Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Safeguarding and Securing the Open Internet	)))))	WC Docket No. 23-320

REPLY COMMENTS OF KIRK R. ARNER, HAROLD FURCHTGOTT-ROTH, AND WASHINGTON LEGAL FOUNDATION

I. Interest

Kirk R. Arner and Harold Furchtgott-Roth of the Hudson Institute Center for the Economics of the Internet,[1] together with the Washington Legal Foundation, respectfully submit these reply comments[2] in response to the Federal Communications Commission's (the "Commission" or "FCC") Notice of Proposed Rulemaking ("NPRM") in this matter.[3]

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Harold Furchtgott-Roth is a widely-recognized authority on the economics and regulation of the communications sector. He served as a commissioner of the Federal Communications Commission from 1997 through 2001. Before his appointment to the FCC, Dr. Furchtgott-Roth was chief economist for the House Committee on Commerce and a principal staff member working on legislation that became the Telecommunications Act of 1996. He currently is a senior fellow and founder of the Center for the Economics of the Internet at the Hudson Institute.

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[1] These comments are presented by Kirk R. Arner and Harold Furchtgott-Roth in their individual capacities. They do not necessarily represent the views of the Hudson Institute, its leadership, or its other fellows.
[2] For initial comments, *see* Comments of Harold Furchtgott-Roth, Kirk R. Arner, and Washington Legal Foundation, https://www.fcc.gov/ecfs/document/12120250001667/1 ("*Initial Comments*").
[3] *In re Safeguarding and Securing the Open Internet*, Notice of Proposed Rulemaking, WC Docket No. 23-320, FCC 23-83 (rel. Oct. 20, 2023) ("*NPRM*").
[4] *See, e.g.*, Kirk R. Arner and Harold Furchtgott-Roth, *End Comment Fraud at the Cost of a Stamp*, Wall St. J. (May 13, 2021), https://www.wsj.com/articles/end-comment-fraud-at-the-cost-of-a-stamp-11620944367; Kirk R. Arner and Harold Furchtgott-Roth, *Congress Shouldn't Encourage the FTC's Section 13(b) Abuses*, Real Clear Markets (Dec. 3, 2020), https://www.realclearmarkets.com/articles/2020/12/03/congress_shouldnt_encourage_the_ftcs_section_13b_abuses_651772.html.

Founded in 1977, the Washington Legal Foundation ("WLF") is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF defends free enterprise, individual rights, limited government, and the rule of law. To that end, WLF regularly files formal comments with federal administrative agencies, including the FCC, to ensure adherence to the rule of law.[5] Likewise, WLF has participated as an amicus curiae in litigation challenging the FCC's regulatory authority.[6]

II. Introduction

The FCC and the supporters of its proposed rules raise a novel claim in this proceeding: Title II reclassification of broadband providers is vital to protecting America's national security interests.[7] We, along with several other commenters, disagree.[8] The FCC, as well as the federal government more broadly, have used numerous non-Title II authorities to counter threats to American national security in the broadband space.

We agree with the FCC that the Internet is vital to the American economy and American society more broadly. But despite the FCC's insistence, it does not follow that because of its importance, the Internet should be regulated as a utility. To the contrary, the "major economic importance"[9] of the Internet likely means that, absent clear congressional authorization—which the Commission lacks—the FCC's proposed rules violate the Supreme Court's recently-reinvigorated major questions doctrine.

III. The FCC and The Federal Government More Broadly Maintain and Exercise Sufficient Non-Title II Authority to Counter Threats to American National Security in the Internet Sector

In its NPRM, the FCC claims that Title II reclassification of broadband providers is crucial to ward off threats to American national security—especially to prevent a hostile foreign

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[5] *See, e.g.*, *In re Proposed FCC Rule on Protecting Privacy*, WC Docket No. 16-106, FCC 16-39 (rel. May 27, 2016) (urging against FCC's adoption of its Proposed Rule on Protecting the Privacy of Customers of Broadband and other Telecommunications Services as exceeding the agency's statutory grant of authority).

[6] *See, e.g.*, *Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016) (successfully challenging FCC's authority to order North Carolina and Tennessee to operate expanded ISPs); *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (challenging FCC's authority to regulate the Internet).

[7] *NPRM* at ¶¶ 25-29. *See also FACT SHEET: National Security and Public Safety Impacts of Restoring Broadband Oversight*, FCC Office of the Chairwoman, https://docs.fcc.gov/public/attachments/DOC-397494A1.pdf; The FCC (@FCC), X (Oct. 17, 2023), https://x.com/FCC/status/1714327562481029433?s=20.

