

Internet and Telecommunication Regulation

2020 SUPPLEMENT

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MOZILLA CORP. v. FCC
940 F.3d 1 (D.C. Cir. 2019)

Opinion for the court Per Curiam. Concurring opinions filed by Circuit Judge MILLETT and WILKINS. Opinion concurring in part and dissenting in part filed by Senior Circuit Judge WILLIAMS.

PER CURIAM:

In 2018, the Federal Communications Commission adopted an order classifying broadband Internet access service as an information service under Title I of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. *See* Restoring Internet Freedom, 33 FCC Rcd. 311 (2018) (“*2018 Order*”). In so doing, the agency pursued a market-based, “light-touch” policy for governing the Internet and departed from its 2015 order that had imposed utility-style regulation under Title II of the Act.

Petitioners—an array of Internet companies, non-profits, state and local governments, and other entities—bring a host of challenges to the *2018 Order*. We find their objections unconvincing for the most part, though we vacate one portion of the *2018 Order* and remand for further proceedings on three discrete points.

The *2018 Order* and today’s litigation represent yet another iteration of a long-running debate regarding the regulation of the Internet. We rehearsed much of this complex history in *United States Telecom Association v. FCC*, 825 F.3d 674, 689–97 (D.C. Cir. 2016) (*USTA*), and see no need to recapitulate here what was so well and thoroughly said there. In the interest of reader-friendliness, though, we briefly review certain highlights necessary to understand this opinion.

As relevant here, the 1996 Telecommunications Act creates two potential classifications for broadband Internet: “telecommunications services” under Title II of the Act and “information services” under Title I. These similar-sounding terms carry considerable significance: Title II entails common carrier status, *see* 47 U.S.C. § 153(51) (defining “telecommunications carrier”), and triggers an array of statutory restrictions and requirements (subject to forbearance at the Commission’s election). For example, Title II “declar[es] . . . unlawful” “any . . . charge, practice, classification or regulation that is unjust or unreasonable.” *Id.* § 201(b). By contrast, “information services” are exempted from common carriage status and, hence, Title II regulation.

An analogous set of classifications applies to mobile broadband: A “commercial mobile service” is subject to common carrier status, *see* 47 U.S.C. § 332(c)(1), whereas a “private mobile service” is not, *see id.* § 332(c)(2).

The Commission’s authority under the Act includes classifying various services into the appropriate statutory categories. In the years since the Act’s passage, the Commission has exercised its classification authority with some frequency. Initially, in 1998, the Commission classified broadband over phone lines as a “telecommunications service.” *See* Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 FCC Rcd. 24,012 (1998). Just four years later, though, the Commission determined that cable broadband was an “information service,” *see* Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities (*Cable Modem Order*), 17 FCC Rcd. 4,798 (2002), a choice that the Supreme Court upheld in *Brand X. National Cable Telecom. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*). The agency then applied a similar classification to wireline and wireless broadband.

But in 2015 the Commission took the view that broadband Internet access is, in fact, a “telecommunications service” and that mobile broadband is a “commercial mobile service.” *See* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5,601 (2015) (*Title II Order*). In *USTA*, this court upheld that classification as reflecting a reasonable interpretation of the statute under *Chevron*’s second step. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

Once again, the Commission has switched its tack. In 2017, the Commission issued a notice of proposed rulemaking seeking to revert to its pre-2015 position, Restoring Internet Freedom, 32 FCC Rcd. 4434 (2017), and released the final order at issue in this case in January 2018.

The *2018 Order* accomplishes a number of objectives. First, and most importantly, it classifies broadband

Internet as an “information service,” and mobile broadband as a “private mobile service.” Second, relying on Section 257 of the Act (located in Title II but written so as to apply to Titles I through VI), the Commission adopts transparency rules intended to ensure that consumers have adequate data about Internet Service Providers’ network practices. Third, the Commission undertakes a cost-benefit analysis, concluding that the benefits of a market-based, “light-touch” regime for Internet governance outweigh those of common carrier regulation under Title II, resting heavily on the combination of the transparency requirements imposed by the Commission under Section 257 with enforcement of existing antitrust and consumer protection laws. The Commission likewise finds that the burdens of the *Title II Order*’s conduct rules exceed their benefits.

We uphold the *2018 Order*, with two exceptions. First, the Court concludes that the Commission has not shown legal authority to issue its Preemption Directive, which would have barred states from imposing any rule or requirement that the Commission “repealed or decided to refrain from imposing” in the Order or that is “more stringent” than the Order. The Court accordingly vacates that portion of the Order. Second, we remand the Order to the agency on three discrete issues: (1) The Order failed to examine the implications of its decisions for public safety; (2) the Order does not sufficiently explain what reclassification will mean for regulation of pole attachments; and (3) the agency did not adequately address Petitioners’ concerns about the effects of broadband reclassification on the Lifeline Program.

I. Broadband Internet Classification

The central issue before us is whether the Commission lawfully applied the statute in classifying broadband Internet access service as an “information service.” We approach the issue through the lens of the Supreme Court’s decision in *Brand X*, which upheld the Commission’s 2002 refusal to classify cable broadband as a “telecommunications service.” 545 U.S. at 974. The Commission’s classification of cable modem as an “information service” was not challenged in *Brand X*, but, given that “telecommunications service” and “information service” have been treated as mutually exclusive by the Commission since the late 1990s, a premise Petitioners do not challenge, we view *Brand X* as binding precedent in this case.

We start, of course, with the statutory definition. Section 47 U.S.C. § 153(24) reads:

The term “information service” means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

The final clause is known as the “telecommunications management” exception. The Act defines “telecommunications service” as follows:

The term “telecommunications service” means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

Id. § 153(53).

The Commission appears to make two arguments for its classification. It states first that “broadband Internet access service necessarily has the capacity or potential ability to be used to engage in the activities within the information service definition—‘generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,’” *2018 Order* ¶ 30 (quoting 47 U.S.C. § 153(24)), and on that basis alone merits an “information service” classification. The Commission then goes on to say: “But even if ‘capability’ were understood as requiring more of the information processing to be performed by the classified service itself, we find that broadband Internet access service meets that standard.” *2018 Order* ¶ 33.

Our review is governed by the familiar *Chevron* framework in which we defer to an agency’s construction of an ambiguous provision in a statute that it administers if that construction is reasonable. . By the same token, if “Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would

be unreasonable.” *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009).

[W]e hold that classifying broadband Internet access as an “information service” based on the functionalities of DNS and caching is “‘a reasonable policy choice for the [Commission] to make’ at *Chevron*’s second step.” *Brand X*, 545 U.S. at 997 (alteration in original) (quoting *Chevron*, 467 U.S. at 845).

A. The Supreme Court’s Decision in *Brand X*

Brand X held that, by virtue of the ambiguity of the word “offering,” the FCC could permissibly choose not to classify cable modem service as a “telecommunications service.” *Brand X*, 545 U.S. at 973–74, 989–92. As to DNS and caching, the *Brand X* Court endorsed the Commission’s argument that those functionalities can be relied on to classify cable modem service as an “information service.” Challengers opposing the FCC had argued that when consumers “go[] beyond” certain Internet services offered by cable modem companies themselves—for example, beyond access to proprietary e-mail and Web pages (commonly referred to as the cable modem companies’ “walled gardens”)—the companies were “offering” a “telecommunications service” rather than an “information service.” *Id.* at 998. The Court rejected this claim. It found that such a view “conflicts with the Commission’s understanding of the nature of cable modem service,” which the Court deemed “reasonable.” *Id.*; cf. *2018 Order* ¶ 51. The Court explained that—when a user accesses purely third-party content online—“he is *equally using* the information service provided by the cable company that offers him Internet access as when he accesses the company’s own Web site, its e-mail service, or his personal Web page,” *Brand X*, 545 U.S. at 999 (emphasis added), i.e., “walled garden” services. Why so?

Brand X’s answer, as relevant here, lay in DNS and caching. The argument proceeded in two steps—first, showing that DNS and caching themselves can properly fall under the “information service” rubric; second, showing that these “information services” are sufficiently integrated with the transmission element of broadband that it is reasonable to classify cable modem service as an “information service.” See *Brand X*, 545 U.S. at 999–1000.

As to the first step, the Court observed that “[a] user cannot reach a third party’s Web site without DNS,” *Brand X*, 545 U.S. at 999, which “among other things, matches the Web page addresses that end users type into their browsers (or ‘click’ on) with the Internet Protocol (IP) addresses of the servers containing the Web pages the users wish to access,” *id.* at 987. It therefore saw it as “at least reasonable” to treat DNS *itself* “as a ‘capability for acquiring . . . retrieving, utilizing, or making available’ Web site addresses and therefore part of the information service cable companies provide.” *Id.* at 999 (quoting 47 U.S.C. § 153(24)).

As to the second step, the *Brand X* Court endorsed the FCC’s position that—because DNS and caching are “inextricably intertwined” with high-speed transmission—it was reasonable for the Commission *not* to treat the resulting package as an “offering” of a standalone “telecommunications service.” 545 U.S. at 978–79, 989–91. “[H]igh-speed transmission used to provide cable modem service is a *functionally integrated* component of [cable modem] service because it transmits data only in connection with the further processing of information and is necessary to provide Internet service.” *Brand X*, 545 U.S. at 998 (emphasis added). DNS and caching, in turn, are two examples of such “further processing” integrated with the data transmission aspect of cable modem service. Thus, according to the Supreme Court, the Commission reasonably concluded that cable modem service is not an offering of a standalone “telecommunications service,” but, rather, an “information service”—which by definition is offered “via telecommunications.” See *id.* at 989–92; see also *2018 Order* ¶ 52.

B. DNS and Caching in the 2018 Order

The reasoning in the *2018 Order* tallies with the line of argument in *Brand X* described above. The Commission’s principal claim is that “ISPs offer end users the capability to interact with information online . . . through a variety of functionally integrated information processing components that are part and parcel of the broadband Internet access service offering itself”—including DNS and caching. *2018 Order* ¶ 33. The Commission describes DNS and caching as “integrated information processing capabilities offered as part of broadband Internet access service to consumers today.” *Id.* We hold that under *Brand X* this conclusion is reasonable.

C. Objections to the Classification

Petitioners raise numerous objections aimed to show that the Commission’s reliance on DNS and caching for classifying broadband as an “information service” is unreasonable at *Chevron*’s second step. We find them unconvincing.

1. “Walled Garden” Reading of *Brand X*

First, to short-circuit the Commission’s reliance on *Brand X*, Petitioners try to characterize the Court’s reasoning in that case as dependent on a vision of Internet providers as offering mainly access to their “walled gardens.” They assert that in *Brand X* “the Court was focused on the [Broadband Internet Access Service (BIAS)] providers’ add-on information services, such as ISP-provided e-mail,” and that “the Court had no occasion to consider the proper classification of a service combining telecommunications with nothing more than DNS and caching.” Mozilla Br. 42. This reading is unpersuasive because it airbrushes out the lengthy discussion summarized above in which the Court finds “reasonable” the Commission’s “information-service” classification even where “a consumer goes beyond [walled garden] offerings and accesses content provided by parties other than the cable company,” *Brand X*, 545 U.S. at 998—by virtue of the functionalities of DNS and caching. We thus reject Petitioners’ attempt to discredit the Commission’s sensible reliance on *Brand X*’s treatment of DNS and caching.

2. “Telecommunications Management” Exception

Petitioners assert that DNS and caching fall under the “telecommunications management” exception (TME) and so cannot be relied on to justify an “information service” classification. *See* Mozilla Br. 43–46. We find that Petitioners’ arguments do not hold up, either because they rest on a misreading of *Brand X* and *USTA* or do not adequately grapple with the Commission’s reasonable explanation as to why DNS and caching fall outside that exception. Our discussion here will be quite involved in part because *Brand X* did not directly confront whether DNS and caching may fall within the TME.

In deciding whether to slot DNS and caching under the TME the Commission confronted “archetypal *Chevron* questions[] about how best to construe an ambiguous term in light of competing policy interests.” *City of Arlington v. FCC*, 569 U.S. 290, 304 (2013). “[I]f the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.” *Brand X*, 545 U.S. at 980. And when an agency changes course, as it did here, it “must show that there are good reasons for the new policy,” but “it need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one.” *USTA*, 825 F.3d at 707 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). The Commission clears this bar.

a. *The Commission’s Interpretation*

To begin with, Petitioners misconstrue *USTA*. As they do persistently, they gloss passages that find parts of the *Title II Order* to be *permissible* readings of the statute as *mandating* those readings—when the passages plainly do not do so. A case in point is the treatment of the TME. Petitioners say that “[t]his Court has *already agreed* that DNS and caching fall within the terms of the telecommunications management exception.” Mozilla Br. 43 (emphasis added) (citing *USTA*, 825 F.3d at 705). Yet all we said in *USTA* was that we were “unpersuaded” that the FCC’s “use of the telecommunications management exception was . . . unreasonable.” *USTA*, 825 F.3d at 705. The *Title II Order*, in other words, adopted a permissible reading, though not a required one. This holding in no way bars the Commission from adopting a contrary view now—so long as it adequately justifies that view, as we find it has.

If a service is “directed at . . . customers or end users,” *2018 Order* ¶ 36 (quoting *United States v. Western Elec. Co.*, No. 82-0192, 1989 WL 119060, at *1 (D.D.C. Sept. 11, 1989)), or benefits users “in significant part,” *id.* ¶ 38, or “predominantly,” *id.* ¶ 42, it does not call for TME classification. We view this construction as an adequately justified departure from the *Title II Order*’s understanding of the TME in the face of a dauntingly ambiguous provision with inevitably fuzzy borderline cases and complex and possibly inconsistent (or at least orthogonal) policy implications.

