No. _____

In the
Supreme Court of the United States

UNITED STATES CELLULAR CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Communications Commission ("FCC") is prohibited from regulating information-service providers under the common-carrier provisions of Title II of the Communications Act of 1934 ("Act"). The FCC classifies broadband Internet access service as an information service.

The question presented is whether Congress authorized the FCC to adopt rules requiring the recipients of universal service support to provide broadband Internet access service subject to common-carrier regulation under Title II of the Act.

PARTIES

Federal Communications Commission
United States of America
Direct Communications Cedar Valley, LLC
Totah Communications, Inc.
H & B Communications, Inc.
The Moundridge Telephone Company of Moundridge
Pioneer Telephone Association, Inc.
Twin Valley Telephone, Inc.
Pine Telephone Company, Inc.
Pennsylvania Public Utility Commission
Choctaw Telephone Company
Core Communications, Inc.
National Association of State Utility Consumer Advocates
National Telecommunications Cooperative Association
Cellular South, Inc.
Halo Wireless, Inc.
The Voice on the Net Coalition, Inc.
Public Utilities Commission of Ohio
tw telecom Inc.
Vermont Public Service Board
Transcom Enhanced Services, Inc.
The Kansas State Corporation Commission
CenturyLink, Inc.
Gila River Indian Community
Gila River Telecommunications, Inc.
Allband Communications Cooperative
North County Communications Corporation
United States Cellular Corporation
PR Wireless, Inc.
Docomo Pacific, Inc.
Nex-Tech Wireless, LLC
Penasco Valley Telephone Cooperative, Inc.

Cellular Network Partnership, A Limited Partnership
U.S. TelePacific Corp.
Consolidated Communications Holdings, Inc.
National Association of Regulatory Utility Commissioners
Rural Independent Competitive Alliance
Rural Telephone Service Company, Inc.
Adak Eagle Enterprises LLC
Adams Telephone Cooperative
Alenco Communications, Inc.
Arlington Telephone Company
Bay Springs Telephone Company, Inc.
Big Bend Telephone Company, Inc.
The Blair Telephone Company
Blountsville Telephone LLC
Blue Valley Telecommunications, Inc.
Bluffton Telephone Company, Inc.
BPM, Inc.
Brantley Telephone Company, Inc.
Brazoria Telephone Company
Brindlee Mountain Telephone LLC
Bruce Telephone Company
Bugs Island Telephone Cooperative
Cameron Telephone Company, LLC
Chariton Valley Telephone Corporation
Chequamegon Communications Cooperative, Inc.
Chickamauga Telephone Corporation
Chickasaw Telephone Company
Chippewa County Telephone Company
Citizens Telephone Company
Clear Lake Independent Telephone Company
Comsouth Telecommunications, Inc.
Copper Valley Telephone Cooperative
Cordova Telephone Cooperative

Crockett Telephone Company, Inc.
Darien Telephone Company
Deerfield Farmers' Telephone Company
Delta Telephone Company, Inc.
East Ascension Telephone Company, LLC
Eastern Nebraska Telephone Company
Eastex Telephone Coop., Inc.
Egyptian Telephone Cooperative Association
Elizabeth Telephone Company, LLC
Ellijay Telephone Company
Farmers Telephone Cooperative, Inc.
Flatrock Telephone Coop., Inc.
Franklin Telephone Company, Inc.
Fulton Telephone Company, Inc.
Glenwood Telephone Company
Granby Telephone LLC
Hart Telephone Company
Hiawatha Telephone Company
Holway Telephone Company
Home Telephone Company (St. Jacob, Ill.)
Home Telephone Company (Moncks Corner, SC)
Hopper Telecommunications Company, Inc.
Horry Telephone Cooperative, Inc.
Interior Telephone Company
Kaplan Telephone Company, Inc.
KLM Telephone Company
City of Ketchikan, Alaska
Lackawaxen Telecommunications Services, Inc.
Lafourche Telephone Company, LLC
La Harpe Telephone Company, Inc.
Lakeside Telephone Company
Lincolnville Telephone Company
Loretto Telephone Company, Inc.
Madison Telephone Company
Matanuska Telephone Association, Inc.

McDonough Telephone Coop., Inc.
MGW Telephone Company, Inc.
Mid Century Telephone Coop., Inc.
Midway Telephone Company
Mid-Maine Telecom LLC
Mound Bayou Telephone & Communications, Inc.
Moundville Telephone Company, Inc.
Mukluk Telephone Company, Inc.
National Telephone of Alabama, Inc.
Ontonagon County Telephone Company
Otelco Mid-Missouri LLC
Otelco Telephone LLC
Panhandle Telephone Cooperative, Inc.
Pembroke Telephone Company, Inc.
People's Telephone Company
Peoples Telephone Company
Piedmont Rural Telephone Cooperative, Inc.
Pine Belt Telephone Company
Pine Tree Telephone LLC
Pioneer Telephone Cooperative, Inc.
Poka Lambro Telephone Cooperative, Inc.
Public Service Telephone Company
Ringgold Telephone Company
Roanoke Telephone Company, Inc.
Rock County Telephone Company
Saco River Telephone LLC
Sandhill Telephone Cooperative, Inc.
Shoreham Telephone LLC
The Siskiyou Telephone Company
Sledge Telephone Company
South Canaan Telephone Company
South Central Telephone Association
Star Telephone Company, Inc.
Stayton Cooperative Telephone Company
The North-Eastern Pennsylvania Telephone

Company
Tidewater Telecom, Inc.
Tohono O'Odham Utility Authority, SD
Unitel, Inc.
War Telephone LLC
West Carolina Rural Telephone Cooperative, Inc.
West Tennessee Telephone Company, Inc.
West Wisconsin Telcom Cooperative, Inc.
Wiggins Telephone Association
Winnebago Cooperative Telecom Association
Yukon Telephone Co., Inc.
Arizona Corporation Commission
Windstream Corporation
Windstream Communications, Inc.
Sprint Nextel Corporation
Level 3 Communications, LLC
Connecticut Public Utilities Regulatory Authority
Independent Telephone & Telecommunications Alliance
Western Telecommunications Alliance
National Exchange Carrier Association, Inc.
Cambridge Telephone Company
Clarks Telecommunications Co.
Consolidated Telephone Company
Consolidated Telco, Inc.
Consolidated Telecom, Inc.
The Curtis Telephone Company
Great Plains Communications, Inc.
K. & M. Telephone Company, Inc.
Nebraska Central Telephone Company
Northeast Nebraska Telephone Company
Three River Telco
RCA-The Competitive Carriers Association
Rural Telecommunications Group, Inc.
T-Mobile USA, Inc.

