No. 15-16585

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

AT&T MOBILITY LLC,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 3:14-cv-04785-EMC
Hon. Edward M. Chen

BRIEF OF *AMICI CURIAE* CONSUMERS UNION, CONSUMER FEDERATION OF AMERICA, CONSUMER FEDERATION OF CALIFORNIA, CONSUMER ACTION, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL CONSUMERS LEAGUE, CENTER FOR DIGITAL DEMOCRACY, CENTER FOR DEMOCRACY & TECHNOLOGY, ELECTRONIC PRIVACY INFORMATION CENTER, BENTON FOUNDATION, COMMON SENSE KIDS ACTION, AND PRIVACY RIGHTS CLEARINGHOUSE IN SUPPORT OF THE FEDERAL TRADE COMMISSION'S PETITION FOR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

No party to this filing has a for-profit parent corporation, and no corporation owns 10% or more of the stock of any party to this filing.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are consumer and privacy rights organizations that are profoundly aware of the crucial role that the Federal Trade Commission plays in policing the marketplace, both directly through enforcement actions and indirectly by deterring the exercise of unfair or deceptive business practices. The hole carved in FTC authority by the panel opinion is of profound concern to *amici*, which seek to share with the Court their expertise and experience with the vital work of the FTC in safeguarding marketplace privacy and other consumer protections among companies deemed "common carriers."

Specific information about each *amicus* appears in the Appendix.[1]

[1] No counsel of any party to this proceeding authored any part of this brief. No party or party's counsel, or person other than *amici*, their members, and their counsel, contributed money to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Amici curiae Center for Digital Democracy, Center for Democracy & Technology, Consumer Action, Consumer Federation of America, Consumer Federation of California, Consumers Union, Electronic Privacy Information Center, National Association of Consumer Advocates, National Consumers League, Benton Foundation, Common Sense Kids Action, and Privacy Rights Clearinghouse file this brief to highlight the potential far-reaching ramifications of this case as well as the degree to which the panel decision breaks from century-long precedent, thereby creating a sharp split among the courts of appeals.

First, the panel opinion raises issues of exceptional importance. If allowed to stand, the ruling could immunize from FTC oversight a vast swath of companies that engage to some degree in a common carrier activity. This result is unprecedented, deeply disruptive to the market, and at odds with Congress's intent. Many of the world's largest companies offer broadband Internet or other common carriage service. These highly diverse companies could harm consumers by committing acts that are deceptive or unfair, breach privacy commitments, fail to provide reasonable security for sensitive personal data, violate any of the seventy consumer protection statutes Congress has directed the FTC to enforce, or, as in the AT&T case, deliberately omit critical information about the services a company provides – and

nonetheless escape FTC enforcement. No other federal agency has authority to fill this void.

To make matters worse, the panel's opinion fails to grapple with the likelihood that many businesses – especially technology companies like Amazon, Apple, Facebook, and Twitter – are engaging or may soon engage in common carrier activities as a result of innovation, acquisition, or even to shed FTC oversight. The opinion also threatens to undermine international commitments like the recently adopted Privacy Shield agreement between the United States and the European Union, which authorizes the cross-Atlantic transmission of personal data based on the commitment that the FTC will use its enforcement power to safeguard the privacy of transferred EU data.

These results are irreconcilable with Congress's mandate that the FTC prevent harm to vulnerable consumers and Congress's conviction that state and local law enforcement authorities cannot effectively protect consumers in a national – indeed, international – marketplace.

Second, the panel's decision creates a deep Circuit split by breaking from the 100-year-long understanding that the term "common carrier" is defined by activities, not status. Departing from established norms of statutory construction, the panel failed to heed settled interpretive rules requiring that exemptions from antitrust laws be construed narrowly; that remedial statutes be read broadly to effectuate their

purposes; and that an agency's interpretation of its organic statute be accorded deference. The panel's inversion of decades of precedent creates a substantial regulatory gap and puts the Ninth Circuit directly in conflict with the D.C. and Second Circuits.

Review by the *en banc* court is very much in order.

