No. 15-16585

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

AT&T MOBILITY LLC,
Defendant-Appellant.

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

ANSWERING BRIEF OF THE FEDERAL TRADE COMMISSION

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The FTC concurs with the statement of jurisdiction in AT&T's brief.

INTRODUCTION

AT&T promised millions of its smartphone customers "unlimited" mobile data usage each month. But when a customer exceeded an arbitrary data-use ceiling, AT&T "throttled" the speed of data transmission for the rest of the month, which degraded the quality of the service and made many common applications virtually unusable. Because AT&T did not adequately disclose the throttling program or its effects on service, the FTC sued it for unfair and deceptive practices in violation of the FTC Act.

AT&T moved to dismiss, claiming immunity from enforcement of the FTC Act under an exception in the Act for "common carriers subject to the Acts to regulate commerce" (which include the Communications Act). It acknowledged that mobile data service was not common carriage, but argued that because other services it provides are common carriage, it has the "status" of a common carrier and is therefore immune from FTC enforcement in all its lines of business.

While AT&T's motion was pending, the Federal Communications Commission issued an order prospectively reclassifying mobile data service as a common-carrier service beginning in June 2015. AT&T then argued that

even if the FTC has authority to enforce the FTC Act against non-common-carrier lines of business, the FCC's order stripped the FTC of power over a newly designated common-carrier service.

The district court rejected both arguments. It held that the language of the common carrier exception—in particular, the established meaning of the term "common carrier" when the exception was adopted in 1914—as well as the history and prior application of the exception all demonstrate that it applies to a company only to the extent that it is actually engaged in common-carrier activity. The exception thus does not shield AT&T's mobile data service. The court also held that the FCC's order does not defeat the FTC's case. Those decisions were correct and should be affirmed.

QUESTIONS PRESENTED

1. Whether the common carrier exception shields AT&T's non-common-carrier lines of business from FTC enforcement.

2. Whether FCC regulation of AT&T's mobile data service precludes FTC enforcement of the FTC Act against AT&T's violations of the Act.

3. Whether the FCC's prospective reclassification of mobile data as a common-carrier service retroactively immunizes AT&T from liability for FTC Act violations committed before the order's effective date.

STATUTES

Relevant statutes are reproduced in the Addendum.

STATEMENT OF THE CASE

A. AT&T's Throttling Of Data Service

In 2007, AT&T became the exclusive provider of mobile data service (Internet access via cell phones and other wireless devices) for the newly introduced iPhone. Compl. ¶10 (ER138). To attract customers, AT&T offered service plans that promised "unlimited" mobile data for a flat monthly fee. *Id.* It later offered the same plans for other smartphones. *Id.* Millions of customers signed up for unlimited data plans. *Id.* ¶12. In June 2010, AT&T stopped offering unlimited plans to new customers, but to minimize loss of existing customers to competitors, AT&T allowed them to keep their unlimited service plans. *Id.* ¶¶11-13. New customers had to choose among "tiered" plans that offered progressively higher quantities of data at correspondingly higher monthly rates. *Id.* ¶11. Millions of customers chose to keep their existing plans based on AT&T's assurance that they would continue to enjoy flat-rate unlimited mobile data. *Id.* ¶14 (ER139).

Instead of honoring that promise, however, AT&T developed a scheme to circumvent it. Beginning in October 2011, AT&T began to restrict data throughput speeds—a practice known as "data throttling"—when a customer's usage during a billing cycle exceeded an arbitrary limit set by

AT&T. *Id*. ¶¶15-18 (ER139). For example, some unlimited-data customers who used more than 3 gigabytes of data in a billing cycle would be throttled for the remainder of that cycle. *Id.* ¶17. AT&T slowed data transmission as much as 95%, degrading many everyday applications—such as web browsing, GPS navigation, and video streaming—so severely that some became practically unusable. *Id.* ¶20 (ER140).

AT&T did not throttle customers simply to protect its network. It throttled only subscribers with unlimited monthly service plans and not those with tiered plans, no matter how much data they used. *Id*. ¶29 (ER142). Nor did the restrictions address network congestion. Customers were throttled even when AT&T's network had capacity to carry their data. *Id*. ¶26 (ER142).[1]

AT&T made only token efforts to disclose the throttling program and its effect on service. *Id.* ¶¶31-37 (ER145-47). For example, when customers renewed unlimited mobile service contracts, AT&T did not tell them about the throttling program and its consequences. *Id.* ¶34 (ER145). AT&T told most customers only through short messages on their July or August 2011

[1] The Court should disregard AT&T's purported justifications for its throttling policy (Br. 8-12), which go beyond the allegations of the complaint and are not properly part of the record here. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (review limited to allegations in complaint).

bills; those who neared or passed the throttling threshold were text messaged or emailed. The company never adequately disclosed the degree of data speed reduction or its effect on the service. *Id.* ¶35 (ER145-46).

Since October 2011, AT&T has throttled more than 3.5 million unique customers more than 25 million times, for an average of twelve days per month each time. *Id*. ¶27 (ER142). Thousands of customers complained about the practice to government and private consumer agencies; more than 190,000 customers contacted AT&T directly about throttling. *Id*. ¶¶23-25 (ER140-42).

B. The FTC's Enforcement Lawsuit

The FTC sued AT&T in October 2014, charging that its throttling of customers to whom it had promised unlimited data was an unfair practice and that the inadequate notice made it deceptive. Compl. ¶¶45-49 (ER147-48). The agency seeks equitable relief, including monetary redress for consumers. ER148-49.

AT&T moved to dismiss. It did not dispute that the facts alleged in the complaint stated a viable claim of unfair and deceptive practices. Instead, AT&T argued that it is immune from FTC enforcement under an exception to Section 5 of the FTC Act for "common carriers subject to the Acts to regulate commerce." 15 U.S.C. §45(a)(2). The Communications Act is one of those

Acts. *See* 15 U.S.C. § 44. AT&T conceded that "mobile data services are not regulated as common-carrier services." Mot. to Dismiss (Dkt. No.29) at 9 (Jan. 5, 2015). AT&T nonetheless argued that because it also provides common-carrier services such as mobile *voice* service, it has common carrier "status" and is therefore immune from FTC enforcement in *all* of its lines of business.

In response, the FTC showed that the common carrier exception does not turn solely on the basis of common-carrier status. Rather, the exception applies only to common-carrier services. Because mobile data service was not common carriage under existing FCC rules, AT&T's practices in providing that service were subject to FTC Act enforcement.

C. The FCC's Reclassification Of Mobile Data Service

While AT&T's motion was pending, the FCC issued an order reclassifying broadband Internet access service, including mobile data service, as common carriage under the Communications Act. *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015) (*Reclassification Order*). The FCC made clear that the reclassification would apply "only on a prospective basis" starting on the Order's effective date of June 12, 2015. *Id.* at 5734 n.792; 80 Fed. Reg. 19738, 19783 (Apr. 13, 2015). AT&T and other companies promptly challenged the order, arguing that the FCC's action was

unlawful. *United States Telecom Ass'n v. FCC*, No. 15-1063 (D.C. Cir.) (argued Dec. 4, 2015).

At the same time, however, AT&T argued to the district court in *this* matter that even if the common carrier exception were activity-based, the FCC's reclassification of mobile data service as common carriage retroactively immunized AT&T from FTC enforcement for service provided on a non-common-carriage basis before the order's effective date. The FTC responded that the FCC's order applied only prospectively and did not shield AT&T from liability for its past misconduct.

D. The District Court's Order

The district court denied AT&T's motion to dismiss. ER1-23. It held that the term "common carrier" in Section 5 must be read as Congress understood it when it enacted the statute in 1914. Then, "an entity was deemed a common carrier and regulated as such under the common law only where it was actually engaged in common carrier activity." ER6. Thus, "the term 'common carrier' encompassed not only a 'status' but also an 'activity' component: an entity was deemed a common carrier when it had the status of common carrier *and* was actually engaging in common carriage services." ER8. The court found that reading supported by the statute's text and legislative history, as well as practical considerations—specifically, the

possibility that consumers would be unprotected if the FTC could not enforce Section 5 when companies engage in non-common-carrier activities. ER8-10.

The court noted that its interpretation was consistent with the only other judicial opinion to address the issue, which held that the common carrier exception is activity-based. *See FTC v. Verity Int'l, Ltd.*, 194 F. Supp. 2d 270, 274-77 (S.D.N.Y. 2002) (*Verity I*), *aff'd in part on other grounds*, 443 F.3d 48 (2d Cir. 2006) (*Verity II*). ER16-17. The court noted further that the FTC Act is a remedial statute that should be construed broadly. ER17-18. It also held that the FTC's consistently articulated position that "the common carrier exception should be viewed both in terms of status and activity, and not just status alone" was entitled to some deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). ER18-19. The district court found unpersuasive AT&T's arguments, based largely on post-1914 amendments or proposed amendments to the FTC Act, that the common carrier exception is purely status-based.

The district court also rejected the argument that the *Reclassification Order* retroactively immunizes AT&T's past misconduct from FTC enforcement. ER19-23. Reclassification changed the FTC's authority over future services, the court held, but it should not be given retroactive effect because doing so would affect the substantive rights of already-injured

consumers. ER20-21. Thus, the *Reclassification Order* does "not deprive the FTC of any jurisdiction over *past* alleged misconduct." ER23.

