No. 15-16585

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

AT&T MOBILITY LLC, a limited liability company,

Defendant-Appellant.

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

BRIEF FOR AMICUS CURIAE SENATOR RICHARD BLUMENTHAL IN SUPPORT OF THE FEDERAL TRADE COMMISSION'S PETITION FOR REHEARING EN BANC

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Richard Blumenthal is a United States Senator who is committed to the protection of consumers from unfair and deceptive acts and practices. The Senator legislates against the background of existing consumer-protection laws to further protect his constituents and other consumers from those who would seek to cheat and deceive them. Senator Blumenthal sits on the Senate Committee on Commerce, Science, and Transportation, which has jurisdiction over interstate commerce and regulation of a broad range of consumer products and which is charged with studying and reviewing matters related to consumer affairs. He is the Ranking Member of the Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security, which oversees the FTC.

As a member of Congress working to ensure that consumers are protected in the marketplace, Senator Blumenthal has a strong interest in the proper interpretation of the Federal Trade Commission Act (FTC Act) and in vigorous enforcement of the Act by the Federal Trade Commission (FTC). He has seen evidence in hearings and reports of the significant consumer harms that can occur when such enforcement is lacking.

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[1] Senator Blumenthal has moved for leave to file this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than Senator Blumenthal made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

The panel opinion in this case held that an exception in the FTC Act for "common carriers subject to the Acts to regulate commerce," 15 U.S.C. § 45(a)(2), applies to an entity with the "status" of a common carrier even when the entity is engaged in non-common-carrier activity. Senator Blumenthal is filing this brief in support of the FTC's petition for rehearing en banc because the panel's interpretation of the common-carrier exception is contrary to congressional intent and long-standing understandings of the FTC Act and, if allowed to stand, would create a regulatory gap when businesses that engage in common-carrier activities also engage in non-common-carrier activities. Particularly given the extent to which the telecommunications industry and other industries are increasingly intermingling—AT&T, for example, just announced an $85.4 billion deal to buy Time Warner—this regulatory gap would allow unfair, deceptive, and fraudulent behavior to go unchecked, harming consumers and increasing unfairness in the marketplace.

I. The Panel Opinion Undermines the FTC's Unique and Important Role in Protecting Consumers.

In the FTC Act, Congress charged the FTC with a broad mission, to prevent "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a). The FTC has used its broad authority "to be the first line of defense for consumers in a marketplace often fraught with bad actors." David C. Vladeck, *Charting the*

Course: The Federal Trade Commission's Second Hundred Years, 83 Geo. Wash. L. Rev. 2101, 2102 (2015). It has "protect[ed] consumers from scam-artists intent on taking the last dollars out of their wallets, from abusive debt collectors, from shady lenders, from advertisers who make false claims about their product's attributes, and from those who hijack consumers' personal information for commercial gain." *Id*.

The FTC's role in protecting consumers is unique in that its authority cuts across industries, broadly checking unfair and deceptive behavior, subject only to specific, limited exceptions. *See* 15 U.S.C. § 45(a)(2). Recent FTC enforcement actions manifest the wide scope of the FTC's mandate:

- an action against Volkswagen for cheating emissions tests and deceptively advertising its cars as "clean";[2]
- an action alleging that Herbalife, a multi-level marketing company, deceived consumers into thinking they could earn substantial amounts by selling Herbalife's diet, nutritional, and personal care products;[3]

[2] *See* FTC, Press Release, *Volkswagen to Spend up to $14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles* (June 28, 2016), https://www.ftc.gov/news-events/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating.

[3] *See* FTC, Press Release, *Herbalife Will Restructure Its Multi-level Marketing Operations and Pay $200 Million For Consumer Redress to Settle FTC Charges* (July 15, 2016), https://www.ftc.gov/news-events/press-releases/2016/07/herbalife-will-restructure-its-multi-level-marketing-operations.

- an action charging that a smartphone app developer deceived consumers into downloading an app that contained hidden malicious software that took control of the consumers' devices to mine virtual currency for the developer;[4]
- an action alleging that the retailer Lord & Taylor misrepresented that advertisements and Instagram posts paid for by the company had come from independent sources;[5] and
- an action against a college alleging that the school told students that its courses of study would provide them with comprehensive training and credentials to change careers or obtain jobs, when the programs often did not meet basic educational requirements set by state licensing boards.[6]

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[4] *See* FTC, Press Release, *App Developer Settles FTC and New Jersey Charges It Hijacked Consumers' Phones to Mine Cryptocurrency* (June 29, 2015), https://www.ftc.gov/news-events/press-releases/2015/06/app-developer-settles-ftc-new-jersey-charges-it-hijacked.

