ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1063 (and consolidated cases)

UNITED STATES TELECOM ASSOCIATION, *et al.*
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

On Petitions for Review of an Order
of the Federal Communications Commission

BRIEF OF PROFESSORS OF ADMINISTRATIVE LAW AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

MICHAEL J. BURSTEIN
BENJAMIN N. CARDOZO SCHOOL OF LAW
55 Fifth Avenue, Room 944
New York, NY 10003
(212) 790-0350

September 21, 2015

Counsel for Amici Curiae

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Except for the following, all parties, intervenors, and amici appearing in this Court are listed in the brief for Petitioners United States Telecom Association, National Cable &Telecommunications Association, CTIA – The Wireless Association®, American Cable Association, Wireless Internet Service Providers Association, AT&T Inc., and CenturyLink.

The following parties have filed a notice or motion for leave to participate as amici as of the date of this filing:

- Harold Furchtgott-Roth
- Washington Legal Foundation
- Consumers Union
- Competitive Enterprise Institute
- American Library Association
- Richard Bennett
- Association of College and Research Libraries
- Business Roundtable
- Association of Research Libraries
- Center for Boundless Innovation in Technology
- Officers of State Library Agencies
- Chamber of Commerce of the United States of America
- Open Internet Civil Rights Coalition
- Georgetown Center for Business and Public Policy
- Electronic Frontier Foundation
- International Center for Law and Economics and Affiliated Scholars
- American Civil Liberties Union
- William J. Kirsch
- Computer & Communications Industry Association
- Mobile Future

- Mozilla
- Multicultural Media, Telecom and Internet Council
- Engine Advocacy
- National Association of Manufacturers
- Phoenix Center for Advanced Legal and Economic Public Policy Studies
- Dwolla, Inc.
- Telecommunications Industry Association
- Our Film Festival, Inc.
- Christopher Seung-gil Yoo
- Foursquare Labs, Inc.
- General Assembly Space, Inc.
- Github, Inc.
- Imgur, Inc.
- Keen Labs, Inc.
- Mapbox, Inc.
- Shapeways, Inc.
- Automattic, Inc.
- A Medium Corporation
- Reddit, Inc.
- Squarespace, Inc.
- Twitter, Inc.
- Yelp, Inc.
- Media Alliance
- Broadband Institute of California
- Broadband Regulatory Clinic
- Tim Wu
- Edward J. Markey
- Anna Eshoo
- Professors of Administrative Law
- Sascha Meinrath
- Zephyr Teachout
- Internet Users

B. Rulings Under Review

The ruling under review is the FCC's *Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601 (2015) ("*Order*").

C. Related Cases

The FCC's *Order* has not previously been the subject of a petition for review by this Court or any other court. All petitions for review of the *Order* have been consolidated in this Court, and *amici* are unaware of any other related cases pending before this Court or any other court.

CERTIFICATE REGARDING AUTHORITY TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief. *Amici* filed a Notice of Intent to Participate as *Amici Curiae* on September 9, 2015.

Pursuant to D.C. Circuit Rule 29(d), *amici curiae* certify that they are aware of no other non-government *amicus* brief that addresses the administrative law issues discussed herein. As professors of law who specialize in federal administrative law and procedure, *amici* are particularly well suited to discuss the notice and reliance issues raised in the course of the FCC's rulemaking.

/s/ *Michael J. Burstein*
Michael J. Burstein

September 21, 2015 *Counsel for Amici Curiae*

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Order	Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015) (JA___-__)
NPRM	Notice of Proposed Rulemaking, *Protecting and Promoting the Open Internet*, 29 FCC Rcd 5561 (2014) (JA___-__)
Pet. Br.	Joint Brief for Petitioners USTelecom, NCTA, CTIA, ACA, WISPA, AT&T, and CenturyLink

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Joint Brief for Petitioners USTelecom, NCTA, CTIA, ACA, WISPA, AT&T, and CenturyLink and the Brief for Respondents.