[8] *See* TechFreedom Comments at 55-59, https://www.fcc.gov/ecfs/document/1219287065191/1; ITI Comments at 3-4, https://www.fcc.gov/ecfs/document/1214283643013/1; NCTA Comments at 67-71, https://www.fcc.gov/ecfs/document/121484978453/1; USTelecom Comments at 70-76, https://www.fcc.gov/ecfs/document/1214671128530/1; Dr. Burger Comments at 5-7, https://www.fcc.gov/ecfs/document/121575379531/1; Verizon Comments at 11-13, https://www.fcc.gov/ecfs/document/1214489314927/1.

[9] *West Virginia v. EPA*, 142 S.Ct. 2587, 2608-09 (2022).

power's creation or acquisition of a broadband provider in the United States.[10] Some commenters agree with these claims.[11]

We, along with several other commenters,[12] strongly disagree. In our initial comments, we explained how CFIUS—the Committee on Foreign Investment in the United States—already allows the federal government to block foreign mergers, acquisitions, and other transactions deemed a threat to American national security, both inside and outside of the broadband space.[13] Several other commenters have similarly highlighted CFIUS's broad power to protect American national security without the need for Title II reclassification.[14]

CFIUS is just the tip of the spear. As other commenters note, there are many other mechanisms that the FCC and the broader federal government already have to protect American national security in the broadband sector without the need for Title II authority. These include the Secure Networks Act and Secure Equipment Act's Equipment Authorization program, which helps screen untrusted suppliers from U.S. networks;[15] CALEA, the Communications Assistance for Law Enforcement Act, which requires broadband providers to assist in various capacities with law enforcement operations;[16] the Department of Commerce's broad powers to condition or prohibit transactions under the Information and Communications Technology and Service Supply Chain Rule;[17] and the General Services Administration's power to restrict federal contractors' use of telecommunicaitons equipment and services from specific foreign entities under the National Defense Authorization Act of 2019.[18]

There's more. As the FCC itself notes in its NPRM, the Commission has already taken several actions to protect American national security in today's Title I world.[19] These include:

> prohibit[ing] the use of universal service fund (USF) support to purchase or obtain any equipment or services produced or provided by companies posing a national security threat; prohibit[ing] the use of federal subsidies administered by the Commission and used for capital expenditures to provide advanced communications service to purchase, rent, lease, or otherwise obtain such equipment or services; creat[ing] and maintain[ing] a list of communications equipment and services that pose an unacceptable risk to the national security ("covered equipment and services"); [and] establish[ing] the Secure and Trusted Communications Networks Reimbursement Program (Reimbursement Program)

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[10] *Supra* n.7.
[11] *See, e.g.*, Free Press Comments at 59-60, https://www.fcc.gov/ecfs/document/12150937720322/1; Public Knowledge Comments at 62-65, https://www.fcc.gov/ecfs/document/12141254615295/1.
[12] *Supra* n.8.
[13] *Initial Comments* at 9-10.
[14] Verizon Comments at 12; TechFreedom Comments at 57; ITI Comments at 3; NCTA Comments at 70; USTelecom Comments at 71; Dr. Burger Comments at 5.
[15] Verizon Comments at 11.
[16] Verizon Comments at 11; NCTA Comments at 68; USTelecom Comments at 71; Dr. Burger Comments at 5.
[17] Verizon Comments at 12; TechFreedom Comments at 57-58; ITI Comments at 3; NCTA Comments at 70-71.
[18] Verizon Comments at 12; NCTA Comments at 71; USTelecom Comments at 71.
[19] *See* ITI Comments at 3-4.

> to reimburse the costs providers incur to remove, replace, and dispose of covered Huawei and ZTE equipment and services from their networks.[20]

As other commenters note, Congress carefully crafted these and other powers knowing that broadband services were classified as Title I, rather than Title II, services.[21] It does not follow, then, that Title II reclassification is necessary to duplicate or reinforce these or other authorities in the interest of American national security. On the contrary, adding yet another chef to the proverbial kitchen may "introduce destabilizing uncertainty" to an existing system "where national security agencies have clear lanes and established processes for coordination."[22] Put another way, "[t]he Commission's assertion that its supporting role in protecting national security and law enforcement supplies a basis for reclassifying broadband—an assertion made without any clear statutory authority—would upend the whole-of-government approach that Congress designed and agencies with superior expertise have implemented."[23]

IV. Rather than Support Utility Regulation, the Internet's "Major Economic Importance" Shows Why the FCC's Proposed Rules Likely Violate the Major Questions Doctrine

The Commission argues that the supposed need for Title II regulation flows from the Internet's importance. In its NPRM, the Commission takes great pains to note the importance of the Internet to the American economy and society more broadly, in particular citing the heightened importance of the Internet to Americans during and since the COVID-19 pandemic.[24]

