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## FTC v. AT&T: Black Mirror Brought to Life?

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## **FTC v. AT&T: BLACK MIRROR BROUGHT TO LIFE?**

“The internet is the first thing that humanity has built that humanity doesn’t understand, the largest experiment in anarchy that we’ve ever had.”

~ Eric Schmidt, Google, Inc., CEO<sup>1</sup>

### I. INTRODUCTION

The Netflix original series, *Black Mirror*, paints the grim picture of a not-too distant future dominated by nefarious entities preying on the public through the titular *black mirrors* we all carry around in our pockets. Equal parts disjointedly surreal and horrifyingly familiar, *Black Mirror* features allegorical stories of the dangers of the use and abuse of technology. The episode, *The Entire History of You*, shows an alternate reality wherein every member of society is equipped with a device that records their every memory, leading the characters to obsess and degenerate over such memories.<sup>2</sup> Meanwhile, the episode titled *Nosedive*, follows a protagonist obsessed with her rankings in a fictitious social media platform, and shows how this obsession drives her deeper and deeper into violent insanity.<sup>3</sup> While the world of *Black Mirror* is fictitious, our own world is creeping ever closer to that dystopia.

Since revelations about the United States National Security Agency’s PRISM program broke in 2013, internet data security is back in the forefront of American attention.<sup>4</sup> While concerns over privacy in the age of technology are by no means new,<sup>5</sup> the omnipresence of smartphones, satellite positioning, and

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1. Jerome Taylor, *Google Chief: My Fears for Generation Facebook*, INDEPENDENT (Aug. 17, 2010, 11:00 p.m.), <http://www.independent.co.uk/life-style/gadgets-and-tech/news/google-chief-my-fears-for-generation-facebook-2055390.html> [<https://perma.cc/ZH2K-QXWP>].

2. *Black Mirror: “The Entire History of You,”* NETFLIX (2016), <https://www.netflix.com/watch/70264856?trackId=14277283&tctx=0%2C2%2C7c920c67-db72-4bea-a6bb-1537767fc51a-70464741> [<https://perma.cc/34KB-49UP>].

3. *Black Mirror: “Nosedive,”* NETFLIX (2016), <https://perma.cc/34KB-49UP> [<https://perma.cc/6XVW-YMFY>].

4. Timothy B. Lee, *Here’s Everything We Know About PRISM to Date*, WASH. POST (June 12, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/06/12/heres-everything-we-know-about-prism-to-date/> [<https://perma.cc/Q4C4-D5WP>].

5. See Video Privacy Protection Act of 1988, Pub. L. No. 100-618, 102 Stat. 3195 (1988) (codified as amended at 18 U.S.C. § 2710(c)(1) (2012)); see also Stephen Advokat, *Publication of Bork’s Video Rentals Raises Privacy Issue*, CHI. TRIBUNE (Nov. 20, 1987), [http://articles.chicago.tribune.com/1987-11-20/entertainment/8703270590\\_1\\_video-rentals-video-stores-bork-opponent](http://articles.chicago.tribune.com/1987-11-20/entertainment/8703270590_1_video-rentals-video-stores-bork-opponent) [<https://perma.cc/RQQ4-7W3Z>].

the ubiquity of companies (e.g., Google, Apple, Facebook) providing these services, the PRISM revelations have raised new and concerning questions over the privacy of all Americans.<sup>6</sup> This public concern is only compounded by the fact that U.S. citizens are particularly vulnerable to data privacy incursions due to the fact that there is no specified governmental agency charged with protecting data privacy, as compared to the E.U.'s Data Protection Directive.<sup>7</sup>

Indeed, such vulnerabilities have been exposed time and time again. In 2006, Netflix hosted a contest called the Netflix Prize.<sup>8</sup> In the contest, Netflix released 100 million records of the *supposedly* completely anonymous ratings of movies, offering a \$1 million prize for anyone who could use this anonymous data to improve Netflix's movie recommendation algorithm.<sup>9</sup> However, a mere two weeks after the data was published, researchers began reporting the startling ease with which an online attacker might be able to pair this data to specific individuals.<sup>10</sup> Using this data, the researchers were able to identify at least two users to a statistical near-certainty, and were then able to see exactly what movies these individuals watched, shedding light on their views on politics (i.e., Fahrenheit 9/11), religion (i.e., Jesus of Nazareth), and other social issues (i.e., Queer as Folk).<sup>11</sup> This breach of data security led to a class action suit and a separate investigation by the Federal Trade Commission ("FTC") against Netflix.<sup>12</sup>

Such cyber-security concerns were the elephant in the room during *FTC v. AT&T Mobility LLC*. In this suit, the FTC, the de facto federal agency for prosecuting invasions of internet privacy,<sup>13</sup> brought suit against AT&T for unlawfully deceptive business practices of "data throttling."<sup>14</sup> Near the beginning of the smart phone boom in the mid-2000s, AT&T offered a deal for unlimited data usage in contrast to many of the usual usage contracts that had a set limit of data the customer could use before incurring overage charges.<sup>15</sup> AT&T eventually changed its business model to eliminate this offering, but allowed current plan members to be "grandfathered into" it, allowing them to

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6. See Lee, *supra* note 4.

7. See Liane Colonna, *Prism and the European Union's Data Protection Directive*, 30 J. MARSHALL J. INFO. TECH. & PRIVACY L. 227, 228 (2013).

8. Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1720 (2010).

9. *Id.*

10. *Id.* at 1721.

11. *Id.* at 1722.

12. Steve Lohr, *Netflix Cancels Contest Plans and Settles Suit*, N.Y. TIMES (Mar. 12, 2010, 2:46 PM), <https://bits.blogs.nytimes.com/2010/03/12/netflix-cancels-contest-plans-and-settles-suit/> [<https://perma.cc/U6WL-QTPE>].

13. Steven Hetcher, *The De Facto Federal Privacy Commission*, 19 J. MARSHALL J. COMPUTER & INFO. L. 109, 109 (2000).

14. *FTC v. AT & T Mobility LLC*, 835 F.3d 993, 995 (9th Cir. 2016).

15. *Id.*

keep their unlimited plan *ad infinitum*.<sup>16</sup> However, many “unlimited” customers reported drastic decreases in mobile data speeds the more data they used.<sup>17</sup> The FTC brought suit against AT&T alleging that its practice of data throttling these customers with supposed “unlimited” data constituted a deceptive business practice that the FTC is empowered to redress.<sup>18</sup> While AT&T originally claimed that this data throttling was to protect its network from overstress at peak usage hours, the FTC debunked this claim based on data showing that the data throttling had no correlation with the overall data usage of AT&T’s network.<sup>19</sup>

The FTC brought suit in the district court in California, and AT&T moved to dismiss, claiming it fell under the common carrier exception to the FTC’s regulatory powers.<sup>20</sup> After the district court denied AT&T’s motion to dismiss, the cell provider got leave to appeal directly to the Ninth Circuit.<sup>21</sup> The issue on appeal was whether or not AT&T qualified for an exception to the broad regulatory powers granted to the FTC in Section 5 of the FTC Act<sup>22</sup> because it is a “common carrier.”<sup>23</sup> The court noted the frustratingly vague definition (or lack thereof) of common carrier in the statute and therefore had to determine whether common carrier status was based on the activity being carried out or based on the overall activities of the company.<sup>24</sup>

The FTC argued that the common carrier exception was based on the activity, and so AT&T would not be considered as such, as its mobile data service did not constitute a common-carrier activity.<sup>25</sup> However, AT&T countered that the common carrier exception was based on the status of the company, and so if it operated a single common carrier activity, then the whole company should be classified as a common carrier.<sup>26</sup> Thus the essential issue for

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16. *Id.*

17. *Id.*

18. *FTC v. AT & T*, 835 F.3d at 995–96.