Given the Commission’s approach, it need not—and does not—deny that even those services properly classed under the TME benefit end users *in some respect*. As one commenter notes, “To maintain . . . that something that is ‘useful’ to an end user cannot fall under the management exception is absurd, as the entire purpose of broadband is to be useful to end users” Public Knowledge Reply at 37, J.A. 2857; *see 2018 Order* ¶ 38 n.135; *see also* Mozilla Reply Br. 19–20.

But a rule involving a spectrum or continuum commonly requires a decider to select a point where both ends are in play. Night and day are distinguishable, however difficult classification may be at dawn and dusk. The Commission’s way of construing the TME and applying its continuum-based approach is not inconsistent with Public Knowledge’s point that “the entire purpose of broadband is to be useful to end users.” The Commission notes that its

“focus remains on the purpose or use of the specific function in question and not merely whether the resulting service, as a whole, is useful to end-users.” *2018 Order* ¶ 38 n.135. While DNS might play a role in managing a network, the Commission reasonably concluded that DNS “is a function that is useful and essential to providing Internet access for the ordinary consumer,” *id.* ¶ 36, and that these benefits to the end user predominate over any management function DNS might serve. The Commission says that caching “benefits” users through “rapid retrieval of information from a local cache,” *id.* ¶ 42, and can also be used “as part of a service, such as DNS, which is *predominantly* to the benefit of the user (DNS caching),” *id.* (emphasis added). “Although confronted with claims that DNS is, *in significant part*, designed to be useful to end-users rather than providers, the *Title II Order* nonetheless decided that it fell within the [TME].” *Id.* ¶ 38 (emphasis added). The Commission reasonably declined to follow this route (partly, as we shall see below, because it believed that it would cause the exception to swallow the rule in ways antithetical to its reading of Commission precedent and the Act’s goals). It chose a different, and reasonable, alternative.

b. Modification of Final Judgment Precedent

In adopting its approach to the TME, the Commission rested on precedent from a line of judicial decisions interpreting the Modification of Final Judgment (MFJ), a consent decree entered into between the Department of Justice and AT&T in 1982 as part of the breakup of the AT&T monopoly to create a set of independent regional Bell Operating Companies (BOCs).

The Commission makes a good case for the persuasiveness of this precedent. First, the definition of “information service” in the 1996 Act—including the TME—is lifted nearly verbatim from the 1982 consent decree. Second, in the case on which the Commission principally relies, the court was interpreting the MFJ’s TME equivalent and adopted a reading in keeping with its understanding of Department of Justice policy at the time.

In *Western Electric*, Judge Greene addressed the question whether the consent decree permitted the BOCs to offer relay services for customers who use “telecommunications devices for the deaf” (TDDs). 1989 WL 119060, at *1. The court held that, because TDD services involve “transformation of information”—“the very crux and purpose of the TDD relay services”—they “f[e]ll squarely” within the definition of “information services,” which covers the capability to “transform[] . . . information.” *Id.* [T]he court explained, relying on the Department of Justice *Competitive Impact Statement*, that the TME “was *directed at* internal operations, not at services for customers or end users.” *Western Electric*, 1989 WL 119060, at *1 (emphasis added) (citing Department of Justice, *Competitive Impact Statement in Connection with Proposed Modification of Final Judgment*, Notice, 47 Fed. Reg. 7,170, 7,176 (Feb. 17, 1982)).

[T]he Commission rightly acknowledges that being “directed at” one end of a spectrum does not rule out embodying certain aspects from the other end. The agency was within its rights to treat [the *Western Electric*] analysis—which in essence interpreted the statutory provision at issue and squared with the government’s position supporting enforcement of the antitrust decree—as support for its construction of the TME.

The Commission offers an added reason to put stock in the MFJ precedent: It believed that Petitioners’ approach risked causing the TME exception to swallow the “information services” category. It said, plausibly, that such an “expansive view” of the TME assigns it an outsized role, thereby “narrowing . . . the scope of information services” in a way that clashes with the Commission’s pre-1996 Act approach to cabining the “basic services” category, *see 2018 Order* ¶ 38 & n.135, and the 1996 Act’s imperative to “preserve the vibrant and competitive free market . . . for the Internet . . . unfettered by Federal or State regulation,” *id.* ¶ 39 (quoting 47 U.S.C. § 230(b)(2)), which the Commission permissibly uses as a rationale to interpret a vague provision in a way that limits regulatory burdens. In sum, the Commission lawfully construed an ambiguous statutory phrase in a way that tallies with its policy judgment, as is its prerogative.

The Commission extends the same logic to caching, though matters here are less obvious. It explains that caching “does not merely ‘manage’ an ISP’s broadband Internet access service and underlying network,” but “enables and enhances consumers’ access to and use of information online.” *2018 Order* ¶ 42. Granted, some ISPs describe caching in terms indicating that it is a network management practice, and caching can help reduce ISPs’ costs. *See Jordan/Peha Amicus Br.* 20–21. But these facts are not determinative. The Commission is entitled to draw its own conclusions based on its (permissible) interpretation of the TME, so long as consistent with the record. Here it has done that.

3. Adjunct-to-Basic Precedent

Finally, Petitioners raise a host of objections arising from the Commission’s “adjunct-to-basic” precedent, developed in the *Computer Inquiries* orders issued by the Commission. See Amendment of Section 64.702 of the Commission’s Rules and Regulations, 77 F.C.C.2d 384 (1980) (*Second Computer Inquiry*). Because in our view the precedents in this area are murky, raising convoluted questions of grafting older Commission interpretations onto the “information services” definition as applied to broadband Internet service, we find neither side’s recounting of adjunct-to-basic precedent fully compelling. Even though Congress’s creation of the TME may fairly be said to have “[t]rack[ed]” adjunct-to-basic in certain respects, *USTA*, 825 F.3d at 691, the Commission reasonably refused to be bound by facets of the analogy filtered through the lens of the *Title II Order*.

Petitioners try to catch the Commission in a contradiction in a two-step approach. The agency, as we have seen, locates DNS and caching outside the TME. First, Petitioners invoke Commission precedent seeming to suggest that all or most adjunct-to-basic services would fall under the TME. Second, they observe that—whereas paradigmatic examples of adjunct-to-basic services such as speed dialing and call forwarding are undeniably useful to consumers and, per step one, belong under the TME—the Commission can give no satisfactory explanation for excluding DNS and caching from the TME. In particular, Petitioners and commenters analogize DNS to ordinary directory assistance, which the Commission has dubbed adjunct-to-basic, since both services help direct users to their chosen endpoints. The Commission has set out two necessary criteria for a service to qualify as adjunct-to-basic:

[C]arriers may use some of the processing and storage capabilities within their networks to offer optional tariffed features as ‘adjunct to basic’ services, if the features: (1) are intended to facilitate the use of traditional telephone service; and (2) do not alter the fundamental character of telephone service.

In re Establishment of a Funding Mechanism for Interstate Operator Servs. for the Deaf, 11 FCC Rcd. 6808, 6816–17, ¶ 16 (1996) (“*Operator Services Order*”).

Which services qualify as adjunct-to-basic? The answer covers a remarkably wide gamut, including “*inter alia*, speed dialing, call forwarding, computer-provided directory assistance, call monitoring, caller i.d., call tracing, call blocking, call return, repeat dialing, and call tracking, as well as certain Centrex features.” Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Commc’ns Act of 1934, as Amended, 11 FCC Rcd. 21905, 21958, ¶ 107 n.245 (1996). The same goes for “communications between a subscriber and the network itself for call setup, call routing, call cessation, calling or called party identification, billing, and accounting,” North Am. Telecommunications Ass’n Petition for Declaratory Ruling Under Section 64.702 of the Commission’s Rules Regarding the Integration of Centrex, Enhanced Servs., and Customer Premises Equip., 3 FCC Rcd. 4385, 4386, ¶ 11 (1988), and prepaid calling cards with built-in advertisements, *see American Tel. & Tel. Co. v. FCC*, 454 F.3d 329, 331 (D.C. Cir. 2006)—though not “talking yellow pages” with advertisements, *see id.* at 333.

We are satisfied with the Commission’s prioritization of the MFJ precedent and its way of squaring the adjunct-to-basic precedent with its treatment of DNS and caching. [D]evising a coherent and workable test for applying the statutory TME permissibly takes precedence in the Commission’s analysis over attempts to reach synthetic conformity between adjunct-to-basic precedent and the 1996 Act’s terms. As the Court said in *Brand X*, we should “leav[e] federal telecommunications policy in this technical and complex area to be set by the Commission, not by warring analogies,” 545 U.S. at 992, whether crafted by courts, litigants, or Commissions past.

[T]he Commission had ample basis to dub the adjunct-to-basic line of analysis “potentially ambiguous precedent,” 2018 *Order* ¶ 39, and depart from what it regarded as “loose analogies” devised in the *Title II Order*. “Because broadband Internet access service was not directly addressed in pre-1996 Act *Computer Inquiries* and MFJ precedent, analogies to functions that were classified under that precedent must account for potentially distinguishing characteristics” as they relate to “technical details” and “regulatory backdrop.” *Id.* These claims are not unreasonable. Whatever the Commission’s prior views on the relationship between basic services and *their* adjuncts, it is reasonable for the Commission to say that that rubric need not transfer over neatly to what it claims *is not* a basic service—broadband Internet access. *See id.* ¶ 40 n.139. Hence there is little basis for the claim that adjunct-to-basic lore requires the Commission to jettison the lesson of Judge Greene’s TDD ruling. *See Western Elec. Co.*, 1989 WL 119060, at *1; *see also* Mozilla Br. 44.

Even if Petitioners offer plausible interpretations of rulings on address translation and third-party storage

services provided by the BOCs, we believe the Commission has given a sufficiently sturdy justification for treating DNS and caching as non-TME services apart from other MFJ-linked analogies. It has set forth a plausible reading of the highly ambiguous TME, adequately explained its basis for giving more credence to judicial MFJ precedent than to the *Computer Inquiries* in this context, and made a reasonable case as to why DNS and caching need not be classed under the TME.

4. Functional Integration

Petitioners then open a new—and final—line of attack: *Even if* DNS and caching are “information services,” the Commission’s reliance on them to classify broadband as an “information service” was still unreasonable. As a threshold matter, we note that *Brand X* already held it reasonable for the Commission to conclude that DNS and caching are information services functionally integrated with the offering of “Internet access [service]” “to members of the public.” *Brand X*, 545 U.S. at 1000.

Petitioners first play up the facts that users may obtain DNS from providers other than their ISPs and that caching is not utterly indispensable. According to them, because “a user can easily configure her computer to use a third-party DNS server and content can be delivered even without caching,” Mozilla Br. 46, especially in the context of encrypted communications that occur without caching, *id.* at 46–47, it follows that DNS and caching are not “inextricably intertwined with the transmission component” of broadband, *id.* at 46. These facts ostensibly yield a “contradict[ion]” in the agency’s position, since one’s ISP-provided DNS and caching are not “indispensable” after all. *Id.*

We find the objection misguided. As the Commission explained, “[T]he fact that some consumers obtain [DNS and caching] from third-party alternatives is not a basis for ignoring the capabilities that a broadband provider actually ‘offers.’” 2018 Order ¶ 50. Given the ambiguity in the term “offe[r],” *see Brand X*, 545 U.S. at 989–90, the Commission’s preferred reading of that term rather than the *Title II Order*’s “narrower interpretation,” 2018 Order ¶ 50—which would foreclose the Commission’s view quoted above—is permissible. The agency reasonably concluded that, notwithstanding the availability of alternative sources of DNS, a market where “the vast majority of ordinary consumers”—“[a]pproximately 97 percent”—“rely upon the DNS functionality provided by their ISP,” 2018 Order ¶ 34 & n.109 (citation omitted in second quotation), as “part and parcel of the broadband Internet access service,” *id.* ¶ 42, meets *Brand X*’s requirements for functional integration. *Chevron* licenses these interpretive steps.

Second, Petitioners focus on what they dub the “relative importance” of the “inextricably intertwined” components at play—DNS/caching and high-speed transmission. Mozilla Br. 47. The transmission aspect, they say, overshadows DNS and caching in “importance,” where that concept is understood in terms of what “consumers focus on,” *id.* (quoting *USTA*, 825 F.3d at 698), and what aspect has “dominance in the broadband experience,” *id.*; *see also* Mozilla Reply Br. 24. Petitioners’ invocation of *USTA* is yet again misplaced. There we said simply that the Commission *reasonably* determined what “consumers focus on,” *USTA*, 825 F.3d at 698, without holding that that is the only permissible view. Average consumers, presumably, are no less in the dark now about the inner workings of DNS and caching than they were in 2005 when the Court decided *Brand X*. Yet that did not keep the Court from finding reasonable the FCC’s position that DNS and caching were functionally integrated with high-speed transmission.

Finally, Petitioners contend that even if DNS and caching *were* functionally integrated with transmission, that “does not automatically lead to an information service classification.” Mozilla Br. 47. The idea seems to be that basing an “information service” designation on DNS and caching alone is currently as dubious as saying that a few golden threads interwoven in an ordinary sweater turn the sweater into a golden garment.

