No. 17-498

In the
Supreme Court of the United States

DANIEL BERNINGER,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

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

REPLY OF PETITIONER

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SUMMARY OF ARGUMENT

This Court has characterized the Telecommunications Act of 1996 as "an unusually important legislative enactment" whose "primary purpose was to reduce regulation" of new technologies, including the Internet. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 858 (1997). Petitioner Daniel Berninger is one of the entrepreneurs developing those new technologies and bringing them to market. Those new technologies are only possible, however, because of the position, explicitly stated in section 230 of the Act that "it is the policy of the United States … (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*." 47 U.S.C. § 230(a).

Congress has not altered this stated policy since 1996, yet the Federal Communications Commission (FCC) decided in 2015 to chart a new course and adopt its own policy for how the Internet and these new technologies should be regulated. In its Open Internet Order and accompanying regulations, the FCC ruled that Broadband Internet Service Providers would now be subjected to heavy regulation as a "common carrier" under Title II of the Communications Act of 1934. Included in this new heavy regulation was a prohibition on "paid prioritization" which was required for a new communications product Petitioner was developing. This new FCC policy of heavy regulation of the Internet forecloses this new method of communication, infringing on Petitioner's First Amendment rights.

After delaying its response to this petition by nearly a year, the FCC now argues that the case is moot because it once again has changed its mind about imposing heavy common-carrier regulation on the Internet. This "new" regulatory approach still interferes with Petitioner's access to paid prioritization. Nonetheless, the FCC refuses to respond to the constitutional defects of its order (and the constitutional defects of the Court of Appeals' decision upholding that order), but instead claims the power to change its mind anytime the voting majority on the Commission changes. The unilateral action of the Commission cannot moot this case. In any event, it is far from certain that the Commission's new declaratory ruling will survive either judicial or Congressional review.

Intervenors below[1] argue that Petitioner Berninger does not have standing to raise his First Amendment claim and state (without argument) that the First Amendment claim is not worthy of review. Intervenors below further assert that Petitioner has failed to identify a conflict between the circuits. Well-established precedent from this Court establishes both that Berninger has standing and a viable claim when a government agency seeks to foreclose (or even

[1] Intervenors below are private individuals and organizations and thus have no standing to defend a federal regulation on their own. *Diamond v. Charles*, 476 U.S. 54, 63 (1986); *see Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). At best, they are amici in support of neither side. Petitioner will refer to these organizations as "intervenors below" to distinguish them from the government respondent who is the only party with standing to defend (or abandon) the challenged declaratory order and accompanying regulations.

burden access to) a channel of communication. Further, the conflict between the circuits on the major rules doctrine has deepened since the petition was filed.

Finally, if the Court finds the action moot based on the unilateral action of Respondent Commission, the order challenged will stand both unreviewed and now unreviewable. Equity demands that if the challenge is now moot that the declaratory order and accompanying rules be vacated.

ARGUMENT

I. The Commission's Unilateral Action Cannot Moot this Constitutional Challenge

This Court has ruled in numerous cases that "voluntary cessation of allegedly unlawful conduct does not ordinarily suffice to moot a case." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012); *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 174 (2000); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). The concern is that the defendant is free to return to the conduct that spawned the litigation in the first place. In the case of municipal regulation, the concern is that the city entity would be free to reenact the challenged legislation – perhaps with a few cosmetic changes – once the litigation had been dismissed. *Ne. Fla. Chapter of Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 662 (1993). Yet this cannot be a rule for cities only. It is just as easy for the FCC to adopt a new declaratory order as it is for a city to adopt a new ordinance.