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who write and teach about federal administrative law and procedure.[2] Although we take no or varying positions about the merits of the Federal Communications Commission's Open Internet Rules at issue in this case, we are uniformly concerned that the Petitioners in this case seek to impose onerous new obligations on agencies that engage in notice-and-comment rulemaking pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 553. We submit this brief to express our view as scholars that such obligations are unsupported by existing law and inconsistent with sound administrative policy.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the Commission, following the notice-and-comment procedures of the APA, determined that broadband Internet access service is a

[1] Pursuant to Fed. R. App. P. 29(c)(5), *amici curiae* state that no party's counsel authored this brief in whole or in part. No party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. Media Democracy Fund made a monetary contribution to the preparation and filing of this brief.

[2] A complete list of *amici* can be found in the Appendix.

"telecommunications service" under the Communications Act (the "Act"). 47 U.S.C. § 153(53). In so doing, it revisited its previous construction of ambiguous terms in the Act, upheld by the Supreme Court in *National Cable & Telecomms. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967 (2005). Among other objections to the Commission's decision to reclassify broadband Internet access service, Petitioners challenge the adequacy of the Commission's notice of its proposed legal change and its supposed failure to account for Petitioners' asserted reliance interests. Petitioners' arguments, if accepted, would significantly change the scope of agencies' obligations under the APA when agencies revise their positions on matters of statutory interpretation.

I. Petitioners would require agencies to include in notices of proposed rulemaking detailed legal justifications for their changes in statutory interpretation. That requirement, however, has no basis in the APA, is inconsistent with the Supreme Court's *Vermont Yankee* decision and its progeny, and would impose a substantial burden on agencies with little or no accompanying benefit. When an agency expressly asks for comment on a legal issue, that alone is adequate notice, whether or not the agency goes on to flesh out its own (necessarily preliminary) legal theories. That is because, unlike with respect to facts and policy choices, interested commenters can usually anticipate legal issues and sub-issues, can inform themselves about the greater regulatory context in which those issues are

decided, and are not prejudiced by a lack of detailed justification from the agency. In short, detailed legal discussions add little to the public notice function of notices of proposed rulemaking, but requiring them will likely add significant cost and time to the agency rulemaking process.

In this case, because the Commission expressly sought comment on the question whether to reclassify broadband Internet access service, commenters were put on notice that they should comment on the range of subsidiary issues that such a reclassification would entail, and the agency's decision to rely on that reclassification as the statutory basis for its open Internet rules is a "logical outgrowth" of its notice.

II. Petitioners would impose a heightened standard of review of agency decision making when an agency changes a legal position that has engendered substantial reliance by regulated entities. But neither the Supreme Court's decision in *FCC v. Fox Television Stations* nor this Court's applications of that decision establish a bifurcated standard in which some changes of position are subject to heightened review and others are not. Instead, those decisions stand for the more moderate proposition that an agency's burden of justification is commensurate with the scale of the reliance engendered by the previous rule. More significant reliance, in other words, requires a greater explanation from the agency about why a legal change is justified, and, inversely, the lesser the reliance interest, the lesser

the agency's burden of justification. In this case, Petitioners assert that the value of their fixed investments may change because of the Commission's reclassification decision. The Commission adequately accounted for such reliance interests when it weighed them against the benefits of its regulatory change.

ARGUMENT

I. THE APA DOES NOT REQUIRE DETAILED NOTICE OF THE LEGAL JUSTIFICATION SUPPORTING AN AGENCY'S INTERPRETATION OF AN AMBIGUOUS STATUTE

Section 553 of the APA requires agencies engaging in notice-and-comment rulemaking to publish in a notice of proposed rulemaking "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). "The object" of this requirement "is one of fair notice" of the agency's intent. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). This Court has long held that "[t]he final rule need not be the one proposed in the notice. Rather, '[a]n agency's final rule need only be a logical outgrowth of its notice.'" *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013) (quoting *Covad Commnc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006)); *see also Long Island Care at Home*, 551 U.S. at 174 ("The Courts of Appeals have generally interpreted this to mean that the final rule the agency adopts must be 'a logical outgrowth of the rule proposed.'") (internal quotation marks omitted). "An agency's final rule qualifies as the logical outgrowth of its

NPRM if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Agape Church*, 738 F.3d at 411 (quoting Harry T. Edwards, Linda A. Elliott & Marin K. Levy, *Federal Standards of Review* 195 (2d ed. 2013) (internal quotation marks omitted)).