But the Supreme Court has never imposed or even hinted at such a quantitative standard to determine whether inextricably intertwined functionalities can justify an “information service” classification. We see no basis for launching such a notion on our own. We conclude, under the guidance of *Brand X*, that the Commission permissibly classified broadband Internet access as an “information service” by virtue of the functionalities afforded by DNS and caching.

II. Mobile Broadband Classification

In keeping with its classification of broadband Internet as an “information service” not subject to Title II, the

Commission classified mobile broadband as a “private mobile service”—a classification that under the statute automatically exempted it from common carriage treatment—just as the sole alternative classification available under the statute would have automatically *required* common carriage treatment. *See* 47 U.S.C. § 332(c)(1) & (2). We uphold this classification as reasonable under *Chevron*. As we said in *USTA* (and as the *Title II Order* and Petitioners recognize), the Commission has compelling policy grounds to ensure consistent treatment of the two varieties of broadband Internet access, fixed and mobile, subjecting both, or neither, to Title II.

A. The 2018 Order’s Provisions

Title III of the Act, as amended by Congress in 1993, Pub. L. No. 103-66, 107 Stat. 312, establishes two mutually exclusive categories of mobile services—“commercial” and “private.” Because the latter is defined negatively, as “any mobile service . . . that is *not* a commercial service or [its] functional equivalent,” 47 U.S.C. § 332(d)(3) (emphases added), the key definition is that of “commercial mobile service.” And the statute defines it as “any mobile service . . . that is provided for profit and makes interconnected service available” to the public. *Id.* § 332(d)(1). “[I]nterconnected service,” in turn, is a “service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) . . .” *Id.* § 332(d)(2).

Viewing these definitions in the policy-driven mode endorsed by *Brand X*, the Commission observed: “No one disputes that, consistent with the Commission’s previous findings, if mobile broadband Internet access service were a commercial mobile service for purposes of § 332 and were also classified as an information service, such a regulatory framework could lead to contradictory and absurd results.” 2018 Order ¶ 82. Just as the *Title II Order* strove to avoid a “statutory contradiction” that would arise if mobile broadband were classified differently from broadband Internet, *see Title II Order* ¶ 403, the Commission now opted to treat mobile broadband as a “private mobile service.” Petitioners accept the general proposition, though with an inverse spin: They say that if we were to reject the Commission’s “information service” classification, that refusal *in itself* “would be a powerful factor in favor of concluding that mobile BIAS is a commercial mobile service,” because it “would be unreasonable to construe the statute to create . . . a contradiction.” Mozilla Br. 79.

Of course the Commission’s legitimate policy purposes could not justify its indulging in unreasonable interpretations of the controlling provisions. But it is obliged to interpret the statute as a whole, and interpretations needed to avert “statutory contradiction” (really, self-contradiction) ipso facto have a leg up on reasonableness.

B. Objections to the Classification

We now analyze Petitioners’ three specific objections.

1. Meaning of “Public Switched Network”

First, Petitioners protest the Commission’s reversion to the pre-*Title II Order* definition of “the public switched network.” Their initial argument in support of that claim is an entirely misplaced reliance on passages in *USTA* where we rejected challengers’ argument “that the statutory phrase ‘public switched network’ *must* be understood as if Congress had used the phrase ‘public switched *telephone* network.’” 825 F.3d at 718 (first emphasis added). Rejection of that claim meant, under *Chevron*, that we were required to affirm the *Title II Order* so long as it had “*permissibly* considered a network using [both] telephone numbers and IP addresses to be a ‘public switched network.’” *Id.* (emphasis added). Thus we said that the phrase “public switched network” “by its plain language *can* reach beyond telephone networks alone.” *Id.* at 717–18 (emphasis added). In light of *Chevron* and *Brand X*, there is no basis for doubting that we meant just what we said, leaving the door open to a different, adequately supported, reading, which the Commission has provided here.

We likewise see no basis for a view that the statutory language compels the Commission to retain the phrase “or public IP address,” which the *Title II Order* had inserted into the definition of “public switched network.” We note, as we did in *USTA*, that the agency acts under express statutory authority to modify its definition: The term “the public switched network” is to be “defined by regulation by the Commission.” 47 U.S.C. § 332(d)(2); *see USTA*, 825 F.3d at 717–18; *Title II Order* ¶ 396. [T]he Commission singles out precedent going back to 1981, as well as cases from this circuit, referring to “public switched network” and “public switched telephone network” seemingly interchangeably, *see id.* n.279. It was against this background that Congress added the phrase “the public switched network” to Title III in 1993. Although mobile broadband was not yet in widespread use, these textual points and identification of contemporaneous usage and meaning lend support to the Commission’s gloss of that term to mean a “singular network that ‘must still be interconnected with the local exchange or interexchange switched network as it

evolves.” *Id.* ¶ 76 (quoting *Wireless Broadband Order*, 22 FCC Rcd. at 5,918, ¶ 45).

Next, Petitioners stress the need for Commission policy to keep pace with technological innovation. But, given the ambiguity in the statutory text, the manner in which the Commission chooses to carry out that “continuing obligation” is naturally and permissibly driven by its underlying policy judgments. Noting that the *Title II Order* expressly invoked *its* policy reasons for broadening the concept of public switched network, the Commission similarly invoked its policy choices to restore the agency’s previous view.

The Commission also reasoned that it wished to harmonize its definition of “public switched network” with that of an “interconnected service.” [A] restoration of “all” in the definition of “interconnected service,” coupled with an important technological development, gave added reason to restore the agency’s prior view of the “public switched network.”

In sum the Commission amply justified its return to the CMRS definition of “public switched network.”

2. Whether Mobile Broadband Is an “Interconnected Service”

Second, Petitioners argue that—even on the Commission’s definition of “public switched network”—it is unreasonable to conclude that mobile broadband is not an “interconnected service.” *See* Mozilla Br. 75–79. We disagree.

As noted previously, an “interconnected service,” in the Commission’s view, “gives subscribers the capability to communicate to or receive communication from *all* other users on the public switched network.” 47 C.F.R. § 20.3 (emphasis added). The Commission’s core contention is that Voice-over-IP (VoIP)—the generic name for voice calls transmitted over the Internet—is “a separate application or service” from mobile broadband. *2018 Order* ¶ 80. Hence the capabilities it affords cannot turn mobile broadband, a separate service, into an “interconnected service” as defined above. “[M]obile broadband Internet access as a core service is distinct from the service capabilities offered by applications (whether installed by a user or hardware manufacturer) that may ride on top of it.” *Id.* ¶ 81. The Commission instead centers its inquiry on the capabilities mobile broadband service *itself* affords, rather than “whether [it] allows consumers to acquire other services that bridge the gap to the telephone network.” *Id.* ¶ 80 (quoting Verizon Comments at 47, J.A. 1967). As the Commission explained in its 2007 *Wireless Broadband Order*, its finding that mobile broadband was not an “interconnected service” did not prejudice how other services—such as “interconnected VoIP”—should be classified. *Wireless Broadband Order*, 22 FCC Rcd. at 5,918, ¶ 46.

Petitioners by contrast contend, reprising the *Title II Order*, that mobile broadband service meets the above definition of “interconnected service” by virtue of functionalities afforded by VoIP. VoIP applications—like Apple FaceTime, Google Voice, and Skype—are now ubiquitous and easy to use. Some carriers themselves offer preinstalled Wi-Fi calling and Voice-over-LTE capabilities that permit users to make voice calls to NANP numbers via broadband without needing any additional applications. As Petitioners see it, VoIP functionalities have become part and parcel of mobile broadband service *itself* and give subscribers “capabilit[ies]” that make mobile broadband an “interconnected service.”

We do not see it Petitioners’ way. In our view the Commission adequately defended its approach and responded to relevant objections, in keeping with its inclusion of the word “all” in the definition of “interconnected service.”

3. Whether Mobile Broadband Is the “Functional Equivalent” of a Commercial Mobile Service

Third, Petitioners dispute the Commission’s conclusion that mobile broadband is not a “functional equivalent” of mobile voice, which all agree is a commercial mobile service. We are unconvinced. We find that the Commission reasonably readopted its test for functionally equivalent services that it had used from 1994 until 2015 and permissibly found that mobile broadband does not qualify as a service functionally equivalent to mobile voice.

In justifying its return to the CMRS test, the Commission properly underscores its statutory “discretion” to define functional equivalence, *2018 Order* ¶ 84, whose meaning is to be “specified by regulation by the Commission,” 47 U.S.C. § 332(d)(3); *cf.* *Title II Order* ¶ 404. The Commission argues that the CMRS test “reflects the best interpretation of section 332,” *2018 Order* ¶ 83, and “hews much more faithfully to the intent of Congress” than the *Title II Order* “or the analyses in the record focusing on the extent of service availability,” *id.* ¶ 84.

It was reasonable for the Commission to home in on substitutability: If the same regulatory regime is to govern two services, the Commission could sensibly conclude that economic rationality suggests that the risk of regulation-engendered economic distortions will be less if the two are close substitutes. As the Commission rightly observed in the Second CMRS Report and Order, the “statute’s overriding purpose [is] to ensure that *similar services* are subject to the same regulatory classification and requirements.” 9 FCC Rcd. at 1447, ¶ 78 (emphasis added). The *2018 Order* quite properly rested on this section of the Second CMRS Report and Order. *2018 Order* ¶ 84 & n.312.

Applying the restored CMRS test, the Commission appropriately looked to substitutability of the services on offer. It reasoned that mobile voice and mobile broadband “have different service characteristics and intended uses and are not closely substitutable for each other” *2018 Order* ¶ 85. Consumers purchase mobile broadband to “access the Internet, on-line video, games, search engines, websites, and various other applications.” *Id.* By contrast, consumers “purchase mobile voice service solely to make calls to other users using NANP numbers [presumably referring primarily to users reachable via the public switched telephone network].” *Id.* In virtue of these differences, the two are not “closely substitutable in the eyes of consumers.” *Id.* ¶ 84; *cf. Second CMRS Report and Order*, 9 FCC Rcd. at 1447–48, ¶ 80 (asking whether a service is a “close substitute”).

In sum, even though Petitioners’ reading of a “functional equivalen[ce]” in Section 332(d)(3) is not foreclosed by the statute, the agency’s interpretation of that term, and its application to mobile broadband, are reasonable and merit *Chevron* deference.

III. Section 706 Authority

Petitioners additionally argue that the Commission could have addressed the harms of blocking and throttling and issued open Internet rules under Section 706 of the Telecommunications Act. Pursuant to Section 706(a), the FCC “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” 47 U.S.C. § 1302(a). Furthermore, Section 706(b) states that the agency “shall take immediate action” if this goal is not being met “in a timely fashion.” *Id.* § 1302(b). The Commission interpreted these provisions as “exhorting the Commission to exercise market-based or deregulatory authority granted under other statutory provisions, particularly the Communications Act” not as “an independent grant of regulatory authority to give those provisions meaning.” *2018 Order* ¶ 270. Despite Petitioners’ contentions, we find that this interpretation of Sections 706(a) and (b) is lawful.

As with our prior analysis of the Commission’s classification determinations, we evaluate its statutory interpretation decisions concerning Section 706 authority by applying the two-step analysis of *Chevron*. *See* 467 U.S. at 842–43.

In *Verizon v. FCC*, we noted that the language of Section 706 is ambiguous. Thus, we proceed to Step Two of the analysis and ask whether the Commission’s understanding of Section 706 as hortatory represents a reasonable interpretation of the statute. We find that it does. Indeed, we have previously held that the language of Section 706(a) could “certainly be read as simply setting forth a statement of congressional policy” and “just as easily be read to vest the Commission with actual authority. 740 F.3d 623, 637 (D.C. Cir. 2014). We have also understood Section 706(b) to be similarly permissive. Furthermore, in support of its interpretation, the Commission notes that Section 706 lacks details “identify[ing] the providers or entities whose conduct could be regulated,” whereas other provisions of the Act that unambiguously grant regulatory authority do specify such details. *2018 Order* ¶ 271. We find the Commission’s rationales in favor of its reading of Section 706 to be reasonable.

IV. Section 257 and the 2018 Order’s Transparency Requirements

In its *2018 Order*, the Commission retained a “transparency rule,” which provided that “[a]ny person providing broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient to enable consumers to make informed choices” *2018 Order* ¶ 215. Petitioners challenge the Commission’s legal authority to issue a transparency rule under 47 U.S.C. § 257. Instead, Petitioners argue that the Commission should have adopted the rule under Section 706 of the Telecommunications Act. We disagree.

[T]he Commission’s reliance on 47 U.S.C. § 257 to issue the transparency rule was proper. Section 257(a) of the Communications Act required the FCC, within 15 months after enactment of the 1996 Act, to “complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this chapter (other than this section), market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services.” 47 U.S.C. § 257(a). Section 257(c) directed the Commission, “triennially thereafter, to report to Congress on such marketplace barriers and how they have been addressed by regulation or could be addressed by recommended statutory changes.” 2018 Order ¶ 232 (citing 47 U.S.C. § 257(c)). The Commission observed that “section 257 does not specify precisely how [they] should obtain and analyze information for purposes of its reports to Congress,” and thus “construe[d] the statutory mandate to ‘identify’ the presence of market barriers as including within it direct authority to collect evidence to prove that such barriers exist.” 2018 Order ¶ 232 n.847. We find that this interpretation of Section 257(a) is permissible. The relevant language in Section 257 is sufficiently ambiguous—Congress does not proscribe the means of “identifying” market barriers. The Commission permissibly read the clause to apply only to the elimination of market barriers. In turn, we find that the Commission’s reading easily satisfies review at *Chevron* Step Two, under which we defer to the agency’s interpretation unless it is “arbitrary or capricious in substance, or manifestly contrary to the statute.” *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

V. Arbitrary and Capricious Challenges

The Commission claims that we can uphold its entire rulemaking on the weight of its statutory interpretation alone. In the Commission’s view, the reasonableness of its interpretation necessarily insulates the 2018 Order from arbitrary and capricious challenge. *See id.*

That argument misunderstands the law. To be sure, the analysis of an agency’s statutory interpretation at *Chevron* Step Two has some overlap with arbitrary and capricious review. The former asks whether the agency’s interpretation “is based on a permissible construction of the statute.” *Chevron*, 467 U.S. at 843. And the latter asks whether the agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made,” and “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations marks omitted). Nevertheless, “the Venn diagram of the two inquiries is not a circle.” *Humane Soc’y of United States v. Zinke*, 865 F.3d 585, 605 (D.C. Cir. 2017). Each test must be independently satisfied.