Central Texas Telephone Cooperative, Inc.
Venture Communications Cooperative, Inc.
Alpine Communications, LC
Emery Telcom
Peñasco Valley Telephone Cooperative, Inc.
Smithville Communications, Inc.
South Slope Cooperative Telephone Co., Inc.
Spring Grove Communications
3 Rivers Telephone Cooperative, Inc.
Walnut Telephone Company, Inc.
West River Cooperative Telephone Company, Inc.
Ronan Telephone Company
Hot Springs Telephone Company
Hypercube Telecom, LLC
Virginia State Corporation Commission
Montana Public Service Commission
Verizon Wireless
Verizon
AT&T Inc.
Cox Communications, Inc.
Comcast Corporation
Vonage Holdings Corporation
National Cable & Telecommunications Association
Smart City Telecom
State Members of the Federal–State Joint Board on Universal Service

RULE 29.6 STATEMENT

Petitioner United States Cellular Corporation is a publicly-held Delaware corporation. It is an 83%-owned subsidiary of Telephone and Data Systems, which is also publicly held. No other publicly-held company has a 10% or greater ownership interest in United States Cellular Corporation.

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PETITION FOR WRIT OF CERTIORARI

An estimated 87 percent of all Americans, or 228 million people, use the Internet, and the FCC wants to be the federal agency that regulates their broadband access to the Internet. However, the FCC has classified broadband Internet access service as an information service over which it has no express statutory authority. Rather than abandoning its information-service classification of broadband, the FCC has attempted to concoct a regime of Internet regulation under the guise of statutory construction. The D.C. Circuit has twice rebuffed the FCC's attempts to confer Internet regulatory authority upon itself.

Here, the Tenth Circuit deferred to the FCC's construction of two statutory provisions as delegations of authority to make a transformational change in the universal service program. The FCC redirected the program from supporting telecommunications services to funding broadband service. It did so by imposing the "condition" that the recipients of the funds provide broadband subject to a host of FCC-prescribed rules. By that device, the FCC assumed the power to regulate Internet access.

This petition asks the Court to decide whether Congress authorized the FCC to adopt rules regulating the $260 billion Internet marketplace. The Court should grant the petition and hold that the FCC cannot regulate broadband so long as it is classified as an information service.

OPINIONS BELOW

The initial opinion of the Tenth Circuit (App. 1a)

is reported at 753 F.3d 1015. The report and order of the FCC (App. 163a) is reported at 26 F.C.C.R. 17663.

JURISDICTION

The judgment of the Tenth Circuit was entered on May 23, 2014. Petitions for rehearing were denied on August 27, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 153(51), 214(e), 254(a)-(h), and 332(c) of the Act, § 706 of the Telecommunications Act of 1996 ("1996 Act"), §§ 102, 103 and 106 the Broadband Data Improvement Act ("Broadband Data Act"), and § 6001 of the American Recovery and Reinvestment Act of 2009 ("Recovery Act") are reproduced at App. 848a-880a.

STATEMENT OF THE CASE

A. Statutory Background

The Act, as amended, is codified in Chapter 5 of Title 47 of the United States Code ("Code"). *See* 47 U.S.C. § 609 ("This chapter may be cited as the 'Communications Act of 1934'"). Chapter 5 of Title 47 of the Code ("Chapter 5") has seven subchapters or "Titles."

The FCC was created under Title I "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio," and with the mandate to "execute and enforce the provisions of [Chapter 5]." *Id.* § 151. Title I empowers the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [Chapter 5], as may be

necessary in the execution of its functions." 47 U.S.C. § 154(i).

The FCC is delegated authority to regulate communications services by Titles II ("Common Carrier"), III ("Special Provisions Relating to Radio"), V-A ("Cable Communications"), and VI ("Miscellaneous Provisions") of the Act. *See Comcast Corp. v. FCC*, 600 F.3d 642, 654 (D.C. Cir. 2010) (for example, "it is Titles II, III, and VI that do the delegating"). Titles II and III authorize the FCC to prescribe such rules and regulations as may be necessary "to carry out the provisions of [Chapter 5]." 47 U.S.C. §§ 201(b), 303(r).

The Omnibus Budget Reconciliation Act of 1993 amended § 332 of the Act to specify the regulatory treatment that the FCC must afford all mobile radio services.[1] Congress classified such services as either "commercial mobile service" or "private mobile service." *Id.* § 332(c). It commanded that "[a] person engaged in the provision of … a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for the purposes of [Chapter 5]." *Id.* § 332(c)(1)(A).

The structure of the Act was overhauled by the 1996 Act.[2] Likely "the most important piece of economic legislation of the twentieth century," the 1996 Act had as its overarching purpose the transition of the telecommunications industry from "regulated monopoly to unregulated competition." Peter W. Huber, Michael K. Kellogg & John Thorne,

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[1] *See* Pub. L. No. 103-66, Title VI, § 6002(c), 107 Stat. 312, 393-94 (1993).

[2] Pub. L. No. 104-104, 110 Stat. 56 (1996).

Federal Telecommunications Law § 1.9, at 53 (2d ed. 1999).

The "major components" of the 1996 Act had "nothing to do with the Internet." *See Reno v. ACLU*, 521 U.S. 844, 857 (1997). The statute did add § 230 to Title II, which states that "[i]t is the policy of the United States … to promote the development of the Internet and other interactive computer services … [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). The term "interactive computer service" was defined to mean "any information service … including specifically a service … that provides access to the Internet." *Id.* § 230(f)(2).

The 1996 Act amended Title I to include definitions of two categories of communications service: "telecommunications service," a common-carrier service subject to regulation under Title II, *id.* § 153(53); and "information service," a service exempt from Title II common-carrier regulation. *Id.* § 153(24). *See National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 975-76 (2005).

The definition of "telecommunications carrier" largely mirrored the regulatory treatment language of § 332(c). It included the proviso that "[a] telecommunications carrier shall be treated as a common carrier under [Chapter 5] only to the extent that it is engaged in providing telecommunications services." 47 U.S.C. § 153(51).

The 1996 Act left intact most of the existing provisions of Title II in a new "Part I − Common

Carrier Regulation." *See* 1996 Act, § 101(b). However, Congress added subsection (e) to § 214 to authorize the "[p]rovision of universal service" by "[e]ligible telecommunications carriers" ("ETCs"). 47 U.S.C. § 214(e)(1). Subsection (e)(1) provides:

> A common carrier designated as an [ETC] … shall be eligible to receive universal service support in accordance with [§] 254 … and shall, throughout the service area for which the designation is received … offer the services that are supported by Federal universal service support mechanisms under [§] 254(c) … either using its own facilities or a combination of its own facilities and resale of another carrier's services.[3]

The 1996 Act included the universal service provisions of § 254 in a new "Part II – Development of Competitive Markets" to Title II. 1996 Act, § 101(a). Universal service is defined in § 254(c) as "an evolving level of telecommunications services that the [FCC] shall establish periodically … taking into account advances in telecommunications and information technologies and services." 47 U.S.C. § 254(c)(1).

When establishing "the definition of the services that are supported by Federal universal service support mechanisms," the FCC must consider:

> the extent to which such telecommunications services … are essential to education, public health, or public safety; … have … been subscribed to by a substantial majority of residential customers; [and] are being

[3] 47 U.S.C. § 214(e)(1).

