FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	
Securing and Safeguarding the Open Internet	WC Docket No. 23-320
Restoring Internet Freedom	WC Docket No. 17-108

JOINT PETITION FOR STAY OF USTELECOM – THE BROADBAND ASSOCIATION, NCTA – THE INTERNET & TELEVISION ASSOCIATION, CTIA – THE WIRELESS ASSOCIATION, WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION, ACA CONNECTS – AMERICA'S COMMUNICATIONS ASSOCIATION, FLORIDA INTERNET & TELEVISION ASSOCIATION, MCTA – THE MISSOURI INTERNET & TELEVISION ASSOCIATION, OHIO CABLE TELECOMMUNICATIONS ASSOCIATION, OHIO TELECOM ASSOCIATION, AND TEXAS CABLE ASSOCIATION

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INTRODUCTION

In its Open Internet Order,[1] the Commission has once again claimed all-encompassing authority to regulate how Americans access the Internet—this time, adopting even more invasive rules than it did in 2015. By reclassifying broadband under Title II of the Communications Act of 1934, the Commission asserts the power to set prices, dictate terms and conditions, require or prohibit investment or divestment, and more. It should be "indisputable" that the major-questions doctrine applies to that seismic claim of authority. *U.S. Telecom Ass'n* v. *FCC*, 855 F.3d 381, 422 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc). And the Commission cannot point to clear congressional authorization for its reclassification decision. Indeed, the Order fails even an ordinary plain-text analysis of the Telecommunications Act of 1996.

The Order is scheduled to take effect on July 22, 2024. Petitioners have filed petitions for review of the Order in several courts of appeals.[2] Petitioners respectfully request that the Commission stay the effectiveness of its Order pending judicial review. Petitioners further request that the Commission rule on this stay petition by June 7, 2024, to give petitioners time to seek a stay in the court of appeals, if necessary, and to give the court of appeals time to adjudicate the stay before the Order takes effect. In 2015, the Commission ruled on a comparable stay request

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[1] Declaratory Ruling, Order, Report and Order, and Order on Reconsideration, *In re Matter of Safeguarding and Securing the Open Internet*, WC Docket Nos. 23-320 & 17-108, FCC 24-52 (released May 7, 2024).

[2] *See Texas Cable Ass'n* v. *FCC*, No. 24-60263 (5th Cir. May 29, 2024); *Ohio Telecom Ass'n* v. *FCC*, No. 24-3449 (6th Cir. May 28, 2024); *Ohio Cable Telecomm. Ass'n* v. *FCC*, No. 24-3450 (6th Cir. May 28, 2024); *Missouri Internet & Television Ass'n* v. *FCC*, No. 24-2092 (8th Cir. May 28, 2024); *Florida Internet & Television Ass'n* v. *FCC*, No. 24-11701 (11th Cir. May 28, 2024); *CTIA – The Wireless Ass'n* v. *FCC* (D.C. Cir. May 29, 2024) (docket number pending); *Wireless Internet Servs. Providers Ass'n* v. *FCC* (D.C. Cir. May 30, 2024) (docket number pending); *ACA Connects* v. *FCC* (D.C. Cir. May 31, 2024) (docket number pending).

within seven days. *See* Order Denying Stay Petitions, *In re Protecting and Promoting the Open Internet*, GN Docket Nos. 14-28, DA 15-563 (May 8, 2015).

Petitioners' challenges to the Order satisfy the Commission's four criteria for a stay, which track the factors applied by federal courts. *See* Order Denying Stay Request, *In re Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable & Broadband Industry*, 4 FCC Rcd. 6476, 6476-6477 (1989).

First, petitioners are likely to prevail on their argument that the Order is unlawful under both the major-questions doctrine and ordinary principles of statutory interpretation. At a minimum, the Commission's repeated reversals between Title I and Title II classification of broadband, along with its divided 3-2 vote here, make clear that the lawfulness of the Order is subject to serious doubt.

Second, the Order will begin harming petitioners' members as soon as it goes into effect on July 22. As a range of Internet service providers (ISPs) commented during the rulemaking process, the Order will impose significant, unrecoverable costs. ISPs need not speculate about that: they know what to expect thanks to their experience with the Commission's last effort to classify broadband as a Title II service. Among other harms, ISPs will be forced to delay or scrap offerings, slow investment, and shoulder substantial new compliance and capital costs. None of these costs will be recoverable in the event petitioners prevail in their challenges to the Order.

