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 AND UNITED STATES OF AMERICA,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational foundation that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs to advance its public interest mission and has appeared as *amicus curiae* in this Court on many occasions.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs to advance its purpose and has appeared as *amicus curiae* in this Court on many occasions.

Amici are broadly concerned that the U.S. Court of Appeals for the DC Circuit gave an administrative agency like the Federal Communications Commission extended future powers to destroy enormous amounts of national wealth by reclassifying and regulating broadband internet service. As long as the FCC has this power, it will be prone to abuse it with dangerous and politically-corrupted decisions like the one under

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[1] *Amici* state that each of the Petitioners and Respondents have given their consent in writing to the filing of this *amicus* brief. No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation and submission of this brief.

appeal.[2] The result will be constant risk of damage to a major portion of the American economy and a simultaneous increase in wasteful rent-seeking behavior and agency lobbying.[3]

Amici are additionally concerned that unless this Court acts to rein in an unchecked administrative state, federal separation of powers doctrine will be badly undermined. The FCC's reclassification power blessed by the DC Circuit represents the expansion of *Chevron* doctrine beyond anything ever intended by this Court. Accordingly, the potential harm is even greater than the risk to the vibrant sector of the economy that is the internet and the continued growth and expansion of this valued platform for civic communication. The harm is that the DC Circuit has

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[2] *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 409-411 (D.C. Cir. 2017) (*reh'ng en banc denied*) (Brown, J., dissenting) ("*Why*, on the verge of announcing a new *Open Internet Order* in 2014 that both implemented "net neutrality" principles and preserved broadband Internet access as an "information service," would the FCC instead reclassify broadband Internet access as a public utility?... [T]he President's intervention into the FCC's deliberations was… outcome determinative…") (internal citations and punctuation omitted).

[3] Gerald R. Faulhaber, THE ECONOMICS OF NETWORK NEUTRALITY, Regulation, Vol. 34 No. 4 (Winter 2011-2012), at 24 ("When regulators are open for business, firms understand that pleasing / manipulating the regulators is far more important than innovating, investing, and pleasing customers. It is precisely because regulators have *not* been open for business on the Internet that it has been such an innovative and successful enterprise.") (*quoting* Gerald Faulhaber and Christiaan Hogendorn, THE MARKET STRUCTURE OF BROADBAND TELECOMMUNICATIONS, Journal of Industrial Economics, Vol. 48, No. 3, (2000)), available at https://object.cato.org/sites/cato.org/files/serials/files/regulation/2012/6/v34n4-4.pdf.

undermined the separation of powers outlined in the first three articles of the Constitution, which require Congress to make laws and establish policy with executive enforcement and judicial review. *Chevron* has now expanded to the point where the executive branch makes policy, the judiciary approves or rejects that policy, while Congress happily abdicates its authority and avoids all resulting political accountability. This is exactly the opposite of what the framers intended, as it greatly reduces the power of the most democratically-accountable branch of government and the only branch designed to foster genuine political compromise.

With all laws decided by an executive with little need to compromise and passed on by a judiciary where compromise is inimical to its very nature, the nation is deprived of lawmaking by a deliberative body that can only act when it negotiates and builds consensus between the many diverse stakeholders to any public debate. Without Congressional compromise, the nation is further deprived of 535 members of Congress who can return to their states and districts following compromise legislation and explain to their constituents why the law was in the best interest of the nation. Instead, members of Congress can endlessly avoid accountability, and instead may pass the buck and blame the nation's problems on out-of-control Presidents or out-of-control federal courts.

The result of this blurring of the separation of powers is that no political compromise is ever reached, so various factions just become further

entrenched into increasingly hostile positions. By abandoning our constitutional system of government, we are left with a system where parties compete aggressively for the only political prize remaining – the White House – and then take turns maximizing their success in capturing that branch by implementing as many overreaching executive actions as possible. Once the opposition party retakes the Presidency, the new party undoes all the executive actions of the previous administration and the cycle repeats itself. This turns the federal government into a mere battlefield in an endless policy war of attrition. This Court must rein in *Chevron* to protect the founders' intent in creating three separate branches of government, forcing Congress back into its proper role of the deliberative legislative branch which decides the nation's major rules and policies through negotiation and compromise.

