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

In the
Supreme Court of the United States

DANIEL BERNINGER, et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

OLIVER J. DUNFORD*
WENCONG FA
THOMAS A. BERRY
**Counsel of Record*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: odunford@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation, National Federation of Independent Business Small Business Legal Center, and Southeastern Legal Foundation

QUESTIONS PRESENTED

1. It is the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet . . ., unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). The Federal Communications Commission (FCC) reclassified broadband-internet service as a "telecommunications service," thereby subjecting internet-service providers to onerous common-carrier regulations under Title II of the Communications Act of 1934. Applying *Chevron* deference, a panel of the D.C. Circuit below found the FCC's unilateral reinterpretation of the law to be reasonable.

The question presented is whether the Constitution's Separation of Powers—Congress' exclusive authority to write laws, the Executive Branch's obligation to administer the law, and the Judicial Branch's province and duty to say what the law is—precludes the Judicial Branch from deferring to Executive Branch statutory interpretation.

2. *Wooley v. Maynard* held that an individual has a "First Amendment right to avoid becoming the courier for [a] message" with which he disagrees. 430 U.S. 705, 717 (1977). The question presented is whether a professional courier also has that right.

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Pacific Legal Foundation (**PLF**) is widely respected as an experienced advocate of constitutional boundaries, including the separation of powers. PLF has participated as lead counsel or amici counsel in several cases before this Court involving the relationship between the judicial power and the administrative state, including *Lucia v. SEC*, No. 17-130 (U.S. filed Aug. 25, 2017); *Gloucester Cnty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017); *Nat'l Restaurant Ass'n v. Dep't of Labor*, No. 16-920 (U.S. filed Feb. 21, 2016); *U.S. Army Corps of Eng'rs v. Hawkes*, 136 S. Ct. 1807 (2016); *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016); and *Sackett v. EPA*, 566 U.S. 120 (2012).

National Federation of Independent Business Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. National Federation of Independent Business (NFIB) is the nation's leading small business association. Founded in 1943 as a nonprofit,

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB Small Business Legal Center frequently files amicus briefs in cases impacting small businesses.

Southeastern Legal Foundation (**SLF**), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in courts of law and public opinion. In particular, SLF advocates for the rigorous enforcement of constitutional limitations on the activities of federal and state governments. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court, including *In re U.S. Dep't of Defense*, 817 F.3d 261 (6th Cir. 2016), *cert. granted*; *Nat'l Ass'n of Manufacturers v. Dep't of Def.*, 137 S. Ct. 811 (2017); and *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014). SLF also regularly files amicus curiae briefs with this Court regarding issues of agency overreach and deference, including *Flytenow v. FAA*, 137 S. Ct. 618 (2017); *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016); and *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016).

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The "ultimate purpose of th[e] separation of powers is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). Indeed, "[n]o political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." *The*

Federalist No. 47, at 324 (Madison) (J. Cooke ed. 1961).

The Framers therefore established a government of divided powers. The legislature is vested with the power to establish law—that is, "generally applicable rules" adopted "only through the constitutionally prescribed process." *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring in the judgment). The Executive Branch, including "independent" agencies like the Federal Communications Commission (FCC), is obligated solely to administer and enforce duly enacted law. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."). Disputes concerning the meaning and application of the law are vested exclusively in the Judicial Branch. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

But as Justice Jackson lamented, administrative agencies "have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting). This Court's *Chevron* jurisprudence has exacerbated the problem by encouraging administrative agencies to concentrate "vast power [that] touches almost every aspect of daily life." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010).

The FCC's action here demonstrates why the Framers warned about the "encroaching nature" of

power that "ought to be effectually restrained from" exceeding its limits. *The Federalist No. 48*, at 332 (Madison).

2. Congress enacted the Communications Act of 1934 to address AT&T's (then) monopoly. Title II of the Act regulated as common carriers those involved in radio "transmission," while those engaged in "broadcasting" (the "dissemination of radio communications") were exempt. 47 U.S.C. §§ 153(6), (10) (1934).

Congress amended the 1934 Act in 1996 "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). Congress found that the "Internet and other interactive computer services have flourished to the benefit of all Americans, with a minimum of government regulation." 47 U.S.C. § 230(a)(4). Congress therefore adopted as the "policy of the United States" the "preserv[ation of] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *Id.* § 230(b)(2).

