consider whether Congress is likely to have delegated such questions to the FCC to decide—specifically, whether BIAS providers should be deprived of the immunity afforded to all other Internet services as "interactive computer services" under Section 230 or, by the same token, whether Section 223's prohibition on sending child sexual abuse material (CSAM) (referred to as "child pornography" in the statute) over interactive computer services should apply to sharing of such material over BIAS. It is "unlikely that Congress would" authorize the FCC to "settle" such questions "in such an oblique and indirect manner."[106]

Finally, consider what Section 230 does: it explicitly protects ICS providers from liability for restricting access to content.[107] This immunity goes even beyond the discretion

---

[104] RIF Order ¶ 53 ("The approach we adopt today best implements the Commission's long-standing view that Congress intended the definitions of 'telecommunications service' and 'information service' to be mutually exclusive ways to classify a given service.").

[105] 47 U.S.C. § 230(f)(4)(c).

[106] U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 825 F.3d 674, 702 (D.C. Cir. 2016) (quoting 2015 Order ¶ 386).

[107] 47 U.S.C. § (c)(2)(A). *See also* U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 825 F.3d 674, 702-03 (D.C. Cir. 2016).

common carriers have always enjoyed to refuse to provide service,[108] including not only specific categories of content ("obscene, lewd, lascivious, filthy, excessively violent, harassing") but also whatever the ICS provider considers "otherwise objectionable, whether or not such material is constitutionally protected."[109] If Congress had intended broadband providers be subject to rules barring blocking, throttling and other restrictions on access to content, it would not have included Internet access in the definition of an "interactive computer service"[110] that would be protected from liability for content moderation.

D. The Fact That Most of Title II Must Be Suspended Indicates That Congress Never Intended BIAS to Be a Title II Service

Besides the text of the Communications Act, the fact that the 2015 Order conceded the need to forbear so "extensively" from the provisions of Title II—to craft what the 2015 Order called a "Title II tailored for the 21st century"[111]—"should have," as the Court said in

---

[108] "An innkeeper or common carrier has always been allowed to exclude drunks, criminals and diseased persons[.]" Lombard v. Louisiana, 373 U.S. 267, 280 (1963) (Douglas, J., concurring) (citing BRUCE WYMAN, PUBLIC SERVICE CORPORATIONS (1911), available at https://books.google.fr/books/about/The_Special_Law_Governing_Public_Service.html). "It is not the mere intoxication that disables the person from requiring service; it is the fact that he may be obnoxious to the others." WYMAN § 632. "Telegraph companies likewise need not accept obscene, blasphemous, profane or indecent messages." *Id*. § 633. In short, common carriers enjoyed broad discretion to "restrain" and "prevent" "profaneness, indecency, [and] other breaches of decorum in speech or behavior." *Id*. § 644.

[109] 47 U.S.C. § 230(c)(2)(A). Section 230(c)(1) has also been interpreted to broadly protect content moderation as a core aspect of acting as a "publisher." Zeran v. Am. Online, 129 F.3d 327, 330 (4th Cir. 1997).

[110] Indeed, the FCC's Open Internet Orders have always excluded services that make clear that they restrict access to some content from the definition of BIAS. *See* 2015 Order ¶ 555.

[111] 2015 Order ¶ 38.

UARG, "alerted [the agency] that it had taken a wrong interpretive turn."[112] TechFreedom made this argument as intervenors in *U.S. Telecom*. Judges Srinivasan and Tatel responded:

> This case is nothing like *Utility Air*. Far from rewriting clear statutory language, the Commission followed an express statutory mandate requiring it to "forbear from applying any regulation or any provision" of the Communications Act if certain criteria are met. Nothing in the Clean Air Act gave EPA any comparable authority. Accordingly, the Commission's extensive forbearance does not suggest that the Order is unreasonable.[113]

