

Title II "Net Neutrality" Broadband Rules Would Breach Major Questions Doctrine

Former Obama Administration Solicitors General Identify Legal Barrier to Utility Regulation of the Internet, Suggest Alternate Paths for Net Neutrality

Donald B. Verrilli, Jr. and Ian Heath Gershengorn



September 20, 2023

TABLE OF CONTENTS

- I. Introduction 1

- II. The Supreme Court’s Articulation of the Major Questions Doctrine.....3

- III. Under Binding Supreme Court Precedent, the Commission Lacks Authority to Reclassify Broadband Service as a Telecommunications Service Subject to Title II Common Carrier Regulation. 10

- IV. Given the Lack of Clear Authority, the Commission Should Not Proceed to Regulate Broadband Under Title II..... 16

- V. Conclusion 17



I. INTRODUCTION¹

The Federal Communications Commission may soon be considering once again how broadband internet access service should be regulated. The goal of enacting core open internet principles so that all consumers can enjoy free and unimpeded access to lawful internet content of their choosing is laudable. The key question, however, is *who* gets to decide how such principles should be translated into law. As it has before, the Commission wants to take that responsibility for itself. Based on public reports and congressional testimony, the Commission is likely to propose treating broadband service as though it were a traditional common carrier service and to subject it to the same regulatory regime under Title II of the Communications Act of 1934 that has historically governed basic telephone service. But that would be wasted effort. Any attempt by the Commission to impose such broad regulatory requirements under current statutes would be struck down by the Supreme Court. And the contentious litigation leading to that inevitable result would waste countless resources for the government, industry, and the public, while distracting all parties from more promising efforts, such as obtaining congressional action to resolve these important issues. The Commission should not go down that path.

Consider first the law. The Supreme Court is likely to invalidate any attempt by the Commission to impose Title II regulation on broadband internet access service. As the last two Terms have made clear, the major questions doctrine is here to stay, and that doctrine resolves this case. The Supreme Court will surely consider the question whether to classify broadband as a Title II telecommunications service subject to common carrier regulation to be a “major question”—that is, one involving a matter of major economic and political significance. As then-Judge Kavanaugh noted, that proposition is “indisputable,” and “any other conclusion would fail the straight-face test.” And, the Court has made crystal clear that when a federal agency seeks to address a major question, the agency must have “clear congressional authorization” for the regulations it imposes. The statutory text on which the Commission proposes to hang its hat lacks the clear statement of authority that the Supreme Court demands. Nothing in Title II of the Communications Act itself or in any other statute gives the Commission the clear and unambiguous authority to classify broadband as a Title II telecommunications service subject to common carrier regulation, and the Commission cannot reasonably conclude otherwise.

¹ Donald B. Verrilli, Jr. is a partner at Munger, Tolles & Olson LLP. He previously served as the Solicitor General of the United States (2011-2016), Deputy White House Counsel (2010-2011), and Associate Deputy Attorney General (2009-2010). Ian Heath Gershengorn is a partner at Jenner & Block LLP. He previously served as Acting Solicitor General of the United States (2016-2017), Principal Deputy Solicitor General (2013-2016), and Deputy Assistant Attorney General (2009-2013). Over the course of our careers, we have represented the federal government and broadband providers on issues relevant to this paper, and we gratefully acknowledge the support of USTelecom–The Broadband Association and NCTA–The Internet & Television Association—in funding this analysis. All views expressed here are our own and do not necessarily reflect the views of USTelecom, NCTA, or their members.

We recognize that the Commission determined in 2015 that it had the authority to reclassify broadband internet access services as Title II telecommunications services,² and that the D.C. Circuit upheld that determination.³ The Commission, however, can take little solace from that ruling. The Supreme Court never got to consider the lawfulness of the Commission's 2015 decision, and the Commission rescinded that decision and abandoned the Title II approach to broadband regulation in 2018. The Supreme Court's commitment to the major questions doctrine has intensified in the years since the D.C. Circuit ruled, as the Court's recent decision in *West Virginia v. EPA* makes clear. Even at the time, it was clear to then-Judge Kavanaugh that the panel's ruling upholding the Commission's classification decision was foreclosed by the major questions doctrine.⁴ There is every reason to think that the views he expressed then would command the agreement of a majority of the Justices on the Supreme Court today.

“ **A Commission decision reclassifying broadband as a Title II telecommunications service will not survive a Supreme Court encounter with the major questions doctrine.** ”

Given that legal reality, for the Commission to move forward unilaterally to impose Title II regulations on broadband would be a serious mistake. The administrative proceedings to develop the new regime will require a massive commitment of resources from the government and private parties alike, and the ensuing court challenges will do the same. Moving ahead in this way thus would distract the Commission from its other priorities—ones fully within the scope of its congressional authority. Moreover, as a practical matter, the Commission's actions will prevent the parties from focusing on the real solution here: crafting legislation that will provide a clear and stable framework for broadband regulation. Only that approach will provide a solution that survives changes to the political make-up of the Commission and does so in a way that the Supreme Court could uphold.

To be sure, the wisdom and propriety of the Supreme Court's major questions doctrine is a matter of debate. Some (including both of us) believe that the Court has gone too far in restricting federal agency authority to meet new and pressing challenges. But like it or not, a robust major questions doctrine is now a fact of regulatory life. A Commission decision reclassifying broadband as a Title II telecommunications service will not survive a Supreme Court encounter with the major questions doctrine. It would be folly for the Commission and Congress to assume otherwise.