The 1996 amendments maintained the longstanding distinctions between (1) basic "transmission" or "telecommunications" services and (2) "enhanced" or "information" services (*i.e.*, the "offering" of "information via telecommunications"). 47 U.S.C. §§ 153(20), (43), (46) (1996). Title II

common-carrier rules again apply only to "telecommunications services." *Id.* § 153(51).

These distinctions track the FCC's historical practice. *See In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities,* 17 FCC Rcd. 4798, 4820, ¶ 34 n.139 (2002) ("The term 'information service' follows from a distinction the [FCC] drew in the *First [1973], Second [1980], and Third [1986] Computer Inquiries* . . . .") (citations omitted). These "decisions drew a distinction between bottleneck common carrier facilities and services for the transmission or movement of information on the one hand and, on the other, the use of computer processing applications to act on the content, code, protocol, or other aspects of the subscriber's information." *Id.* Thus, a "cable operator providing cable modem service over its own facilities . . . is not offering telecommunications service to the end user, but rather is merely using telecommunications to provide end users with cable modem service." *Id.* 4823-24, ¶ 41 (footnote omitted).

The upshot is that both the cable operator of 2002 and broadband internet-service providers (ISPs) today merely *use* "telecommunications services" in order to provide "information services." Consistent with this original understanding and Congress' policy of "unfettered" internet regulation, the FCC determined that ISPs provide "information services," exempt from Title II regulations. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (upholding FCC interpretation).

3. Under political pressure,[2] the FCC ignored congressional policy and unilaterally reclassified ISP services as "telecommunications services." *Report and Order on Remand, Declaratory Ruling, and Order, Protecting and Promoting the Open Internet* (Order), 30 FCC Rcd. 5601 (2015) (Pet. App. 188a-1126a); *see id.* ¶¶ 306-433 (Pet. App. 500a-670a). As common carriers, ISPs will be subject to Title II regulations. *See* 47 U.S.C. §§ 201-276.

In addition, the FCC Order adopted a "net-neutrality" rule, which prohibits ISPs from "block[ing] lawful content." Order ¶ 112 (Pet. App. 301a-302a).

4. A divided panel of the D.C. Circuit upheld the FCC's action, on the ground that this Court's *Chevron* jurisprudence mandated deference. Pet. App. 1a-187a. Thus—despite explicit congressional policy of an "unfettered" internet, unamended statutory text, the FCC's own previous treatment of ISPs, and the political nature of the FCC's "reclassification"—the panel effectively delegated legislative power to an administrative agency that claimed unilateral authority to *re*-establish the Nation's internet policy.

The FCC's action here cannot stand as just another "permissible" or "reasonable" application of statutory text, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council,* 467 U.S. 837, 842-43 (1984), because the Administrative State's "slight encroachments create new boundaries from which [its] legions of power [] seek new territory to capture[,]" *Stern v. Marshall,* 564 U.S. 462, 503 (2011) (internal quotation marks and citation omitted).

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[2] *See* Pet. App. 1414a-1429a (Brown, J., dissenting from denial of rehearing en banc) (describing pressure placed on FCC).

Further, this case involves not a "slight encroachment," but the total reversal of congressionally established policy. The Telecommunications Act of 1996 was enacted expressly "[t]o *promote* competition and *reduce* regulation" over the internet. Telecommunications Act of 1996, *supra* (emphasis added). Congress—the only branch vested with this power—unambiguously established "the policy of the United States," namely, "to preserve the vibrant and competitive free market . . . for the Internet . . ., *unfettered by* . . . *regulation*." 47 U.S.C. § 230(b)(2) (emphasis added). Yet the FCC arrogated to itself the "power to micromanage virtually every aspect of how the Internet works." Dissenting Statement of Commissioner Ajit Pai (Pet. App. 943a).

If allowed to stand, the decision below will further erode the Separation of Powers, and the Framers' structure of divided federal power will be—*it is being*—replaced "with an undifferentiated 'governmental power[,]'" against which the individual has little defense. *Ass'n of Am. R.R.*, 135 S. Ct. at 1240 (Thomas, J., concurring in judgment).

Nor is the "accumulation of these powers in the same hands [] an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government." *Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting). And while it may be a "bit much to describe the result as 'the very definition of tyranny,' [] the danger posed by the growing power of the administrative state cannot be dismissed." *Id.* at 315 (Roberts, C.J., dissenting) (citations omitted).