Petitioners concede that the Commission expressly noticed its intent to reconsider whether broadband Internet access service is a "telecommunications service," 47 U.S.C. § 153(53), subject to regulation under Title II of the Communications Act. Pet. Br. 85, 87. Nonetheless, they argue that the Commission's decision was not a "logical outgrowth" of its notice because the *NPRM* failed to explain in detail the Commission's "path to reclassification." *Id.* at 87 (emphasis omitted).[3] But this Court has never held that agencies must provide legal justifications for their statutory interpretations in notices of proposed rulemaking, and it should decline to do so here. Such a requirement is not necessary to put parties on "fair notice," *Long Island Care at Home*, 551 U.S. at 174, is inconsistent with the APA, and would unduly burden agency decision making.

[3] The argument in this brief is limited to the Commission's decision to reclassify broadband Internet access service as a "telecommunications service" under the Act. *Amici* take no position with respect to Petitioners' arguments (Pet. Br. 92-94) about the scope or content of the open Internet rules.

A. Express requests for comment on a legal interpretation are sufficient notice that an agency may revisit that interpretation

This Court has "found that a final rule represents a logical outgrowth where the NPRM expressly asked for comments on a particular issue or otherwise made clear that the agency was contemplating a particular change." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009); *see, e.g.*, *Nat'l Oilseed Processors Ass'n v. OSHA*, 769 F.3d 1173, 1180 (D.C. Cir. 2014); *City of Portland, Or. v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007) (holding that questions asked in "Request for Comments" portion of proposed rule put parties on notice of changes that could be made in final rule). When an agency expressly seeks comment on an issue, it stands to reason that interested parties should take the agency up on its request.

In this case, the Commission proposed in the *NPRM* to rely upon its authority under § 706 of the Telecommunication Act of 1996, 47 U.S.C. § 1302, to enact its proposed open Internet rules. *See NPRM* ¶ 142 (JA __). But the Commission expressly sought comment on "the nature and extent of [its] authority to adopt open Internet rules relying on Title II [of the Act], and other possible sources of authority, including Title III [for mobile broadband]" instead. *Id.* The Commission specifically asked "whether [it] should revisit its prior classification decisions and apply Title II to broadband Internet access service." *Id.* ¶ 149 (JA__). It also sought comment on a number of subsidiary issues, including "to

what extent is any telecommunications component of [broadband Internet access] service integrated with applications and other offerings," *id.* ¶ 150, whether such telecommunications are "held out 'for a fee directly to the public,'" *id.* (quoting 47 U.S.C. § 153(53)), whether, "[f]or mobile broadband . . . that service fit[s] within the definition of 'commercial mobile service'" in the statute, *id.* (citing 47 U.S.C. § 332), "whether [it] should separately identify and classify as a telecommunications service a service that 'broadband providers . . . furnish to edge providers,'" *id.* ¶ 148 (ellipses in original), "the extent to which forbearance from certain provisions of the Act or [the Commission's] rules would be justified," *id.* ¶ 153, and others.

The Commission, in short, expressly put interested parties on notice that it was considering an alternative source of legal authority for the open Internet rules alongside that which it proposed. Petitioners therefore cannot reasonably claim that they were caught unawares when the Commission decided to utilize the alternative. Indeed, Petitioners themselves submitted extensive comments on multiple aspects of the reclassification decision, both during the comment period and in multiple and sustained ex parte filings thereafter. *See Order* ¶ 387 n.1101 (JA__); *Nat'l Mining Ass'n v. MSHA*, 512 F.3d 696, 699-700 (D.C. Cir. 2008) (considering "the comments, statements and proposals made during the notice-and-comment period" to determine the scope of adequate notice); *Miami-Dade Cnty. v. EPA*, 529 F.3d 1049, 1060-61 (11th Cir. 2008) (same).