This is a case in point. The Commission has advanced what is, under controlling precedent, a reasonable interpretation of the statute for purposes of *Chevron*. But aspects of the Commission’s decision are still arbitrary and capricious under the Administrative Procedure Act because of the Commission’s failure to address an important and statutorily mandated consideration—the impact of the 2018 Order on public safety—and the Commission’s inadequate consideration of the 2018 Order’s impact on pole-attachment regulation and the Lifeline Program. We consider each of Petitioners’ challenges in turn.

A. Effects on Investment and Innovation

Petitioners challenge the Commission’s conclusion that reclassification of broadband as an information service is “likely to increase ISP investment and output,” 2018 Order ¶ 98, focusing almost entirely on the Commission’s suggestion that the *Title II Order* may well have led to reduced investment in broadband. They object to particular studies on which the agency relies, the explanations it offers for its conclusions, and its failure to credit certain data. We find that the agency’s position as to the economic benefits of reclassification away from “public-utility style regulation,” *id.* ¶ 90, which the Commission sees as “particularly inapt for a dynamic industry built on technological development and disruption,” *id.* ¶ 100, is supported by substantial evidence, *see National Lifeline Ass’n v. FCC*, 921 F.3d 1102, 1111 (D.C. Cir. 2019), and so reject Petitioners’ objections.

As part of its justification for “light-touch” regulation of the Internet ecosystem, the Commission made a variety of arguments about optimal, and suboptimal, conditions for broadband investment and innovation. It relied on, among other things, (1) prior agency positions; (2) a finding that “the balance of the evidence indicates that Title II discourages investment by ISPs,” *id.* ¶ 93, supported by studies evaluating ISP investment before and after the *Title II Order*, *id.* ¶¶ 89–98; (3) the disincentive to investment arising from regulatory uncertainty about the substance and potential reach of Title II regulation; (4) effects on small ISPs and rural communities where firms are more likely to

take the risks of offering much-needed services in a more predictable and less onerous regulatory climate; and (5) the absence of evidence of negative effects on edge investment. This diverse array of theses led the Commission to conclude that “Title II classification likely has resulted, and will result, in considerable social cost, in terms of forgone investment and innovation,” without “discernable incremental benefit relative to Title I classification.” *Id.* ¶ 87.

We reiterate that our posture in arbitrary and capricious review is deferential. Especially apt here is an admonition we have long made: “Predictions regarding the actions of regulated entities are precisely the type of policy judgments that courts routinely and quite correctly leave to administrative agencies.” *Public Citizen, Inc. v. National Highway Traffic Safety Admin.*, 374 F.3d 1251, 1260–61 (D.C. Cir. 2004) (quoting *Public Utils. Comm’n v. FERC*, 24 F.3d 275, 281 (D.C. Cir. 1994)).

[T]he Commission was clear-eyed in assigning quite modest probative value to studies attempting to draw links between the *Title II Order* and broadband investment, so that there is less daylight between the Commission and Petitioners than the latter seem to think. It states that “reclassification . . . is *likely* to increase ISP investment and output.” *2018 Order* ¶ 98 (emphasis added). The takeaway here is *both* that Petitioners’ skepticism is echoed in the *2018 Order* and that some commenters seem to set the bar so high that no empirical grounds relating to the *Title II Order*’s effects on ISP investment could support (or refute) the Commission’s policy.

[T]he Commission’s recognition that the *Title II Order*’s effect on investment was subject to honest dispute, repeatedly flagging shortcomings in studies it cites, and qualifying their probative force. It found modestly that “[t]he balance of the evidence in the record suggests that Title II classification has reduced ISP investment in broadband networks.” *2018 Order* ¶ 88. We are, in short, unpersuaded by Petitioners’ and Intervenor’s objections to the Commission’s finding and their implicit claim that uncertainties associated with that finding render arbitrary the Commission’s overall judgment—that there are net public policy benefits from reclassification, based not only on a likelihood of increased investment and innovation but also on the absence of any “discernable incremental benefit relative to Title I classification.” *Id.* ¶ 87. This court “properly defers to policy determinations invoking the [agency’s] expertise in evaluating complex market conditions.” *Gas Transmission Nw. Corp. v. FERC*, 504 F.3d 1318, 1322 (D.C. Cir. 2007).

B. Harms to Edge Providers and Consumers

Petitioners emphasize that, historically, the “FCC has repeatedly found that [broadband providers] have the ability and incentive to harm edge providers and consumers.” *See Mozilla Br.* at 62 (citing *2010 Order* ¶ 21 and *Title II Order* ¶ 20). According to Petitioners, the Commission ignored these prior findings when it issued the *2018 Order*. Under *Fox Television*, when an agency changes its policy “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” 556 U.S. at 515–16. While “[a]n agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate,” *Id.* at 537 (Kennedy, J., concurring), such is not the case here.

The Commission reasonably concluded that the harms the *Title II Order* was designed to prevent did not require the prior Order’s regulatory measures but could instead be mitigated—at a lower cost—with transparency requirements, consumer protection, and antitrust enforcement measures. Even if the conduct rules lead to marginal deterrence, the Commission determined that the “substantial costs” are “not worth the possible benefits.” *2018 Order* ¶ 245; *see also id.* ¶¶ 240–266. In arriving at this conclusion, the Commission “scrutinize[d] closely each prior conduct rule.” *2018 Order* ¶ 239. Rather than ignoring its prior findings, the Commission changed its balancing of the relevant incentives. The Commission employed a different method to address its previous concerns regarding broadband providers’ behavior and incentives. In so doing, the Commission provided a “reasoned explanation” for its changed view as required by *Fox*.

We are, however, troubled by the Commission’s failure to grapple with the fact that, for much of the past two decades, broadband providers were subject to some degree of open Internet restrictions. For example, from the late 1990s to 2005, Title II applied to the transmission component of DSL service. *Title II Order* ¶ 313. Even after the Commission issued the 2005 Wireline Broadband Order, which classified DSL as an integrated information service and thus further removing it from Title II’s ambit, the Commission announced that should it “see evidence that providers of telecommunications for Internet access or IP-enabled services are violating” the Internet Policy Statement, which reflected Chairman Michael Powell’s four principles of Internet openness, it would “not hesitate to take action to address that conduct,” *id.* at 14,904, ¶ 96. In 2015, the Commission also claimed that “Title II has been

maintained by more than 1000 rural local exchange carriers that have chosen to offer their DSL and fiber broadband services as common carrier offerings.” *Title II Order* ¶ 9. The Commission’s failure to acknowledge this regulatory history, however, does not provide grounds for reversal on this record given its view that market forces combined with other enforcement mechanisms, rather than regulation, are enough to limit harmful behavior by broadband providers.

Petitioners dispute that the transparency rule, market forces, or existing antitrust and consumer protection laws can adequately protect Internet openness. The Commission’s conclusion to the contrary, they argue, was arbitrary and capricious. We consider Petitioners’ attack on components of the light-touch regime but are ultimately unpersuaded.

1. Reliance on the Transparency Rule

The Commission, in large part, undergirds its light-touch regime with its finding that the transparency rule’s disclosure requirements will discourage broadband providers from engaging in harmful practices. Specifically, the Commission reasoned that public disclosure requirements would encourage broadband providers to abide by open Internet principles and “incentivize[] quick corrective measures by providers if problematic conduct is identified.” *Id.* Disclosure could help ensure that “those affected by such conduct will be in a position to make informed competitive choices or seek available remedies for anticompetitive, unfair, or deceptive practices.” *Id.* ¶ 217. But Petitioners contend that the Commission’s reliance on the transparency rule was unreasonable because “[d]isclosure does little for consumers with no practical alternatives.” *Mozilla Br.* 55. We disagree and find that the Commission offered a reasonable justification for the transparency rules. Since the Commission first adopted a transparency rule in 2010, “almost no incidents of harm to Internet openness have arisen.” *2018 Order* ¶ 242; *see also id.* ¶ 241. Based on this record, the Commission concluded that “public scrutiny and market pressure” is an effective “disinfectant” and leads to “increasingly fast [broadband provider]-driven resolution[s]” when issues do arise. *Id.* ¶ 243. Beyond its claim that the transparency rule does not go far enough to protect some consumers, Petitioners offer no more elaborate reason for explaining how the Commission’s reliance on disclosure was impermissible. Seeing none, we reject Petitioners’ arbitrary-and-capricious challenge.

2. Reliance on Competition

Petitioners contend that the Commission acted arbitrarily and capriciously in changing its view about the magnitude of competitive pressures in the fixed broadband market. Recall, the “premise of Title II and other public utility regulation is that [broadband providers] can exercise market power sufficient to substantially distort economic efficiency and harm end users.” *2018 Order* ¶ 123. But in the most recent order, the Commission concluded that “fixed broadband Internet access providers frequently face competitive pressures that mitigate their ability to exert market power.” *2018 Order* ¶ 217. Petitioners responded[, but do not] surmount the highly deferential standard of review.

Petitioners claim that the Commission arbitrarily accepted a lack of competition in the fixed broadband market. For example, Petitioners lament that almost half of Americans have either one or no choice for residential high-speed wireline broadband providers (download speeds of 25 Mbps and higher and upload speeds of 3 Mbps and higher). Another 45 percent have only two high-speed wireline options. Despite this information, the Commission concludes that competition is “widespread.” *2018 Order* ¶ 125.

As part of its overall argument, the Commission suggests that “fixed satellite and fixed terrestrial wireless Internet access providers” exert “some pressure on [broadband] providers.” *2018 Order* at ¶ 125. First, the Commission acknowledges that fixed satellite and fixed terrestrial wireless Internet access service may not be “broadly effective competitors.” *Id.* ¶ 125. So, at best, we can only anticipate that “these services, where available, place *some* competitive constraints on wireline providers.” *Id.* (emphasis added). Second, the Commission “make[s] no finding as to whether lower speed fixed Internet access services are in the same market as higher speed fixed Internet access services.” *Id.* ¶ 124 n.454. Taken together, the Commission fails to provide a fully satisfying analysis of the competitive constraints faced by broadband providers.

We are, however, satisfied by the Commission’s other reasons for believing that competition exists in the broadband market. The Commission turns to empirical research that supports the claim that the presence of two wireline providers is enough to ensure that meaningful competition exists. Consumers in areas with fewer than two providers may also reap the benefits of competition; a provider in this area “will tend to treat customers that do not have a competitive choice as if they do” because competitive pressures elsewhere “often have spillover effects across a given corporation.” *Id.* ¶ 127. Additionally, these providers could face hefty operational and reputational cost from

acting badly in uncompetitive areas. Based on these reasonable findings and our highly deferential standard of review, it was not arbitrary for the Commission to conclude that fixed broadband providers face competitive pressures.

3. Reliance on Antitrust and Consumer Protection Laws

The Commission found that “[i]n the unlikely event that ISPs engage in conduct that harms Internet openness,” legal regimes like “antitrust law and the FTC’s authority under Section 5 of the FTC Act to prohibit unfair and deceptive practice” will provide protection for consumers. *See 2018 Order* ¶ 140. The Commission reasoned that antitrust and consumer protection laws are particularly well-suited to addressing openness concerns because “they apply to the whole of the Internet ecosystem, including edge providers, thereby avoiding tilting the playing field against ISPs and causing economic distortions by regulating only one side of business transactions on the Internet.” *Id.* Petitioners argue that reliance on antitrust and consumer protection law was an improper delegation of authority. We disagree.

Petitioners’ argument relies on Section 706, which directs “[t]he Commission” to “encourage the deployment” of broadband, 47 U.S.C. § 1302(a) (emphasis added), and Section 1 of the Communications Act, which likewise directs the FCC to make rapid and efficient communications services available to all. According to Petitioners, these mandates mean that the Commission may not “delegate” fundamental questions of national telecommunications policy to the Department of Justice and the Federal Trade Commission.

Petitioners liken this case to *Local 1976, United Brotherhood of Carpenters & Joiners v. NLRB*, 357 U.S. 93 (1958), where the Supreme Court held that an agency may not “abandon an independent inquiry into the requirements of its own statute and mechanically accept standards elaborated by another agency under a different statute for wholly different purposes.” *Id.* at 111. But the Commission has not “mechanically accept[ed] the standards” of other laws as satisfying its own. Instead, it has conducted an independent assessment of the degree of problematic conduct that has been and will be committed by broadband providers and whether, as a policy matter, the benefits of restricting that conduct outweigh the costs. A reasonable piece of that policy-making puzzle, then, is an assessment of other regulatory regimes that might already limit the conduct in question. Therefore, it was not impermissible for the Commission to recognize that the Department of Justice and Federal Trade Commission have the ability to police blocking and throttling practices *ex post*.