SUMMARY OF ARGUMENT

1. The FTC Act exception for "common carriers subject to the Acts to regulate commerce" shields a company from FTC enforcement only with respect to its common-carrier activities. AT&T was not acting as a common carrier when it committed the unfair and deceptive practices at issue here because at the time mobile data service was not common carriage. AT&T therefore cannot invoke the common carrier exception as a defense in this action.

The district court correctly held that common-carrier "status" does not by itself trigger the exception. Instead, the exception applies only to such an entity's common-carrier activities. That activity-based interpretation is firmly grounded in the commonly accepted meaning of the term "common carrier" at the time Congress wrote the FTC Act. It is further supported by the statute's plain language and legislative history. AT&T's preferred interpretation not only is inconsistent with those ordinary tools of statutory interpretation, but also would undermine the goals of the FTC Act.

The FTC Act neither defines "common carrier" nor explains what it means to be "subject to" the Acts to regulate commerce. Congress wrote the common carrier exception in 1914 and has not changed it since then. At the time, courts had established that treatment as a common carrier turned on the specific activity at issue and that only common-carrier activities were "subject to" the Interstate Commerce Act. The plain language of Section 5 confirms that understanding. As originally enacted, it excepted just two categories of businesses: "banks" and "common carriers subject to the Act to regulate commerce." The unqualified exception for banks contrasts with the conditional one for common carriers, demonstrating that the latter one does not apply across the board to all entities with common carrier status. The legislative history confirms that Congress intended the exception to apply only to common-carrier activities—the floor manager of the bill said so directly.

Decades of subsequent judicial decisions support an activity-based reading of the common carrier exception. Courts (including this one) have consistently held that a company can be a common carrier for some purposes but not others, depending on the particular practice at issue. *E.g.*, *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1005 (9th Cir. 2010). The Seventh Circuit decision on which AT&T relies, *FTC v. Miller*, 549 F.2d 452 (7th Cir.

1977), did not hold otherwise. *Miller* expressly did not reach the question presented here. It had no need to because, unlike AT&T, the company at issue provided *only* common-carrier service.

Other Section 5 exceptions do not support AT&T's status-based interpretation. Those provisions were added to the statute decades after enactment of the common carrier exception and thus have no interpretive bearing on Congress's intent in 1914. They would not prove AT&T's point even if they were relevant. For example, when Congress first added the Packers and Stockyards exception to the FTC Act in 1938, it expressly intended the exception to be activity-based—and it phrased that exception identically to the common carrier exception. Twenty years later, Congress amended the language of the Packers and Stockyards exception by adding more explicitly activity-based wording, but it did not intend to change the existing scope of the exception. Similarly, when Congress added a proviso to Section 6 of the FTC Act that refers to FTC authority over companies "incidentally" engaged in common-carrier business, Congress intended to allow the FTC to investigate otherwise exempt common-carrier activities. The proviso does not reflect Congress's understanding that the common carrier exception is status-based and is fully consistent with an activity-based reading.

Proposed amendments that Congress did *not* adopt provide even less support for AT&T's case. Failed legislative proposals shed no light on the meaning of an existing statute—and those on which AT&T relies are unquestionably inapposite. One was never even put before Congress, but was suggested by a hearing witness who acknowledged that the existing common carrier exception was activity-based and disavowed any intent to change its scope. The FTC's unsuccessful requests to modify or repeal the common carrier exception show only that the FTC sought new authority to protect consumers of common-carrier services in addition to its existing authority over non-common-carrier services.

AT&T's interpretation of the common carrier exception would thwart Congress's intent to empower the FTC to protect consumers across the economy. AT&T's approach would give it (or any other company that has or acquires the status of a common carrier) the ability to operate a pyramid scheme, sell phony products, or otherwise cheat consumers without fear of FTC enforcement. Such a result is plainly inconsistent with the FTC Act.

2. The FCC's authority to regulate mobile data service has no effect on this case. If AT&T's conduct violates both the FTC Act and FCC rules, then both agencies may concurrently enforce their respective laws. Courts established long ago that, where two statutes apply to the same conduct,

parties must comply with, and courts must give effect to, both wherever possible. It is immaterial that both the FTC and the FCC have pending enforcement proceedings challenging AT&T's throttling practices, since there is no genuine possibility that the two agencies will impose conflicting requirements.

3. The FCC's *Reclassification Order* does not strip the FTC of enforcement authority over AT&T's unlawful acts committed before that order took effect. The order states explicitly that it applies only prospectively. Yet AT&T's attempt to change the consequences of its past acts would give the order the very retroactive effect it disavows. AT&T's theory that the FCC's reclassification of mobile data service terminated the FTC's enforcement authority is unfounded. The argument has no basis in the language of Section 5, which "empowers" the FTC to enforce its requirements. It also ignores entirely Section 13(b) of the FTC Act, which authorizes the agency to sue to challenge any violation of the FTC Act.

ARGUMENT

I. THE COMMON CARRIER EXCEPTION DOES NOT SHIELD AT&T FROM LIABILITY FOR NON-COMMON-CARRIER ACTIVITY

The district court correctly rejected AT&T's claim that it is immune from liability under the FTC Act because it has the "status" of a common carrier, properly concluding instead that "the common carrier exception …

requires consideration of both status and activity, and not just status alone." ER10. The court's interpretation is supported by the statutory text and legislative history, as well as decades of judicial precedent. AT&T's contrary interpretation of the exception is unsupported by any of those interpretive tools and would undermine the purposes of the FTC Act by leaving consumers unprotected in major areas of the economy.

A. The Language And Legislative History Of Section 5 Show That The Common Carrier Exception Is Activity-based.

AT&T argues (Br. 25) that the common carrier exception "plainly" applies only to "entities" and not activities. Ordinary tools of statutory construction show otherwise.

1. The contemporaneous understanding of "common carrier" and the plain language of the statute show that Congress intended to enact an activity-based exception.

When it crafted the common carrier exception, Congress used the phrase "common carriers subject to the Acts to regulate commerce" to refer to entities only to the extent they provided common-carrier services that fell within the jurisdiction of the Interstate Commerce Commission. The common carrier exception was part of the original FTC Act and has not been changed since then. As written in 1914, Section 5 provided in relevant part:

> The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

FTC Act, ch. 311, § 5, 38 Stat. 717, 719 (1914). The phrase "Acts to regulate commerce" was defined separately in Section 4 to mean the Interstate Commerce Act (which at the time applied to common carriers by rail and pipeline as well as telecommunications companies). *Id.* § 4, 38 Stat. at 719; *see also* Mann-Elkins Act, ch. 309, § 7, 36 Stat, 539, 544-45 (1910) (amending Interstate Commerce Act).

Congress did not define "common carrier" or explain what it meant to be "subject to the Acts to regulate commerce." The contemporaneous meaning of that language therefore controls the interpretation of the exception. "Where Congress uses terms that have accumulated settled meaning under ... the common law," courts infer "that Congress means to incorporate the established meaning of those terms." *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2246 (2011) (citations and internal alterations omitted); *accord Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911) (words that have "a well-known meaning at common law or in the law of this country" are "presumed to have been used in that sense"); *Perrin v. United States*, 444 U.S. 37, 42 (1979).

By 1914, it was well established that the term "common carrier" referred to a firm only to the extent it performed common-carrier activities and that the same entity could be a common carrier for some purposes but not others. For example, at common law, common carriers were insurers for the goods they carried and could not shift the risk of loss by contract. *See Railroad Co. v. Lockwood*, 84 U.S. (17 Wall.) 357 (1873). But they were *not* subject to that restriction when not acting as common carriers. Thus, in *Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Bros. Construction Co.*, 228 U.S. 177 (1913), a railroad hired a construction company to build a new line and transported its equipment by rail. When the equipment was destroyed en route, the construction company argued that the railroad was required to indemnify the loss. The Supreme Court disagreed because the railroad was "acting outside the performance of its duty as a common carrier." *Id.* at 185. Likewise, in *Lockwood*, the Court explained that a company might be treated as a common carrier when engaged in its usual line of business, but not "when … [it] undertakes to carry something which it is not his business to carry." 84 U.S. at 377; *see also Northern Pacific Ry. Co. v. Adams*, 192 U.S. 440, 453 (1904) (railroad could shift liability for negligence to passengers

riding without charge because it was not acting as a common carrier as to such passengers).[2]

It was also established by 1914 that a carrier was "subject to" the Interstate Commerce Act only to the extent it engaged in common-carrier activity. For example, in *ICC v. Goodrich Transit Co.*, 224 U.S. 194 (1912), a rail and water common carrier also operated amusement parks that included "lunch-stands, merry-go-rounds, bowling alleys, bath houses, etc." *Id.* at 205. The Supreme Court held that although the ICC could impose accounting rules applicable to all of the company's operations in order to ensure proper operation of the common-carrier business, the agency could not "regulate the affairs of the corporation not within its jurisdiction." *Id.* at 211. In other words, non-common-carrier activities were generally not subject to ICC jurisdiction. The Court reiterated this point explicitly—and in language that parallels the FTC Act—in *Kansas City Southern Railway Co. v. United States*, 282 U.S. 760 (1931), explaining that "[t]here is no doubt that common carriers, subject to the Interstate Commerce Act, may have *activities* which

[2] *See also* 1 Robert Hutchinson *et al.*, *A Treatise on the Law of Carriers* §§ 59, 60 (3d ed. 1906) ("A common carrier is … not liable as such where … he undertakes to carry a class of goods which it is not his business to carry" or "to carry goods by unusual and exceptional methods or routes.").

lie outside the performance of their duties as common carriers and are *not subject to the provisions of the Act*." *Id.* at 764 (emphasis added).