This case presents the Court with a particularly egregious abuse of the deference accorded to administrative agencies. It threatens not only the structural guarantees of liberty, but it also violates an express constitutional protection: The "net neutrality" rule, by forcing ISPs to carry communications with which they disagree, amounts to a compelled-speech violation of the First Amendment.

This Court should grant the Petition and reinvigorate the Constitution's Separation of Powers doctrine.

ARGUMENT

I. IT IS EMPHATICALLY THE PROVINCE AND DUTY OF THE JUDICIAL DEPARTMENT TO SAY WHAT THE LAW IS

The FCC's Order should be invalidated for two reasons. First, this Court has held that *Chevron* is inapplicable where, as here, "major questions" are at issue. Second, as this case demonstrates, the Court's *Chevron* jurisprudence leads to inconsistent determinations whether deference is warranted. This Court should revisit its *Chevron* jurisprudence and reclaim the judiciary's duty to interpret the law.

A. *Chevron* and Its "Major Questions" Doctrine require reversal

A court reviewing an agency interpretation of a statute it administers considers two questions. First, if the "intent of Congress is clear," then that "is the end of the matter[,]" because the court, "as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43 (footnote omitted). If the statute is "silent or

ambiguous with respect to the specific issue," then the court need determine only whether the agency's interpretation is "based on a permissible construction of the statute." *Id.* at 843. This approach "'is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.'" *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

To determine whether Congress has unambiguously expressed its intent, courts apply traditional tools of statutory construction. *Chevron*, 467 U.S. at 843 n.9. One "fundamental canon of statutory construction" requires "that the words of a statute [] be read in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (internal quotation marks and citation omitted).

Therefore, "[e]ven under *Chevron*'s deferential framework, an agency must operate 'within the bounds of reasonable interpretation.'" *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014) (*UARG*) (quoting *Arlington*, 569 U.S. at 296). An "agency interpretation that is inconsisten[t] with the design and structure of the statute as a whole[] . . . does not merit deference." *UARG*, 134 S. Ct. at 2442 (internal quotation marks and citation omitted). Nor does an agency have "power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Id.* at 2445.

Accordingly, as Judges Brown and Kavanaugh explained,[3] this Court applies a "major questions" or "major rules" analysis, according to which Congress must "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *UARG*, 134 S. Ct. at 2445 (quoting *Brown & Williamson*, 529 U.S. at 160). *See Brown & Williamson*, 529 U.S. at 133 ("In addition [to statutory canons of construction], we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.") (citation omitted).[4]

Therefore, while statutory ambiguities *may* suggest an implied delegation to agencies to "fill in the gaps," in "'extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.'" *King*, 135 S. Ct. at 2488-89 (quoting *Brown & Williamson*, 529 U.S. at 159).[5]

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[3] *See* Pet. App. 1399a-1405a (Brown, J., dissenting from denial of rehearing en banc), *and* 1432a-1449a (Kavanaugh, J., dissenting from denial of rehearing en banc).

[4] *See also* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.") (footnote omitted).

[5] The Court has adopted other qualifications to its *Chevron* analysis. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1157 (10th Cir. 2016) (Gorsuch, J., concurring) (noting that this Court does not always apply *Chevron* to civil statutes, never applies it to criminal statutes, and has added "step zero" to the inquiry).

This analysis finds support in *Chevron* itself, which holds that when Congress' unambiguously expressed intent is clear, no deference is afforded the agency's interpretation. *Chevron*, 467 U.S. at 842-43. And so, ultimately, whether the Court expressly adopts a "major rules" qualification to its *Chevron* analysis or not, the result here is the same.

First, "[t]his is one of those [extraordinary] cases" of vast economic and political significance. *King*, 135 S. Ct. at 2489. *See*, *e.g.*, *Verizon v. FCC*, 740 F.3d 623, 634 (D.C. Cir. 2014) (noting that the "the question of net neutrality implicates serious policy questions, which have engaged lawmakers, regulators, businesses, and other members of the public for years").

Moreover, and independently, the FCC's attempt to micromanage ISPs—purporting to control not merely how they manage the internet, but also, how they run their businesses—"operate[s]" far outside "the bounds of its statutory authority." *UARG*, 134 S. Ct. at 2445 (internal quotation marks and citation omitted).