19. *Id.* at 995.

20. *Id.* at 996.

21. *Id.*

22. 15 U.S.C. § 45(a)(2) (2012):

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(citations omitted).

23. *FTC v. AT & T*, 835 F.3d at 997.

24. *Id.*

25. *Id.* at 997–98.

26. *Id.* at 997.

the Ninth Circuit panel was to determine whether the designation of common carrier was based on the activity engaged in or based on the status of the company.

Because common carrier is not defined in the statute, the Ninth Circuit applied canons of construction and examined the legislative history of the FTC Act to determine whether the 1914 Congress intended the common carrier exemption to be based on status or activity.<sup>27</sup> The court noted that the exception is surrounded in the statute by institutions like banks and credit unions that are status-based.<sup>28</sup> The Ninth Circuit also observed that courts presume that Congress is aware of past judicial interpretations and practices, and assert that Congress would have been more explicit if it wished to change this interpretation of the common carrier exception.<sup>29</sup>

The court also derived significant guidance from the Packers and Stockyards exemption in Section 5.<sup>30</sup> The court noted that the Packers and Stockyards exemption exempts entities “insofar as they are subject to the Packers and Stockyards Act.”<sup>31</sup> The court reasoned, therefore, that by withholding this “insofar as” language from the common carrier exception, the 1914 Congress signaled that the exception was status-based.<sup>32</sup> Given these arguments, the court held the statute conveys a status-based definition of common carrier, and so it would be inappropriate for the courts to legislate around the statute.<sup>33</sup> The court summarily reversed the lower court and remanded for dismissal.<sup>34</sup> However, recently, the Ninth Circuit has granted the FTC’s motion for rehearing en banc, agreeing to hear the case in a one-page opinion.<sup>35</sup>

This decision by the Ninth Circuit panel in *FTC v. AT&T* has established an unconscionable loophole for companies like AT&T, Apple, Google, and Facebook to avoid any regulation concerning their use of consumer data. Without FTC oversight, these companies, many of whom have already been disciplined for violating user privacy, will be beyond the regulatory powers of any government agency. This lack of supervision will beg for abuse. The FTC has long been the government agency responsible for regulating internet privacy, and by robbing it of this power, the Ninth Circuit has left a terrifying regulatory

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27. *Id.* at 998.

28. *FTC v. AT & T*, 835 F.3d at 998.

29. *Id.* at 999.

30. 15 U.S.C. § 45(a)(2) (2012).

31. *FTC v. AT & T*, 835 F.3d at 999.

32. *Id.* at 999, 1002.

33. *Id.* at 999, 1003.

34. *Id.* at 1003.

35. *FTC v. AT&T Mobility LLC*, 864 F.3d 995, 995 (9th Cir. 2017) (en banc).

gap that will be abused by companies that have shown time and time again their willingness to skirt the rules of data privacy.<sup>36</sup>

In this Note, I will argue that the Ninth Circuit sitting en banc should affirm the ruling of the district court, negating the decision of the appellate panel. Failing that, Congress must act to empower another federal agency to regulate the use of data by AT&T and other internet “superpowers,” such as Apple, Google, Verizon, and Facebook, who will be shielded from any meaningful regulatory oversight by the panel’s decision.

In Part II, I will trace the well-established rights and powers of the FTC in performing the duties of the federal government’s privacy watchdog. In Part III, I will make the case as to why it is imperative that the United States has strong regulation of internet privacy in light of the immense power wielded by entities like AT&T. In Part IV, I will discuss problems with the Ninth Circuit panel’s decision, and in Part V, I will provide solutions to the massive regulatory gap established by the Ninth Circuit’s decision if the decision stands and the Supreme Court does not take up the case.

## II. THE FTC’S LONG-STANDING POSITION AS AN INTERNET PRIVACY REGULATOR

One of the main reasons that the decision in *FTC v. AT&T* concerns so many legal scholars is that it overturns over twenty years of the established practice of the FTC acting as the federal government’s privacy regulator. By stripping the FTC of this power, the Ninth Circuit has left these internet superpowers, who are the biggest aggregators of private and sensitive information, without anyone to hold them accountable.

Established by the FTC Act in 1914, the FTC was established with broad consumer protection powers at the height of the anti-trust regulation period in the early twentieth century.<sup>37</sup> The powers granted to the FTC were expanded in the following years to combat new types of consumer abuse, culminating with the Wheeler-Lea Amendment of 1938.<sup>38</sup> The Wheeler-Lea Amendment, pertinently, established the FTC’s powers described in Section 5, empowering the Commission to “prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”<sup>39</sup>

However, as the digital economy began taking off in the late 1990s and early 2000s, the FTC began policing improper trade of private information, relying on

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36. See *Cases and Proceedings*, FTC, <https://www.ftc.gov/enforcement/cases-proceedings> [<https://perma.cc/5ANN-KN49>].

37. See *Our History*, FTC, <https://www.ftc.gov/about-ftc/our-history> [<https://perma.cc/PX89-TGP2>].

38. 15 U.S.C. § 45(a)(2) (2012).

39. *Id.*

its powers in Section 5.<sup>40</sup> Contrary to some critics' suppositions, the FTC was not engaging in a "power grab," but indeed was filling an exigent need within the executive branch.<sup>41</sup> Congress explicitly ratified the FTC's use of Section 5 in this manner by explicitly delegating privacy-related powers to the FTC through acts of Congress such as the Children's Online Privacy Protection Act and the CAN-SPAM Act of 2003.<sup>42</sup>

To better equip itself for its emerging role as a privacy watchdog, the FTC has established a Division of Privacy and Identity Protection ("DPIP") with the sole purpose of exercising the FTC's privacy regulatory powers.<sup>43</sup> DPIP employs forty-six full-time employees whose only job is to "focus on direct law enforcement and compliance" dealing with privacy and identity protection.<sup>44</sup> Furthermore, the FTC has five full-time employees dedicated entirely to mobile privacy.<sup>45</sup> This expansion shows not only that the FTC has been designated as the central federal privacy regulator, but also that such regulation is becoming more and more vital as American consumers trust companies with more and more private information.

Indeed, the FTC has put these privacy protection powers to use in recent years. The FTC filed suit against Google a number of times in the last few years for deceptive practices and irresponsible actions taken with consumers' personal information.<sup>46</sup> One of the most pertinent of these suits charged Google with

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40. Press Release, FTC Sues Failed Website, Toysmart.com, for Deceptively Offering for Sale Personal Information of Website Visitors, FTC (July 10, 2010), <https://www.ftc.gov/news-events/press-releases/2000/07/ftc-sues-failed-website-toysmartcom-deceptively-offering-sale> [<https://perma.cc/QH7A-UH4Z>]; Press Release, Internet Site Agrees to Settle FTC Charges of Deceptively Collecting Personal Information in Agency's First Internet Privacy Case, FTC (Aug. 13, 1998), <https://www.ftc.gov/news-events/press-releases/1998/08/internet-site-agrees-settle-ftc-charges-deceptively-collecting> [<https://perma.cc/3D2B-G5ZG>].

41. Geoffrey Manne, *Time for Congress to Stop the FTC's Power Grab on Antitrust Enforcement*, FORBES (Dec. 20, 2012, 2:24 PM), <https://www.forbes.com/sites/beltway/2012/12/20/time-for-congress-to-stop-the-ftcs-power-grab-on-antitrust-enforcement/#ba423e51fc84> [<https://perma.cc/K8WH-2WFE>].

