No. 15-16585

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

AT&T MOBILITY LLC, a limited liability company,

Defendant-Appellant.

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

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February 22, 2016

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INTRODUCTION AND SUMMARY OF ARGUMENT

I. Section 5 of the FTC Act grants the FTC jurisdiction over enumerated entities ("persons, partnerships, or corporations") and then exempts certain entities, including common carriers subject to the Communications Act. As the FTC itself has long understood, "Section 5(a)(2) specifically lists *categories of businesses*" — including "common carriers subject to the Acts to regulate commerce" — "whose acts and practices are not subject to the Commission's authority under the FTC Act."[1]

That established understanding requires dismissal here. To avoid that result, the FTC now claims that the "common carrier" exemption is limited to certain activities. That cannot be squared with the statutory text. The exemption refers to entities, not activities. The one exception is a separate exemption for packers and stockyards that excludes those businesses from FTC authority only "*insofar as they are* subject to" the authority of another federal agency — *i.e.*, only insofar as they are engaged in activities subject to that other authority. 15 U.S.C. § 45(a)(2) (emphasis added). That two adjacent exemptions are worded differently establishes that they were intended to operate differently.

The FTC nevertheless argues that, when the FTC Act was enacted in 1914, the term "common carrier" referred to activity in addition to status. The FTC's

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[1] *LabMD, Inc.*, 2014 WL 253518, at *10 (FTC Jan. 16, 2014) (emphasis added); *see also infra* pp. 13-14.

pre-1914 cases, however, simply show that common carriers have always engaged in non-common-carrier activities. Congress nevertheless drafted an exemption for "persons, partnerships, or corporations" that are "common carriers subject to," among other things, the Communications Act. Just as Citibank is a "bank" under Section 5 regardless of whether the specific activities at issue constitute banking under the Federal Reserve Act, AT&T is a common carrier that is subject to the Communications Act, regardless of whether the specific activities at issue here constitute common carriage.

Judicial precedent likewise shows that the Section 5 exemptions, including the one for "common carriers," turn only on status, and "*not activities* subject to regulation." *E.g.*, *FTC v. Miller*, 549 F.2d 452, 455 (7th Cir. 1977) (emphasis added).

The FTC's own legislative history, which shows one House member's unenacted preference for an activity-based exemption, reinforces this conclusion, as does the history of Section 5's amendments (and failed amendments). Congress demonstrated its understanding that the common-carrier exemption is status-based by repeatedly rejecting activity-based language for common carriers and by enacting a distinctly worded activity-based exemption in the same subsection for packers and stockyards. Congress again reinforced the status-based nature of the common-carrier exemption in Section 5 by permitting the FTC to investigate

companies "engaged only incidentally," 15 U.S.C. § 46 (second proviso), in common carriage, authority that would be unnecessary if the exemption were activity-based. Although the FTC seeks to diminish the significance of these subsequent amendments, courts interpret statutory text "in the context of the *corpus juris* of which [the statute is] a part, including later-enacted statutes" that give content to statutory meaning. *Branch v. Smith*, 538 U.S. 254, 281 (2003).

II. The FTC offers no response to AT&T's straightforward claim that, even under the FTC's status-and-activity-based interpretation of Section 5, AT&T is a common carrier *and* its mobile data services have at all relevant times been "subject to the [Communications Act]." 15 U.S.C. § 45(a)(2). Nor does the FTC dispute that AT&T is currently subject to dueling regulation by two agencies considering the same issue concerning the same conduct. As to the FTC's policy concerns with AT&T's interpretation — concerns that should be directed to Congress — the FTC has yet to identify a single concrete example of the "regulatory gap" it claims to fear.

In any event, the FCC *did* regulate mobile data as common carriage between November 2011 and March 2014, so, at a minimum, the FTC's claims are barred for that time period. Contrary to the FTC's assertion, the mobile services at issue here *were* subject to what the *Verizon* court called "*per se*" common-carriage

regulation because the *2010 Open Internet Order* expressly included a mobile no-blocking rule.

III. Finally, even if the FTC once had jurisdiction to press this case, it does not have it now. The FCC is now indisputably regulating the subject activities as common carriage. The FTC Act — Section 13 no less than Section 5 — bars the FTC from taking enforcement actions against common carriers. The FTC thus "literally has no power to act." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). The FTC offers no authority to counter this accepted tenet of administrative law.

The FTC's loss of administrative authority does not implicate retroactivity concerns because the FCC's *Reclassification Order* affects the FTC's *present* authority to prosecute this action, rather than a prior interest. *See Southwest Ctr. for Biological Diversity v. Department of Agric.*, 314 F.3d 1060 (9th Cir. 2002). And, contrary to the FTC's assertion, AT&T's customers remain free to seek recovery if they suffered actionable harm.