AT&T largely ignores the consistent judicial interpretation of "common carrier" to mean a company only to the degree it engages in common-carrier activity. It does not address *Santa Fe* or *Kansas City* at all, even though the district court placed significant weight on those cases. It ignores *Lockwood*'s determination that companies are not treated as common carriers when they act outside that business. Instead, AT&T points to a statement in *Lockwood* that common carriers are defined "'by virtue of their occupation, not by virtue of the responsibilities under which they rest.'" Br. 28 (quoting *Lockwood*, 84 U.S. at 376). Read in context, *Lockwood* plainly used the term "occupation" (and, later in the same paragraph, the synonymous terms "employment" and "nature of his business") to refer to the specific business activity in which the railroad engaged. AT&T likewise fails to distinguish *Goodrich Transit*, which held that because non-carrier activities were not "subject to" the Interstate Commerce Act, the ICC could not "regulate the affairs of the corporation not within its jurisdiction." 224 U.S. at 211.

The plain language of the two exceptions in the original version of Section 5 confirms the contemporary understanding of the term "common

carrier." As originally enacted, the FTC Act used different language to describe the two business categories excepted from Section 5. Banks were excepted without any qualification.[3] Common carriers, by contrast, were excepted only when they were "subject to the Acts to regulate commerce." Congress's use of the phrase "subject to" for common carriers—but not for banks—shows that the bank exception was categorical but the common carrier exception was not.

AT&T argues that Congress "could easily have crafted" a clearer exception by stating that common carriers were excepted "insofar as" they were engaged in common carrier activities. Br. 28. But "the mere possibility of clearer phrasing cannot defeat the most natural reading of a statute." *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 132 S. Ct. 1670, 1682 (2012). There was no need here for AT&T's proposed phrasing because by its plain terms and ordinary usage "common carrier subject to" the Interstate Commerce Act referred to a company only to the extent it actually engaged in common-carrier activity.

[3] The FTC Act did not define "bank" until 1991. *See* Pub. L. No. 102-242, § 212(g), 105 Stat. 2236, 2302 (1991) (codified at 15 U.S.C. § 57a(f)(2)).

2. Legislative history confirms that the exception is activity-based.

Legislative history confirms that Congress intended the exception to be activity-based. During debate on the House bill that ultimately became the FTC Act, Representative Frederic Stevens, a manager of the bill, plainly envisioned an activity-based reading of the exception. He explained that "where a railroad company engages in work *outside of that of a public carrier* … such work ought to come within the scope of this commission." 51 Cong. Rec. 8996 (May 21, 1914) (emphasis added). He added that the powers of the Commission would apply to "every corporation engaged in commerce except common carriers, and, even as to them I do not know but that we include their operations *outside of public carriage regulated by the interstate-commerce acts*." *Id.* (emphasis added).

AT&T fails to address that legislative history and the district court's thorough analysis of it. AT&T merely asserts in a passing footnote (Br. 36 n.23) that statements of individual legislators have little significance. But because Representative Stevens was a floor manager of the bill, his statements are "entitled to substantial weight." *Arizona Power Auth. v. Morton*, 549 F.2d 1231, 1250 (9th Cir. 1977); *accord Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 705 (1995) (relying on floor manager statement). Indeed, the very treatise cited by AT&T explains that statements of the

"committeeman in charge of a bill … have the same interpretive weight as formal committee reports." 2A Norman J. Singer, *Statutes and Statutory Construction* § 48.14 (7th ed. 2014).

B. Decades Of Judicial Decisions Demonstrate That The Common Carrier Exception Is Activity-Based.

Consistent with the common law meaning of "common carrier," courts, including this one, have regularly construed the term to refer to an entity only to the degree it engages in common-carrier activities. For example, interpreting the Communications Act, this Court recognized that "[w]hether an entity in a given case is to be considered a common carrier or [not] turns on the particular practice under surveillance." *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1005 (9th Cir. 2010) (quoting *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994). Thus, a company may be a common carrier "in some instances but not in others, depending on the nature of the activity which is subject to scrutiny." *McDonnell Douglas Corp. v. Gen. Tel. Co.*, 594 F.2d 720, 724 n.3 (9th Cir. 1979).

Those decisions relied in turn on earlier decisions of the D.C. Circuit, which likewise established that whether an entity is a common carrier turns on "the actual activities he carries on." *National Ass'n of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (*NARUC*). Emphasizing that "one can be a common carrier with regard to some

activities but not others," the court held that the determination turns on examination of "particular activities." *Id*. at 608; *see id*. ("a common carrier is such by virtue of … the actual activities [it] carries on"). Thus, where a single entity "carr[ies] on many types of activities," it necessarily could "be a common carrier with regard to some activities but not others." *Id*. In short, the term "common carrier" is "used to indicate not an entity but rather an activity as to which an entity is a common carrier." *Computer & Commc'ns Indus. Assoc. v. FCC*, 693 F.2d 198, 209 n.59 (D.C. Cir. 1982).

Relying on those authorities, the district court in *Verity I*—the only prior court ever to dispositively address the issue in this case—rejected as "fundamentally erroneous" the claim that a company engaged in some common-carrier activity was "a common carrier for all purposes and thus entirely beyond the reach of the FTC." *Verity I*, 194 F. Supp. 2d at 274. Consistent with the decades of precedent, the court held instead that the common carrier exception does not cover non-common-carrier activities. *Id.* at 275. Although the Second Circuit resolved the case on the ground that the appellant was not a common carrier at all, it construed "common carrier" consistent with the D.C. Circuit decisions cited above. *Verity II*, 443 F.3d at 58 (citing *NARUC*, 533 F.2d at 608-09).

AT&T does not confront the consistent precedent holding that "common carrier" refers to specific activities and not merely status. Instead, it relies on *FTC v. Miller*, 549 F.2d 452 (7th Cir. 1977), for the proposition that "the case law" interprets the common carrier exception "as turning on status and not activity." Br. 39. *Miller* held no such thing. To begin with—and dispositively—the Seventh Circuit expressly declined to decide the issue presented here: "We need not decide whether … the non-carrier activities of a common carrier do not fall within the scope of the … exemption." 549 F.2d at 458.

Miller did not need to reach that question because the company involved "engaged *solely* in [common] carrier activities," 549 F.2d at 458 (emphasis added), and the activity in question—allegedly deceptive advertising relating to motor-carriage service—was part and parcel of the common-carrier service itself. *Id.* at 454.[4] The Seventh Circuit held only that the FTC could not regulate the practices of a common carrier providing a common-carrier service. *Id.*; *see also Massachusetts. Furniture & Piano Movers Ass'n, Inc.*, 102 F.T.C. 1176, 1213 n.7 (1983) (*Miller* "expressly

[4] Similarly, the FCC deems advertising of common-carrier telecommunications services part of the service itself, and deceptive advertising can violate the Communications Act. *See, e.g.*, *Locus Telecomm'ns, Inc.*, 30 FCC Rcd 11805, 11808-09 (2015).

declined to decide whether 'non-carrier activities of a common carrier' qualify for exemption from the FTC Act.").

AT&T mistakenly relies on *Miller*'s statement that the common carrier exception is "in terms of status as a common carrier subject to the Interstate Commerce Act, not activities subject to regulation under that Act." 549 F.2d at 455. In that statement, the court rejected the FTC's argument that it could regulate the common carrier's advertising because the ICC did not, whether or not the advertising was related to the common carriage activity. *Id.* at 457-58. Read in context, the court's statement means that where a company provides solely common-carrier services, a particular activity related to its common-carrier service does not fall outside the exception just because that activity is not regulated by the ICC. The court did not hold (as AT&T contends it did) that any entity with the "status" of a common carrier is exempt from all FTC regulation when it engages in non-common-carrier lines of business. Indeed, as noted above it expressly declined to reach that very issue.

The district court below correctly rejected *Miller* on the ground that its "basic reasoning … is not persuasive." ER15. A status-based interpretation of the common carrier exception is inconsistent with the overwhelming weight of authority holding that an entity is a common carrier only to the

extent it actually engages in common-carrier activity. *Miller* did not address the historical meaning of the term "common carrier," its usage in 1914, or the legislative history of the common carrier exception. *Miller*'s analysis of the Packers and Stockyards Act exception is wrong for the reasons explained below at pages 28-32.

AT&T gets no help from cases involving companies that lacked the status of entities subject to other Section 5 exceptions, which show only that common carrier "status" is necessary, but not sufficient, to invoke the exception. As the district court correctly recognized, an entity must both have "the status of common carrier *and* … actually engag[e] in common carriage services." ER8. For example, *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980), involved a publisher of flight schedules that was "not itself an air carrier." *Id.* at 923. Lacking the status of an air carrier, the publisher did not trigger the air carrier exception. The court did not address whether an *air carrier* is excepted from liability when it engages in non-air-carrier activity.

Similarly, *National Federation of the Blind v. FTC*, 303 F. Supp. 2d 707 (D. Md. 2004), *aff'd on other grounds*, 420 F.3d 331 (4th Cir. 2005), involved the FTC's determination that for-profit fundraisers hired by nonprofit organizations are subject to FTC jurisdiction even though the

nonprofit organizations themselves are not covered by the FTC Act. 303 F. Supp. 2d at 714. The district court held that without the status of a non-profit, the fundraisers were subject to FTC jurisdiction. The court did not address whether a *non-profit* that also engaged in for-profit activities would be exempt from FTC jurisdiction for those activities.[5]

C. Post-1914 Amendments To The FTC Act Have No Bearing On Congress's Original Intent And In Any Event Do Not Support AT&T's Argument.

