

**No. 15-16585**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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FEDERAL TRADE COMMISSION,

*Petitioner-Appellee-Plaintiff,*

v.

AT&T MOBILITY LLC, a limited liability company,

*Respondent-Appellant-Defendant.*

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

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**BRIEF OF AMICUS CURIAE CAUSE OF ACTION INSTITUTE IN  
SUPPORT OF RESPONDENT-APPELLANT AT&T MOBILITY LLC  
DURING PENDENCY OF REHEARING EN BANC**

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**RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

Amicus Curiae Cause of Action Institute is a nonprofit corporation. It has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

Amicus Curiae Cause of Action Institute (“CoA”) is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, the rule of law, and principled enforcement of the separation of powers protect liberty and economic opportunity. As part of this mission, it works to expose and prevent government and agency misuse of power by, *inter alia*, appearing as amicus curiae before federal courts. *See, e.g., McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

CoA has a particular interest in challenging the Federal Trade Commission’s (“FTC” or “Commission”) extra-statutory and unconstitutional regulation of data security, privacy, and technology under Section 5 of the FTC Act, 15 U.S.C. § 45, and curtailing the FTC’s pattern and practice of separation-of-powers violations in pursuit of its regulatory ambitions. In order to fulfill this mission, CoA has defended businesses against FTC enforcement actions in federal district and appellate courts, *see, e.g., LabMD, Inc. v. FTC*, No. 1:14-cv-00810-WSD, 2014 U.S. Dist. LEXIS

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(a)(4)(E), amicus curiae states that no counsel for a party other than CoA authored this brief in whole or in part, and no counsel or party other than CoA made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission. A motion for leave to file has been filed with this brief. AT&T takes no position on CoA’s motion for leave.

65090 (N.D. Ga. May 12, 2014), *aff'd*, 776 F.3d 1275 (11th Cir. 2015); *FTC v. D-Link Systems, Inc.*, No. 17-cv-00039-JD (N.D. Cal.), and before the Commission, *see, e.g., In the Matter of LabMD, Inc.*, FTC Dkt. No. 9357.<sup>2</sup>

CoA has also represented pro bono a group of doctors who chose to speak out as amici about the real-world harms the FTC has caused the medical profession through an ultra vires in-house administrative prosecution of a cancer-detection business. *See* Doctors' Amicus Br., *LabMD, Inc. v. FTC*, No. 16-16270-D (11th Cir., filed Jan. 3, 2017). That matter is currently pending in the U.S. Court of Appeals for the Eleventh Circuit (oral argument scheduled for June 21, 2017), which (notably) stayed the Commission Opinion imposing liability. *See LabMD, Inc. v. FTC*, No. 16-16270-D, 2016 U.S. App. LEXIS 23559 (11th Cir. Nov. 10, 2016).

CoA has an interest in this case because to the extent this Court goes beyond the narrow statutory interpretation question whether the common-carrier exemption

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<sup>2</sup> That enforcement action was predicated on false evidence provided to FTC by a third party through a shell company, the "Privacy Institute," created for that sole specific purpose. *See generally* Initial Decision, *In re LabMD, Inc.*, F.T.C. Dkt. No. 9357, 2015 FTC LEXIS 272, at \*12-22, \*53-72 (Nov. 13, 2015) (discussing, *inter alia*, shell company used as vehicle to funnel stolen sensitive files to FTC and creation of false evidence for use by FTC against Respondent), *vacated by* Opinion of the Commission, 2016 FTC LEXIS 128 (July 29, 2016), *stayed sub nom., LabMD, Inc. v. FTC*, No. 16-16270-D, 2016 U.S. App. LEXIS 23559 (11th Cir. Nov. 10, 2016); STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 113TH CONG., TIVERSA, INC.: WHITE KNIGHT OR HIGH-TECH PROTECTION RACKET (2015), *available at* <https://www.databreaches.net/wp-content/uploads/2015.01.02-Staff-Report-for-Rep.-Issa-re-Tiversa.pdf>; *Daugherty et al. v. Sheer et al.*, No. 15-cv-2034, 2017 U.S. Dist. LEXIS 48943 (D.D.C. Mar. 31, 2017).

is status or activities based, the Court’s decision could directly affect CoA’s ability to protect businesses from the FTC in litigation in this Circuit. CoA is concerned that the FTC would weaponize, misinterpret, and exploit any dicta on matters not directly within the scope of the narrow issue presented (even if not briefed) in other ways to extra-statutorily expand its powers, as it has done before.<sup>3</sup>

CoA is also concerned that this case is part of an emerging pattern of ultra vires, unconstitutional FTC enforcement actions grounded in a fundamental error of statutory interpretation—specifically, the FTC’s apparent belief that it need not wait for Congress to pass legislation giving it permission to regulate broad swaths of the economy, so long as the FTC’s actions reflect its subjective vision of enlightened public policy—that not only flips basic administrative law on its head,<sup>4</sup> but threatens the separation of powers vital to liberty.<sup>5</sup> CoA’s interest in this case also stems from its view that, regardless of whether the FTC’s policy goals are sound, the FTC has

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<sup>3</sup> See, e.g., Order Denying Motion to Dismiss, *In re LabMD, Inc.*, No. 9357, 2014 FTC LEXIS 2, \*54 (Jan. 16, 2014) (misinterpreting dicta in *FTC v. Neovi, Inc.*, 604 F.3d 1150 (9th Cir. 2010), to support claim that businesses’ data-security practices can be “unfair” even absent a data breach).