To the contrary, the "major economic importance"[25] of the Internet—and consequently, the FCC's attempt to regulate broadband providers absent clear congressional authorization—makes Title II classification all the more improper. The Supreme Court has recently revisited and revived the major questions doctrine, which dictates that if a regulation involves an issue of major economic or political importance, Congress must have clearly delegated necessary authority to the relevant agency for the regulation to withstand legal scrutiny.[26] According to two former Obama solicitor generals, Title II regulation of broadband providers, as contemplated by this NPRM, would undoubtedly pose a major question, and would also fail the Court's test.[27]

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[20] *NPRM* at ¶29.
[21] NCTA Comments at 71; USTelecom Comments at 71-75; TechFreedom Comments at 58-59; ITI Comments at 3; Verizon Comments at 12-13.
[22] USTelecom Comments at 71.
[23] Verizon Comments at 13.
[24] *NPRM* at ¶17. *See also Remarks of Chairwoman Jessica Rosenworcel at the National Press Club* (Sept. 26, 2023), https://docs.fcc.gov/public/attachments/DOC-397257A1.pdf ("[T]he pandemic . . . made it crystal clear that broadband is no longer nice-to-have; it's need-to-have for everyone, everywhere. It is not a luxury. It is a necessity. It is essential infrastructure for modern life. No one without it has a fair shot at 21st century success.").
[25] *West Virginia v. EPA*, 142 S.Ct. 2587, 2608-09 (2022).
[26] *Id.*
[27] Donald B. Verrilli, Jr. and Ian Heath Gershengorn, *Title II "Net Neutrality" Broadband Rules Would Breach Major Questions Doctrine*, Bloomberg Law (Sept. 20, 2023), https://aboutblaw.com/bazq.

Additionally, as other commenters note, the mere importance of a product or service does not require that it be regulated as a common carrier utility.[28] Food, shelter, and clothing are essential to human life. Yet these and countless other markets for vital goods and services are not regulated as common carrier utilities, despite their obvious importance.[29] Instead, competitive market forces are trusted to produce, and do in fact produce, better and more innovative products and services at lower costs to consumers.[30]

V. Conclusion

When considering recent regulatory proposals targeting artificial intelligence—a technology that, like the Internet, has been left largely unregulated and has enjoyed tremendous growth, innovation, and investment in a comparably short period of time—Tim Wu, the so-called father of network neutrality, recently warned:

> [B]e wary of taking premature government action that fails to address concrete harms . . . . [T]ech history is full of confident projections and "inevitabilities" that never happened . . . . Actual harm, not imagined risk, is a far better guide to how and when the state should intervene.[31]

The FCC and its regulatory proponents would be wise to apply these observations to broadband regulation. The proposed rules in this proceeding are not necessary to advance American national security interests. Moreover, they likely run afoul of the law. For these reasons, as well as those discussed in our original comments, we respectfully urge the Commission to reverse course in this proceeding.

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[28] *See, e.g.*, Comcast Comments at 5-9, https://www.fcc.gov/ecfs/document/121475751514/1/. *See also Communicators with Michael Powell*, C-SPAN (Dec. 18, 2015), https://www.c-span.org/video/?401727-1/communicators-michael-powell (6:44-7:15) ("I think what's happened unfortunately and a lot of lazy thinking is common carriage or utility regulation is the same thing as saying something's important and indispensable. It's really important to me, so why wouldn't it be a utility?").

[29] *See* Alfred E. Khan, *The Economics of Regulation: Principles and Institutions*, Vol. I, 11-12 (1988) ("[P]ublic utilities are important; but do they make a greater contribution to the national product or economic growth than the provision of food, medical care, housing or education, none of which is regulated in the same fashion? Their importance, clearly, is not a sufficient explanation or economic justification for their subjection to regulation.").

[30] Comcast Comments at 13-18; *id.* at 13 n.47 (quoting Off. of Mgmt. & Budget, Exec. Off. of the President, Circular No. A-4, Regulatory Analysis 14, 27 (Nov. 9, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf ("In light of both economic theory and actual experience, it is particularly difficult to demonstrate positive net benefits for any of the following types of regulations: price controls in well-functioning competitive markets . . . [and] mandatory uniform quality standards for goods or services, if the potential problem can be adequately dealt with through voluntary standards or by disclosing information of the hazard to buyers or users.")); *id.* at 15-16 ("Since passage of the Airline Deregulation Act, average domestic round-trip real airfares have decreased 60 percent; the percentage of seats filled on each flight climbed from 55 percent to 84 percent; and, perhaps most importantly, the percentage of U.S. adults that have flown has increased from 49 percent in the early 1970s to 87 percent in 2020.").

[31] Tim Wu, *In Regulating A.I., We May Be Doing Too Much. And Too Little,* N.Y. Times (Nov. 7, 2023), https://www.nytimes.com/2023/11/07/opinion/biden-ai-regulation.html.

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Respectfully submitted,

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