Congress' intent is express and unambiguous: "to preserve the vibrant and competitive free market that presently exists for the Internet . . ., unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). Thus, even if the FCC's reclassification of ISP service as a "telecommunications service" were "plausible in the abstract," it is "ultimately inconsistent with both the text and context of the statute as a whole." *Sturgeon*, 136 S. Ct. at 1070.[6]

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[6] As Judge Brown explained, "the mere existence" of statutory ambiguity "is not enough *per se* to warrant deference to the

Nothing supports the assumption that Congress implicitly delegated to the FCC the authority to minutely regulate a technology that, in the FCC's own words, "drives the American economy and serves, every day, as a critical tool for America's citizens." Order ¶ 1 (Pet. App. 194a).

B. This Court should nonetheless reconsider its *Chevron* jurisprudence, which violates the Constitution's Separation of Powers

1. The Judicial Branch is vested with "a constitutional control" over the Executive and Legislative Branches

The Framers recognized that the Constitution's mere "parchment barriers" between the branches were not a sufficient guarantor of liberty. *The Federalist No. 48*, at 333 (Madison). Therefore, the Constitution gave "to each [branch] a constitutional control of the others," without which "the degree of separation which the maxim requires, as essential to a free government, [could] never in practice be duly maintained." *Id*. at 332. The "constant aim," Madison explained, was "to divide and arrange the several [branches] in such a manner as that each may be a check on the other." *The Federalist No. 51*, at 349 (Madison).

These "constitutional controls" are needed because "power is of an encroaching nature[] and . . . ought to be effectually restrained from passing the limits

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agency's interpretation. The ambiguity must be such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity." Pet. App. 1400a (Brown, J., dissenting from denial of rehearing en banc) (internal quotation marks and citation omitted).

assigned to it." *The Federalist No. 48*, at 332 (Madison).

The constitutional control vested in the Judicial Branch is, of course, its *independent* and *exclusive* duty "to say what the law is[,]" *Marbury*, 5 U.S. at 177—a power intended as "an excellent barrier to the despotism of the prince" and "the encroachments and oppressions of the representative body." *The Federalist No*. 78, at 522 (Hamilton).

2. *Chevron* deference has effected a *de facto* abdication of the Court's exclusive duty to say what the law is

This Court insists that Congress cannot delegate any of its legislative authority. *See*, *e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (The Constitution's "text permits no delegation of [Congress' legislative] powers.") (citation omitted). And administrative agencies have "literally . . . no power to act . . . unless and until Congress confers power upon [them]." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

In practice, however, Congress delegates broad law-making—*i.e.*, legislative—power to administrative agencies. So long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform," delegation of broad law-making power passes constitutional muster. *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409 (1928).

Indeed, aside from two 1935 cases, this Court has "upheld . . . delegations under standards phrased in sweeping terms." *Loving v. United States*, 517 U.S. 748, 771 (1996) (citing *Nat'l Broad. Co. v. United*

States, 319 U.S. 190, 216-17, 225-26 (1943) (upholding delegation to FCC to regulate radio broadcasting according to the "public interest, convenience, or necessity")).

This "practical understanding," regardless of its purported "'necess[ity,]'" *Mistretta v. United States*, 488 U.S. 361, 372 (1989), allows in practice "quite permissive [] congressional delegations," *Dillon v. United States*, 560 U.S. 817, 842 (2010). The FCC's Order proves it.

Here, the FCC reversed itself and reclassified broadband-internet service as "telecommunications service" so that the FCC could regulate ISPs as common carriers. But what "intelligible principle" can justify interpretations that broadband-internet service *both* is *and* is not a "telecommunications service"? How can these *contradictory* interpretations *both* be "permissible" readings of the statute? On what basis can statutory ambiguity (if it exists) justify upending Congress' policy of "reduce[d]" and "unfettered" regulation?

And, far from merely administering the law, or "filling in the gaps," the FCC purported to "modern[ize]"—*i.e.*, amend—Title II. Order ¶ 37 (heading) (Pet. App. 216a). By doing so, the FCC has created uncertainty in a field of unquestioned importance, threatening billions of dollars in investments, thousands if not millions of jobs, and, of course, the everyday lives of all citizens who use the internet. *Cf. Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring) (noting due process concerns existing when rules can be changed by administrative fiat).