42. 15 U.S.C. § 6505 (2012) ("Except as otherwise provided, this chapter shall be enforced by the Commission under the Federal Trade Commission Act." (citation omitted)); *see also* 15 U.S.C. § 7706 (2012) ("[T]his chapter shall be enforced by the Commission as if the violation of this chapter were an unfair or deceptive act or practice proscribed under section . . . 15 U.S.C. 57a(a)(1)(B).").

43. *Division of Privacy and Identity Protection*, FTC, <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-privacy-and-identity> [<https://perma.cc/A4CD-FAJ5>].

44. Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 601 (2014).

45. *Id.*

46. Press Release, FTC Charges Deceptive Privacy Practices in Googles Rollout of Its Buzz Social Network, FTC (Mar. 30, 2011), <https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz> [<https://perma.cc/88L5-873Y>]; Press Release, Google Agrees to Change Its Business Practices to Resolve FTC Competition

deceptive practices in misrepresenting its privacy policy to users of its (short-lived) social media platform, Buzz.<sup>47</sup> In that case, Google deceived users by using consumers' personal information even when the users opted-out of the service.<sup>48</sup> Google eventually settled these charges, agreeing to a consent order that required Google to implement a comprehensive privacy program to protect the privacy of consumers' information.<sup>49</sup>

Given the FTC's unique role in law enforcement, its consent orders have come to be viewed as a type of common law for privacy law enforcement.<sup>50</sup> In the vast majority of cases, privacy enforcement complaints get dropped or settled prior to judicial review.<sup>51</sup> Once these suits are settled, the FTC hands down a consent order that contains a description of the improper behavior.<sup>52</sup> These consent orders subsequently serve as a common law-esque collection of guidance for other companies wishing to avoid FTC investigation.<sup>53</sup> In this manner, the FTC has developed a sizeable common law to which commercial entities can look for guidance, establishing itself as the proper agency to regulate internet privacy.

The FTC was granted broad regulatory powers to be a "back stop" to the many gaps inherent in the U.S.'s regulatory structure.<sup>54</sup> By specializing and through specific grants of power from Congress in the area of internet data security, the FTC has become the de facto privacy regulator in the United States. The FTC must continue to be so, lest we risk massive gaps in regulation that will be exploited by highly motivated businesses and individuals.

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Concerns in the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search, FTC (Jan. 3, 2013), <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc> [<https://perma.cc/68LB-RND3>]; Press Release, Google Will Pay \$22.5 Million to Settle FTC Charges It Misrepresented Privacy Assurances to Users of Apple's Safari Internet Browser, FTC (Aug. 9, 2012), <https://www.ftc.gov/news-events/press-releases/2012/08/google-will-pay-225-million-settle-ftc-charges-it-misrepresented> [<https://perma.cc/5TSY-TZRR>].

47. Press Release, FTC Charges Deceptive Privacy Practices in Google's Rollout of Its Buzz Social Network, *supra* note 46.

48. *Id.*

49. *Id.*

50. Solove & Hartzog, *supra* note 44, at 607.

51. *Id.* at 610–11 (only 1 of the over 170 privacy related complaints charged by the FTC has drawn a judicial opinion).

52. *Id.* at 610.

53. *Id.*

54. See *FTC v. Brown Shoe Co.*, 384 U.S. 316, 320–21 (1966) (“[T]he Commission has broad powers to declare trade practices unfair. This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws.”).



## III. THE PERILS OF NON-REGULATION

By ruling that the common carrier exception is status-based, the Ninth Circuit panel has established a truck-sized loophole through which internet superpowers can avoid any federal oversight of their handling of consumers' sensitive information. By the Ninth Circuit's logic, if any superpowers offer or acquire any common carrier service, such as telecommunication services, then the entirety of their business is untouchable by any current regulatory force. Indeed, many of these internet superpowers might already be able to take advantage of such a loophole.

Internet superpowers have recently begun offering or acquiring telecommunication services that would likely confer common carrier activity status under judicial scrutiny. Google's "Google Fiber" would likely be considered a common carrier service, and Verizon's recent acquisitions of AOL and Yahoo would likewise absolve it of any oversight.<sup>55</sup> Furthermore, it would seem that Facebook could be poised to acquire such common carrier services as part of its goal to "connect a billion additional people to the internet."<sup>56</sup> With such a massive loophole looming, these tech giants could very easily engage in covert surveillance of their customers. This begs the question: What is the worst that can happen?

As Americans increasingly spend their time online, one would think that they would be increasingly careful about privacy issues given the complex nature of computers and the internet. However, a recent Pew Research Center survey actually shows just the opposite.<sup>57</sup> In a survey conducted in 2014, ninety-one percent of adults admit that we have lost control over how personal information is recorded and used by companies.<sup>58</sup> Eighty percent of adults say that they are concerned about advertisers or businesses accessing information gained through social networking sites.<sup>59</sup> Sixty-four percent say that the government should do more to regulate these companies.<sup>60</sup> However, despite these sentiments, there has not been any large public outcry protesting these practices.

Meanwhile, businesses big and small have a massive interest in online data. The collection and sale of consumer data by businesses has grown to be a

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55. Brian Fung, *How the World's Biggest Tech Companies Could Wriggle Out of Privacy Rules*, CHI. TRIBUNE (Sept. 4, 2016, 8:00 AM), <http://www.chicagotribune.com/bluesky/technology/ct-tech-companies-privacy-rules-wp-bfi-20160904-story.html> [https://perma.cc/6QWX-FSH3].

56. *Id.*

57. Mary Madden, *Public Perceptions of Privacy and Security in a Post-Snowden Era*, PEW RESEARCH CTR. (Nov. 12, 2014), <http://www.pewinternet.org/2014/11/12/public-privacy-perceptions/> [https://perma.cc/KNP9-DCAB].

58. *Id.*

59. *Id.*

60. *Id.*

multibillion-dollar industry, and indeed has been a cornerstone of Google and Facebook's success.<sup>61</sup> Companies routinely utilize such data sets to predict consumer behavior and ensnare new consumers using these predictions.<sup>62</sup> This shows that there is a clear and cognizable incentive for these companies to maximize their use of consumer data to increase profits. One study on behavioral advertising concludes that this use of consumer data is so central to a modern digital economy "that a small number of companies have a window into most of our movements online."<sup>63</sup> And companies do not stop at merely gathering data on what their consumers buy. Social reading programs allow companies to track data concerning how users read web pages, tracking a reader's behavior down to a specific page that holds the reader's attention.<sup>64</sup> Without a federal agency empowered to stop them, these companies will have even more incentive to skirt data privacy rules to get an edge over their competition.

In his article, *The Dangers of Surveillance*, Neil M. Richards contends that, "our society lacks an understanding of why (and when) government surveillance is harmful."<sup>65</sup> Part of the danger, Richards asserts, are the laws themselves.<sup>66</sup> The only way that a citizen can challenge secret surveillance is when it is discovered; and even then, courts often dismiss claims for lack of standing because the harms produced are "too speculative."<sup>67</sup> Meanwhile, against the specter of terrorist attack, surveillance is often cast as a necessary evil to preempt even greater harm. Richards contends that this is because courts cast surveillance solely as a Fourth Amendment right, concerning crime prevention, as opposed to a legitimate infringement on First Amendment rights.<sup>68</sup>

One of the biggest dangers of unfettered surveillance is the suppression of free thought and free speech, both fundamental rights enshrined in the First Amendment.<sup>69</sup> Surveillance, and particularly an awareness of surveillance by

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61. See DAVID KIRKPATRICK, *THE FACEBOOK EFFECT* 259–67 (2010); STEVEN LEVY, *IN THE PLEX: HOW GOOGLE THINKS, WORKS, AND SHAPES OUR LIVES* 262–63, 336–37 (2011).

62. Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. TIMES, (Feb. 16, 2012), <http://www.nytimes.com/2012/02/19/magazine/shopping-habits.html> (last visited Sept. 20, 2017) (discussing the tactics Target employs to ensnare highly desirable demographics).