ARGUMENT

I. THE PANEL OPINION THREATENS TO DISRUPT FEDERAL OVERSIGHT OF CRITICAL MARKETS.

The panel opinion raises issues of exceptional importance. If allowed to stand, it threatens to throw out of balance a carefully calibrated consumer protection regime that Congress has worked for decades to construct. The Supreme Court has stated repeatedly that courts have a duty to construe remedial statutes to effectuate their purpose. *See, e.g., Abbott Laboratories v. Portland Retail Druggist Ass'n, Inc.,* 425 U.S. 1, 11-12 (1976) (citing cases). The panel decision shows little regard for the serious consequences – domestic and international – that could flow from its ruling.

Sharply curtailing the authority of the Federal Trade Commission is a severe and destabilizing step – one that could not, one would think, be taken without carefully examining the consequences of removing FTC authority from

an area where it has been exercised for a century. Yet that is precisely what the panel has done. The Federal Trade Commission is the nation's primary consumer protection agency. The FTC Act directs the Commission to prevent "unfair methods of competition" as well as "unfair and deceptive acts and practices," 15 U.S.C. § 45(a), and Congress intended that the agency's authority span virtually all of the nation's economy. Under this broad mandate, the FTC is responsible for safeguarding consumers from deceptive advertising and marketing practices, unfair financial practices, fraudulent billing schemes, and scam artists, and for enforcing over seventy sector-specific consumer protection laws, including the Children's Online Privacy Protection Act, the CAN-SPAM Act, the Telemarketing and Consumer Fraud and Abuse Prevention Act, and the Fair Debt Collection Practices Act. This broad authority allows the Commission to address a wide array of harmful practices affecting consumers, including those that emerge with the development of new technologies.

With the growth of the Internet and web-based services, the FTC has become the nation's principal regulator on the critical consumer protection issues raised by the mass collection, use, sale, and security of sensitive, personal data. Over the past decade, the FTC has brought dozens of enforcement actions against companies that violate promises to keep personal information confidential or fail to maintain reasonable security. *See* Daniel Solove and

Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583 (2014). The FTC also plays a pivotal role in protecting privacy in cross-border data transfers. Under the new Privacy Shield Agreement, the FTC is responsible for overseeing U.S. companies engaged in the collection and use of personal data transferred from the EU.[2]

The havoc that the panel decision could unleash on federal consumer protection is therefore enormous. The panel held that any company engaging in a common carrier activity is categorically exempt from FTC oversight. The ruling therefore not only threatens the FTC's authority over non-common carrier activities of traditional common carriers like telephone companies, but also, under the FCC's recent Reclassification Order (deeming broadband providers common carriers),[3] jeopardizes FTC jurisdiction over a wide array of digital technology companies. Under the panel's ruling, scores or even hundreds of Internet service providers, including Google and the dozens of technology conglomerates among the Fortune 500, may be able to claim status as common

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[2] *See* FTC, Privacy and Data Security Update 2015 (Jan. 2016) (summarizing the FTC's work in privacy and data security), at https://www.ftc.gov/report/privacy-data-security-update-2015: *see also* Letter From Chairwoman Edith Ramirez To Věra Jourová, Commissioner for Justice (Feb. 29, 2016), at https://www.ftc.gov/public-statements/2016/02/letter-chairwoman-edith-ramirez-vera-jourova-commissioner-justice.

[3] *See* FCC Report and Order (Feb. 26, 2015), at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf

carriers and escape FTC oversight – even though they have to this point been subject to FTC jurisdiction for their non-common carrier activities. AT&T's proposed $85 billion acquisition of Time Warner illustrates the scale of the problem.[4] *Trillions* of dollars' worth of consumer-facing economic activity could be placed effectively beyond the reach of federal consumer protection authorities.

A. The Panel Decision Could Hobble the FTC's Ability to Protect Consumers From Wrongful Acts Committed by Companies Engaged in Any Common Carrier Activity.

To see how dramatic the impact of the panel's ruling could be, it is worth considering a few examples of enforcement actions the FTC has taken – but may be foreclosed from taking in the future – against companies engaged in common carrier activities. In each of these cases, the *activity* at issue was not viewed by either the FCC or the FTC to be a common carriage activity and, for that reason, both agencies believed that the FTC had undisputed authority to bring the action.