> deployed in public telecommunications networks by telecommunications carriers.[4]

Under § 254(e), only an ETC designated under § 214(e) is eligible to receive universal service support. *See* 47 U.S.C. § 254(e). An ETC that "receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." *Id.*

The FCC is required to base its universal service policies on the six principles enumerated in § 254(b). *See id.* § 254(b)(1)-(6). The second and third principles are that "access to advanced telecommunications and information services" should be provided throughout the country, *id.* § 254(b)(2), and that all consumers should have "access to telecommunications and information services." *Id.* § 254(b)(3). The sixth principle is that "[e]lementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in [§] 254(h)." *Id.* § 254(b)(6).

In addition to the telecommunications services included in the definition of universal service under § 254(c)(1), the FCC is authorized to "designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of [§ 254(h)]." *Id.* § 254(c)(3). The FCC is directed to:

> establish competitively neutral rules … to enhance … access to advanced telecommunications and information services for all public and nonprofit elementary and

[4] 47 U.S.C. § 254(c)(1)(A)-(C).

> secondary school classrooms, health care providers, and libraries; and … to define the circumstances under which a telecommunications carrier may be required to connect its network to such public institutional telecommunications users.[5]

Congress directed that most, but not all, of the provisions of the 1996 Act be inserted into Chapter 5.[6] Some of the provisions amended other chapters of the Code;[7] others were "freestanding enactment[s]." *AT&T Corp. v. Iowa Utilities Bd.,* 525 U.S. 366, 378 n.5 (1999). One freestanding enactment was § 706, which provided "incentives" for the deployment of "advanced telecommunications capability," 47 U.S.C. § 1302(a), which was defined as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications." *Id*. § 1302(d)(1).

Section 706(a) directed the FCC to encourage the timely deployment of advanced telecommunications capability using "regulating methods that remove barriers to infrastructure investment." *Id*. § 1302(a). Under § 706(b), if the FCC determined that high-speed, switched, broadband capability was not being deployed in a timely fashion, it was "to take immediate action to accelerate deployment of such capability by removing barriers to infrastructure

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[5] 47 U.S.C. § 254(h)(2).

[6] *See* 1996 Act, § 1(b) ("whenever … an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the … Act").

[7] *See, e.g.,* 1996 Act, § 507 (amending 18 U.S.C. §§ 1462, 1465).

investment and by promoting competition in the telecommunications market." 47 U.S.C. § 1302(b).

The Law Revision Counsel published § 706 of the 1996 Act as a note to § 157 of Chapter 5. *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 14 F.C.C.R. 2398, 2400 n.3 (1999) (§ 706 is "reproduced in the notes under … § 157").

In 2008 and 2009, Congress enacted three pieces of "broadband legislation" to promote broadband deployment. *A National Broadband Plan for Our Future*, 24 F.C.C.R. 4342, 4384 (2009) ("*Broadband Plan Inquiry*").

- The Food, Conservation, and Energy Act of 2008 ("Farm Bill") directed the FCC's Chairman, in coordination with the Secretary of the U.S. Department of Agriculture ("USDA"), to submit to Congress a "comprehensive rural broadband strategy" for the deployment of broadband in rural areas.[8]
- The Broadband Data Act enacted Chapter 12 ("Broadband") of Title 47 of the Code; amended § 706 of the 1996 Act,[9] which was transferred to Chapter 12, *see* 47 U.S.C. § 1302; directed the FCC and the Secretary of Commerce ("Commerce Secretary") to develop improved data on the extent of broadband deployment, *see id*. § 1303; and authorized the Commerce Secretary to establish a program to encourage statewide initiatives to improve broadband access. *See* 47

[8] Pub. L. No. 110-234, § 6112(a), 122 Stat. 923, 1966 (2008).

[9] *See* Pub. L. 110-385, Title I, §§ 101, 103, 122 Stat. 4096, 4096-97 (2008).

U.S.C. § 1304.

- The Recovery Act[10] directed the Commerce Department's National Telecommunications and Information Administration ("NTIA") to prescribe rules to establish and administer the Broadband Technology Opportunity Program ("Broadband Program"), *see Broadband Plan Inquiry*, 24 F.C.C.R. at 4384, and required the FCC to submit a report to Congress containing a national broadband plan. *See* 47 U.S.C. § 1305(k).

B. Regulatory Background

When it implemented the 1996 Act, the FCC concluded that "the categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive." *Federal-State Joint Board on Universal Service,* 13 F.C.C.R. 11501, 11507 (1998). It found that the 1996 Act "impose[d] no regulatory obligations on information-service providers," *id.* at 11516, and that such providers were not "subject to regulation as common carriers merely because they provide their services 'via telecommunications.'" *Id.* at 11508. It also concluded that "the information service component of Internet access service cannot be supported under [§] 254(c)(1), which describes universal service as 'an evolving level of telecommunications services.'" *Federal-State Joint Board on Universal Service*, 12 F.C.C.R. 8776, 8822 (1997).

In 1998, the FCC decided that § 706(a) of the 1996 Act does not constitute an "independent grant" of regulatory authority. *Deployment of Wireline*

[10] Pub. L. No. 111-5, 123 Stat. 115 (2009).

Services Offering Advanced Telecommunications Capability, 13 F.C.C.R. 24011, 24044 (1998). The Agency concluded that § 706(a) directs it to use the authority granted it by the Act to encourage the deployment of advanced services. *See id*. at 24044-45.

Prior to the enactment of the Farm Bill, the FCC took a "deregulatory approach" to broadband deployment on the theory "that reliance on market forces, rather than regulation, was the best way to increase investment in broadband networks and make affordable broadband services available to consumers." *Bringing Broadband to Rural America: Report on a Rural Broadband Strategy*, 24 F.C.C.R. 12792, 12849 (2009) ("*Rural Broadband Report*"). The FCC's deregulatory approach manifested itself in a series of decisions classifying any form of broadband as "an information service, which is not subject to Title II and cannot be regulated as common carrier service." *Protecting and Promoting the Open Internet*, 29 F.C.C.R. 5561, 5613 (2014) ("*Open Interne*"").

C. The Broadband Plan

Pursuant to the Recovery Act directive, the FCC's staff authored a 350-page national broadband plan, which was delivered to Congress in March 2010. *See Connecting America: The National Broadband Plan*, 2010 WL 972375, at *1 (2010) ("*Broadband Plan*"). The *Broadband Plan* called for a "comprehensive reform" of the FCC's universal service fund ("USF"). *Id*. at *116.

USF reform was deemed necessary by the *Broadband Plan* because "the current USF was not designed to support broadband directly, other than

for schools, libraries and rural health care providers." *Broadband Plan*, 2010 WL at *121. Despite recognizing that "broadband is not a supported service," *id.* at *125, the plan recommended replacing the high-cost USF program with two new funds: a "Connect America Fund" that would shift $15.5 billion from supporting legacy telephone networks to directly supporting wireline broadband networks, and a "Mobility Fund" to provide "targeted funding" for mobile broadband networks. *See id.* at *5.