Instead of focusing on the common carrier exception as it was drafted in 1914, AT&T argues that other provisions enacted decades later show the common carrier exception to be status-based. Its claims are meritless.

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[5] The FTC's brief in *FTC v. Saja*, No. 97-cv-0666 (D. Ariz. Filed Aug. 18, 1997) likewise shows that an entity without an excepted status cannot qualify for an exception based on its conduct. ER130-31. *FTC v. CompuCredit Corp*, 2008 WL 8762850 at *4 (N.D. Ga. Oct. 8, 2008), involved a non-bank that provided services for banks. It is similarly irrelevant. The FTC's reply brief in *Stonebridge Life Ins. Co. v. FTC*, No. 03-cv-739 (D.D.C. filed June 6, 2003), concerns the exceptions for "banks, savings and loan institutions, and federal credit unions," which as shown at page 19, *supra*, *are* status-based.

AT&T unpersuasively cites an FTC adjudicatory opinion that Section 5 "specifically lists *categories of businesses* whose acts and practices are not subject to the Commission's authority under the FTC Act." Br. 31-32 (quoting *LabMD, Inc.*, 2014 WL 253518 at *10 (2014). AT&T omits the FTC's immediately preceding explanation that "the FTC Act makes clear that, when Congress wants to exempt a particular category of entities *or activities* from the Commission's authority, it knows how to do so explicitly[.]" Thus, "categories of business" refers to both activities covered by the common carrier exception and entities such as banks covered by other exceptions.

The Supreme Court has emphasized that "the view of a later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996). Subsequent amendments always "form a hazardous basis" for inferring the intent of an earlier Congress, *United States v. Price*, 361 U.S. 304, 313 (1960), especially where—as here—many years elapsed between the original statute and the amendment. "When a later statute is offered as an expression of how the Congress interpreted a statute passed by another Congress a half century before, such interpretation has very little, if any, significance." *Bilski v. Kappos*, 561 U.S. 593, 645 (2010) (citation omitted); *see also Public Employees Ret. Sys. v. Betts*, 492 U.S. 158, 168 (1989) ("[T]he interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.").

For that reason, AT&T's reliance on the interpretive canon *noscitur a sociis* (Br. 29) is misplaced. That canon can be useful to interpret "an entire provision passed in proximity as part of the same Act." *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015). AT&T illogically tries to apply the *noscitur* precept to disparate statutory clauses enacted years apart.

But even if later amendments to the FTC Act were relevant to divining Congress's intent in 1914, the two provisions relied on by AT&T do not support its argument.

1. The Packers and Stockyards exception does not show that the common carrier exception is status-based.

AT&T relies most heavily on the "Packers and Stockyards" exception to Section 5. In its current form, as amended in 1958, the exception applies to "persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921." 45 U.S.C. § 45(a)(2). AT&T argues that the phrase "insofar as" creates an activity-based exception, in contrast to the phrase "subject to" in the common carrier exception, which, the argument goes, therefore must be status-based.

In fact, the statutory history shows just the opposite. To the degree the later-added exception has any interpretive bearing on the common carrier exception, AT&T's own reasoning demonstrates that common carrier exception is activity-based. Like the common carrier exception, the pre-1958 Packers and Stockyard exception applied to companies "subject to" the Packers and Stockyards Act of 1921. As we show below, the pre-1958 exception was activity-based and Congress did not intend the 1958 amendment to change it.

The 1921 Packers and Stockyards Act adopted an explicitly activity-based regime. That statute authorized the Secretary of Agriculture to regulate nearly all the practices of "packers" and "stockyards" and stripped the FTC of "power or jurisdiction *so far as* relating to any *matter* which by this Act is made subject to the jurisdiction of the Secretary." Packers and Stockyards Act, ch. 64, § 406(b), 42 Stat. 159, 169 (1921) (emphasis added). In 1938, Congress passed conforming amendments to the FTC Act, adding a new Section 5 exception for "persons, partnerships or corporations *subject to* the Packers and Stockyards Act, 1921." Wheeler-Lea Act, ch. 49, § 3, 52 Stat. 111, 111-12 (1938) (emphasis added).

Congress clearly intended the phrase "subject to" to replicate the activity-based formulation "*so far as* relating to any *matter*" from the 1921 Act. The House report explained that the amendment "*conforms to the existing practice and assures no change* in view of the amendments to the Federal Trade Act. The Federal Trade Commission *would retain its existing jurisdiction* under the provisions of the Stock Yard Act." H.R. Rep. No. 75-1613, at 3-4 (1937) (emphasis added). The FTC could only have had jurisdiction over a packer or stockyard in the first place if Congress had implemented an activity-based test.

Consistent with that history, the Commission held in *Food Fair Stores, Inc.*, 54 F.T.C. 392 (1957), that the phrase "subject to" in the Packers and Stockyards exception did not "remov[e] *all activities* of packers from the jurisdiction of the [FTC], as has been done … in the case of banks." *Id.* at 400 (emphasis added). In that case, a supermarket chain also owned a meatpacking plant and therefore qualified as a "packer" excepted from FTC enforcement for activities under the jurisdiction of the Agriculture Department. *Id*. at 399. The Commission held that packers were not categorically exempt from Section 5, but that Congress "denied jurisdiction only as to any *matter* made subject to the jurisdiction of the Secretary by the Packers and Stockyards Act." *Id*. at 400-01. The scope of the Secretary of Agriculture's jurisdiction over activities subject to the statute, not the store's status as a packer, determined whether the exception applied.[6] Because the matters at issue were within the Secretary of Agriculture's jurisdiction, however, the supermarket was not subject to FTC enforcement. *Id*. at 408.

[6] AT&T cites a statement in a House report that proposed to amend the Packers and Stockyards Act "so that jurisdiction is predicated not upon the mere fact that a person or firm may fall within the definition of a packer but upon the type of activity carried on by such person." H.R. Rep. No. 85-1048, at 6 (1957). But Congress did not enact this proposed amendment and it is irrelevant to the interpretation of the exception for the reasons discussed at pages 35-36, *infra*.

The *Food Fair* decision led Congress to amend both the Packers and Stockyards Act and Section 5 of the FTC Act to its current form, but Congress did not intend the change in language to change the meaning of the Packer and Stockyards exception. Following *Food Fair*, other supermarket chains began to buy packinghouse operations so that they would fall within the jurisdiction of the Agriculture Department and thereby evade FTC enforcement. *See* 104 Cong. Rec. 17,179 (Aug. 12, 1958) (statement of Rep. Poage); H.R. Rep. No. 85-1507, at 6 (1958). Congress solved the problem by splitting functional responsibilities: the Secretary would have jurisdiction over *production* of livestock, meat, and related food, and the FTC over *retail sales* of these products. *See* Pub. L. No. 85-909, § 1, 72 Stat. 1749 (1958). Congress also added the "insofar as" clause to the Packers and Stockyards exception in conjunction with these changes. *Id.* § 3, 72 Stat. at 1750. The intent of the changes was only to "enlarge the jurisdiction of the [FTC] to the extent that the jurisdiction of the Secretary of Agriculture is reduced" and to "reduce the jurisdiction of the [FTC] to the extent that the jurisdiction of the Secretary of Agriculture is enlarged." H.R. Rep. No. 85-1507, at 8.

The provenance of the "insofar as" clause thus defeats AT&T's claim that the clause changed the exception from status-based (under the "subject to" formulation) to activity-based (under the new formulation). Because the

original exception was always activity-based, the amendment could not have changed it to activity-based.[7] The "insofar as" clause merely clarified the respective agencies' jurisdiction and made explicit what Congress had already intended years earlier.

The Fourth Circuit's decision in *Crosse & Blackwell Co. v. FTC*, 262 F.2d 600 (4th Cir. 1959), confirms that the 1958 amendment did not change the nature of the exception. The court held that even before the amendment, it was "not reasonable to suppose that the Congress intended the limitations upon the jurisdiction of the [FTC] to be more extensive than the regulatory powers conferred on the Secretary of Agriculture." *Id*. at 605. Rather, the pre-1958 statute must be read "harmonious[ly]" to allow the FTC to exercise jurisdiction over activities not subject to the Packers and Stockyards Act. *Id.* The 1958 amendment simply removed "[w]hatever doubt there may have been on that score." *Id.*

Congress often clarifies statutes in this manner. For example, *O'Gilvie* involved the Internal Revenue Code's exclusion of personal injury damages from gross income. Congress amended the Code to provide that the exclusion would not apply to punitive damages for nonphysical injury. 519

[7] A former FTC Chairman's 1977 statement referring to the 1958 amendment (Br. 38) is a feeble basis for AT&T's characterization of the exception and sheds no light at all on the common carrier exception.

U.S. at 81. Similarly to AT&T here, the taxpayers argued that the amendment showed that Congress believed that the pre-amendment exclusion covered *all* punitive damages. *Id.* at 89-90. The Court rejected the argument, explaining that Congress may simply have "wanted to clarify the matter in respect to nonphysical injuries, but … leave the law where it found it in respect to physical injuries." *Id.* at 81. Likewise here, Congress simply clarified the Packers and Stockyards exception even as it left intact the existing activity-based regime.