To be sure, the Commission’s discussion of antitrust and consumer protection law is no model of agency decisionmaking. The Commission theorized why antitrust and consumer protection law is preferred to *ex ante* regulations but failed to provide any meaningful analysis of whether these laws would, in practice, prevent blocking and throttling. For example, the Commission opines that “[m]ost of the examples of net neutrality violations discussed in the *Title II Order* could have been investigated as antitrust violations,” *see 2018 Order* ¶ 145, but fails to explain what, if any, concrete remedies might address these antitrust violations. It is concerning that the Commission provides such an anemic analysis of the safety valve that it insists will limit anticompetitive behavior among broadband providers. Nonetheless, we cannot go so far as to say that this failure is so profound that the agency “entirely failed to consider an important aspect of the problem,” *State Farm*, 463 U.S. at 43, or otherwise engaged in unreasoned decisionmaking. That is especially true because the Commission viewed those laws as only one part of a larger regulatory and economic framework that it believes will limit broadband providers’ engagement in undesirable practices. The Commission barely survives arbitrary and capricious review on this issue.

C. Public Safety

The Governmental Petitioners challenge as arbitrary and capricious the Commission’s failure to consider the implications for public safety of its changed regulatory posture in the *2018 Order*. And they are right.

Congress created the Commission for the purpose of, among other things, “promoting safety of life and property through the use of wire and radio communications.” 47 U.S.C. § 151. So the Commission is “required to consider public safety by . . . its enabling act.” *Nuvio Corp. v. FCC*, 473 F.3d 302, 307 (D.C. Cir. 2006); *see also* 47 U.S.C. § 615 (The Wireless Communication and Public Safety Act of 1999, Pub. L. No. 106-81, § 3, 113 Stat. 1286, 1287, directs the Commission to “encourage and support efforts by States to deploy comprehensive end-to-end emergency communications infrastructure and programs” and to “consult and cooperate with State and local officials responsible for emergency services and public safety.”).

An agency’s failure to consider and address during rulemaking “an important aspect of the problem” renders

its decision arbitrary and capricious. *State Farm*, 463 U.S. at 43. A “statutorily mandated factor, by definition, is an important aspect of any issue before an administrative agency, as it is for Congress in the first instance to define the appropriate scope of an agency’s mission.” *Public Citizen v. Federal Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004).

A number of commenters voiced concerns about the threat to public safety that would arise under the proposed (and ultimately adopted) *2018 Order*. Specifically, public safety officials explained at some length how allowing broadband providers to prioritize Internet traffic as they see fit, or to demand payment for top-rate speed, could imperil the ability of first responders, providers of critical infrastructure, and members of the public to communicate during a crisis.

On appeal, the Governmental Petitioners attempt to supplement their record comments with documentation of an incident involving the (apparently accidental) decision by Verizon to throttle the broadband Internet of Santa Clara firefighters while they were battling a devastating California wildfire.

In fact, the Commission does not dispute that it was obligated to consider public safety. Nor does it claim that it specifically addressed public safety in its *2018 Order*. Instead, the Commission offers two defenses. The Commission argues that the June 2018 incident with Verizon demonstrates that light-touch rules promote public safety because, in response to the negative public reaction to its throttling practice, Verizon introduced a new plan for public safety customers. The Commission also reasons that the Governmental Petitioners’ concerns “about government services are issues that apply to all edge providers, public and private.” Commission Br. 95. Those arguments are too little, too late.

First, the argument about Verizon’s response was not made in the *2018 Order* to explain the Commission’s bypassing of the required public-safety analysis. In fact, it was not made at all because, as noted, this incident postdated the final *2018 Order* by half a year. Just as we will not expand the record to consider documentation about Verizon’s decision to throttle the Santa Clara County Fire Department after the *2018 Order* was issued, we will not consider the public statements made by Verizon in response to that controversy. Under the Administrative Procedure Act as elsewhere, what is good for the goose is good for the gander.

Second, the Commission did not claim in the *2018 Order* that the public safety issues raised by the Governmental Petitioners could be ignored because they were redundant of the arguments made by edge providers. Therefore, the Commission’s argument is an off-limits *post hoc* rationalization. See *Temple Univ. Hosp., Inc. v. NLRB*, 929 F.3d 729, 734 (D.C. Cir. 2019).

And the argument is facially inadequate to boot. The Commission’s after-the-fact reasoning entirely misses the fact that, whenever public safety is involved, lives are at stake. As noted by Santa Clara County, unlike most harms to edge providers incurred because of discriminatory practices by broadband providers, the harms from blocking and throttling during a public safety emergency are irreparable. People could be injured or die..

The Commission’s disregard of its duty to analyze the impact of the *2018 Order* on public safety renders its decision arbitrary and capricious in that part and warrants a remand with direction to address the issues raised.

D. Reliance Interests

Petitioners argue[s] that the Commission paid too little heed to the reliance that various parties—particularly edge providers and state and local governments—allegedly placed on the *Title II Order* in making investments that Petitioners see as jeopardized by the Commission’s action here. The Commission acknowledged, as it must, the significance of reliance interests as a potential weight against its decision, but found the submissions wanting. It argues first that parties have not established any reliance to begin with, for lack of any “attempt to attribute particular portions of th[eir] investment to any reliance on the *Title II Order*.” *2018 Order* ¶ 159. Second, even if reliance had been shown, the Commission maintains that it would not have been reasonable under the circumstances. *Id.* ¶ 159.

As to the Commission’s first argument, the issue is whether the Commission was arbitrary or capricious in finding that there were no serious reliance interests attributable to the *Title II Order* because it was not convinced that edge providers’ investments in the time since the *Title II Order* had been made in reliance on that order. We lack

adequate briefing on the issues we would need to settle here, including what findings an agency must make to support a conclusion that serious reliance interests do not exist in the first place—issues that neither the Supreme Court, *see* *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 195 (2016); *Fox Television*, 556 U.S. at 515–16, nor our circuit has resolved. Given as much, and in light of the availability of other grounds for decision, we will not pass on the Commission’s first argument. Rather, we will uphold the agency’s treatment of reliance interests based on its alternative argument. That is, assuming the change in agency position implicated serious reliance interests, we agree with the Commission that such reliance would have been unreasonable on the facts before us.

Insofar as the regulation on which reliance is asserted is simply the *Title II Order*’s package of rules and policies, we think this is a fair response. [I]n light of the Commission’s approach to classifying cable modem service and Internet access since the late 1990s, the *Title II Order* could reasonably have been viewed as a regulatory step that might soon be reversed. *See 2018 Order* ¶ 159 (referring to “lengthy prior history of information service classification of broadband Internet access service”).

[Thus,] [w]e conclude that the agency’s treatment of reliance interests is not arbitrary or capricious.

E. Pole Attachments

The Governmental Petitioners express substantial concern that, in reclassifying broadband Internet as an information service, the Commission, without reasoned consideration, took broadband outside the current statutory scheme governing pole attachments. That is because the Communications Act defines the “pole attachment[s]” it subjects to regulation by reference to “telecommunications service[s]” under Title II, not information services under Title I. 47 U.S.C. § 224(a)(4).

We agree. The Commission offered, at best, scattered and unreasoned observations in response to comments on this issue. Because the Commission did not adequately address how the reclassification of broadband would affect the regulation of pole attachments, we remand for the Commission to do so.

F. Lifeline Program

The Lifeline Program subsidizes low-income consumers’ access to certain communications technologies, including broadband Internet access. *See* 47 U.S.C. §§ 214, 254; 47 C.F.R. § 54.403. The Governmental Petitioners challenged the *2018 Order* on the ground that reclassification would eliminate the statutory basis for broadband’s inclusion in the Program. *See* 47 U.S.C. §§ 214(e), 254(e). The Commission brushed off their concern. That was straightforward legal error. Several commenters raised this concern in response to the NPRM. The Commission backhanded the issue, stating that it “need not address concerns in the record about the effect of . . . reclassification” given its “authority under Section 254(e) of the Act to provide Lifeline support to [Eligible Telecommunications Carriers] that provide broadband service over facilities-based broadband-capable networks that support voice service.” *2018 Order* ¶ 193.

That response does not work. The Commission completely fails to explain how its “authority under Section 254(e)” could extend to broadband, even “over facilities-based broadband-capable networks that support voice service,” *2018 Order* ¶ 193, now that broadband is no longer considered to be a common carrier. After all, Section 254(e) provides that “only an eligible *telecommunications carrier* designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support.” 47 U.S.C. § 254(e) (emphasis added). And the statute expressly defines an “eligible telecommunications carrier” as a “common carrier” under Title II. *Id.* § 214(e)(1).

For whatever it is worth, the Commission has proven unable to explain itself in this litigation either. Rather than engage with the Governmental Petitioners’ statutory argument, the Commission takes the position that it has “broad discretion” to “defer consideration of particular issues to future proceedings,” and it “need not address all problems in one fell swoop.” Commission Br. 110 (quoting *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004)).

That is a non-sequitur. If, as the statute seems to clearly say, the Commission’s reclassification of broadband as an information service *precludes* the agency from solving this problem in future proceedings, the possibility of future proceedings is irrelevant. At the very least, the Governmental Petitioners identified a “relevant and significant” problem that the Commission was obligated to address in a reasoned way. *See Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1312 (D.C. Cir. 2014) (“An agency’s failure to respond to

relevant and significant public comments generally demonstrates that the agency’s decision was not based on a consideration of the relevant factors.”) (formatting modified). So we must remand this portion of the *2018 Order* for the Commission to address the issue now.

G. Cost-Benefit Analysis

Petitioners next take exception to the Commission’s cost-benefit analysis. They express two sets of concerns. The first set goes to the general nature of the analysis (qualitative rather than quantitative) and to the NPRM’s allegedly having failed to alert the public to the possibility that the Commission would pursue a purely qualitative analysis. The second set goes to some specific treatments of benefits and costs. We review cost-benefit analyses with deference, and here find nothing arbitrary in the Commission’s choice of methodology or explanation of its conclusions.

The notice argument rests on a claim that the NPRM’s discussion committed the Commission to a quantitative analysis under OMB Circular A-4. It fails on two grounds: the NPRM made clear that the Commission was not wedded to the idea of following the Circular, and the Circular itself calls for a qualitative analysis under circumstances that the Commission reasonably invoked.

As to the substance of the cost-benefit analysis, Petitioners set out four challenges. Two of these are addressed separately in this opinion—the claims that the Commission overlooked particular reliance interests, and overstated the costs of Title II classification by relying selectively on studies whose defects it ignored.

We thus turn directly to the other two, which overlap so heavily as to amount to one. We identify them separately, but will treat them together. First, Petitioners claim that the agency did not account for harms to “innovation and democratic discourse” that the *2018 Order* would supposedly bring about. Mozilla Br. 73. Second, they assert that the Commission failed to factor in the “cost to consumers of decreased innovation and other consumer harms,” citing a comment about Comcast’s interference with file sharing, *see* J.A. 1098, and news stories from 2007–2008 describing how “Comcast had blocked users’ ability to share copies of the King James Bible,” Mozilla Br. 73–74; *see also* J.A. 2429 & n.198.

As an initial matter, Petitioners do not explain how the *2018 Order* would harm “innovation and democratic discourse” beyond quoting an assertion by a commentator that “*ex post* enforcement would hamstring nascent industries.” Mozilla Br. 73; *see* J.A. 1097. [T]he Commission’s cost-benefit analysis makes a reasonable case that its “light-touch” approach is more conducive to innovation and openness than the *Title II Order*. We do note that antitrust enforcement by the Commission’s sister agencies (the Department of Justice and the FTC, the latter being released by the *2018 Order* from the statutory exclusion effected by application of Title II) aims at generating and protecting competition, *see* Part V.B.3; at least as a general matter, it seems reasonable to expect that competition would tend to multiply the voices in the public square. The agency says as much, noting that “the transparency rule and the ISP commitments backed up by FTC enforcement are targeted to preserving free expression, particularly the no-blocking commitment,” and that “[t]he market competition that antitrust law preserves will protect values such as free expression.” *2018 Order* ¶ 153. At the same time, the Commission frankly acknowledges that “[t]he competitive process and antitrust would not protect free expression in cases where consumers have decided that they are willing to tolerate some blocking or throttling in order to obtain other things of value.” *Id.* at n.558.

As to harms akin to those such as interference with file-sharing, the Commission observes that commenters could point “only to a handful of incidents that purportedly affected Internet openness, while ignoring the two decades of flourishing innovation that preceded the *Title II Order*.” *2018 Order* ¶ 110; *see also id.* ¶ 116. The colorful example of difficulties with downloading the King James Bible arose from Comcast’s “throttling of BitTorrent, a peer-to-peer networking protocol,” *id.* ¶ 112, which had nothing in particular to do with the Bible, and which Petitioners do not suggest is of a type likely to recur. Further, Petitioners do nothing to refute the agency’s claim that “since 2008, few tangible threats to the openness of the Internet have arisen.” *2018 Order* ¶ 113.