But the fact that FCC had been given explicit authority for such forbearance after *MCI*, is irrelevant. Yes, Congress gave the FCC authority to set aside common carrier obligations. But note what the 2015 Order did: it chose one of two possible interpretations (classifying broadband under Title II), acknowledged that this would be unworkable, absent unprecedented "tailoring" of nearly all provisions of Title II, and—for all its grand talk of "broad forbearance"—delivered no meaningful relief at all. As our comments explained,[114] the promise of such forbearance—in the 2015 Order and again in the NPRM—has always been an illusion: the FCC didn't, and wouldn't, forbear from Sections 201(b) and Section 202(a), which are "the heart of [Title II]," as the 2015 Order recognized.[115] These two provisions grant the FCC all the powers it needs. As Commissioner Mike O'Rielly said of the 2015 Order's talk of "broad forbearance": "It is fauxbearance: all of Title II applied through the backdoor of sections 201 and 202 of the Act."[116] In *UARG*, the need for "tailoring" was a problem because Congress had not yet authorized such tailoring. Here, the need for

---

[112] Util. Air Regulatory Grp. v. Envtl. Prot. Agency, 573 U.S. 302, 328 (2014).

[113] U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 825 F.3d 674, 706 (D.C. Cir. 2016)

[114] Comments of TechFreedom at 22.

[115] 2015 Order ¶ 441.

[116] 2015 Order at 396-98.

"tailoring" is a problem for a different reason: the FCC has clear authority to do it, but the forbearance the FCC delivers does not actually solve the problem the FCC identifies: the mismatch between the nature of broadband and the structure of Title II. The result in either case "should have alerted [the agency] that it had taken a wrong interpretive turn."

E. "Clear" Authority to Make Classification Decisions Is Not Enough to Decide the Major Question of How to Govern BIAS

Public Knowledge argues that a "clear" authority to make classifications is, by itself, enough to authorize placing BIAS under Title II even if that is considered a major question.[117] But this approach runs headlong into the Supreme Court's recent major questions jurisprudence. Indeed, a *key tenet* of major questions is that Congress can't toss to agencies the responsibility to legislate—to resolve big, important issues—simply by writing a few broad, generic commands. Just because Congress grants the power to "waive or modify" the rules for student loans doesn't mean the agency can forgive many billions of dollars in student debt.[118] Just because Congress grants the power to impose the "best system of emission reduction" doesn't mean the agency can "restructure[e] the Nation's overall mix of electricity generation."[119] And just because Congress grants the power to classify

---

[117] Comments of Public Knowledge at 45. On a similar note, Public Knowledge writes that "The FCC . . . classif[ied] various services as either information services or telecommunications services throughout the first decade of the 21st Century." *Id*. at 41. To the extent this is meant to serve as a freestanding argument, it is a straightforward instance of the fallacy of composition. Observing that *some* attempts at classification are valid does not establish that *all* attempts at classification are valid.

[118] Biden v. Nebraska, 143 S. Ct. 2355, 2368 (2023) ("We hold today that the Act allows the Secretary to 'waive or modify' existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act, not to rewrite that statute from the ground up.").

[119] West Virginia v. Envtl. Prot. Agency 142 S. Ct. 2587, 2607 (2022).

communications services doesn't mean the agency can engage in a *de facto* takeover of Internet infrastructure.

F. Neither Statutory Purpose nor Agency Expertise Will Substitute for Clear Authority to Decide a Major Question

Unable to cite an *actual*, governing, clear statement, Public Knowledge falls back on statutory purpose and the FCC's comparative expertise.[120] The Communications Act was "intentionally designed," PK claims, "to confer 'substantial discretion'" on the FCC.[121] But these arguments, too, have been squarely addressed in the recent major questions decisions. "In a final bid to elide the statutory text," the Court observed in *Nebraska v. Biden*, "the Secretary [of Education] appeals to congressional purpose."[122] In the government's telling, the statute at issue was "left deliberately vague because Congress intended 'to grant substantial discretion to the Secretary to respond to unforeseen emergencies.'"[123] But that, the Court responded, won't do. Congress can't shunt policy tasks to an agency because they're hard or pressing. To the contrary, "the basic and consequential tradeoffs inherent in" the resolution of hard or pressing issues "are ones that Congress" likely "intend[s] for itself."[124] The major questions doctrine applied in *Nebraska*, therefore, just as it applies here.

---

[120] Comments of Public Knowledge at 39.

[121] *Id*. (quoting National Ass'n of Regulatory Util. Comm'rs v. Fed. Commc'ns Comm'n, 525 F.2d 630, 638 n.37 (D.C. Cir. 1976) ("NARUC I")).

[122] Biden v. Nebraska, 143 S. Ct. at 2372.

[123] *Id*. (quoting the government's reply brief).

[124] *Id*. at 2361.

