The FCC's Terrible, Horrible, No Good, Very Bad Day[1]

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1. JUDITH VIORST, ALEXANDER AND THE TERRIBLE, HORRIBLE, NO GOOD, VERY BAD DAY (1987). For reasons that should become obvious upon reading, the article's original title was: Why Net Neutrality May Yet Survive *Loper-Bright*'s Repeal of *Chevron*: The (Nearly) Forgotten Story Behind *Brand X*.

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I. INTRODUCTION

On May 22, 2024, the FCC ruled that broadband access to the Internet provided by cable and telephone companies was a "telecommunications service" under the 1996 Telecommunications Act and thus subject to FCC common carrier regulation requiring "net neutrality," that is, barring broadband providers from "blocking, throttling, or engaging in paid or affiliated prioritization arrangements."[2] In *National Cable & Telecommunications Association v. Brand X Internet Services*,[3] now nearly twenty years ago, the Supreme Court had upheld the agency's right under the *Chevron* doctrine[4] to reach the opposite interpretation—and even to change it later, so long as its changed interpretation of the ambiguous term was reasonable.[5] The latest FCC rule was the fifth time the agency has changed its interpretation of "telecommunications service"[6] (the Supreme Court undercounts the number of flip flops at four[7])—all coinciding with changes in presidential administrations.[8] The second of the first four course changes was not challenged in court. And each of the other three reinterpretations survived judicial review under *Chevron*.[9] But little more than a month after the agency's latest 180º, the Supreme Court, moved by the example of these frequent policy reversals,[10] held in *Loper Bright Enterprises v. Raimondo* that

2. *Safeguarding and Securing the Open Internet*, 89 Fed. Reg. 45404, 45404 (May 22, 2024).

3. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980-82 (2005).

4. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842-44 (1984). *Chevron* established a two-part test for review of agency interpretations of statutes they were charged with administering. *Id.* First, using traditional tools of statutory interpretation, courts would ascertain whether or not a statute was ambiguous. *Id.* If not, that would end the inquiry. *Id.* If the court found the statute ambiguous, however, it would be required to defer to the agency's interpretation, if reasonable, irrespective of whether the court found the agency's reading the best one. *Id.* at 842-43. *Chevron* also permitted agencies to change their interpretations of ambiguous statutes. *Id.* at 863-64.

5. *Brand X*, 545 U.S. at 980-82.

6. Change one: Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facils., *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002) [hereinafter Cable Modem Rule] (reversing holding in Deployment of Wireline Servs. Offering Advanced Telecomm. Capability, *Memorandum Opinion and Order*, 13 FCC Rcd 24012, paras. 34-35 (1998) [hereinafter DSL Rule] that broadband internet access was a telecommunications service—at least as applied to cable companies), *aff'd*, *Brand X*, 545 U.S. 967. Change two: In re Appropriate Framework for Broadband Access to the Internet over Wireline Facils., 20 FCC Rcd 14853 (2005) [hereinafter 2005 Wireline Broadband Order]; In re Appropriate Regul. Treatment for Broadband Access to the Internet over Wireless Networks, 22 FCC Rcd 5901 (2007) [hereinafter Wireless Broadband Order] (reversing prior holding in DSL Rule and declaring that DSL was now an information service, too). Change three: In re Protecting and Promoting the Open Internet, 30 FCC Rcd 5601 (2015), *aff'd,* U.S. Telecomm. Ass'n v. FCC, 825 F.3d 674, 689-97 (D.C. Cir. 2016). Change four: In re Restoring Internet Freedom, 33 FCC Rcd 311 (2018), *aff'd in relevant part*, Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019). Change five: *Safeguarding and Securing the Open Internet, supra* note 2.

7. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2288 (2024) (Gorsuch, J., concurring).

8. *Id.*

9. *See* cases cited *supra* note 6.

10. *Loper Bright*, 144 S. Ct. at 2272.

Chevron created too much instability and, except for its *stare decisis* effect in settled cases, would apply no more.[11] Henceforth, the Court stated, agencies would have to convince courts that their new or revised interpretation of ambiguous statutes is not only a permissible, but the best reading of the law.[12] Not surprisingly, a flood of challenges to the agency's latest reversal on net neutrality were quickly brought in various circuit courts of appeal and ultimately consolidated in the Sixth Circuit.[13]

The only question I had originally planned to write about was this: Without *Chevron*'s safety net, can the FCC's latest about-face survive judicial review? I have a personal connection to *Brand X*, the first of the agency's flip flop cases, a Supreme Court case whose backstory gives us a strong reason to believe that the FCC's restoration of net neutrality can and should survive judicial review. And, because of my own sense of optimism, I still intend to explain why.

But the courts may never reach that question. Only a week after the Fifth Circuit had struck down the FCC's universal service funding program as an unconstitutional violation of the Taxing Clause[14]—and only days before the FCC's net neutrality rule was to go into effect—the agency took another direct blow to the chin. On August 1, 2024, a Sixth Circuit panel issued a per curiam order granting a stay of the rule pending litigation.[15] Its principal reason: there was a likelihood that the rule presented a question of "great economic and political significance" that Congress had not clearly authorized the FCC to decide and thus violated the Major Question Doctrine ("MQD")[16] a doctrine that, if applicable, strips agencies not only of *Chevron* deference to their statutory interpretations, but the authority to interpret.[17]

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11. *Id.* at 2272-73. While the net neutrality cases have been a poster child for the stability argument, others have observed that *Chevron* has made judicial review of agency decisions less ideological and more predictable. *Id.* at 2309 (Kagan, J., dissenting) (first citing Kent Barnett et. al, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1502 (2018); and then citing Cass R. Sunstein, *Chevron As Law*, 107 GEO. L.J. 1613, 1672 (2019)); *see also*, Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 625 (2021).

12. *Id.* at 2251.

13. In re MCP No. 185, No. 24-7000 (J.P.M.L. June 6, 2024) (ordering consolidation of cases and assigning to the Sixth Circuit).

14. Consumers' Rsch. Cause Based Commerce, Inc. v. FCC, 109 F.4th 743, 786 (5th Cir. 2024).

15. In re MCP No. 185, No. 24-7000, 2024 U.S. App. LEXIS 19815 at *13 (6th Cir. Aug. 1, 2024) [hereinafter Stay Order] (granting stay).

16. *Id.* The panel also held that the movants had demonstrated the "possibility of irreparable injury," an odd claim, given that the cable companies had not quantified their compliance costs, had previously operated under a net neutrality regime and, in any event, have long touted that they were neither blocking nor throttling websites or streaming services. *Id.* at *7, *9, *10. *See also Reaffirming Our Commitment to an Open Internet*, NCTA (May 17, 2017), https://x.com/NCTAitv/status/864829105837158401 [https://perma.cc/FB6G-K53S].

17. *See* Sunstein, *infra* note 25.

That was a "terrible, horrible, no good, very bad day" for the FCC. Still, a different panel will decide the merits.[18] And it will have two interrelated reasons to reverse course.

The court's stay order followed its request for supplemental briefing on the reach of *Loper Bright*, *not* on the applicability of the major questions doctrine. In finding a major question, the stay panel overreached, missing entirely the role *stare decisis* still plays under *Loper Bright*. Despite the FCC's flip flops on the meaning of "telecommunications service," its determination that it had the authority to decide that question—one way or the other—was upheld by the Supreme Court in *Brand X*. And because that determination has *stare decisis* status,[19] whether the FCC has authority to decide what is "telecommunications service" cannot logically be a "major question." No wonder the FCC did not brief the MQD issue.