Against this backdrop of what the Commission views as slim empirical support for relevant harms, the agency argues that the benefits of “maintaining a free and open Internet” are “positive and considerable,” *id.* ¶ 313. It contends that its “light-touch” strategy—rooted in transparency rules and “enforcement under antitrust and consumer protection law,” *id.*—will protect Internet openness and help “prevent and remedy harmful behaviors by ISPs,” *id.*, without the costs imposed by Title II regulations (measured by “the economic welfare of consumers, ISPs, and edge providers,” *id.* ¶ 306). For example, a “light-touch” route incentivizes greater “deployment of [broadband] service to unserved

areas,” *id.* ¶ 308, so that more people can get online sooner and enjoy content at higher speeds—especially those “in rural and/or lower-income communities” with “underserved and hard-to-reach populations,” *id.* ¶ 106. Such an outcome, presumably, would bolster democratic discourse and participation.

In weighing the costs and benefits of Title II regulation against those of a deregulatory strategy, the agency finds that, on almost every point, the latter approach is preferable. Title II regulation would “discourage[] investment in the network,” which, in turn, may cause “society . . . to lose some spillover benefits,” *2018 Order* ¶ 310, including forgone “improvements in productivity and innovation that occur because broadband is a general-purpose technology,” *id.* Conduct rules mandated by the *Title II Order*, the Commission said, have “large [negative] effects on consumers obtaining innovative services,” such as zero-rating. *Id.* ¶ 318. Following up its prior observation that “smaller edge providers may benefit from tiered pricing, such as paid prioritization, as a means of gaining entry,” *id.* ¶ 133, it reasoned that removal of the *Title II Order*’s ban could yield “innovative services and business models,” *id.* ¶ 321. Whatever harms might occur absent a ban on paid prioritization, the agency estimated them to be “small” and “infrequent,” *id.* ¶ 320, and thus outweighed by the costs of the *Title II Order*. As for rules against blocking and throttling, the agency states that their costs are “likely small,” though they could grow if compliance becomes more onerous. *Id.* ¶ 322. The benefits of such rules, however, are “approximately zero,” *id.* ¶ 323—a point Petitioners do not grapple with. That is so, in the agency’s view, because the *2018 Order*’s transparency rules—combined with the deterrent effects of “market forces, public opprobrium, and enforcement of the consumer protection laws”—can “mitigate potential harms.” *2018 Order* ¶ 323; *cf.* ¶ 315 (explaining that the *Title II Order*’s transparency rules would “impose significant additional costs” without “additional benefits”). In sum, a “light-touch” approach can in the Commission’s judgment secure Internet openness and encourage innovation at lower cost than the *Title II Order*, while yielding unique benefits.

The Commission’s reasoning rehearsed above is not plagued by “serious flaw[s]” that so “undermin[e]” its cost-benefit analysis as to render the rule “unreasonable.” *Home Builders*, 682 F.3d at 1040. We therefore reject Petitioners’ objections on this front.

VI. Preemption

We vacate the portion of the *2018 Order* that expressly preempts “any state or local requirements that are inconsistent with [its] deregulatory approach.” *2018 Order* ¶ 194; *see id.* ¶¶ 194–204 (Preemption Directive). The Commission ignored binding precedent by failing to ground its sweeping Preemption Directive—which goes far beyond conflict preemption—in a lawful source of statutory authority. That failure is fatal.

The relevant portion of the Order provides that “regulation of broadband Internet access service should be governed principally by a uniform set of federal regulations,” and not “by a patchwork that includes separate state and local requirements.” *2018 Order* ¶ 194. In service of that goal, the *2018 Order* expressly “preempt[s] any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order.” *Id.* ¶ 195. In other words, the Preemption Directive invalidates all state and local laws that the Commission deems to “interfere with federal regulatory objectives” or that involve “any aspect of broadband service . . . address[ed]” in the Order. *Id.* ¶¶ 195–96.

The Preemption Directive conveys more than a mere intent for the agency to preempt state laws in the future if they conflict with the *2018 Order*. The Order was meant to have independent and far-reaching preemptive effect from the moment it issued. And the Commission meant for that preemptive effect to wipe out a broader array of state and local laws than traditional conflict preemption principles would allow.

The Governmental Petitioners challenge the Preemption Directive on the ground that it exceeds the Commission’s statutory authority. They are right.

A. Express and Ancillary Authority

“The [Commission], like other federal agencies, literally has no power to act unless and until Congress confers power upon it.” *American Library Ass’n v. FCC.*, 406 F.3d 689, 698 (D.C. Cir. 2005) (formatting modified). That means that the Commission “may preempt state law only when and if it is acting within the scope of its congressionally delegated authority.” *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (*Louisiana*

PSC). By the same token, in any area where the Commission lacks the authority to regulate, it equally lacks the power to preempt state law. After all, an “agency may not confer power on itself,” and “[t]o permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress.” *Louisiana PSC*, 476 U.S. at 374–75.

The Commission’s regulatory jurisdiction falls into two categories. The first is the “express and expansive authority” Congress delegated in the Act to regulate certain technologies. *Comcast*, 600 F.3d at 645. This authority extends to “common carrier services, including landline telephony (Title II of the Act); radio transmissions, including broadcast television, radio, and cellular telephony (Title III); and ‘cable services,’ including cable television (Title VI).” *Id.* (internal citations omitted).

The second is the Commission’s “ancillary authority.” *Comcast*, 600 F.3d at 650. The Commission’s ancillary authority derives from a provision within Title I of the Act that empowers the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.” 47 U.S.C. § 154(i). That provision enables the Commission to regulate on matters “reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities.” *American Library*, 406 F.3d at 692.

For the Preemption Directive to stand, then, the Commission must have had express or ancillary authority to issue it. It had neither.

The Preemption Directive could not possibly be an exercise of the Commission’s express statutory authority. By reclassifying broadband as an information service, the Commission placed broadband *outside* of its Title II jurisdiction. And broadband is not a “radio transmission” under Title III or a “cable service” under Title VI. So the Commission’s express authority under Titles III or VI does not come into play either. Nor did Congress statutorily grant the Commission freestanding preemption authority to displace state laws even in areas in which it does not otherwise have regulatory power.

Neither can the Commission house the Preemption Directive in its ancillary authority under Title I. “Title I is not an independent source of regulatory authority.” *People of State of Cal. v. FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990) (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968)). As a result, ancillary jurisdiction exists only when “(1) the Commission’s general jurisdictional grant under Title I of the Communications Act covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.” *American Library*, 406 F.3d at 691–92 (formatting modified).

Under binding circuit precedent, those “statutorily mandated responsibilities” must themselves be dictated by Title II, III, or VI of the Act—none of which apply since the Commission took broadband out of Title II. *See Comcast*, 600 F.3d at 654 (“[I]t is Title II, III, or VI to which the authority must ultimately be ancillary.”).

The Commission seemingly agrees because nowhere in the *2018 Order* or its briefing does it claim ancillary authority for the Preemption Directive. *See 2018 Order* ¶¶ 194–204; Commission Br. 121 (acknowledging that the Order “makes *no mention* of either Title II or ancillary authority”).

B. The Commission’s Asserted Sources of Authority

With express and ancillary preemption authority off the table, the Commission was explicit that it was grounding its Preemption Directive in (i) the “impossibility exception” to state jurisdiction, and (ii) the “federal policy of nonregulation for information services.” *2018 Order* ¶¶ 198, 202. Neither theory holds up.

1. Impossibility Exception

Section 152 of the Communications Act provides, as relevant here, that “nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . regulations for or in connection with intrastate communication service by wire or radio of any carrier.” 47 U.S.C. § 152(b). That provision divides regulatory authority “into two separate components: interstate communications, which can be regulated by the [Commission]; and intrastate communications, which cannot.” *Maryland PSC*, 909 F.2d at 1514 (internal quotation marks omitted). In doing so, Section 152 “severely circumscribes” the Commission’s “power by ‘fencing off from

[its] reach or regulation intrastate matters,” including “matters in connection with intrastate service.” *Public Util. Comm’n of Tx. v. FCC*, 886 F.2d 1325, 1331 (D.C. Cir. 1989) (quoting *Louisiana PSC*, 476 U.S. at 370 (formatting modified)). The “impossibility exception” is a judicial gloss on Section 152 that attempts to help navigate the Act’s sometimes complicated division of regulatory power.

All the impossibility exception does is help police the line between those communications matters falling under the Commission’s authority (Section 152(a)) and those remaining within the States’ wheelhouse (Section 152(b)). Specifically, if the matter involves interstate communications or a mix of state and federal matters *and* it falls within the impossibility exception, then the Commission may regulate to the extent of its statutory authority. *See Louisiana PSC*, 476 U.S. at 374; *Maryland PSC*, 909 F.2d at 1513–15. If not, the matter falls within the States’ jurisdiction. In other words, the impossibility exception presupposes the existence of statutory authority to regulate; it does not serve as a substitute for that necessary delegation of power from Congress.

Nor can 47 U.S.C. § 152—the statutory hook for the impossibility exception—by itself provide a source of preemption authority. We have rejected that precise argument before. In *NARUC II*, *supra*, the Commission asserted that Section 152 authorized it to preempt state regulation of two-way communications over cable systems’ leased access channels.³ That argument failed, we explained, because “each and every assertion of jurisdiction over cable television must be independently justified as reasonably ancillary to the Commission’s power over broadcasting.” *NARUC II*, 533 F.2d at 612. So the Commission cannot bootstrap itself into preemption authority just by pointing to Section 152. It has to identify an independent source of regulatory authority to which the preemption action would be “reasonably ancillary.” *Id.*

[C]ontrary to the Commission’s argument, the “impossibility exception” does not create preemption authority out of thin air.

2. Federal Policy of Nonregulation

What the Commission calls the “federal policy of nonregulation for information services,” Commission Br. 123, cannot sustain the Preemption Directive either.

First, as a matter of both basic agency law and federalism, the power to preempt the States’ laws must be conferred by Congress. It cannot be a mere byproduct of self-made agency policy. Doubly so here where preemption treads into an area—State regulation of intrastate communications—over which Congress expressly “deni[ed]” the Commission regulatory authority, *Louisiana PSC*, 476 U.S. at 374.

Presumably recognizing as much, the Commission attempts to house its preemption authority in 47 U.S.C. § 230(b)(2). That provision says that “the policy of the United States [is] . . . 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.* No dice. As the Commission has itself acknowledged, “[p]olicy statements are just that—statements of policy. They are not delegations of regulatory authority.” *Comcast*, 600 F.3d at 654.

Nor do policy statements convey “statutorily mandated responsibilities” that the Commission may use to support an exercise of ancillary authority. *Comcast*, 600 F.3d at 644, 654 (“Although policy statements may illuminate [delegated] authority, it is Title II, III, or VI to which the authority must ultimately be ancillary.”).

Second, the Commission points to 47 U.S.C. § 153(51), which defines “telecommunications carrier,” and provides that “[a] telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services.”

That does not work either. Section 153(51) is a definitional provision in Title I, and so is “not an independent source of regulatory authority.” *People of State of Cal.*, 905 F.2d at 1240 n.35. Quite the opposite. As the parties agree, that provision is a *limitation* on the Commission’s authority.

It also would make no sense for Congress to bury the enormously far-reaching and consequential authority to override every single State’s *statutorily conferred* power to regulate intrastate communications deep within a list of fifty-nine definitions in a non-regulatory portion of the statute, and then articulate the relevant definition as a *restriction* of the Commission’s power.

Third, the Commission points to 47 U.S.C. § 160(e). That provision says that “[a] State commission may not continue to apply or enforce any provision of [the Act] that the Commission has determined to forbear from applying under subsection (a).” Subsection (a), in turn, gives the Commission some flexibility to forbear from regulating technologies classified under Title II. *Id.* § 160(a).

That Title II provision has no work to do here because the *2018 Order* took broadband out of Title II. So the Commission is not “forbear[ing] from applying any provision” of the Act to a Title-II technology. 47 U.S.C. § 160(e). On top of that, Section 160(e)—as a part of Title I—does not itself delegate any preemption authority to the Commission.

The best the Commission can do is try to argue by analogy. It claims that it would be “incongruous” not to extend preemption authority under Title I, given that Section 160(e) prohibits States from regulating a service classified under Title II in instances of federal forbearance. Commission Br. 115–16.

That is a complaint that the Commission is free to take up with Congress. Until then, preemption authority depends on the Commission identifying an applicable statutory delegation of regulatory authority, and Section 160(e) does not provide it. The Commission’s “own bruised sense of symmetry” is irrelevant. *NARUC II*, 533 F.2d at 614.

Anyhow, there is no such incongruity. By expressly requiring that communications services under Title II be regulated as common carriers, the Federal Communications Act grants the Commission broad authority over services classified under Title II, unlike those classified under Title I. Which is also why the Act carves out more space for federal objectives to displace those of the States in the Title II context.

The dissenting opinion calls this “a complete non sequitur,” arguing that it “assumes an asymmetry in preemption implications” in which preemption protects “heavy-handed regulation” more than “light-touch regulation.” Dissenting Op. — (emphasis omitted). Not so. The Commission could choose to enact heavier or lighter regulation under Title II by exercising less or more of its Title II forbearance authority, with symmetrical “preemption implications,” *id.* It just cannot completely disavow Title II with one hand while still clinging to Title II forbearance authority with the other.

3. Case Precedent

Governing precedent nails the coffin shut on the Preemption Directive.

In *Louisiana PSC*, the Supreme Court squarely rejected the Commission’s argument that it “is entitled to preempt inconsistent state regulation” just because it “frustrates federal policy.” 476 U.S. at 368. In doing so, the Court was explicit that, if the Commission cannot tether a rule of preemption to a relevant source of statutory authority, courts “simply cannot accept [the] argument that the [Commission] may nevertheless take action which it thinks will best effectuate a federal policy.” *Id.* at 374. That fits this case to a T.