<sup>4</sup> Cf. *ABA v. FTC*, 430 F.3d 457, 468-69 (D.C. Cir. 2005) (rejecting similar FTC error of statutory interpretation).

<sup>5</sup> See generally *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1215–17 (2015) (Thomas, J., concurring) (separation of powers protects individual liberty); *Clinton v. City of N.Y.*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (“Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.”).

now “spun out of the known legal universe and ... [is] now orbiting alone in some cold, dark corner of a far-off galaxy, where no one can hear the scream ‘separation of powers.’” *Or. Rest. & Lodging Ass’n v. Perez*, 843 F.3d 355, 363 n.4 (9th Cir. 2016) (O’Scannlain, J., dissenting from denial of rehearing en banc).

### **SUMMARY OF ARGUMENT**

Despite all of the parade-of-horribles hand waving by FTC’s gaggle of amici, this interlocutory appeal presents one, and only one, question: Can the FTC ignore express statutory limits on the FTC’s authority and violate the plain language of its own organic statute to advance what it perceives to be sound public policy? Our Constitution dictates the answer: no, the FTC may not arrogate to itself legislative powers Article I of the Constitution reserves for Congress, no matter how important the FTC (or the Federal Communications Commission (“FCC”)) thinks its policy aims might be, any perceived congressional “gridlock” notwithstanding.

FTC “is not a legislative body unto itself, but instead must carry out Congress’s intent.” *See Or. Rest. & Lodging Ass’n v. Perez*, 661 F.3d 433, 816 F.3d 1080, 1094 (9th Cir. 2016) (Smith, J., dissenting). FTC has not done so here. Therefore, this Court should rebuff FTC’s ends-justify-the-means attempt to circumvent the Constitution (and Congress)—all in violation of the separation of powers—even if draped in the superficially benign mantle of protecting “consumer” privacy. FTC may not like current federal law, but it must follow it unless and until

*Congress*—not the FTC, not the FCC, and not an Article III Court—changes it. FTC’s “extravagant theory of executive lawmaking” should be rejected wholesale. *See Or. Rest. & Lodging Ass’n v. Perez*, 843 F.3d 355, 363 (9th Cir. 2016) (O’Scannlain, J., dissenting from denial of rehearing en banc). While FTC (and FCC) may prefer to “[n]ever let a statute get in the way of a tempting regulation,” our Constitution should not permit “such a breezy approach to the separation of powers[.]” *See id.*

The Panel properly rejected the FTC’s Section 5 power grab.

## ARGUMENT

### I. THE PANEL CORRECTLY ELEVATED SECTION 5’S TEXT AND STRUCTURE ABOVE THE FTC’S PUBLIC POLICY CONCERNS.

As the Panel and Respondent-Appellant AT&T have explained,<sup>6</sup> this case turns on matters of straightforward statutory interpretation—not public policy. Accordingly, the Panel correctly focused on Section 5’s text and structure. *FTC v. AT&T Mobility LLC*, 835 F.3d 993, 998 (9th Cir. 2016); *see also MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 951 (9th Cir. 2010) (policy “considerations cannot trump the statute’s plain text and structure”). The Panel first looked to

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<sup>6</sup> CoA agrees with but will not repeat AT&T’s arguments here. Nor will CoA burden this Court with repetition of the Panel’s well-reasoned decision, which this Court may consider to the extent it is persuasive, *see, e.g., Harrison v. Gillespie*, 640 F.3d 888, 896-97 (9th Cir. 2011), notwithstanding that it has no precedential effect, *see Socop-Gonzalez v. INS*, 272 F.3d 1176, 1186 n.8 (9th Cir. 2001).



Section 5's plain language. *See AT&T Mobility LLC*, 835 F.3d at 998 (“[W]e first consider the language of the statute itself. The plain language of the common carrier exemption casts the exemption in terms of status[.] ... A literal reading of the words Congress selected simply does not comport with an activity-based approach.” (citations omitted)). The Panel found further support for its interpretation in Section 5's structure. *See id.* at 999. As the Supreme Court has made clear, this is how courts should construe statutes. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *accord NCUA Bd. v. RBS Sec.*, 833 F.3d 1125, 1135 (9th Cir. 2016).

In stark contrast, “policy ... is the field on which [FTC and its amici] ... seem most eager to pitch battle.” *See Henson v. Santander Consumer USA, Inc.*, No. 16-349, slip op. at 8, 582 U.S. \_\_\_\_ (June 12, 2017) (unanimous Opinion per Gorsuch, J.). The common theme and unifying feature of the FTC's Petition for Rehearing and all amicus briefs in support of FTC is this: the Panel decision is bad public policy that leaves a “regulatory gap” and hobbles FTC's putative “consumer” protection efforts. *See, e.g.*, FTC Pet., Dkt. No. 33, at 1-3; Law Prof. Am. Br., Dkt. No. 38, at 1-21; Public Knowledge Am. Br., Dkt. No. 39, at 1-3, 11-15; Consumer Group Am. Br., Dkt. No. 35, at 2-16; Blumenthal Am. Br., Dkt. No. 41, at 1-14; Social Justice Groups' Am. Br., Dkt. No. 45, at 2-21; FCC Am. Br., Dkt. No. 37, at 1-6; FCC Am. Br., Dkt. No. 83, at 1-2, 6; *see also* FTC Resp. Br., Dkt. No. 20, at 45-49.