For these and other reasons set forth below, *amici* urge the Court to grant the pending petition for certiorari.

SUMMARY OF ARGUMENT

The DC Circuit's grant of unchecked power to the FCC to heavily regulate the broadband internet industry whenever politically expedient to do so is extremely dangerous, and grant of certiorari is important for multiple reasons. First, this decision risks enormous harm to the future growth of the internet, which in turn constitutes a massive risk to the U.S. economy. Beyond that risk, this precedent

must be overturned to prevent the limitless expansion of the administrative state to the point where the separation of powers outlined in the first three articles of the Constitution is rendered meaningless.

This Court should reverse the illegal DC Circuit decision and properly explain *Chevron's* limits in this case. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Specifically, this Court should find the FCC's Order violated either the Major Rules Doctrine of *Utility Air Group* or the arbitrary and capricious standard of the Administrative Procedure Act as explained in *State Farm*. *Utility Air Regulatory Group. v. EPA*, 134 S. Ct. 2427, 2444 (2014); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins.*, 463 U.S. 29, 43 (1983). This case is especially important because the FCC Order violated both doctrines, and the DC Circuit improperly ignored both. As a result, the judiciary is blessing Congress' evasion of its constitutional responsibility to make laws. This will lead the executive branch to continue to usurp this authority with bolder and more inventive interpretations of decades-old statutes until eventually all real lawmaking power will lie in the executive and the judiciary. This is an inherently unstable situation that poses a great danger to the American system of governance.

ARGUMENT

I. This Case is Important Because Internet Overregulation Will be a Damocles' Sword Over the U.S. Economy Until Resolved by This Court

The internet accounts for a substantial portion of the U.S. economy, and an even larger percentage of the growth in the economy over the last 20 years. If the DC Circuit's decision stands, the FCC will continue to have absolute power to do untold damage to the U.S. economy whenever the political winds shift. Even if the FCC repeals the Order in question later this year, the risk of these dangerous regulations returning once the White House changes hands again is too great for this Court to ignore. The prospect of these harmful rules returning amounts to a Sword of Damocles hanging over the U.S. economy. This Court should grant certiorari to end this uncertainty.

The modern internet economy does not even closely resemble that of the telephone network, which was never used for both one-to-one communications and mass media communications on this scale. This makes the FCC's reinterpretation of the statute even more unreasonable. The economics of networks that primarily serve a one-to-one purpose and those that also serve a one-to-many model are dramatically

different.[4] Indeed, the internet's variable-use nature is what makes it such a priceless economic asset, as services and applications can start out with a small audience and then can scale to become global. This is also what makes the internet invaluable to civic life as "the most participatory form of mass speech yet developed." *Reno v. ACLU*, 521 U.S. 844, 863 (1997). Any regulations for the internet must therefore be flexible enough to accommodate all its distinct uses without damaging any part of it.

The DC Circuit's decision grants the FCC massive powers of intervention in the broadband internet economy which were never blessed by Congress. Consider just two of the regulations the FCC adopted in its Order with its "reclassification" authority. First, the FCC flatly outlawed the market for internet traffic prioritization, which prevents broadband providers from recovering the costs of network expansion from those web services putting the greatest demand on the network.[5] 47 C.F.R. § 8.9. This ban will result in less capital for network capacity expansion, which means slower network

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[4] *See* Christopher S. Yoo, NETWORK NEUTRALITY OR INTERNET INNOVATION?, Regulation, Vol. 33, No. 1, p. 28, (Spring 2010) (discussing dissimilar network economic effects of telephone networks and broadcast television networks), available at https://object.cato.org/sites/cato.org/files/serials/files/regulation/2010/2/regv33n1-6.pdf.

[5] *Id.*, p. 29 ("[P]reventing network providers from exercising pricing flexibility … would simply increase the proportion of the network costs that providers must recover directly from end users. This simultaneously raises the prices paid by consumers and decreases the likelihood that the capital improvements will ever be built.").

expansions, which in turn will result in longer wait times before the next innovative, bandwidth-intensive edge application can reach market scale.