² *Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling and Order*, 30 FCC Rcd 5601 ¶ 1 (2015) (“Title II Order”).

³ *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

⁴ *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 426 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).



II. THE SUPREME COURT'S ARTICULATION OF THE MAJOR QUESTIONS DOCTRINE

The Supreme Court's understanding of the appropriate relationship between federal administrative agencies and the judiciary has undergone a sea change over the past two decades. Federal agencies can no longer expect to receive substantial deference from the courts when they interpret statutory provisions defining the nature and scope of their regulatory authority, particularly when they pursue expansive or creative interpretations of statutes to adopt rules of major consequence. Whether or not the Supreme Court formally overrules *Chevron*,⁵ the days in which federal courts uncritically uphold any reasonable agency interpretation of the statute it administers are over. The Court itself has not upheld an agency action on the basis of *Chevron* deference in almost a decade. When the Court reviews federal agency action for conformity to law, it routinely decides for itself what the statute means. And the Supreme Court has not hesitated to invalidate agency actions that lower courts have upheld under *Chevron* when the Court concludes that agency's course of action cannot be reconciled with the most straightforward reading of the relevant statute.⁶ In systematic fashion, the Court is reclaiming the primary authority to determine the meaning of the statutes that federal agencies implement.

“ The Court itself has not upheld an agency action on the basis of *Chevron* deference in almost a decade. ”

Perhaps the most powerful manifestation of this reconfigured relationship between the courts and administrative agencies is the “major questions doctrine.” The Court has rooted the doctrine in the Constitution's separation of powers, which the Court has understood to mean that policy choices about matters of great economic and political significance should be made by the democratically accountable Congress in the exercise of its Constitutional authority to make the nation's laws, and not by unaccountable administrative agencies acting under the purported authority of ambiguous statutes. To implement that principle, the Supreme Court has made clear, and emphatically reaffirmed this year, that an administrative agency does not possess the authority to promulgate rules addressing matters of great economic and political significance unless Congress has provided “clear congressional authorization” for such rules. Importantly, the Court has not said merely that it will decide for itself whether ambiguous statutory text is best read as giving the agency the authority to resolve the major question

⁵ *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

⁶ See *American Hospital Ass'n v. Becerra*, 142 S.Ct. 1896, 1899 (2022).

in the manner that the agency has. The Court has gone a good deal further. If the statute invoked by the agency lacks a clear congressional authorization for agency action on a major question, then the agency lacks the authority to act *at all*. Put simply, if the statute is not unambiguous, a reviewing court must invalidate the agency policy.⁷

The major questions doctrine has been gathering steam since at least the Court's 2000 decision in *FDA v. Brown & Williamson Tobacco Corp.*⁸ In that case, the Court invalidated the FDA's decision in the 1990s to regulate tobacco products as drugs. The statutory text of the Food, Drug and Cosmetics Act defined "drugs" and "devices" subject to the FDA's jurisdiction in a manner that could reasonably be read as covering tobacco products. But the Court refused to defer to the FDA's reading of the terms, stating that it was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."⁹ Instead the Court looked to the overall structure of the statutory scheme, a 50-year history of the FDA's leaving tobacco unregulated, and the fact that Congress had enacted numerous pieces of legislation "addressing the problem of tobacco use and human health" without ever suggesting that the FDA had regulatory authority over tobacco products. Based on those considerations, the Court concluded that it was "clear . . . that Congress ha[d] precluded the FDA from regulating tobacco products."¹⁰ The Court was unwilling to accept that Congress left it to the agency's discretion to determine whether to take a step with such vast "economic and political significance."¹¹ The bottom line for the Court in *Brown & Williamson* was that a decision to subject tobacco products to FDA-style regulation was not one an agency could make on its own. Such a decision was important enough, and its ramifications significant enough for the economy and the public, that it should be made by the body the Constitution assigns the authority to make law: Congress.¹²

⁷ Commentators have noted the existence of both a "weak" and a "strong" version of the major questions doctrine. See, e.g., Cass R. Sunstein, *There are Two "Major Questions" Doctrines*, 73 Admin. L. Rev. 475 (2021). As applied in its so-called "weak" version, the doctrine denies federal agencies *Chevron* deference when they interpret ambiguous statutory provisions of deep "economic and political significance" that are "central to [a] statutory scheme." *King v. Burwell*, 576 U.S. 473, 486 (2015). But it is the "strong" version of the doctrine that has emerged as dominant. Under the strong version, an agency not only loses the benefit of *Chevron* deference, it is denied the authority to act at all unless it can demonstrate that it has clear congressional authorization to regulate with respect to the matter at issue.

⁸ 529 U.S. 120 (2000).

⁹ 529 U.S. at 160.

¹⁰ *Id.*

¹¹ *Id.* at 159.

¹² See also *Gonzales v. Oregon*, 546 U.S. 243 (2006). In *Gonzales*, the Court considered whether the Controlled Substances Act gave the Attorney General the power to forbid physicians from prescribing controlled substances for assisted suicides. The Attorney General possessed statutory authority to de-register physicians, thus preventing them from writing prescriptions for certain drugs, if the Attorney General concluded that de-registration was in the public interest. The Attorney General issued an interpretive rule declaring that physicians could not prescribe controlled substances for assisted suicides. The Court invalidated the rule, concluding that in the absence of a clear statutory grant of authority, it would not assume that Congress gave the Attorney General a sweeping power to declare an entire class of activity outside the course of professional practice. *Id.* at 262.

