Nos. 17-498, 17-499, 17-500, 17-501, 17-502, 17-503, and 17-504

In the Supreme Court of the United States

DANIEL BERNINGER, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

AT&T INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

AMERICAN CABLE ASSOCIATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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Additional Captions Listed on Inside Cover

CTIA-THE WIRELESS ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

NCTA - THE INTERNET AND TELEVISION ASSOCIATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

TECHFREEDOM, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

UNITED STATES TELECOM ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

QUESTION PRESENTED

In 2015, the Federal Communications Commission (FCC) adopted an order that reclassified broadband internet access service as a "telecommunications service" subject to common-carrier regulation under Title II of the Communications Act of 1934, 47 U.S.C. 201 *et seq.*, and imposed new rules governing the conduct of broadband providers. After the petitions for writs of certiorari were filed, the FCC adopted a new order superseding the 2015 order, abandoning its classification of broadband as a telecommunications service, and repealing the accompanying conduct rules. The question presented is as follows:

Whether the now-superseded 2015 order was invalid because it exceeded the FCC's statutory authority, was arbitrary and capricious, was promulgated without adequate public notice, or violated the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-187a[1]) is reported at 825 F.3d 674. The order of the

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[1] All references to "Pet. App." refer to the appendix to the petition for a writ of certiorari in No. 17-499.

Federal Communications Commission (Pet. App. 188a-1126a) is reported at 30 FCC Rcd 5601.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2016. Petitions for rehearing were denied on May 1, 2017 (Pet. App. 1354a-1355a, 1356a-1468a). On July 20, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 28, 2017. The petition in No. 17-498 was filed on September 27, 2017, and the other petitions were filed on September 28, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Over the past two decades, the Federal Communications Commission (FCC or Commission) has issued a series of orders addressing the appropriate regulatory treatment of broadband internet access service. In the decision below, the court of appeals addressed petitions for review of an order in which the FCC had departed from its previous approach and had classified broadband as a "telecommunications service" subject to common-carrier regulation under Title II of the Communications Act of 1934 (Communications Act or Act), 47 U.S.C. 201 *et seq.* After the petitions for writs of certiorari were filed, the Commission adopted a new order superseding the order under review here and returning to the Commission's traditional classification of broadband as an "information service" that is not subject to common-carrier regulation.

1. The Communications Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the infor-

mation as sent and received." 47 U.S.C. 153(50). "[T]elecommunications service" is "the offering of telecommunications for a fee directly to the public * * * regardless of the facilities used." 47 U.S.C. 153(53). Telecommunications service is distinct from "information service," which is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. 153(24).

The distinction between telecommunications services and information services has important regulatory consequences under the Communications Act. A provider of telecommunications services (in the Act's parlance, a "telecommunications carrier") is "treated as a common carrier" subject to Title II of the Act, 47 U.S.C. 201 *et seq.*, "only to the extent that it is engaged in providing telecommunications services." 47 U.S.C. 153(51). Telecommunications carriers must, for example, "charge just and reasonable, nondiscriminatory rates" and "design their systems so that other carriers can interconnect with their communications networks." *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 975 (2005) (*Brand X*). "These provisions are mandatory, but the Commission must forbear from applying them if it determines that the public interest requires it." *Id.* at 976 (citing 47 U.S.C. 160(a) and (b)). By contrast, an information-service provider is "not subject to mandatory common-carrier regulation under Title II." *Ibid.*

2. The definitions of "telecommunications service" and "information service" were added to the Communications Act in 1996. See Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, § 3, 110 Stat. 59-60. In the ensuing years, the Commission issued a

series of orders that classified and regulated broadband service as an information service.

a. In 1998, the FCC submitted a report to Congress concluding that Internet access service should be classified as an information service, not a telecommunications service. *In re Federal-State Joint Bd. on Universal Serv.*, 13 FCC Rcd 11,501, 11,536 (1998). In 2002, consistent with that conclusion, the Commission issued an order classifying cable modem service—a form of broadband service—as an information service exempt from common-carrier regulation under Title II. *In re Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities*, 17 FCC Rcd 4798 (2002). This Court upheld that classification, concluding that it was based on a permissible reading of ambiguous language in the Communications Act's definitional provisions. *Brand X*, 545 U.S. at 986-1000.