Third and fourth, the balance of harms and public interest support a stay. The record does not suggest that the rules imposed by the Order are necessary to address significant present or near-term harms to the public. Instead, the Order primarily rests on unfounded fears of unmaterialized risks. Those concerns cannot justify saddling a critical sector of the economy with substantial new costs while the Commission's flawed Order awaits judicial review. To the contrary, the public

would benefit from stability in the regulatory treatment of the broadband industry pending final determination of the Order's legality.

BACKGROUND

1. The Telecommunications Act of 1996 establishes two mutually exclusive categories of communications services: "information service[s]," which are subject to limited regulatory oversight, and "telecommunications service[s]," which are subject to the common-carrier regulations in Title II of the Communications Act of 1934. 47 U.S.C. §§ 153(24), (53). The 1996 Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public." *Id.* § 153(53). "Telecommunications" means "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content." *Id.* § 153(50). An "information service," by contrast, is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." *Id.* § 153(24).

The Commission has long classified services providing access to the Internet as "information services." In a report issued shortly after the 1996 Act, the Commission concluded that "Internet access" is an information service because it "gives users a variety of advanced capabilities" to manipulate information. Report to Congress, *In re Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 11501, 11539 (1998). A few years later, the Commission confirmed that cable broadband is an information service. *See* Declaratory Ruling and Notice of Proposed Rulemaking, *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798, 4802 (2002). The Supreme Court upheld that classification in *National Cable & Telecommunications Association* v. *Brand X Internet Services*, 545 U.S. 967 (2005). The Commission then consistently classified other forms of broadband as information services. *See* Report and Order and Notice of Proposed Rulemaking, *In re*

Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 FCC Rcd. 14853, 14862 (2005); Memorandum Opinion and Order, *In re United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd. 13281, 13281 (2006); Declaratory Ruling, *In re Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd. 5901, 5901-5902 (2007).

2. In 2015, the Commission reversed course, reclassifying broadband as a telecommunications service subject to Title II. *See In re Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, 5757-5777 (2015) (2015 Order). As it does today, the Commission claimed that Title II authority was necessary to promulgate "net neutrality" rules. *See id.* at 5626-5645. A divided panel of the D.C. Circuit upheld the 2015 Order, deferring to it under *Chevron U.S.A. Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), as a reasonable construction of an ambiguous statute. *See U.S. Telecom Ass'n* v. *FCC*, 825 F.3d 674, 704-706 (D.C. Cir. 2016).

While a petition for Supreme Court review was pending, the Commission restored broadband's information-service classification. *See* Declaratory Ruling, Report and Order, and Order, *In re Matter of Restoring Internet Freedom*, 33 FCC Rcd. 311, 312 (2018). The D.C. Circuit largely upheld that order, too, under the same *Chevron* framework. *See Mozilla Corp.* v. *FCC*, 940 F.3d 1, 35 (2019).

3. In the challenged Order, the Commission voted to again reclassify broadband as a telecommunications service subject to Title II common-carrier regulation. Order ¶ 106. The Order invokes many of the same "open Internet" rationales from 2015, but also cites new reasons, such as defending national security and combatting cybersecurity threats. *See* Order ¶¶ 30, 42.

In reliance on its Title II classification of broadband, the Order reinstates the Commission's prior "net neutrality" rules, which ban ISPs from blocking, throttling, and paid prioritization. Order ¶ 492. It also reinstates the general conduct standard, prohibiting practices "that unreasonably interfere with the ability of consumers or [content providers] to select, access, and use broadband." *Id.* ¶ 513. The general conduct standard will be implemented by applying a "non-exhaustive list of factors" on a "case-by-case" basis. *Id.* Finally, for the time being at least, the Commission has forborne from certain Title II powers. *See id.* ¶ 383; *see also* 47 U.S.C. § 160 (forbearance authority).

Following publication of the Order in the Federal Register on May 22, 2024, *see* 89 Fed. Reg. 45404, petitioners filed petitions for review in several federal courts of appeals. *See supra*, p. 1 n.2. Those petitions seek review of the Order on the grounds that it is arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*; in excess of the Commission's statutory authority; unconstitutional; and otherwise contrary to law.