The Supreme Court took a similar approach in 2014 in *Utility Air Regulatory Group v. EPA* when it invalidated an EPA decision to include greenhouse gases under certain permitting provisions of the Clean Air Act.¹³ As in *Brown & Williamson*, the Court did not focus its analysis on whether purportedly ambiguous statutory text could reasonably be construed to encompass the action that the EPA sought to take. Instead, the Court emphasized that allowing the EPA to apply its permitting process to sites that emitted greenhouse gases “would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.”¹⁴ As in *Brown & Williamson*, the Court was deeply skeptical, stating that when “an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ we typically greet its announcement with a measure of skepticism.”¹⁵ Instead, the Court “expect[s] Congress to *speak clearly* if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”¹⁶ Ambiguous text simply will not suffice.

In the past two Terms, the Supreme Court has applied the major questions doctrine with particular vigor. In four separate cases, the Court has invoked the doctrine to reject a federal agency’s exercise of its authority to address significant national problems through interpreting ambiguous statutory provisions.

In resolving the challenge to the broad Covid-related moratorium on residential evictions imposed by the Centers for Disease Control, for example, the Court’s per curiam opinion in *Ala. Ass’n of Realtors v. Dep’t of Health & Human Servs.* rejected the CDC’s reading of the statutory text.¹⁷ Notably, the Court concluded that even if the statutory text “were ambiguous, the sheer scope of the CDC’s claimed authority under [the statute] would counsel against the Government’s interpretation” because the Court “expect[s] Congress to speak clearly when authorizing an agency to exercise powers of ‘vast economic and political significance.’”¹⁸ Nothing short of an unambiguous grant of statutory authority could justify the CDC’s decision to take a major step like imposing an eviction moratorium.

The Court followed the same approach in the OSHA vaccine-mandate case, *NFIB v. Department of Labor*. There, the per curiam opinion for six Justices did not engage in a careful parsing of the statutory text on which OSHA

¹³ 573 U.S. 302 (2014).

¹⁴ *Id.* at 321, 324.

¹⁵ 573 U.S. 302, 324 (2014) (quoting *Brown & Williamson*, 529 U.S. at 159).

¹⁶ *Id.* (quoting *Brown & Williamson*, 529 U.S. at 160) (emphasis added).

¹⁷ *Ala. Ass’n of Realtors v. Dep’t of Health & Human Servs.*, 141 S. Ct. 2485, 2488 (2021) (per curiam).

¹⁸ *Id.* at 2489 (quoting *Utility Air Regulatory Grp.*, 573 U.S. at 324). Justice Kavanaugh made a similar point in an earlier opinion regarding a stay of the district court’s order holding the moratorium unlawful. His opinion cited *Utility Air Regulatory Group*, and noted that “clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend [its] moratorium.” *Ala Ass’n of Realtors v. Dep’t of Health & Human Servs.*, 141 S. Ct. 2320, 2321 (2021) (Kavanaugh, J., concurring).



relied—text that arguably was broad enough on its face to authorize the vaccine mandate.¹⁹ The Court instead again held that Congress must “speak clearly when authorizing an agency to exercise powers of vast economic and political significance.”²⁰ The Court explained that OSHA’s vaccine mandate qualified as an exercise of vast economic and political significance: “It is . . . a significant encroachment into the lives—and health—of a vast number of employees.”²¹ It was therefore not enough that the Occupational Safety and Health Act might plausibly be read to give OSHA the authority to impose a workplace vaccine mandate. The question was whether the statute “*plainly* authorizes the Secretary’s mandate.”²² Finding no clear authorization, the Court held that the agency action was unlawful.²³

In a concurrence joined by Justices Alito and Thomas, Justice Gorsuch went farther still. He argued that there are important constitutional underpinnings to the major questions doctrine. As he understood it, the doctrine “ensures that the national government’s power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people’s elected representatives.”²⁴ Thus, under the major questions doctrine, “any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.”²⁵ In his view, the Court should—indeed must—presume that Congress did not grant federal agencies the power to effectively make law through regulatory action on matters of vast economic and political significance on the basis of ambiguous statutes that do not directly address the matter at hand. Were agencies to exercise authority over such matters, they would act in derogation of the “non-delegation doctrine”—which holds that Congress may not “divest[] itself of its legislative responsibilities” through the excessive delegation of legislative power to administrative agencies.²⁶

Then, with striking clarity, the Court reaffirmed the importance of the major questions doctrine in *West Virginia v. EPA*.²⁷ There, the Court held that the EPA did not have statutory authority under 42 U.S.C. § 7411(d) to devise

¹⁹ The statutory text authorizes OSHA to promulgate emergency temporary health standards for workplaces wherever OSHA determines “(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.” 29 U.S.C. § 655(c)(1).

²⁰ *NFIB v. Dep’t of Labor*, 142 S. Ct. at 665 (quoting *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489).

²¹ *Id.*

²² *Id.* (emphasis added).

²³ To be sure, the Court did uphold the health-care-worker vaccine mandate, promulgated by the Centers for Medicare and Medicaid Services (CMS) through Medicare and Medicaid regulations. *Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam). But as the Court saw it, the health care worker mandate was far more limited in its scope and application than the OSHA mandate. See *id.* at 653. And CMS has routinely used its statutory authority to impose conditions of participation in Medicare and Medicaid. See *id.* at 652-53.

