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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JURISDICTION

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 imCy f aci378 -2d the-

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

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 dece

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

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 th

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.

consumers. ER20-21. Thus, the Reclassification Order does "not deprive the

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 Pacx.To and Stockyards exception tothe 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 Pacx.To 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.

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 challe

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

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

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]

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 a

"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).

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 invol

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

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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.

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.

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

status-based. Otherwise, AT&T argues, it “would not be ne

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."

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

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

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[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 excep

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

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.

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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

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[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.

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 W

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

"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

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

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

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The district court correctly rejected AT&T's attempt to evadioity/TT6 1-16.695347 T

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 1954),

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.

☐ this brief uses a monospaced typeface and contains lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

9th Circuit Case Number(s) 15-16585

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