True as that may (*or may not*) be, such policy concerns must yield to Section 5’s plain text. *United States v. Tohono O’odham Nation*, 563 U.S. 307, 317 (2011) (“[C]onsiderations of policy divorced from the statute’s text and purpose c[an] not override its meaning.”); *Stahl v. Simon (In re Adamson Apparel, Inc.)*, 785 F.3d 1285, 1295 (9th Cir. 2015) (“[W]hen faced with a clearly drafted statute, we are not at liberty to deviate from the text in favor of a generalized notion of public policy.”). This Court “will not alter the text in order to satisfy the policy preferences of the [agency].”<sup>7</sup> *Negrete-Ramirez v. Holder*, 741 F.3d 1047, 1054 (9th Cir. 2014) (brackets in original and quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002)). For, as former Chief Justice Earl Warren has observed, courts “are bound to operate within the framework of the words chosen by Congress and not to question the wisdom of the latter in the process of construction.”<sup>8</sup> *Richards v. United State*, 369 U.S. 1, 10 (1962) (Warren, C.J.).

That is precisely what the Panel did here: “It is not for us to rewrite the statute so that it covers only *what we think is necessary to achieve what we think Congress*

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<sup>7</sup> “These are battles that should be fought among the political branches and the industry. Those parties should not seek to amend the statute by appeal to the Judicial Branch.” *Barnhart*, 534 U.S. at 462.

<sup>8</sup> *Accord Anderson v. Wilson*, 289 U.S. 20, 27 (1933) (Cardozo, J.) (“We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take the statute as we find it.”); *see also Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 588 (2012) (Courts do not express judgment on wisdom of statutes; that job is reserved for the people).

*really intended.*’ That is a job for Congress, not the courts.” *AT&T Mobility*, 835 F.3d at 1002 (emphasis added) (quoting *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010)); accord *Magwood v. Patterson*, 561 U.S. 320, 334 (2010) (“We cannot replace the actual text with speculation as to Congress’ intent.”); *Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (Scalia, J.) (“The question ... is not what Congress ‘would have wanted’ but what Congress enacted.”). The Panel correctly “sa[id] what the law is,” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), firmly tethering its decision to Section 5’s plain language and structure.<sup>9</sup> Public policy arguments, however compelling, cannot change statutory text, as the Supreme Court recently (and unanimously) reaffirmed. *See Henson*, No. 16-349, slip op. at 8-11, 582 U.S. \_\_\_\_.

FTC (and FCC and a host of other amici) may disagree with Section 5’s plain language, the “wisdom” of the common-carrier exemption, and Congress’s refusal

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<sup>9</sup> FTC amici’s invocation of the remedial purpose canon (Consumer Group Am. Br. 4, 16-18) is a false flag for their underlying policy arguments. *See generally* ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, 364-66, § 64 (2012) (“The false notion that remedial statutes should be liberally construed”). This Court should reject that red herring. *See, e.g., United States v. EME Homer City Generation, L.P.*, 727 F.3d 274, 295 (3d Cir. 2013) (“Allowing the EPA’s remedial-purpose canon to trump *eiusdem generis* would amount to little more than disguising a purpose-driven interpretation as a canon.”). In any event, application of this canon here to effectively expand the scope of Section 5 liability would (further) violate AT&T’s due process right to fair notice and should be rejected. *See generally Edward J. DeBartolo Corp. v. FGCBCTC*, 485 U.S. 568, 574-78 (1988) (if possible, statutes should be construed to avoid constitutional problems).

to pass legislation FTC wants, all of which stand in tension with FTC’s regulatory ambitions. But “[a]s every novice learns, the official theory of the administrative state begins from the premise that ‘the lawmaking function belongs to Congress ... and may not be conveyed to another branch or entity.’” *Or. Rest. & Lodging Ass’n*, 843 F.3d at 360 n.3 (O’Scannlain, J., dissenting from denial of rehearing en banc) (quoting *Loving v. United States*, 517 U.S. 748, 758 (1996)). And as then-Judge (now Justice) Gorsuch has observed: “When the political branches disagree with a judicial interpretation of existing law, the Constitution prescribes the appropriate remedial process. It’s called legislation. Admittedly, the legislative process can be an arduous one. But that’s no bug in the constitutional design: it is the very point of the design.” *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring); *accord Henson*, No. 16-349, slip op. at 10-11, 582 U.S. \_\_\_\_\_. So too here.

**II. THE PANEL DECISION IS GROUNDED IN BASIC PRINCIPLES OF STATUTORY INTERPRETATION AND RESPECT FOR THE SEPARATION OF POWERS AND JUDICIAL ROLE.**

**A. The Panel Did Not Create a “Regulatory Gap.”**

The FTC contends that “the panel’s ruling will create an enforcement gap cutting across the American economy” and that “[t]he decision strips the FTC of enforcement power[.]” FTC Pet. at 7. The FTC is wrong on both counts.

First, to the extent the FTC perceives an “enforcement gap,” the Panel did not create it. *See AT&T Mobility*, 835 F.3d at 1002-03 (basing decision on “the language of the common carrier exemption and the structure of the FTC Act,” not public policy). Any such “gap” is preexisting, as FTC knows,<sup>10</sup> and for Congress alone to close if it chooses to do so. *See, e.g., Taylor v. Huerta*, Nos. 15-1495, 16-1008, 16-1011, 2017 U.S. App. LEXIS 8790, at \*9 (D.C. Cir. May 19, 2017) (“Congress is of course always free to repeal or amend its 2012 prohibition on FAA rules regarding model aircraft. Perhaps Congress should do so. Perhaps not. In any event, we must follow the statute as written.”); *aaiPharma Inc. v. Thompson*, 296 F.3d 227, 243 (4th Cir. 2002) (explaining that only Congress can close “enforcement gap”).