B. Commenters on notice of an agency's potential change in legal position do not require further explanation of the agency's legal reasoning

As described above, Petitioners cannot claim to be surprised by the Commission's decision to reclassify broadband Internet access service. Still, Petitioners argue that the Commission failed to "provid[e] notice of the *path* to reclassification the *Order* adopted"—"*what* or *how* or *on what basis* the FCC might reclassify," or its "rationale and analysis." Pet. Br. 87. But the Commission was under no obligation to spell out such details in the *NPRM*. The appropriate classification of broadband Internet access under the Communications Act is fundamentally a *legal* question—an interpretation of the Act and the application of that interpretation to a given set of services. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-82 (2005) (applying *Chevron* analysis to FCC's prior classification of broadband cable modem service).[4] Assuming that such decisions represent instances of legislative rulemaking, they are subject to the APA's notice requirements. *See* 5 U.S.C. § 553(b)(3). Raising

[4] There is debate in the academic literature over whether the analysis under step two of the *Chevron* framework is properly characterized as law, fact, or policy. *See, e.g.*, Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 Va. L. Rev. 597, 602-04 (2009) (reviewing literature). This case involves primarily legal issues regardless of how one describes *Chevron*'s analysis. Petitioners argue that broadband Internet access service is unambiguously an "information service" under the Act. *See* Pet. Br. 30-46.

and seeking comment on the legal issue puts interested parties on notice of the potential legal rationale, for at least three reasons:

First, reasonable commenters usually can anticipate the legal questions associated with a change in statutory interpretation. As the Seventh Circuit has observed, the relevant standard for determining the adequacy of notice is whether a reasonable member of the regulated class would know to file comments on a given issue. *See Alto Dairy v. Veneman*, 336 F.3d 560, 570 (7th Cir. 2003); *see also Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1109 (D.C. Cir. 2014) (asking whether "a reasonable member of the regulated class" would anticipate final rule from agency's notice). With respect to legal issues like statutory interpretation, the range of potential issues for comment is dictated by logic and the interplay of statutes, regulations, and case law. It is bounded. If a proposed agency action is lawful, for example, only under one interpretation of a statute, then a reasonable commenter should be on notice to submit comments about the proper interpretation of the statute.[5]

[5] This Court has applied a similar principle in the reverse setting: exhaustion. In *Nat. Res. Def. Council v. EPA*, 755 F.3d 1010 (D.C. Cir. 2014), for example, the court held that a petitioner did not forfeit its challenge to an agency's legal determination so long as it raised the issue in comments, even if those comments lacked legal detail. *See id.* at 1022-23.

Legal issues are, in this sense, significantly different from issues of fact or policy, which are not similarly bounded. That explains why the court in *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011), held that the Commission failed to provide adequate notice of its final media cross-ownership rules when it asked solely whether such rules should vary "depending upon the characteristics of local markets, and, if so, what characteristics should be considered." *Id.* at 450 (internal quotation marks omitted). In a fact-specific inquiry such as that, which ultimately turned on a wide variety of policy considerations, the agency had to provide enough detail to inform "interested parties [about] what to comment on." *Id.* (quoting *Horsehead Res. Dev. Co., Inc. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994)). Likewise, when this Court has called upon agencies to "describe the range of alternatives being considered with reasonable specificity," *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983), it has done so where the relevant alternatives were matters of fact and policy, not law. *See, e.g.*, *id.* at 548-49 (proposing quantitative threshold of oil refinery production); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36-39 (D.C. Cir. 1977) (evaluating whether cable regulation is in the public interest).