G. Reduced Ambiguity Regarding the Application of "Telecommunications" to BIAS Would Not Suffice under the Major Questions Doctrine.

The *Brand X* Court decided that the Communications Act is ambiguous with respect to the proper classification of broadband.[125] Public Knowledge claims that "what may have been ambiguous twenty years ago is now much clearer."[126] Somehow, because of changes in the perception of consumers, today, "the language of the statute is unambiguous that BIAS is a telecommunications service."[127] PK does not, however, explain which gradual changes in degree made the statute *un*ambiguous, or how they did so. The argument appears to be merely that the statute is *less* ambiguous than it was in 2005. Yet the major questions doctrine requires more than reduced ambiguity or greater reasonableness; it requires *clarity* as to Congress's intent. Other supporters of Title II are more clear in what they are arguing. The Electronic Frontier Foundation, for example, argues that "the Commission's current classification of broadband Internet access as a Title II telecommunications service is the better classification" in light of how "how the consumer perceives the service being offered."[128] "Better" speaks to *Chevron* Step Two (the permissibility of an agency's interpretation) but it concedes that the statutory provision is ambiguous, and therefore ineligible for *Chevron* deference if the major questions doctrine applies.

---

[125] Nat'l Cable Telecomms. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 992 (2005).

[126] Comments of Public Knowledge at 28.

[127] *Id.*

[128] Comments of Electronic Frontier Foundation at 17, https://www.fcc.gov/ecfs/document/1215074196426/1 (quoting *Brand X*, 545 U.S. 967, 976).

IV. Title II Reclassification Has Not Been Justified by Any of the Various Arguments Made for It

Supporters of Title II make a wide variety of arguments that reclassification is necessary to serve the public interest. None hold water. We address a few here.

A. No Commenter Has Shown That Title II Would Be More Effective Than the Consumer Protection Law It Would Displace Given the Definitional Limitations of the Term "BIAS"

Public Knowledge claims that, under a Title I classification, "neither state consumer protection laws [n]or FTC enforcement impacted ISP behavior. Only because some states enacted their own net neutrality laws did ISPs stop their blocking and degradation of service. As this demonstrates, neither consumer protection laws [n]or antitrust laws provide any deterrence to ISPs."[129] But it is impossible to show that Title II would be more effective without analyzing whether it would actually apply to the scenarios PK worries about—scenarios that have been vanishingly rare.

As our comments explain, before wielding its Title II powers, the FCC would first have to show that a service actually met the definition of BIAS; this would require analyzing whether the service was presented to consumers as an uncurated service—under much the same analysis of marketing claims that the FTC would be required to conduct in any deception case.[130] If anything, the FCC's approach would be *less* protective of consumers—yet Title II classification would entirely displace the FTC's authority over BIAS.[131] A single

---

[129] Comments of Public Knowledge at 18.

[130] Comments of TechFreedom at 31-38.

[131] 15 U.S.C. § 45(a)(2) ("The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except . . . common carriers subject to the . . . from using unfair methods of competition in or affecting commerce").

non-neutral practice, if adequately disclosed, would make a service non-BIAS. Title II wouldn't apply—even to other non-neutral aspects of that service that were not adequately disclosed. If clearly disclosed, blocking, throttling, and discrimination would place a service outside the definition of BIAS and thus beyond the reach of the FCC's rules—yet the FTC might still be able to police such practices as unfair practices or methods of competition. One could imagine two parallel regimes existing, with the FCC policing uncurated BIAS and the FTC policing curated broadband services; in this scenario, apart from some undisclosed non-neutral practices, the FTC would do the real work of policing non-neutrality among services that properly disclose it. No one favors such a system, and it is obvious that the FCC does not intend to propose it.

Because the NPRM relies heavily on the inadequacy of consumer protection law as a basis for Title II reclassification, the Commission must develop a record comparing how the FCC could use Title II with how the FTC, in particular, would apply consumer protection law to the same scenarios. Otherwise, the Commission's decision-making will be arbitrary and capricious. No such record exists—unsurprisingly, given that the NPRM scarcely poses such questions.