63. Chris Jay Hoofnagle, et al., *Behavioral Advertising: The Offer You Cannot Refuse*, 6 HARV. L. & POL'Y REV. 273, 279 (2012).

64. Neil M. Richards, *The Perils of Social Reading*, 101 GEO. L.J. 689, 698–99 (2013).

65. Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1935 (2013).

66. *Id.* at 1934.

67. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013).

68. Richards, *supra* note 65, at 1948. "The First Amendment protects public speech and the free exchange of ideas, while the Fourth Amendment protects citizens from unwanted intrusion into their personal lives and effects." *Id.* at 1943 (quoting *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007)).

69. Richards likens internet surveillance to the theory of the Panopticon, whereby a prison can be designed around a central guard tower so all inmates could be theoretically watched at all times.

the watched party, leads to chilling effects in speech and even thought.<sup>70</sup> In the United States, this phenomenon has led to robust protections of the First Amendment by the Supreme Court. In a now classic dissent, Justice Holmes wrote that “the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”<sup>71</sup> In *Whitney v. California*, Justice Brandeis captured the spirit of free thought when he wrote:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. . . .<sup>72</sup>

Beyond the civil rights arguments against mass data gathering lies strong scientific evidence showing significant threats to the mental and physical health of those being watched. The scientific community has long known that surveillance leads to stress, fatigue, and anxiety.<sup>73</sup> However, these negative effects are magnified by the negative effects of constrained thought. In a series of now classic social psychology experiments, psychologist Solomon Asch demonstrated the massive power surveillance has to force conformity, even when the majority is clearly in the wrong.<sup>74</sup> Such research has upsetting implications in and of itself; however, when combined with superpower internet communication providers wielding unfettered surveillance powers, the ability to

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Richards, *supra* note 65, at 1948. This theory is one of the fundamental themes used in George Orwell’s novel, *1984*, (First Signet Classic 1977) (1949).

70. See, e.g., DAVID LYON, *SURVEILLANCE STUDIES: AN OVERVIEW* 115 (2007); Lilian Mitrou, *The Impact of Communications Data Retention on Fundamental Rights and Democracy—the Case of the EU Data Retention Directive*, in *SURVEILLANCE AND DEMOCRACY* 127, 129 (Kevin D. Haggerty & Minas Samatas eds., 2010); see also Graham Sewell & James R. Barker, *Neither Good, Nor Bad, but Dangerous: Surveillance as an Ethical Paradox*, in *THE SURVEILLANCE STUDIES READER* 354, 357 (Sean P. Hier & Joshua Greenberg eds., 2007).

71. *Abrams v. United States*, 250 U.S. 616, 630 (1919).

72. 274 U.S. 357, 375 (1927).

73. Emina Subašić, et al., *Leadership, Power and the Use of Surveillance: Implications of Shared Social Identity for Leaders’ Capacity to Influence*, 22 *LEADERSHIP QUARTERLY* 170, 171 (2011), <http://www.sciencedirect.com/science/article/pii/S1048984310001943> (last visited Feb. 2, 2017)

74. Saul McLeod, *Asch Experiment*, *SIMPLY PSYCHOLOGY* (2008), <http://www.simplypsychology.org/asch-conformity.html> [<https://perma.cc/XW5K-D8FH>]. In this experiment, Asch invited subjects to participate in a “vision test,” wherein other people in the vision test, who were in on the experiment, intentionally gave wrong answers when asked. In these experiments, nearly seventy-five percent of subjects conformed to their peers’ incorrect answers. *Id.*

induce conformity begins looking disturbingly like a new episode of *Black Mirror*.

“If you have something that you don’t want anyone to know, maybe you shouldn’t be doing it in the first place.”<sup>75</sup> This is not a quote from George Orwell’s *1984*, but instead from former Google CEO, Eric Schmidt, in an interview with CNBC.<sup>76</sup> Although this “nothing to hide, nothing to fear” argument has been debunked and disproven time and time again,<sup>77</sup> it remains pervasive because Americans, by and large, have yet to grasp the importance of internet privacy.<sup>78</sup> This same argument will prove to be fertile ground for abuse if there is no government agency to protect them.

Although not explicit in its opinion, the Ninth Circuit panel has turned a blind eye to the unrestricted and unregulated use of personally identifying information as a result of their decision. This abdication of the court’s inherent power to strike down unconstitutional laws is at best cowardly and at worst intentionally exposing the American public to mass surveillance like never before. Therefore, the Ninth Circuit sitting en banc should invalidate the panel’s decision and affirm the district court’s preservation of the FTC’s role as privacy regulator.

#### IV. WHY THE NINTH CIRCUIT GOT IT WRONG

In a scant ten pages in their August decision, the Ninth Circuit gave internet superpowers within their jurisdiction *carte blanche* with which to avoid any regulation of their handling of sensitive customer data. While the Ninth Circuit focused its analysis on principles of statutory interpretation of the FTC Act, it myopically turned a blind eye to broader concerns championed by the FTC’s complaint.

##### A. *The Traditional Purpose of a Common Carrier*

The only defense put forward by AT&T is the affirmative defense that it is outside of the FTC’s jurisdiction due to the common carrier exception in Section

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75. *Google CEO on Privacy (VIDEO): ‘If You Have Something You Don’t Want Anyone To Know, Maybe You Shouldn’t Be Doing It,’* HUFFINGTON POST (Mar. 18, 2010, 5:12 AM), [http://www.huffingtonpost.com/2009/12/07/google-ceo-on-privacy-if\\_n\\_383105.html](http://www.huffingtonpost.com/2009/12/07/google-ceo-on-privacy-if_n_383105.html) [https://perma.cc/LND9-VSC3].

76. *Id.* Eric Schmitt later blacklisted CNET.com who published personal information of his own in response. *See* Jennifer Westhoven, *CNET: We’ve Been Blackballed by Google*, CNN (Aug. 5, 2005, 6:15 PM), [http://money.cnn.com/2005/08/05/technology/google\\_cnet/](http://money.cnn.com/2005/08/05/technology/google_cnet/) [https://perma.cc/P93-57W3].

77. *See, e.g.,* Alex Abdo, *You May Have ‘Nothing to Hide’ but You Still Have Something to Fear*, ACLU (Aug. 2, 2013, 10:17 AM), <https://www.aclu.org/blog/you-may-have-nothing-hide-you-still-have-something-fear> [https://perma.cc/ZD9K-FEHD].

78. As pointed out by many scholars, this argument does nothing to justify its position, but instead asks the opposition to justify their position in the alternative.

5 of the FTC Act.<sup>79</sup> While many areas of the common law provide for special rules for common carriers, it is unlikely, as suggested by AT&T and the Ninth Circuit panel, that the drafters of the 1914 FTC Act envisioned mobile service providers to be considered common carriers.

A long-standing feature of the common law, the common carrier doctrine holds at its heart the notion that some businesses are subject to different rules because they hold themselves out to the public for service.<sup>80</sup> In modern law, common carriers are most often entities in the business of transporting people or cargo.<sup>81</sup> According to the Restatement (Second) of Torts:

- (1) A common carrier is under a duty to its passengers to take reasonable action
  - (a) to protect them against unreasonable risk of physical harm, and
  - (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.<sup>82</sup>

The purpose of establishing special rules for common carriers is to ensure that they are using proper care as befitting a business holding itself out for use by the public, and to avoid overburdening these entities to the point of discouragement of such vital public service.<sup>83</sup> While it is apparent why special rules might be needed for railroads, shipping companies, airlines, and other companies who hold themselves out to transport physical property or people, it is less clear why AT&T and other internet superpowers are allowed to invoke this classification. Furthermore, the additional question arises as to why this classification should allow such superpowers to avoid protecting their customers from unreasonable harm, which is at the *heart* of the common carrier doctrine.