²⁴ *Id.* at 668 (Gorsuch, J., concurring).

²⁵ *Id.* at 668-69.

²⁶ *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting).

²⁷ 142 S. Ct. 2587 (2022).



a regulatory program that would directly shift the nation's overall mix of electricity generation from coal to gas and from both to renewable energy. Chief Justice Roberts, writing for the Court, noted that the major questions doctrine applies in "cases in which the history and the breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority."²⁸ In those cases, "a plausible textual basis" for the agency's actions is not enough.²⁹ Instead, the agency must point to "clear congressional authorization" for the authority it claims.³⁰ As the Court put it, "enabling legislation is generally not an open book to which the agency may add pages and change the plot line."³¹ Accordingly, the Court will presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies."³²

“ Enabling legislation is generally not an open book to which the agency may add pages and change the plot line. ”
— *West Virginia v. EPA*, U.S. Supreme Court, 2022

Chief Justice Roberts' opinion articulates several factors that the Court considers relevant to the "clear authorization" inquiry. As the Court viewed it, § 7411(d) was an insufficient basis for the agency's exercise of broad authority because that provision was a "long-extant" "gap filler" that had rarely been invoked and had only been invoked as authority for a different regulatory approach.³³ The Court also based its holding on the conclusion that the EPA's exercise of authority "effected a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind."³⁴ And, the Court placed some weight on its conclusion that it is "highly unlikely that Congress would leave' to 'agency discretion' the decision of how much coal-based generation there should be over the coming decades," and that Congress consistently considered and rejected a regulatory program of the kind adopted by the EPA.³⁵

²⁸ *Id.* at 2608 (cleaned up).

²⁹ *Id.* at 2608-09.

³⁰ *Id.* at 2609 (quoting *Utility Air*, 573 U.S. at 324).

³¹ *Id.* at 2609.

³² *Id.* (quoting *U.S. Telecom Ass'n v. FCC*, 855 F.3d at 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

³³ *Id.* at 2610.

³⁴ *Id.* at 2612 (quoting *MCI*, 512 U.S. at 231).

³⁵ *Id.* at 2613.

Justice Gorsuch, joined by Justice Alito, once again filed a concurring opinion to “offer some additional observations about the doctrine.”³⁶ He echoed the majority’s assertion that the doctrine applies especially to “a matter of great political significance,” as well as regulations affecting “a significant portion of the American economy.”³⁷ And he noted tell-tale signs for agency overreach, including locating “broad and unusual authority” in “oblique statutory language”; using “an old statute” to “solve a new and different problem”; and invoking a “previously unheralded power” in the absence of a “long-held Executive Branch interpretation of a statute.”³⁸

Finally, just this past June, the Court in *Biden v. Nebraska* reaffirmed its commitment to the major questions doctrine when it struck down President Biden’s federal student loan forgiveness program. In the student loan case, the Secretary of Education had invoked his broad statutory authority during the pandemic to “waive or modify any statutory or regulatory provision applicable to the student financial assistance program . . . as the Secretary [of Education] deems necessary in connection with a . . . national emergency.”³⁹ The Court in a 6-3 decision held that the Secretary nonetheless lacked authority for his actions. Chief Justice Roberts began his analysis by noting that “The question here is not whether something should be done; it is who has authority to do it.”⁴⁰ And, invoking *West Virginia v. EPA* and the major questions doctrine, he concluded that it was Congress—and not the Secretary of Education—that had the requisite authority. As the Court saw it, “the economic and political significance of the Secretary’s action is staggering by any measure”;⁴¹ “Congress is not unaware of the challenges facing student borrowers”;⁴² and the loan forgiveness program “raises questions that are personal and emotionally charged, hitting fundamental issues about the structure of the economy.”⁴³ Against that backdrop, the Court concluded, the “indicators from our previous major questions cases are present.”⁴⁴

Along the way, the Court rejected the dissent’s contention that *West Virginia v. EPA* and the major questions doctrine were inapplicable where, as here, decisions regarding student loans “are in the Secretary’s

³⁶ *Id.* at 2616 (Gorsuch, J. concurring).

³⁷ *Id.* at 2620-2621 (Gorsuch, J. concurring) (internal quotation marks omitted).

³⁸ *Id.* at 2623 (Gorsuch, J. concurring) (cleaned up).

³⁹ *Op.* at 13 (quoting 20 U.S.C. 1098bb(a)(1)).

⁴⁰ *Op.* at 19.

⁴¹ *Id.* at 21 (internal quotation omitted).

⁴² *Id.* at 22.

⁴³ *Id.* at 22.

⁴⁴ *Id.* at 23.



wheelhouse.”⁴⁵ Instead, the Court’s majority believed, “in light of the sweeping and unprecedented impact of the Secretary’s loan forgiveness program, it would seem more accurate to describe the program as being in the ‘wheelhouse’ of the House and Senate Committees on Appropriations.”⁴⁶ In any event, the Court concluded, “the issue now is not whether *West Virginia* is correct”; instead, “the question is whether that case is distinguishable from this one. And it is not.”⁴⁷

What is the upshot of these decisions? First, the major questions doctrine imposes a significant constraint on the power of administrative agencies to regulate on matters of great economic and political significance: the agency must have a clear mandate from Congress before it can move forward. Second, while the precise contours of what constitutes a “major question” remain uncertain at the margins, agency actions that would impose serious regulatory burdens on a significant portion of the American economy or a significant portion of the American population, or that entail enormous costs to regulated entities or the public, or that have garnered substantial attention from Congress and the public, will qualify.⁴⁸ Third, if the agency’s proposed regulation would amount to a substantial and unprecedented expansion of the scope and intrusiveness of its regulatory authority, the Court will likely find that the requirements of the major questions doctrine apply. Fourth, if Congress has repeatedly considered the matter on which the agency proposes to regulate and has not enacted legislation, that fact will weigh in favor of finding that the matter is beyond agency authority. And, fifth, agency authority is more likely lacking in the absence of a consistent and long-standing agency construction that it has such authority.