DISCUSSION

In 2015, after years of light-touch regulation of the Internet across Administrations of both parties, the Commission claimed a broad new Title II authority over Internet access services. Litigation ensued, but before it could be finally resolved, the Commission (under a new Administration) restored its longstanding light-touch approach. Now, in the Order challenged here, the Commission has flipped back to its 2015 position. This destabilizing pattern is untenable for a critical American industry. Rather than impose yet another change on ISPs before the Order's lawfulness can be adjudicated, the Commission should preserve the status quo. A stay pending judicial review would allow the courts to resolve—perhaps, for everyone's sake, finally—whether Congress contemplated the application of Title II to broadband providers.

Under Commission precedent, petitioners must show that (1) they are likely to prevail on the merits; (2) they will suffer irreparable harm if the stay is not granted; (3) other interested parties will not be substantially harmed if the stay is granted; and (4) the public interest favors granting a stay. Order Denying Stay Request, *In re Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industry*, 4 FCC Rcd. at 6476-6477 (citing *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metro. Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 842, 843 (D.C. Cir. 1997)). Petitioners readily satisfy all four criteria.

I. PETITIONERS ARE LIKELY TO PREVAIL ON THE MERITS.

Under the major-questions doctrine, when an agency claims to have uncovered an "extraordinary grant[] of regulatory authority," it "must point to clear congressional authorization for the power it claims." *West Virginia* v. *EPA*, 597 U.S. 697, 723 (2022) (quoting *Utility Air Regul. Grp.* v. *EPA*, 573 U.S. 302, 324 (2014)). "Under any conceivable test for what makes a rule major," this one qualifies. *U.S. Telecom*, 855 F.3d at 423 (Kavanaugh, J., dissenting). And the Commission lacks clear congressional authorization for its reclassification of broadband under Title II.

A. The Commission's Reclassification Of Broadband Under Title II Is A Major Question.

The Supreme Court has described a variety of factors that make a rule "major." All of the most relevant factors apply here.

First, subjecting broadband to Title II would "bring about an enormous and transformative expansion" in the Commission's "regulatory authority." *Utility Air*, 573 U.S. at 324. Under the Commission's longstanding light-touch regime, ISPs make business decisions in response to market forces. Under Title II, the Commission would have near-plenary authority over virtually

all of those decisions. It does not matter whether or how the Commission is currently *exercising* that authority, because the major-questions doctrine depends "on the underlying claim of authority, even if not fully exercised." USTelecom Comments 35; *see West Virginia*, 597 U.S. at 728-729.

Second, the "economic and political significance" of the Commission's claimed authority "is staggering by any measure." *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2373 (2023); *see* NCTA Comments 15-20; USTelecom Comments 29-33; CTIA Comments 74-76. The broadband industry generates about $150 billion in annual revenue. *See* U.S. Chamber of Commerce Comments 51. And as the Order recognizes, broadband is "indispensable to every aspect of our daily lives, from work, education, and healthcare, to commerce, community, communication, and free expression." Order ¶ 1. Politically, the Commission's authority in this space "has been the subject of an earnest and profound debate across the country." *West Virginia*, 597 U.S. at 732 (citation omitted). In particular, Congress has considered (but never passed) numerous bills related to net neutrality and common-carrier regulation of ISPs. *See* USTelecom Comments 31-32.

Third, the Commission's "post-enactment conduct" with respect to the 1996 Act underscores the significance of its current shift. *Biden*, 143 S. Ct. at 2383 (Barrett, J., concurring); *see West Virginia*, 597 U.S. at 724-725. Just two years after Congress passed the 1996 Act, the Commission concluded that "Internet access services are appropriately classed as information, rather than telecommunications, services," and should thus be immune from Title II regulation. Report to Congress, *In re Federal-State Joint Board on Universal Service*, 13 FCC Rcd. at 11536. That conclusion tracked regulatory distinctions that predated the 1996 Act and held for nearly two decades after it.