By extending the common carrier exception to the entirety of companies that have some mobile data or telecommunication components, the Ninth Circuit panel defeats the purpose of a common carrier exception in general. In choosing to pursue a status-based definition of common carrier, the panel decision extends full protection to portions of companies that have nothing to do with common carrier activity. By way of analogy, such a rule is similar to absolving airlines for deceptively advertising low fares that do not exist; however, the federal government has taken in over twenty million dollars in three years in fines from such deceptive practices.<sup>84</sup>

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79. 15 U.S.C. § 45 (2012).

80. Joseph H. Beale, Jr., *The Carrier's Liability: Its History*, 11 HARV. L. REV. 158, 163 (1897).

81. 13 C.J.S. *Carriers* § 2 (2018).

82. RESTATEMENT (SECOND) OF TORTS § 314(A) (AM. LAW INST. 1965).

83. Beale, *supra* note 80, at 163.

84. Hugo Martin & Sandra Poindexter, *Unfair, Deceptive Practices Most Common Airline Violation, DOT Records Show*, L.A. TIMES (Aug. 3, 2014), <http://archive.jsonline.com/business/sometimes-airfares-are-just-too-good-to-be-true-b99320858z1-269750741.html> [https://perma.cc/R68T-UUR6].

Furthermore, the Ninth Circuit's ruling is in direct contravention of all previous understandings of common carriers as used in the Federal Communications Commission ("FCC") and FTC Acts. In *FCC v. Midwest Video Corp.*, the Supreme Court explicitly stated that a cable system "may operate as a common carrier with respect to a portion of its service only."<sup>85</sup> Such rulings reflect earlier cases dealing with railroads who were not subject to common carrier protection when operating outside their common carrier duties.<sup>86</sup> It is also important to note that the FTC Act, which gives the FCC supposedly interlocking and complimentary authority to that of the FTC over common carriers, also uses an activity-based definition of common carriers.<sup>87</sup> The Telecommunications Act of 1996 states that a telecommunications carrier "shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services."<sup>88</sup> This explicit activity-based definition is a Congressional signal to codify the pre-existing understanding of an activity-based definition of common carriers between the FTC and FCC.

It is also important to point to the multitudes of previous FTC enforcement actions that support the notion that the Section 5 common carrier exceptions are activity-based, without so much as a peep of dissent from the courts. In one of the very rare opinions issued in an FTC enforcement action,<sup>89</sup> the Tenth Circuit supported broad regulatory powers for the FTC in its case against Accusearch Inc. The court found that Accusearch Inc. violated consumer privacy by selling its telephone records to third parties, holding "the [Federal Tort Claims Act ("FTCA")] enables the FTC to take action against unfair practices that have not yet been contemplated by more specific laws."<sup>90</sup> Furthermore, the FTC's enforcement actions resulting in consent agreements also point to the strong need for broad regulatory powers, especially against companies that might otherwise be considered common carriers, such as T-Mobile, Comcast, and AT&T.<sup>91</sup> These enforcement actions would be disallowed by the Ninth Circuit's

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85. 440 U.S. 689, 700–01 n.9 (1979); *see also* *McDonnell Douglas Corp. v. Gen. Tel. Co. of Cal.*, 594 F.2d 720, 724 n.3 (1979) ("A carrier may be an interstate 'common carrier' . . . in some instances but not in others, depending on the nature of the activity which is subject to scrutiny.").

86. *See Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Bros. Constr. Co.*, 228 U.S. 177, 185 (1913).

87. 47 U.S.C. § 153(51) (2012).

88. *Id.*

89. Solove & Hartzog, *supra* note 44, at 610–11 ("The FTC has issued over 170 privacy-related complaints against companies. Yet virtually every complaint has either been dropped or settled. Only one case has yielded a judicial opinion—*FTC v. Accusearch Inc.*" (footnotes omitted)).

90. *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1194 (10th Cir. 2009).

91. *See* Press Release, T-Mobile to Pay at Least \$90 Million, Including Full Consumer Refunds to Settle FTC Mobile Cramming Case, FTC (Dec. 14, 2014), <https://www.ftc.gov/news-events/press-releases/2014/12/t-mobile-pay-least-90-million-including-full-consumer-refunds>

new rule, leaving millions of abused consumers without a remedy for their grievances.

Furthermore, a common carrier exception protects carriers from their own negligent wrongdoing, not their own knowingly deceptive practices. Comment E of the Restatement summarizes the duties of common carriers as one of “reasonable care under the circumstances.”<sup>92</sup> Therefore, it should be clear that intentionally deceptive practices are unreasonable per se, and so are in contravention of the fundamental purpose of common carrier protections. In this case, AT&T’s deceptive practices are intentional actions taken that injure consumers whose private information warranted common carrier protections in the first place.<sup>93</sup> This is completely antithetical to the purpose of the common carrier designation and cannot stand.

Therefore, the Ninth Circuit’s ruling goes against the long history of the common law outlining the rights and responsibilities of common carriers.

### B. *Privacy*

The Ninth Circuit’s ruling not only turns a blind eye to the traditional role and interpretations that common carriers have played in the digital economy, but has also betrayed longstanding principles of privacy established in the United States. Even 125 years ago, legal scholars were advocating for stronger privacy rights, and the call to action from Justice Warren and Justice Brandeis in their classic article, *The Right to Privacy*, remains hauntingly relevant to the issues presented in this case.<sup>94</sup> There, the (soon to be) Justices wrote, “[r]ecent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right ‘to be let alone.’”<sup>95</sup>

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[<https://perma.cc/8SQV-Z9QU>]; see also Press Release, AT&T to Pay \$80 Million to FTC for Consumer Refunds in Mobile Cramming Case, FTC (Oct. 8, 2014), <https://www.ftc.gov/news-events/press-releases/2014/10/att-pay-80-million-ftc-consumer-refunds-mobile-cramming-case> [<https://perma.cc/SZT2-XDDT>] (bringing charges against AT&T for deceptive “cramming” of unauthorized charges on consumer bills); Press Release, DIRECTV, Comcast to Pay Total of \$3.21 Million for Entity-Specific Do Not Call Violations, FTC (Apr. 16, 2009), <https://www.ftc.gov/news-events/press-releases/2014/12/t-mobile-pay-least-90-million-including-full-consumer-refunds> [<https://perma.cc/7S6V-M3SS>].

92. RESTATEMENT (SECOND) OF TORTS § 314A cmt. e (AM. LAW INST. 1964).

93. *FTC v. AT & T Mobility LLC*, 835 F.3d 993, 995 (9th Cir. 2016).

94. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

95. *Id.* at 195 (citing T.M. COOLEY ON TORTS 29 (2d ed. 1891)). Justice Warren and Justice Brandeis went on to say:

Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that “what is whispered in the closet shall be proclaimed from the house-tops.” For years there has been a feeling that the law must afford some remedy for the unauthorized

Although the right to privacy is found in many areas of the law, a substantive right to privacy for a person's own actions has been vigorously advocated since the end of the twentieth century and into the twenty-first century. One of the first Supreme Court cases to rely on such a substantive right to privacy was *Griswold v. Connecticut*, wherein the court held that the right to privacy protected a couple's right to use of contraception.<sup>96</sup> Since that decision in 1965, the Supreme Court has regularly been called upon to further define the scope and outline of this right to privacy of an individual's personal decisions and information, generally holding that the more intimate the information, the greater the need for privacy.<sup>97</sup>

Recently, the Supreme Court has grappled with a narrower element of a citizen's right to privacy in that citizen's right to *informational privacy*. In the fairly recent case of *NASA v. Nelson*, the Supreme Court suggested that the storage and protection of personally identifying information was a matter of constitutional proportions.<sup>98</sup> While the Court has not yet ruled establishing this right against private companies, the Court has referred generally to a constitutional privacy "interest in avoiding disclosure of personal matters."<sup>99</sup> It is upon this basis that the FTC has established its privacy watchdog role.