As to the merits, before there was *Brand X*, there was the Ninth Circuit's decision in *AT&T v. City of Portland*.[20] Because it was a private cause of action and did not rest on *Chevron*,[21] the court's holding that broadband was a telecommunications service was, by definition, that court's best reading of the statute. Couple that with the fact that three Justices in *Brand X* thought the same thing[22] and the Sixth Circuit will have ample grounds to uphold the FCC's net neutrality rule as the best reading of the statute.

II. WHAT IS THE MAJOR QUESTIONS DOCTRINE AND WHY IS IT INAPPLICABLE TO THE FCC'S NET NEUTRALITY RULE?

"I know it when I see it," the late Justice Potter Stewart famously declared in trying to define hard core pornography.[23] But he might as well have been describing how lower court judges are to determine when an agency decision presents a major question. The major question doctrine posits, as readers may well know, that when in "extraordinary cases" an agency's interpretation of a statute's meaning poses a question of "vast economic and political significance"—a test that Berkeley law professor Dan Farber aptly observed is largely "in the eye of the beholder"[24]—an agency not merely gets no deference—it lacks authority altogether unless it can "point to

18. *See* Sunstein, *infra* note 25.
19. *Loper Bright*, 144 S. Ct. at *15-16 ("The Court does not call into question prior cases that relied on the *Chevron* framework.").
20. AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000).
21. *Id.* at 876.
22. *Brand X*, 545 U.S. at 1005 (Scalia, J., dissenting).
23. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
24. Dan Farber, *Another Worrisome Signal from the Supreme Court*, LEGAL PLANET (Aug. 30, 2021), https://legal-planet.org/2021/08/30/another-worrisome-signal-from-the-supreme-court/ [https://perma.cc/X8ZQ-VUW3].

'clear congressional authorization' for the power it claims."[25] In May 2022, I had written a law review article about the dangers to administrative agencies posed by the greatly expanded major questions doctrine the Supreme Court had articulated in two shadow docket cases—*Alabama Ass'n. of Realtors v. Department of Health and Human Services* and *National Federation of Independent Business v. OSHA*.[26] And I expressed hope that in the context of a full merits review it would take a step back from the precipice.[27] That didn't happen.

A month later, the Supreme Court found its third major question case in a year's span, declaring in *West Virginia v. EPA* that a dormant Obama era EPA regulation—one that "never went into effect"[28] and that the Biden Administration had disavowed any intention to resurrect[29]—nonetheless violated the major question doctrine because no direct delegation for it could be found in the Clean Air Act.[30] There was almost one more MQD case that same term. Four justices would also have invalidated HHS's COVID vaccine requirement for the staffs of hospitals receiving Medicare funding on MQD grounds as well.[31]

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25. West Virginia v. EPA, 597 U.S. 697, 723 (2022). Professor Cass Sunstein worried about precisely this problem. Under what he called the "weak version" of the major questions doctrine, agencies would simply lose *Chevron* deference, but could still win, as was the case when the Supreme Court upheld the Affordable Care Act. Cass Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 477 (2021). Under the "strong version"—what is now the law of the land—he warned that "[t]he idea is not merely that courts will decide questions of statutory meaning on their own. *Id.* It is that such questions will be resolved unfavorably to the agency." *Id.*

26. *See* Harvey L. Reiter, *Would FERC's Landmark Decisions Have Survived Review Under the Supreme Court's Expanding "Major Questions Doctrine" And Could The Doctrine Stifle New Regulatory Initiatives?*, 3 ENERGY BAR ASS'N 1 (2022), https://www.eba-net.org/wp-content/uploads/2023/01/EBA_Brief_V3-1.pdf [https://perma.cc/2VDW-9L7F] (discussing Ala. Ass'n of Realtors v. HHS 594 U.S. 758 (2021) and Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 595 U.S. 109 (2022)).

27. *Id.* at 15.

28. West Virginia v. EPA, 597 U.S. at 715.

29. *Id.* at 717.

30. *Id.* at 732.

31. *See* Biden v. Missouri, 595 U.S. 87, 102 (2022).

What has followed has been a deluge of "extraordinary cases" flooding the lower courts.[32] A year after deciding *West Virginia v. EPA*, the Supreme Court again invalidated a federal rule under the major questions doctrine. Following an Eighth Circuit nationwide injunction, in *Biden v. Nebraska*, it overturned the federal government's student load debt relief plan.[33] Even the Supreme Court's *Loper Bright* case about requiring herring fisherman to pay the costs of federal monitors started as a major questions case.[34] And earlier this year, FERC Commissioner Christie invoked the MQD in his dissent from a new agency rule requiring public utilities to engage in coordinated long-range planning of electric transmission facilities.[35] The rule, Order No. 1920, built upon a 2011 rule, affirmed by the D.C. Circuit, that already required those utilities to participate in regional transmission planning and to devise benefits-based allocations of the costs of regionally planned projects.[36] Multiple petitions for review of Order No. 1920 have since been filed in

32. *See, e.g.*, Kentucky v. Biden, 23 F.4th 585, 607-08 (6th Cir. 2022) (denying stay of lower court order enjoining Property Act rule mandating that the employees of federal contractors in "covered contract[s]" with the federal government become fully vaccinated against COVID-19—injunction granted on grounds that rule was violative of MQD); Georgia v. President of the United States, 46 F.4th 1283, 1308 (11th Cir. 2022) (same—but narrowing the nationwide scope of the injunction); Brown v. U.S. Dep't of Educ., 640 F. Supp. 3d 644, 664-5 (N.D. Tex. 2022) (finding the debt relief plan violated MQD); Louisiana v. Biden, 585 F. Supp. 3d 840, 865 (W.D. La. 2022) (finding the social cost of carbon Executive order violated MQD) (reversed for lack of standing), *rev'd*, 64 F.4th 674, 677-78 (5th Cir. 2023); Oklahoma v. Biden, 577 F. Supp. 3d 1245, 1261-62 (W.D. Okla. 2021) (rejecting Oklahoma's challenge to vaccine mandate for National Guard members as not posing a "major question"); Kovac v. Wray, 660 F. Supp. 3d 555, 564-66 (N.D. Tex. 2023) (accepting claim that government's terrorist watchlist regulations presented a major question, but finding "clear" authorization for watchlist to be used in screening airline passengers); Ohio v. Yellen, 53 F.4th 983, 991 n.5 (6th Cir. 2022) (noting that MQD challenge to Treasury regulation clarifying conditions on state receipt of COVID-19 assistance "might have supported an attempt to seek vacatur of the Rule under 5 U.S.C. § 706, but Ohio has never asked for vacatur of the Rule"); Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1164 (M.D. Fla. 2022) (upholding challenge to CDC mask mandate on public transit as violative of MQD as alternative ground to finding *Chevron* deference inapplicable). *See also* Allison Larsen, *Becoming a Doctrine*, 76 FLA. L. REV. 1, 5 (2024) (noting that before 2017 only one federal judge had used the phrase major questions doctrine "and in only five federal decisions—at any level of court—before 2020"). Court filings using the term since 2016 (when it was used by then Judge Kavanaugh) jumped from 198 "to 450 filings in 2022." *Id.* at 7. For those seeking to challenge agency actions on MQD grounds, the Fifth Circuit appears to be the forum of choice. By the end of October, 2023, that court had decided twenty MQD cases, more than twice as many as the Eleventh Circuit, and had found a major question in more than half of those cases. Erin Webb, *Analysis: More Major Questions Doctrine Decisions Are Coming* (Bloomberg Law), Nov. 5, 2023, https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-more-major-questions-doctrine-decisions-are-coming [https://perma.cc/Y5LB-A5J3].

33. Biden v. Nebraska, 600 U.S. 477, 506 (2023) (holding that HEROES Act provided no "'clear congressional authorization' to justify [such a] program").