The bottom line is this: an administrative agency may regulate on a matter of major economic and political significance only if Congress has unambiguously conferred on it the statutory authority to impose the regulation. And that is true even if the agency believes—sincerely—that its actions are needed to prevent great harm. The Supreme Court’s decisions over the past two years leave no doubt on that score. In the CDC eviction moratorium case, the OSHA vaccine mandate case, and the federal student loan case, the Court applied the major questions doctrine to constrain federal agency authority even with respect to emergency actions taken to respond to an unprecedented public health crisis that killed more than a million Americans and upended the nation’s economy. And in the EPA case, the Court curtailed EPA authority to address climate change, one of the most pressing threats to our planet. Under the Court’s doctrine, it is Congress—not the agency—that must respond.

⁴⁵ *Id.* at 23.

⁴⁶ *Id.*

⁴⁷ *Id.* (cleaned up).

⁴⁸ *U.S. Telecom Ass’n v. FCC*, 855 F.3d at 422-23 (Kavanaugh, J., dissenting from denial of rehearing en banc) (noting that relevant factors include “the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue”).



III. UNDER BINDING SUPREME COURT PRECEDENT, THE COMMISSION LACKS AUTHORITY TO RECLASSIFY BROADBAND SERVICE AS A TELECOMMUNICATIONS SERVICE SUBJECT TO TITLE II COMMON CARRIER REGULATION.

Against this legal backdrop, the question of whether the Commission possesses the authority to subject broadband internet access services to traditional common-carrier regulation under Title II of the Communications Act is an easy one: The Commission lacks that authority. Under the Court's current doctrine, the issue of reclassification of broadband under Title II is a "major question." And, the Commission lacks the "clear congressional authorization" that the Court requires.

Classification of broadband as a Title II service subject to utility-style regulation implicates a major question.

There is no doubt that under current law, the decision whether to reclassify broadband as a telecommunications service is a decision of great economic and political significance, and thus presents a major question. Indeed, when faced with this precise issue, then-Judge Kavanaugh called it "indisputable" that reclassification under Title II presented a major question, and he asserted that "any other conclusion would fail the straight-face test."⁴⁹

“ Any other conclusion would fail the straight-face test. ”
— *then-Judge Kavanaugh, 2017*

The nation's experience during the Covid-19 pandemic vividly illustrates the point. It is difficult to imagine how our economy, to say nothing of our family and social lives, could have persevered these past few years without the wide availability of reliable, effective broadband service. Broadband services provided the indispensable link that allowed hundreds of millions of Americans to do their jobs, go to school, and maintain vitally important personal and family relationships. Even before the experience of the pandemic, the Commission itself recognized, when it reclassified broadband internet access service as a telecommunications service in 2015, that the "open internet drives the American economy and serves, every day, as a critical tool for America's citizens to conduct commerce, communicate, educate, entertain and engage in the world around them."⁵⁰

⁴⁹ *U.S. Telecom Ass'n v. FCC*, 855 F.3d at 424 (Kavanaugh, J., dissenting from denial of rehearing en banc). Judge Brown made the same point. *Id.* at 402 (Brown, J., dissenting from denial of rehearing en banc).

⁵⁰ *Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling and Order*, 30 FCC Rcd 5601 ¶ 1 (2015) ("Title II Order").



Justice Kavanaugh made the same point when the issue was presented to the D.C. Circuit:

“The net neutrality rule is a major rule because it imposes common-carrier regulation on Internet service providers. . . . In so doing, the net neutrality rule fundamentally transforms the Internet by prohibiting Internet service providers from choosing the content they want to transmit to consumers and from fully responding to their customers’ preferences. The rule therefore wrests control of the Internet from the people and private Internet service providers and gives control to the Government. The rule will affect every Internet service provider, every Internet content provider, and every Internet consumer. The financial impact of the rule—in terms of the portion of the economy affected, as well as the impact on investment in infrastructure, content, and business—is staggering.”⁵¹

The nature, scope, and effects of common carrier regulation of this indispensable element of our national economic and social lives thus raises precisely the concerns that bring the major questions doctrine into play.