However, the panel's decision has effectively stripped the FTC of this privacy watchdog role in direct contradiction of these Supreme Court rulings.<sup>100</sup> The FTC has already brought an enforcement action against Facebook for abusing consumer privacy.<sup>101</sup> These actions, in addition to the actions against Google discussed above, show that these internet superpowers have demonstrated a penchant for abusing consumer privacy.<sup>102</sup>

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circulation of portraits of private persons; and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer.

*Id.* (footnotes omitted).

96. 381 U.S. 479, 485–86 (1965).

97. See also *Lawrence v. Texas*, 539 U.S. 558, 565, 567 (2003); *Roe v. Wade*, 410 U.S. 113, 726, 727 (1973).

98. See 562 U.S. 134, 147 (2011) ("[W]e will assume for present purposes that the Government's challenged inquiries implicate a privacy interest of constitutional significance."); see also *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 439 (1977); *Whalen v. Roe*, 429 U.S. 589, 591 (1977).

99. *Whalen*, 429 U.S. at 599 (1977).

100. See *Enforcing Privacy Promises*, FTC, <https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/enforcing-privacy-promises> [https://perma.cc/VG3E-FY YE].

101. Press Release, Facebook Settles FTC Charges That It Deceived Consumers by Failing to Keep Privacy Promises, FTC (Nov. 29, 2011), <https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep> [https://perma.cc/86FW-WRMT] (violating promises that it would keep consumer information private but allowing that information to be widely shared).

102. Press Release, Google Will Pay \$22.5 Million to Settle FTC Charges It Misrepresented Privacy Assurances to Users of Apple's Safari Internet Browser, *supra* note 46.



However, it is not just the internet superpowers that need FTC oversight, as large and small companies across the nation have succumbed to the temptation of improper data usage. Perhaps most troublingly, the FTC brought suit against the television provider VIZIO for secretly collecting viewing data from eleven million consumers through its Smart TVs.<sup>103</sup> In this case, the FTC alleged that VIZIO's Smart TVs collected "second-by-second information" on what was being displayed on the TV, from cable, streaming, and internet *without any kind of privacy disclaimer*.<sup>104</sup> Meanwhile, in 2016, the FTC sued Practice Fusion, an internet-based health records company responsible for handling highly sensitive information for thousands of customers, for mishandling that private information.<sup>105</sup>

Given the growing volume of the FTC's privacy actions, it is clear that there is a need for strong privacy regulation in the United States, especially when viewed in light of other areas of the law where privacy is already compromised. However, in its ruling in *FTC v. AT&T*, the Ninth Circuit panel has given internet superpowers free reign to use personal information in whatever manner they see fit, in direct contrast to the constitutional interests in avoiding the disclosure of personal matters.

### C. Regulation Gap

In a world of complex corporate structures, how will this status interpretation of common carrier apply to companies who engage in elements of common carrier activities? What is the threshold of activity to be granted the status of common carrier and thereby avoid FTC regulation?<sup>106</sup> Because the United States insists on taking a piece-meal approach to data security, as opposed to the more holistic approach employed by the European Union, we are uniquely exposed to potential gaps in data security. Up to this point, the only safety net for such policy gaps has been the powers of the FTC, and without these, the American public is exposed.<sup>107</sup>

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103. Press Release, VIZIO to Pay \$2.2 Million to FTC, State of New Jersey to Settle Charges It Collected Viewing Histories on 11 Million Smart Televisions Without Users' Consent, FTC (Feb 6, 2017), <https://www.ftc.gov/news-events/press-releases/2017/02/vizio-pay-22-million-ftc-state-new-jersey-settle-charges-it> [<https://perma.cc/4XKN-X7VL>].

104. *Id.*

105. Press Release, Electronic Health Records Company Settles FTC Charges It Deceived Consumers About Privacy of Doctor Reviews, FTC (June 8, 2016), <https://www.ftc.gov/news-events/press-releases/2016/06/electronic-health-records-company-settles-ftc-charges-it-deceived> [<https://perma.cc/3JG4-SH98>] (charging that the company misled users concerning whether their sensitive personal and medical information would become public).

106. It is worth noting that the legislative history of the FTC Act intended to avoid tricky definitions of the FTC's power for fear of making it ineffective. *See* H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.) (finding that, regarding unfairness, "[i]f Congress were to adopt the method of definition, it would undertake an endless task").

107. *See generally* Solove & Hartzog, *supra* note 44, at 585.

For obvious reasons, the FTC action against AT&T has attracted attention from scholars across the nation, many of whom have submitted amicus briefs on one side or another. One such brief, submitted by a collection of Data Privacy and Security Law Professors, points to many regulatory gaps that would result from allowing the panel's decision to stand.<sup>108</sup> This brief points out the limits of FCC regulation which AT&T argues is the intent of the common carrier exemption in the first place. However, the FCC's ability to regulate companies like AT&T would be limited only to information gained "by virtue of its provision of a telecommunications service" as proscribed in the Telecommunications Act.<sup>109</sup> The amici curiae further point out that these companies take in vast amounts of personal data from portions of their operations that would not be covered by the Telecommunications Act, such as their mobile data services, leaving regulation of such to "a largely unregulated 'wild west,' subject only to inadequate state law, enforced through class action suits and circumscribed regulatory authority."<sup>110</sup>

The flip side of this rule is that while the FCC is empowered to regulate common carriers, it is not empowered to regulate an activity that does not provide telecommunications services. This would leave a regulatory gap for any deceptive advertising or content services, unable to be prosecuted by the FTC or the FCC.<sup>111</sup> These concerns are only magnified by a brief of amici curiae submitted in support of the FTC *by the FCC itself*.<sup>112</sup> In this brief, the FCC argues forcefully that the panel's ruling destroys the "cooperative and complementary" roles played by each agency in protecting consumers.<sup>113</sup> The FCC points to the FCC-FTC Consumer Protection Memorandum of Understanding to argue that both agencies have long understood that the FTC has jurisdiction over non-common carrier services of entities that also engage in common carrier services typically overseen by the FCC.<sup>114</sup>

Perhaps the most telling amicus brief filed in support of the FTC, however, came from the last place anyone would expect: the internet superpowers themselves. In an amicus brief filed by Charter, Comcast, Cox, and Verizon,

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108. Brief for Data Privacy and Security Law Professors as Amici Curiae Supporting Petitioner at 9–21, *FTC v. AT&T Mobility, LLC*, 835 F.3d 993 (9th Cir. 2016) (No. 15-16585).

109. 47 U.S.C. § 222(c)(1) (2012).

110. Brief for Data Privacy and Security Law Professors as Amici Curiae Supporting Petitioner, *supra* note 108, at 13.

111. *Id.* at 3 n.1.

112. Brief for Federal Communications Commission as Amicus Curiae Supporting Petitioner, *FTC v. AT&T Mobility, LLC*, 835 F.3d 993 (9th Cir. 2016) (No. 15-16585).