2. The 1973 amendment to Section 6 has no bearing on the meaning of the common carrier exception.

Section 6 of the FTC Act, part of the original FTC Act, grants the FTC broad investigatory powers, and like Section 5, excepts banks and "common carriers subject to the Act to regulate commerce." 15 U.S.C. § 46(a), (b). In 1973, Congress added a proviso to Section 6 specifying that the FTC may investigate and compel information from any company when "necessary to the investigation of any corporation, group of corporations, or industry which is not engaged or is engaged only incidentally in banking or in business as a common carrier subject to the Act to regulate commerce." Pub. L. No. 93-153, § 408(e), 87 Stat 576, 592 (1973). AT&T asserts that Congress's use of the word "incidental" shows that it read the common carrier exception as

status-based. Otherwise, AT&T argues, it "would not be necessary" to refer to incidental common-carrier activities. Br. 27. Not so.

As shown above, Congress's actions in 1973 are irrelevant to the interpretation of a statute enacted six decades earlier. *See, e.g.*, *O'Gilvie*, 519 U.S. at 90. The time lag is reason enough to reject AT&T's reliance on the proviso.

AT&T's reading of the Section 6 proviso is also wrong. The proviso and its use of "incidental" are consistent with an activity-based reading of the common carrier exception. Congress adopted the proviso after the FTC encountered "significant delays" in an investigation of the petroleum industry. Pub. L. No. 93-153, § 408(a)(2), 87 Stat. at 592; *see also* 119 Cong. Rec. 22,979, 22,979-80 (Jul. 10, 1973). The inquiry had been hampered in part because the agency could not obtain information about oil pipelines, which are common carriers. Congress thus sought to narrow the effect of the common carrier exception by "clarify[ing] the Commission's authority to compel production of data from pipeline companies, notwithstanding their common carrier status." 119 Cong. Rec. 36,610 (Nov. 12, 1973).

Thus, neither the problem Congress intended to solve nor the solution it chose had to do with a status-based reading of the common carrier exception. The proviso clarifies that the FTC has authority to obtain

information from or about any person—even a bank or common carrier—when necessary in the course of an underlying investigation into a company, group of companies, or an industry, so long as banking or common carriage is only incidental to the principal subject of the investigation. Nothing in the text of the amendment or its legislative history suggests that Congress thought the FTC lacked authority to investigate the non-common-carrier activities of an oil company that owned a pipeline and thus had common-carrier status.

D. Proposed Amendments To The FTC Act That Congress Did Not Adopt Are Irrelevant To The Meaning Of The Common Carrier Exception.

AT&T also argues that Congress's inaction on various proposed amendments to the FTC Act since 1914 supports a status-based interpretation of the common carrier exception. Br. 33-34, 38-39. The argument runs headlong into the Supreme Court's admonition that "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *United States v. Craft*, 535 U.S. 274, 287 (2002) (citation and internal quotation marks omitted).

For example, in *United States v. Wise*, 370 U.S. 405 (1962), the defendant argued that the definition of "person" in the Sherman Act, 15 U.S.C. § 1, did not include corporate officers. He relied on a bill proposed

ten years later that would have designated corporate officers as "persons" and an accompanying committee report stating that existing law did not subject officers to penalties. The Court held that the failure to adopt this amendment had "no persuasive significance" because "[l]ogically, several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment in the light of the interpretation placed upon the existing law by [the amendment's proponents], including the inference that the existing legislation already incorporated the offered change." 370 U.S. at 411.

The authorities AT&T cites indicate only that rejection of a legislative proposal during the *original enactment* of a bill may indicate that Congress did not intend the bill to include the rejected provisions.[8] Even then, AT&T's own preferred treatise notes that "[c]ourts should be cautious" about using rejection of an amendment to interpret legislative intent, because "rejection may signal … that a bill already includes those provisions." 2A Singer, *supra*, at § 48.18.

This Court has also rejected the idea that failed amendments can be used to interpret *existing* statutes. The Court "distinguish[es] unsuccessful attempts to amend proposed legislation during the process of enactment from

[8] *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 100 (1993); *Microsoft Corp. v. Commissioner*, 311 F.3d 1178, 1186 (9th Cir. 2002); *Fiedler v. Clark*, 714 F.2d 77, 79 (9th Cir. 1983).

unsuccessful attempts to amend a measure passed by a previous legislative session." *Tahoe Reg'l Planning Agency v. McKay*, 769 F.2d 534, 538 (9th Cir. 1985) (citations omitted). "[A]ction on a proposed amendment is not a significant aid to interpretation of an act that was passed years before." *Id.*[9]

In any case, the proposed amendments that AT&T cites do not support its position, but reinforce that Congress never intended Section 5 to exclude non-common-carrier activity from the FTC's jurisdiction.

1. An unadopted proposal by a hearing witness shows nothing about Congress's intent.

AT&T relies first on an amendment proposed by a witness at a 1937 House hearing that would have added the Communications Act to the definition of "Acts to regulate commerce" and specified that common carriers under the Communications Act were exempt from FTC regulation "only in respect of their common-carrier activities." *To Amend the Federal Trade Commission Act: Hearing on H.R. 3143 Before the H. Comm. on Interstate and Foreign Commerce*, 75th Cong., at 23 (1937) (1937 Hr'g Tr.).[10] AT&T

[9] AT&T wrongly relies on *In re Perroton*, 958 F.2d 889 (9th Cir. 2002), in which the same Congress adopted an amendment to a statute and then deleted it later the same year. *Id.* at 894. No such unusual circumstances are present here.

[10] AT&T wrongly asserts that this proposal originated from the FTC. BR. 35 n.22. In fact, the FTC opposed it as unnecessary. 1937 Hr'g Tr. at 61-62.

claims that Congress "rejected" the proposal and "broadened" the exception, thereby showing it to be status-based. Br. 34, 36.

The idea that Congress's action in 1937 resolves the meaning of a statute enacted 23 years earlier is wrong as a legal matter, as discussed above. It is factually incorrect too. To begin with, Congress did not "reject" the "proposal" AT&T cites. It was never formally introduced by a member of Congress nor voted on by any committee in either House, but was merely suggested by a witness at a committee hearing and then barely noted.

Furthermore, contrary to AT&T's bald assertion (Br. 35-36), Congress was not "actively considering" the scope of the common carrier exception in 1937, and it did not "broaden" the exception. Congress was grappling only with the effect of post-1914 legislative changes. Specifically, when the FTC Act was enacted, telecommunications companies were regulated as common carriers by the ICC under the Interstate Commerce Act. The Communications Act of 1934 transferred jurisdiction over such carriers to the FCC, casting doubt whether the common carrier exception in the FTC Act continued to apply to them. The proposal cited by AT&T would have amended the definition of "Acts to regulate commerce" in Section 4 of the FTC Act to include the Communications Act and clarify that telecommunications carriers would continue to be treated the same.

Indeed, the witness disavowed any intent to change the scope of the existing common carrier exception. He testified instead that the proposal would "carry forward the policy that, so far as this point is concerned, has always been in the old Trade Commission Act." 1937 Hr'g Tr. at 27. In particular, he acknowledged that the existing exception did not apply to non-common-carrier activities, such as a telephone company's manufacturing subsidiary. *Id*.

Congress's response to the proposal shows that it, like the witness, understood that the common carrier exception already applied only to common-carrier activities. No member of the House committee introduced the proposal as an amendment, and the committee never voted on it, finding "no pressing need" to amend Section 4. H.R. Rep. No. 75-1613, at 1. The Senate, however, adopted a different version of the amendment, which simply added the Communications Act to the definition of "Acts to regulate commerce." 81 Cong. Rec. 2806-07 (Mar. 29, 1937). The Conference Report and the final bill included the Senate amendment. *See* H.R. Rep. No. 75-1774, at 9 (1938). Both the proposal cited by AT&T and the amendment that was ultimately adopted by Congress simply clarified that telecommunications carriers remained exempt from Section 5 to the same

extent that they were before 1934—*i.e.*, with respect to common-carrier activities only.

2. FTC proposals to amend or repeal the common carrier exception do not show it to be status-based.

In 1977, the FTC asked Congress to amend all the Section 5 exceptions to give the agency enforcement authority over any activity "not subject to regulation by another federal agency." *FTC Amendments of 1977 and Oversight: Hearings Before the Subcomm. on Consumer Prot. & Fin. of the H. Comm. on Interstate and Foreign Commerce*, 95th Cong., at 53-55 (1977) (1977 Hr'g Tr.). In 2003, the FTC recommended that Congress repeal the exception for communications common carriers. *FTC Reauthorization: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. on Commerce, Sci. & Transp.*, 107th Cong., at 27 (2002) (2002 Hr'g Tr.). Congress did neither. Relying on *FDA v. Brown & Williamson Tobacco Corp*, 529 U.S. 120, 156 (2000), AT&T claims that Congress's inaction means it has "effectively ratified" a status-based understanding of the common carrier exception. Br. 39. The argument is legally and factually wrong.

Brown & Williamson does not support AT&T's assertion that congressional inaction sheds light on the meaning of an existing statute. There, after consistently taking the position that it lacked authority to regulate

tobacco, the Food and Drug Administration unsuccessfully asked Congress to grant it that authority. The agency then declared that it already had the authority after all. In rejecting the FDA's position, the Supreme Court "d[id] not rely on Congress' failure to act—its consideration and rejection of bills that would have given the FDA" the authority it requested. *Id.* at 155. Instead, the Court focused on Congress's *enactment* of several tobacco-related statutes in reliance on the FDA's own longstanding prior position that it lacked jurisdiction over tobacco. *Id.* at 155-56.