Outlawing a market in traffic delivery speed also kills incentives for websites and application providers at the "edge" of the network to develop further technological innovations of their own:

> [P]ricing for extra speed would incentivize edge providers to innovate in technologies that enable their material to travel faster (or reduce latency or jitter) even in the absence of improved ISP technology.... Thus paid prioritization would yield finely tuned incentives for innovation exactly where it is needed to relieve network congestion. These innovations could improve the experience for users, driving demand and therefore investment.

United States Telecom Ass'n v. FCC, 825 F.3d 674, 763 (D.C. Cir. 2016) (Williams, J., dissenting). Far from preserving openness and facilitating increased innovation and investment, the FCC's prioritization ban will therefore send the internet into a downward spiral.

Similarly, the FCC's internet conduct rule chills broadband providers' ability to adopt new network management policies, which virtually ensures that websites and application providers will use network bandwidth less efficiently. 47 C.F.R. § 8.11. This rule gives the FCC a flexible standard to judge what is and

is not reasonable network management on a case-by-case basis. Giving this unchecked power to the FCC essentially means innovation by network operators will grind to a halt, as the internet becomes a "mother may I" economy at the center or "core" of the network. This in turn means bandwidth efficiencies are created more slowly, and therefore websites and services at the "edge" of the network must wait longer before capitalizing on increased bandwidth availability to reach customers. Placing prior restraints on broadband providers' technological innovation will also dramatically reduce incentives for the edge providers themselves to develop technologies for efficient transmission of data.[6] Again, the FCC's overbearing rules will drastically slow the internet's historic cycles of innovation and investment.

Preserving the cycle of internet growth and investment requires innovation at both the edge and the core of the network. If the core remains an unchanging public utility where network management innovations are subject to federal approval, the edge should not bother developing the next generation of more bandwidth-intensive applications because the core will never be able to transmit them effectively – nor will broadband

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[6] Chris Fedeli, CARPOOL LANES ON THE INTERNET: EFFECTIVE NETWORK MANAGEMENT, 26 Comm. Lawyer 1, at 31-32 (Jul. 2009) ("By allowing such practices, network operators can increase speed of traffic delivery based on how much of an effort the traffic itself... makes to ease congestion through steps they can take at little cost. This is a highly efficient network management principle…"), https://www.americanbar.org/content/dam/aba/publishing/communications_lawyer/fedeli.authcheckdam.pdf.

providers have as much incentive to make the needed improvements.

Accordingly, the DC Circuit has effectively granted the FCC the power to freeze a major portion of the U.S. economy and declare it a zero-growth zone whenever the populist winds demand it. This Court should not hesitate to now reverse the DC Circuit's infelicitous decision and restore certainty that the internet economy will continue to experience healthy growth and expansion.

II. This Case is Important Because This Court Must Clarify the Major Rules Doctrine to Protect Separation of Powers

It is urgently important for this Court to accept review and clarify the Major Rules Doctrine now, rather than at some future time. In recent years, the federal government has strayed further towards making the executive branch the primary seat of policymaking rather than Congress, diverging from the intent of the founders. If the Court allows regulatory agencies to assume such broad powers to change the law without explicit Congressional directive – as the FCC did with the DC Circuit's blessing – then Congress will be free to abdicate its legislative responsibilities in favor of rule by executive. The harms to the nation from this *sub rosa* realignment of federal political power are potentially enormous. When the most democratic and popularly accountable branch of government is permitted to cede its responsibility to make policy to the executive branch, the opportunities for compromise and lasting

deal-making in federal lawmaking are dramatically reduced. Instead, the Congressional system designed by the founders will be replaced with an executive system where the political parties endlessly vie for the White House and, once successful, strive only to undo and reverse all the executive regulatory legislation enacted by the predecessor's party. This Major Rules case therefore presents the Court with a unique opportunity to put an end to Congress' recent neglect of its constitutional duties.