Shortly after the *Broadband Plan* was sent to Congress, the D.C. Circuit held that the FCC, having conceded that it was without express statutory jurisdiction, was also without Title I ancillary jurisdiction to regulate broadband. *See Comcast*, 600 F.3d at 644. The FCC subsequently initiated a proceeding to determine whether it had authority under § 254 of the Act and § 706 of the 1996 Act to revise its USF program to support broadband. *See Framework for Broadband Internet Service*, 25 F.C.C.R. 7866, 7880-83 (2010). Without waiting to answer that question, the FCC proceeded to implement its *Broadband Plan*.

D. The FCC Rulemaking

In February 2011, the FCC initiated a notice-and-comment rulemaking to "fundamentally modernize" the USF program as recommended by the *Broadband Plan*. *Connect America Fund*, 26 F.C.C.R. 4554, 4557 (2011). The FCC announced its plan to "refocus USF … to make affordable broadband available to all Americans." *Id.* at 4560. It opined that it could extend USF support to "broadband services offered as information services"

either under the authority granted it by §§ 254 and 706 or pursuant to Title I ancillary authority, or both. *Connect America Fund*, 26 F.C.C.R. at 4577.

Ultimately, the FCC decided that it had the statutory authority to implement the USF recommendations of the *Broadband Plan* and "to support broadband networks, regardless of regulatory classification." App. 219a. It held that § 254 of the Act granted it clear authority to provide USF support for telecommunications services and to "condition" the receipt of that support on the deployment of broadband networks. App. 206a.

The FCC discovered its regulatory authority in the § 254(e) mandate that an ETC that receives USF support "shall use that support only for the provision, maintenance, and upgrading of *facilities and services* for which the support is intended." App. 210a (emphasis in original). According to the FCC, by referring to facilities and services as "distinct items" for which USF support may be used, Congress granted the Agency "the flexibility not only to designate the types of telecommunications services for which support would be provided, but also to encourage the deployment of the types of facilities that will best achieve the principles set forth in [§] 254." App. 210a-211a.

The FCC ordered that, as a condition of receiving USF support, all ETCs are "required to offer broadband service in their supported area that meets certain basic performance requirements and to report regularly on associated performance measures." App. 233a-234a. ETCs also must make broadband service "available at rates that are reasonably comparable to offerings of comparable

broadband services in urban areas." App. 234a. Moreover, "[u]pon receipt of a reasonable request for service, carriers must deploy broadband to the requesting customer within a reasonable amount of time." App. 345a.

The FCC promulgated 27 pages of new universal service rules. *See* App. 774a-835a. One of those rules mandates that the use of USF support "*shall* include investments in plant that can, either as built or with the addition of plant elements, when available, provide access to advanced telecommunications and information services." App. 777a (47 C.F.R. § 54.7(b)) (emphasis added). When engaged in providing broadband service, ETCs are subject to FCC rules that: (1) establish "broadband performance metrics," focusing on "speed, latency, and capacity as three core characteristics," App. 236a;[11] (2) set broadband buildout obligations, *see* App. 249a-251a;[12] and (3) impose broadband testing and reporting obligations. *See* App. 257a-263a.[13]

E. The Tenth Circuit Decision

Petitions for judicial review of the FCC's rulemaking decision were filed pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2344. The Judicial Panel on Multidistrict Litigation consolidated the petitions in the Tenth Circuit. The court had jurisdiction under 28 U.S.C. § 2342(1).

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[11] *See* 47 C.F.R. §§ 54.312(b)(4), 54.313(b)(2), (e)(1)-(3), (f)(1)(i), (g), 54.1006(a), (b).

[12] *See also id.* §§ 54.202(a)(1)(ii), 54.312(b)(2)-(4), 54.313(a)(1), (b),(c), (e), (f)(1), 54.1006(a), (b).

[13] *See also id.* § 54.313(a)(11).

The Tenth Circuit upheld the FCC in every respect. It rejected the argument that §§ 254(c)(1) and 254(e) unambiguously bar the FCC from conditioning USF funding on an ETC's agreement to provide broadband service. *See* App. 29a-31a. The court found that nothing in § 254(c)(1) "expressly or implicitly deprives the FCC of authority to direct that a USF recipient … use some of its USF funds to provide services or build facilities related to services that fall outside the FCC's current definition of 'universal service.'" App. 30a.

The Tenth Circuit held that the FCC reasonably interpreted the second sentence of § 254(e) as an implicit grant of authority for the FCC "to determine and specify precisely how USF funds may or must be used." App. 31a. The court decided that the FCC reasonably construed the language "facilities and services" in § 254(e) to authorize it to "encourage" the deployment of broadband facilities. *See* App. 31a-32a.

The Tenth Circuit also rejected arguments that § 153(51) of the Act: (1) prohibited the FCC from treating telecommunications carriers "as common carriers under Title II when they are engaged in providing an information service," App. 131a; and (2) when considered with §§ 214(e)(1) and 254, made a common-carrier ETC eligible to receive USF support "only to the extent that it is engaged in providing telecom services on a common-carrier basis." App. 132a.

The argument that the FCC is regulating broadband service providers under Title II was also rejected. The Tenth Circuit concluded that the FCC "merely impose[d] broadband-related conditions on

those ETCs that voluntarily seek to participate in the USF funding scheme." App. 133a.

The Tenth Circuit specifically held that § 706(b) "of the Act" serves as an "independent grant of authority" to the FCC to impose its "broadband requirement." App. 36a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Settle the Important Question of Whether the FCC Has the Authority to Regulate the Internet

In *Brand X*, the Court decided the question of whether the FCC could classify the broadband Internet access service provided by cable companies as an information service that is "exempt from mandatory common carrier regulation under Title II." 545 U.S. at 973-74. The Court has not decided whether the FCC has the statutory authority to regulate broadband service despite having classified all forms of the service as information services. The resolution of that question will have far-reaching consequences.

The FCC views the Internet as "America's most important platform for economic growth, innovation, competition, free expression, and broadband investment and deployment." *Open Internet*, 29 F.C.C.R. at 5563. It estimates that 87 percent of Americans are dependent on the Internet. *See id.* at 5564. According to the Agency, the Internet "is a critical route of commerce, supporting an e-commerce marketplace that now boasts U.S. revenues of $263.3 billion." *Id.*

The question of whether the FCC should regulate broadband "implicates serious policy

questions, which have engaged lawmakers, regulators, businesses, and other members of the public for years." *Verizon v. FCC*, 740 F.3d 623, 634 (D.C. Cir. 2014). The FCC has long wanted to regulate broadband, but its information-service classification of broadband left it without express statutory authority over the service. *See Comcast*, 600 F.3d at 644 (the FCC acknowledged having "no express statutory authority" over Internet service providers). For nearly a decade, the Agency struggled to concoct an Internet regulatory regime "under the guise of statutory construction." *Brand X*, 545 U.S. at 1005 (Scalia, J., dissenting). The FCC's attempts to regulate broadband were "invalidated" twice by the D.C. Circuit, most recently in *Verizon*, leaving the Agency without "legally enforceable" broadband regulations. *See Open Internet*, 29 F.C.C.R. at 5564.