There are no similar circumstances here. The FTC has never adopted a status-based interpretation of the common carrier exception that Congress could have ratified, nor has Congress enacted legislation in reliance on any status-based interpretation held by the FTC. Quite to the contrary, the FTC for years has interpreted the exception as activity-based. Three decades ago, the Commission explained in *Massachusetts Furniture* that "were an ICC-regulated common carrier to engage in activities unrelated to interstate transportation, such as real estate or manufacturing, … those other activities would not be exempt from FTC jurisdiction merely because they were undertaken by a common carrier subject to the ICA." 102 F.T.C. at 1213.

The FTC has also successfully argued for an activity-based reading of the statute in court. *See Verity I*, 194 F. Supp. 2d at 274-75. And contrary to

AT&T's assertions (Br. 3, 39), the FTC has successfully enforced Section 5 against other telecommunications carriers that have engaged in unlawful practices with respect to non-common-carrier activities. Just last year the FTC entered into a consent decree with cell phone company TracFone Wireless to address practices similar to those at issue in this case.[11]

The FTC has also repeatedly endorsed an activity-based reading of the statute in other contexts. For example, in 2002 Commissioner Sheila Anthony told a Senate subcommittee that "[t]he Commission firmly believes that only the common carrier activities of such companies are exempted." 2002 Hr'g Tr. at 28. In 2006, Commissioner William Kovacic testified that "[t]he Commission has jurisdiction under the FTC Act over broadband Internet access services offered on a non-common carrier basis."[12] A 2007 FTC staff report stated that "[a]n entity is a common carrier … only with respect to services it provides on a common carrier basis" and that "because most broadband Internet access services are not provided on a common

[11] *FTC v. TracFone Wireless, Inc.*, No. 3:15-cv-392 (N.D. Cal.) (Dkt. No. 17 Feb. 20, 2015).

[12] *FTC Jurisdiction Over Broadband Internet Access Services*, Prepared Statement of the Federal Trade Commission to the S. Comm. on the Judiciary 2-3 (June 14, 2006), *available at* https://www.ftc.gov/public-statements/2006/06/prepared-statement-ftc-jurisdiction-over-broadband-internet-access.

carrier basis, they are … subject to the FTC's general competition and consumer protection authority."[13] More recently, the FCC and FTC have entered into a memorandum of understanding concerning the scope of their respective consumer protection activities and expressing the agencies' shared view that "the scope of the common carrier exemption in the FTC Act does not preclude the FTC from addressing non-common carrier activity engaged in by common carriers."[14]

The legislative proposals on which AT&T relies (Br. 38-39) do not show that the FTC read the common carrier exception as status-based. As noted above, the 1977 proposal would have given the agency jurisdiction over *any* activity not subject to actual regulation by another federal agency—including activities engaged in by companies like the one in *Miller* that provided only common-carrier services. And although AT&T intimates that the proposal concerned only the common carrier exception, it would in fact

[13] *Broadband Connectivity Competition Policy*, FTC Staff Report, at 38 (June 2007), *available at* https://www.ftc.gov/reports/broadband-connectivity-competition-policy-staff-report.

[14] *FCC-FTC Consumer Protection Memorandum of Understanding*, at 2 (Nov. 16, 2015), *available at* https://www.ftc.gov/policy/cooperation-agreements/memorandum-understanding-consumer-protection-between-federal-trade.

have covered all the exceptions to Section 5, including the categorical bank exception. 1977 Hr'g Tr., at 53-55.

The FTC's proposal to repeal the exception for communications common carriers likewise does not suggest that the FTC read the exception as status-based. Commissioner Anthony testified clearly to the contrary. 2002 Hr'g Tr. at 28. As she explained, an activity-based exception can hinder FTC enforcement by creating disputes (such as the subject of this appeal) that bog down the process. The exception also restricts the agency's ability to engage in consumer protection and antitrust enforcement involving common-carrier services. 2002 Hr'g Tr. at 22-23.

Notably, while the FTC's position regarding the proper interpretation of the common carrier exception has been consistent, AT&T's position has not. As recently as 2010, AT&T itself took the position that the common carrier exception is activity-based. In comments filed with the FCC, AT&T urged that agency not to reclassify broadband Internet service as a common-carrier service because doing so "could *divest the FTC of any jurisdiction* over broadband Internet access providers by presumably placing them squarely within the 'common carrier' exception to the FTC's section 5 jurisdiction." AT&T Comments, *Framework for Broadband Internet Service*, GN Docket No. 10-127 (FCC filed July 15, 2010) at 13 (emphasis added);

accord id. at 20, 30, 35.[15] It also acknowledged that the FTC "has and regularly exercises its enforcement authority" with respect to Internet services, *id.* at 29, and expressed concern that reclassification would harm consumers because the FTC could no longer protect them. Since many broadband service providers were also (like AT&T) common carriers, AT&T's position necessarily presumes that the common carrier exception is activity-based.

E. AT&T's Interpretation Of The Common Carrier Exception Would Undermine The Purposes Of The FTC Act.

When courts interpret statutes "in which a general statement of policy is qualified by an exception," they "read the exception narrowly in order to preserve the primary operation of the provision." *Commissioner v. Clark*, 489 U.S. 726, 739 (1989). That is why the Court considers the "practical effects" of a proposed statutory interpretation. *United States v. Byun*, 539 F.3d 982, 991 (9th Cir. 2008). AT&T's reading of the common carrier exception could severely undermine FTC enforcement of the FTC Act.

In crafting the FTC Act, Congress plainly intended to give the FTC a "broad delegation of authority" to address the "many and variable practices that prevail in commerce" throughout the economy. *Atlantic Ref. Co. v. FTC*,

[15] Available at http://apps.fcc.gov/ecfs/document/view?id=7020544677.

381 U.S. 357, 367 (1965) (citation omitted). But AT&T's status-based interpretation of Section 5 would remove from the coverage of the statute a large range of potentially harmful activities that no other agency could address. The Court should not interpret the exception to "produce absurd results … if alternative interpretations consistent with the legislative purpose are available." *Joffe v. Google, Inc.*, 746 F.3d 920, 936 (9th Cir. 2013).

This case demonstrates the gap that would result from AT&T's interpretation. AT&T engages in a wide range of activities, only some of them common carriage. In addition to mobile voice and data service, it sells consumer goods and services such as smartphones, tablet computers, digital video recorders, GPS devices, fitness trackers, cellphone accessories, home automation, and security systems.[16] Congress intended the consumers of such services to be protected by the FTC. AT&T's reading of the common carrier exception, however, would leave them unprotected—and no other agency could fill the breach. The FCC cannot address many of AT&T's non-carrier activities, for its authority is generally limited to "interstate and foreign communications by wire or radio." 47 U.S.C. § 152. The resulting gap could

[16] *See, e.g.*, https://www.att.com/shop/wireless/devices/internet devices.html; https://www.att.com/shop/wireless/accessories.html; https://my-digitallife.att.com/learn/explore-home-automation; https://my-digitallife.att.com/learn/explore-home-automation.

seriously undermine the purposes of the FTC Act. Indeed, companies could immunize themselves from FTC enforcement simply by providing some common-carrier service.

The regulatory gap that would be created by AT&T's status-based reading of the common carrier exception is widened in light of the FCC's *Reclassification Order*, which reclassifies as common carriage not only mobile data service, but *all* forms of broadband Internet access. If that order is upheld, a broad range of companies that do not provide traditional common-carrier service will now be able to claim common carrier status. They include most cable television companies and emerging broadband providers such as Google. Such companies may collect vast amounts of consumer data with the corresponding possibility of harming privacy interests; some such companies have been the subject of prior FTC enforcement. Their market positions can also pose threats to fair competition. Yet if the Court accepts AT&T's reading of the FTC Act, consumers will be left unprotected by the FTC Act in all these companies' lines of business. The agency would be powerless to protect the public against newly emerging harms that reach into virtually every area of commerce.

The resulting gaps in enforcement would not be limited to telecommunications. Pipelines are also common carriers. A status-based

interpretation of the common carrier exception would render the FTC powerless to enforce the FTC Act against most petroleum companies. The FTC has a track record of policing deceptive, unfair, or anticompetitive practices in that market. *See, e.g.*, *FTC v. Texaco*, 393 U.S. 223 (1968).

AT&T attempts to dismiss these concerns as "hypothetical and farfetched." Br. 47. But in today's economy, it is beyond dispute that many companies offer both common-carrier and non-common-carrier services. Deceptive, unfair, or anticompetitive acts or practices in connection with such services can significantly harm consumers. AT&T's interpretation of Section 5 would leave consumers unprotected in many important areas, undermining Congress's core purpose in creating the FTC. AT&T itself recognized as much when it attempted to convince the FCC not to reclassify broadband Internet access service. *See* pp.44-45, *supra*.

Alternatively, AT&T argues that the problem can be addressed by reading a "*de minimis*" exception into the statute, which would prevent companies from purchasing immunity by acquiring small stakes in common carriers. Br. 48-49 (citing *Ober v. Whitman*, 243 F.3d 1190 (9th Cir. 2001)). Assuming such a reading could be consistent with the statute, it would not solve the problem. The common-carrier services of AT&T and similar companies are not *de minimis*, so AT&T's proposed solution would not work

in such cases. Nor would it prevent companies that do not currently provide common-carrier services from beginning to provide them and thereby insulating *all* of their activities from the reach of the FTC Act.

II. AT&T'S CLAIM THAT THE FTC MAY NOT ENFORCE THE FTC ACT WHILE THE FCC ENFORCES ITS OWN REGULATIONS IS MERITLESS

As a fallback position, AT&T argues that because mobile data services are regulated by the FCC—albeit not as common carriage—the FTC may not exercise its statutory. Br. 43-45. AT&T first contends that "[i]f the FTC's case were allowed to proceed against AT&T, AT&T would be subject to dueling federal agency regulation and potentially inconsistent regulatory commands." *Id.* 44. Alternatively, it asserts that FCC regulations in effect from November 2011 to March 2014 transformed mobile data service into a common-carrier activity during that time period. *Id*. 46-47. Both arguments fail.