Further illustrating the critical importance of broadband reclassification is the amount of attention reclassification has received in Congress, and in the public debate more broadly. Indeed, like the regulation of tobacco at issue in *Brown & Williamson*, broadband internet access service has its own “unique political history” and its own “unique place in American history and society.”⁵² Classifying such service as a Title II service subject to common-carrier regulation “implicates serious policy questions, which have engaged lawmakers, regulators, businesses, and other members of the public for years.”⁵³ Congress has repeatedly considered—though has never enacted—legislation that would have imposed common-carrier regulations on providers of broadband internet access service.⁵⁴ Nor has Congress abandoned the effort: In July of last year, Senator Markey, Senator Wyden, and Congresswoman Matsui introduced yet another net-neutrality bill, touting both the importance of the issue and the need for congressional action.⁵⁵ Conversely, in 2021, Congress actually enacted legislation that establishes a framework for broadband service that includes low-income and deployment subsidies, consumer protection rules, and price transparency requirements, and establishes a policy of broadband equal access and non-discrimination, all without reference to Title II.⁵⁶

⁵¹ *U.S. Telecom Ass’n v. FCC*, 855 F.3d at 426 (Kavanaugh, J., dissenting from denial of rehearing en banc).

⁵² *Id.*

⁵³ *Verizon v. FCC*, 740 F.3d 623, 634 (D.C. Cir. 2014).

⁵⁴ *U.S. Telecom Ass’n v. FCC*, 855 F.3d at 423; see also, e.g., Save the Internet Act of 2019, H.R. 1644 (2019).

⁵⁵ Net Neutrality and Broadband Justice Act of 2022 (S. 4676). Sponsors of the legislation emphasized that the Internet is “essential” to the national economy (statement of Senator Markey), and noted the need for Congress to provide “clear rules of the road” (statement of Congresswoman Matsui), available at <https://www.markey.senate.gov/news/press-releases/senators-markey-wyden-and-rep-matsui-introduce-legislation-to-reinstate-net-neutrality-reverse-damaging-trump-era-deregulation>.



Similarly, each time the Commission has sought to address this broadband Title II classification question, it has received (literally) millions of comments from industry, public interest organizations, and members of the public, all of whom sought to explain the significant perceived consequences and benefits of Commission regulation.⁵⁷

Nor is there any doubt that classifying broadband internet access service as a Title II telecommunications service would “bring about an enormous and transformative expansion in [the agency’s] regulatory authority . . . over the national economy.”⁵⁸ Then-Judge Kavanaugh called the Commission’s last net neutrality rule “one of the most consequential regulations ever issued by any executive or independent agency in the history of the United States.”⁵⁹ Whether or not the Commission exercises the full scope of its authority under Title II in regulating broadband services, classifying broadband internet access service as a Title II service would indisputably give the Commission the *power* to impose the full range of common-carrier regulation should it choose to do so.⁶⁰ So, in the relevant sense, reclassifying broadband internet access services as Title II services would vastly expand the Commission’s authority over those services.

The Commission itself has acknowledged as much. It stated in the 2015 *Title II Order* that classifying broadband internet access service as a telecommunications service would bring about “a sudden, substantial expansion of the actual or potential regulatory requirements and obligations” for broadband internet access services.⁶¹ In this respect, the Commission’s approach during the brief period when it classified broadband service as a Title II telecommunications service is telling. As the Commission quickly realized, many Title II provisions cannot sensibly be applied to broadband internet access services because those provisions refer to traditional telephone service or equipment and long predated the broadband era.⁶² The Commission thus had to invoke its authority under Section 10 of the Communications Act to forbear from enforcing the large majority of common-carrier requirements that would otherwise have applied to broadband service under

⁵⁶ Infrastructure Investment and Jobs Act, Pub. Law No. 117-58, 135 Stat. 429, div. F, tit. V (“Broadband Affordability”) (2021).

⁵⁷ *U.S. Telecom Ass’n v. FCC*, 855 F.3d at 423 (Kavanaugh, J., dissenting from denial of rehearing en banc) (noting that the FCC had received “some 4 million comments on the proposed rule, apparently the largest number (by far) that the [Commission] has ever received about a proposed rule”).

⁵⁸ *Utility Air Regulatory Grp.*, 573 U.S. at 324.

⁵⁹ *U.S. Telecom Ass’n v. FCC*, 855 F.3d at 417 (Kavanaugh, J., dissenting from denial of rehearing en banc).

⁶⁰ As then-Judge Kavanaugh observed:

The rule transforms the Internet by imposing common-carrier obligations on Internet service providers and thereby prohibiting Internet service providers from exercising editorial control over the content they transmit to consumers. The rule will affect every Internet service provider, every Internet content provider, and every Internet consumer. The economic and political significance of the rule is vast.

U.S. Telecom Ass’n v. FCC, 855 F.3d at 417 (Kavanaugh, J., dissenting from denial of rehearing en banc).

⁶¹ *Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601 ¶ 495 (2015).

⁶² E.g. 47 U.S.C. §§ 221, 223, 225, 226, 227, 228, 251, 252, 258.

Title II—and the Commission will have to do so again if it seeks to reclassify broadband today. It is thus clear that if the Commission purports to reclassify broadband under Title II—as it did in 2015—the Commission would not in any real sense be implementing a policy choice by Congress, but would instead be using statutory forbearance authority to create a bespoke regulatory framework from scratch. Under the Supreme Court’s understanding of the major questions doctrine, such an approach is an exercise of the legislative power itself, not an implementation of legislative judgments already made by Congress. It is precisely the exercise of such “legislative” authority by agencies that the doctrine seeks to constrain.⁶³