In 2014, for example, the FTC sued T-Mobile USA for its practice of "cramming" unauthorized charges onto consumers' bills. The case was settled

[4] Michael de la Merced, *Swift Opposition to Resurrection of AT&T Giant*, N.Y. TIMES (Oct. 23, 2016), at http://www.nytimes.com/2016/10/24/business/dealbook/swift-opposition-to-resurrection-of-att-giant.html?action=click&contentCollection=DealBook&module=RelatedCoverage&region=EndOfArticle&pgtype=article

with refunds and a permanent injunction.[5] Comcast Corp. settled with the FTC in 2009 for contacting consumers in violation of the FTC's Do Not Call rules, agreeing to civil penalties and a permanent injunction.[6] TracFone, another wireless provider, settled with the FTC in 2015 over allegations that it, like AT&T, had promised consumers unlimited service but then throttled that service. That case was resolved with refunds and a permanent injunction.[7] And in 2014, AT&T Mobility paid $105 million in refunds and penalties to settle with the FTC and FCC for cramming practices; the order in that case is a permanent injunction.[8] The panel opinion could preclude the FTC from addressing these practices in the future.

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[5] *See* FTC Press Release, *In re T-Mobile* (Dec. 14, 2014) at https://www.ftc.gov/enforcement/cases-proceedings/132-3231/t-mobile-usa-inc.

[6] *See* FTC Press Release, *In re Comcast* (Apr. 16, 2009) at https://www.ftc.gov/news-events/press-releases/2009/04/directv-comcast-pay-total-321-million-entity-specific-do-not-call.

[7] *See* FTC Press Release, *In re TracFone* (Jan. 28, 2015) at https://www.ftc.gov/news-events/blogs/business-blog/2015/01/tracfones-limits-unlimited-data-lead-40-million-consumer.

[8] *See* FTC Press Release, *In re AT&T* (Oct. 14, 2014) at https://www.ftc.gov/news-events/press-releases/2014/10/att-pay-80-million-ftc-consumer-refunds-mobile-cramming-case. AT&T is hardly the only mobile service provider that engaged in cramming. *See, e.g.,* FTC Press Release in *FTC v. MDK Media* (May 6, 2015) at https://www.ftc.gov/enforcement/cases-proceedings/132-3225-132-3224-132-3223-x140034/mdk-media-inc; FTC Press Release in *FTC v. Inc21* (March 1, 2010) at https://www.ftc.gov/news-events/press-releases/2010/03/ftc-halts-massive-cramming-operation-illegally-billed-thousands.

Moreover, it is not just the traditional telecommunications firms that may escape FTC oversight. For example, Google (aka Alphabet, Inc., its new parent company) has never been thought to be, or held itself out as, a common carrier. But the FCC Reclassification Order categorizes Google's "Fiber" Internet and broadband service as a common carrier activity. Although the FCC's classifications are based solely on activities, the panel decision would appear to transform Google into an all-purpose "common carrier" – a type of entity invented by the panel that exists nowhere else in the law, and one that is exempt from oversight by the nation's principal consumer protection agency.

The panel decision would potentially remove from federal regulation most of the consumer-facing business activities of what is by some measures the world's largest company. That would mean exempting from FTC oversight not only Google's search functions and Gmail service but also, among many other businesses, Android phones, YouTube videos, Nest home automation, Nexus smartphones and tablets, and Chromebook laptops. Bizarrely, an advertising campaign falsely characterizing the performance of a smartphone or computer – the heartland of the FTC's work for the past 75 years – would now be off limits.

The same is true of privacy violations, another area in which the FTC acts as the principal federal enforcer. Twice in the past five years the FTC has brought enforcement actions against Google for compromising the privacy of its

users. In its rollout of "Google Buzz," the company publicly released vast amounts of sensitive personal data despite promises not to do so. The FTC's 2011 enforcement case resulted in a consent decree that remains in effect until 2031. A year later, the FTC brought a contempt action against Google after the company told consumers that they could avoid being tracked when using the Safari browser; Google's instructions were flawed and Safari users' information was in fact tracked and compiled. That action was settled with injunctive relief and Google paying a $22.5 million civil penalty.[9] If the panel opinion stands, it appears neither action would be possible; Google could even, presumably, challenge the validity of the ongoing injunctive relief. Under the panel's rationale, because Google offers broadband services, it is a common carrier for all purposes and all of the company's far-flung activities are shielded from FTC enforcement.