Following the "blueprint" for broadband regulation offered by the *Verizon* court, the FCC is proposing to rely on its interpretation of § 706 of the 1996 Act as its authority to adopt new "net neutrality" rules, *id.* at 5563, a proposal that was harshly criticized by one of its commissioners. *See id.* at 5658 (the proposed rule "rests on a faulty foundation of make-believe statutory authority") (Commissioner O'Rielly, dissenting). The FCC's proposed rules triggered a storm of controversy. A record-setting 3.7 million comments poured into the FCC[14] at a rate that allegedly caused its Web site to

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[14] *See* Edward Wyatt, *Net Neutrality Comments to FCC Overwhelmingly One-Sided* (Sept. 18, 2014) http://bits.blogs.nytimes.com/2014/09/18/net-neutrality-comments-to-f-c-c-overwhelmingly-one-sided-.

crash.[15]

This case offers the Court the opportunity to test the FCC's claim that it discovered in § 706(b) an "unheralded power" to regulate the $260 billion Internet marketplace. *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014). The FCC construed § 706(b), in conjunction with the words "facilities and services" in § 254(e) of the Act, to authorize it to prescribe rules to implement its *Broadband Plan* by redirecting the Title II USF program to support broadband. Exhibiting deference to the Agency that bordered on acquiescence, the Tenth Circuit held that the FCC reasonably construed the three-word phrase in § 254(e), and the broadband deployment provisions of § 706(b), as authorizing it to prescribe the so-called "broadband requirement" which mandates that USF-support recipients provide broadband service, upon reasonable request, that meets requirements set forth in its rules. App. 30a. Hence, the court allowed the FCC to regulate broadband.

Facing the FCC's obvious power-grab, the Tenth Circuit should have considered the limits that Congress placed on the FCC's authority under Title II to administer the USF program. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013) (a reviewing court can prevent agency self-aggrandizement "by taking seriously, and applying rigorously," the statutory limits on the agency's authority). But the court failed to weigh that

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[15] *See* Soraya Nadia McDonald, *John Oliver's Net Neutrality Rant May Have Caused FCC Site Crash* (June 4, 2014) http://www.washingtonpost.com/news/morning-mix/wp/2014-/06/04john-oliver-.

Congress limited the FCC's rulemaking authority to prescribing rules to carry out the provisions of the Act, and gave the Agency no additional authority to implement § 706(b) of the 1996 Act. This Court should decide whether the FCC stayed "within the bounds of reasonable interpretation," *Arlington*, 133 S. Ct. at 1868, when it construed § 706(b) to authorize it to regulate the Internet, perhaps the most significant portion of the American economy.

II. The Tenth Circuit Erred by Deferring to the FCC's Construction of § 706(b) of the 1996 Act and § 254(e) of the Act

A. The FCC Lacks Authority to Prescribe Rules to Implement § 706

"Regardless of how serious the problem an administrative agency seeks to address, … it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). The FCC went outside the administrative structure enacted by Congress, when it relied upon § 706(b) to prescribe rules to "accelerate" broadband deployment. 47 U.S.C. § 1302(b). As constrained by Congress, the FCC's rulemaking authority is bound by the Act, and does not reach § 706(b).

Congress vested the FCC with the authority to administer Chapter 5. *See id.* § 151 (the FCC "shall execute and enforce the provisions of [Chapter 5]"). Congress unambiguously limited the FCC's rulemaking authority to prescribing "such rules and regulations as may be necessary in the public

interest to carry out the provisions of [Chapter 5]." 47 U.S.C. § 201(b). *See id.* § 303(r) (the FCC may make "such rules and regulations …, not inconsistent with law, as may be necessary to carry out the provisions of [Chapter 5]"). However, § 706(b) was never among the provisions of Chapter 5; it is codified among the broadband provisions of Chapter 12. *See Preserving the Open Internet*, 25 F.C.C.R. 17905, 17950 n.248 (2010).

The FCC recognizes that § 706 is "not part of the … Act [*i.e.,* Chapter 5]." *Id.* Thus, the FCC argued in *Verizon* that it does not act "under" the Act when it "utilizes the authority granted to it in [§] 706." 740 F.3d at 650. In fact, § 706(b) did not grant the FCC any additional authority.

When it adopted § 706, Congress was aware that the provisions of the 1996 Act that it enacted "as an amendment to, and hence a *part of*, [the] Act," were subject to the FCC's rulemaking authority under § 201(b) to prescribe rules to "carry out the provisions of [the] Act." *Iowa Utilities*, 525 U.S. at 378 n.5 (emphasis in original). It was also aware that the FCC's exercise of "the general grant of rulemaking authority contained within the … Act" does not extend to a "freestanding enactment" such as § 706, which is not part of the Act. *Id.* Therefore, Congress knew what it was doing in 1996, when it did not insert § 706 into the Act. It was granting the FCC no additional authority to prescribe rules to accelerate the deployment of "advanced telecommunications capability." 47 U.S.C. § 1302(b). The Agency was left to take "immediate action" to accelerate such deployment under its *existing authority* to regulate the "telecommunications market." *Id.*

Congress' decision not to authorize the FCC to prescribe rules under § 706(b) was within the regulatory framework erected by the 1996 Act. That framework was constructed in large part on the FCC's *Computer II* regime,[16] under which basic (telecommunications) service was regulated under Title II, but enhanced (information) service was exempt from such regulation. *See Brand X*, 545 U.S. at 976-77; *Verizon*, 740 F.3d at 629-31. Congress passed § 706(b) against the "backdrop" of the FCC's history of subjecting entities that operated the "last-mile" Internet access facilities to Title II regulation. *Id.* at 638. It "contemplated that the [FCC] would continue regulating Internet providers in the manner it had previously." *Id.* at 639. With respect to § 706(b), Congress envisioned that the FCC would employ its Title II authority to accelerate broadband deployment by telecommunications carriers, but allow information-service providers to continue deploying broadband "unfettered" by regulation. 47 U.S.C. § 230(b)(2).

Congress has not disturbed the administrative structure it enacted in 1996, and it has never granted the FCC any additional authority to enact rules to implement the provisions of Chapter 12. *See id.* §§ 1301-1305. Hence, the "statutory text forecloses the agency's assertion of authority" under § 706(b) to prescribe the rules it adopted below. *Arlington,* 133 S. Ct. at 1870-71. To accelerate broadband deployment, the FCC is confined to exercising its authority under the Act to remove "barriers to infrastructure investment" and promote

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[16] *See Second Computer Inquiry*, 77 F.C.C. 2d 384, 417-23 (1980).

"competition in the telecommunications marketplace." 47 U.S.C. § 1302(b).

B. The FCC's Interpretation of § 706(b) Is Ineligible for *Chevron* Deference

For *Chevron*[17] deference to apply to an agency's statutory interpretation, the agency "must have received congressional authority to determine the particular matter at issue in the particular manner adopted." *Arlington,* 133 S. Ct. at 1874. First, Congress must have authorized the agency to administer the statute it interpreted. *See Chevron,* 467 U.S. at 842 (*Chevron* applies when "a court reviews an agency's construction of the statute it administers"). Second, there must be "express congressional authorization" for the agency "to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

Whenever the FCC interprets a provision of the Act, "the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the … Act through rulemaking and adjudication, and the agency interpretation was promulgated in the exercise of that authority." *Arlington,* 133 S. Ct. at 1874. However, the preconditions were not present when the FCC construed § 706(b), since the Agency was not interpreting a provision of the Act.