34. Loper Bright Enters., Inc. v. Raimondo, 45 F.4th 359, 364-65 (D.C. Cir. 2022), *vacated*, 144 S. Ct. 2244 (2024) (rejecting argument that rule presented a major question).

35. Building for the Future Through Electric Regional Transmission Planning and Cost Allocation, 89 Fed. Reg. 49565, 49574 (June 11, 2024) [hereinafter Order No. 1920].

36. *See* S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41, 48 (D.C. Cir. 2014).

several different circuit courts of appeal and consolidated for review in the Fourth Circuit.[37]

One of the strangest of the many post-*West Virginia v. EPA* citations to the doctrine appears in the Fourth Circuit's 2023 decision in *NCCFRG v. Capt. Gaston LLC*.[38] There, it agreed with the EPA that, contrary to the claim of the appellant, EPA (which was not a party to the case) had no authority—and had never claimed authority—under the Clean Water Act to prohibit commercial shrimpers from returning fish they had inadvertently snared in their nets (what the industry refers to as "bycatch") back into the ocean.[39] But it inexplicably went on to opine—at great length—that had EPA ruled otherwise, its interpretation would have run afoul of the MQD.[40]

On its face, the Sixth Circuit panel's stay, like the Fourth Circuit's dicta in *Captain Gaston*, is pretty remarkable.[41] It dismisses in only a few paragraphs the possibility that Congress contemplated "telecommunications services" might take place over broadband.[42] But the 1996 Act obligates "every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request."[43] And it defines "telecommunications service" as "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*

37. Madeline Lyskawa, *La., Miss. Utility Regulators Launch FERC Grid Policy Fight*, LAW360 (Jul. 15, 2024, 9:42 PM), https://www.law360.com/articles/1858295; *In re* MCP 190, Nos. 24-1650, (J.P.M.L. Aug. 8, 2024) (ordering consolidation of cases 24-1748, 24-1751, 24-1756 and 24-1650).

38. N.C. Coastal Fisheries Reform Grp. v. Captain Gaston, LLC, 76 F.4th 291, 296-304 (4th Cir. 2023).

39. *Id.* at 299 ("EPA has never sought the authority to regulate bycatch in the fifty years since the Clean Water Act was passed. Indeed, the EPA does not even seek it now.").

40. *Id.* at 295-304.

41. This author hopes that the panel's decision is an outlier and does not disprove Professor Richard Pierce's view that *Loper Bright*'s restriction on agency flip-flops "eliminates any justification for continued application of the powerful new version of the major questions doctrine that the Court created in 2021 and has now applied in four cases." Richard J. Pierce, Jr., *Two Neglected Effects of Loper Bright*, THE REGUL. REV. (Jul. 1, 2024), https://www.theregreview.org/2024/07/01/pierce-two-neglected-effects-of-loper-bright/ [https://perma.cc/TPW6-PYAX]. As Professor Pierce noted regarding the MQD, "[t]he Court has struggled to justify this radical new doctrine and has done a poor job of explaining it. The dangers created by the major questions doctrine become obvious when you look at the way that lower courts have applied it." *Id.* Justice Kavanaugh (who has endorsed the MQD), perhaps inadvertently, has pointed out how much havoc a broad reading of the MQD by lower courts might cause: "Justice Gorsuch," he noted, "would not allow … congressional delegations to agencies of authority to decide major policy questions—*even if Congress expressly and specifically delegates that authority*." Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (emphasis added). That view, if accepted by the lower courts, would amount to an endorsement of the non-delegation doctrine without the limiting, i.e., "intelligible principle" exception—that only Congress can legislate, so rulemaking on major questions, as a form of legislation, is unconstitutional. *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001).

42. *Stay Order*, *supra* note 15, at *6-7.

43. 47 U.S.C. § 201(a).

used."[44] From the very beginning, as the Ninth Circuit noted in *City of Portland*, the FCC was "regulat[ing] DSL service, a high-speed competitor to cable broadband, as an advanced telecommunications service subject to common carrier obligations."[45] Similarly, among the authorities the Act granted the FCC was the huge power to order incumbent owners of telephone networks to "unbundle" their individual components and make them available for sale or lease so that competing telecom providers *with no facilities of their own*, could assemble the components and compete.[46]

But letting the FCC decide what a telecom service is was too big for the agency to address? It makes little sense. Even under the Court's malleable test, it is not enough that a rule has "vast economic and political significance."[47] After all, nationwide rulemaking decisions by agencies regulating major industries will often have such significance. Rather, the rule must also be "extraordinary."[48] One of the few criteria the Court offered in *West Virginia v. EPA* that the EPA had gone too far was that it had relied on "vague language of an 'ancillary provision' of the Act [that] had rarely been used in the preceding decades."[49] By contrast, in declaring that DSL broadband was a "telecommunications service" in 1998, the FCC was relying on a *core* provision of a then only two-year old statute.

The FCC, of course, no longer gets the *Chevron* deference to determine the scope of its authority that the Supreme Court declared only a decade ago in *City of Arlington v. FCC*.[50] But whether its interpretation of its authority gets deference is far different from whether its view of what constitutes telecommunications service is a major question. Common sense ought to prevail here.

Under the Act, companies offering telecommunications services are common carriers "regardless of the facilities used." If the FCC hadn't been delegated the responsibility to ascertain who was a common carrier under the Act's definition, what purpose would the provision serve? Isn't identifying providers of telecommunications services the very type of question regulatory agencies regularly address and are expected to address?

In a case that predated *Chevron* by more than a decade, for example, the Supreme Court agreed with the Federal Power Commission that a transaction between two utilities located wholly within Florida nonetheless involved the interstate transmission of electricity and was thus subject to its jurisdiction.[51] A major question of "vast economic and political significance"? Well, overnight its impact was to bring virtually every transmission arrangement in the contiguous United States under the agency's oversight.[52] And the agency's direct authority? It came from the statute's until

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44. 47 U.S.C. § 153(53) (emphasis added).
45. *City of Portland*, 216 F.3d at 879.
46. 47 U.S.C. § 251(c), (h).
47. *West Virginia v. EPA*, 597 U.S. at 716.
48. *Id.* at 723.
49. *Id.* at 724.
50. City of Arlington v. FCC, 569 U.S. 290, 307 (2013).
51, Fed. Power Comm'n v. Fla. Power & Light Co., 404 U.S. 453, 453 (1972).
52. Joel B. Eisen, *FERC's Expansive Authority to Transform the Electric Grid*, 49 U.C. DAVIS L. REV. 1783, 1789 n.21 (2016).

then lightly-used declaration that interstate transmission of electricity was subject to the Federal Power Act.