The point here is not to suggest that Google is somehow a rogue company. It is instead to underscore that Congress intended that the FTC serve as the cop on the beat to protect consumers from unfair or deceptive practices committed by the nation's largest and most sophisticated companies. It is that

[9] *See* FTC Press Release, *FTC v. Google*, (Nov. 20, 2012), at https://www.ftc.gov/news-events/press-releases/2012/08/google-will-pay-225-million-settle-ftc-charges-it-misrepresented, and FTC Press Release, *In re Google* (March 30, 2011) at https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz.

essential enforcement role that the panel's ruling could frustrate and sharply curtail.

B. The Panel Opinion May Encourage Technology Companies to Evade FTC Oversight by Offering a Common Carriage Service.

The panel opinion threatens not only to withdraw FTC oversight from telecommunications companies and Internet service providers, but also to extend the regulatory vacuum to businesses that provide products and services wholly unrelated to common carriage. These activities include the capturing, storage, use and sale of personal information from advertising networks, social networking, streaming music and video, Internet of Things devices, cloud storage and service, and data brokering. Technology companies like Amazon, Apple, Facebook, Myspace, Twitter and Yelp could easily become "common carriers" by offering broadband Internet, reselling telecommunications services, or even buying a small local exchange carrier. It may be that these companies will come to offer a common carrier service because of innovation or acquisition. But the panel opinion also creates perverse incentives for any reasonably capitalized company to offer a common carrier service to obtain a wholesale exemption from FTC oversight.

These companies have incentives to do just that. Each engages in one or more activities now overseen by the FTC: advertising, the collection and use of

sensitive personal information, offering cloud and web-based services, financial transactions with consumers, social networking, or selling products designed for young children. And each is subject to at least one FTC enforcement order for violations of the FTC Act. For instance, the FTC sued Facebook in 2011 for violating its privacy promises to consumers; Facebook is currently under a 20-year FTC order.[10] Apple faced an FTC enforcement action for billing consumers for unauthorized charges incurred by children using mobile apps; it must pay $35 million in refunds and remains subject to an order until 2034. The FTC is in litigation with Amazon over similar claims; the company is also under a separate FTC order for deceptive advertising.[11] Twitter is under an FTC order until 2031 for failing to adequately secure personal information.[12] Myspace, a

[10] *See* FTC Press Release, *In re Facebook* (Nov. 29, 2011) at https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep.

[11] *See* FTC Press Release, *In re Apple* (Jan. 14, 2015), at https://www.ftc.gov/news-events/press-releases/2014/01/apple-inc-will-provide-full-consumer-refunds-least-325-million; FTC Press Release, *FTC v. Amazon* (April 27, 2016), at https://www.ftc.gov/enforcement/cases-proceedings/122-3238/amazoncom-inc. Amazon has been the subject of another FTC enforcement action, for false advertising, *see* FTC Press Release, *FTC v. Amazon* (Jan. 3, 2013), at https://www.ftc.gov/enforcement/cases-proceedings/102-3132/amazoncom-inc-united-states-america-federal-trade-commission.

[12] *See* FTC Press Release, *In re Twitter* (June 24, 2011), at https://www.ftc.gov/news-events/press-releases/2010/06/twitter-settles-charges-it-failed-protect-consumers-personal.

social networking site, is subject to an FTC order until 2032 for sharing its users' personal information with third parties despite promises not to do so.[13]

Cases brought to enforce the Children's Online Privacy Protection Act (COPPA), 15 U.S.C. § 6501 et seq., which forbids companies from tracking children twelve and under without parental permission, starkly illustrate the potential adverse consequences of the panel's ruling. If the decision is allowed to stand, the very companies that COPPA was designed to regulate may be beyond the FTC's reach. *See* 15 U.S.C. § 6105(b) (incorporating the FTC Act into COPPA). If so, they will also be beyond the reach of other federal agencies: the FTC is the sole federal agency authorized to implement and enforce COPPA. 15 U.S.C. § 6505; *see FTC v. Yelp Inc.* ($450,000 civil penalty and entry of permanent injunction)[14]; *FTC v. InMobi Pte Ltd* (civil penalties and permanent injunction for tracking millions of individuals, including children, without their knowledge to serve them geo-targeted advertising)[15]; *FTC v. Playdom, Inc.* (Disney) ($3 million penalty and permanent injunction for

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[13] *See* FTC Press Release, *In re Myspace* (Sept. 11, 2012), at https://www.ftc.gov/enforcement/cases-proceedings/102-3058/myspace-llc-matter.