For example, Public Knowledge complains that the use of the word "unlimited" to describe plans that offer unlimited data but are subject to speed restrictions after a certain point is confusing, but does not specify what, exactly, the Commission should do about it even under Title II.[132] The 2015 Order offered no clear answer, saying only that the Commission would assess whether such policies were "reasonable network manage-

[132] Comments of Public Knowledge at 18-19.

ment."[133] The FCC has long said it follows the FTC's 1983 Deception Policy Statement (DPS) in policing marketing claims by common carriers.[134] What, exactly, would be different under Title II? No commenter has explained this. The same question goes for the other category of potentially deceptive marketing claims PK cites: those involving "5G service."[135]

B. The 2015 Rules Avoided First Amendment Challenge Because They Applied Only to Uncurated BIAS

Public Knowledge worries that "political motivations might well prompt ISPs to manipulate content based on political or economic motivations."[136] Yet if an ISP actually engaged in blocking, throttling, or discrimination, its broadband service would not have been considered BIAS and would not have been covered by the 2015 Order's rules. Nor would it be covered by the proposed rules against blocking, throttling, or discrimination[137]—provided that the ISP had made "sufficiently clear to potential customers that it provides a

---

[133] 2015 Order ¶ 34 ("With mobile broadband service now subject to the same rules as fixed broadband service, the Order expressly recognizes that evaluation of network management practices will take into account the additional challenges involved in the management of mobile networks, including the dynamic conditions under which they operate. It also recognizes the specific network management needs of other technologies, such as unlicensed Wi-Fi networks.").

[134] "The FCC has found that unfair and deceptive marketing practices by common carriers constitute unjust and unreasonable practices under section 201(b). Principles of truth-in-advertising law developed by the FTC under Section 5 of the FTC Act provide helpful guidance to carriers regarding how to comply with section 201(b) of the Communications Act in this context." Fed. Commc'ns Comm'n, Joint FCC/FTC Policy Statement For the Advertising of Dial-Around And Other Long-Distance Services To Consumers, FCC 00-72 (Mar. 1, 2000), https://docs.fcc.gov/public/attachments/FCC-00-72A1.pdf.

[135] Comments of Public Knowledge at 19.

[136] *Id.* at 6.

[137] 2015 Order ¶ 549 (BIAS providers "represent that their services allow Internet end users to access all or substantially all content on the Internet, without alteration, blocking, or editorial intervention.").

filtered service involving the ISP's exercise of 'editorial intervention.'"[138] Public Knowledge declares that "no BIAS provider should have the power to control the information or services available to their subscribers."[139] But if an ISP wielded such power openly and transparently, it simply would not be subject to the rules, as Judges Tatel and Srinivasan explained in their *U.S. Telecom* opinion.[140] Otherwise, the rule would have triggered the First Amendment.[141]

Public Knowledge tries to sidestep this discussion by arguing that the Supreme Court has held that "a common carrier may not use contract law or any form of 'stipulation' to evade its common carriage duties."[142] But the "duty" at issue, in that 1913 case, was to provide service with the "utmost care," and what the carrier could not use "any sort of stipulation" to "secure" was "immunity from liability for their negligence."[143] Moreover, because the carrier at issue was a railroad, and the carriage at issue was that of physical goods, not speech, the Court did not have to consider the First Amendment—as a court would have to do here. This case tells us literally nothing about whether the First Amendment would permit the FCC to impose common carriage status upon an ISP that made clear that it no longer wished to provide uncurated service.

---

[138] U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381, 389 (D.C. Cir. 2017).

[139] Comments of Public Knowledge at 7.

[140] *U.S. Telecom*, 855 F.3d at 388-93.

[141] *Id.* at 392 ("When a broadband provider holds itself out as giving customers neutral, indiscriminate access to web content of their own choosing, the First Amendment poses no obstacle to holding the provider to its representation.").

[142] Comments of Public Knowledge at 68 (citing Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Bros. Constr. Co., 228 U.S. 177, 184-85 (1913)).

[143] 228 U.S. at 184-85.

"Common carriage is not an optional regulatory category," claims Public Knowledge, "but a legal status that stems from the functionality of the carriage service offered, and how it is offered to consumers."[144] This is only partially correct. A service that was clearly disclosed as curated would not qualify as common carriage under the FCC's longstanding two-part *NARUC* test.[145] First, such a service would not offer pure transmission, defined as the ability of customers to "transmit intelligence of their own design and choosing";[146] the ISP would do some of the "choosing." Second, such a provider must either (a) operate under a "legal compulsion . . . to serve indifferently"—which the 2015 Order purported *not* to do, emphasizing its narrow definition of BIAS to exclude curated service[147]—or (b) voluntarily makes "a conscious decision to offer [that] service to all takers on a common carrier basis,"[148] precisely what a transparently curated service would *not* do.