The FTC’s own recent public statements reveal that the agency’s true quarrel here is not with the Panel’s decision but with Congress’s refusal to pass legislation FTC wants. For instance, FTC Commissioner Terrell McSweeney has recently explained why FTC cannot “fill” the perceived “gap” absent Congress’s permission:

The Federal Trade Commission cannot fill that gap because it does not currently have jurisdiction over the security and privacy practices of

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<sup>10</sup> FTC Staff has previously acknowledged that the statute itself is the source of FTC’s perceived public policy problem: “The FTC regards the common carrier exemption in the FTC Act as outmoded and, as it creates a jurisdictional gap, an obstacle to sound competition and consumer protection policy.... As the telecommunications and Internet industries continue to converge, the common carrier exemption is likely to frustrate the FTC’s efforts to combat unfair or deceptive acts and practices and unfair methods of competition in these interconnected markets.” FED. TRADE COMM’N, BROADBAND CONNECTIVITY COMPETITION POLICY, 41 (2007).

broadband, cable and wireless carriers.... That will continue to be the case until Congress acts to fully repeal the common carrier exemption in the Federal Trade Commission Act.<sup>11</sup>

Likewise, Acting FTC Chairman Maureen K. Ohlhausen has also appealed to Congress's prerogative of enacting (or repealing) federal law: "And the current [common carrier] exemption no longer makes sense in today's environment where the lines between telecommunications and other services are increasingly becoming blurred. So I ask that Congress reform or repeal the exemption to ensure that the FTC can protect consumers everywhere on the Internet."<sup>12</sup> Indeed, FTC has put Congress on notice of the Panel's ruling, reiterating that "[t]he FTC has long called for the repeal of the common carrier exception."<sup>13</sup>

Congress's rejection of FTC's legislative proposals to date underscores why the Panel reached the correct result. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983); *Flood v. Kuhn*, 407 U.S. 258, 283 (1972) ("Remedial legislation

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<sup>11</sup> FTC Commissioner Terrell McSweeney, *The Future of Broadband Privacy and the Open Internet: Who Will Protect Consumers?*, Open Technology Institute New America, at 2 (April 17, 2017).

<sup>12</sup> Remarks of Acting Chairman Maureen K. Ohlhausen, "Internet Privacy: Technology and Policy Developments," at 7 (May 1, 2017).

<sup>13</sup> Prepared Statement of FTC, on Oversight of the Federal Trade Commission, Before the Senate Committee on Commerce, Science, and Transportation, at 22-25 (Sept. 27, 2016), [https://www.ftc.gov/system/files/documents/public\\_statements/986433/commissioner\\_testimony\\_oversight\\_senate\\_09272016.pdf](https://www.ftc.gov/system/files/documents/public_statements/986433/commissioner_testimony_oversight_senate_09272016.pdf).

has been introduced repeatedly in Congress but none has ever been enacted. The Court, accordingly, has concluded that Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes.”). The same holds true with respect to recently introduced targeted legislation that would give the FTC focused authority (and adequate congressional guidance) to regulate broadband providers. *See, e.g.,* H.R. 2520, 115th Cong. (introduced May 18, 2017).<sup>14</sup> *Cf. Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 701 (1995) (“When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.” (citation omitted)). For the decision whether (and, if so, how) to “close” the perceived “enforcement gap” is strictly within Congress’s purview. *See also Henson*, No. 16-349, slip op. at 9, 582 U.S. \_\_\_\_ (“[I]t is quite mistaken to assume, as petitioners would have us, that ‘whatever’ might appear to ‘further[ ] the statute’s primary objective must be the law.’” (citation omitted)).

### **B. The Panel Did Not Strip the FTC of Authority.**

Nor did the Panel strip the FTC of authority it otherwise had. Instead, the Panel simply enforced existing statutory limitations on the FTC’s authority. The FTC “literally has no power to act ... unless and until Congress confers power upon it.” *La. Pub. Serv. Com v. FCC*, 476 U.S. 355, 374 (1986); *Lyng v. Payne*, 476 U.S.

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<sup>14</sup> Available at <https://www.congress.gov/bill/115th-congress/house-bill/2520/text?q=%7B%22search%22%3A%5B%22%5C%22broadband%5C%22+and+%5C%22blackburn%5C%22%22%5D%7D&r=3>.

926, 937 (1986) (“[A]n agency’s power is no greater than that delegated to it by Congress.”); *Or. Rest. & Lodging Ass’n*, 843 F.3d at 356 (O’Scannlain, J., dissenting from denial of rehearing en banc) (Noting “the most elemental teaching of administrative law: agencies exercise whatever powers they possess because—and only because—such powers have been delegated to them by Congress.”). Here, Congress did the opposite by barring FTC from regulating common carriers. 15 U.S.C. § 45(a)(2). Unless and until Congress enacts legislation authorizing FTC to regulate broadband providers, the FTC lacks authority to do so. *Cf. ABA v. FTC*, 430 F.3d 457, 468-69 (D.C. Cir. 2005).

**C. Only Congress—Not the FTC, Not the FCC, and Not an Article III Court—Can Close Any “Regulatory Gap.”**

Like the FTC (and FCC), this Court is not a legislative body unto itself. This Court should therefore reject FTC’s proposal to rewrite Section 5 in response to policy arguments, for that is Congress’s prerogative alone.