If Congress wants agencies to make far reaching and sweeping decisions that can jolt massive segments of the economy, it must say so particularly clearly in the statute. In this case, if Congress had wanted to give the FCC the power to change regulatory treatment of internet services back and forth from light to heavy regulation depending on what the FCC thought was good for the market or consumers at any moment, Congress would have spelled out the FCC's authority to do so. For instance, Congress *could* have written market-based or consumer-based definitions of different kinds of communications services into the statute *instead of* the technology and service-based definitions Congress *did* write. 47 U.S.C. §§ 153(24), 153(53). The former kinds of definitions will necessarily fluctuate by external factors, when markets change or when prices rise and competition disappears. But the latter kinds of definitions are intrinsic to the service itself, based on the technology and the providers offering the communications service regardless of external factors. Accordingly, this case falls outside of *Chevron* doctrine and within the ambit of the Major Rules

Doctrine explained in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014).

The DC Circuit was wrong to affirm the FCC's 2015 decision to "reclassify" broadband internet as a telecommunications service. The FCC's reclassification flies in the face of the barest common sense when one considers that Congress created two statutory regulatory categories – one for telephone communications networks, and one for computer communications networks – and never gave the FCC the power to treat one like the other. 47 U.S.C. §§ 153(24), 153(53). Functionally, this case is no different than if the U.S. Department of Agriculture decided to reclassify "fish" as "beef" under the relevant statutes because the cattle laws happen to be more suitable to how the USDA wishes to regulate the fisheries industry.

Importantly, the DC Circuit upheld the FCC's power not just to interpret ambiguous statutory phrases but to rewrite the Communications Act in ways that are "inconsistent with — in fact, would overthrow — the Act's structure and design." *Utility Air Group*, 134 S. Ct. at 2442. The FCC claimed power to unilaterally implement a "decision of vast economic and political significance" affecting "a significant portion of the American economy." *Id.* In *Utility Air Group*, this Court held that agencies may only issue such orders when Congress *explicitly* delegated that kind of broad and expansive power to an agency by statute. *Id*.

The Major Rules Doctrine necessarily limits the application of *Chevron* in the instant case. "One might be tempted to say turning Internet access into a public utility is obviously a 'major question' of deep economic and political significance—any other conclusion would fail the straight-face test." *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 402 (Brown, J., dissenting). Importantly, the *Brand X* court never applied the Major Rules Doctrine because in that 2005 case the FCC had not imposed burdensome new regulations on an entire industry, but rather was announcing its *refusal* to impose such regulations. *National Cable & Telecomms Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). As Judge Kavanaugh explained, "the *Brand X* Court did not have to — and did not — consider whether classifying Internet service as a telecommunications service and imposing common-carrier regulation on the Internet would be consistent with the major rules doctrine." *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 425 (D.C. Cir. 2017) (*reh'ng en banc denied*) (Kavanaugh, J., dissenting).

Despite the DC Circuit majority's reasoning, it is not especially difficult to reconcile the Major Rules Doctrine with *Brand X*. As this Court is aware, the *Brand X* decision applied *Chevron* to the FCC's 2002 interpretation of Sections 153(24) and (53) of the Communications Act. 47 U.S.C. §§ 153(24), 153(53) (providing technology based definitions of telecommunications services and information services). Even if we assume that the *Brand X* precedent gives the FCC the power to reinterpret the Communications Act so that broadband internet

could be either an information service or telecommunications service, the case at bar would still be different from *Brand X*.

Specifically, the current Court would still need to apply the Major Rules Doctrine separately from (or in addition to) the traditional two steps of *Chevron*. The Major Rules Doctrine has been referred to as "*Chevron* Step Zero" to illustrate how it should be applied.[7] Apart from the usual "ambiguous statute, permissible interpretation" analysis, the Court must consider whether the interpretation will amount to a major economic reordering of an entire industry, and if so, whether Congress deliberately vested such massive power in the administrative agency.

Since the FCC's authority to adopt non-common carrier, light-touch net neutrality regulations had previously been upheld, the only reason for its Title II reclassification was to impose extreme command-and-control economic regulations on an entire industry. *See Verizon v. FCC*, 740 F.3d 623, 649, 651-658 (D.C. Cir. 2014) (upholding, under *Chevron*, the FCC's authority to lightly regulate information services under 47 U.S.C. § 1302). The massive economic impact without clear Congressional directive is what runs afoul of the Major Rules Doctrine – not the simple statutory reinterpretation, which at least hypothetically could be lawful under *Chevron* and *Brand X*.

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[7] Cass Sunstein, *CHEVRON* STEP ZERO, 92 Va. L. Rev. 187, 236 (2006).