To be sure, the idea of invoking the MQD to block the FCC's latest net neutrality rule did not come out of nowhere. While still a circuit court judge, and before the Supreme Court ever used the term, then Judge Kavanaugh would have invalidated the FCC's 2015 net neutrality rule under what he termed the "major rules doctrine" (the Supreme Court would not label it the major questions doctrine for a few more years). In dissenting from the D.C. Circuit's denial of rehearing *en banc*, Kavanaugh argued that the question of what constitutes a telecommunications service was so big—and Congress's intent so ambiguous—that the FCC had no authority to adopt a rule on what constitutes a telecommunications service at all.[53]

This drew a rare response from Judge Kavanaugh's fellow judges Srinivasan and Tatel. How could the net neutrality rule trigger a major rule doctrine, they asked. After all, "we know Congress vested the agency with authority to impose obligations like the ones instituted by the Order because the Supreme Court has specifically told us so [in *Brand X*]." [54] The late Justice Scalia had made the same point a few years earlier, speaking for the Court in *City of Arlington v. FCC*.[55] Citing *Brand X*, he explained that a regulatory agency deciding who is a common carrier was the type of question that would be evaluated under *Chevron*.[56]

Lost in the headlines over the Sixth Circuit's stay decision is the fact that its ruling followed a request for supplemental briefing, *not on the major questions doctrine*, but on the application of *stare decisis* to *Brand X* following the Supreme Court's *Loper Bright* decision. The FCC's supplemental brief, unsurprisingly, made no mention of the MQD.[57] And the

53. U.S. Telecomm. Ass'n v. FCC, 855 F.3d 381, 419-21 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc) ("If a statute only ambiguously supplies authority for the major rule, the rule is unlawful . . . If an agency wants to exercise expansive regulatory authority over some major social or economic activity—regulating cigarettes, banning physician-assisted suicide, eliminating telecommunications rate-filing requirements, or regulating greenhouse gas emitters, for example—an ambiguous grant of statutory authority is not enough. Congress must clearly authorize an agency to take such a major regulatory action.").

54. *Id.* at 383-84 (Srinivasan, J., concurring in denial of reh'g en banc).

55. City of Arlington v. FCC, 569 U.S. 290, 297-301 (2013).

56. *Id.*

57. Brief for Respondent, In re MCP No. 185, No. 24-7000, 2024 U.S. App. LEXIS 19815 (6th Cir. Aug. 1, 2024), https://www.law360.com/articles/1860621/attachments/1, https://docs.fcc.gov/public/attachments/DOC-404244A1.txt [https://perma.cc/DS2P-23ZT] [hereinafter FCC Supplemental Brief] (opposing motion to stay).

broadband petitioners only made a brief mention of the MQD in the last paragraph of their nineteen-page brief.[58]

By invoking the MQD, the Sixth Circuit panel greatly overreached in its reading of *Loper Bright*. In overturning *Chevron*, *Loper Bright* clearly precluded the FCC from relying on *Chevron* to support *revisions* to its interpretation of "telecommunications services." But the Court also added that where agencies adhere to prior interpretations affirmed under *Chevron*, those prior interpretations would enjoy *stare decisis* status.[59] While the FCC has changed its interpretation of "telecommunications service," it has consistently maintained that it had the authority to determine whether broadband was a telecommunications service.

So how should courts honor *stare decisis* after *Loper Bright* where an agency has previously won *Chevron* deference from a reviewing court on two issues but clings to one aspect of its prior interpretation while reversing another? The short, but logical answer is that the agency is entitled to *stare decisis* protection for its unchanged interpretation, but no judicial deference to its changed interpretation. As Judges Srinivasan and Tatel observed, in *Brand X* "the Court made clear in its decision—over and over—that the Act left the matter to the agency's discretion. In other words, the FCC could elect to treat broadband ISPs as common carriers (as it had done with DSL providers), but the agency did not have to do so."[60]

In opposing the stay of its May 2024 net neutrality rule, the FCC made essentially that very argument. The one aspect of *Brand X* (and all the subsequent rules on net neutrality) that remained unchanged and thus entitled to *stare decisis* status under *Loper Bright*, it explained, was the Supreme Court's affirmance of the FCC's authority to determine who was a common carrier.[61]

In granting the stay, the per curiam panel never directly addresses that argument. While acknowledging that the FCC had invoked *stare decisis*, it erroneously characterizes the FCC's position, not as an interpretation of *Loper*, but as claiming that "*Brand X*'s silence about the major questions doctrine implies that it does not matter to today's dispute."[62] It then gives *that*

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58. Supplemental Brief for Petitioner, In re MCP No. 185, No. 24-7000, 2024 U.S. App. LEXIS 19815 at *13 (6th Cir. Aug. 1, 2024) (filed July 19, 2024), https://www.law360.com/articles/1860621/attachments/0. The petitioners take the interesting position *both* that (1) the FCC's decision in *Brand X* to label broadband as an unregulated "information service" gets "vertical *stare decisis* effect" that not only deprives the agency's revised interpretation of *Chevron* deference, but bars courts from even entertaining "the Commission's new, contrary" interpretation, and (2) that the whole issue presents a major question. *Id.* at *8, 17. The petitioners do not explain how the FCC's since-disavowed interpretation of "telecommunications service" is binding on the courts *and* that the FCC has no "clear congressional authorization to exercise that kind of power." *Id.* at *8.

59. *Loper Bright*, 144 S. Ct. at 2273.

60. *U.S. Telecomm. Ass'n*, 855 F.3d at 384.

61. Supplemental Brief for Petitioner, *supra* note 58, at 1. "*Brand X* remains binding on this Court under established principles of *stare decisis* as to all issues the Supreme Court decided in that case. [Thus] *Brand X*'s holding that the Communications Act gives the FCC authority to classify and regulate broadband service [thus] forecloses petitioners' arguments that the major-questions doctrine deprives the agency of that authority." *Id.*

62. Stay Order, *supra* note 15, at *8.

argument short, and unilluminating, shrift. "[S]ilence," it says, is just that."[63] But as the courts have noted, a stay or preliminary injunction finding the movant's likelihood of success on the merits is not a decision on the merits.[64] And the Stay Order makes clear that the merits of the petitioners' claims are to be considered by "a randomly drawn merits panel."[65] With that in mind, and this author's expectation that with a more fully considered analysis of the issue by a merits panel, that panel may well reject the MQD label given the FCC's interpretation by the stay panel, this article addresses why *City of Portland* got it right and why that should matter in a post-*Loper Bright* world.

III. THE CABLE MODEM RULE—THE ORIGINAL ABOUT FACE

The Telecommunications Act of 1996 provides that, "regardless of the facilities used," companies offering a "telecommunications service" to the public are common carriers, obligated to offer their services on a non-discriminatory basis.[66] Applying that standard, by 1998 the FCC had required telephone companies offering digital subscriber line ("DSL") services—what was then considered a "high speed" broadband telecommunications service—to make their services available to independent internet service providers ("ISPs") otherwise dependent on slow telephone line "dial up" connections.[67] But a few years later, in what came to be known as the *Cable Modem Rule*,[68] the FCC declared that broadband services offered by cable companies (but

63. *Id.*

64. *See, e.g.*, Cook Cnty. v. Wolf, 962 F.3d 208, 234 (7th Cir. 2020) ("There would be no point in the merits stage if an issuance of a stay must be understood as a sub silentio disposition of the underlying dispute."). *See also* ACA Connects v. Bonta, 24 F.4th 1233, 1249 (9th Cir. 2022) (Wallace, J., concurring) ("[A] disposition of a preliminary injunction appeal is not an adjudication on the merits and . . . the parties should not 'read too much into' such holdings.") (internal citation omitted); Ctr. for Biological Diversity v. Salazar, 706 F.3d 1085, 1090 (9th Cir. 2013) ("We have repeatedly emphasized the preliminary nature of preliminary injunction appeals.").

65. Stay Order, *supra* note 15, at *9. After granting the stay, the panel established a very ambitious schedule, with petitioners' merits briefs to be filed a mere 10 days after its ruling and oral argument to take place between October 28th and November 1. *Id.*

66. 47 U.S.C. § 153(51), (53).

67. Deployment of Wireline Servs. Offering Advanced Telecomm. Capability, *Memorandum Opinion and Order*, 13 FCC Rcd. 24011, paras. 34-35 (1998). In granting a stay of the FCC's latest net neutrality rule, the Sixth Circuit inexplicably overlooked this ruling, erroneously stating that "[a]fter passage of the 1996 Act, the Commission for many years took the view that broadband internet access services were information services, not telecommunication services." Stay Order, *supra* note 15, at *3.