113. *Id.*

114. *Id.* (quoting *FCC-FTC Consumer Protection Memorandum of Understanding*, at 2 (Dec. 17, 2015), [https://www.ftc.gov/system/files/documents/cooperation\\_agreements/151116ftcfcc-mou.pdf](https://www.ftc.gov/system/files/documents/cooperation_agreements/151116ftcfcc-mou.pdf) [<https://perma.cc/PSR7-NWQL>]) ("[T]he scope of the common carrier exemption in the FTC Act does not preclude the FTC from addressing non-common carrier activities engaged in by common carriers.").

these massive Internet Service Providers (“ISPs” and “ISP”) admit at the outset that “[a]t first glance, *amici’s* position might seem surprising.”<sup>115</sup> However, the amici go on to argue that “the important regulatory goals that are at stake in this case cannot be achieved if the en banc Court accepts the panel’s interpretation.”<sup>116</sup> Charter, et al. argue that “[t]he panel’s decision undercuts” the regulatory need for consistency and expertise in enforcing consumer protection laws.<sup>117</sup> These ISPs demonstrate admirable foresight in forecasting “a cacophony of regulatory burdens that will harm consumers and businesses alike” as a result of the panel’s decision.<sup>118</sup>

Furthermore, the panel’s conceptualization of a status-based interpretation of the common carrier exception calls into question precisely how many services an entity must provide until it can claim the status of a common carrier. The Ninth Circuit’s panel seemed cognizant of this problem in its opinion, saying common carrier status would not extend to the “acquisition of some minor [common carrier] division unrelated to the company’s core activities that generates a tiny fraction of its revenue.”<sup>119</sup> Not only does this leave a vague standard that will trigger heavy litigation, but it ignores the economic realities of the companies affected. As discussed supra, internet superpowers like Verizon, Google, and Facebook have begun acquiring significant corporate players, contributing much more to the overall operations of the company, and therefore avoiding the panel’s concerns of adding only a *tiny fraction* to establish common carrier status.<sup>120</sup>

The Ninth Circuit’s decision also establishes a circuit split with decisions of the Second and D.C. Circuits. The Second Circuit fairly recently agreed with almost the exact same argument put forward by the FTC in this case in *FTC v. Verity International, Ltd.*,<sup>121</sup> and the D.C. Circuit has long held that the term “common carrier” is activities-based.<sup>122</sup> While it is proper for the circuits to assert different views on the law, the vulnerabilities exposed by this particular split warrant special consideration. Because most of the companies implicated in the Ninth Circuit’s decision are national in scope, this loophole could likewise be national in scope.

The regulation gap that results from the Ninth Circuit decision will not only leave consumers vulnerable to abuse by these internet superpowers, but will also disrupt the regulation of critical markets.

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115. Brief for Charter Communications, et al., as Amicus Curiae Supporting Respondent at 3, *FTC v. AT&T Mobility, LLC*, 835 F.3d 993 (9th Cir. 2016) (No. 15-16585).

116. *Id.*

117. *Id.*

118. *Id.* at 15.

119. *FTC v. AT & T Mobility LLC*, 835 F.3d 993, 1002 (9th Cir. 2016).

120. *See Fung, supra* note 55.

121. 443 F.3d 48, 56–61 (2nd Cir. 2006).

122. *See Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976).

#### D. Statutory Interpretation

In addition to these wider policy arguments against allowing AT&T (and similarly situated companies) to claim immunity for its deceptive practices as a common carrier, the Ninth Circuit's opinion is flawed in and of itself. The opinion issued by the Ninth Circuit panel devotes the majority of its space to discussing the statutory interpretive rules followed by the Circuit in finding the common carrier exception as one concerning the "status" of the company, and not the activity that the company is conducting.<sup>123</sup> However, the district court, in ruling against AT&T, relied on a number of Supreme Court decisions that held it is possible for companies to lose their protections as common carriers if they engaged in activity that is "outside the performance of its duty as a common carrier."<sup>124</sup>

In concluding that common carrier is an activity-based analysis and not a status-based one, the district court made a convincing case of its own statutory interpretation.<sup>125</sup> The district court pointed to the meaning of common carrier as understood at the passing of the FTC Act in 1914 as one that includes the activity in question.<sup>126</sup> The court also pointed to statements made by members of Congress in debating the bill that suggests that activity should be a part of the common carrier analysis.<sup>127</sup> Furthermore, the court noted that the FTC's interpretation of the Act was entitled to some deference per *Skidmore v. Swift & Co.*<sup>128</sup> The Ninth Circuit disagreed with all of these points.<sup>129</sup>

The panel cited to the established presumption that Congress is aware of prior judicial interpretations of issues being legislated<sup>130</sup> to show that the bare terms of common carrier was an intentional exclusion of the activity-based interpretations found in earlier Supreme Court cases.<sup>131</sup> However, by this same

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123. *FTC v. AT & T*, 835 F.3d at 998–00.

124. *Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Bros. Constr. Co.*, 228 U.S. 177, 185 (1913) ("[T]his rule has no application when a railroad company is acting outside the performance of its duty as a common carrier."); *R.R. Co. v. Lockwood*, 84 U.S. 357, 377 (1873) (stating that a company can become a private carrier when it "undertakes to carry something which it is not [its] business to carry").

125. *FTC v. AT & T Mobility LLC*, 87 F. Supp. 3d 1087, 1104 (N.D. Cal. 2015).

126. *Id.* at 1092.

127. *Id.* at 1094 (quoting Representative Stevens, a manager of the bill, who said: "They ought to be under the jurisdiction of this commission in order to protect the public, in order that all of their public operations should be supervised, *just the same as where a railroad company engages in work outside of that of a public carrier. In that case such work ought to come within the scope of this commission for investigation. . . . [E]very corporation engaged in commerce except common carriers, and even as to them I do not know but that we include their operations outside of public carriage regulated by the interstate-commerce acts.*").

128. *Id.* at 1101 (holding "a non-controlling agency opinion may carry persuasive weight").

129. *FTC v. AT & T Mobility LLC*, 835 F.3d 993, 999, 1002–03 (9th Cir. 2016).

130. *Id.* at 999.

131. *Id.*

presumption, the proper interpretation of the FTC Act would be that Congress was aware of such activity-based qualifications for common carriers, and by not using explicit language to change this meaning, actually intended such interpretations to remain concerning common carriers in Section 5 of the FTC Act.

Given these glaring issues with the panel's decision, the Ninth Circuit should invalidate it by agreeing with the district court's interpretation that common carrier status is based on activity.

#### V. IF NOT THE FTC, THEN WHO?

Even if the courts decide that the common carrier exception established in Section 5 of the FTC Act does prevent the FTC from holding AT&T accountable for its deceptive practices, the legal arguments against such unaccountability still remain. This begs the question, if the FTC, the government agency which is widely considered to have the strongest regulatory powers in this area of commerce, is robbed of its powers, who will be able to rein in these technological superpowers and hold them accountable for bad behavior?

##### A. *The FCC*

As indicated by AT&T itself in its brief in support of its dismissal motion, the FCC seems to be the next logical agency to take on the mantle of regulation of large internet-oriented companies.<sup>132</sup> The FCC's privacy regulatory powers are derived from Section 22 of the Telecommunications Act, which gives the FCC power to regulate common carriers outside the reach of the current FTC jurisdiction.<sup>133</sup>

Furthermore, in recent years, the FCC has been making strides to become a more powerful regulatory force concerning the internet. After adopting an order establishing basic net neutrality rules, which were upheld by the D.C. Circuit in a recent ruling,<sup>134</sup> the FCC has set itself up as a stronger regulatory force than in the past.<sup>135</sup> Furthermore, as discussed by AT&T in its brief on the case, the FCC has recently re-classified ISPs to be common carriers, bringing AT&T under its

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132. Motion to Dismiss by Defendant AT&T Mobility, LLC, *FTC v. AT&T Mobility LLC*, 87 F. Supp. 3d 1087 (N.D. Cal. 2015) (No. 3:14-cv-04785-EMC), 2015 WL 462303.

133. 47 U.S.C. § 222 (2012).