III. This Case is Important Because the Court Must Restore the APA Requirement That Agencies Provide Genuinely Sound and Accurate Reasons for Regulatory Actions

The Court should also accept review to rule on the APA issues here for the same reason Major Rules review is needed: to properly protect the first three articles of the Constitution and restore the balance of power between the branches of government. If the "arbitrary and capricious" standard remains so toothless that it can be satisfied with any mealy-mouthed excuse an agency gives, Congress can avoid legislating and accountability indefinitely. Combined with the over-expansive *Chevron* doctrine, the administrative state's overreach will therefore continue to erode the powers once reserved for Congress. This Court should not continue to allow this expansion of executive power.

Agency action is "arbitrary and capricious" if the agency has "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins.*, 463 U.S. 29, 43 (1983). The FCC's 2015 reinterpretation of Section 153 of the Communications Act was arbitrary not because it differed from the FCC's 2003 interpretation, but because the FCC made the decision to regulate more heavily without offering an explanation consistent with the evidence before the agency:

> [T]he Commission relied on explanations contrary to the record before it and failed to consider issues critical to its conclusion… To the extent that the Commission justified the switch on the basis of new policy perceptions, its explanation of the policy is watery thin and self-contradictory. Having set forth the notion that paid prioritization poses a threat to broadband deployment… the Commission then fails to respond to criticisms and alternatives proposed in the record, in clear violation of the demands of *State Farm*, 463 U.S. at 43, 51.

United States Telecom Ass'n v. FCC, 825 F.3d 674, 762 (D.C. Cir. 2016) (Williams, J., dissenting).

The FCC either ignored or casually distinguished reams of economic evidence grounded in accepted theory that outlawing market transactions and business practices will deprive the market of growth, hurting both the internet and consumers. This was not a mere difference of opinion; the 2015 order amounts to "economics denialism" by the Commission.[8] Furthermore, this is not a case where the FCC stated it was willingly sacrificing innovation and growth of the internet in exchange for guaranteed

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[8] *See* Stuart N. Brotman, *Creating an economics-sensitive zone at the FCC*, Brookings Institute (May 25, 2017) (the FCC's former chief economist described the Title II net neutrality rulemaking as one where "a fair amount of the economics was wrong, unsupported, or irrelevant."), available at www.brookings.edu/blog/techtank/2017/05/25/creating-an-economics-sensitive-zone-at-the-fcc.

equality of internet access and cost. Such a decision would be an unwise political choice in *amici's* view, but as an explanation it would at least square with the evidence in the record and therefore satisfy the APA. Indeed, there may be occasions where destroying national wealth is a legitimate political choice if done in the service of some other important goal – such as paying for necessary government services, or reducing wealth disparities to avert social unrest. *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 766 (D.C. Cir. 2016) (Williams, J., dissenting) ("[P]erhaps the Commission is drawn to its present stance because it enables it to revel in populist rhetorical flourishes…."). The APA's requirement is that agencies identify such reasons forthrightly when they are the actual reasons for agency action. Instead, the FCC waived away established economic evidence and theory with its own set of "alternative facts" to deny that its decision would have any impact on growth of the internet economy. There is a point at which such willful agency ignorance of a field of knowledge crosses the line between a difference of opinion supported by reason and arbitrary action in pursuit of an unstated agenda. The FCC's order crosses this line.

Additionally, this Court further explained in *State Farm* that "the agency nevertheless must examine the relevant data and articulate a satisfactory explanation for its action," which includes showing a "rational connection between facts and judgment... to pass muster under the arbitrary and capricious standard." 463 U.S. at 56. It is not this Court's role to accept whatever rationale the FCC offered for its

decision uncritically, as if the arbitrary and capricious standard were a mere rubber-stamp. Rather, this Court must examine the FCC's stated reasons and, if they do not adequately account for the evidence, ask if there were other unstated reasons for the decision. *See e.g. District of Columbia v. Heller*, 554 U.S. 570, 628, fn. 27 (2008) (a simple "rational basis" review is meaningless if it only excludes pure irrationality); *see also Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 112 (Tex. 2015) (Willett, J., concurring) (judges must "conduct a genuine search for truth… asking 'What is government actually up to?'"). If the agency reason proffered is not the actual reason for the decision, the agency has avoided accountability and the decision is therefore unlawfully arbitrary and capricious under the APA.