Finally, the Order strays into areas well outside the Commission's "comparative expertise." *West Virginia*, 597 U.S. 729-730. For example, the Order claims that Title II is needed to address

"national security risks." Order ¶ 4. But absent specific statutory language, "[t]here is little reason to think Congress assigned such decisions" to the Commission rather than agencies with more relevant expertise. *West Virginia*, 597 U.S. at 729; *see* USTelecom Reply Comments 42-50; CTIA Comments 24-29; USTelecom Reply Comments, Ex. A (Grotto Paper) 25-29, 33-34; NCTA et al. Reply Comments, Ex. A (Anthony Scott Comments) 6-7.

B. The Commission Lacks Clear Congressional Authorization To Reclassify Broadband.

The 1996 Act does not provide clear congressional authorization for the Order. Courts have on multiple occasions found ambiguity in the statutory language, which "by definition means that Congress has not clearly authorized" the Commission's current exercise of authority. *U.S. Telecom*, 855 F.3d at 426 (Kavanaugh, J., dissenting). In particular, both the Supreme Court and the D.C. Circuit have held that it is at least permissible to classify broadband as an "information service" immune from Title II regulation. *See Brand X*, 545 U.S. 967; *Mozilla*, 940 F.3d at 23. That alone makes plain that Congress did not *clearly* subject broadband to Title II treatment.[3]

But even setting aside the major-questions doctrine, the better reading of the 1996 Act is that broadband is an "information service." Start with the text. Unlike a "telecommunications service" involving pure transmission, broadband provides users with the capability to engage with information on websites and applications. It is thus an "offering of [the] capability" to do all of the actions set forth in the statutory definition: "generating" and "making available information" by posting on social media; "acquiring" or "retrieving" information from websites; "storing" information online; and "transforming," "processing," and "utilizing" information in limitless

[3] Although the Order halfheartedly mentions *Chevron*, ¶ 106 n.402, that doctrine's two-step framework is inapposite in this major-questions case. In any event, the Supreme Court is currently reconsidering the *Chevron* doctrine. *See Loper Bright Enters.* v. *Raimondo*, No. 22-451 (U.S.); *Relentless* v. *Department of Commerce*, No. 22-1219 (U.S.).

ways, from editing photos to playing video games. 47 U.S.C. § 153(24); *see* USTelecom Comments 9-10. Consumer perception, which is critical to determining the content of ISPs' "offering," *Brand X*, 545 U.S. at 990, confirms that broadband is better understood as an information service. *See* Letter from USTelecom to Marlene H. Dortch 1 (filed Apr. 18, 2024) (discussing surveys showing that the vast majority of consumers perceive broadband as providing information-service capabilities). Broadband is also an information service because the service itself offers information-service capabilities, such as DNS and caching. *See* USTelecom Comments 17-20; NCTA Comments 41-44; CTIA Comments 50-51, 80-81.

Statutory structure confirms that broadband must be an information service. The Commission's need to forbear from applying over a quarter of Title II's provisions to broadband, *see* Order ¶ 425, strongly suggests that the "telecommunications service" classification is a poor fit. The need to essentially "rewrite . . . the statute should have alerted" the Commission that "it had taken a wrong interpretive turn." *Utility Air*, 573 U.S. at 328.

The Order's treatment of mobile broadband provides further evidence. The Order recognized that, to avoid a "statutory contradiction," it could reclassify broadband as an information service only if it simultaneously reclassified mobile broadband as a "commercial mobile service" under Section 332(d) of the Communications Act. Order ¶ 230; *see* 47 U.S.C. § 332(d). But that move does not work. Mobile broadband cannot be a "commercial mobile service" because it is not "interconnected with the public switched network"—a term of art that refers to the traditional 10-digit telephone network. 47 U.S.C. §§ 332(d)(1), (2); *see* CTIA Comments 65-74. Indeed, for that reason, the Order's separate reclassification of mobile broadband as a commercial mobile service is also unlawful and provides a further justification for the Commission to stay its Order. *See* Order ¶¶ 214-236.

Finally, other statutes enacted around the time of the 1996 Act demonstrate that Congress viewed Internet access service as an information service. *See, e.g.*, 47 U.S.C. § 230(f)(2) (defining "interactive computer service" to include "any information service . . . that provides access to the Internet"); *id.* § 230(b)(2) (adopting as "policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation"); *id.* § 231(e)(4) (defining "internet access service" as "a service that enables users to access content . . . offered over the Internet" and making clear that "[s]uch term does not include telecommunications services").