The Commission lacks clear statutory authority to reclassify broadband under Title II. The Commission lacks authority to resolve this major question because it cannot point to any clear statutory authority granting it the power to classify broadband internet access service as a Title II telecommunications service. That is unsurprising. The Congress that passed the Communications Act in 1934 obviously could not have envisioned the internet as we have it today, and thus that act surely did not provide the necessary clear authorization. Nor did the Telecommunications Act of 1996 do the trick. That act was passed against the background of a regulatory history that distinguished between “basic” services and “enhanced” services, a distinction that roughly mirrors the current statutory distinction between “telecommunications services” and “information services.” “Enhanced services” included the kind of services that are now made available by broadband internet access service providers.⁶⁴ The 1996 Act also specifically defined “interactive computer service[s]” to include any “information service . . . including specifically a service . . . that provides access to the Internet.”⁶⁵ That definition suggests that Congress contemplated that “a service . . . that provides access to the Internet” would be governed under a new and distinct regulatory scheme for “information service” providers—not under the decades-old common carrier regime that governed traditional telephone service. In these respects, the present situation again resembles *Brown & Williamson*, in which Congress enacted legislation addressing the regulation of tobacco against a backdrop of FDA regulations that distinguished tobacco from “drugs.”⁶⁶ Whatever else may be the case, Congress has not *clearly* authorized the FCC to classify broadband internet access as a Title II telecommunications service.

⁶³ To be sure, forbearance authority itself is a form of express authorization for the Commission to exercise discretion in the application of Title II. But the extensive nature of the Commission’s forbearance went well beyond tailoring Title II to reflect changes in market conditions and was aimed at nothing less than achieving an entirely new regulatory construct. See 30 FCC Rcd 5601 ¶ 5 (touting the exercise of forbearance authority “to forbear from application of 27 provisions of Title II of the Communications Act, and over 700 Commission rules and regulations”). Moreover, the Commission’s need to exercise such massive forbearance authorization to make the policy function reenforces that the Commission’s reclassification of broadband as a Title II telecommunications service qualifies as a major question.

⁶⁴ See, e.g., *Bell Atl. Tel. Cos.*, 3 FCC Rcd 6045, ¶¶ 3, 7 & n.8 (1988) (treating “gateway services” allowing “a customer with a personal computer . . . to reach . . . databases providing business, . . . investment, . . . and entertainment information” as “enhanced services”).

⁶⁵ 47 U.S.C. § 230(f)(2).

⁶⁶ *Brown & Williamson*, 529 U.S. at 144.



Likewise relevant to the analysis is the fact that the Commission's own regulations have for decades left broadband service providers free from the more burdensome regulations that a Commission Title II reclassification would impose. That is consistent with the "light-touch" regulatory approach that Congress anticipated when it amended the Communications Act in 1996, and it is *inconsistent* with the notion that the Commission has, from the start, had the clear congressional authorization to impose a restrictive regulatory regime—created for traditional telephone service—on broadband internet access. Moreover, as noted, Members of Congress have continued to propose and debate legislation that would regulate broadband internet access, an unusual situation if (as the Commission would seem to believe) Congress had already established a clear framework for the Commission to do so. In short, the Commission lacks clear congressional authorization for Title II reclassification, and thus the major questions doctrine precludes the Commission from doing so on its own initiative under the existing statutory framework.

Brand X is not to the contrary. The Supreme Court's 2005 decision in *Brand X Internet Servs. v. Nat'l Cable Telecomms. Ass'n*⁶⁷ does not justify reclassifying broadband internet access service as a Title II telecommunications service. To the contrary, as then-Judge Kavanaugh pointed out, if anything, *Brand X* forecloses the Commission from reclassifying broadband internet access service as a Title II common carrier service.⁶⁸



In *Brand X*, the Supreme Court *upheld* the Commission's policy of treating broadband internet access service as an information service—a policy that has been in place in all but two years since the Commission first implemented the 1996 Act. In so doing, the Court rejected the argument that the statutory text of the Communications Act compelled the Commission to classify broadband as a Title II telecommunications service subject to traditional common-carrier regulation. The Court held that the statutory "term 'telecommunications service' is ambiguous" in its application to broadband internet access service.⁶⁹ Having concluded that the Act "fails unambiguously to classify facilities-based information-service providers as telecommunications-service offerors," the Court upheld as reasonable the Commission's decision to

⁶⁷ 545 U.S. 967, 996-97 (2004).

⁶⁸ *U.S. Telecom Ass'n v. FCC*, 855 F.3d at 426 (Kavanaugh, J., dissenting from denial of rehearing en banc).

⁶⁹ *Id.* at 993.

regulate them as information service providers.⁷⁰ The predicate of the Court's ruling, therefore, was that the Communications Act did not unambiguously require the Commission to classify broadband internet access service as a Title II telecommunications service. That ruling effectively dictates how the major questions doctrine will apply to any attempt on the part of the Commission to so classify broadband internet access service now.

We recognize that two respected judges on the D.C. Circuit—Chief Judge Srinivasan and Judge Tatel—have interpreted *Brand X* as interpreting the existing statutory scheme to provide a sufficiently clear grant of authority to satisfy the major questions doctrine. We believe that conclusion is incorrect, and we believe the Supreme Court will reject it. The Supreme Court in *Brand X* had no occasion to consider—and did not consider—how the major questions doctrine might affect that case. That is because, as then-Judge Kavanaugh has explained, the Commission's decision to classify broadband internet access service as an information service did not entail the "exercise [of] expansive regulatory authority over some major social or economic activity."⁷¹ Instead, the "light touch" regulation that resulted from the Commission decision at issue in *Brand X* was not, in the words of *Utility Air Regulatory Group*, "an enormous and transformative expansion of [the Commission's] regulatory authority."⁷² A decision by the Commission to classify broadband internet access services as information services therefore did not implicate the concerns animating the major questions doctrine.