ARGUMENT

I. THE FTC'S INTERPRETATION OF SECTION 5 IS INCORRECT

A. The FTC's Interpretation of the Text of Section 5 Is Both Methodologically Unsound and Wrong

1. The plain language and structure of the statute should resolve this case. Section 5, in unambiguous terms, empowers the FTC to enforce the FTC Act against "persons, partnerships, or corporations" — entities — and then exempts a specific subset of entities: "banks, savings and loan institutions . . . , Federal credit unions . . . , common carriers subject to the [Communications Act], air carriers and foreign air carriers subject to part A of subtitle VII of title 49." 15 U.S.C. § 45(a)(2). Indeed, the FTC concedes (at 26 n.5) that the exemptions on the list — other than the common-carrier exemption — "*are* status-based."

The FTC suggests (at 19) that the common-carrier exemption is different because, as "originally enacted," it referred to a regulatory scheme, while the bank exemption did not. But, since the FTC Act's enactment, courts have treated the two exemptions as equivalent. *See T.C. Hurst & Son v. FTC*, 268 F. 874, 877 (E.D. Va. 1920) ("Banks and common carriers were doubtless excepted from the provisions of the act, because each was subject to the direction and control of a separate commission . . . ."); *Lorenzetti v. American Trust Co.*, 45 F. Supp. 128, 134 (N.D. Cal. 1942); *Miller*, 549 F.2d at 459 (labeling the bank and common-carrier exemptions "coextensive"). The qualifier "subject to the Acts to regulate

commerce" simply distinguished common-carrier entities that *were* subject to the Interstate Commerce Act from those, such as steamships, that were "common carriers *not* subject to the act to regulate commerce," *United States v. Erie R.R. Co.*, 236 U.S. 259, 267 (1915) (emphasis added).

In any event, the other exempted entities on the list are also defined by reference to the regulatory scheme under which they operate. *See*, *e.g.*, 15 U.S.C. § 57a(f)(2)(B) (defining "bank," in part, as "organizations operating under section 25 or 25A of the Federal Reserve Act"). Banks engage in activities (such as managing real estate or providing investment advice) that are not quintessentially "banking." Yet the FTC concedes (at 19) that banks are exempt from FTC jurisdiction based on their *status* as banks without regard to the particular activities in question.

Contrary to the FTC's argument, *noscitur a sociis* applies here. That "commonsense canon" of construction provides "that a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008). Given courts' obligation to construe statutes to fit "all parts into an harmonious whole," *FDA v. Brown & Williamson Tobacco*

Corp., 529 U.S. 120, 133 (2000), it is hardly "illogical[ ]" (FTC Br. 27) to interpret a list of exemptions as referring to entities consistently.[2]

2. Two structural points reinforce this conclusion. *First*, the statute contains a distinctly worded activity-based exemption for "persons, partnerships, or corporations *insofar as they are* subject to the Packers and Stockyards Act." 15 U.S.C. § 45(a)(2) (emphasis added). To "interpret[ ] the statute to create a symmetrical and coherent regulatory scheme," *Brown & Williamson*, 529 U.S. at 121, the Court should give effect to the distinction between Section 5's differently worded exemptions. *See SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003); *Alaska v. United States*, 213 F.3d 1092, 1095 (9th Cir. 2000).

The FTC repeatedly tries to read the statute as though the status-based common-carrier exemption were equivalent to the activity-based exemption for packers and stockyards. *See*, *e.g.*, FTC Br. 14 ("only to the extent they provided common-carrier services"); *id.* at 9 ("only with respect to its common-carrier activities"). Those words, of course, do not appear in Section 5. That the FTC needs to add them underscores that its interpretation is untenable.

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[2] *Yates v. United States*, which the FTC quotes out of context (at 27), is not to the contrary. *See* 135 S. Ct. 1074, 1085 (2015). The Court said, "We resist a reading of § 1519 that would render superfluous an entire provision passed in proximity as part of the same Act." *Id.* Its discussion of *noscitur a sociis* followed in a separate paragraph and was not qualified in the way the FTC implies.

The FTC alternatively argues (*e.g.*, at 11, 26) that Congress's enactment (in 1938) and amendment (in 1958) of the Packers and Stockyards Act exemption "[h]ave [n]o [b]earing" on the common-carrier exemption because they postdate it. That is wrong. The statute must be interpreted "as a whole, presuming congressional intent to create a coherent regulatory scheme." *Padash v. INS*, 358 F.3d 1161, 1170 (9th Cir. 2004).[3] Accordingly, interpretation of a statute's original text must take subsequent enactments into consideration. *See*, *e.g.*, *Brown & Williamson*, 529 U.S. at 143 ("[T]he implications of a statute may be altered by the implications of a later statute."); *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 222 (2008) (interpreting statute in light of amendment because "our construction . . . must, to the extent possible, ensure that the statutory scheme is coherent and consistent").

Second, Congress's amendment of Section 6 of the FTC Act further supports the status-based interpretation because that section explicitly allows the FTC to investigate entities "engaged only incidentally," 15 U.S.C. § 46 (second proviso),

[3] *Bilski v. Kappos*, 561 U.S. 593 (2010), does not help the government: the Court there interpreted section 101 of the Patent Act in light of later-enacted 35 U.S.C. § 273, holding that the canon against surplusage, "of course, applies to interpreting any two provisions in the U.S. Code, *even when Congress enacted the provisions at different times*." *Id.* at 607-08 (emphasis added). In arguing to the contrary (at 27), the FTC cites the concurrence. *See id.* at 613 (Stevens, J., concurring in the judgment).

in common carriage. *See* AT&T Br. 27.[4] The FTC's suggestion (at 34) that Congress added this language to allow the FTC to investigate "pipeline companies, notwithstanding their common carrier status," further proves AT&T's point. If the common-carrier exemption were activity-based, such separate authority would be unnecessary.