[5] *See* FTC, Press Release, *FTC Approves Final Lord & Taylor Order Prohibiting Deceptive Advertising Techniques* (May 23, 2016), https://www.ftc.gov/news-events/press-releases/2016/05/ftc-approves-final-lord-taylor-order-prohibiting-deceptive.

[6] *See* FTC, Press Release, *Ashworth College Settles FTC Charges it Misled Students About Career Training, Credit Transfers* (May 26, 2015), https://www.ftc.gov/news-events/press-releases/2015/05/ashworth-college-settles-ftc-charges-it-misled-students-about.

See generally Oversight of the Federal Trade Commission: Hearing Before the S. Comm. on Commerce, Science, and Transportation, 114th Cong. (Sept. 27, 2016) (Prepared Statement of the FTC) (discussing and demonstrating broad scope of FTC enforcement activities).

The FTC's broad authority over unfair and deceptive acts and practices across the economy ensures that the federal government can take action to address deception that harms consumers across the marketplace. Because of the FTC's key role in protecting consumers, it is particularly important that the FTC Act be interpreted in accordance with "the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). Rather than following this well-settled rule of statutory construction, however, the panel interpreted the Act's scope narrowly, creating a wide hole in FTC jurisdiction that undermines the agency's ability to remedy deceptive acts committed by the growing range of companies that engage in common-carrier activity as well as non-common-carrier activity.

II. The Panel Opinion Creates a Regulatory Gap That Will Harm Consumers.

If the panel opinion stands, it will greatly limit the government's ability to police unfair and deceptive practices in fields that Congress has long considered within the FTC's authority and that are inarguably not common-carrier activities.

Not only does the panel opinion immunize from FTC oversight traditional common carriers who engage in non-common-carrier activities, but it will inevitably prompt non-common carriers to take on common-carrier activities, as a means to exempt all facets of their business practices from the FTC's enforcement of the prohibition against deceptive acts and practices. Congress could not have intended this gap in creating the common-carrier exception.

Common Carriers. Should the panel opinion stand, any company that offers common-carrier services will be immune from FTC enforcement in all of its business practices, regardless of whether the practice is related to those common-carrier services. Thus, if a company that acts as a common carrier engages in unfair or deceptive conduct unrelated to the provision of telecommunications services, neither the FTC nor FCC could act. At the same time, if a company that does not engage in common-carrier activities engages in that same conduct, the FTC could take action. That illogical disparity is not required by the language of the FTC Act's common-carrier exception.

The panel opinion's harms would be compounded by the FCC's 2015 order classifying broadband internet access as a common-carrier service. The voluminous record in that FCC rulemaking proceeding shows that the agency properly interpreted the Communications Act to reach its decision. Moreover, broadband "reclassification" protects consumers from all manner of anti-consumer

and anti-competitive practices by internet service providers (ISPs) when they are engaged in the activity of providing broadband internet access service. Yet, in light of reclassification, the panel opinion could eliminate all FTC authority over ISPs, and leave consumers unprotected from unfair and deceptive practices in which internet companies engage outside of their ISP businesses. The FCC can prohibit such unjust and unreasonable behavior by ISPs in their provision of broadband. But the Communications Act shields telecommunications carriers from FCC common-carrier regulation when they perform non-common-carrier activities. *See* 47 U.S.C. § 153(51) ("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[.]").

Google provides a good example of a company that could fall within a regulatory gap if the panel opinion is upheld. A sprawling Internet behemoth with revenues from selling advertising, hardware (*e.g.*, smartphones, tablets, laptops), and software (*e.g.*, the Android operating system), Google has historically been subject to FTC jurisdiction. The FTC has brought successful actions against Google related to the company's misuse of users' personal information and billing of parents for unauthorized charges in children's mobile apps downloaded from the

Google app store.[7] But Google also owns Google Fiber, a broadband internet service. In light of the panel opinion, Google could argue that Google Fiber renders it immune from government oversight—either by the FTC or FCC—where the conduct is unrelated to Google Fiber or another common-carrier activity.

Similarly, Walmart, the world's largest company by revenue, operates businesses unrelated to common carriage—a chain of discount department and grocery stores. Recently, after an inquiry by the FTC into possible deceptive labeling, Walmart removed "Made in the USA" logos from its e-commerce site.[8] Yet, Walmart currently resells mobile wireless voice and data services. Should the panel opinion stand, Walmart could argue that, because of these mobile services, it is a common carrier, and thus has shed all federal oversight of potentially unfair or deceptive conduct unrelated to its common-carrier activities. If Walmart prevailed in this reasoning, "Common Carrier Walmart" could print "Made in the USA" on products from across the globe, exempt from the FTC's enforcement authority.