134. Cecilia Kang, *Court Backs Rules Treating Internet as Utility, Not Luxury*, N.Y. TIMES (June 14, 2016), [https://www.nytimes.com/2016/06/15/technology/net-neutrality-fcc-appeals-court-ruling.html?\\_r=0](https://www.nytimes.com/2016/06/15/technology/net-neutrality-fcc-appeals-court-ruling.html?_r=0) [<https://perma.cc/K4NL-VB3S>]. However, the current Trump administration is pushing to repeal these rules. See Brian Fung, *The Republican Push to Repeal Net Neutrality Will Get Underway This Week*, WASH. POST (May 17, 2017), [https://www.washingtonpost.com/news/the-switch/wp/2017/05/17/the-republican-push-to-repeal-net-neutrality-is-getting-underway-this-week/?utm\\_term=.6cfb59a42fc1](https://www.washingtonpost.com/news/the-switch/wp/2017/05/17/the-republican-push-to-repeal-net-neutrality-is-getting-underway-this-week/?utm_term=.6cfb59a42fc1) [<https://perma.cc/F7DP-DYLP>].

135. Kang, *supra* note 134.

Section 202 jurisdiction.<sup>136</sup> However, many observers remain skeptical of the FCC's regulatory potency and its proposed policy's effect on internet privacy.

One major critique of the FCC's new proposed regulations is its failure to address the sensitivity of information gathered. The FCC's newly adopted rules set out specific procedures based on the entity using the personal information gathered by the ISP.<sup>137</sup> However, these rules do not address the sensitivity of the information gathered, instead relying on boilerplate "opt-in" agreements regardless of the situation.<sup>138</sup> These critics assert that consumers will blithely opt into such usages as part of user agreements routinely clicked through by end-users today, potentially releasing highly sensitive data.<sup>139</sup>

The court in *FTC v. AT&T* implies that the FCC would be able to fill the massive gap in regulation made by its ruling; however, this is not the case.<sup>140</sup> The language of the Telecommunications Act, which governs the FCC, allows the FCC to regulate telecommunication companies only insofar that they receive information "by virtue of its provision of a telecommunications service."<sup>141</sup> Given the panel's demonstrated insistence on statutory language, it is unlikely it would expand the Act's language to allow "telecommunications service" to include mobile data usage, and so the regulatory gap would remain without any additional action taken by Congress.

### B. Congress

If the Ninth Circuit's en banc ruling agrees with the panel's doggedly demonstrated deference to the legislature in interpreting Section 5, however, it might become necessary to legislate around this loophole.

As demonstrated in *FTC v. AT&T*, while the FTC's Section 5 common carrier exception has good policy effects in the wider schema of the FTC's regulation of interstate trade, it is particularly harmful to the FTC's more specific task of privacy regulation.<sup>142</sup> Indeed, even FTC chairwoman Edith Ramirez has urged congress to repeal the common carrier exception in its entirety to better protect consumers.<sup>143</sup> Such a move has garnered support from both the FTC and

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136. Motion to Dismiss by Defendant AT&T Mobility, LLC, *supra* note 132.

137. Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, 82 Fed. Reg. 44,118 (Sept. 21, 2012) (codified at 47 C.F.R. § 64) (2017), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-16-39A1\\_Rcd.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-39A1_Rcd.pdf) [<https://perma.cc/HC62-UBGG>].

138. Rosemary C. Harold, *The FCC Forgot Something in Piecing Together Its Unnecessarily Complex Proposal for Broadband Privacy Regulation: Consumers*, 17 FEDERALIST SOC'Y REV. 72, 77, 79 (Oct. 2016).

139. *See id.* at 77–78.

140. *FTC v. AT & T Mobility LLC*, 835 F.3d 993, 996, 1003 (9th Cir. 2016).

141. 47 U.S.C. § 222(c)(3) (2012).

142. *FTC v. AT & T Mobility LLC*, 87 F. Supp. 3d 1087, 1095 (N.D. Cal. 2015).

143. *Prepared Statement of the Federal Trade Commission on "Legislative Hearing on 17 FTC Bills" Before the H. Comm. on Energy and Commerce*, 114th Cong. 1, 8 (May 24, 2016),

the FCC, and as such, a repeal would allow for better inter-agency cooperation in service of consumer protection.<sup>144</sup> Legislation to repeal the common carrier exception, introduced by Congressman Jerry McNerney, was referred to committee in May 2016<sup>145</sup> and has the support of the FTC.<sup>146</sup>

Such legislation would be consistent with the recent trend of increasing, rather than decreasing, federal oversight of internet based companies. As the internet has become a more dominant force in the world, Congress has legislated to control it and protect citizens.<sup>147</sup> By adopting net neutrality rules, the FCC has signaled its commitment to regulation of ISPs.<sup>148</sup> Legislation formally repealing the common carrier exception would simply be the next logical step in internet regulation.

## VI. CONCLUSION

Life in the twenty-first century is, almost by definition, shaped by the internet and rapidly advancing technology. With this characteristic comes dizzying advancements in the fields of science, medicine, commerce, and virtually any other industry in our lives. However, as Eric Schmidt, Google CEO has said, it is important to remember that the internet is “the first thing that humanity has built that humanity doesn’t understand.”<sup>149</sup> This uncertainty must be treated with caution and healthy skepticism, lest we allow it to become a tool of greed and oppression.

When the Ninth Circuit panel heard AT&T Mobility’s appeal in its case against the FTC, it was not hearing a simple case of statutory interpretation. It was hearing a case charged with much wider, generation-defining issues at play. The panel failed to address privacy concerns. The panel failed to address corporate manipulation concerns. The panel failed to address the outdated and

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[https://www.ftc.gov/system/files/documents/public\\_statements/950403/160524commtestimony-17-bills.pdf](https://www.ftc.gov/system/files/documents/public_statements/950403/160524commtestimony-17-bills.pdf) [https://perma.cc/W79N-SSPE].

144. Brian Fung, *How to End a Fight over Who Should Regulate Internet Providers*, WASH. POST (Mar. 26, 2015), [https://www.washingtonpost.com/news/the-switch/wp/2015/03/26/could-the-ftcs-inability-to-regulate-internet-providers-come-to-an-end/?utm\\_term=.d2d9e35fc7fd](https://www.washingtonpost.com/news/the-switch/wp/2015/03/26/could-the-ftcs-inability-to-regulate-internet-providers-come-to-an-end/?utm_term=.d2d9e35fc7fd) [https://perma.cc/MJ6H-E24S].

145. *Protecting Consumers in Commerce Act of 2016*, H.R. 5239 114th Cong. (2016), <https://www.congress.gov/bill/114th-congress/house-bill/5239/committees> [https://perma.cc/T7NT-SDP4].

146. BERIN SZÓKA & GEOFFREY A. MANNE, RESTORING CONGRESSIONAL OVERSIGHT OF THE SECOND NATIONAL LEGISLATURE, FTC 93 (May 2016), <http://docs.house.gov/meetings/IF/IF17/20160524/104976/HHRG-114-IF17-Wstate-ManneG-20160524-SD004.pdf> [https://perma.cc/W339-VKMC].

147. See 47 U.S.C. § 153(51) (2012).

148. Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 (Feb. 26, 2015), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-24A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf) [https://perma.cc/7EKA-GCZB].

149. Taylor, *supra* note 1.

outclassed language of a statute written over 100 years ago, clinging to that language in the face of a period of the most rapid promulgation of technology known to the human race. Because the Ninth Circuit panel that heard AT&T's appeal addressed none of these issues, the Ninth Circuit hearing the case en banc must address these issues. If these issues are addressed, there is only one conclusion: the Ninth Circuit must affirm the district court's ruling, invalidate the panel's decision, and ensure that individual American citizens are not used and abused by those lurking behind *black mirrors*.

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