A. The FCC's Concurrent Jurisdiction Does Not Restrict The FTC's Authority.

The FCC is investigating whether AT&T's throttling program complied with an FCC rule requiring AT&T to disclose its terms of service. Seven months after the FTC filed its complaint, the FCC proposed to fine the company for violating that rule. *See AT&T Mobility, LLC*, 30 FCC Rcd 6613 (2015). AT&T now contends that it would "contravene[] Congress's intent to

give the federal government two chances to make the same determination about the same conduct." Br. 44, 45.

That claim is flatly wrong. AT&T fails to cite a single case (and we are aware of none) in which a court dismissed a government enforcement lawsuit because another agency was enforcing its own compatible statute against the same conduct. The lack of support for AT&T's argument is hardly surprising, for it is firmly established that, in this "age of overlapping and concurring regulatory jurisdiction," *Thompson Med. Co. v. FTC*, 791 F.2d 189, 192–93 (D.C. Cir. 1986), multiple agencies often have concurrent authority to enforce their own statutes against the same conduct. Such "overlapping agency jurisdiction under different statutory mandates," *FTC v. Texaco, Inc.*, 555 F.2d 862, 881 (D.C. Cir. 1977), is particularly common for the FTC, to which Congress granted broad authority over unfair or deceptive conduct "in or affecting commerce" across most sectors of the national economy. 15 U.S.C. § 45(a). *See FTC v. Cement Inst.*, 333 U.S. 683, 693-94 (1948) (upholding concurrent proceedings by the FTC and the Department of Justice over the same conduct by the same parties).

Concurrent proceedings by the FTC and the FCC thus pose no bar here. As the Supreme Court determined long ago, where two statutes apply to "the same subject, effect should be given to both if possible." *Posadas v. National*

City Bank of N.Y., 296 U.S. 497, 503 (1936); *accord J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001) ("when two statutes are capable of co-existence, it is the duty of the courts … to regard each as effective"). The FTC thus "may proceed against unfair [or deceptive] practices even if those practices violate some other statute that the FTC lacks authority to administer." *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009) (*en banc*). Multi-agency proceedings involving the FTC are commonplace. *See FTC v. Pantron I Corp.*, 33 F.3d 1088, 1091 (9th Cir. 1994) (FTC, FDA, and Postal Service); *United States v. Lane Labs-USA Inc.*, 427 F.3d 219, 221-22 (3d Cir. 2005) (FTC and FDA); *FTC v. Trudeau*, 662 F.3d 947 (7th Cir. 2011) (FTC civil contempt and DOJ criminal contempt); *Thompson*, 791 F.2d 189, 192-93 (FTC and FDA); *Texaco*, 555 F.2d 862 (FTC and Federal Power Commission).

That consistent line of authority renders irrelevant AT&T's claim that the FCC is an "expert agency Congress designed to regulate telecommunications providers" and is the "principal regulator" of certain of AT&T's services and activities. Br. 12, 21. The same might be said of the FDA's role in regulating over-the-counter drugs, yet the D.C. Circuit has held that the FTC can police aspects of that market as well. *Thompson*, 791 F.2d at 192-93. Any overlap between FTC and FCC authority is governed by the

principles set forth above, except to the degree that Congress directed otherwise in the common carrier exception. Where that exception does not apply, FCC "expertise" does not restrict the FTC's authority. AT&T recognized as much itself in its comments to the FCC. *See* pp.44-45, *supra*.

Indeed, the FTC routinely exercises its ordinary authority to enforce the FTC Act against companies over which the FCC also has authority. The FTC reviews and has authority to challenge mergers and acquisitions involving companies whose activities are pervasively regulated by the FCC. *E.g.*, *Time Warner, Inc.*, 123 F.T.C. 171 (1997); *America Online, Inc. & Time Warner, Inc.*, 131 F.T.C. 829 (2001). It has also enforced the FTC Act against other mobile phone providers. *See* p.42 & n.11, *supra*.

B. The FTC And FCC Enforcement Matters Are Consistent With One Another.

AT&T implausibly suggests that there is "a real possibility" that this case and the FCC's pending enforcement proceeding could result in "inconsistent regulatory commands." Br. 44. That could happen only if the FCC were to *require* AT&T to engage in conduct that the FTC *prohibits* (or vice versa). There is no such genuine possibility here. To the contrary, the FTC's complaint in this case is closely aligned with the FCC proceeding. Both agencies are investigating whether AT&T informed its subscribers about its data throttling practices. AT&T would violate the FTC Act if it

"fail[ed] to perform promised services," *Pantron I*, 33 F.3d at 1096 n.22, and it would violate the FCC's rule if it failed to "publicly disclose accurate information regarding the … performance" of its wireless data service. 47 C.F.R. § 8.3. Moreover, as noted at p.43 *supra*, the agencies have agreed to cooperate where their jurisdictions overlap.

Where, as here, the agencies' regulatory regimes are compatible, it makes no difference if their standards are not identical so that conduct allowable under one statute might be prohibited under another. The Supreme Court has determined that there is no bar to FTC enforcement action where the FTC Act forbids conduct that another applicable statute permits. That is why conduct found by one agency "to be consonant with the public interest could still be viewed by the FTC as an unfair method of competition." *Texaco*, 555 F.2d at 881; *accord United States v. Radio Corp. of Am.*, 358 U.S. 334, 346 (1959); *Cement Inst.*, 333 U.S. at 694. For the same reason, the D.C. Circuit upheld an FTC rule prohibiting credit practices that were "authorized by [other bodies of] law," where "creditors will be able to comply with both [the other] law and this rule." *American Fin. Servs. v. FTC*, 767 F.2d 957, 990 (D.C. Cir. 1985).

AT&T's claim of conflict is especially misplaced here, because the FCC made clear when it adopted the rule it is enforcing against AT&T that

the rule "was not intended to expand or contract broadband providers' rights or obligations with respect to other laws," and that "open Internet protections can and must coexist with … other legal frameworks." *Preserving the Open Internet*, 25 FCC Rcd 17905, 17962-63 (2010) (subsequent history omitted).

C. AT&T's Claim That Mobile Data Service Is Common Carriage Under 2011 FCC Rules Is Both Waived And Wrong.

AT&T argues that FCC rules in effect from November 2011 until March 2014 (when they were struck down by the D.C. Circuit) turned mobile data service into a common-carrier service. As a result, AT&T claims, even if the common carrier exception is activity-based, wireless data service was, as a *de facto* matter, a common-carrier activity during that time period. Br. 46-47. This argument is both waived and wrong.

In its written pleadings before the district court, AT&T argued (prior to the *Reclassification Order*) that its "mobile *data* services [were] not regulated as common-carrier services under the Communications Act." Mot. to Dismiss at 9 (Dkt. No.29) (filed Jan. 5, 2015). It alluded to its current claim only at oral argument on the motion to dismiss (and even then only in passing). That was insufficient to preserve the claim, which the district court did not address. *See McKay v. Ingleson*, 558 F.3d 888, 891 n.5 (9th Cir. 2009); *Broad v. Sealaska Corp.*, 85 F.3d 422, 430 (9th Cir.1996). AT&T

may not now raise it on appeal. *International Alliance of Theatrical Stage Employees v. InSync Show Prod'ns, Inc.*, 801 F.3d 1033, 1044 n.8 (9th Cir. 2015); *see also Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (appellate court generally "does not consider an issue not passed upon below").

If AT&T preserved the argument, it is meritless. Prior to reclassification, the FCC had long deemed mobile data a service that may "not … be treated as a common carrier [service]." *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014); *see Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007). The FCC emphasized in its 2010 order that it did not (and did not intend to) treat mobile data service as common carriage. *2010 Open Internet Order*, 25 FCC Rcd at 17950-51. On review, the D.C. Circuit confirmed that the FCC had done nothing to alter that "still-binding decision." *Verizon*, 740 F.3d at 649-50.

AT&T relies on the D.C. Circuit's statement in *Verizon* that FCC rules for broadband Internet access service "relegated" providers "*pro tanto*, to common carrier status." Br. 46, quoting *Verizon*, 740 F.3d at 654. In fact, the court was addressing two rules that did not apply to the mobile services at issue here. The "nondiscrimination rule" applied only to "fixed broadband Internet access service" and not mobile service. *Open Internet Order*, 25

FCC Rcd at 17992, 17956-58. The "no-blocking" rule applied to services used by Internet content providers such as websites and not to end-user customers of Internet service. *Verizon*, 740 F.3d at 653 (citing *Open Internet Order*, 25 FCC Rcd at 17950-51). The mobile data services at issue in this case were not "relegated … to common carrier status." Br. 46.

III. THE FCC'S *RECLASSIFICATION ORDER* DOES NOT SHIELD AT&T FROM LIABILITY BASED UPON PAST FTC ACT VIOLATIONS

Finally, AT&T argues that even if the common carrier exception is activity-based and the FTC could have pursued a case against it before June 2015, the *Reclassification Order* has since rendered the FTC powerless to maintain this action. If AT&T prevails in its challenge to the *Reclassification Order*, this argument will be moot. If the argument remains live, it fails.