II. THE BALANCE OF HARMS AND THE PUBLIC INTEREST SUPPORT A STAY.

The remaining factors likewise support a stay. Petitioners' members will face serious and irreparable injury if the rule is not stayed; no party will be substantially harmed by a stay; and the public interest favors a stay.

A. Absent A Stay, The Order Will Cause Irreparable Harm.

If the Order remains in effect while litigation is pending, petitioners' members will suffer irreparable harm, as they did in the wake of the 2015 Order. In particular, petitioners' members will be forced to delay or forgo valuable new services, incur prohibitive compliance costs, and pay more to obtain capital. Courts have held that economic injuries of that nature qualify as irreparable harm. *See, e.g.*, *In re NTE Connecticut, LLC*, 26 F.4th 980, 991 (D.C. Cir. 2022) (lost revenue streams); *Iowa Utils. Bd.* v. *FCC*, 109 F.3d 418, 426 (8th Cir. 1996) (loss of consumer goodwill). Those economic losses are unrecoverable, and therefore irreparable, because the federal government enjoys sovereign immunity from suits for damages. *See National Lifeline Ass'n* v. *FCC*, 2018 WL 4154794, at *1 (D.C. Cir. Aug. 10, 2018).

1. Petitioners' members will delay or forgo value-creating offerings at significant cost.

If the Order takes effect, petitioners' members will immediately be required to reevaluate, put on hold, and potentially scrap new offerings and business initiatives. The general conduct standard—with its vague, non-exhaustive list of factors and "case-by-case" adjudication, Order ¶ 513—will force ISPs of all sizes to reevaluate both existing and planned offerings. *See* USTelecom Comments 57 (noting that because ISPs "will have no meaningful way of knowing how to predict the Commission's actions," they "will be less likely to innovate . . . , sticking instead to old practices and old offerings that seem to have cleared the bar"); NCTA Comments 21-22 ("ISPs must either pre-clear any innovative new service features with the Commission or else face the risk of enforcement action, substantial fines, and other remedial measures."); CTIA Comments 97-99 ("When providers are left to guess as to whether a new offering will be subjected to extended government review or even penalties, they may reasonably decline to take the risk of introducing new consumer-friendly functions and plans."). Small ISPs will suffer especially acute harms, as they will have no choice but to shift their scarce resources away from expanding their services in rural and underserved communities to ensuring compliance with the Order. *See* ACA Connects Comments, Vexus Fiber Decl. ¶¶ 3, 6 (explaining that the company's "growth would be chilled if the Commission were to impose Title II common carrier regulation"); ACA Connects Comments, Shentel Decl. ¶ 12; WISPA Comments 25-26.

The Order will therefore both restrict potential revenue streams and hinder petitioners' members from responding or adapting to consumer demand, potentially threatening market share and good will. Federal courts of appeals have repeatedly held that such impacts qualify as irreparable injury. *See, e.g.*, *In re NTE Connecticut*, 26 F.4th at 991; *Iowa Utils. Bd.*, 109 F.3d at 426.

2. Petitioners' members will incur atypical and non-recoverable compliance costs.

Petitioners' members will also suffer irreparable harm in the form of compliance costs that are qualitatively and quantitatively different from those associated with typical regulation. That is because the Order combines the creation of an extensive and burdensome enforcement apparatus with the adoption of wide-ranging, open-ended rules. The Order (i) authorizes the Commission to initiate investigations of any suspected violation of its new rules and to "pursue remedies and penalties," Order ¶ 581; (ii) subjects ISPs to informal complaints from the public as well as Section 208's costly and burdensome formal complaint process, *id.* ¶¶ 589, 590; and (iii) opens the door to private rights of action for money damages in federal court, *id.* ¶ 330; *see* 47 U.S.C. §§ 206, 207. Meanwhile, many of the rules the Order adopts are vague, indeterminate, and largely devoid of safe harbors. Sections 201 and 202, for example, prohibit "discrimination" and "unjust or unreasonable" conduct with respect to *any* business practice. 47 U.S.C. §§ 201, 202. The general conduct standard likewise prohibits practices that "unreasonably interfere" with consumers' ability to use broadband, as determined on a "case-by-case" basis. Order ¶ 513. It is impossible to know how these prohibitions may be invoked against ISPs by either the Commission or private parties.