In this and similar cases, by contrast, articulation of the legal issue usually shapes the potential range of alternatives with specificity. For example, the

Commission here sought comment on whether, "[f]or mobile broadband Internet access service, . . . that service fit[s] within the definition of 'commercial mobile service,'" *NPRM* ¶ 150 (JA__), as would be required to treat such service providers as common carriers subject to Title II under the Act. *See* 47 U.S.C. § 332(c)(1)–(2). That request necessarily raised the question how to interpret the statutory definition of "commercial mobile service." *See id.* § 332(d). Reading that definition, in turn, a reasonable commentator would have known (contrary to Petitioners' argument, *see* Pet. Br. 88-89) to submit comments about the proper interpretation of those definitional terms, including "interconnected service" and "public switched network." *See id.*; 47 C.F.R. § 20.3; *Order* ¶ 394 (JA__). Indeed, many commenters, including several petitioners, did so. *See Order* ¶ 394 n.1134 (JA__).

Second, and especially with respect to changes in agency interpretations, reasonable commenters have notice of the "regulatory context" in which the change takes place. *Allina Health Servs.*, 746 F.3d at 1108. That context includes the history of agency interpretation of the term and related proceedings that address the meaning of the term. In *National Oilseed*, for example, the Court held that OSHA's final rule, which differed significantly from its proposal, was a logical outgrowth of the proposal in light of the relevant regulatory history. *See* 769 F.3d at 1179-80. That history, the Court held, would suggest to a reasonable

commenter that the particular option the agency chose was indeed on the table. *See id.*

So too in this case, the Commission made express reference to the decade-plus long debate over the proper classification of broadband Internet access service. *See NPRM* ¶ 149 (JA__). It also referenced an earlier notice of inquiry (the "*2010 NOI*") dedicated to the reclassification question. *See id.* As the Commission noted, *id.* ¶ 149 n.302 (JA__), that notice remained open and was incorporated by reference into the *NPRM*. Several commenters submitted their comments simultaneously in both the *2010 NOI* and *NPRM* dockets. The *2010 NOI* specifically addressed several of the interpretive issues about which Petitioners now complain, including those directed at the classification of mobile broadband services, *see id.* ¶¶ 101-05.

Third, commenters are generally not prejudiced by the absence of a complete legal rationale in a rulemaking proceeding because judicial review of issues of law does not require the compilation of an evidentiary record. This Court has long held that adequate notice is "crucial to ensure that agency regulations are tested via exposure to diverse public comment, to ensure fairness to affected parties, and to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union, United Mine Workers of Am. v. MSHA*, 626 F.3d 84,

95 (D.C. Cir. 2010) (internal quotation marks and alterations omitted). As described above, the first two functions of notice are met in the context of legal issues by raising the issue; that alone should prompt reasonable commenters to submit pertinent comments if they so choose. Judicial review of agency legal determinations, however, generally does not require the submission of data or evidence that is in the hands of commenters. Neither is a legal challenge in court confined to an administrative record. So specificity in the notice is not required to generate the kind of information that agencies and reviewing courts would find useful. Indeed, it is telling that in this case, Petitioners do not suggest whether or how their own legal analyses in comments would have been different had the agency provided more detail about its rationale. *See City of Waukesha v. EPA*, 320 F.3d 228, 246 (D.C. Cir. 2003) (considering "petitioners' failure to suggest how their comments would have been different as a factor in [the court's] 'logical outgrowth' analysis").

C. Requiring detailed legal justification in a notice of proposed rulemaking would be inconsistent with statutory text, Supreme Court precedent, and sound agency decision making

As the previous part demonstrates, an agency's legal justification for a change in interpretation of a statutory term is a "logical outgrowth" of notice that the agency is considering just such a change. This Court should decline

Petitioners' apparent invitation to expand the required elements of a notice of proposed rulemaking to include a detailed legal justification for the proposed rule.

For one thing, such a requirement would be inconsistent with the text and structure of the APA. Section 553(b)(3) requires that a notice of proposed rulemaking include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." *After* that notice and the requisite period for public comments, the agency must "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). That section forms the basis of the requirement that the agency supply "a satisfactory explanation" and a "reasoned basis" for its action. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see* 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 7.4, at 592-96 (5th ed. 2010). That explanation includes the agency's legal justification for taking its action. *See* Pierce, *supra*, § 7.4, at 594. Petitioners seek to import the reasoned explanation requirement from § 553(c) into the notice required by § 553(b). But the different terms of those two sections suggest that Congress knew how to draft a requirement that the agency explain its decision in detail, and its failure to do so in § 553(b) precludes courts from importing such a requirement into the notice of proposed rulemaking.