Consistent with its approach to cable modem service, the FCC later classified other forms of broadband as information services. See, *e.g.*, *In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007).[2] In classifying wireless broadband service as an information service, the Commission further determined that wireless broadband was not a "commercial mobile service" subject to common-carrier regulation under a separate provision of the Communications Act, 47 U.S.C. 332(c)(1)(A). See 22 FCC Rcd at 5915-5921.

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[2] See also *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14,853 (2005); *In re United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Serv. as an Info. Serv.*, 21 FCC Rcd 13,281 (2006).

b. In 2005, to provide "guidance and insight into its approach to the Internet and broadband," the FCC articulated four principles "to preserve and promote the vibrant and open character of the Internet." *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14,986, 14,987 (2005). The Commission declared that consumers are entitled to "access the lawful Internet content of their choice," to "run applications and use services of their choice," to "connect their choice of legal devices that do not harm the network," and to "competition among network providers, application and service providers, and content providers." *Id.* at 14,988. The Commission stated that it would incorporate those four principles "into its ongoing policymaking activities," *ibid.*, but it did not undertake any formal rulemaking action to codify them.

In 2008, in response to a complaint that a large broadband provider had violated the foregoing principles by interfering with its customers' use of peer-to-peer file-sharing networks, the FCC ordered the provider to revise its network-management practices. *In re Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd 13,028 (2008). Because the Commission had classified broadband service as an information service, it could not rely on Title II of the Communications Act as authority for the order. Instead, it invoked its ancillary regulatory authority under Title I. *Id.* at 13,034-13,035. The D.C. Circuit vacated the order, concluding that the Commission had "failed to tie its assertion of ancillary authority" to any

of its "'statutorily mandated responsibilit[ies].'" *Comcast Corp.* v. *FCC*, 600 F.3d 642, 661 (2010) (citation omitted).

c. In 2010, in response to the D.C. Circuit's decision, the FCC issued an order adopting three specific "open Internet" rules: (1) a transparency rule requiring the disclosure of network-management practices by fixed broadband providers (which serve users primarily at fixed endpoints) and mobile broadband providers (which serve users primarily using mobile stations); (2) a rule barring broadband providers from blocking consumers' access to the Internet; and (3) a rule prohibiting fixed broadband providers from unreasonably discriminating in transmitting lawful Internet traffic. *In re Preserving the Open Internet*, 25 FCC Rcd 17,905, 17,906 (2010). The FCC concluded that its adoption of those rules was authorized by Section 706 of the 1996 Act, 110 Stat. 153, which directs the agency to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." 47 U.S.C. 1302(a); see 25 FCC Rcd at 17,968.

The D.C. Circuit again held that the FCC had exceeded its authority. *Verizon* v. *FCC*, 740 F.3d 623 (2014). The court concluded that the Commission had reasonably construed Section 706 to authorize all three of the rules at issue. *Id.* at 635-649. But the court held that the anti-blocking and anti-discrimination rules imposed common-carrier requirements and therefore violated the Communications Act's prohibition on common-carrier regulation of information-service providers. *Id.* at 649-659. The court vacated those two rules and remanded to the Commission for further proceedings. *Id.* at 659.

3. The FCC initially responded to the D.C. Circuit's remand by issuing a notice of proposed rulemaking seeking comment on a proposal to revise the anti-blocking and anti-discrimination rules so that they no longer imposed common-carrier obligations. Pet. App. 1200a-1240a. But in 2015, in the order at issue here (the 2015 Order), the Commission adopted a different approach. *Id.* at 188a-1126a.

a. The 2015 Order reversed the FCC's longstanding classification of broadband as an information service and reclassified it as a telecommunications service subject to Title II's common-carrier requirements. Pet. App. 523a-604a. The Commission also reclassified mobile broadband as a "commercial mobile service," so that it (like fixed broadband) would be regulated under Title II. *Id.* at 605a-636a. Because those reclassifications subjected broadband providers to the full panoply of Title II common-carriage requirements, the Commission exercised its authority under 47 U.S.C. 160 to forbear from applying "27 provisions of Title II of the Communications Act, and over 700 Commission rules and regulations," to broadband providers. Pet. App. 195a-196a; see *id.* at 670a-820a.