3. The text and structure described above make the meaning of the phrase "common carriers subject to the Acts to regulate commerce" unambiguous and thus obviate the need to consult the common law. In any event, what the FTC's pre-enactment cases establish is that, prior to 1914 (as now), a common carrier sometimes engaged in activity "outside the performance of its duty as a common carrier." *Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Bros. Constr. Co.*, 228 U.S. 177, 185 (1913). That does not mean that, when a common carrier engages in such activities, it *ceases to be* a common carrier for purposes of Section 5, any more than a bank ceases to be a bank for purposes of Section 5 when it sublets office space, provides investment advice and brokerage services, or engages in other activities that do not constitute "banking" under the relevant

[4] Section 6 contains no special allowance for the FTC to investigate packers, because none is necessary. Because only certain of their activities are exempt from FTC oversight, packers naturally remain subject to the FTC's investigative authority.

regulations. *See* 12 C.F.R. § 225.28 (listing "permissible nonbanking activities" for banks).

Nor do the cases cited by the FTC "establish[ ]" a rule of interpretation that an entity was a common carrier "subject to" the Interstate Commerce Act "only to the extent it engaged in common-carrier activity." FTC Br. 17. The FTC's cases simply reflect the actual scope of the Interstate Commerce Act, which generally excluded "non-common-carrier activities" (unlike the Communications Act), *id.*, and applied to some common-carrier entities but not others, *cf. Erie*, 236 U.S. at 267.

B. Precedent Supports Reversal

The FTC argues (at 21) that "[d]ecades [o]f [j]udicial [d]ecisions" support its interpretation of Section 5. Most of the FTC's cases, however, do not interpret the FTC Act but instead address whether an entity is acting as "a common carrier for purposes of the [Communications Act]" when it engages in certain activities. *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1004 (9th Cir. 2010). For instance, in *McDonnell Douglas Corp. v. General Telephone Co.*, this Court acknowledged that the appellee had been "declared to be an interstate common carrier" by the D.C. Circuit, but nevertheless affirmed dismissal of a cause of action under the Communications Act because "[a] carrier may be an interstate 'common carrier'

within the meaning of § 202 in some instances but not in others." 594 F.2d 720, 724 n.3 (9th Cir. 1979).

Section 5, however, does not operate in the same way. It exempts from the category of entities it covers — "persons, partnerships, or corporations" — any entity that is a "common carrier[] subject to" the Communications Act; it does not exempt only activities "subject to" the common-carrier provisions of the Communications Act, which is the question at issue in the cases cited by the FTC.

That leaves only *Verity I*.[5] But, as explained, *see* AT&T Br. 42-43, the district court's "activity-based" reasoning was not a basis for affirmance in the Second Circuit, as the United States emphasized in opposing Supreme Court review. *See* Br. for FTC in Opp. at 7, *Verity Int'l, Ltd. v. FTC*, No. 06-669, 2007 WL 496334 (U.S. filed Feb. 15, 2007) (noting that "[t]he court of appeals expressly assumed that the relevant question was whether [the defendant] had the status of a common carrier" and arguing that the Second Circuit was "clearly correct" that it did not).

The FTC, moreover, errs in concluding (at 22) that the district court in *Verity I* is "the only prior court" to decide the issue here. The district court here correctly acknowledged that *FTC v. Miller* decided "the exact issue" in this case.

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[5] *FTC v. Verity Int'l, Ltd.*, 194 F. Supp. 2d 270 (S.D.N.Y. 2002) ("*Verity I*"), *aff'd*, 443 F.3d 48 (2d Cir. 2006) ("*Verity II*").

ER15 n.7. In *Miller*, the Seventh Circuit analyzed Sections 5 and 6 of the FTC Act and concluded that both are triggered by an entity's "*status* as a common carrier subject to the Interstate Commerce Act, *not activities* subject to regulation under that Act." 549 F.2d at 455 (emphases added); *see also id.* at 456-57. The court then considered whether a potential "gap in regulation" justified departing from that text-based understanding, and concluded that it did not. *Id.* at 458. *Miller* rejected the FTC's claim of subpoena authority *because* the common-carrier exemption "is in terms of status," and "*not activities*." *Id.* at 455 (emphasis added). Because *Miller*'s statutory interpretation was "necessary to [its] result," *Miller* is on-point authority. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). *Contra* FTC Br. 23.[6]

In addition to *Miller*, numerous courts have held that the Section 5 exemptions turn on status and not activity. The FTC's attempt (at 25) to dismiss these cases as finding status to be "necessary, but not sufficient," cannot be squared with those decisions, which expressly *reject* an activity component for the full set of Section 5 exemptions. *See National Fed'n of Blind v. FTC*, 303 F. Supp. 2d 707, 714-15 (D. Md. 2004) (interpreting exemptions to be "based on [an]