68. Cable Modem Rule, *supra* note 6.

not telephone companies) would be considered "information services" exempt under that same Act from FCC regulation.[69]

Although the FCC had previously conditioned the merger of Time Warner Cable with AOL on the merged entity's obligation to offer broadband access to competing independent ISPs,[70] and had similarly acknowledged in its *Cable Modem Rule* that cable companies "can lease their transmission facilities to independent ISPs that then use the facilities to provide consumers with Internet access,"[71] the FCC nonetheless reasoned that the cable companies' offerings of their cable broadband facilities bundled with their own Internet services were so tightly integrated that the whole bundled package should be considered an unregulated information service.[72]

This was understandably wonderful news for the cable companies, which, to that point, had been refusing to offer broadband access to independent ISPs anyway, forcing the latter to rely on increasingly uncompetitive dial up.[73] But it was terrible news for independent ISPs, including a small Los Angeles-based internet service provider I represented called Brand X. Still, we had what we believed was an ace up our sleeve.

Only a few years earlier, the Ninth Circuit had ruled in *AT&T v. City of Portland*[74]—a private cause of action in which, as noted earlier, *Chevron* was inapplicable[75]—that broadband service provided by cable companies *was* a "telecommunications service."[76] On appeal of the FCC's rule, Brand X argued

69. *Id.* at paras. 7, 34, 59, 60, 68. The Act defines "information services" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(24) (1996). Today, we think of information services as not only access to websites, but services from what the FCC calls "edge providers"—streaming video (think Netflix, Hulu, AppleTV+, etc) content providers and "those who, like Amazon or Google, provide content, services, and applications over the Internet." Verizon v. FCC, 740 F.3d 623, 629 (D.C. Cir. 2014).

70. Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 6547, paras. 93-100 (2001) (barring discrimination against unaffiliated ISPs, including content, first screens, and service standards); *see also* Harvey Reiter, *The Contrasting Policies of the FCC and FERC Regarding the Importance of Open Transmission Networks in Downstream Competitive Markets*, 57 FED. COMM. L.J. 246, 271-72 n.157 (2005), https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1405&context=fclj [https://perma.cc/N5K2-E3PQ] [hereinafter *Contrasting Policies*].

71. *Brand X*, 545 U.S. at 975 (citing Cable Modem Rule, *supra* note 6, at para. 6).

72. Cable Modem Rule, *supra* note 6, at para. 39 (finding that the "telecommunications component" of cable modem service was "not . . . separable from the data-processing capabilities of the service," but instead constituted one integrated information service).

73. *Contrasting Policies*, *supra* note 70 at 275.

74. *City of Portland*, 216 F.3d. at 880.

75. *Id.* at 876.

76. *Id.* at 878 ("Like other ISPs, @Home consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are that of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.").

to the Ninth Circuit that *Chevron* was wholly inapplicable because its earlier decision in *City of Portland* trumped the FCC's contrary interpretation.[77]

The panel agreed. Citing the Supreme Court's decision in *Neal v. United States*,[78] it held that where a court has previously decided the meaning of a statutory term, its ruling would override any subsequent and contrary ruling by the administrative agency.[79] And, because the panel was bound by the circuit's prior ruling in *City of Portland*, it ruled that the FCC, too, was bound by that earlier interpretation.[80] Brand X's success in invoking *City of Portland*, however, was unfortunately short-lived. Following denial of its en banc hearing request, the FCC sought and was granted certiorari by the Supreme Court. And, in the rarest of alignments, a 6-3 majority led by Justice Thomas rejected the strongly-worded dissent of Justice Scalia, holding that *Chevron* did apply, and that the FCC's interpretation that cable broadband was an unregulated "information service" was reasonable.[81]

Here again is the punchline, the details of which this article will shortly discuss more deeply: While the Supreme Court's decision in *Brand X* rendered *City of Portland* irrelevant for two decades, post-*Loper*, it is irrelevant no longer. Even without *Chevron*, the current FCC—whose position is now aligned with *City of Portland*—is not left simply to argue that the Court should buy its latest interpretation as the best reading of the statute. It has a well-reasoned, common sense-based and directly applicable judicial decision that was reached without *Chevron* deference. While judicial review of the FCC's latest decision will not take place in the Ninth Circuit, that decision should carry significant weight with other circuits. And so too should the dissenters' view in *Brand X* that, even under *Chevron*, the FCC's interpretation was unreasonable.

IV. WHAT *BRAND X* SAID AND DIDN'T SAY

To reach its decision to affirm the FCC's *Cable Modem Rule* under *Chevron*, the Court had to mount two hurdles. First, it had to square its decision in *Neal* with its conclusion that an agency's statutory interpretation

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77. It bears mentioning the agency's acknowledgement in the Cable Modem Rule itself that its decision was at odds with *City of Portland*. But it dismissed the case's relevance on grounds that it had been decided "without the benefit of briefing by . . . the Commission." Cable Modem Rule, *supra* note 6, at paras 57-58. This was a remarkable display of regulatory chutzpah. After all, the agency had participated as amicus in the *City of Portland* proceeding, but then "declined, both in its regulatory capacity and as amicus curiae, to address the issue . . . " *City of Portland*, 216 F.3d at 876. That, in fact, was why the *City of Portland* court held *Chevron* inapplicable. *See id.*

78. Neal v. U.S., 516 U.S. 284, 295 (1996) ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of stare decisis, and we assess an agency's later interpretation of the statute against that settled law.").

79. Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1131-32 (9th Cir. 2003), *rev'd*, 545 U.S. 967 (2005).

80. *Id.* at 1130-32.

81. *Brand X*, 545 U.S. at 980, 997.

could trump an earlier judicial one. Second, because the FCC's decision involved a change in policy, the Court still had to find that the agency had acknowledged and explained its changed position.[82]

As to the first point, in a conclusion he would years later describe as a mistake,[83] Justice Thomas interpreted *Neal* to mean that a prior judicial interpretation would take precedence over a later agency one only if a court had previously found the statute to be unambiguous.[84] The Ninth Circuit, it bears noting, had never said that the statute was ambiguous.[85] *Brand X*'s interpretation of *Neal* also begged the question: if a court was not reviewing an agency's interpretation—the case in *City of Portland*—why would it need to declare whether or not a statute was unambiguous? Justice Scalia said as much in his dissent:

> The Court's unanimous holding in *Neal v. United States*, 516 U. S. 284 (1996), plainly rejected the notion that any form of deference could cause the Court to revisit a prior statutory-construction holding: "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of stare decisis, and we assess an agency's later interpretation of the statute against that settled law." The Court attempts to reinterpret this plain language by dissecting the cases *Neal* cited, noting that they referred to previous determinations of "'a statute's clear meaning.'" But those cases reveal that today's focus on the term "clear" is revisionist. The oldest case in the chain using that word, *Maislin Industries*, did not rely on a prior decision that held the statute to be clear, but on a run-of-the-mill statutory interpretation contained in a 1908 decision. When *Maislin Industries* referred to the Court's prior determination of "a statute's clear meaning," it was referring to the fact that the prior decision had made the statute clear, and was not conducting a retrospective inquiry into whether the prior decision had declared the statute itself to be clear on its own terms.[86]

As to the agency's departure from its treatment of DSL broadband as a telecommunications service, the majority found reasonable the FCC's

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82. *Id.* at 981-82.