Likewise, in *City of New York v. FCC*, on which the Commission and their amici heavily rely, the Supreme Court repeated that “an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.” 486 U.S. 57, 66 (1988). The Court then added that “the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency.” *Id.* (quoting *Louisiana PSC*, 476 U.S. at 374 (1989)). Needless to say, no such examination can occur if there is no legislative grant of authority against which to evaluate the preemptive rule, and certainly not when, as here, Congress expressly *withheld* regulatory authority over the matter.

To be sure, in *City of New York*, the Supreme Court referenced the “background of federal pre-emption on this particular issue” as weighing in favor of preemption. 486 U.S. at 66–67. But the Court said so only after the threshold requirement of statutory authority had been satisfied. That statutory authority is the fatal gap in the Commission’s argument here.

Not only is the Commission lacking in its own statutory authority to preempt, but its effort to kick the States out of intrastate broadband regulation also overlooks the Communications Act’s vision of dual federal-state authority and cooperation in this area specifically. Even the *2018 Order* itself acknowledges the States’ central role in “policing

such matters as fraud, taxation, and general commercial dealings,” *2018 Order* ¶ 196, “remedying violations of a wide variety of general state laws,” *id.* ¶ 196 n.732, and “enforcing fair business practices,” *id.* ¶ 196—categories to which broadband regulation is inextricably connected.

C. Conflict Preemption

Finally, the Commission argues that we should leave the Preemption Directive undisturbed because principles of conflict preemption would lead to the same result. *See* Commission Br. 130–33.

Any intuitive appeal this argument might have offered evaporated at oral argument when the Commission confirmed what the Preemption Directive’s plain language bespeaks: It sweeps “broader than ordinary conflict preemption.” Oral Arg. Tr. 171; *see 2018 Order* ¶ 195 (preempting “any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order”). The necessary consequence of this position is that ordinary conflict preemption principles cannot salvage the Preemption Directive.

Beyond that, the Commission’s conflict-preemption argument tries to force a square peg into a round hole. Conflict preemption applies to “state law that *under the circumstances of the particular case* stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress—whether that ‘obstacle’ goes by the name of conflicting; contrary to; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; interference, or the like.” *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000) (formatting modified).

Because a conflict-preemption analysis “involves fact-intensive inquiries,” it “mandates deferral of review until an actual preemption of a specific state regulation occurs.” *Alascom*, 727 F.2d at 1220. Without the facts of any alleged conflict before us, we cannot begin to make a conflict-preemption assessment in this case, let alone a categorical determination that any and all forms of state regulation of intrastate broadband would inevitably conflict with the *2018 Order*.

The dissenting opinion, for its part, invents a brand new source of preemptive power that not even the Commission claims. The power to preempt is said to derive from *Chevron* deference and the “definitional ambiguity” that permits the Commission to classify broadband under Title I. In the dissenting opinion’s view, that interpretive ambiguity alone spawns a power to preempt with all the might of an express statutory grant of authority, and is singlehandedly capable of investing the Commission with the very state-law-displacing authority that the statute withheld in Section 152(b). That theory fails for [several] reasons.

First, this asserted legal basis for preemption is not before us. The *2018 Order* offered two, and only two, sources of authority for the Preemption Directive: the impossibility exception and the federal policy of nonregulation for information services. It did not advance *Chevron* Step Two as a source of preemption authority, so it cannot do so here for the first time. *See Chenery*, 318 U.S. at 87 (“The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”). Of course, the Commission alluded to its *Chevron* Step Two interpretation in explaining its *policy* reasons for desiring categorical preemption. But nowhere does it argue what the dissenting opinion does: that *Chevron* interpretive ambiguity provides an affirmative source of legal *authority* to preempt state laws.

Second, the dissenting opinion fails to explain how the Commission’s interpretive authority under *Chevron* to *classify* broadband as a Title I information service could do away with the *sine qua non* for agency preemption: a congressional delegation of authority either to preempt or to *regulate*. Congress expressly “fenc[ed] off from [the Commission’s] reach or regulation intrastate matters, . . . including matters in connection with intrastate service.” *Louisiana PSC*, 476 U.S. at 370 (internal quotation marks omitted). It is also Congress that chose to house affirmative regulatory authority in Titles II, III, and VI, and not in Title I. And it is Congress to which the Constitution assigns the power to set the metes and bounds of agency authority, especially when agency authority would otherwise trample on the power of States to act within their own borders. So to work here, the agency’s interpretive authority would have to trump Congress’s calibrated assignment of regulatory authority in the Communications Act.

But that cannot be right. No matter how desirous of protecting their policy judgments, agency officials cannot invest themselves with power that Congress has not conferred. And nothing in *Chevron* rewrites or erases plain statutory text.

The dissenting opinion invokes two cases discussing implied preemption arising from different agencies' decisions to forgo regulation under different statutory schemes. It first cites *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, in which the Supreme Court observed that "a federal decision to forgo regulation in a given area *may* imply an authoritative federal determination that the area is best left unregulated." 461 U.S. 375, 384 (1983) (formatting modified). The Court went on to conclude that the relevant statute did not in fact imply such a determination, and so the state regulation at issue was not preempted. *Id.*

At best, *Arkansas Electric* sets up one version of the question. But it gets the dissent no closer to its preferred answer: that here, Congress delegated to the Commission the authority to give sweeping preemptive effect to whatever policy determination underlay its *Chevron* Step Two interpretation of "offer."

In the second case, *Ray v. Atlantic Richfield Co.*, the Supreme Court described the "pre-emptive impact" implied by the "failure of federal officials affirmatively to exercise their full authority" under a statute that the Court had already recognized as delegating regulatory power to the agency. 435 U.S. 151, 174, 177–78 (1978) (formatting modified) ("We begin with the premise that the Secretary has the authority to establish 'vessel size and speed limitations.'").

Those cases do nothing to empower the Commission to engage in *express* preemption in the *2018 Order*. See Oral Arg. Tr. 171 (Commission: "No, Your Honor, it's express preemption."). In neither case was the source or existence of statutory authority for the agency to preempt state regulation at issue. Nor do those cases speak to a statutory scheme in which Congress expressly marked out a regulatory role for States that the federal agency has attempted to supplant. If Congress wanted Title I to vest the Commission with some form of Dormant-Commerce-Clause-like power to negate States' statutory (and sovereign) authority just by washing its hands of its own regulatory authority, Congress could have said so.

Third, the dissenting opinion's effort to discern Congress's delegation of preemption authority in *Chevron* and *Brand X* does not work either. The dissenting opinion acknowledges that its theory of *Chevron* preemption authority derives entirely from the "ambiguity in the word 'offer,'" a word that is buried in a definitional section in a non-regulatory part of the statute, 47 U.S.C. § 153(53).

To be sure, *Chevron* and *Brand X* together confirm that the Commission has interpretive "discretion" to classify broadband as either an information service or a telecommunications service. Congress, in other words, created an interpretive statutory fork in the road and gave the Commission the authority to choose the path.

But the Commission's power to choose one regulatory destination or another does not carry with it the option to mix and match its favorite parts of both. The dissenting opinion's defense of the Preemption Directive makes the mistake of collapsing the distinction between (i) the Commission's authority to make a threshold classification decision, and (ii) the authority to issue affirmative and State-displacing legal commands within the bounds of the classification scheme the Commission has selected (here, Title I). The agency's power to do the former says nothing about its authority to do the latter. *Chevron*, after all, is not a magic wand that invests agencies with regulatory power beyond what their authorizing statutes provide. Instead, the point of *Chevron* was simply to draw lines between the courts' and administrative agencies' respective roles in interpreting ambiguous statutes. See *Chevron*, 467 U.S. at 842–44.

The dissenting opinion's theory of *Chevron* preemption, in other words, takes the discretion to decide which definition best fits a real-world communications service and attempts to turn that subsidiary judgment into a license to reorder the entire statutory scheme to enforce an overarching "nationwide regime" that enforces the policy preference underlying the definitional choice. Nothing in *Chevron* goes that far. And doing so here would turn every exercise of *Chevron* Step-Two interpretation into a bureaucratic blunderbuss capable of demolishing state laws across the Nation any time the agency fears that state regulation might intrude on its regulatory or deregulatory ethos.

At bottom, the Commission lacked the legal authority to categorically abolish all fifty States' statutorily conferred authority to regulate intrastate communications. For that reason, we vacate the Preemption Directive. And because no particular state law is at issue in this case and the Commission makes no provision-specific arguments, it would be wholly premature to pass on the preemptive effect, under conflict or other recognized preemption principles, of the remaining portions of the *2018 Order*.

VII. Conclusion

Despite the Commission’s failure to adequately consider the *2018 Order*’s impact on public safety, pole-attachment regulation, and the Lifeline Program and despite our vacatur of the Preemption Directive, we decline to vacate the *2018 Order* in its entirety.

When deciding whether to vacate an order, courts are to consider the “the seriousness of [its] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.” *Allied-Signal, Inc. v. United States Nuclear Regulatory Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993); *see also* *Heartland Regional Med. Ctr. v. Sebelius*, 566 F.3d 193 (D.C. Cir. 2009) (analyzing the *Allied-Signal* factors).

Here, those factors weigh in favor of remand without vacatur. First, the Commission may well be able to address on remand the issues it failed to adequately consider in the *2018 Order*. Second, the burdens of vacatur on both the regulated parties (or non-regulated parties as it may be) and the Commission counsel in favor of providing the Commission with an opportunity to rectify its errors. Regulation of broadband Internet has been the subject of protracted litigation, with broadband providers subjected to and then released from common carrier regulation over the previous decade. We decline to yet again flick the on-off switch of common-carrier regulation under these circumstances.

But because the Commission’s Preemption Directive lies beyond its authority, we vacate the portion of the *2018 Order* purporting to preempt “any state or local requirements that are inconsistent with [the Commission’s] deregulatory approach[.]” *see id.* ¶ 194.

For the foregoing reasons, the petitions for review are granted in part and denied in part.

So ordered.

MILLETT, Circuit Judge, concurring:

I join the Court’s opinion in full, but not without substantial reservation. The Supreme Court’s decision in *Brand X* compels us to affirm as a reasonable option the agency’s reclassification of broadband as an information service based on its provision of Domain Name System (DNS) and caching. But I am deeply concerned that the result is unhinged from the realities of modern broadband service.

We have held before, as we do again today, that under the Supreme Court’s decision in *Brand X*, “classification of broadband as an information service *was permissible*.” *USTA*, 825 at 704 (emphasis added). That is because the Supreme Court “made clear” in *Brand X*, “over and over[.]” that the [Communications] Act left [classification] to the agency’s discretion.” *USTA v. FCC*, 855 F.3d 381, 384 (D.C. Cir. 2017) (Srinivasan and Tatel, JJ., concurring in the denial of rehearing *en banc*).

But that was then, and this is now. *Brand X* was decided almost fifteen years ago, during the bygone era of iPods, AOL, and Razr flip phones. The market for broadband access has changed dramatically in the interim. *Brand X* faced a “walled garden” reality, in which broadband was valued not merely as a means to access third-party content, but also for its bundling of then-nascent information services like private email, user newsgroups, and personal webpage development. Today, none of those add-ons occupy the significance that they used to. Now it is impossible “to deny [the] dominance of [third-party content] in the broadband experience.” *USTA*, 825 F.3d at 698. “[C]onsumers use broadband principally to access third-party content, *not* [ISP-provided] email and other add-on applications.” *Id.* (emphasis added). In a nutshell, a speedy pathway to content is what consumers value. It is what broadband providers advertise and compete over. And so, under any natural reading of the statute, the technological mechanism for accessing third-party content is what broadband providers “offer.”

As our opinion today recognizes, auxiliary services like DNS and caching remain in the broadband bundle. But their salience has waned significantly since *Brand X* was decided. DNS is readily available, free of charge, and at a remarkably high quality, from upwards of twenty different third-party providers. And caching has been fundamentally stymied by the explosion of Internet encryption. For these accessories to singlehandedly drive the

Commission’s classification decision is to confuse the leash for the dog. In 2005, the Commission’s classification decision was “just barely” permissible. *Brand X*, 545 U.S. at 1003 (Breyer, J., concurring). Almost fifteen years later, hanging the legal status of Internet broadband services on DNS and caching blinks technological reality.

In an area so fraught with political contest and technical complexity, we ordinarily grant the administering agency the widest possible berth in interpreting and administering a technical statutory scheme. But that discretion is not unlimited, and it cannot be invoked to sustain rules fundamentally disconnected from the factual landscape the agency is tasked with regulating. By putting singular and dispositive regulatory weight on broadband’s incidental offering of DNS and caching, the Commission misses the technological forest for a twig.

Yet, as a lower court, we are bound to “the [Supreme Court] case which directly controls,” and so we must follow *Brand X*, as the court’s opinion does. *Agostini v. Felton*, 521 U.S. 203 (1997). It is the Supreme Court’s sole “prerogative” to read *Brand X* in light of the facts of its day, *id.*, and to require the Commission to bring the law into harmony with the realities of the modern broadband marketplace. Until it does—or until Congress steps up to the legislative plate—I am bound to concur in sustaining the Commission’s action.

WILKINS, Circuit Judge, concurring:

I too join the Court’s opinion in full. As Judge Millett’s concurring opinion persuasively explains, we are bound by the Supreme Court’s decision in *Brand X* even though critical aspects of broadband Internet technology and marketing underpinning the Court’s decision have drastically changed since 2005. But revisiting *Brand X* is a task for the Court—in its wisdom—not us.