The fact that the FTC believes its enforcement activities in the area of data security to be “good policy does not change the statute’s text.” *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1083 (D.C. Cir. 2017) (citing *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 188 (1994)); *see also Env’tl. Def. Fund v. City of Chi.*, 985 F.2d 303, 304 (7th Cir. 1993) (“Only Congress may change the law in response to policy arguments, courts may not do so.”). Nor does it change this Court’s role. *See Henson*, No. 16-349, slip op. at 11, 582 U.S. \_\_\_\_ (noting “the



proper role of the judiciary...—to apply, not amend, the work of the People’s representatives”). As this Court has recognized: “[W]e have no license to disregard the plain text of the statute.... It is “beyond our province to rescue Congress from its drafting errors, and to provide for what we might think ... is the preferred result.”” *Chu v. United States CFTC*, 823 F.3d 1245, 1250 (9th Cir. 2016) (quoting *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (alteration in original)); *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1267 n.6 (9th Cir. 2009).<sup>15</sup>

This is because the Ninth Circuit “[is] not in the business of rewriting the law, but that of interpreting Congress’s words when it enacted the statute.” *United States v. Havelock*, 664 F.3d 1284, 1292 (9th Cir. 2012); *Stratman v. Leisnoi, Inc.*, 545 F.3d 1161, 1172 (9th Cir. 2008) (“As long as the legislation is valid, it is not the duty of the courts to revise it[.]”). “[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a carte blanche to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do.” *Havelock*, 664 F.3d at 1292 (quoting *United States v. Locke*, 471 U.S. 84, 95 (1985)).

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<sup>15</sup> As the Supreme Court has explained: “If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent.... This allows both of our branches to adhere to our respected, and respective, constitutional roles.” *Lamie*, 540 U.S. at 542; *see also P.R. Dep’t of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988) (“unenacted approvals, beliefs, and desires are not laws”).

As this Court has explained: “we are not legislators[.]” *Gorospe v. Comm’r*, 451 F.3d 966, 970 (9th Cir. 2006).

Nor is the FTC (or FCC). *See La. Pub. Serv.*, 476 U.S. at 374; *see also Or. Rest. & Lodging Ass’n*, 843 F.3d at 356-66 (O’Scannlain, J., dissenting from the denial of rehearing en banc). Notwithstanding the FTC’s views regarding what the FTC perceives to be a “regulatory gap” in the area of data security, privacy, and technology—no matter how strongly held and well intentioned—the FTC is not allowed to do anything to fill that perceived gap without Congress’s permission. “Regardless of how serious the problem an administrative agency seeks to address, ... it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (citation and internal quotation marks omitted).

Against this backdrop, this Court should decline the FTC’s invitation to rewrite federal law. *See also Henson*, No. 16-349, slip op. at 11, 582 U.S. \_\_\_\_ (“we will not presume with petitioners that any result consistent with their account of the statute’s overarching goal must be the law”). Any “loophole” in federal privacy law “is properly left for Congress to consider, and to close if it finds such action

warranted.”<sup>16</sup> *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 457 (2007). *Cf. DOT v. Ass’n of Am. R.R.*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) (“The principle that Congress cannot delegate away its vested powers exists to protect liberty.”).

**D. The FCC’s Implementation of the Communications Act Does Not Affect the FTC’s Jurisdiction Under Section 5 of the FTC Act.**

Because the common-carrier exemption is status based,<sup>17</sup> the FTC (and FCC) are also wrong when they (now) claim that the way in which the FCC implements the Communications Act has anything whatsoever to do with the scope of the FTC’s jurisdiction under Section 5.

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<sup>16</sup> The FTC’s misapplication of the rule against absurdities (FTC Resp. Br. 46) to suggest that this Court can override Section 5’s plain language should be rejected wholesale, for reasons now-Justice Gorsuch has explained. *See Lexington Ins. Co. v. Precision Drilling Co., L.P.*, 830 F.3d 1219, 1222 (10th Cir. 2016) (Gorsuch, J.) (“To be sure, at one time some thought a court could override even unambiguous statutory texts like the one before us in order to avoid putatively absurd consequences in their application. But this court some years ago all but rejected at least this particular form of the absurdity doctrine.” (citations omitted)).

<sup>17</sup> Even if the plain language of the common-carrier exemption did not foreclose an activities-based interpretation, the FTC would still lack jurisdiction over AT&T here due to, *inter alia*, the FCC’s imposition of overlapping and potentially conflicting regulatory obligations, as AT&T has explained. *See* AT&T Br., Dkt. No. 7, at 43-59; AT&T Reply Br., Dkt. No. 23, at 22-30; *see also Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 275-85 (2007) (stating and applying factors for determining whether danger of inconsistent and overlapping regulation by two agencies under two different statutes precludes imposition of liability under general statute *even absent statutory exemption*).

For example, the FCC contends that the FCC’s 2015 Open Internet Order<sup>18</sup> “exempts broadband internet access service from FTC oversight and authority by operation of the FTC Act’s common-carrier exception.” FCC Br. 4. Not so. Perhaps that argument might have merit if (like the Packers and Stockyards Act exemption) the common-carrier exemption applied only “insofar as” a common carrier is “subject to” FCC regulation under the Communications Act. *See* 15 U.S.C. § 45(a)(2). That is because Congress’s use of “insofar as” qualifying language could reasonably be read to link the scope of the exception to the scope of the FCC’s regulatory activities. But, as the Panel recognized, *see AT&T Mobility*, 835 F.3d at 999, the common-carrier exemption does not say this.<sup>19</sup> *See* 15 U.S.C. § 45(a)(2) (“common carriers *subject to* the Acts to regulate commerce” (emphasis added)). Therefore, the manner in which the FCC interprets and implements the Communications Act is irrelevant. Accordingly, the Panel did “not address ... arguments regarding overlapping regulation and the effect of the FCC’s Reclassification Order.” *AT&T Mobility*, 835 F.3d at 1003.