Congress did not expressly authorize the FCC to administer § 706(b) through rulemaking or

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[17] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

adjudication. That being so, Congress could not have authorized the FCC to "speak with the force of law" when it construed § 706(b) to grant it the rulemaking authority that Congress withheld. *Mead*, 533 U.S. at 229.

Because Congress did not empower the FCC to decide whether § 706(b) was an independent grant of authority in the rulemaking below, no *Chevron* deference was due the FCC's interpretation. *See id.* at 227 n.6 (*Chevron* deference assumes that "the agency's exercise of authority … does not exceed its jurisdiction").

C. Section 706 Was Not a Delegation of Authority

When an agency examines a long-extant statute and claims to find the power to regulate a significant portion of the economy, or to fundamentally alter a regulatory scheme, the Court applies the presumption that Congress does not "hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). That is to say, the Court assumes that Congress would not have authorized a transformative expansion of an agency's regulatory power in an ambiguous or ancillary statutory provision. *See Utility Air,* 134 S. Ct. at 2444 (Congress is expected to "speak clearly" if it wishes to assign to an agency decisions of vast economic and political significance); *Whitman*, 531 U.S. at 468 (Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions"). Lying outside the FCC's enabling statute, the provisions of § 706 are less than ancillary to the Agency's jurisdiction.

Common sense informs us that Congress would

have inserted § 706 into the Act in 1996, if it intended § 706(b) to operate as a delegation of authority. By leaving § 706 as a freestanding enactment, Congress manifested its intention that the enactment serve as a "general instruction to the FCC to 'encourage the deployment' of broadband capability and, if necessary, 'to accelerate deployment of such capability by removing barriers to infrastructure investment.'" *National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (quoting the note following § 157 of the Act).

Section 706 was published as a note to § 157 of Title I, which made it "the policy of the United States to encourage the provision of new technologies and services to the public." 47 U.S.C. § 157(a). By relegating § 706 to the margin of § 157, Congress expressed its understanding that § 706 was subsumed by the policy statement codified in § 157. And policy statements in the Act "are not delegations of regulatory authority." *Comcast*, 600 F.3d at 654.

Chapter 12 was enacted in 2008 by the Broadband Data Act. The statute was based on the congressional findings that the continued deployment of broadband technology was "vital" to the Nation's economy, 47 U.S.C. § 1301(2), and that improving federal data on broadband deployment will assist in the development of the technology. *See id*. § 1301(3). Congress revised § 706 to improve the quality of the broadband data that the FCC was collecting, *see Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 24 F.C.C.R. 10505, 10513 (2009), and codified § 706 as § 1302 of Chapter 12. *See* 47 U.S.C. § 1302.

If Congress had wanted the FCC to regulate broadband, or to bestow additional authority on the FCC to accelerate broadband deployment, the Broadband Data Act would have expressly authorized the FCC to prescribe rules to implement the new § 1302. Congress declined to do so.

The *Verizon* court distinguished *Whitman* by pronouncing in *ipse dixit* fashion that § 706 is "no mousehole." 740 F.3d at 639. Because a mousehole is usually found indoors, § 706 is more akin to a mole hill since it is found outside the FCC's enabling statute. One might say that Congress does not make a mountain out of a mole hill. Thus, it did not authorize the FCC to prescribe rules to regulate broadband, when it enacted § 706(b) and placed it outside the scope of the FCC's rulemaking authority.

D. Congress Has Withheld Broadband Rulemaking Authority from the FCC

Where it is clear, based on the overall regulatory scheme and subsequent legislation, that Congress "has directly spoken to the question at issue and precluded the [agency] from regulating," *Brown & Williamson,* 529 U.S. at 160-61, the Court is "obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the [agency] this power." *Id*. at 160. In such cases, the Court has "refused to find implicit in ambiguous sections" of a statute an authorization "that has elsewhere, and so often, been expressly withheld." *Whitman*, 531 U.S. at 467. Such should be the case here.

Since the advent of the Internet, Congress has enacted four statutes – the 1996 Act, the Farm Act, the Broadband Data Act, and the Recovery Act –

that speak directly to how Congress wanted federal agencies to encourage broadband deployment. Together, they represent a "consistent history of legislation" in which Congress withheld broadband rulemaking authority from the FCC. *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 233 (1994).

Congress did not employ the term "broadband" in the 1996 Act to refer to Internet access services. But it did state that the purpose of the statute was "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[18]

The 1996 Act added § 230 to Title II, thereby codifying Congress' findings as to the political and social importance of Internet access services. *See* 47 U.S.C. § 230(a). Finding that Internet access services had "flourished, to the benefit of all Americans, with a minimum of governmental regulation," *id*. § 230(a)(4), Congress made it the policy of the United States to promote the continued development of those services unfettered by regulation. *See id*. § 230(b)(2).

Consistent with Congress' policy choice, § 706(b) did not empower the FCC to prescribe rules to regulate Internet access services. Having designed the "pro-competitive, de-regulatory" policy framework of the 1996 Act specifically to accelerate

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[18] H.R. Rep. No. 104-458, at 1 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 124.

"private sector deployment" of advanced telecommunications and information services, Congress enacted § 706(b) to direct the FCC to determine whether the private sector was deploying "advanced telecommunications capability" in a timely fashion and, if not, to "accelerate deployment of such capability" by immediately taking the deregulatory actions of "removing barriers to infrastructure investment" and "promoting competition in the telecommunications market." 47 U.S.C. § 1302(b).

The goal of § 706(b) was to accelerate, if necessary, private sector investment in, and deployment of, infrastructure that had "high-speed, switched, broadband telecommunications capability." *Id.* § 1302(d)(1). Because the word "deploy" means "to arrange in a position of readiness,"[19] Congress' use of the terms "deployed" and "deployment" in § 706(b) works to limit the duration of the FCC's obligation to take action under the provision. That obligation terminates once the private sector puts sufficient broadband telecommunications infrastructure in place for use in the origination and termination of "high-quality voice, data, graphics, and video telecommunications." *Id.*

Section 706 did not empower the FCC to provide funding for broadband infrastructure investment. And it did not authorize the FCC to take any action *after* the infrastructure was deployed and put to use.

According to the FCC, Congress "reaffirmed its strong interest in ubiquitous deployment of high

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[19] *Random House Webster's Unabridged Dictionary* 535 (2d ed. 2001).

speed broadband communications networks" by enacting the Farm Bill, the Broadband Data Act, and the Recovery Act. App. 206a-207a. But none of these enactments authorized the FCC to engage in post-deployment regulation of broadband service.

The Farm Bill did not authorize the FCC to take any action. It just required the FCC Chairman and the USDA Secretary to make recommendations to Congress to coordinate existing federal rural broadband "initiatives" and identify how federal agencies "can best respond to rural broadband requirements." *Rural Broadband Report*, 24 F.C.C.R. at 12814 (quoting Farm Bill § 6112(a)).