Having reclassified broadband as a telecommunications service subject to common-carrier regulation, the 2015 Order also promulgated new rules governing the conduct of broadband providers. Those rules prohibited providers from blocking or throttling lawful content, applications, services, or non-harmful devices, Pet. App. 300a-312a, or engaging in "paid prioritization" (giving preferential treatment to certain Internet traffic either in exchange for consideration or to benefit an affiliated entity), *id.* at 312a; see *id.* at 312a-325a. The Commission also adopted a general conduct standard to

be applied on a case-by-case basis. Under that standard, broadband providers were barred from unreasonably interfering with or unreasonably disadvantaging the ability of "edge providers" (providers of Internet content, applications, services, and devices) to make their offerings available to users, or the ability of users to select, access, and use the content, applications, services, and devices offered by edge providers. *Id.* at 326a-349a.

b. Commissioners Pai and O'Rielly dissented from the 2015 Order. Pet. App. 941a-1089a, 1090a-1126a. They maintained, *inter alia*, that the FCC lacked authority to classify broadband Internet access service as a telecommunications service or to classify mobile broadband as a commercial mobile service. *Id.* at 1011a-1056a, 1102a-1115a. They also contended that the agency had failed to provide adequate notice of the new rules or its decision to forbear from numerous statutory and regulatory requirements, *id.* at 976a-1010a, 1092a-1094a, and that the substantial costs of Title II regulation (including disincentives to investment and innovation) outweighed any benefits that the new rules might yield. *Id.* at 943a-972a, 1094a-1102a.

4. Petitioners filed petitions for review of the 2015 Order under 28 U.S.C. 2342(1), which gives the courts of appeals jurisdiction to review final orders of the FCC. A divided panel of the D.C. Circuit rejected petitioners' challenges and upheld the 2015 Order. Pet. App. 1a-115a.

a. As relevant here, the court of appeals first rejected petitioners' contention that the FCC had failed to provide adequate notice that it was considering reclassifying broadband as a telecommunications service. Pet. App. 24a-25a. The court noted that the 2014 notice

of proposed rulemaking had "'expressly asked for comments' on whether the Commission should reclassify broadband." *Id.* at 25a (citation omitted).

The court of appeals next held that the 2015 Order had permissibly reclassified broadband as a telecommunications service. Pet. App. 27a-37a. The court stated that, although this Court in *Brand X* had upheld the previous classification of broadband as an information service, the Court had also "expressly recognized that Congress, by leaving a statutory ambiguity, had delegated to the Commission the power to regulate broadband service" as a telecommunications service instead. *Id.* at 33a. The court of appeals further held that the Commission had adequately explained the reasons for its change in position. *Id.* at 37a-46a.

The court of appeals similarly concluded that "the Commission's reclassification of mobile broadband as a commercial mobile service [wa]s reasonable and supported by the record." Pet. App. 53a; see *id* at 51a-73a. The court rejected petitioners' contention that the FCC had failed to provide adequate notice that it was considering this reclassification. *Id.* at 75a-79a. Finally, the court of appeals rejected the argument that the rules adopted in the 2015 Order "violate[d] the First Amendment by forcing broadband providers to transmit speech with which they might disagree." *Id.* at 108a; see *id.* at 108a-115a.

b. Judge Williams concurred in part and dissented in part. Pet. App. 116a-187a. He would have held for several reasons that the FCC had failed to justify its change in policy. First, he concluded that the Commission had not adequately considered the "serious reliance interests" that its previous classification of broadband had engendered. *Id.* at 119a (quoting *FCC* v. *Fox*

Television Stations, Inc., 556 U.S. 502, 515 (2009)); see *id.* at 119a-124a. Second, he concluded that the FCC had not identified any changed circumstances that justified its reclassification of broadband. *Id.* at 124a-125a. Finally, he concluded that the Commission—having made no finding of market power—could not justify subjecting broadband providers to costly and burdensome common-carrier regulation that would have an "unambiguously negative" effect on investment. *Id.* at 125a-141a.

5. In May 2017, the court of appeals denied rehearing and rehearing en banc. Pet. App. 1354a-1355a, 1356a-1468a.

a. Judges Brown and Kavanaugh dissented from the denial of rehearing en banc. Pet. App. 1381a-1429a, 1430a-1468a. Both judges would have held, *inter alia*, that the 2015 Order should be vacated because the FCC lacks the power to regulate broadband providers as common carriers absent express authorization from Congress. *Id.* at 1396a-1411a, 1432a-1449a. Judge Kavanaugh further concluded that, absent a finding that broadband providers have market power, the First Amendment bars the Commission from regulating them as common carriers. *Id.* at 1449a-1468a.

b. Judge Srinivasan (joined by Judge Tatel, the other member of the panel majority) concurred in the denial of rehearing en banc. Pet. App. 1357a-1380a. In addition to defending the panel's decision on the merits, Judge Srinivasan stated that en banc review "would be particularly unwarranted" because the FCC had recently announced that it was considering "replac[ing] the [2015 Order] with a markedly different one." *Id.* at 1357a.