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[6] *Miller* left open only whether a carrier's "non-carrier activities" were subject to FTC authority *when* "the carrier's activities were not within the scope of ICC regulation." 549 F.2d at 458. Because the FCC has at all relevant times regulated AT&T's mobile data services, the issue left open in *Miller* is distinct from "the issue presented here" (FTC Br. 23).

entity's status, *not its activity*") (emphasis altered), *aff'd*, 420 F.3d 331 (4th Cir. 2005); *FTC v. CompuCredit Corp.*, No. 1:08-CV-1976, 2008 WL 8762850, at *4 (N.D. Ga. Oct. 8, 2008) ("plain language" of exemptions turns on "status *rather than . . . activities*") (emphasis added); *FTC v. Saja*, No. 97-cv-0666, 1997 WL 703399, at *1 (D. Ariz. Oct. 7, 1997) (agreeing that "exemption for not-for-profit corporations, *like other FTC Act exemptions for banks, common carriers, etc.*, is directed at the status of the entity *not the conduct to be regulated*") (emphases added).

Moreover, courts have consistently adopted this "status"-based interpretation *at the FTC's urging*. *See* AT&T Br. 31; *CompuCredit*, 2008 WL 8762850, at *4; *Saja*, 1997 WL 703399, at *1. The FTC's suggestion (at 26 n.5) that its argument in *Saja* assumed that both status *and* conduct were required for the exemption to apply is contradicted by its *Saja* brief, which provided the language adopted nearly verbatim by the district court. *See* ER130.

The FTC has also applied this interpretation in its own proceedings. In *LabMD*, the Commission stated: "Section 5(a)(2) specifically lists *categories of businesses*" — including "common carriers subject to the Acts to regulate commerce" — "whose acts and practices are not subject to the Commission's authority under the FTC Act." 2014 WL 253518, at *10 (emphasis added). The FTC's defense of *LabMD* (at 26 n.5) is unpersuasive, as the sentence AT&T

supposedly "omits" does not support the FTC's point. The opinion stated that Congress knows how to "exempt a particular category of entities or activities from the Commission's authority," and then listed *two* sets of exemptions — one for "entities" and one for "activities." 2014 WL 253518, at *10. It described (i) the "categories of businesses," including common carriers, that are exempt under Section 5(a)(2), and (ii) the "*practices* that the Commission may not address, such as commerce with foreign nations" under Section 5(a)(3). *Id.* (emphasis added). The Commission's reference to exemptions for "entities or activities" clearly referred to these two distinct sets of exemptions.

C. Legislative History Confirms That the Common-Carrier Exemption Is Status-Based

Because the statute is unambiguous, resort to legislative history is unnecessary. *See Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1132 (9th Cir. 2015) ("A court looks to legislative history only if the statute is unclear."). In any event, the legislative history of the FTC Act buttresses the conclusion that Congress has not given the FTC the authority it seeks here.

1. 1914 FTC Act

The FTC's solitary claim of historical support is a citation (at 20) to floor statements debating a proposed amendment to an early version of a bill that would become the FTC Act. The bill on the floor would have exempted from FTC jurisdiction "corporations subject to the [Interstate Commerce Act]." H.R. 15613,

63d Cong. § 9 (as introduced to Committee on Interstate and Foreign Commerce, Apr. 13, 1914). In the debate cited by the FTC, Representative Towner had proposed an amendment that, like the enacted statute, specifically exempted certain entities from the FTC's jurisdiction. *See* 51 Cong. Rec. 8936, 8995 (May 21, 1914) (exempting "*banks* and *financial corporations*, and such corporations as are subject to control by the [ICC]") (emphasis added). Representative Stevens opposed the amendment. He preferred that the bill's exemptions, rather than identify specific "legal entities," be activity-based. *Id.* at 8996. Thus, on his approach, neither "financial institutions . . . engaged in some industrial [non-financial] pursuit" nor "railroad compan[ies] engage[d] in work outside of that of a public carrier" would be exempt. *Id.*

Congress, of course, disagreed, and ultimately enacted language that *does* identify specific exempt entities, including common carriers.[7] Representative Stevens's interpretation of his *rejected* approach — however authoritative — thus undermines, rather than supports, the FTC.

2. Wheeler-Lea Act

In 1937, the House Committee on Interstate and Foreign Commerce had before it a proposed amendment to the FTC Act that would have exempted

[7] As noted *supra* p. 5, the FTC concedes that the exemption for "banks" is status-based, and courts have long treated the bank and common-carrier exemptions equivalently.

common carriers from Section 5 "only in respect of their common carrier operations." *To Amend the Federal Trade Commission Act: Hearing on H.R. 3143 Before the H. Comm. on Interstate and Foreign Commerce*, 75th Cong. 23, 25 (1937) [hereinafter "*1937 Hr'g Tr.*"]. The Committee rejected the amendment.