No matter. For under *Chevron*, as applied by the panel below, the FCC's interpretation—while not "the best reading"—*Brand X*, 545 U.S. at 983—is authoritative, even though its previous, contradictory interpretation was itself authoritative, and even though Congress has not amended its express policy.

Thus, when it applies, "*Chevron* deference *precludes* judges from exercising [independent] judgment." *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (emphasis added). *Chevron* has indeed become a "kind of counter-*Marbury* for the administrative state." Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 189 (2006).

This Court should therefore grant the Petition and reconsider whether *Chevron* deference complies with the Constitution's Separation of Powers.

II. THE FCC'S "MUST CARRY" REGULATION COMPELS ISPs TO FACILITATE EXPRESSION WITH WHICH THEY DISAGREE, IN VIOLATION OF THE FIRST AMENDMENT

The Net Neutrality regulations promulgated by the FCC require that ISPs "shall not block lawful content." Order ¶ 112 (Pet. App. 301a-302a). This means that ISPs are forced to provide their service—offering a share of their limited bandwidth for transmission of "data packets"—to anyone who wishes to use it to disseminate their speech over the internet. ISPs object, since this mandate requires them "to transmit *all* lawful content, including Nazi hate speech, Islamic State videos, pornography, and political speech with which they disagree." Joint Brief

for Petitioners Alamo Broadband Inc. and Daniel Berninger at 7, *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

A. The appearance of endorsement is irrelevant to the Compelled Speech Doctrine

ISPs are conduits for speech. *See*, *e.g.*, Nicholas Bramble, *Ill Telecommunications: How Internet Infrastructure Providers Lose First Amendment Protection*, 17 Mich. Telecomm. & Tech. L. Rev. 67, 79 (2010) ("The administrators and access providers who implement Internet communications . . . facilitate the expression of others."). Thus, the FCC's "must carry" rule forces ISPs to facilitate speech with which they disagree.

According to the D.C. Circuit, however, ISPs can make no First Amendment claim unless the general public associates the facilitation of speech with the *endorsement* of speech: "Because a broadband provider does not—and is not understood by users to—'speak' when providing neutral access to internet content as common carriage, the First Amendment poses no bar to the open internet rules." Pet. App. 115a.

This high bar for a First Amendment claim ignores the reasoning inherent in this Court's three core compelled-speech cases, none of which held that a public misperception of endorsement is a necessary component of a First Amendment violation. Rather, in each case, the relevant inquiry was whether individuals are in any way "force[d] . . . to be an instrument for fostering" a message with which they

disagree. *Wooley v. Maynard,* 430 U.S. 705, 715 (1977).

This Court's first compelled speech case involved a requirement that every public-school student salute the flag and recite the pledge of allegiance each day. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). This regulation did not explicitly force pupils to "forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony;" rather, the Court noted, they might merely "simulate assent by words without belief and by a gesture barren of meaning." *Id.* at 633. Indeed, because recital was mandatory, "no reasonable observer in *Barnette* would conclude that the coerced schoolchildren believed in the Pledge." Larry Alexander, *Compelled Speech*, 23 Const. Comment. 147, 152 (2006). But this Court correctly recognized that such compelled speech "invades the sphere of intellect and spirit" all the same, because it forced the reciters to "confess by word or act" a message they did not choose to support. *Barnette*, 319 U.S. at 642.

Next, the Court confronted a requirement that all drivers in New Hampshire carry the state motto "Live Free or Die" on their license plates. *Wooley*, 430 U.S. at 715. Neither plaintiffs nor the Court suggested that passersby would assume that the (mandatory) slogan on the Maynards' car meant that they themselves believed in its message. Indeed, "it would seem highly unlikely that anyone would have regarded [their] compliance as an expression of [their] views concerning the state motto[,]" since "everyone else was also required to display similar license plates on their automobiles." David B. Gaebler, *First Amendment Protection Against Government Compelled Expression*

and Association, 23 B.C. L. Rev. 995, 1011-12 (1982). Thus, "the Maynards' exemption from displaying 'Live Free or Die' on their car was not rooted in concern that others would perceive the couple as affirmatively endorsing the motto." Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 Buff. L. Rev. 847, 903 (2011). Instead, the law was struck down solely because the government may not "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property." *Wooley*, 430 U.S. at 713. Doing so "forces an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* at 715. Thus, the Court recognized a "First Amendment right to avoid becoming the courier for [a] message" with which one disagrees. *Id.* at 717.