Leaving aside the distinction between sections 553(b) and (c), Petitioners' proposed requirement would plainly "impose[] on agencies an obligation beyond the 'maximum procedural requirements' specified in the APA." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015) (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978)). Section 553(b) nowhere suggests that a detailed legal justification of the proposed rule is necessary.

To be sure, this Court requires agencies "to identify and make available technical studies and data that [they] ha[ve] employed in reaching the decisions to propose particular rules." *Conn. Light & Power Co. v. Nuclear Reg. Com'n*, 673 F.2d 525, 530 (D.C. Cir. 1982); *see Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973). This requirement, too, is arguably inconsistent with the principle announced in *Vermont Yankee* that "reviewing courts are generally not free to impose" upon agencies additional informal rulemaking procedures beyond those specified in § 553. 435 U.S. at 524; *see American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 245-47 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("[T]he *Portland Cement* doctrine cannot be squared with the text of § 553 of the APA."); Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 Geo. Wash. L. Rev. 856, 894-95 (2007) ("There is nothing in the bare text of § 553

that could remotely give rise to such a requirement . . . ."); *cf.* Pierce, *supra*, § 7.3, at 583 ("The Supreme Court's opinion in *Vermont Yankee* . . . raises a question concerning the continuing vitality of the *Portland Cement* requirement that an agency provide public notice of the data on which it proposes to rely in a rulemaking."). At the very least, however, the requirement that an agency disclose data and technical analyses on which it relied in the rulemaking finds an "anchor[]," *Am. Radio Relay League*, 524 F.3d at 239, in a "logical interpretation of § 553," Pierce, *supra*, § 7.3, at 583. If the purpose of § 553 "is to permit potentially affected members of the public to file meaningful comments . . . criticizing (or supporting) the agency's proposal," then "it is impossible to file meaningful comments critical of a proposed action that is premised on particular data unless that data is available." *Id.*; *see also Am. Radio Relay League*, 524 F.3d at 243 (Tatel, J., concurring) (noting that an agency's "failure to turn over" critical data "undermines th[e] court's ability to perform the review function" the APA demands). Petitioners' proposed requirement has no such anchor. Legal reasoning is not information that is solely in the hands of the agency and therefore not susceptible of public comment until it is disclosed. Instead, as described above, it is readily discernable with notice of the legal issue at stake. And judicial review of legal issues does not depend on evidentiary submissions by members of the regulated public. In short, it is "very difficult to see where courts get the legal

authority" to add a requirement that an agency disclose not only data but also the legal reasoning that led to a proposed rule. Beermann & Lawson, 75 Geo. Wash. L. Rev. at 894-95.

Finally, requiring agencies to engage in a full legal justification of a proposed rule in the notice of proposed rulemaking would unduly hinder agency decision making. The legal justification that agencies typically provide in final rules is detailed and requires significant effort to prepare. Requiring that same level of detail *before* the final rule is promulgated replicates this expense for little gain. Indeed, it hinders agencies' ability quickly to promulgate notices of proposed rulemakings and therefore to receive the benefit of comments. This case provides a good illustration. In *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), this Court vacated and remanded the Commission's anti-discrimination and anti-blocking rules because they amounted to common carriage regulation of services that were not "telecommunications services" under the Act. *See id.* at 656-58. The Commission promulgated the *NPRM* just four months later so as to begin receiving comments about how it could achieve its preferred regulatory objectives in a more sustainable manner. *See NPRM* ¶ 2 (JA__). Although the agency initially proposed to rely on its authority under § 706 of the Communications Act, it also solicited comments on whether reclassifying broadband Internet access service as a "telecommunications service" subject to Title II would be lawful and efficacious.