In contrast, a decision to classify broadband as a Title II telecommunications service would implicate those concerns in the most fundamental ways. Put differently, the statutory ambiguity at issue in *Brand X* could be resolved in favor of classifying broadband internet access service as an information service without triggering the limitations of the major questions doctrine. However, the very existence of that ambiguity would preclude classifying broadband internet access service as a Title II telecommunications service, because such a decision would vastly expand the Commission's authority and would transform the way a federal agency regulates a vitally important element of our economy and the personal and social lives of hundreds of millions of Americans.

In all events, as the Court's decisions from the past two Terms show, the Supreme Court's commitment to the major questions doctrine has intensified considerably in the nearly two decades since *Brand X* was decided. There is every reason to think that a majority of the Supreme Court will view the question whether the Commission possesses the authority to classify broadband internet access services as Title II telecommunications services exactly as then-Judge Kavanaugh did in his dissenting opinion in *U.S. Telecom*.

⁷⁰ *Id.* at 989.

⁷¹ 885 F.3d at 425-26 n.5.

⁷² 573 U.S. at 324.



IV. GIVEN THE LACK OF CLEAR AUTHORITY, THE COMMISSION SHOULD NOT PROCEED TO REGULATE BROADBAND UNDER TITLE II

Against this legal framework, the Commission would be ill-served by a decision to reclassify broadband under Title II. To be sure, even when a loss is certain, the Commission may be tempted for political reasons to “get caught trying,” and leave it to the Court to pronounce its judgments. But that would be a mistake.

Rulemakings of this sort are massive undertakings, and parties have spent collectively millions of dollars to comment on the proposed rules. The ensuing litigation can be just as costly. If past is prologue, one can expect numerous challenges and countless amicus briefs as part of years of costly litigation. And for what? Just so the Supreme Court can confirm what is already apparent: The Commission lacks authority to act.

“ [O]ne can expect numerous challenges and countless amicus briefs as part of years of costly litigation ... Just so the Supreme Court can confirm what is already apparent: The Commission lacks authority to act. ”

Worse, the cost of Commission action here is measured not just in dollars spent, but in opportunities wasted. Our time in government and representing private parties has convinced us that rulemakings of this scope impose enormous demands on agency leadership and staff, to the detriment of other agency priorities that can be pursued lawfully. And, as a practical matter, the agency process and inevitable ensuing litigation freezes the legislative process, as Congress, industry, and the public await the Court’s judgment.

Moreover, there can be long-term adverse consequences for regulators tempted to let the Court “play the heavy” and strike down the agency action. Court decisions can have unpredictable consequences, and decisions restricting agency authority may impede agency regulatory efforts in a range of areas for years to come.

In the end, a better course is clear. Congress should enact legislation to resolve this issue once and for all. Absent that, the Commission could use its finite resources to pursue more legally defensible policy initiatives, such as adopting light-touch net neutrality rules under Section 706 of the Telecommunications Act, thereby



avoiding Title II reclassification that would be inevitably doomed under the major questions doctrine.⁷³ Only if these paths are pursued can we avoid the inevitable Supreme Court decision vacating any FCC Order reclassifying broadband under Title II. Only if these paths are pursued can we avoid the massive waste of resources for the government, industry, and the public, as well as the lost opportunity to pursue more pressing policy goals such as deploying robust broadband service to all Americans. And only if these paths are pursued will the complicated policy issues surrounding broadband regulation be resolved within an enduring and lawful regulatory scheme that will achieve the laudable objectives that the Commission seeks.

V. CONCLUSION

Whatever one's views about the wisdom of the major questions doctrine, there is no denying that a clear majority of the Supreme Court is prepared to wield the doctrine to limit agency discretion to address matters of major economic and political significance. The proposal to classify broadband internet access service as a Title II telecommunications service and to treat it as a form of traditional common carriage is precisely the kind of issue to which the Court is likely to apply the doctrine. The consequences of such a step for our economy and our society are potentially enormous; the public has been engaged in a years-long debate about what policies are best suited to maximizing the potential of broadband; and Congress has repeatedly considered, and is still considering, what regulatory framework will best allow broadband internet access service to flourish. At the

“ **[A]ny Commission attempt to impose Title II regulation will be invalidated.** ”

same time, it is clear that the Commission lacks the clear authorization that the Supreme Court requires: Neither the Communications Act nor the 1996 Telecommunications Act unambiguously authorizes the Commission to take such a step, an unsurprising conclusion given that the internet as we know it today did not exist when those statutory provisions were enacted. The result is thus preordained; any Commission attempt to impose Title II regulation will be invalidated. The Commission and Congress should heed these clear warnings, and should instead seek to establish enduring net neutrality rules through Section 706 of the Telecommunications Act or through congressional legislation, not through Title II.

⁷³ The D.C. Circuit has previously held Section 706 to be a valid source of authority for such light-touch rules. See *Verizon v FCC*, 740 F.3d 623, 628 (2014) (“The Commission, we further hold, has reasonably interpreted section 706 to empower it to promulgate rules governing broadband providers’ treatment of Internet traffic, and its justification for the specific rules at issue here—that they will preserve and facilitate the “virtuous circle” of innovation that has driven the explosive growth of the Internet—is reasonable and supported by substantial evidence.”).