The FTC's argument (at 37) that the proposal was an attempt "to amend a measure passed by a previous" Congress does not lessen the force of this history. The original FTC Act did not exempt entities subject to the Communications Act (because that Act did not exist). *See* Pub. L. No. 63-203, § 4, 38 Stat. 717, 719 (1914). Thus, in 1937, Congress was confronted both with *whether* to alter the scope of the common-carrier exemption — which it did, by adding the Communications Act to the definition of "Acts to regulate commerce" in Section 4 — and *how* to do so.[8] Congress's rejection of the proposed "limiting language" to accompany the addition of the Communications Act to the Section 5 exemption thus indicates that "the limitation was not intended." *Cf. Russello v. United States*, 464 U.S. 16, 23-24 (1983).

[8] The FTC claims (at 38) that Congress was not "considering" the scope of the common-carrier exemption, that it did not "reject" the proposed amendment, and that the proposal was "barely noted," but these are the facts: A committee of the United States Congress asked questions and heard testimony on several occasions regarding the proposed amendment to the common-carrier exemption, *see 1937 Hr'g Tr.* 23-27, 61-62, 67-68, and declined to include that amendment in the bill it presented for passage.

3. Packers and Stockyards Act Exemption

The history of the Packers and Stockyards Act exemption likewise confirms the proper construction of Section 5. In 1938, Congress amended Section 5 to exempt "persons, partnerships, or corporations subject to the Packers and Stockyards Act," Wheeler-Lea Act, Pub. L. No. 75-447, § 3, 52 Stat. 111, 111-12 (1938), using the same status-based, "subject to" formulation as the common-carrier exemption. Then, in 1958, Congress changed the language as part of "a reassignment of jurisdiction" between the FTC and the Secretary of Agriculture. H.R. Rep. No. 85-1507, at 3 (1958). Under the amended (current) language, packers and stockyards are exempted from FTC authority only "*insofar as they are subject to*" the Packers and Stockyards Act. Pub. L. No. 85-909, § 3, 72 Stat. 1749, 1750 (1958) (emphasis added). Congress altered the language of the provision to create a unique activity-based exemption, as distinguished from the status-based common-carrier exemption, so that the FTC could regulate the activities of packers that were no longer subject to the Agriculture Secretary's jurisdiction. Under the prior, status-based formulation, such regulation by the FTC would have been prohibited.

The FTC argues (at 29) that the original "subject to" language was activity-based because the 1921 Packers and Stockyards Act adopted an "activity-based regime." But the 1921 Act gave the Secretary of Agriculture authority over "any

packer," Packers and Stockyards Act of 1921, Pub. L. No. 67-51, § 203(a), 42 Stat. 159, 161, and defined a "packer" by reference to the nature of its business, not its activities at any given moment, *see id.* § 201, 42 Stat. 160. The Act then categorically stripped the FTC's jurisdiction, as of the day of the Act, over "any matter which by this Act is made subject to the jurisdiction of the Secretary [of Agriculture]." *Id.* § 406(b), 42 Stat. 169.[9]

As the Fourth Circuit explained *before* the 1958 amendment, if an entity had (or acquired) the "status" of a packer, the FTC "had no further power of regulation over it." *United Corp. v. FTC*, 110 F.2d 473, 474, 476 (4th Cir. 1940).[10] *United Corp.* was a challenge to an FTC cease-and-desist order by a corporation that, following the FTC petition but prior to its final order, came within the definition of a "packer" under the 1921 Act. The FTC argued "that it had jurisdiction because petitioner had not acquired *that status* at the time of" the petition, *id.* at 474 (emphasis added), but the court disagreed. Analyzing the statute at length, it

[9] The FTC implies (at 29) that the term "matter" referred only to specific proceedings, and not — as it is more naturally read — to subject matter. But, when referring to specific proceedings, section 406(b) used the word "cases," as when it preserved the FTC's jurisdiction over "cases in which, before the enactment of this Act, complaint has been served" by the FTC.

[10] The Packers and Stockyards Act preserved FTC jurisdiction in special cases where "the Secretary of Agriculture . . . request[ed] of the [FTC] that it make investigations and report." § 406(b), 42 Stat. 169; *see United Corp.*, 110 F.2d at 474. The FTC is thus wrong in concluding (at 29) that, following the 1938 amendment, "[t]he FTC could only have had jurisdiction over a packer or stockyard . . . if Congress had implemented an activity-based test."

concluded that the Agriculture Secretary's authority over packers was "plenary." *Id.* at 475. Thus, once "petitioner became a packer whose business was subject to the control of the Secretary of Agriculture," it was wholly "excepted from the jurisdiction of the [FTC]." *Id.* at 474.

FTC decisions before the 1958 amendment support the point. In *Food Fair Stores, Inc.*, which the FTC cites (at 30), the FTC acknowledged that, because the supermarket chain fell "within the definition of 'packer,'" it was not subject to FTC authority. 54 F.T.C. 392, 406-08 (1957). The FTC specifically rejected the argument that it had jurisdiction over "those products not associated with [the grocer's] packing business," given the history of the Packers and Stockyards Act. *Id.* The FTC reached the same conclusion a year earlier in *Armour & Co.* *See* 52 F.T.C. 1028, 1033-36 (1956) (rejecting argument that respondents, though "admittedly 'packers' within the meaning and definition of the Packers and Stockyards Act," were subject to FTC authority on the basis of their activities).