And the solicited comments convinced the agency to pursue that alternative path. Had the agency first been required to produce a detailed legal justification for each alternative, the path to the current order would have been significantly slower. Such a requirement also may paradoxically decrease the quality of agency decision making and judicial review. An agency ought to be able to ask for comments about the scope of its authority before it has reached a fully detailed legal conclusion and then use the comments to help make the final determination. In this light, comments are most helpful when they think thoroughly, creatively, and from scratch about the legal issues raised by the agency. Similarly, courts then benefit from the agency's considered view, in the final rule, about the range of legal issues surfaced in the notice-and-comment proceeding.

II. WHEN AN AGENCY CHANGES POSITION, IT MUST CONSIDER AND APPROPRIATELY RESPOND TO RELIANCE INTERESTS ENGENDERED BY THE PREVIOUS RULE

The APA calls upon courts to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In practice, this standard requires that an agency "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), the Supreme Court held that the same standard

applies both to initial agency action and to a subsequent change in position. *See id.* at 513-16. "To be sure," the Court stated, "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position," but "the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Id.* at 515. At the same time, however, the Court held that "when [the agency's] prior policy has engendered serious reliance interests that must be taken into account," "[i]t would be arbitrary or capricious to ignore such matters." *Id.* Instead, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* at 516.

Petitioners argue that "when agencies reverse course, they must confront significant reliance interests engendered by their previous policies and provide 'a more substantial justification' for adopting that new course." Pet. Br. 26 (quoting *Perez*, 135 S. Ct. at 1209). To the extent that Petitioners argue for "heightened review" in such situations, as some circuits have suggested, *see, e.g.*, *Modesto Irr. Dist. V. Gutierrez*, 619 F.3d 1024, 1034 (9th Cir. 2010), Petitioners misread *Fox Television*. *Fox Television* does not establish a binary standard for heightened review of agency changes in position but rather stands for the more modest proposition that an agency needs to account for reliance interests in its analysis. Significant reliance interests may require greater explanation before an agency can

set them aside. But the inverse is just as true; when reliance interests are small, so too is the agency's burden of explanation.

A. *Fox Television* does not create a heightened standard of review

The Supreme Court in *Fox Television* synthesized a long-standing approach to the respect agencies must pay to the reliance engendered by their actions. That respect is not absolute. Instead, agencies must not "ignore such matters," and must provide a "reasoned explanation" for "disregarding" such reliance. 556 U.S. at 515–16; *see id.* at 536 (Kennedy, J., concurring in part and concurring in the judgment) ("Reliance interests in the prior policy may also have weight in the analysis."). "[C]hange that does not *take account* of legitimate reliance on prior interpretation *may* be arbitrary, capricious, or an abuse of discretion." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996) (emphasis added) (internal citations and quotation marks omitted).

It may sometimes be that reliance interests are so significant that an agency will be hard-pressed to come up with a justification for setting them aside. When, for example, "new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements," *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974), or when a regulated entity is "affirmatively misled by the responsible administrative agency into believing that the law did not apply" in a particular situation, *United States v. Pa. Indus. Chem.*

Corp., 411 U.S. 655, 674 (1973), it may be difficult for an agency to avoid a finding of arbitrariness or caprice. Indeed, in extreme instances, such retroactive changes to the law are unconstitutional. *See, e.g.*, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1975). This case presents no such circumstance. At most, it involves what is sometimes called "secondary retroactivity," which is not really retroactivity at all. Such burdens must be considered by the agency, and if an agency "alter[s] future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring), its action may require substantial justification. *See, e.g.*, *Fox Television*, 556 U.S. at 549 (Breyer, J., dissenting) (explaining that greater justification may be necessary for an agency change in "a policy that requires driving on the right-side, rather than the left-side, of the road" than for initial choice).