The FCC's stated goal of "protecting and promoting the open internet" does not adequately account for its choice to reclassify broadband under Title II (47 U.S.C. § 201 *et seq*.) and impose heavy-handed public utility regulations when it could have protected openness with light-touch, Title I information service regulations. *See Verizon v. FCC*, 740 F.3d 623, 649, 651-658 (D.C. Cir. 2014).[9] The economic evidence and analysis in the record demonstrated quite persuasively that the prohibitions on market transactions and business

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[9] *See also* Comments of Judicial Watch and Allied Educational Foundation, *In re Restoring Internet Freedom*, WC Docket 17-108, FCC 17-60, pp. 11-16 (filed July 17, 2017) (providing examples of light-touch net neutrality regulations that protect internet openness without imposing burdensome economic restrictions), available at http://www.judicialwatch.org/wp-content/uploads/2017/07/FCC-comments-net-neutrality.pdf.

practices would gradually destroy billions of dollars of value. For instance, in adopting the paid prioritization ban, the FCC failed to adequately account for evidence of the importance of a two-sided market for broadband internet, which draws vastly more capital into the broadband economy through ordinary market pressures and self-interested behavior.[10] Furthermore, the Commission did not adequately account for evidence that the clear economic harm of this regulation could have been mitigated if applied more carefully:

> [T]he Commission adopted a flat prohibition [on prioritization], paying no attention to circumstances under which specific varieties of paid prioritization would (again, assuming market power) adversely or favorably affect the value of the internet to all users. In the absence of such an evaluation, the Order's scathing terms about paid prioritization… fall flat.

United States Telecom Ass'n v. FCC, 825 F.3d 674, 766 (D.C. Cir. 2016) (Williams, J., dissenting). Similarly, the consumer protection rationale for the FCC's

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[10] Justin (Gus) Hurwitz, TWO SIDES OF THE INTERNET'S TWO-SIDEDNESS: A CONSUMER WELFARE PERSPECTIVE, Perspectives from FSF Scholars, Vol. 8, No. 25 (Sept. 30, 2013) ("[W]hy do we care if a market is two-sided? Because in most two-sided markets, the purveyor of the intermediary goods that the two sides are consuming… sets different prices for each side of the market in order to maximize the value of the market."), www.freestatefoundation.org/images/Two_Sides_of_the_Internet_s_Two-Sidedness_-_A_Consumer_Welfare_Perspective_092713.pdf.

prioritization ban fails to square with the evidence that a two-sided market can serve as an even better price control system than federal regulations.[11]

Additionally, in imposing the internet conduct regulation, the FCC's reasoning does not account for the evidence that preventing broadband providers from adopting network management innovations will inevitably lead to inefficient bandwidth use. This will in turn delay or foreclose the development of more bandwidth-intensive applications and content delivery innovations, slowing growth of a major segment of the economy.[12]

The FCC never owned up to the fact that it was sacrificing all the above for internet openness, nor to the fact that it could have protected openness without sacrificing innovation and investment. The Court should now restate the law and prohibit agencies from unaccountable and opaque decisionmaking. Permitting this kind of agency action only serves to

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[11] *Id*. ("...the Open Internet rules, by preventing Verizon from charging firms like Google and Netflix for access to its network, prevent this market from behaving like a two-sided market.... [A]llowing broadband ISPs to charge content providers can benefit consumers and increase infrastructure investment.").

[12] Chris Fedeli, CARPOOL LANES ON THE INTERNET: EFFECTIVE NETWORK MANAGEMENT, 26 Comm. Lawyer 1, at 31 (Jul. 2009) ("The Internet could evolve to require stricter technical protocols for levels of integrity and performance needed for delivery of high speed and real-time applications like online gaming... [T]he FCC's rules should allow network operators to accommodate the kinds of functions next generation Internet users may want."), https://www.americanbar.org/content/dam/aba/publishing/communications_lawyer/fedeli.authcheckdam.pdf.

further insulate Congress from accountability for national policy while dangerously expanding the policymaking powers of the executive branch.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant the petitions for writs of certiorari.

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