As a result of the Order's breadth and indeterminacy, ISPs will be forced to spend considerable resources both preemptively assessing business practices for compliance and defending against investigations and complaints, regardless of their merit. *See* AT&T Comments 25; NTCA Comments 28; USTelecom Comments 6. Smaller ISPs will face particularly disproportionate compliance costs, given the mismatch between their preexisting legal resources and the demands and uncertainties of Title II. *See, e.g.*, ACA Connects Comments, Sjoberg's Decl. ¶¶ 4, 11; ACA Connects Comments, ImOn Decl. ¶ 17; WISPA Comments 10-11, 26-31.

3. Petitioners' members will face higher capital costs.

Petitioners will also suffer irreparable harm in the form of increased capital costs, which are the inevitable consequence of subjecting ISPs to a regime designed for public-utility regulation. The "pervasive and uncertain" rules adopted by the Order send the "direct message that investment returns risk being cut off," which "will make it harder for the industry to raise capital." NCTA Comments, Ex. A (Israel Decl.) ¶ 19. And the threat of future regulation looms large. *See, e.g.*, ACA Connects Comments, Sjoberg's Decl. ¶ 12 ("The additional costs" of Title II regulation create "uncertainty for the financial health of the company in the eyes of lenders."); WISPA Comments 12-15.

B. The Public Interest Supports A Stay.

A stay would also *benefit*, rather than harm, the interests of the public. Pausing the Order would ensure that ISPs continue to invest in network improvement and offer innovative new programs that benefit consumers, rather than divert those efforts toward compliance or forgo such offerings altogether. Indeed, under the last six years of the Title I light-touch approach, investment and innovation have flourished. *See* NCTA Comments 86-88; NCTA Comments, Ex. A (Israel Decl.) ¶¶ 25-47; USTelecom Comments 36-45; CTIA Comments 8-19; CTIA Comments, Ex. A (Keating Report) 2-4; Letter from NCTA to Marlene H. Dortch Attachment (Israel White Paper) 2-8 (Apr. 18, 2024). The status quo has led to higher speeds and lower costs for consumers, enabling widespread access to fast Internet. *See* Arthur Menko, *2023 Broadband Pricing Index*, USTelecom – The Broadband Association (Oct. 11, 2023), https://ustelecom.org/wp-content/uploads/2023/10/USTelecom-2023-BPI-Report-final.pdf; *see also* WISPA Comments 14; ACA Connects Comments 8-13. Assuming the Commission disagrees and believes that a Title II regime would be superior in the long-term, even it must recognize that the public would benefit from the

certainty of a final judicial decision and from avoiding the constant flip-flopping between Title I and Title II regimes.

By contrast, the public would suffer minimal harm from putting the Commission's rule on hold. More than six years after the RIF Order, the Commission cannot point to a single clear example of the kind of harmful practices that many (wrongly) predicted would abound after returning to the Title I regime. *See* Letter from NCTA, USTelecom, and CTIA to Marlene H. Dortch (Apr. 18, 2024). As the rulemaking comments make clear, ISPs do not block, throttle, or discriminate among lawful content. *See, e.g.*, NCTA Comments 52, USTelecom Comments 5, ACA Connects Comments 16-17 & nn.29-31, WISPA Comments 37. Many of the Order's other justifications for reclassification are similarly prophylactic. *See, e.g.*, Order ¶¶ 4-5 (arguing that reclassification "improves the Commission's ability to coordinate with federal partners"; "enhance[s]" existing authorities, "support[s] the Commission's [already ongoing] efforts to support access to broadband," and so on). And other agencies are well-positioned to address any current regulatory gaps during the pending appeal. *See supra*, pp. 7-8.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Commission stay the effectiveness of the Order pending judicial review. Petitioners also request that the Commission resolve this petition for a stay expeditiously. If the Commission has not ruled by June 7, 2024, petitioners will conclude that the agency has "denied the motion or failed to afford the relief requested." Fed. R. App. P. 18(a).

Respectfully submitted,

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