A. The FCC's Order Does Not Retroactively Immunize AT&T's Unlawful Conduct.

AT&T's understanding of the *Reclassification Order* collides with its express terms. The FCC stated explicitly that broadband Internet access service will be treated as common carriage "*only on a prospective basis*." 30 FCC Rcd at 5734 n.792 (emphasis added). AT&T's approach, by contrast, would alter "the past legal consequences of [its] past actions," *American Mining Cong. v. EPA*, 965 F.2d 759, 769 (9th Cir. 1992) (citation

and emphasis omitted), giving the *Reclassification Order* the very retroactive effect it disavows.

The district court correctly rejected AT&T's attempt to evade liability through retroactive application of the *Reclassification Order*. AT&T's unlawful practices were not common-carrier activities when they were undertaken and were subject to FTC enforcement prior to the June 2015 effective date of the *Reclassification Order*. Under AT&T's theory, its prior conduct is now immunized from enforcement. But administrative rules "will not be construed to have retroactive effect unless their language requires this result." *Landgraf v. USI Film Prods., Inc.*, 511 U.S. 244, 264 (1994). The *Reclassification Order* leaves no doubt that it was *not* intended to apply to past conduct.

AT&T claims that *Southwest Center for Biological Diversity v. Department of Agriculture*, 314 F.3d 1060 (9th Cir. 2002), held otherwise. Br. 55-56. It did not. Unlike the regulatory reclassification at issue here, which the FCC clearly stated would apply only prospectively, the statutory change at issue in *Southwest Center* was ambiguous. Moreover, the Court held that applying a newly enacted statute to that pending FOIA case would not be impermissibly retroactive because it would not impair the plaintiff's existing rights. As the district court held, the present case, by contrast,

involves "substantive rights directly affecting financial interest[s]." ER22. AT&T's approach would retroactively erase the possibility of restitution for millions of AT&T customers who were the victims of its unlawful behavior. This case thus is on all fours with *Hughes Aircraft Co. v. United States*, 520 U.S. 939 (1997), because AT&T's suggested approach would "attach[] a new disability, in respect to transactions or considerations already past." *Id.* at 948 (citing *Landgraf*, 511 U.S. at 264); *see* ER21-22.

Because the FCC's order expressly disclaims any retroactive effect, the Court need not resort to interpretive rules that govern ambiguous statutes, such as the general presumption against retroactivity. *See Landgraf*, 511 U.S. at 273. Nonetheless, AT&T is wrong that the presumption does not apply to the government. Br. 58-59. The Supreme Court has "applied the presumption [against retroactivity] in cases involving new monetary obligations that fell only on the government." *Landgraf*, 511 U.S. at 271 n.25. AT&T's principal case, *United States v. Lindsay*, 346 U.S. 568 (1954), does not show otherwise. It held only that the plain language of a new statute of limitations showed that Congress intended the law to apply to existing claims. *Id.* at 570-71. Furthermore, the present case involves not only governmental interests, but the economic interests of private consumers as well. As the district court correctly concluded, retroactive application of the

Reclassification Order would have the effect of "destroying … [those consumers'] rights." ER21 (citation omitted).

B. Section 13(b) Of The FTC Act Authorizes The District Court To Order Equitable Remedies For AT&T's Past Violations.

Section 5 of the FTC Act states that the FTC is "empowered and directed" to combat unfair or deceptive acts or practices, subject to exceptions such as the common carrier exception. 15 U.S.C. § 45(a)(2). According to AT&T, because mobile data service now falls within the common carrier exception, the FTC is no longer "empowered" to maintain this action. Br. 51. In a nutshell, AT&T claims that, because its future conduct is beyond the reach of FTC enforcement, it is now entirely off the hook for its past illegal activity and is entitled to retain the ill-gotten gains it reaped from cheating its customers for years.

Nothing about the word "empowered" in Section 5 requires such an implausible interpretation, which is fundamentally at odds with the principle that remedial statutes like the FTC Act should be "construed broadly so as to achieve the Act's objectives." *Padilla v. Lever*, 463 F.3d 1046, 1057 (9th Cir. 2006). Congress intended the Act to protect consumers from the very types of acts engaged in by AT&T, and its reading of Section 5 would directly undermine that intent. The FTC may lack power to enforce the Act

against AT&T's *future* provision of mobile data service, but there is no good reason to believe that the statute operates like a light switch that turns off with respect to past violations when it no longer applies to future ones.

AT&T's attempt to avoid enforcement of the FTC Act also cannot be squared with Congress's separate grant to the FTC of authority to bring enforcement lawsuits in federal court, which is the direct source of the FTC's power to litigate this case. Section 13(b) of the FTC Act—which AT&T does not even mention—authorizes the agency in any "proper case" to sue for (and the court to issue) a "permanent injunction." 15 U.S.C. § 53(b). A "proper case" is one that involves the violation of "any provision of law enforced by" the FTC, including Section 5. *Id.*; *see, e.g.*, *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982). Once the FTC brings such a case, Section 13(b) gives the district court "broad authority to fashion appropriate remedies for violations of the Act"—not just forward-looking injunctive relief but the full range of equitable remedies, including restitution and other equitable monetary remedies for past unlawful conduct. *Pantron I*, 33 F.3d at 1102; *see also H.N. Singer*, 668 F.2d at 1112-13; *FTC v. Grant Connect LLC*, 763 F.3d 1094, 1101-02 (9th Cir 2014); *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1160-61 (9th Cir. 2010)

Section 13(b) authorized the FTC to bring this action to seek remedies for AT&T's violations of Section 5. Nothing in Section 13(b) suggests that the FTC's power to maintain the action or the district court's authority to award equitable relief is contingent on the enforceability of Section 5 against AT&T's future conduct. To the contrary, the court's power to redress prior violations remains intact even when there is no likelihood of recurrence. *Evans Prods.*, 775 F.2d at 1088; *accord SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 103 n.13 (2d Cir. 1978) (defendant has an "obligation to disgorge" for past violations even when future violations are unlikely); *United States v. Moore*, 340 U.S. 616, 620-21 (1951) (court could order restitution of illegal overcharges collected in violation of rent control rules, even the rules were no longer in effect). By the same logic, the FTC has power to seek and the district court has power to award equitable relief based on AT&T's past violations, regardless whether its future conduct is beyond the scope of the FTC's enforcement authority

The same reasoning also defeats AT&T's suggestion that the *Reclassification Order* renders this case moot. Br. 54 n.33. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1009 n.3 (2013) (citation omitted). Here, at a minimum, the

district court may properly grant equitable monetary relief to redress AT&T's past violations.

The cases AT&T cites do not support its position that the change in the regulatory status of mobile data strips the FTC of authority to maintain this action. Several of them stand for the unremarkable proposition that a tribunal can no longer adjudicate a pending case when Congress repeals its jurisdiction, unless the repealing statute contains a savings clause. *See Bruner v. United States*, 343 U.S. 112, 116-17 (1952); *Pentheny, Ltd. v. Government of Virgin Islands*, 360 F.2d 786, 790 (3d Cir. 1966). Such cases are inapposite because Congress has not repealed or modified the district court's jurisdiction under Section 13(b). The FTC's litigating authority and the court's remedial power have remained the same—there has simply been a regulatory change in the future status of a particular activity.[17]

[17] *American Electric Power Co.*, 2006 WL 305806 (SEC Feb. 9, 2006), involved legislative repeal of an enabling statute, and *Eddis v. LB&B Assocs., Inc.*, 2001 WL 960049 (Dep't of Labor ALJ, 2001), turned on regulations that had been rescinded pursuant to an executive order. *Swift & Co.*, 18 Agric. Dec. 464 (USDA 1959), is also irrelevant. There, the Agriculture Department without objection voluntarily moved to dismiss an administrative complaint in favor of a parallel FTC proceeding and the hearing examiner granted the motion without addressing jurisdiction. *Id.* at 465. The decision has neither precedential value nor bearing on whether the FTC may obtain equitable relief under Section 13(b).

AT&T gets no support from *Giant Food Shopping Center, Inc.*, 55 F.T.C. 2058 (1959), an administrative proceeding and not a Section 13(b) lawsuit, where the Commission held that the 1958 amendments expanding FTC jurisdiction applied to a pending case. By contrast, the present case involves neither a statutory change in the FTC's jurisdiction nor a retroactive change of any kind. *Giant Food* does not address whether a regulatory change affects the FTC's authority to maintain a Section 13(b) lawsuit.

Leonard F. Porter, Inc., 88 F.T.C. 546 (1976), is inapposite for the same reasons, and the ruling in that matter on which AT&T relies is not good law anyway. The Administrative Law Judge found that one of the defendants was no longer subject to FTC jurisdiction because while the case was pending it had stopped selling goods in interstate commerce, a prerequisite to FTC authority. *Id.* at 609-11, 622. That conclusion was not directly challenged on appeal to the full Commission, but it was plainly wrong given the well-settled rule that "voluntary cessation of allegedly illegal conduct" generally "does not deprive the tribunal of power to hear and determine the case." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). The full Commission noted that "the law looks with disfavor upon the claim of abandonment [of unlawful conduct] as a defense to a charge of Section 5 violations." *Porter*, 88 F.T.C. at 629.

AT&T's position would preclude enforcement of the FTC Act against all past violations of the FTC Act whenever an unlawful practice becomes excepted from enforcement in the future due to its regulatory status. Letting AT&T off the hook for its past violation depriving its victims of redress simply because another agency changed a regulatory definition would illogically undermine the Act. The Court should not condone such a senseless outcome.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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February 3, 2016

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the FTC states that it is unaware of any related cases pending before this Court.

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