[14] *See* FTC Press Release, *FTC v. Yelp* (Sept. 17, 2014), at https://www.ftc.gov/news-events/press-releases/2014/09/yelp-tinyco-settle-ftc-charges-their-apps-improperly-collected.

[15] *See* FTC Press Release, *FTC v. InModi Pte Ltd* (June 22, 2016), at https://www.ftc.gov/news-events/press-releases/2016/06/mobile-advertising-network-inmobi-settles-ftc-charges-it-tracked.

violations of COPPA and FTC Act).[16] If the FTC cannot act, then companies that track children online without parental permission will be able to do so with no risk of federal enforcement.

C. The Panel Ruling Jeopardizes the Ability of the United States to Honor Its International Commitments.

The panel ruling, if it stands, is also likely to undermine the implementation of the recently adopted Privacy Shield protocol.[17] The Privacy Shield agreement is based on the understanding that the FTC will remain the chief privacy enforcer in the United States and will ensure that U.S. companies adhere to their commitment to protect the privacy of data transferred from the EU. Indeed, with certain exceptions, "[i]n order to enter the Privacy Shield, an organization must be subject to the investigatory and enforcement powers of the Federal Trade Commission …."[18]

For fifteen years, the FTC played a central role in the implementation of the predecessor agreement, the US-EU Safe Harbor Agreement, bringing thirty-nine enforcement cases against companies – including Google, Facebook, and Myspace – that falsely claimed compliance with the Agreement. Here, too, with

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[16] *See* FTC Press Release, *In re Playdom (Disney)* (May 12, 2011) at https://www.ftc.gov/enforcement/cases-proceedings/1023036/playdom-inc.
[17] At https://iapp.org/media/pdf/resource_center/eu_us_privacy_shield_full_text.pdf.pdf.
[18] *Id*., at ¶ 2.

minor exceptions, only companies within the FTC's jurisdiction were subject to enforcement.[19]

If the FTC's authority is withdrawn over significant sectors of the economy, it is difficult to see how the Privacy Shield, or any other agreement that depends on robust privacy enforcement by a federal agency, could remain in place.

No federal agency can fill the regulatory void that would be created by sidelining the FTC. To be sure, the FCC has proposed privacy regulations that would apply to broadband service providers. *See* Notice of Proposed Rulemaking, 81 Fed. Reg. 23360 (Apr. 20, 2016). But the FCC is not a general purpose consumer protection regulatory agency. It has no authority over the collection, storage, use or sale of data collected by other means, and certainly has no authority to enforce the FTC Act, COPPA, or any of the other consumer protection laws Congress has directed the FTC to administer. It has no authority to order financial redress to consumers. Nor does the FCC have a role under the Privacy Shield Agreement. To the extent companies that escape FTC oversight would be subject to any general consumer protection regulation, it would come, if at all, from patchwork interventions by state attorneys general, many of whom

[19] At https://iapp.org/media/pdf/resource_center/IAPP_FTC_SH-enforcement .pdf, at 3.

lack the resources to take on major corporations. That, of course, is the reason Congress created the FTC in the first place.

The Supreme Court has often made clear that when a reading of statutory text leads to results that seem "odd" or implausible given Congress's intent, a court is bound to look to indications in addition to text to ensure that it faithfully construes the statute. *See, e.g., Public Citizen v. Department of Justice*, 491 U.S. 440, 454 (1989); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509 (1989). Here, the panel's result is more than "odd." It is beyond implausible to think that Congress intended to withdraw considerable swaths of the economy from federal regulation simply because one component of a firm's activity is subject to common carrier regulation. Yet that is a necessary assumption of the panel's reading of the FTC Act.

And that result is reason enough to reconsider this case.

II. THE PANEL DECISION CREATES A CLEAR CIRCUIT SPLIT OVER THE PROPER INTERPRETATION OF THE FTC ACT.

One reason the panel reached such an implausible conclusion is that it failed to apply well-settled rules of construction. In so doing, it created a deep split among the Circuits on the scope of the FTC Act.