A great deal of regulatory activity, however, is concerned with adjusting the benefits and burdens of economic life, often in ways that impact the value of previously-made investments. As this Court has explained, "[i]t is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes." *Chem. Waste Mgmt. v. EPA*, 869 F.2d 1526, 1536 (D.C. Cir. 1989). But "most economic regulation would be unworkable if all laws disrupting prior expectations were

deemed suspect." *Id.* Even after *Fox Television*, therefore, courts hold that "[s]econdary retroactivity—which occurs if an agency's rule affects a regulated entity's investment made in reliance on the regulatory status quo before the rule's promulgation—will be upheld if it is reasonable." *In re FCC 11-161*, 753 F.3d 1015, 1072 (10th Cir. 2014) (quoting *Mobile Relay Assoc. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 1996)). In such settings, the agency will not act arbitrarily or capriciously so long as it accounts for reliance in its policy calculus. *See id.* at 1143 (holding that the Commission "did not ignore the [regulated entities'] reliance interests; instead, the FCC concluded that these interests did not trump other competing considerations").

B. The Commission in this case properly accounted for Petitioners' reliance interests

Applying the principles described above to this case leads to the conclusion that the Commission here acted reasonably in accounting for Petitioners' reliance interests. Petitioners argue that fixed and mobile broadband service providers "invested more than $800 billion in broadband service . . . in reliance on the FCC's classification of broadband as an information service." Pet. Br. 51 (internal quotation marks omitted). Petitioners' complaint appears to be that the value of that investment may decline, or that they will be discouraged from making future investments. This is not a case in which the regulated entities claim that fixed investments have become worthless, *cf. Fox Television*, 556 U.S. at 549 (Breyer,

J., dissenting), or in which activity that was previously lawful has now become unlawful. Instead, Petitioners claim that future regulation has negatively impacted their economic outlook.

In addressing this kind of claim, the Commission fulfilled its obligation under the APA by assessing the extent and impact of Petitioners' reliance on regulation as Title I carriers and comparing that to the benefits of reclassification. The Commission questioned the extent to which the value of Petitioners' investments was tied to their regulatory classification under the Communications Act, *Order* ¶ 360 (JA__), the extent to which Petitioners' reliance, if any, was reasonable given the long-standing debate over classification, *id.*; *see also Qwest Corp. v. FCC*, 689 F.3d 1214, 1230 (10th Cir. 2012) (upholding FCC judgment that policy uncertainty diminished reliance interests), and determined that the impact on Petitioners' reliance interests could be decreased through forbearance, *Order* ¶ 360 (JA__). These are all "empirical judgment[s] on . . . issue[s] involving [the Commission's] institutional expertise" that are worthy of "deference." *In re FCC 11-161*, 753 F3d at 1143. The Commission "did not ignore," *id.*, Petitioners' reliance interests; it merely found them insufficient for a variety of reasons to overcome the benefits of reclassification.

Respectfully submitted,

/s/ *Michael J. Burstein*
MICHAEL J. BURSTEIN
BENJAMIN N. CARDOZO SCHOOL OF LAW
55 Fifth Avenue, Room 944
New York, NY 10003
(212) 790-0350

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Counsel for Amici Curiae

APPENDIX

LIST OF SIGNATORIES
(Institutions are listed for identification purposes only)

Michael J. Burstein
Associate Professor of Law
Cardozo School of Law
Yeshiva University

Michael Herz
Arthur Kaplan Professor of Law
Cardozo School of Law
Yeshiva University

Ronald M. Levin
William R. Orthwein Distinguished Professor of Law
Washington University School of Law

Jeffrey S. Lubbers
Professor of Practice in Administrative Law
Washington College of Law
American University

Seymour Moskowitz
Professor of Law and Michael and Dianne Swygert Teaching Fellow
Valparaiso University Law School

Anthony E. Varona
Professor and Associate Dean for Faculty and Academic Affairs
Washington College of Law
American University

Amy Wildermuth
Professor of Law
S.J. Quinney College of Law
University of Utah

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 29(d), the undersigned certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e)(1), this brief contains 5670 words. This certificate was prepared in reliance upon the word-count function of the word-processing system (Microsoft Word for Mac 2011) used to prepare the brief.

/s/ *Michael J. Burstein*
Michael J. Burstein

September 21, 2015

CERTIFICATE OF SERVICE

I hereby certify that, on September 21, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *Michael J. Burstein*
Michael J. Burstein

September 21, 2015