The FTC next argues (at 31-32) that the "insofar as" amendment did not change the exemption — but, even on the FTC's own reasoning, it did. Rather than divide the FTC's and the Agriculture Secretary's jurisdiction based on status, Congress amended the FTC Act and Packers and Stockyards Act in 1958 to "split[] functional responsibilities," narrowing the jurisdiction of the Agriculture Secretary, on the one hand, and broadening FTC authority, on the other, such that

the FTC could now regulate packer activities no longer subject to the Secretary's jurisdiction. FTC Br. 31; *see* Pub. L. No. 85-909, § 1, 72 Stat. 1749-50; H.R. Rep. No. 85-1507, at 8 (purpose of amendment to "enlarge the jurisdiction" of the FTC). Accordingly, Congress amended Section 5 "by striking out . . . 'subject to the Packers and Stockyards Act' . . . and substituting therefor . . . 'insofar as they are subject to' " that Act precisely to ensure that the FTC could regulate activities no longer under the Secretary's jurisdiction, even if they were performed by packers. Pub. L. No. 85-909, § 3, 72 Stat. 1750. Both agencies acknowledged the effect of the change. *See* AT&T Br. 38.

It thus makes no sense to suggest, as the FTC does (at 32), "that the 1958 amendment did not change the nature of the exception." Furthermore, such an interpretation would "render[] meaningless Congress's choice of two different words . . . in the same section of the Act," *Alaska*, 213 F.3d at 1095, and deny the amendment the "real and substantial effect" this Court presumes congressional action to have, *Johnson v. Consumerinfo.com, Inc.*, 745 F.3d 1019, 1022 (9th Cir. 2014).[11] If, as the FTC suggests, the 1958 amendment did not change the nature of

[11] *Crosse & Blackwell Co. v. FTC*, 262 F.2d 600 (4th Cir. 1959), upon which the FTC relies (at 32), was wrongly decided, ignoring the applicable canons of construction discussed above even while acknowledging that the 1958 amendment posed a "difficulty" for its holding, *id.* at 605. The decision also contradicted the Fourth Circuit's prior holding in *United Corp.* that the pre-1958 packers exemption was status-based. *See Norfolk & Western Ry. Co. v. Director, Office of Worker's*

the exemption, there would have been no need for the amendment. Congress changed the wording for a reason.

4. The FTC's Subsequent Attempts To Amend the FTC Act

The FTC admits (at 40) that, "[i]n 1977, the FTC asked Congress to amend all the Section 5 exceptions" — including the common-carrier exemption — "to give the agency enforcement authority over any activity not subject to regulation by another federal agency." The FTC cannot explain why it made such a request if the exemptions have always been activity-based, not status-based. In proposing the 1977 amendments, former FTC Chairman Collier represented that "[t]he Commission supports a similar adjustment" to the one enacted in 1958 when "Congress amended the law to eliminate *the status exception*" for packers and stockyards.[12]

Moreover, the FTC has consistently viewed the exemptions as status-based, repeatedly advocating for that interpretation in court and applying it in its own administrative proceedings. *See supra* pp. 13-14. *Contra* FTC Br. 41. Other than the stray, self-serving comments of individual commissioners, *see*, *e.g.*, FTC Br.

Comp. Programs, 5 F.3d 777, 779 (4th Cir. 1993) (one three-judge panel "may not overrule another panel's decision").

[12] *Federal Trade Commission Amendments of 1977 and Oversight: Hearings Before the Subcomm. on Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 95th Cong. 77 (1977) [hereinafter "*1977 Hr'g Tr.*"] (statement of Calvin J. Collier) (emphasis added).

42, 44, the FTC points to *only one case in 102 years* (*Verity I*) in which it successfully argued for the activity-based reading in court. The FTC's citation (at 42) of recent *settled* proceedings carries no weight, as parties settle for reasons "wholly unrelated to the substance and issues involved in the litigation." *Hooper v. Demco, Inc.*, 37 F.3d 287, 292 (7th Cir. 1994).

Congress's refusal to update the common-carrier exemption — particularly in light of the FTC's own consistent status-based reading — supports the conclusion that Congress has "effectively ratified" the status-based exemption. *Brown & Williamson*, 529 U.S. at 156.

II. AT&T IS EXEMPT FROM FTC ENFORCEMENT EVEN ON AN ACTIVITY-BASED READING OF THE STATUTE

A. Dismissal Furthers the Purpose of Section 5

The FTC does not dispute that the purpose of the Section 5 exemptions is to "prevent[] interagency conflict" by preventing two agencies from asserting jurisdiction over the same activity. *Verity II*, 443 F.3d at 57; *see also T.C. Hurst & Son*, 268 F. at 877. The FTC's view (at 17) that the common-carrier exemption was meant to leave intact FTC authority over activities "not subject to ICC jurisdiction," however, supports reversal, not affirmance. At all relevant times, AT&T's mobile data services have been subject to regulation by the FCC under Title III of the Communications Act and section 706 of the Telecommunications Act of 1996 (47 U.S.C. § 1302). *See* AT&T Br. 43-44; *accord 1977 Hr'g Tr.* 54

(FTC chairman seeking authority over activities "not subject to regulation by another federal agency"). This case is thus unlike the ICC regime discussed in the FTC's cases, because, as the FTC says, "non-common-carrier activities were generally *not subject to ICC jurisdiction*." FTC Br. 17 (emphasis added). The same is not true under the Communications Act.