To start, the Supreme Court has long held that exceptions from antitrust laws, express or implied, are to be narrowly construed. *See, e.g., Group Life &*

Health Insurance Co. v. Royal Drug, 440 U.S. 205, 231 (1979). But this rule went unmentioned by the panel. The FTC Act's exception for "common carriers subject to the Acts to regulate commerce," 15 U.S.C. § 45(a)(1), was crafted as an exception to an antitrust law: when the FTC Act was enacted in 1914, its mission was "to prevent . . . unfair methods of competition in commerce." *Id.*; 38 Stat. 719 (Sept. 26, 1914). Because common carrier regulation could authorize activities that would otherwise violate antitrust laws, Congress inserted the "exception" language to make certain that the FTC would not take action against activities that, although anti-competitive, were authorized by other agencies. The evident purpose of the exception was to allocate jurisdiction among agencies, not to create regulatory gaps. And though the current case involves the FTC's later-enacted authority to regulate "unfair and deceptive acts and practices," 52 Stat. 111 (Mar. 28, 1938), the panel's reasoning applies equally to the Commission's ability to regulate competition.

The panel also failed to apply the equally well-settled rule that remedial statutes are to be read in a way that effectuates their purpose. *See, e.g., Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 504 (1999); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). Courts have long held that antitrust laws and other consumer protection statutes are to be construed broadly to ensure that the agencies charged with their enforcement can fulfill their statutory missions. *See*

Abbott Labs. v. Portland Retail Druggists Ass'n, Inc., 425 U.S. 1, 11 (1976) ("antitrust laws . . . are to be construed liberally, and . . . exceptions from their application are to be construed strictly."); *In re Ferrell*, 539 F.3d 1186, 1189 (9th Cir. 2008) (construing Truth in Lending Act broadly "in order to effectuate [its] purpose"). Only by ignoring this rule could the panel decide that the FTC Act required shielding all of AT&T's activities – and all of the activities of any company that engages in any common carriage activities – from the FTC's reach. There is no evidence that Congress intended that the general rule of FTC enforcement be swallowed by a limited exception.

In addition, the panel failed to apply the longstanding rule that persuasive agency interpretations of their organic statutes, including the scope of those statutes, are to be accorded deference. *See City of Arlington, Texas v. FCC*, 133 S.Ct. 1863 (2013); *Skidmore v. Swift & Co*., 323 U.S. 134 (1944). In assessing the FTC's activity-based interpretation, the panel declared that the distinction between carrier and non-carrier activities "do[es] not show that when Congress used the term 'common carrier' in the FTC Act, it could *only* have meant 'common carrier to the extent engaged in common carrier activity.'" (Panel Op. at 11; emphasis added). But the question is not whether the FTC's interpretation is the "only" permissible interpretation. Rather, the question is: Is the FTC's

activities-based interpretation (which is also supported by the FCC)[20] a persuasive interpretation of its statute?

It is true that the FTC's interpretation is not set forth in a regulation. But the FTC has repeatedly filed complaints against companies engaged in common carriage activities based on the Commission's consistent position that the exception is activities-based, not status-based. Many of these cases have resulted in permanent injunctions. *See supra* at 8-9. Agencies can develop policy through enforcement. *SEC v. Chenery Corp*., 332 U.S. 194 (1947). The Commission's longstanding and consistently held interpretation is in no sense a "*post hoc* rationalization," nor is there any reason to suspect that the interpretation does not reflect the Commission's "fair and considered judgment." *Long Island Care at Home v. Coke*, 551 U.S. 158, 170 (2007) (quoting *Auer v. Robbins,* 519 U.S. 452, 462 (1997)). Under these circumstances, some degree of deference is due. *Id.*; *U.S. v. Mead Corp*., 533 U.S. 218 (2001). Instead, the panel simply declared that deference was not warranted and substituted its judgment for the Commission's.

[20] *See* FTC Press Release, *FTC and FCC Sign Memorandum of Understanding For Continued Cooperation on Consumer Protection Issues* (Nov. 16, 2015), at https://www.ftc.gov/news-events/press-releases/2015/11/ftc-fcc-sign-memorandum-understanding-continued-cooperation.