WILLIAMS, Senior Circuit Judge, concurring in part and dissenting in part:

*And be these juggling fiends no more believed,
That palter with us in a double sense;
That keep the word of promise to our ear,
And break it to our hope.*

So says Macbeth, finding that the witches’ assurances were sheer artifice and that his life is collapsing around him. The enactors of the *2018 Order*, though surely no Macbeths, might nonetheless feel a certain kinship, being told that they acted lawfully in *rejecting* the heavy hand of Title II for the Internet, but that each of the 50 states is free to impose just that. (Many have already enacted such legislation. See, e.g., Cal. S. Comm. on Judiciary, SB 822 Analysis 1 (2018) (explaining that California has expressly “codif[ied] portions of the recently-rescinded . . . rules”). If Internet communications were tidily divided into federal markets and readily severable state markets, this might be no problem. But no modern user of the Internet can believe for a second in such tidy isolation; indeed, the Commission here made an uncontested finding that it would be “impossible” to maintain the regime it had adopted under Title I in the face of inconsistent state regulation. On my colleagues’ view, state policy trumps federal; or, more precisely, the most draconian state policy trumps all else. “The Commission may lawfully decide to free the Internet from Title II,” we say, “It just can’t give its decision any effect in the real world.”

The Commission has invoked the “impossibility exception,” a well-established ground of FCC preemption. As formulated by our circuit, the exception permits the Commission to preempt state regulation “when (1) the matter to be regulated has both interstate and intrastate aspects . . . ; (2) FCC preemption is necessary to protect a valid federal regulatory objective . . . ; and (3) state regulation would ‘negate[] the exercise by the FCC of its own lawful authority’ because regulation of the interstate aspects of the matter cannot be ‘unbundled’ from regulation of the intrastate aspects.” *Public Service Comm’n of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990).

The *2018 Order* reasoned that trying to segregate flows of Internet data into discrete intrastate and interstate components for regulatory purposes would be quite hopeless. Although petitioners posed objections to [this] before the agency, they make none here, despite the high bar our cases set for the agency on such issues. Thus the proposition that disallowance of preemption would thoroughly frustrate the application of the Commission’s decision is uncontested. Given the uncontested findings, petitioners and the majority rest the case against preemption entirely on the theory that the Commission lacks authority to preempt. Of course authority is essential. Preemption by an agency without authority to preempt would be a contradiction in terms under our constitutional system, where Congress makes

the laws. It is also uncontested here that Congress did not afford the FCC *express* authority to preempt.

But Supreme Court decisions make clear that a federal agency's authority to preempt state law *need not be expressly granted*. When a federal agency "promulgates regulations intended to pre-empt state law [i.e., with an express statement of agency intent], the court's inquiry is ... limited," *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982):

If [the agency's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

Id. (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)).

Given the Commission's undisputed findings here, the only vulnerability of its position is the possibility suggested in the last clause—whether "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." Inquiry into that question proceeds in the usual way of discerning congressional intent.

We start with *Chevron's* understanding that where "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority." *Chevron*, 467 U.S. at 843–44. "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit." *Id.* at 844. In the case of the 1996 Act, via ambiguity in the word "offer," see *Brand X*, 545 U.S. at 989–92, Congress implicitly delegated to the FCC the power to determine whether to locate broadband under Title II, where it would be potentially subject to the full gamut of regulations designed for natural monopoly, or under Title I, which itself authorizes virtually no federal regulation. All members of the panel agree that here as in *Brand X* the Commission lawfully placed broadband service under Title I of the 1996 Act and lawfully rejected placing it under Title II.

As Congress did not specifically grant or withhold preemption authority in the context of Title I, we must look for other clues. The strongest (invoked by the Commission, see *2018 Order* ¶ 204) is the provision flat-out preempting state authority to enforce any of the Title II provisions "that the Commission has determined to forbear from applying." 47 U.S.C. § 160(e). Within the Title II realm, the statute automatically requires state congruence with the Commission's choices as to regulatory stringency (at least to the extent that choices are made by forbearance or refraining from forbearance). As the Commission exercises discretion to go down the scale of dirigisme, Congress requires the states to trail along.

Of course this inference from statutory forbearance preemption automatically encounters the maxim *expressio unius est exclusio alterius*: Congress's direction of preemption for all lawful exercises of forbearance from Title II authority, with no parallel provision for the Commission's choice of Title I, might be taken to exclude any preemption once the Commission chooses Title I (putting aside preemption aimed at maintaining the effectiveness of regulation under Title II, see *Comcast Corp. v. FCC*, 600 F.3d 642, 654 (D.C. Cir. 2010)).

Such a congressional intent seems improbable. It is hard to imagine a rational Congress providing for use of Title I, but requiring that any *national* deregulatory policy be implemented only to the degree that it might prove achievable under the internal constraints of Title II.

[* * *]

[T]he question turns on whether we see preemption as serving to protect the federal *regulations* from state frustration or to protect federal choice of a *regulatory regime* from state frustration. The majority staunchly believes that preemption serves solely to protect *affirmative* federal *regulations*. Responding to the Commission's reliance on the preemption that automatically follows forbearance under Title II, it says, "the Commission [has] broad authority over services classified under Title II, unlike those classified under Title I." *Maj. op.* —. True enough. But the lesson it draws is a complete non sequitur: The broad authority under Title II, says the majority, is "why the Act carves out more space for federal objectives to displace those of the States in the Title II context." *Id.* This explanation assumes an *asymmetry* in preemption implications between (i) heavy-handed regulation and (ii) light-touch regulation. If an agency decides that a robust regulatory scheme is apt in a given sector (say, under Title II), the majority is ready

to infer authority to preempt. But, the majority insists, if the agency determines that an industry will flourish best under competitive market norms and accordingly adopts a “light-touch” path, preemption is suddenly superfluous *because* the agency now has less “power to regulate services.” A clearer insistence on the unsupported notion that preemption protects *only regulation* itself, *not* a regime of lawful regulatory choices, is hard to imagine.

Viewed as a matter of protecting a lawfully chosen federal regulatory scheme, an inference of preemptive authority is sound to the extent that the state action in question would frustrate an agency’s authorized policy choices and actions. Dirigiste state regulation in a sector that an agency thinks works best under market norms would undercut the agency’s aims, *no more, no less*, than state rules undermining the agency’s affirmative regulations.

The majority’s leitmotiv—indeed the entire foundation of its conclusion—is that *only* an agency’s possession of affirmative regulatory authority can support authority to preempt state regulation (state regulation nominally applying only to intrastate communications, but because of the impossibility of separation, in practice engulfing interstate communications). See *Maj. op.* —. But reiteration is not proof—no matter how self-assured. The claim is wrong in its broad form and is inapplicable to the circumstances here.

The Supreme Court has clearly ruled that authority to preempt may be inferred to support an agency’s regulatory scheme. In *City of New York*, as we’ve seen, the Court found that Congress had empowered the FCC to preempt state attempts to apply more stringent technical standards than those imposed by the Commission, regardless of any conflict between the federal and state standards. 486 U.S. at 63, 65-66. (That decision was under a statute enacted against a background of parallel Commission preemption, an issue I’ll take up below.) Similarly, the Court has said that a “federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *unregulated*, and in that event would have as much pre-emptive force as a decision *to regulate*.” *Arkansas Electric Co-op. Corp. v. Arkansas Public Service Comm’n*, 461 U.S. 375, 384, (1983); see *2018 Order* ¶ 194 & n.726. The majority points out that the Court found the statute at issue did not, in fact, “imply an authoritative federal determination that the area is best left unregulated,” 461 U.S. at 384 (or, as here, a congressional delegation to the agency of authority to make that choice). But the reason for this does nothing to undermine the relevance of *Arkansas Electric*. The Federal Power Commission had determined as a jurisdictional matter that *another agency* had “exclusive authority” over rural power cooperatives, so that it in fact had no occasion to “determine that, as a matter of policy, rural power cooperatives that are engaged in sales for resale should be left unregulated.” *Id.* The FCC’s choice of Title I in the *2018 Order* was of course *exactly* a determination that broadband should be left free of the burdens of Title II.

As the majority points out, legal authority (as opposed to the facts essential for application of the impossibility exception) was not formally at issue. But the court’s idea of what a “conflict” might be is radically different from the majority’s here. In upholding the FCC’s assertion of irreconcilable conflict *if* it later chose to classify VoIP as an information service, the court pointed to the agency’s “longstanding,” “market-oriented policy” of “nonregulation of information services” and upheld the FCC’s bottom line: “[A]ny state regulation of an information service conflicts with the federal policy of nonregulation.” *Id.* at 580. The decision seems wholly incompatible with the majority’s idea that there is no Commission preemptive authority vis-à-vis a service located under Title I (with the narrow exception of regulatory authority expressly made applicable to Title I, such as that of § 257).

The majority says the agency did not adequately flesh out these arguments in the *2018 Order* or in its briefing here. Flattered as I am at the thought that I deserve credit for all or most of the thinking in this opinion, it isn’t so. [T]he Commission rejected—and asserted ample grounds for doing so—the majority’s novel notion that for an intrusive regulatory regime an agency’s preemptive power can be inferred, while a deregulatory regime is a Cinderella-like waif, and can be protected from state interference only if Congress expressly reaches out its protective hand.

Moreover, even if the Commission had not laid this foundation, the majority is mistaken in its assumption that our obligation to “judge the propriety of [agency] action solely by the grounds invoked by the agency,” *Sec. & Exch. Comm’n v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (*Chenery II*); see also *Sec. & Exch. Comm’n v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (*Chenery I*), prevents our independent analysis of the legal issues undergirding preemptive authority. [T]hat principle does not apply when the issue turns on a purely legal question, such as, here, “our interpretation of [a statute] and binding Supreme Court precedent.” See *Sierra Club*, 827 F.3d at 49.

Though the majority never says so as explicitly, some of its concern appears to stem from the preemption

directive's scope—its painting with (as they see it) too broad a brush. I disagree that the *2018 Order* sweeps too broadly; tellingly, the majority offers no examples of possible state rules, preempted by the *Order*'s language, that would not thwart the Commission's policy objectives. Even if it did, though, that is no reason to vacate the operative portion of the order now.

In the majority's view, when the Commission adopts a deregulatory regime under Title I, there's no there. Of course no one wants the majority to decide a case not before it; but if the handwaving toward conflict preemption is to mean anything, it requires a vision of a Commission exercise of power with which some state regulation could actually conflict. This the majority denies absolutely. Rather, the majority insists that power to preempt depends either on the Commission's "express and expansive authority" "to regulate certain technologies," *Maj. op.* —, or on "ancillary authority." The latter in turn requires that the Commission's action be "reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities," *id.*, which are *exclusively* its responsibilities under Title II, III, at VI of the Act, see also *Comcast*, 600 F.3d at 654. There is no room in this concept for authority to establish a regulatory regime for broadband as an information service—meaning, given the extreme paucity of affirmative regulatory authority under Title I, a highly deregulatory regime. For the majority, the observation that by "reclassifying broadband as an information service, the Commission placed broadband *outside* of its Title II jurisdiction," *Maj. op.* —, is pretty much the end of the game. The majority conspicuously never offers an explanation of how a state regulation could ever conflict with the federal white space to which its reasoning consigns broadband.

I pause to make an entirely unrelated observation. The petitioners advance a bevy of attacks against the Commission's conclusion that the market for broadband internet is fairly competitive—attacks that the majority correctly dismisses. But the Commission's case is stronger than the majority lets on: The petitioners never contest the Commission's findings on market concentration as measured by the familiar HHI for residential fixed broadband service. Even the HHI for the fastest speed category (25 Mbps down and 3 Mbps up) "meets the Department of Justice . . . designation of 'moderately concentrated'" (2,208, with the DOJ range being 1,500 to 2,500). *2018 Order* ¶ 132 & n.478. Those findings, which though doubtless subject to contextual analysis have gone uncriticized by petitioners, seem highly relevant and deserving of mention.

My colleagues and I agree that the 1996 Act affords the Commission authority to apply Title II to broadband, or not. Despite the ample and uncontested findings of the Commission that the absence of preemption will gut the *Order* by leaving all broadband subject to state regulation in which the most intrusive will prevail, and despite Supreme Court authority inferring preemptive power to protect an agency's regulatory choices, they vacate the preemption directive. Thus, the Commission can choose to apply Title I and not Title II—but if it does, its choice will be meaningless. I respectfully dissent.

Notes and Questions

1. Deference. The court follows Supreme Court precedent that an agency is entitled to change its mind, and that the standard of review does not change simply because the agency has changed its mind. But many petitioners pressed the point that the FCC has changed its mind almost completely, now a number of times, in the span of a relatively small number of years—and that such a situation does not seem to be the exercise of considered, policymaking judgment. Do you think that the court really grapples with this argument? If it shared those concerns, however, what would be its doctrinal or decisional response?

2. Preemption. The court's decision that the FCC could not preempt all state net neutrality laws substantially limits the effect of the FCC's action. Do you think that there are any future circumstances in which the FCC would not find there to be conflict preemption? Are there any circumstances in which the court would not uphold such an FCC determination?

3. Section 706. Did the FCC commit a fatal misstep by disavowing its regulatory authority under Section 706? Recall the D.C. Circuit's *Verizon* decision and ask whether the FCC would have better reached its intended policy results—of no "public utility regulation," maintaining transparency rules, and effecting preemption of state net neutrality law—if it had agreed with early decisions that Section 706 did in fact give it some new authority.