83. Baldwin v. United States, 140 S. Ct. 690, 690-91 (2020) ("Although I authored Brand X, 'it is never too late to surrende[r] former views to a better considered position.'"). *Baldwin* involved a taxpayer's challenge to an agency's interpretation of a statutory refund deadline that the Ninth Circuit had upheld under *Chevron* even though it was at odds with that Court's contrary interpretation made years earlier. *Id.* In dissenting from the Court's decision denying certiorari, and presaging *Loper Bright Enterprises*, Thomas argued, *inter alia*, that deferring to an agency's interpretation violated the APA. *Id.* at 692.

84. *Brand X*, 545 U.S. at 982 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

85. *Brand X v. FCC*, 345 F.3d at 1131, *rev'd* 545 U.S. 967 (2005) ("[W]hile we never explicitly stated in *Portland* that our interpretation of the Act was the only one possible, we never said the relevant provisions of the Act were ambiguous.").

86. *Brand* X, 545 U.S. at 1016 n.11 (Scalia, J., dissenting) (citations omitted).

conclusion "that changed market conditions warrant different treatment of facilities-based cable companies providing Internet access," and that "there was nothing arbitrary about the Commission's providing a fresh analysis of the problem as applied to the cable industry, which it has never subjected to these rules."[87] Ironically, it was the Court's ruling in *Brand X* that the agency then used only months later to strip independent ISPs of their access to DSL.[88]

None of the foregoing convinced the three dissenting Justices.

So, to put *Brand X* in perspective: No justice in the majority indicated a belief that the FCC was right on the merits. The opinion's author, Justice Thomas, has since disavowed his own opinion. Concurring Justice Breyer had found the FCC's position reasonable, but "just barely."[89] And Justice Scalia, joined by Justices Ginsburg and Souter, had concluded that even under *Chevron* step II, the FCC's interpretation was unreasonable.[90] "Indeed, the Court majority went as far as to affirmatively 'leave[] untouched' the court of appeals's [sic] belief that the better reading of the statute—albeit not the one that had been adopted by the agency—called for treating broadband providers as telecommunications carriers."[91]

V. THE POST-*BRAND X* CASES THAT MAY HAVE BEEN THE TIPPING POINT LEADING TO *LOPER BRIGHT*

This article noted at the outset that an apparent impetus behind the Court's decision to end *Chevron* deference was the instability it had created, amplified by the FCC's oscillating between declaring broadband an unregulated "information service" and a regulated "telecommunications service." But why has the debate gone on for so long? After all, the independent ISPs who were the main opposition to the FCC's *Cable Modem Rule* have all but disappeared. The reasons seem to be twofold.

First, for reasons that escaped me twenty years ago[92] and that escape me still, the concept of open access to network transmission/transportation facilities as a means to facilitate competition has long been a bipartisan policy embraced by FERC commissioners and members of Congress of both major parties—a policy that has transformed the natural gas pipeline and electric

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87. *Id.* at 1001-1002.

88. *See* 2005 Wireline Broadband Order, *supra* note 6, at n.2. Not surprisingly, the thousands of independent ISPs that had existing before *Brand X* have now all but vanished.

89. *Brand X*, 545 U.S. at 1003 (Breyer, J., concurring).

90. *See U.S. Telecomm. Ass'n*, 855 F.3d at 385 (D.C. Cir. 2017) (Srinivasan J., concurring in denial of reh'g en banc) ("All nine Justices [in *Brand X*] recognized the agency's statutory authority to institute 'common-carrier regulation of all ISPs,' with some Justices even concluding that the Act left the agency with no other choice.").

91. *Id.* at 384 (Srinivasan, J., concurring) (quoting *Brand X*, 545 U.S. at 985-86).

92. *Contrasting Policies*, *supra* note 70.

utility industries.[93] But open access to the broadband facilities owned by the nation's cable systems has been an intensely, if irrationally partisan issue. This is evident from the purely partisan divide among the FCC commissioners on this issue for now a quarter century. That is, each of the agency's interpretation reversals have been adopted in straight party-line votes.[94]

Second, following on the heels of the demise of competition from independent ISPs to those operated by cable companies,[95] broadband proved to be a godsend for "edge providers" now able to stream high quality video, exchange mountains of data and offer gaming services online.[96] The cable companies' control over broadband, however, gave them the economic power—which edge providers feared the cable operators would use—to favor their own content, to throttle the speeds with which customers could access certain websites or online apps, to extract extra fees to prioritize access, or to block some competing edge services altogether.[97] As the D.C. Circuit explained in upholding the FCC's 2015 Open Internet Order[98]:

93. *See, e.g.*, Philip M. Marston, *Pipeline Restructuring: The Future of Open-Access Transportation*, 12 ENERGY L.J. 53 (1991); Christopher Flavin, Nicholas Lenssen, *Reshaping the Electric Power Industry*, 22 ENERGY POL'Y 1029 (1994), https://www.sciencedirect.com/science/article/abs/pii/0301421594900175 [https://perma.cc/HCB3-97FA].

94. *See, e.g.*, Barbara Ortutay & Tali Arbel, *FCC votes along party lines to end 'net neutrality,'* AP (Dec. 14, 2017), https://apnews.com/article/e1eabbdf1525477dbaacf1a482b57ed4 [https://perma.cc/HF9N-E6T5]; Julia Shapero, *FCC votes to Restore Net Neutrality Rules*, THE HILL (April 25, 2024), https://thehill.com/policy/technology/4620907-fcc-votes-to-restore-net-neutrality-rules/ [https://perma.cc/KVR2-K2UF] ("agency voted 3-2 along partisan lines"); Christopher W. Savage et al., *Landmark Open Internet Order Released by FCC*, DAVIS WRIGHT TREMAINE LLP (Aug. 2015), https://www.dwt.com/blogs/media-law-monitor/2015/06/landmark-open-internet-order-released-by-fcc [https://perma.cc/H8MT-6U5L] (noting issuance "on a 3-2 party line vote"); *What's Not To Like About Open Internet Rules?*, BENTON INSTITUTE FOR BROADBAND AND SOCIETY (Mar. 1, 2015), https://www.benton.org/blog/whats-not-about-open-internet-rules [https://perma.cc/LES3-5P6W] (noting "[The Cable Modem Rule] was not a bipartisan decision. Commissioner Michael Copps, then the only Democrat on the Commission, dissented.").

95. Telecom providers also offer fiber-based broadband. But their presence is largely confined to a handful of densely populated metropolitan centers and the largest—FIOS—has added no new territories for almost fifteen years. Peter Svensson, *Verizon winds down expensive Fios expansion*, USA TODAY (Mar. 26, 2010), https://web.archive.org/web/20120111040823/https://www.usatoday.com/money/industries/telecom/2010-03-26-verizon-fios_N.htm/ [https://perma.cc/R8BK-ZW56].

96. *See, e.g.*, Lisa Iscrupe & Hannah Whatley, *Best Internet speeds for streaming without buffering*, USA TODAY (May 3, 2024), https://www.usatoday.com/tech/internet/what-internet-speed-do-you-need-for-streaming/ [https://perma.cc/3FMN-L3VL].

97. *U.S. Telecomm.*, 825 F.3d at 694.