The Broadband Data Act tasked several federal agencies, including the FCC, with broadband data collection responsibilities. *See Broadband Plan Inquiry,* 24 F.C.C.R. at 4387. But it only delegated rulemaking authority to the Commerce Secretary to establish a broadband data and development grant program to encourage statewide initiatives to improve broadband services. *See* 47 U.S.C. § 1304.

Finally, the Recovery Act directed NTIA to establish and administer the Broadband Program to award grants to States, non-profit organizations, and broadband providers to provide or improve consumer access to broadband service. *See Broadband Plan Inquiry*, 24 F.C.C.R. at 4384-85; 47 U.S.C. § 1305. In contrast, the statute only imposed the obligation on the FCC to submit to the House and Senate Commerce Committees a "report containing a national broadband plan," *id*. § 1305(k)(1), to "ensure that all people of the United States have access to broadband capability." *Id*. § 1305(k)(2). Once it handed over the *Broadband Plan* to Congress for its

consideration, the FCC had no further role to play under the Recovery Act.

The broadband provisions of the Recovery Act are codified in § 1305 of Chapter 12. The statute only delegated authority to NTIA "to prescribe such rules as are necessary to carry out the purposes of [§ 1305]." 47 U.S.C. § 1305(m). No rulemaking authority was granted the FCC.

Congress never authorized the FCC to implement its *Broadband Plan* or enacted another piece of broadband-specific legislation. Thus, it left intact the deregulatory policy framework of the 1996 Act, under which the FCC was to encourage the deployment of Internet access services unfettered by regulation. By codifying its broadband legislation outside the reach of the FCC's Chapter 5 rulemaking authority, while giving the FCC no new rulemaking authority, Congress denied the FCC any additional power to prescribe rules to carry out the broadband provisions of Chapter 12.

In deference to Congress' "consistent judgment" to deny the FCC the authority to regulate broadband by rulemaking, *Brown & Williamson*, 529 U.S. at 160, the Tenth Circuit should have held that § 706(b) did not serve as an independent grant of authority to the FCC to prescribe rules that imposed its broadband requirement.

E. The FCC's Interpretation of § 254(e) of the Act Is Unreasonable

The FCC derives its authority to administer the USF program from Title II. The Agency is obliged to "execute and enforce" the USF provisions of §§ 214(e) and 254 of Title II, 47 U.S.C. § 151, using its

authority to prescribe rules and regulations to carry out those provisions. *See* 47 U.S.C. § 201(b). The FCC's prescription of the USF rules below was an exercise of its Title II authority.

The FCC discovered its Title II authority to adopt its broadband requirement hidden in the words "facilities and services" in the second sentence of § 254(e). The Tenth Circuit found that it was sensible to construe that three-word "mousehole" to be a delegation of authority for the FCC to prescribe rules that govern ETC-provided broadband service. That cannot be.

The FCC's interpretation of the "facilities and services" language of § 254(e) is unreasonable, because it did not "account for both 'the specific context in which … language is used' and 'the broader context of the statute as a whole,'" *Utility Air*, 134 S. Ct. at 2442 (quoting *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997)), and it was inconsistent with the "design and structure of the statute." *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2529 (2013). The FCC's construction is inconsistent with the provisions of § 254(e) itself, as well as the deregulatory framework erected by the 1996 Act.

Under § 153(51) of the Act, a telecommunications carrier can be treated as a common carrier under the Act "only to the extent that it is engaged in providing telecommunications service." 47 U.S.C. § 153(51). The FCC has classified broadband as an information service, which "cannot be regulated as common carrier service." *Open Internet*, 29 F.C.C.R. at 5613. But under § 214(e) of Title II, only a common carrier that has been designated as an ETC is eligible to

receive USF support in accordance with § 254. *See* 47 U.S.C. § 214(e)(1). Because an ETC cannot be treated as a common carrier under Title II when it is providing an information service, it is not eligible to receive USF under § 254 when it is providing broadband.

The first sentence of § 254(e) mirrors § 214(e)(1) by providing that only an ETC designated under § 214(e) is eligible to receive USF support. *See id.* § 254(e). Under § 254(c), only "telecommunications services" deployed by "telecommunications carriers" can be supported by "universal service support." *Id.* § 254(c)(1)(C). Finally, the second sentence of § 254(e) mandates that an ETC receiving USF support "*shall* use that support *only* for the provision … of facilities and services for which the support is intended." *Id.* § 254(e) (emphasis added).

The FCC's construction transforms § 254(e) from a limitation that Congress imposed on an ETC's use of USF support into a congressional grant of authority for the FCC to require an ETC to use USF support "for the provision … of [broadband] facilities and services for which the support is [*not*] intended." Thus, the FCC construed § 254(e) to authorize it to require what § 254(e) forbids.

The FCC's interpretation of § 254(e) as an authorization for its broadband requirement is also inconsistent with §§ 153(51), 214(e) and 254(c). Under the broadband requirement, an ETC must provide an information service, the provision of which deprives the ETC of its common-carrier status pursuant to § 153(51), and renders it ineligible to be an ETC under § 214(e)(1). And the FCC requires ETCs to use USF support to provide broadband

service, which is ineligible to be a USF-supported telecommunications service under § 254(c).

The FCC's construction of § 254(e) as an implicit grant of rulemaking authority is inconsistent with the rulemaking authority that Congress expressly gave the Agency under § 254. The FCC claimed that § 254(e) authorized it to prescribe rules to carry out the § 254(b) principles that "access to advanced telecommunications and information services" *should* be provided throughout the country, 47 U.S.C. § 254(b)(2), and to all consumers. *See id.* § 254(b)(3). However, Congress expressly directed the FCC to adopt "competitively neutral rules" to: (1) enhance "access to advanced telecommunications and information services" for all public institutional telecommunications users, and (2) to define when "a telecommunications carrier may be required to connect its network" to such users. *Id.* § 254(h)(2).

Given that Congress explicitly limited the FCC to prescribing rules under which telecommunications carriers would provide broadband to public institutional telecommunications users, the FCC's construction of § 254(e) is unreasonable. Under its construction, the FCC prescribed rules that require ETCs to provide broadband not just to public institutional users, but to anyone who reasonably requests the service. The FCC's attempt to manufacture an implicit grant of authority in § 254(e) cannot override Congress' explicit limitation of the Agency's authority in § 254(h)(2). Considering that Congress spoke directly to the scope of the FCC's rulemaking authority under § 254, if it intended that authority to extend to broadband, it would have said so explicitly.

The FCC's interpretation of § 254(e) allows it to subject broadband providers to common-carrier regulation under Title II. That puts the FCC at odds with the deregulatory framework of the 1996 Act, under which information-service providers are exempt from Title II common-carrier regulation, *see Brand X,* 545 U.S. at 976, and telecommunications carriers are not treated as common carriers under Title II when they are providing information service. *See* 47 U.S.C. § 153(51).