Referring to YourT1WiFi,[149] Public Knowledge declares: "The Commission should resist arguments that this is 'just one case' or 'just a small ISP.' The entire point of *ex ante* rules is to protect the smooth functioning of the open internet, not to create an environment where ISPs develop their own separate practices and fragmenting the internet."[150] But the definition of BIAS, by excluding curated services—as Srinivasan and Tatel found necessary

---

[144] Comments of Public Knowledge at 68.

[145] *See NARUC I*, 525 F.2d 630 (D.C. Cir. 1976); National Ass'n of Regulatory Util. Comm'rs v. Fed. Commc'ns Comm'n, 533 F.2d 601 (D.C. Cir. 1976) ("NARUC II").

[146] *NARUC II*, 533 F.2d at 609.

[147] 2015 Order ¶ 556 ("Providers remain free to engage in the full panoply of protected speech afforded to any other speaker. They are free to offer 'edited' services . . . .").

[148] Southwestern Bell Tel. Co. v. Fed. Commc'ns Comm'n, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

[149] *See* Comments of TechFreedom at 28, 35.

[150] Comments of Public Knowledge at 7.

to avoid triggering the First Amendment[151]—*requires* precisely this: allowing ISPs to "develop their own separate practices."

If, as Public Knowledge claims, "The *RIFO*'s and *RIFO Remand Order*'s insistence that ISPs will not block websites or services in the absence of *ex ante* rules is disproven by an example of just such attempted blocking,"[152] surely the same would go for the first ISP that decided to opt-out of Title II and the Open Internet rules by changing the nature of its offering: one "black swan" would disprove the general claim.[153] So Public Knowledge simply insists such an opt-out is impossible: "The only way for a BIAS provider to evade its Open Internet obligations, would be to exit the consumer broadband market."[154] But if this were so, what were Srinivasan and Tatel talking about? They clearly understood that an ISP could avoid the Open Internet rules by exiting the *BIAS* market—a subset of the "consumer broadband market"—and instead offering a curated broadband service. YourT1WiFi could have been just such an ISP, had it properly informed consumers of its switch to curated service.

Again, we are skeptical that that curated broadband service will ever be a significant component of the broadband market—unless the FCC is so draconian in the application of

---

[151] *See U.S. Telecom*, *supra* note 141.

[152] Comments of Public Knowledge at 7.

[153] "The classic example [of the principle of falsifiability] is disproving the statement 'all swans are white' by producing a single black swan." *Id*.

[154] *Id*. at 69.

its rules that it forces ISPs to choose to offer a curated service that their customers do not want. But the FCC has provided no hard evidence either way of what it intends or expects.[155]

C. ISPs' Supposed "Gatekeeper" Power Would Be Inadequate under First Amendment Analysis

The NPRM claims ISPs "are in a position to act as a 'gatekeeper' between end users' access to edge providers' applications, services, and devices and reciprocally for edge providers' access to end users."[156] Public Knowledge claims ISPs exercise "unique gatekeeper leverage" by controlling "the 'last mile' in between users and the internet."[157] But as then-Judge Kavanaugh noted, the 2015 Order did not even try to show that any BIAS provider had market power in a relevant geographic market, as he declared would be necessary to satisfy the First Amendment.[158] That remains the case today. This is why it is so essential that the FCC's definition of BIAS excluded curated services in the 2015 Order and continues to do so today: only by doing so was the FCC able to avoid having to establish market power, as would be required if the First Amendment were implicated.

If anything, Kavanaugh understated the problem: what allowed must-carry mandates to survive First Amendment review in *Turner*—specifically, to qualify for intermediate,

---

[155] *See, e.g.*, Brief for Intervenors for Rehearing en banc at 74, U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381 (D.C. Cir. 2017) (Nos. 15-1063), https://cdn.arstechnica.net/wp-content/uploads/2016/04/net-neutrality-petition.pdf ("Nor does the Order offer any basis to find that every provider would voluntarily hold itself out indifferently, if the consequence of doing so were the application of Title II.").

[156] NPRM ¶ 123.