Third, this Court struck down a requirement that mandatory public-employee union dues go to lobbying efforts that an employee disagrees with. *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977). The transfer of money at issue occurred entirely out of the public eye, and "the general public [wa]s unlikely even to be aware of any particular individual's financial support compelled by an agency shop agreement." Gaebler, *supra*, at 1019-20. Accordingly, these fees "would not seem likely to identify the individual with the union or its views in the minds of others." *Id.* at 1022. Nonetheless, this Court recognized that it is unconstitutional to force an individual "to contribute to the support of an ideological cause he may oppose." *Abood*, 431 U.S. at 235.

In sum, the First Amendment is implicated whenever someone is compelled to foster speech she

disagrees with. Freedom of speech implies both the right to amplify views freely chosen *and* the right not to amplify views freely rejected. "The right at issue is to refrain from speaking[,] and the sole point is that an individual should not be forced to support private speech. That protection is abridged by the very requirement that the individual do so, regardless of any connection to the message that might or might not be apparent to a reasonable listener." Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 Tul. L. Rev. 163, 205-06 (2002).

The D.C. Circuit's ruling, that compelled content must be "somehow imputed to the broadband provider" to trigger First Amendment scrutiny (Pet. App. 115a), dangerously narrows First Amendment protections and requires this Court's review.

B. Compelled dissemination of speech, just like compelled subsidization of speech, abridges freedom of thought

Abood and its progeny settled one question with certainty: If a private entity wishes to spread its message via a courier service, no one who disagrees with that message may be compelled to subsidize that courier. Yet under the D.C. Circuit's reasoning, when providers of that courier service *themselves* disagree with the message, they may be compelled to provide their service. According to the D.C. Circuit, this compulsion raises no First Amendment concerns, because transmitters "merely facilitate the transmission of the speech of others rather than engage in speech in their own right." Pet. App. 110a.

This reasoning is fundamentally incompatible with *Abood*. If a distributor is an unwilling

participant in the process of disseminating a message, she is made an unwilling participant in "further[ing] [a] common political goal[]" (*Abood*, 431 U.S. at 234) just as much as anyone compelled to pay her fee would be. If the choice of which speakers we amplify by means of our money is ours alone, then the choice of which speakers we amplify by means of our distribution services must be ours alone as well.

This Court has already indicated that no line can be drawn between subsidies and services. For example, this Court has held that "the First Amendment does not permit a union to extract a loan from unwilling nonmembers even if the money is later paid back in full." *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2292-93 (2012). "The harm would be reduced were the union to pay interest," but "[e]ven then the union obtains an involuntary loan for purposes to which the employee objects." *Ellis v. Ry. Clerks*, 466 U.S. 435, 444 (1984). Providing a loan at fair interest is not a subsidy; it is a service. Yet this Court, rightly, drew no constitutional distinction between the two.

If the First Amendment is to protect fully the freedom of conscience, it must protect against compulsory facilitation of speech in *all* its forms. Compelling owners of internet-transmission technology to convey data packets across their network unquestionably forces them to facilitate speech. For this reason, the D.C. Circuit's dismissal of the First Amendment rights of speech transmitters requires this Court's intervention.

C. This Court should grant certiorari to clarify the distinction between the First Amendment freedom and compelled facilitation of speech

Relying on two cases, *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), and *Rumsfeld v. Forum for Acad. & Institutional Rights* (*FAIR*), 547 U.S. 47 (2006), the D.C. Circuit declared that compelled content must be "somehow imputed to the broadband provider" to trigger First Amendment scrutiny. Pet. App. 115a. But neither case applies, because neither involved the circumstances at issue here: a conduit who unambiguously disagrees with the speech of private third parties, and who is nonetheless compelled to carry it.

1. The D.C. Circuit and other lower courts have erroneously expanded *PruneYard* beyond the narrow circumstances of that case

In *PruneYard*, this Court upheld a requirement of the California Constitution that privately owned plazas must open themselves for political advocacy. Attempting to distinguish *Wooley*, the Court noted that "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the [shopping center] owner." *PruneYard*, 447 U.S. at 87. But nowhere in *Wooley* did the Court suggest that the challengers risked being identified with the words on their car's license plate. Nor did the Court "address the more difficult question whether *Pruneyard* can be reconciled with *Abood*," since "requiring the shopping center owners in *PruneYard* to permit use of their property as a forum for speech

by others constitutes a similar compulsion to subsidize ideological activity." Gaebler, *supra*, at 1002.