6. Shortly after the court of appeals denied rehearing en banc, the FCC formally initiated rulemaking pro-

ceedings to replace the 2015 Order. *In re Restoring Internet Freedom*, 32 FCC Rcd 4434, 4441 (2017). In January 2018, after reviewing a voluminous record, the Commission issued a new order that superseded the 2015 Order. *In re Restoring Internet Freedom*, 33 FCC Rcd 311 (2018) (2018 Order).

The 2018 Order "reinstate[d] the information service classification of broadband Internet access service." 33 FCC Rcd at 317-318. It also concluded that "mobile broadband Internet access service should not be classified as a commercial mobile service." *Id.* at 352. The Commission thus restored the regulatory classifications that had governed before the 2015 Order, and the agency made clear that broadband service is not subject to common-carrier regulation under Title II of the Communications Act.

The 2018 Order also "eliminate[d] the conduct rules" that the FCC had adopted in the 2015 Order, "including the general conduct rule and the prohibitions on paid prioritization, blocking, and throttling." 33 FCC Rcd at 450. The FCC determined that "the costs of these [conduct] rules to innovation and investment outweigh any benefits they may have." *Id.* at 313. Instead, the Commission restored "the transparency rule the Commission adopted in 2010 with certain limited modifications to promote additional transparency." *Ibid.* (footnote omitted). The Commission concluded that this transparency rule, "in combination with the state of broadband Internet access service competition and the antitrust and consumer protection laws," would yield "comparable benefits at lower cost." *Id.* at 450. The 2018 Order took effect on June 11, 2018. See 83 Fed. Reg. 21,927 (May 11, 2018).

7. Many petitions for review of the 2018 Order are now pending in the D.C. Circuit. See, *e.g.*, *Mozilla Corp.* v. *FCC*, No. 18-1051 (filed Feb. 22, 2018). Several of the petitioners here (including the American Cable Association, CTIA-The Wireless Association, and NCTA - The Internet and Television Association) have intervened in the D.C. Circuit to defend the 2018 Order. Conversely, the respondents here who intervened to defend the 2015 Order (Free Press, Public Knowledge, and the Open Technology Institute) are among the parties that have filed petitions challenging the 2018 Order.

DISCUSSION

The petitions for writs of certiorari seek review of the court of appeals' decision upholding the 2015 Order. That decision does not warrant this Court's review because the FCC has now issued a new order that supersedes the 2015 Order and repeals its conduct rules. In light of that development, questions concerning the procedural and substantive validity of the 2015 Order lack continuing practical significance.

Instead, the legal questions concerning the proper regulatory treatment of broadband services will be resolved in the pending challenges to the 2018 Order. The Court therefore should grant the petitions, vacate the judgment below, and remand to the court of appeals with instructions to dismiss the petitions for review as moot. Alternatively, the Court could grant the petitions, vacate the judgment below, and remand to allow the court of appeals to consider in the first instance the effect of the 2018 Order on this litigation.

1. Several petitioners predicted (17-499 Pet. 3, 29-30; 17-500 Pet. 23-24; 17-502 Pet. 17-19) that the FCC's issuance of a new order would render this case moot and warrant vacatur of the judgment below under *United*

States v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). We agree that the case appears to be moot and that *Munsingwear* vacatur is appropriate.

"A case becomes moot—and therefore no longer a Case or Controversy for purposes of Article III—when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation and internal quotation marks omitted). Petitioners' petitions for review of the 2015 Order appear to be moot because the 2018 Order abandoned the 2015 Order's regulatory classifications and repealed its conduct rules. Broadband providers are no longer subject to common-carrier regulation under Title II of the Communications Act and are no longer required to comply with the requirements adopted in 2015. Petitioners therefore appear to lack any current "concrete interest" in the validity of the 2015 Order. *Knox* v. *SEIU*, 567 U.S. 298, 307 (2012) (citation omitted). Or, put differently, it appears that a judicial decision setting aside that already-superseded order would not afford petitioners "any effectual relief." *Ibid.* (citations omitted).