[157] Comments of Public Knowledge at 82.

[158] *U.S. Telecom*, 855 F.3d at 418 (Kavanaugh, J., dissenting).

rather than strict, scrutiny—was that cable providers exercised not merely market power but absolute control:

> When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.[159]

This is a far greater degree of control than what Public Knowledge calls "gatekeeper" control vis-à-vis Internet access.[160] In *Turner*, cable operators controlled the "essential pathway" to provide multichannel video service to homes. Today, that is true of few, if any, ISPs. As of 2021, nearly 97% of the U.S. population had access to at least three Internet providers.[161] According to the FCC, 64% of American households have access to at least two providers of at least 100/20 Mbps service.[162] A lighter touch Title I regulatory approach has diminished, if not completely obliterated, any gatekeeper power in the provision of broadband access.

---

[159] Turner Broad. System, Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 656 (1994).

[160] Recall that when *Turner* was decided, cable television effectively was the only multi-channel video programming distribution system available. Direct Broadcast Satellite (DBS) service was just getting started, with DirecTV entering the market in 1994 and DISH network not until 1996. In the 1992 Cable Act, "Congress concluded that, due to 'local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area,' the overwhelming majority of cable operators exercise a monopoly over cable service. 'The result,' Congress determined, 'is undue market power for the cable operator as compared to that of consumers and video programmers.'" *Turner Broadcasting*, 512 U.S. at 633.

[161] *See How many Americans have broadband internet access?*, USAFACTS, https://usafacts.org/articles/how-many-americans-have-broadband-internet-access/ (last visited Jan. 17, 2024).

[162] 2022 Communications Marketplace Report, FCC 22-103, released December 30, 2022, at ¶ 16, https://docs.fcc.gov/public/attachments/FCC-22-103A1.pdf. *See also* ACA CONNECTS, BROADBAND COMPETITION IS THRIVING ACROSS AMERICA, (June 23, 2022), https://acaconnects.org/index.php?checkfileaccess=/wp-content/uploads/2022/06/220623-Broadband-Competition-Is-

D. No Commenter Has Explained Why Reclassification Is Essential for Public Safety

Santa Clara County continues to insist on the "fundamental relevance of the 2018 episode in which Verizon Wireless severely throttled County Fire's access to mobile broadband Internet."[163] In fact, this episode is irrelevant because the data plan at issue was marketed to government users, and therefore not covered by the FCC's 2015 rules, nor by the definition of BIAS contained in the NPRM.[164]

The NPRM and some commenters claim that Title II regulation is necessary to protect public safety—specifically to prevent the blocking or throttling of messages sent by public safety authorities over BIAS. There is no evidence of such blocking in the United States—at least, not by BIAS providers. Only one example stands out, though it's from an edge provider: Earlier this month, Japan suffered a serious earthquake. Japan's public safety agency posted regular updates on the situation on its account on X, formerly Twitter, yet X "rate-limited" its posting briefly.[165]

Thriving-Across-America-An-ACA-Connects-White-Paper.pdf (as of June 2022, 93.6% of the population had access to at least two providers offering 25/3 service, and 91 percent had access to two providers, one of which was offering at least 100/20 service).

[163] Comments of Santa Clara at 23.

[164] Comments of TechFreedom at 46-47.

[165] NERV (@EN_NERV), X (Jan. 1, 2024, 4:25 AM), https://twitter.com/EN_NERV/status/1741752434635186344, before someone reached out to stop such throttling roughly two hours later. NERV (@EN_NERV), X (Jan. 1, 2024, 7:17 AM), https://twitter.com/EN_NERV/status/1741795901239431196.

The problem apparently started in April, 2023, when Twitter changed its API policy, blocking the use of "bots" to make automatic posting, affecting a large number of public safety users. Matt Binder, *Elon Musk just shut down automation for important public safety accounts*, MASHABLE (Apr. 15, 2023), https://mashable.com/article/twitter-api-removal-public-safety-twitter-accounts. Twitter quickly changed the policy to exempt public safety users. Matt Binder, *Public services will get*

If a broadband provider clearly disclosed such a rate-limiting policy, its service would fall outside the definition of BIAS, as Judges Srinivasan and Tatel explained: The 2015 Order "specifies that an ISP remains 'free to offer 'edited' services' without becoming subject to the rule's requirements" and this would, they remarked, "also be true of an ISP that engages in other forms of editorial intervention, such as . . . filtering of content into fast (and slow) lanes based on the ISP's commercial interests."[166] In other words, the NERV example is yet another "black swan"[167]: it illustrates exactly the kind of conduct that would *not* be covered by Title II—yet it is being used to justify Title II reclassification.