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[7] *See* FTC, Press Release, *Google to Refund Consumers at Least $19 Million to Settle FTC Complaint It Unlawfully Billed Parents for Children's Unauthorized In-App Charges* (Sept. 4, 2014), https://www.ftc.gov/news-events/press-releases/2014/09/google-refund-consumers-least-19-million-settle-ftc-complaint-it; FTC, Press Release, *Google Will Pay $22.5 Million to Settle FTC Charges it Misrepresented Privacy Assurances to Users of Apple's Safari Internet Browser* (Aug. 9, 2012), https://www.ftc.gov/news-events/press-releases/2012/08/google-will-pay-225-million-settle-ftc-charges-it-misrepresented.

[8] *See* Phil Wahba, *Walmart removes 'Made in USA' logos from website after government inquiry*, Fortune (Oct. 20, 2015), http://fortune.com/2015/10/20/walmart-made-in-the-usa/.

Non-Common Carriers. The panel opinion gives short shrift to the incentives it creates for businesses that do not engage in common-carrier activities to start doing so to exempt themselves from FTC oversight. The panel dismisses the issue as one for another case, explaining that "AT&T's status as a common carrier is not based on its acquisition of some minor division unrelated to the company's core activities that generates a tiny fraction of its revenue." Panel Op. 17. But the opinion does not contest that a business that becomes or acquires a common carrier could then be exempt from FTC enforcement, and it fails to appreciate the import of that fact on a reasonable interpretation of the FTC Act. A few examples demonstrate the ease with which non-common carriers could potentially acquire common-carrier status to take advantage of the panel opinion.

Amazon is the eighth largest retailer in the world, with over $100 billion in revenue in 2015.[9] Its revenue sources include online retail sales, streaming services, and sales related to its Kindle mobile devices. In addition, Amazon has a large cloud computing business, known as Amazon Web Services. In the past few years, the FTC has brought cases against Amazon for unfair and deceptive

[9] *See* Lauren Gensler, *The World's Largest Retailers 2016: Wal-Mart Dominates But Amazon Is Catching Up*, Forbes (May 27, 2016), http://www.forbes.com/sites/laurengensler/2016/05/27/global-2000-worlds-largest-retailers/#6a10b16629a9; Janko Roettgers, *Amazon Clocks $107 Billion in Revenue in 2015*, Variety (Jan. 28, 2016), http://variety.com/2016/biz/news/amazon-clocks-107-billion-in-revenue-in-2015-1201691106/.

practices, including falsely labeling textiles sold on Amazon as made of bamboo, when they were actually rayon, and billing parents for unauthorized in-app charges made by their children on Amazon's mobile devices.[10] It has been rumored that Amazon plans to purchase or launch an ISP.[11] Indeed, perhaps presaging this eventuality, on October 6, 2016, Amazon announced a multi-year partnership with AT&T to integrate Amazon's cloud service with AT&T's networking service.[12] If Amazon engages in common-carrier activities, and the panel opinion stands, the FTC could lose authority to take action to halt any deceptive acts and practices committed by the company, including in its retail business. And no federal agency would have authority to fill the vacuum.

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[10] *See*, *e.g.*, FTC, Press Release, *Federal Court Finds Amazon Liable for Billing Parents for Children's Unauthorized In-App Charges* (Apr. 27, 2016), https://www.ftc.gov/news-events/press-releases/2016/04/federal-court-finds-amazon-liable-billing-parents-childrens; FTC, Press Release, *Four National Retailers Agree to Pay Penalties Totaling $1.26 Million for Allegedly Falsely Labeling Textiles as Made of Bamboo, While They Actually Were Rayon* (Jan. 3, 2013), https://www.ftc.gov/news-events/press-releases/2013/01/four-national-retailers-agree-pay-penalties-totaling-126-million.

[11] *See*, *e.g.*, Casey Chan, *Report: Amazon Is Testing Its Own Wireless Network*, Gizmodo (Aug. 22, 2013), http://gizmodo.com/report-amazon-is-testing-its-only-wireless-network-1186269155.

[12] *See* Larry Dignan, *AT&T, AWS Forge Cloud Computing, IoT, Networking Alliance*, ZDNet.Com (Oct. 6, 2016), http://www.zdnet.com/article/at-t-aws-forge-cloud-computing-iot-networking-alliance/.

Similarly, Apple is the world's largest technology company by assets and second largest smartphone vendor.[13] Apple sells hardware (*e,g.*, iPhones, iPads, Macbooks), software (*e.g.*, the Mac OS, iTunes), and digital content (via iTunes). Like Amazon, Apple also has a cloud service called iCloud. In 2014, like Google and Amazon, Apple paid millions of dollars to settle an FTC complaint that Apple billed consumers for charges incurred by children in kids' mobile apps without parental consent.[14] Apple has reportedly considered building its own broadband network to ensure faster delivery of its digital content.[15] Should Apple proceed with a plan to develop broadband or acquire a common carrier, or simply take the minimum strategic steps necessary to become a common carrier, the government could become powerless to regulate its non-common-carrier business practices.