Finally, it was unreasonable for the FCC to construe the "facilities and services" snippet in isolation to authorize it to redirect the entire Title II USF program to supporting a service that is statutorily ineligible for USF support. Congress could not have authorized a transformative change in the USF program in so "cryptic a fashion." *Brown & Williamson*, 529 U.S. at 160. *See MCI*, 512 U.S. at 231 (unlikely that Congress would authorize the FCC to determine whether an industry would be rate-regulated by "such a subtle device as permission to 'modify' rate-filing requirements").

F. The FCC Is Regulating Broadband Under the Title II USF Program in a Manner that Contravenes §§ 153(51) and 332(c) of the Act

1. The Tenth Circuit sidestepped the argument that the FCC cannot use its Title II authority to administer the USF program as a bootstrap to regulate broadband. The court found that the FCC is not regulating broadband providers, because it merely imposed broadband-related conditions on ETCs that "voluntarily" participate in the USF program. App. 133a. What the court characterized

as "conditions" are rules, *see* 5 U.S.C. § 551(4), adopted in a notice-and-comment rulemaking, *see id.* § 553, and published in the Federal Register, *see* App. 663a, and in the Code of Federal Regulations. *See supra* notes 11-13.

The FCC's *raison dêtre* is to "regulate," *see* 47 U.S.C. § 151, a word that means "[t]o control (an activity or process) esp[ecially] through the implementation of rules." *Black's Law Dictionary* 1475 (10th ed. 2014). The FCC now controls the provision of broadband service through the implementation of rules that require all ETCs to provide broadband service that meets "basic performance requirements" and to report on "performance measures." App. 233a-234a.

It is immaterial that ETCs voluntarily sought to participate in the USF program. All FCC-regulated entities fall subject to regulation voluntarily. By *voluntarily* obtaining an FCC certificate to operate as a wireline telecommunications carrier, *see* 47 U.S.C. § 214(a), or an FCC license to operate as a wireless telecommunications carrier, *see id.* § 301, an entity falls subject either to common-carrier regulation under Title II or, in the case of a wireless carrier, to both Title II regulation and radio regulation under Title III. *See Cellco Partnership v. FCC,* 700 F.3d 534, 538 (D.C. Cir. 2012) (describing how "mobile voice providers" are subject to Title II and Title III regulation).

The Tenth Circuit concluded that if a carrier voluntarily seeks USF funding, "it clearly can be subjected to certain conditions that the FCC may choose to attach to the funding." App. 133a. Not so, inasmuch as the FCC's discretion to "choose"

conditions is circumscribed by the Act. Thus, the FCC is empowered "to prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [Chapter 5]." 47 U.S.C. § 303(r). And the "condition" that the FCC attached to USF funding is inconsistent with §§ 153(51), 214(e)(1), 254(c), and 254(e). Simply speaking, the FCC made ETCs eligible for USF funding on the condition they use the funds to provide broadband service, the provision of which renders them ineligible for the funding.

Moreover, the FCC "may not confer power upon itself." *Louisiana PSC v. FCC,* 476 U.S. 355, 374 (1986). When Congress chose not to empower the FCC to regulate information-service providers under Title II, *see Brand X*, 545 U.S. at 976, the Agency cannot confer that authority upon itself by imposing a condition that requires a broadband provider to obey regulations prescribed under Title II. If it is allowed to circumvent statutory limits on its authority by prescribing a funding condition that requires the recipient to submit to unauthorized regulation, the FCC's "jurisdiction … would be unbounded." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979).

2. Assuming *arguendo* that § 254(e) included an implicit delegation of authority, the FCC cannot exercise that authority in a manner that is inconsistent with the Act. *See* 47 U.S.C. §§ 154(i), 303(r). Thus, the FCC cannot exercise its Title II authority to administer the USF program in a manner that contravenes "express statutory mandates." *Verizon*, 740 F.3d at 628. Two such mandates are included in §§ 153(51) and 332(c) of the Act. *See id*. at 650 ("We think it is obvious that

the [FCC] would violate [§§ 153(51) and 332(c)] were it to regulate broadband providers as common carriers").

Like § 153(51), § 332(c) provides that a "person engaged in a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier." 47 U.S.C. § 332(c)(1)(A). Congress apparently derived the "treated as a common carrier" language of §§ 153(51) and 332(c) from *Midwest Video,* which teaches that a carrier is "treated" as a common carrier when it is "regulated" as a common carrier.

In *Midwest Video,* the Court enforced the mandate that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 440 U.S. at 704 (quoting 47 U.S.C. § 153(h) (1970)). The Court found the statutory language to be "unequivocal; it stipulates that broadcasters shall not be *treated* as common carriers." *Id*. at 705 (emphasis added). The Court held that, when the FCC exercised its jurisdiction ancillary to its authority to regulate broadcasting, the Agency "may not regulate cable systems as common carriers, just as it may not impose such obligations on … broadcasters." *Id.* at 709. It held that the FCC exceeded its authority in promulgating rules that "plainly impose common-carrier obligations on cable operators." *Id.* at 701.

The Tenth Circuit did not discharge its *Arlington* obligation to seriously consider the limits that §§ 153(51) and 332(c) place on the FCC's authority. The court permitted the FCC to exercise the Title II authority it discovered in § 254(e) to treat ETCs as USF-eligible common carriers when they are

providing broadband. Such common carrier treatment of broadband providers under Title II is expressly prohibited by §§ 153(51) and 332(c).

Further ignoring *Arlington*, the Tenth Circuit upheld the FCC's imposition of a *per se* common-carrier obligation on broadband providers. The duty to furnish communication service "upon reasonable request," is an obligation that § 201(a) imposes on "every common carrier engaged" in interstate communication service. 47 U.S.C. § 201(a). As in *Verizon*, the FCC imposed "this very duty on broadband providers," 740 F.3d at 653, when it required ETCs to furnish broadband upon reasonable request. The imposition of that common carrier obligation on broadband providers was enough to warrant vacatur. *See id.* at 628 (net neutrality rules were vacated because they imposed "*per se* common carrier obligations").

III. There Is a Conflict Among the Circuits on Whether the FCC Can Regulate Broadband Providers as Common Carriers

The Tenth Circuit brushed aside the argument that, under *Midwest Video,* § 153(51) constituted a statutory limitation that prohibited the FCC from requiring ETCs to "offer broadband service upon reasonable request." App. 132a. That alone put the Tenth Circuit in conflict with the Court in *Midwest Video* and the D.C. Circuit in *Verizon*.

Because of the FCC's "still-binding decision" to classify broadband providers as information-service providers, the *Verizon* court held that §§ 153(51) and 332(c) prohibited the Agency from exercising its § 706 authority to "subject broadband providers to

common carrier treatment." 740 F.3d at 650. The court examined the FCC's net neutrality rules under *Midwest Video* and concluded that the rules imposed a common-carrier obligation on broadband providers by requiring them "to serve all edge providers without 'unreasonable discrimination.'" *Id.* at 655-56.

The Court should resolve the conflict between the Circuits by holding that §§ 153(51) and 332(c) prohibit the FCC from treating broadband providers as common carriers for any purpose, including for the purposes of the Title II USF program, so long as it maintains its information-service classification of broadband.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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