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<sup>18</sup> Protecting & Promoting the Open Internet, 30 FCC Rcd. 5601 (2015).

<sup>19</sup> Particularly because “[t]he language of the common carrier exemption meaningfully varies from that of the Packers and Stockyards exemption,” *AT&T Mobility*, 835 F.3d at 999, this Court should “refrain from concluding here that the differing language in the two subsections has the same meaning in each,” and should not “presume to ascribe this difference to a simple mistake in draftsmanship,” *Russello v. United States*, 464 U.S. 16, 23 (1983).

Likewise, the FTC is wrong when it (now) claims that a Joint Senate Resolution disapproving a regulation issued by a different agency implementing a different statute somehow affects the scope of FTC's jurisdiction under Section 5. *See* FTC 28(j) Letter, Dkt. No. 66 (April 5, 2017). Neither the FCC's broadband-related regulatory activities nor Senate Joint Resolution 34 under the Congressional Review Act disapproving of certain of those activities can alter the plain language of Section 5's common carrier exemption. As the FTC previously (and correctly) told this Court, "[t]he FCC's authority to regulate mobile data service has no effect on this case." FTC Resp. Br. 12. FTC cannot change its tune now. And, if anything, FTC's newfound reliance on Congress's disapproval of the FCC's regulatory efforts showcases what this case is really about: advancing the FTC's public policy goals outside of the process for changing federal law set forth in Article I of the U.S. Constitution.

In any event, the 2016 FCC regulations implementing the Communications Act (and Congress's repeal of the same) is, at best, post-enactment legislative history of another statute, which is not entitled to weight. *See generally Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980) (explaining why this is "an extremely hazardous basis for inferring the meaning of a congressional enactment"). "Arguments based on subsequent legislative history,

like arguments based on antecedent futurity, should not be taken seriously....”  
*Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring in part).

Particularly because Congress was evidently aware of the Panel’s decision regarding the FTC’s lack of authority over common carriers,<sup>20</sup> if anything Senate Joint Resolution 34 showcases Congress’s agreement with the Panel decision. *See Chavez v. Robinson*, 817 F.3d 1162, 1168 (9th Cir. 2016) (Congress presumed to be aware of existing judicial interpretations of statute); *United States v. Alvarez-Hernandez*, 478 F.3d 1060, 1065-66 (9th Cir. 2007) (same). If Congress shared FTC’s policy concerns, it presumably would not have passed Senate Joint Resolution 34 or, alternatively, would have addressed FTC’s concerns therein. Congress’s silence speaks for itself.

**E. Pleas For Judicial Deference Should Be Rejected.**

Nor can FTC’s demands for deference save its wayward efforts to extra-statutorily expand the scope of its regulatory authority.

To begin, Consumer Amici’s demands for Skidmore deference to FTC fail.<sup>21</sup>  
*See* Consumer Am. Br. 18-19. No deference is due where, as here, the agency’s

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<sup>20</sup> *See, e.g.*, 163 Cong. Rec. S1951 (daily ed. Mar. 23, 2017) (statement of Sen. Blumenthal); 163 Cong. Rec. S1935-36 (daily ed. Mar. 22, 2017) (statement of Sen. Schatz).

<sup>21</sup> As the Panel noted: “The FTC has not argued that Chevron deference is appropriate in this case. The FTC explicitly disclaimed any reliance on Chevron before the district court.” *AT&T Mobility*, 835 F.3d at 1003 n.5.

interpretation is contrary to the statute's plain language and structure. *See, e.g., John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 109 (1993).

This is true *a fortiori* here because in 2014 the Commission unanimously interpreted Section 5's common carrier exception to be status-based, holding that "Section 5(a)(2) specifically lists *categories* of businesses whose acts and practices are not subject to the Commission's authority under the FTC Act ... includ[ing] common carriers subject to the Acts to regulate commerce[.]" Order Denying Motion to Dismiss, *In re LabMD, Inc.*, No. 9357, 2014 FTC LEXIS 2, \*34 (F.T.C. Jan. 16, 2014) (emphasis added). Then, "the FTC described its Order ... as a 'definitive interpretation of the application of Section 5'" and (wrongly) demanded *Chevron* deference for it in multiple federal courts. *See LabMD, Inc. v. FTC*, 776 F.3d 1275, 1278-79 (11th Cir. 2015). The Commission subsequently (and unanimously) doubled down on this definitive interpretation, explicitly or implicitly affirming it on multiple occasions.<sup>22</sup>

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<sup>22</sup> *See, e.g.,* Commission Order Denying Stay, *In re LabMD, Inc.*, FTC Dkt. No. 9357, 2016 FTC LEXIS 180, \*5 & n.2 (Sept. 29, 2016); Commission Order Denying LabMD Summary Decision Motion, *In re LabMD, Inc.*, FTC Dkt. No. 9357, at 9-10 (May 19, 2014), <https://www.ftc.gov/system/files/documents/cases/140520labmdmotion.pdf>; Commission Opinion, *In re LabMD, Inc.*, FTC Dkt. No. 9357, at 5-6 (July 28, 2016), <https://www.ftc.gov/system/files/documents/cases/160729labmd-opinion.pdf>.