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[13] *See* Gartner, Press Release, *Gartner Says Five of Top 10 Worldwide Mobile Phone Vendors Increased Sales in Second Quarter of 2016* (Aug 19, 2016), http://www.gartner.com/newsroom/id/3415117.

[14] FTC, Press Release, *Apple Inc. Will Provide Full Consumer Refunds of At Least $32.5 Million to Settle FTC Complaint It Charged for Kids' In-App Purchases Without Parental Consent* (Jan. 15, 2014), https://www.ftc.gov/news-events/press-releases/2014/01/apple-inc-will-provide-full-consumer-refunds-least-325-million.

[15] *See*, *e.g.*, Lance Whitney, *Apple reportedly to build its own high-speed data network*, CNET (June 8, 2015), https://www.cnet.com/news/apple-reportedly-to-build-its-own-high-speed-data-network/.

III. The Panel Opinion Is Contrary to Congressional Intent and Upsets Long-Standing Understandings of the Common-Carrier Exception.

The panel's holding that the common-carrier exception deprives the FTC of jurisdiction over activities of entities with the "status" of a common carrier, whether those activities are common-carrier activities or not, upsets the long-held understanding that "[w]hether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance." *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994). This Court has shared this understanding, explaining that 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." *McDonnell Douglas Corp. v. Gen. Tel. Co.*, 594 F.2d 720, 724 n.3 (9th Cir. 1979).

The FTC and FCC have similarly shared the understanding that whether the common-carrier exception applies depends on the activities the entity is undertaking. *See*, *e.g.*, FCC-FTC Consumer Protection Memorandum of Understanding (Nov. 16, 2015). And the FTC has relied on this understanding to keep entities that engage in common-carrier activities from deceiving and cheating consumers when they engage in other activities. *See*, *e.g.*, *FTC v. T-Mobile USA*, *Inc.*, No. 2:14-cv-0097-JLR (W.D. Wash. filed Dec. 19, 2014). This shared understanding has, in turn, formed the backdrop against which Congress has legislated to protect consumers.

The distinction between the regulation of entities when they are performing common-carrier activities and when they are performing non-common-carrier activities dates back over 100 years, to before the enactment of the FTC Act. As the panel acknowledged, at the time the law was enacted, "cases recognize[d] a distinction between common carrier and non-common carrier activities in the regulation of entities with common carrier status." Panel Op. 11. An entity was only subject to rules that applied to common carriers when it was engaged in common-carrier activities. *See*, *e.g.*, *Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Bros. Constr. Co.*, 228 U.S. 177, 184 (1913) (explaining that the rule "that common carriers cannot secure immunity from liability for their negligence by any sort of stipulation . . . has no application when a railroad company is acting outside the performance of its duty as a common carrier"). It can be presumed that Congress was well aware of the background law when it enacted the FTC Act. *See*, *e.g.*, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (presuming "that Congress is knowledgeable about existing law pertinent to the legislation it enacts").

Nonetheless, the panel held that the common-carrier exception is based on an entity's "status," not on whether the entity is performing common-carrier activities, finding "significant support" in the fact that the FTC Act's "Packers and Stockyards" exception exempts "persons, partnerships, or corporations insofar as

they are subject to the Packers and Stockyards Act," while the common-carrier exception exempts "common carriers subject to the Acts to regulate commerce," without the "insofar as" language. Panel Op. 12. But while the "insofar as" language may have been necessary to make clear that the Packers and Stockyards exception was activity-based, the term "common carrier" had an activity-based meaning at common law that made that language unnecessary. *See*, *e.g.*, *Railroad Company v. Lockwood*, 84 U.S. 357, 377 (1873) ("A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when . . . he undertakes to carry something which it is not his business to carry."). Moreover, the "insofar as" language in the Packers and Stockyards exception was added to the FTC Act in 1958, while the common-carrier exception dates to 1914, and the "interpretive value of an amendment to a statute is particularly dubious where, as here, the amendment was enacted long after the original provision." *Hawkins v. United States*, 30 F.3d 1077, 1082 (9th Cir. 1994).

The panel's holding that the common-carrier exception is status-based flies in the face of long-held understandings of the provision, undermines the purposes of the FTC Act, and creates a regulatory gap that no Congress could have intended. It deprives consumers of the refunds they deserve and removes critical deterrents from the marketplace. This case presents an issue of extraordinary importance and en banc review is warranted.

CONCLUSION

For the reasons given above, as well as those in the FTC's petition, this Court should vacate the panel opinion and order that the case be reheard en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Circuit Rule 29-2(c)(2). The brief is composed in a 14-point proportional type-face, Times New Roman. As calculated by my word processing software (Microsoft Word 2010), the brief contains 3,102 words.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on October 24, 2016.

/s/ Adina H. Rosenbaum
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