The FTC's invocation of the FTC Act's general purpose does nothing to suggest that such overlapping FTC and FCC jurisdiction is consistent with the statute. Although *one* purpose of the FTC Act is to empower the FTC to regulate swaths of the economy, *see* FTC Br. 45, "[n]o legislation pursues its purposes at all costs," *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013). And, here, that overarching regulatory purpose is cabined by the explicit limitations in Section 5. Moreover, the purpose of those limitations is emphatically implicated here because the service at issue is unquestionably "subject to" regulation by another federal agency.

Although the FTC complains (at 46) of the supposed "gap that would result from AT&T's interpretation," the FTC never once attempted — at least since *Miller* was decided 40 years ago — to regulate a common carrier until its recent epiphany that it had that authority all along. Yet, even in "today's economy," FTC Br. 48, the FTC remains unable to identify a single instance of the feared regulatory gap. There is accordingly no basis to the FTC's claim (at 47) that

consumers will "be left unprotected" if the statute is interpreted according to its terms, especially because the FCC has had jurisdiction over AT&T's services at all relevant times here.

To the extent companies do attempt to "immunize themselves from FTC enforcement simply by providing some common-carrier service," FTC Br. 47, AT&T does not dispute that a *de minimis* exception is likely consistent with Section 5, *see* AT&T Br. 48-49. The FTC argues (at 48) that the *de minimis* doctrine would not authorize jurisdiction in a case like this, but that is, of course, the point. AT&T's vast array of common-carrier services entitles it to the status of a common carrier. And, as indicated, its (formerly) non-common-carrier data service, which is sold only *with* common-carrier voice service, has always been "subject to" ongoing FCC regulation under Title III and section 706.

Furthermore, the FTC's argument is based on the "questionable assumption . . . that Congress contemplated and intended a perfect correlation between the end sought (avoidance of inter-agency conflict) and the means adopted (the exemption) so that there would be no gap" at all. *Miller*, 549 F.2d at 458. The Supreme Court has rejected the argument that the existence of a potential regulatory gap permits the FTC to assert jurisdiction beyond what the text of the FTC Act authorizes. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 336 n.11 (1963) ("reject[ing] the argument that . . . since the [Federal Reserve Board] has no

authority to enforce the Clayton Act against bank mergers, bank mergers must . . . be subject to the FTC") (citation omitted). If the exemption permits a regulatory gap, it is Congress's job to fill that gap, not the FTC's, and not the Court's.

B. Mobile Data Was Regulated As Common Carriage Between November 2011 and March 2014

The FTC does not dispute that, in *Verizon v. FCC*, the D.C. Circuit held that, while the FCC's 2010 no-blocking and no-discrimination rules were in effect, they regulated data providers as common carriers. *See* 740 F.3d 623, 628 (D.C. Cir. 2014). The FTC merely argues (at 55) that the rules "did not apply to the mobile services at issue here." That is incorrect. The FCC explicitly applied a "no blocking rule" to "mobile broadband providers[ ]," such as AT&T, and barred those providers from blocking end-user access to lawful websites and competing content. *2010 Open Internet Order* ¶ 99. Thus, AT&T's mobile broadband activities were, as the D.C. Circuit held, regulated as common carriage. Even under the FTC's most extreme reading of the Section 5 exemption, those activities were outside its jurisdiction during the period in question.

AT&T did not waive the argument when it stated in district court that its "mobile *data* services [were] not regulated as common-carrier services." Mot. To Dismiss at 9 (Dkt. #29). Rather, that statement accurately described the state of the post-*Verizon* world at the time this complaint was filed. But AT&T clearly stated at oral argument that, during much of the time covered in the complaint, it "was

actually subject, according to the [*Verizon*] Court, to common-carriage regulation by the FCC." Hearing Tr. 16:18-20 (Mar. 12, 2015) (Dkt. #52); *see also* Answer, Affirmative Defenses ¶ 15 (Dkt. #61). At the least, this argument based on *Verizon* bolsters the point that AT&T's mobile broadband service is fully "subject to" the Communications Act and FCC jurisdiction. As the *Reclassification Order* demonstrates, it is up to the FCC, not the FTC, to determine the nature of the regulations to be applied to that service. If this Court disagrees, then, at the very least, the period during which AT&T's broadband service was subject to common-carriage regulation would still have to be excluded from the proceedings below.

III. IN ALL EVENTS, THE FCC RECLASSIFICATION REQUIRES REVERSAL

The FTC misunderstands the effect of the *Reclassification Order*. The question is not whether *AT&T's* conduct has been "[r]etroactively [i]mmunize[d]."[13] FTC Br. 56 (heading). The question is whether the *FTC* possesses *the current authority* to maintain this lawsuit. It does not.