98. *Id.*

> "[B]roadband providers represent[ed] a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment." For example, the [FCC] noted that "broadband providers like AT&T and Time Warner have acknowledged that online video aggregators such as Netflix and Hulu compete directly with their own core video subscription service," and that, even absent direct competition, "[b]roadband providers . . . have powerful incentives to accept fees from edge providers, either in return for excluding their competitors or for granting them prioritized access to end users." Importantly, moreover, the [FCC] found that "broadband providers have the technical . . . ability to impose such restrictions," noting that there was "little dispute that broadband providers have the technological ability to distinguish between and discriminate against certain types of Internet traffic." The [FCC] also "convincingly detailed how broadband providers' [gatekeeper] position in the market gives them the economic power to restrict edge-provider traffic and charge for the services they furnish edge providers." Although the providers' gatekeeper position would have brought them little benefit if end users could have easily switched providers, "we [saw] no basis for questioning the [FCC]'s conclusion that end users [were] unlikely to react in this fashion." The [FCC] "detailed . . . thoroughly . . . the costs of switching," and found that "many end users may have no option to switch, or at least face very limited options."[99]

But prohibition of throttling, paid prioritization, and blocking, the Court had previously held, was beyond the agency's powers so long as it continued to classify broadband as an unregulated information service.[100] With the demise of the independent ISPs after *Brand X* and the limits placed on the FCC's authority to address these acknowledged concerns as long as broadband providers remained unregulated information service providers, these concerns had remained largely unaddressed. "Edge providers" thus offered a new reason for the FCC in 2015 to adopt a telecommunications service definition that would ensure open access to broadband facilities, renamed a push for "net neutrality." And it is those same concerns that undergirded the FCC's 2024 decision to reassert its authority over broadband as a telecommunications service.

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99. *Id.* at 694 (citations omitted).

100. *Id.* at 689, citing *Verizon*, 740 F.3d 623 (D.C. Cir. 2014). *See also U.S. Telecomm.*, 825 F.3d at 707.

VI. THE SIMPLE LOGIC OF *CITY OF PORTLAND* AND JUSTICE SCALIA'S DISSENT IN *BRAND X*

Having received no input from the FCC on the specific issue of broadband over cable (as opposed to FCC-regulated DSL broadband), the court in *City of Portland* did what *Loper Bright* says the courts would do *pre-Chevron*.

First, it gave respect to the agency's interpretation "issued roughly contemporaneously with the enactment of the statute."[101] The court noted that shortly after its enactment, the FCC interpreted telecommunications services to include "DSL service, a high speed competitor to cable broadband, as an advanced telecommunications service subject to common carrier obligations."[102]

Second, it looked at how the term fit within the overall statutory scheme of the Act, i.e., it began by "reviewing text in context."[103] "[T]he definition of cable broadband as a telecommunications service," it reasoned, "coheres with the overall structure of the Communications Act as amended by the Telecommunications Act of 1996, and the FCC's existing regulatory regime."[104] That structure, it pointed out, included "broad reforms" that were "embodied by the dual duties of nondiscrimination and interconnection," and noted that "[e]lsewhere, the Communications Act contemplates the provision of telecommunications services by cable operators over cable systems."[105]

Finally, like any court, it applied common sense to its interpretation.[106] It noted that cable companies, like telephone companies offering DSL to competing ISPs, were offering two distinct services:

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101. *Loper Bright*, 144 S. Ct. at 2257.

102. *City of Portland*, 216 F.3d at 879.

103. *Loper Bright*, 144 S. Ct. at 2262 n.4.

104. *City of Portland*, 216 F.3d at 879.

105. *Id.* On this point, the Court noted that the Act expressly contemplated that cable companies might offer telecommunications services and that they would need no franchise authority to do so. *Id.* (citing 47 U.S.C.§ 541(b)(3)(A)).

106. United States v. Castleman, 572 U.S. 157, 183 (2014).

> Like other ISPs, @Home consists of two elements: a “pipeline” (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are that of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.[107]

The dissenting Justices in *Brand X* doubled down on this point. Not only were information services and telecommunications services distinct, but adopting the FCC’s position would give the cable companies the unilateral power to skirt regulation:

> The merger of the physical connection and Internet functions in cable’s offerings has nothing to do with the “inextricably intertwined” . . . nature of the two . . . , but *is an artificial product of the cable company’s marketing decision not to offer the two separately, so that the [FCC] could . . . exempt it from common-carrier status*.[108]

This reasoning tracked closely the reasoning of two court decisions under the analogous structure of the Natural Gas Act (“NGA”). Just as the Telecommunications Act regulates providers of telecommunications services, the NGA similarly regulates natural gas pipelines providing interstate transportation services. And just as the Telecommunications Act leaves “information services” unregulated, so too does the NGA exempt direct sales of natural gas to consumers from agency rate regulation.[109] The notion that a regulated provider of transportation services can avoid the reach of federal regulation by the artifice of bundling that service with an unregulated service

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107. *Id.* This is not to say that two or more distinct elements cannot be combined into a single product. No one would argue sensibly that a baker selling a cake is really selling eggs, flour, sugar and water or that “a car dealer is in the business of selling steel or carpets because the cars he sells include both steel frames and carpeting.” *Brand X*, 545 U.S. at 1007 (Scalia, J., dissenting). But in other instances the seller may instead be combining two distinct products or services in order to force the unwilling purchase of one of them, as in an unlawful tying agreement under the antitrust laws. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605 (1953). In such cases the question of whether the combined elements are one product or two is ascertained “*from the buyer's perspective.*” Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 20 (1984) (emphasis added). On this score, as *City of Portland* and the dissent in *Brand X* observed, both independent ISPs and the cable companies were seen as offering internet access, but the cable companies uniquely offered service over a separate high speed transmission pipe as a means of access. *City of Portland*, 216 F.3d at 874; *Brand X*, 545 U.S. at 1008 (Scalia, J., dissenting).

108. *Brand X*, 545 U.S. at 1009-10 n.4 (Scalia, J., dissenting) (emphasis added).

109. 15 U.S.C. § 717(b).

—in the NGA context by offering a bundled direct sale of natural gas using the pipeline's facilities to transport the gas—was first rejected by the Supreme Court in *Federal Power Commission v. Louisiana Power & Light Company*.[110]

And some years later when another pipeline tried to advance a similar argument, the D.C. Circuit rejected the attempt in language offering the same warning about manipulation that concerned the dissenters in *Brand X*. "FERC," it stated, "is not barred from regulating a pipeline's interstate transportation of natural gas merely because the sale of gas being transported is not itself subject to federal regulation. FERC's authority over such transactions is beyond dispute."[111] Any other rule, the court observed, would invite manipulation by the utility, which could avoid regulation by offering bundled pricing of the same services:

> As far as the statute is concerned, there would have been no doubt of FERC's Section l(b) authority if MRT, instead of charging a bundled price, had charged separately for transporting the gas and for the gas itself. *To accept MRT's position would therefore be tantamount to conferring on private parties the power whether FERC could set the rate for interstate transportation. Private parties would have this power because it would be entirely up to them whether to structure a direct sale and interstate-transportation transaction in terms of a bundled price or separate charges*.[112]

110. Fed. Power Comm'n v. La. Power & Light Co., 406 U.S. 621 (1972). There, the pipeline and its customer, an electric utility, argued that because direct sales of natural gas were not subject to Federal Power Commission regulation the agency had no power to limit the pipeline's transportation of the gas (the agency had asserted authority to curtail gas deliveries for electric generation to ensure that sufficient natural gas, which was in short supply, would be available for higher priority uses, like hospitals, schools and homes). *Id.* The Supreme Court disagreed. *Id.* It had no authority to regulate the rates charged for direct sales of natural gas, but retained the separate authority to regulate the interstate transportation of that gas. *Id.* at 640-42.

111. Mississippi River Transmission Corp. v. FERC, 969 F.2d 1215, 1217-18 (D.C. Cir. 1992). There, the FERC exercised authority over the transportation component of a bundled contract for the direct sale of natural gas, but not over the natural gas component of the bundled rate. *Id.* The pipeline argued that the bundled contract comprised a single service for the direct sale of natural gas and thus pricing for the entire transaction was outside FERC's jurisdiction entirely. *Id.*

112. *Id.* at 1218 (emphasis added). The court technically affirmed FERC's decision on *Chevron* grounds. *Id.* at 1219-20 ("We need not go so far as to say that FERC's reading of section 1(b) is compelled."). It left little room to conclude that any other interpretation could be justified, noting that FERC had "adopted a straightforward reading of section 1(b) amply supported by forty years of Supreme Court decisions," and that it doubted whether the pipeline's alternative reading was even "plausible." *Id.* at 1219.