Likewise, the FCC’s views regarding the meaning of statute it does not enforce—Section 5 of the FTC Act—are also irrelevant and warrant no deference. *See Dep’t of Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988). Courts “owe no deference to an agency’s resolution of statutory conflicts that implicate legislation that is not administered by that agency.” *Moyle v. Dir., Office of Workers’ Comp. Programs*, 147 F.3d 1116, 1119 (9th Cir. 1998).

Neither the statutory interpretations set forth in the 2015 FCC–FTC Consumer Protection Memorandum of Understanding (“FCC-FTC MOU”) (Nov. 16, 2015), *available at* 2015 WL 7261839, nor those espoused in amicus briefs the FCC has filed purporting to opine on the scope of the common-carrier exemption should be given any weight. *See Judicial Watch, Inc. v. United States Secret Serv.*, 726 F.3d 208, 231 (2013) (legal interpretations in MOU not entitled to deference); *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1179-80 (9th Cir. 2015) (“An agency’s interpretation of the statute—when presented in an amicus brief—is not promulgated in the exercise of its formal rule-making authority, so no Chevron deference is warranted.”); *Smith v. AEGON Cos. Pension Plan*, 769 F.3d 922, 927 (6th Cir. 2014) (“We decline to afford either Chevron or Skidmore deference to the Secretary’s ‘regulation by amicus’ in this case.”); *see also Christensen v. Harris Cty.*, 529 U.S. 576, 586-88 (2000); *LabMD, Inc. v. FTC*, 776 F.3d 1275, 1278-79 & n.1 (11th Cir. 2015).



Furthermore, even FTC Commissioner McSweeney has recognized that FTC lacks necessary expertise to regulate broadband: “FTC ... doesn’t have expertise in network engineering.”<sup>23</sup> FTC’s admitted lack of regulatory expertise further underscores why deference is inappropriate here. *Cf. King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (denying deference because IRS “has no expertise in crafting health insurance policy”).

**III. THE FTC’S UNILATERAL EXPANSION OF ITS SECTION 5 AUTHORITY IN THE AREAS OF DATA SECURITY, PRIVACY, AND TECHNOLOGY SHOULD BE GREETED SKEPTICALLY.**

According to the FTC’s law professor amici, “[i]t is now indisputable that the FTC has become the most important privacy regulator in the United States.” Law Prof. Am. Br. 3. Not so.

To begin, the extent to which the FTC has statutory authority, if any, under Section 5 of the FTC Act to regulate data security, privacy, and/or technology as an “unfair” business practice is unsettled and disputed.<sup>24</sup> *See, e.g., LabMD, Inc. v. FTC*,

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<sup>23</sup> FTC Commissioner Terrell McSweeney, *The Future of Broadband Privacy and the Open Internet: Who Will Protect Consumers?*, Open Technology Institute New America, at 6 (April 17, 2017).

<sup>24</sup> *See generally FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 634 (D.N.J. June 23, 2014) (“[G]iven the novelty of liability issues relating to data-security breaches, ... reasonable jurists may differ over the ... resolution of” these “novel, complex statutory interpretation issues.”); *LabMD, Inc. v. FTC*, No. 14-cv-00810-WSD, 2014 U.S. Dist. LEXIS 65090, \*16 n.6 (N.D. Ga. May 12, 2014) (“[T]he authority of the FTC to enlarge its regulatory activity in the data security area presents an interesting and likely important jurisdictional issue....”).

No. 16-16270-D, 2016 U.S. App. LEXIS 23559, at \*9 (11th Cir. Nov. 10, 2016) (“as LabMD points out, there are compelling reasons why the FTC’s interpretation [of Section 5] may not be reasonable”).

There is reason to think that Congress has not conferred power upon the FTC to regulate privacy, data security, and technology under Section 5 and therefore the FTC lacks authority to do so. *See La. Pub. Serv. Comm’n*, 476 U.S. at 374; *see also ABA v. FTC*, 430 F.3d at 468-69; *FTC v. LabMD*, No.1:12-cv-3005-WSD, Dkt. 23, at 14 (N.D. Ga. Nov. 26, 2012) (“[T]he Court finds there is significant merit to ... [the] argument that Section 5 does not justify an investigation into data security practices and consumer privacy issues[.]”). If Congress wanted the FTC to regulate data security and privacy for the entire economy, it would have clearly and expressly assigned the FTC that economically and politically important task. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014); *Brown & Williamson*, 529 U.S. at 159-60. Congress did the opposite, last amending Section 5 in 1994 to *limit* the FTC’s “unfairness” authority. *See* 15 U.S.C. § 45(n). Congress did not delegate to the FTC broad authority to regulate privacy through statutory amendments specifically intended to narrow its powers. *See also Whitman v. Am. Trucking Ass’ns., Inc.*, 531 U.S. 457, 468 (2001).

Regardless, even if the FTC’s views as to sound public policy (and that of its amici) were at all relevant here—they are not—there is reason to suspect that

untethering the FTC from its statutory limitations neither reflects sound public policy nor Congress's intent.