A. Retroactivity Is Not at Issue

The "prospective basis" on which the FCC's 2015 *Reclassification Order* operates, FTC Br. 56, is not relevant here, because the *current* effect of the order is sufficient to divest the FTC of authority. Section 5 of the FTC Act "empower[s],"

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[13] It has not been. *See infra* p. 29.

in the present tense, the FTC to prevent certain entities (but not common carriers) from violating Section 5, among other laws. Likewise, Section 13 authorizes the FTC to bring suit in a "proper case[]" when a corporation "is violating, or is about to violate," any law enforced by the FTC. 15 U.S.C. § 53(b). Critically, as this Court has stated, "§ 13(b) *may not be used to remedy a past violation* that is not likely to recur." *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1089 (9th Cir. 1985) (emphasis added). AT&T cannot currently or in the future be in violation of Section 5 because AT&T, as a common carrier, is exempt from Section 5. Section 13(b) thus requires dismissal on its own.

The FTC offers no case rebutting the fundamental principle of administrative law that an agency's authority must persist throughout proceedings for the proceedings to be maintained. And the FTC's attempts to distinguish those cases are ineffective. *See* AT&T Br. 52-54 (citing cases).

For example, the FTC calls the Agriculture Department's decision in *Swift & Co.* "irrelevant" because it did not "address[] jurisdiction." FTC Br. 62 n.17. But, with respect to the 1958 realignment of jurisdiction between the FTC and the Agriculture Secretary, *Swift* said this: "The 1958 amendments enacted after the institution of this proceeding place jurisdiction of the subject matter of the proceeding in the [FTC] *and there is a considerable problem as to whether the*

Secretary has jurisdiction to complete this proceeding . . . ." 18 Agric. Dec. 464, 465 (USDA 1959) (emphasis added).

The FTC further claims (at 62 & n.17) that the other cases cited by AT&T involved congressional repeals of jurisdiction, not regulatory changes. But that is a distinction without a difference. The statute Congress passed dictates the outcome here just as much as if the statute were newly passed: as a result of the FCC's *Reclassification Order*, mobile broadband service is now being regulated by the FCC as a common-carriage service. Accordingly, even under the FTC's interpretation of the Section 5 exemption, AT&T indisputably qualifies for an exemption that operates in the present tense. *Cf. United Corp.*, 110 F.2d at 476 (holding that once petitioner "became a packer within the meaning of the Packers and Stockyards Act and subject to the jurisdiction of the Secretary of Agriculture, the [FTC] had no further power of regulation over it").

B. The Retroactivity Doctrine, if Applied, Requires Reversal

1. Even if the presumption against retroactivity were triggered, it would not support jurisdiction. At most, the FTC is a plaintiff with a pending but unproven case. And, as this Court has squarely held, "expectation of success in . . . litigation is not the kind of settled expectation protected by *Landgraf*'s presumption against retroactivity." *Southwest Ctr.*, 314 F.3d at 1062 n.1.

Southwest Center is dispositive. In that case, this Court applied a change in FOIA to a plaintiff with a pending case, because it concluded that the filing of the suit did not constitute a position taken "in reliance upon existing law." *Id.* at 1062. The fact that this case involves *potential* financial relief, *see* FTC Br. 57-58, does not distinguish it. No relief has been awarded, no rights have vested, and no legal interest would be harmed by dismissal. Indeed, as a federal agency, the FTC has no legal *interests* — rather, it has only the limited *authority* "Congress specifically granted it." *American Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 965 (D.C. Cir. 1985).[14]

Nor are AT&T customers — who are not plaintiffs in this lawsuit — threatened with losing "the possibility of restitution," as the FTC erroneously claims (at 58). AT&T customers who believe they have suffered losses can pursue private remedies to the full extent permitted by law against the company, as many have.

2. The presumption against retroactivity does not apply here for the additional reason that the doctrine is not intended to protect the government. The FTC has no answer to the centuries of case law AT&T cites on this point. *See*

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[14] For this reason, *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), is inapposite. Like the plaintiff in *Southwest Center*, the FTC faces merely the dismissal of an unproven lawsuit, which does not constitute "a new disability, in respect to transactions or considerations already past." *Id.* at 948. And private parties fully retain their rights to pursue any lawful remedies.

AT&T Br. 57-58 (purpose of retroactivity doctrine is to protect private parties *from* the government). Instead, the FTC notes (at 58) that the Supreme Court has applied the presumption in extremely narrow circumstances to hold that "new monetary obligations" did not retroactively require payment from the government as defendant, and thus the government was protected by the presumption. *See White v. United States*, 191 U.S. 545 (1903) (increase in naval officer pay); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160 (1928) (recalculation of interest on income tax refund). No such circumstance with respect to the FTC is present here.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief compiles with the applicable type-volume limitations. This brief was prepared in Times New Roman 14-point font and complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), as well as any type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief contains 6,979 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Office Word 2013) used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that, on February 22, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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