VII. *LOPER-BRIGHT* DOES NOT EVISCERATE, BUT PRESERVES DELEGATED AGENCY DISCRETION, PARTICULARLY AS TO REMEDIES

More than three quarters of a century ago, the Supreme Court spoke about the "expansive powers" Congress had granted to the FCC under the 1934 Communications Act. "Congress," it observed, "was acting in a field of regulation which was both new and dynamic."[113] The Court acknowledged that the Act did "not explicitly say that the [FCC] shall have power to deal with network practices found inimical to the public interest."[114] But "[i]n the context of the developing problems to which it was directed, the Act gave the [FCC] . . . expansive powers."[115] "[T]his kind of flexibility and adaptability to changing needs and patterns of transportation,"—it similarly emphasized a quarter century later in affirming an Interstate Commerce Commission rule in *American Trucking Ass'ns v. Atchison, Topeka & Santa Fe Railway Co.*—"is an essential part of the office of a regulatory agency."[116] "Regulatory agencies," it famously said, "do not establish rules of conduct to last forever; they are supposed to, within the limits of the law and of fair and prudent administration, adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday."[117]

In overruling *Chevron*, *Loper Bright* makes clear that it does not seek to cabin in this legislatively-granted flexibility:

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113. Nat'l Broad. Co. v. United States, 319 U.S. 190, 218-19 (1943).
114. *Id.*
115. *Id.* at 219.
116. Am. Trucking Ass'ns v. Atchison, Topeka & Santa Fe Ry. Co., 387 U.S. 397, 416 (1967).
117. *Id.*

> In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes "expressly delegate[]" to an agency the authority to give meaning to a particular statutory term. Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," *such as "appropriate" or "reasonable."*
>
> When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, "fix[ing] the boundaries of [the] delegated authority, and ensuring the agency has engaged in 'reasoned decision making'" within those boundaries. By doing so, a court upholds the traditional conception of the judicial function that the APA adopts.[118]

It is hard to imagine that in passing the sweeping Telecommunications Act of 1996, Congress sought to narrow the FCC's ability to deal with developing technologies Congress had given to it ninety years ago, much less that it thought the classification of broadband was too big a question for the agency to tackle.

Nor would there logically be reason to challenge the scope of the remedies (bans on throttling, paid prioritization, blocking) the FCC has sought to ensure that broadband provides do not discriminate. Section 4(i) of the Communications Act of 1934 authorizes 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."[119] This is the very type of term found in regulatory statutes that denotes Congress's intention to delegate "flexibility to the agency." Indeed, "[i]t is well understood that "[a]gency discretion is often at its 'zenith' when the challenged action relates to the fashioning of remedies."[120] Perhaps the clearest manifestation of congressional intent to give the FCC the authority to determine who is providing a telecommunications service comes from the immense forbearance authority it extended to the agency under the 1996 Act. Section 160 of the Act[121] requires the FCC to forbear from applying to "telecommunications carriers or telecommunications services" any provision of the Act or FCC regulation it determines (1) "is not necessary" to ensure that telecommunications services remain "just and reasonable and not unjustly or unreasonably discriminatory," (2) "not necessary for the

118. *Loper Bright*, 144 S. Ct. at 2263.
119. 47 U.S.C. § 154(i).
120. NTCH, Inc. v. FCC, 841 F.3d 497, 508 (D.C. Cir. 2016).
121. 47 U.S.C. § 160.

protection of consumers" and (3) "is consistent with the public interest."[122] In directing the FCC to consider whether forbearance would "enhance competition among providers of telecommunications services[,]"[123] Congress could not have been unaware of the development of high speed telecommunications.[124] What would be the purpose of forbearance if it would not apply to all types of potential telecommunications services?

I cannot close this article without mentioning the somewhat contradictory arguments of the net neutrality rule's opponents on this point.

Two think tanks have argued that the agency's degree of forbearance was so extensive that it proved the FCC had no authority to regulate broadband in the first place: "If broadband were clearly a Title II service," they argued, "the FCC would not need (as it does) to abuse its forbearance power, ignoring so many core Title II requirements to practically write a new statute."[125] The notion that too much forbearance denotes lack of any authority is an odd one. The 1996 Act gives the FCC authority to forbear from regulating *entirely* if the public interest so requires.

Petitioners, by contrast, have objected that even with its forbearance provisions, the rule still exposes them to heavy-handed "public utility-style regulation" not intended by Congress.[126] But the key feature of utility regulation—agency control over pricing to ensure "just and reasonable rates"[127] – is missing from the Rule.

Thus, if anything, the remedies are too small—the FCC chose (as it did in its 2015 net neutrality order) to forebear from regulating the rates charged

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122. 47 U.S.C. § 160(a)(1)-(3).

123. 47 U.S.C. § 160(b).

124. Cable residential broadband was first offered to consumers in 1996, the year the Telecommunications Act became law. *See Cable's Story*, Nat'l Cable & Telecomms. Ass'n, https://www.ncta.com/cables-story [https://perma.cc/5AAB-SCP2] (last visited Nov. 17, 2024).

125. Brief for TechFreedom and Washington Legal Foundation as Amici Curiae Supporting Petitioner at 25, In re MCP No. 185, No. 24-7000, 2024 U.S. App. LEXIS 19815 (6th Cir. Aug. 1, 2024) (filed Aug. 15, 2024).

126. Brief for Petitioner at 10, 25, In re MCP No. 185, No. 24-7000, 2024 U.S. App. LEXIS 19815 (6th Cir. Aug. 1, 2024) (filed Aug. 12, 2024).

127. Farmers Union Cent. Exch., Inc. v. FERC, 734 F.2d 1486, 1508 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1034 (1984) ("It is of course elementary that market failure and the control of monopoly power are central rationales for the imposition of rate regulation." (citing S. BREYER, REGULATION AND ITS REFORM 1, 5-16 (1982)).

by broadband providers.[128] So, broadband providers might well be acting in a non-discriminatory fashion—by charging *all* users exorbitant rates.[129]

VIII. CONCLUSION

Both *Loper Bright* and the MQD reflect sea changes in administrative law jurisprudence. But the intensely political nature of the net neutrality debate should not distract reviewing courts from either (1) the stare decisis import of *Brand X* in confirming that the FCC has jurisdiction to determine whether cable broadband is a telecommunications service or (2) the fact that the well-reasoned *City of Portland* and the equally persuasive rationale of the dissent in *Brand X* provide ample grounds to conclude that the best reading of the Telecommunications Act is that cable broadband is a telecommunications service the FCC has the authority to regulate. Alexander's very bad day turned out okay. Here's hoping the FCC's does as well.

128. *Safeguarding and Securing the Open Internet*, 89 Fed. Reg. 45404, 45459, 45484 (May 22, 2024).

129. *See, e.g.*, Lee L. Selwyn & Helen E. Golding, *Revisiting the Regulatory Status of Broadband Internet Access: A Policy Framework for Net Neutrality and an Open Competitive Internet*, 63 FED. COM. L.J. 91, 136, 138 (2010) ((1) pointing out the FCC's inconsistency in determining that a retail access duopoly is "ineffective in disciplining rates, terms and conditions" for conventional wireline services, but sanctioning the absence of price regulation for broadband and (2) urging "access to incumbents' unbundled broadband access facilities, at forward-looking, cost-based rates.").