Scholars and jurists—including the FTC's own Chief ALJ—have offered insightful critiques of the FTC's regulatory efforts in the area of privacy and data security. *See generally* Gus Horowitz, *Data Security and the FTC's UnCommon Law*, 101 IOWA L. REV. 955, 959-60, 973-80 (2016) (elaborating on due process concerns, as well as critiques offered by U.S. District Judge and FTC Chief ALJ). For instance, as a U.S. District Judge explained to the FTC in May 2014:

I think that you will admit that there are no security standards from the FTC....

[H]ow does any company in the United States operate when they are trying to focus on what ... [another statute enforced by a different federal agency] requires and to have some other agency parachute in and say, well, I know that's what they require, but we require something different, and some company says, well, tell me exactly what we are supposed to do, and you say, well, all we can say is you are not supposed to do what you did....

[I]t's hard for a company that wants to—even a company who hires people from the outside and says what do we have to do, and they say you have to do this, but I can't tell you what the FTC rules are because they have never told anybody.<sup>25</sup>

Congress, too, has expressed reservations about the FTC's Section 5 “unfairness” regulation of data security.<sup>26</sup>

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<sup>25</sup> Preliminary Injunction Hearing Tr., *LabMD v. FTC*, No. 1:14-cv-810-WSD, at 94:14-17, 94:25-95:3, 95:7-15 (May 7, 2014) (Duffey, J.).

<sup>26</sup> *See, e.g.*, Letter from Sen. Jeff Flake, Chairman, Subcommittee on Privacy, Technology, and the Law, et al., to FTC Chairwoman Edith Ramirez (Sept. 20, 2016)

Furthermore, even the Acting FTC Chair has acknowledged issues with the FTC's regulation of data security: "Businesses would also benefit from increased transparency about our proceedings. In particular, I am thinking about our data security program. ... [W]e can do better."<sup>27</sup>

Put simply, the FTC's activities in the areas of data security, privacy, and technology have not been without controversy.<sup>28</sup>

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(expressing due process-based and other concerns), *available at* [http://668781195408a83df63a-e48385e382d2e5d17821a5e1d8e4c86b.r51.cf1.rackcdn.com/external/Senators\\_Flake\\_and\\_Lee\\_Letter\\_to\\_FTC\\_%20re\\_LabMD\\_092016.pdf](http://668781195408a83df63a-e48385e382d2e5d17821a5e1d8e4c86b.r51.cf1.rackcdn.com/external/Senators_Flake_and_Lee_Letter_to_FTC_%20re_LabMD_092016.pdf); "The Federal Trade Commission and Its Section 5 Authority: Prosecutor, Judge, and Jury," Hearing Before Committee on Oversight and Government Reform, U.S. House of Representatives (July 24, 2014), <https://oversight.house.gov/hearing/federal-trade-commission-section-5-authority-prosecutor-judge-jury-2/>; "Oversight of the Federal Trade Commission," Hearing Before U.S. Senate on Commerce, Science, & Transportation (Sept. 27, 2016), <https://www.commerce.senate.gov/public/index.cfm/hearings?ID=8719C13D-7DB4-4FE1-9F26-DDA55BF46852>.

<sup>27</sup> Hon. Maureen K. Ohlhausen, Acting Chairwoman, FTC, Keynote, ABA 2017 Consumer Protection Conf., at 8 (Feb. 2, 2017), [https://www.ftc.gov/system/files/documents/public\\_statements/1069803/mko\\_aba\\_consumer\\_protection\\_conference.pdf](https://www.ftc.gov/system/files/documents/public_statements/1069803/mko_aba_consumer_protection_conference.pdf).

<sup>28</sup> *See, e.g.*, STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 113TH CONG., TIVERSA, INC.: WHITE KNIGHT OR HIGH-TECH PROTECTION RACKET (2015), *available at* <https://www.databreaches.net/wp-content/uploads/2015.01.02-Staff-Report-for-Rep.-Issa-re-Tiversa.pdf>.

**IV. EVEN IF THIS COURT DETERMINES THAT THE COMMON CARRIER EXEMPTION IS ACTIVITIES BASED, THIS COURT SHOULD NOT BLESS THE FTC'S SECTION 5 FORAY INTO PRIVACY, DATA SECURITY, AND TECHNOLOGY IN THIS INTERLOCUTORY APPEAL INVOLVING A RULE 12 MOTION TO DISMISS.**

Even if this Court agrees with the FTC that the common carrier exemption is activities based, it should refrain from opining on the question whether—and, if so, to what extent—the FTC has Section 5 jurisdiction in the area of data security, privacy, and technology, which is not before the Court and has not been briefed.

The issues raised in this interlocutory appeal by AT&T and the FTC are narrow and have nothing to do with the underlying scope of the FTC's Section 5 jurisdiction to regulate privacy, data security, and technology as an “unfair” or “deceptive” practice. *See* AT&T Opening Br. 2; FTC Resp. Br. 2. Instead, the focus of this appeal is solely on the scope of Section 5's common carrier exemption from FTC regulation under Section 5.

The question whether the common carrier exemption to the FTC Act is status based is separate and distinct from the antecedent question whether the FTC even has jurisdiction to regulate privacy, data security, and technology as an “unfair” or “deceptive” practice under Section 5. As discussed above, the scope of the FTC's statutory authority, if any, in these areas remains highly disputed.

**CONCLUSION**

The Panel correctly rejected the FTC's Section 5 power grab.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Circuit Rule 29-2(c)(2) because this brief contains 6,814 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Office Word 2013 Times New Roman 14-point font.

Date: June 13, 2017

CAUSE OF ACTION INSTITUTE

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 13, 2017, I electronically filed the foregoing 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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Date: June 13, 2017

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