The 2015 Order could conceivably have future legal effect if a private party sought damages for a broadband provider's pre-2018 violation of the common-carrier obligations imposed by the 2015 Order. See 47 U.S.C. 206, 207 (providing for private damages actions) We are not aware of any such suits, however, or of any reason to think that such a suit is likely to be brought against any petitioner in the future. This is thus not a circumstance in which a "real and not remote" possibility of liability for a "past violation" prevents a case from becoming moot despite the repeal of the relevant regulations.

Decker v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 610 (2013).[3]

If the Court determines that this case is moot, it should "vacate the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39. That is the Court's "established practice" where "a civil case from a court in the federal system * * * has become moot while on its way [to this Court]." *Ibid.*; see, *e.g.*, *Azar* v. *Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam); *Trump* v. *Hawaii*, 138 S. Ct. 377, 377 (2017). The Court has identified, as "[o]ne clear example where vacatur is in order," a situation where (as here) "mootness occurs through the unilateral action of the party who prevailed in the lower court." *Garza*, 138 S. Ct. at 1792 (brackets, citations, ellipsis, and internal quotation marks omitted).

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[3] When a plaintiff seeks to enjoin allegedly unlawful conduct, "[t]he voluntary cessation of [the] challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox*, 567 U.S. at 307. That doctrine does not apply here. The 2018 Order makes clear that there is no realistic prospect that the FCC will reinstate the regulatory approach reflected in the 2015 Order. See, *e.g.*, 33 FCC Rcd at 312 (describing the approach adopted in the 2015 Order as "misguided and legally flawed" and concluding that returning broadband to its traditional classification as an information service "best comports with the text and structure of the Act, Commission precedent, and [the Commission's] policy objectives"). Moreover, unlike the typical case in which the voluntary-cessation doctrine applies, these are not suits seeking injunctive or declaratory relief against a particular type of primary conduct. See *Knox*, 567 U.S. at 307. Instead, they are petitions for review seeking to set aside a specific "final order[] of the [FCC]." 28 U.S.C. 2342(1); see 47 U.S.C. 402(a). The prior controversy as to the legality of the 2015 Order would be moot even if there were some meaningful likelihood that the FCC might reenact similar policies in a future order.

A *Munsingwear* vacatur serves to "'clear[] the path for future relitigation'" of the relevant issues "by eliminating a judgment the loser was stopped from opposing on direct review." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71 (1997) (citation omitted). It is thus particularly appropriate here, where many of the same parties are already litigating related legal questions in the pending challenges to the 2018 Order. See p. 13, *supra*.

2. Alternatively, if this Court concludes that the 2018 Order did not render this case moot, or if it prefers not to resolve that issue, it should grant the petitions for writs of certiorari, vacate the judgment below, and remand for further proceedings to allow the court of appeals to consider in the first instance the effect of the 2018 Order on this litigation. The court of appeals upheld the 2015 Order primarily because it concluded that it was required to defer to the FCC's legal and factual judgments as reflected in that order. See, *e.g.*, Pet. App. 29a ("[T]he proper classification of broadband turns 'on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leaves to the Commission to resolve in the first instance.'") (citation omitted). But the Commission itself has now repudiated those factual and legal judgments in a new order issued after full notice-and-comment proceedings.

On remand, the court of appeals might determine that this case is moot. Or it might conclude that the most appropriate course would be to hold this case in abeyance pending its resolution of the challenges to the 2018 Order. At a minimum, however, the 2018 Order constitutes a significant legal development that bears on the issues resolved by the court of appeals. Cf. *Gloucester Cnty. Sch. Bd.* v. *Grimm*, 137 S. Ct. 1239

(2017) (remanding for further consideration in light of an agency guidance document that rejected a previous agency interpretation to which the court of appeals had deferred); *Douglas* v. *Independent Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 616 (2012) (remanding for further consideration in light of intervening agency action).

CONCLUSION

This Court should grant the petitions for writs of certiorari, vacate the court of appeals' judgment, and remand with instructions to dismiss the petitions for review as moot. Alternatively, the Court should grant the petitions, vacate the judgment below, and remand for further proceedings in light of the 2018 Order.

Respectfully submitted.

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