The Court's silence was explained by Justice Powell, who noted that the *PruneYard* plaintiffs did not cite *Abood* and failed to "allege[] that they disagree[d] with the messages at issue in th[e] case." *PruneYard*, 447 U.S. at 98 n.2 (Powell, J., concurring in part and concurring in the judgment). Justice Powell laid out precisely how an *Abood*-based argument might have persuaded the Court to rule differently, since "a requirement that [someone] lend support to the expression of a third party's views may burden impermissibly the freedoms of association and belief." *Id.* Justice Powell further noted that a future property owner who *did* disagree with the speech in question would have a strong First Amendment case, because "the right to control one's own speech may be burdened impermissibly even when listeners will not assume that the messages expressed on private property are those of the owner." *Id.* at 100. *See also Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 12 (1986) ("[T]he [*PruneYard*] owner did not even allege that he objected to the content of the pamphlets" distributed on his property.).

Given this unusual posture, *PruneYard* should not be extended to cases where property owners *do* disagree with speech they are required to facilitate. The D.C. Circuit's opinion below shows that until the limits of the *PruneYard* holding are clarified, that is exactly what courts will continue to do.[7]

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[7] Other circuit courts have similarly applied *PruneYard* to narrow the right against compelled speech. *See, e.g., Int'l Dairy*

2. *FAIR* applies only to government speech and did not expand *PruneYard*'s holding

In *FAIR*, this Court upheld a regulation requiring universities to permit military recruiters to use their property if they were to receive federal funds. Unlike in *PruneYard*, some law schools explicitly objected to the speech their campuses were forced to facilitate ("Don't Ask, Don't Tell").

FAIR addressed the question of compelled-speech facilitation only in a single footnote, where the Court stated that "'[c]itizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech.'" *FAIR*, 547 U.S. at 61 n.4 (quoting *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 562 (2005)). This by itself was enough to settle the compelled subsidization question, since "military recruiters' speech is clearly Government speech." *Id.* Therefore, *FAIR* did not extend *PruneYard*'s holding to speech that is, as here, *private* speech. In citing *FAIR* alongside *PruneYard* to support its holding, the D.C. Circuit missed this crucial distinction.

3. This case presents an ideal vehicle to clarify the rights of speech transmitters

Unlike *PruneYard*, this case concerns challengers who unambiguously disagree with specific and identifiable speech which they are nonetheless forced

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Foods Ass'n v. Amestoy, 92 F.3d 67, 79 (2d Cir. 1996) (upholding compulsory milk-labeling law on the grounds that "[n]o reasonable consumer would understand the signs as constituting any statement by the milk producers").

to transmit. Plaintiffs here have identified particular messages that they strongly disagree with and do not wish to facilitate, including "Nazi hate speech [and] Islamic State videos." Alamo Brief at 7. And unlike *FAIR*, this speech is nongovernmental. This case thus presents an ideal opportunity for the Court to clarify that the freedom not to facilitate speech with which one disagrees extends to private property. Under the D.C. Circuit's reasoning, the owner of a printing press could be forced to print a pamphlet he opposes, the owner of a private billboard could be forced to display an advertisement against her beliefs, and the owner of a bookstore could be forced to display a book he wants no part of. But each of these regulations would be incompatible with the First Amendment right to amplify or facilitate only what one chooses. This Court should affirm that merely being in business to provide speech-facilitating services does not warrant any less protection of the freedom of conscience against compelled speech.

CONCLUSION

"The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Youngstown*, 343 U.S. at 594 (Frankfurter, J., concurring).

The FCC's Order is yet another example of administrative overreach that continues to expand under this Court's *Chevron*-deference jurisprudence. The FCC's overreach here effects an immediate First

Amendment violation, and in the long run, the steady erosion of the People's liberties. The Court should grant certiorari and put an end to this "conscious lawlessness." *SEC v. Chenery*, 332 U.S. 194, 217 (1947) (Jackson, J., dissenting).

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Respectfully submitted,

OLIVER J. DUNFORD*
WENCONG FA
THOMAS A. BERRY
**Counsel of Record*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 429-7747
E-mail: odunford@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation, National Federation of Independent Business Small Business Legal Center, and Southeastern Legal Foundation