Failure to apply these settled rules of construction led the panel to create a Circuit split on the correct construction of the common carrier exception. Although the panel recognized that other Circuits had uniformly interpreted the term "common carrier" to be activities-based, it dismissed those decisions out of hand. *See National Ass'n of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (looking to common law in holding that the term "common carrier" has always been activities-based); *FTC v. Verity*, 443 F.3d 48, 56-61 (2d Cir. 2006) (adopting view that FTC Act's exemption for common carriers is based on activities).

Because the panel decision creates a stark Circuit split on a subject with an overriding need for national uniformity, rehearing *en banc* is warranted. *See* FRAP 35(b)(1)(B); Ninth Cir. Rule 35-1.

CONCLUSION

The panel opinion, if permitted to stand, has the potential to leave large segments of the American economy without effective consumer protection oversight. The matter is one of exceptional importance. *Amici curiae*

respectfully urge that the panel decision be vacated, and that this Court order that the case be reheard *en banc*.

Dated: October 24, 2016

Respectfully submitted,

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APPENDIX

Statements of Interest of *Amici Curiae*

Consumers Union (CU) is the policy and mobilization arm of Consumer Reports. Founded in 1936, CU is an expert, independent, non-profit organization working for a fair, just, and safe marketplace for all consumers, and to empower consumers to protect themselves. This includes supporting the important work of the Federal Trade Commission, which has been protecting consumers from anti-competitive and fraudulent business practices for more than 100 years. CU has an interest in this case because the FTC's jurisdiction under the FTC Act could be significantly curtailed and weakened if the appellate panel's opinion is left to stand.

Consumer Federation of America (CFA) is a nonprofit association of some 280 local, state, and national consumer organizations across the country, which collectively represent millions of consumers. CFA works on many issues within the FTC's jurisdiction, including telemarketing, electronic commerce, privacy, competition, and consumer redress for unfair and deceptive acts or practices.

Consumer Federation of California is a non-profit education and advocacy organization. CFC has authored and supported legislation to protect all California consumers, including laws protecting lower income Californians and consumers with limited English proficiency. CFC has testified on legislation to combat predatory lending, to expand health care safety net programs, to strengthen food and drug safety, to eliminate fraudulent sales practices, to protect assistance programs for low income utility ratepayers, to safeguard online, telecom, medical and financial privacy, to combat elder abuse, and to preserve access to civil justice. CFC has advocated for the rights of telecommunications consumers before the CPUC and the Federal Communications Commission.

Consumer Action, founded in San Francisco in 1971, is a national non-profit organization committed to consumer education and advocacy. During its more

than three decades, Consumer Action has advanced consumer rights by referring consumers to complaint-handling agencies through a free hotline, publishing educational materials in Chinese, English, Korean, Spanish, Vietnamese and other languages, and advocating for consumers in the media and before lawmakers on a wide range of issues. Consumer Action is nationally renowned for its multilingual consumer education and advocacy in the fields of consumer protection, credit, banking, privacy, insurance and utilities.

The **National Association of Consumer Advocates** (NACA) is a nationwide non-profit corporation whose over 1650 members are private, public sector, legal services and non-profit lawyers, law professors, and law students with primary practices or interests that involve consumer rights and protection. NACA is dedicated to furthering the effective and ethical representation of consumers and to serving as a voice for its members and for consumers in an ongoing effort to curb deceptive and exploitative business practices. NACA has furthered this interest in part by appearing as *amicus curiae* in support of consumer interests in federal and state courts throughout the United States.

National Consumers League (NCL) is the nation's oldest consumer organization, representing consumers and workers on marketplace and workplace issues since its founding in 1899 by two of the nation's pioneering social reformers. Its mission is to protect and promote social and economic justice for consumers and workers in the United States and abroad. To that end NCL provides government, businesses, and other organizations with the consumer's perspective on a wide range of important concerns including developments in technology. NCL supports policies that defend the critical role that the Federal Trade Commission plays in protecting consumers from unfair and deceptive acts and practices in the marketplace.

The **Center for Digital Democracy** (CDD) is a national, nonprofit consumer protection organization that works to ensure that the privacy of Americans is safeguarded online. Since its founding in 2000, and with its predecessor group Center for Media Education (founded in 1991), it has played a key leadership role working to ensure that the Federal Trade Commission addresses

contemporary digital data collection and marketing issues. Its research and advocacy work at the FTC led to the enactment of the Children's Online Privacy Protection Act (COPPA) in 1998. That law gives the FTC the regulatory authority to protect the privacy of children under thirteen. Since then CDD has worked to encourage the agency to address growing threats to privacy arising from the broadband media environment. It is vital in the "Big Data" era that the FTC have the authority to effectively protect all American consumers.