But Public Knowledge is undeterred: "Nowhere has the Commission ever found that the nebulous and unsubstantiated benefits of deregulation outweigh the specific benefits of ensuring that public safety responders can communicate reliably with each other and with the public in times of crisis—as demonstrated by the Santa Clara Petition."[168] But it is not the

---

free API access again, Twitter says, MASHABLE (May 2, 2023), https://mashable.com/article/twitter-reverses-api-decision-for-emergency-weather-alerts-public-services.

In July, Twitter began "rate-limiting" both how often free users of the service could post and how many posts users could see each day. *What does Twitter 'rate limit exceeded' mean for users?*, REUTERS (July 4, 2023, 4:10 AM), https://www.reuters.com/technology/what-does-twitter-rate-limit-exceeded-mean-users-2023-07-03/ ("Verified accounts can now read 6,000 posts per day, unverified accounts 600 posts and new un-verified accounts 300 posts. After that, users will get a message that says, "rate limit exceeded."). Again, Twitter exempted public safety users; however, NERV, a leading Japanese disaster alert app, did not qualify for the exemption: "Though it receives its information via a direct, dedicated line from the [Japan Meteorological Agency] and is operated with the agency's approval, the NERV app was developed and is run by security company Gehirn." Amanda Yeo, *Twitter/X appears to restrict Japanese emergency alert account hours after earthquake*, MASHABLE (Jan. 2, 2024), https://mashable.com/article/twitter-japan-earthquake-tsunami-alert-restricted. That company chose not pay $5,000/month for a premium account that would avoid rate-limiting. *Id*.

[166] *U.S. Telecom*, 855 F.3d at 389.

[167] *Cf. supra* Public Knowledge, note 152.

[168] Comments of Public Knowledge at 13.

Open Internet rules that ensure this result: it is the representation by ISPs that their service will offer unedited, uncurated connectivity to the entire Internet. *Without* this representation, the 2015 Order simply would not apply, nor could the FCC impose Title II under some broader definition of BIAS without running headlong into the First Amendment problems explained by Judge Kavanaugh in *U.S. Telecom*.[169] *With* this representation, Title II is unnecessary: the Federal Trade Commission, state attorneys general, and private plaintiffs could enforce this representation under well-established consumer protection law.

We demonstrated this point at length in our comments.[170] Simply put, the net benefit to public safety of Title II reclassification over the status quo ante in terms appears to be zero. No commenter has explained otherwise.

E. Title II Supporters Concede That Title II Will Allow Broadband Price Controls

The NPRM again promises to forbear "from . . . *ex ante* rate regulations" in order to deflect investment concerns.[171] But Public Knowledge readily acknowledges that Title II can be used for rate regulation. During the COVID pandemic, when Title II did not apply to BIAS, PK laments, "the Commission could not prevent ISPs from terminating subscriptions when newly unemployed subscribers could not pay their monthly bills and was therefore forced to rely on a voluntary pledge."[172] Forcing providers to offer service for a price of zero is, in

---

[169] *See supra* notes 138-141 and associated text.

[170] Comments of TechFreedom at 31-39.

[171] The NPRM fails to forebear from Section 214 as did the 2015 Order, which may result in thousands of broad band providers being required to seek, for the first time, authority to operate under Section 214, and allowing the Commission to review each such new application to determine whether authorization would be consistent with U.S. national security policy.

[172] Comments of Public Knowledge at 8.

fact, the ultimate rate regulation. Title II could also be used to meddle with rates in a more granular way, as PK acknowledges: "Other ISPs took advantage of the circumstances to raise fees and impose new caps at a time when customer use of broadband dramatically increased to compensate for the lockdown—effectively price gouging during the crisis."[173] PK wants Title II reclassification precisely so that the FCC can meddle with prices (avoid "price gouging") by determining how much ISPs can charge (which "fees") and for what levels of service (how much data allowance, aka "cap," is provided for a given price). This is at least more honest than the Chair's contorted insistence that the FCC will not engage in rate regulation.[174] The FCC would not forbear from Section 202(a), which is the basis of all FCC rate regulation.

F. Clarifying the President's War Powers to Control the Internet Raises Additional Major Questions and Is Dangerous

Public Knowledge argues that Title II classification "resolves any ambiguity in time of war or national emergency" by clarifying that ISPs would be subject to Section 706(a) of the Communications Act,[175] which allows the President, "[d]uring the continuance of a war in which the United States is engaged, the President is authorized, if he finds it necessary for the national defense and security, to direct that such communications as in his judgment may be essential to the national defense and security shall have preference or priority with any

---

[173] *Id.*

[174] "They say this is a stalking horse for rate regulation. Nope. No how, no way." Jessica Rosenworcel, Chairwoman, Fed. Commc'ns Comm'n, Remarks at the National Press Club 5 (Sept. 26, 2023), https://docs.fcc.gov/public/attachments/DOC-397257A1.pdf.

[175] Comments of Public Knowledge at 65.

carrier,"[176] which the Act elsewhere defines to mean "common carrier."[177] PK further suggests that classifying BIAS as a common carriage service would make it more clear that BIAS counts as a "facility or station" of which the President could "authorize the use or control" "[u]pon proclamation by the President that there exists a "war or threat of war involving the United States" under Section 706(d).[178]

The first point is clearly true: reclassification would increase the President's wartime powers. The second point might be true: it is unclear how these two subsections interrelate, but reclassification certainly would make it easier for a President to *try* to seize control of ISPs during an emergency.

This argument should prompt two questions. First, if reclassification would increase the President's war emergency powers over the Internet, does that not make reclassification more significant and thus more "major" a question?

Second, would increasing the President's emergency powers really be such a good thing? If Donald Trump is really the threat to American democracy that many believe, why would the same people want to trust him with even greater emergency powers over the Internet? Should *any* President be trusted with the power to order prioritization of his own social media posts or of content favorable to him? Section 706(a)'s reference to "the continuance of a war" might well require a formal declaration of war by Congress, but the Supreme Court has not ruled on the question. In its most analogous decision, the Court

---

[176] 47 U.S.C. § 606(a).

[177] 47 U.S.C. § 153(11). ("The term 'common carrier' or 'carrier' means any person engaged as a common carrier for hire.").

[178] 47 U.S.C. § 606(d).

invalidated military tribunals created by the Bush Administration to try detainees at Guantanamo Bay, but also noted: "nothing in our analysis turns on the admitted absence of either a formal declaration of war or a declaration of martial law."[179] So the question remains unresolved. Absent a clear ruling to the contrary, Trump or some other President might, absent a formal declaration, invoke the Authorization for Use of Military Force of 2001, which purports "to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution" of 1973,[180] and which remains on the books. If the courts uphold such a basis for invoking Section 706(a), the President would enjoy sweeping powers to seize control of the Internet and order non-neutrality. Worse, if the courts rule that common carriers' infrastructure is subject to Section 706(d), the President could take control of broadband infrastructure merely based on the "threat" of war.

It would be deeply ironic if this rulemaking, ostensibly aimed at neutrality and an "Open Internet," actually undermined both. But whatever the right balance to be struck, clarifying the meaning of Section 706 is a major question that should properly be decided by Congress, not the FCC.[181]

V. Conclusion

Because the FCC has proposed a rule that lies beyond its authority, the FCC should desist from this rulemaking and deny the petitions for reconsideration. Otherwise, at a minimum, the Commission should wait to see how the Court decides *Loper Bright*.

---

[179] Hamdan v. Rumsfeld, 548 U.S. 557, 600 (2006).

[180] 50 U.S.C. § 1444(b).

[181] *See generally* Berin Szóka, *Why Do Democrats Want to Let Trump Violate Net Neutrality?*, NEXTTV (Feb. 20, 2019), https://www.nexttv.com/blog/why-do-democrats-want-let-trump-violate-net-neutrality-418222.

Respectfully submitted,

_____/s/_____

Berin Szóka
President
bszoka@techfreedom.org

James E. Dunstan
General Counsel
jdunstan@techfreedom.org

Corbin Barthold
Internet Policy Counsel
cbarthold@techfreedom.org

TechFreedom
1500 K Street NW
Floor 2
Washington, DC 20005

January 17, 2023