The **Center for Democracy & Technology** (CDT) is a nonprofit public interest group that seeks to promote free expression, privacy, individual liberty, and technological innovation on the open, decentralized Internet. CDT supports laws, corporate policies, and technical tools that protect the privacy of Internet users, and advocates for stronger legal controls on government surveillance. As innovative technologies emerge with new, sophisticated data collection capabilities, protecting users' privacy and ensuring security is increasingly important. CDT works to develop privacy safeguards for consumers through a combination of legal, technical, and self-regulatory measures to ensure that services are designed in ways that preserve privacy, establish protections that apply across the lifecycle of consumers' data, and give consumers control over how their data is used in the digital age.

The **Electronic Privacy Information Center** (EPIC) is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging privacy issues. EPIC routinely participates as *amicus curiae* in federal cases concerning important consumer privacy issues. *See, e.g., Spokeo v. Robins*, 136 S. Ct. 1540 (2016) (addressing whether a violation of a consumer's privacy rights under the Fair Credit Reporting Act constitutes an injury-in-fact sufficient to confer Article III standing); *FTC v. Wyndham Hotels & Resorts, LLC*, 799 F.3d 236 (3d Cir. 2015) (supporting the agency's argument that data security practices are subject to the unfairness and deception provisions of Section 5 of the FTC Act); *Fraley v. Facebook*, No. 13-16918 (9th Cir. Feb. 20, 2014) (defending consumer interests in a class action privacy settlement). EPIC also advocates on behalf of Internet users before the Federal Trade Commission, and frequently files complaints based on the unfair and deceptive

practices of companies that put at risk the sensitive user data they gather. As a result of EPIC's complaints, the Commission has brought several important enforcement actions. *See, e.g.*, *Google, Inc*., 152 F.T.C. 435 (2011) (finding that Google violated Section 5 by failing to get consent for the use of personal email contacts for a social networking service); *Facebook, Inc.,* FTC No. C-4365, 2012 WL 3518628 (July 27, 2012) (finding that Facebook violated Section 5 by disclosing personal information to third parties contrary to user privacy settings).

Common Sense Kids Action is the advocacy arm of Common Sense Media (collectively, Common Sense), an independent, nonpartisan voice for America's children that helps parents, children, and teachers thrive in the complex word of media and technology. Common Sense works to drive policies at the state and national levels that promote investment in children's education and overall well-being. Common Sense has been an active voice promoting children's online privacy protections at the Federal Trade Commission and before other state and federal legislators and regulators.

The **Benton Foundation** works to ensure that media and telecommunications serve the public interest and enhance our democracy. We pursue this mission by: (1) seeking policy solutions that support the values of access, diversity and equity; (2) demonstrating the value of media and telecommunications for improving the quality of life for all; and (3) providing information resources to policymakers and advocates to inform communications policy debates.

Privacy Rights Clearinghouse (PRC) is a nonprofit consumer education and advocacy organization founded in 1992. PRC engages, educates, and empowers consumers to protect their privacy. PRC publishes educational materials on a wide range of consumer privacy issues, invites individuals to ask privacy-related questions and submit privacy-related complaints, and uses its direct interactions with individuals to inform its advocacy work. Many of the complaints PRC receives from individuals fall under the FTC's jurisdiction, and often there is no other federal agency where an individual may file a privacy complaint. The panel opinion, if it stands, will reduce the likelihood that privacy standards are enforced and create a large void in consumer privacy protection.

CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B). The brief contains 4,158 words, according to Microsoft Word, excluding required disclosures and other parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6).

The brief has been prepared in a proportionally spaced 14-point typeface including serifs. The typeface is Times New Roman.

DATED: October 24, 2016 /s/ *Seth E. Mermin*

Seth E. Mermin

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2016, I caused to be filed electronically via the Court's CM/ECF System, and thereby served on all counsel, a true and correct copy of this Brief of *Amici Curiae*.

DATED: October 24, 2016 /s/ *Seth E. Mermin*

Seth E. Mermin