The challenged order was adopted by a narrow 3-2 vote of the Commission. App. Vol. II at 926a, 931a, 939a, 941a, and Vol. III at 1090a. The declaratory order that the FCC claims moots this case was also adopted by narrow 3-2 majority – after a change in the individuals serving as commissioners.[2] This merely proves that what one narrow majority adopts, a new narrow majority may overturn. The FCC's power to once again reverse directions is precisely the same as the cities' power to reenact disputed regulations in *City of Erie* and *City of Mesquite*. The FCC has not shown why the ruling on mootness ought not to be the same as well.[3]

Further, although the new declaratory order removes the ban on paid prioritization, it still imposes barriers to Petitioner and others who wish to use that technology to open new channels of communication. 33 FCC Red 311¶ 216 (2018). The new declaratory ruling requires Internet Service Providers to disclose any paid prioritization. Such mandated disclosure itself creates disincentives to providing the service to Petitioner and thus operates as a barrier to the new

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[2] *See* https://www.fcc.gov/document/fcc-takes-action-restore-internet-freedom (reporting separate statements of Commissioners).

[3] The Brief for Federal Respondents argues in a footnote that the "2018 Order makes clear that there is no realistic prospect that the FCC will reinstate the regulatory approach reflected in the 2015 Order." *Id*. at 15 n.2. Yet the FCC does not explain why this should be so. The 2018 Order does not bind future commissioners just at the 2015 Order did not bind the commissioners in 2018 from enacting the new order. If anything, the 2015 and 2018 orders demonstrate that the position of the FCC can and will change with even minor changes in the individuals serving as commissioners.

mode of communication he seeks to offer. *See Reno*, 521 U.S. at 874. The First Amendment injury to Petitioner has not been resolved by the new declaratory order.

Finally, it is far from certain that the new declaratory order will survive Congressional and Judicial review. The Senate has already approved a joint resolution disapproving the new declaratory order and accompanying regulations pursuant to the Congressional Review Act. Senate Joint Resolution No. 52. The House of Representatives has until the end of its session to decide whether to join in the Senate's rejection. Since the declaratory ruling challenged in this petition was repealed by the 2018 Order, if that 2018 Order is overturned then the original order that is the subject of this Petition will continue in effect.

The new declaratory ruling is also facing legal challenges in the District of Columbia Circuit Court of Appeals. Twenty-two states and several private organizations have filed challenges to the ruling and briefing is underway. *Mozilla Corp. v. FCC*, No 18-1051 (and consolidated cases) (Brief of Government Petitioners). That court has set argument on these challenges for February of next year. *Id*. (Clerk's Order filed September 21, 2018). Should that court reject the new declaratory ruling, the order challenged in this Petition will continue in effect.

This action is therefore not moot. The FCC cannot moot a case by voluntary cessation, the new declaratory ruling continues to infringe on Petitioner's First Amendment rights, and it is by no means certain that the new declaratory ruling will survive judicial and Congressional challenges that seek to revive the

rule and declaratory order challenged here. The Court should grant the petition to resolve the constitutional questions raised in the petition.

II. The Challenged Order and Regulations Outlaw a Mode of Communication, and thus Infringe on First Amendment Liberties.

A. The Open Internet Order Violates Berninger's First Amendment Rights.

Intervenors below make the curious argument that the "panel majority" thoroughly reviewed Petitioner's First Amendment claim, and, on that basis, the claim is unworthy of review. Brief in Opposition for Free Press at 33. Intervenors below do not cite to the panel decision, but instead refer to opinions concurring in the denial of en banc review. A concurring opinion is hardly something that could be referred to as a "thorough review" by the court. In any event, consideration of a question by the court below cannot preclude review by this Court. Were it otherwise, there would be very little work for this Court to do!

Other than this curious argument, however, neither the FCC nor the intervenors below confront the First Amendment infringement caused when the FCC outlawed a mode of communication on which Berninger relied for his new communications technology.

This is not an attempt to raise the First Amendment rights of other parties nor is it a claim of third party standing. Petitioner, himself, was relying on this mode of communication (paid prioritization) to be able to provide a new method of communication. This is no different than if the FCC had prohibited Internet

Service Providers from allowing Voice over IP – a technology that Petitioner Berninger helped to develop and bring to market that has revolutionized communications.

This Court has emphasized that the First Amendment protects not only the message but also the means by which it is communicated. For instance, in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), this Court held that restrictions on the placement of newspaper racks implicated the First Amendment rights of the newspaper publishing company. The city did not try to control the content of the newspaper. Instead, it claimed control over one of the methods for distribution of the paper. *Id.*, at 753-54. Because the city required a license available only at the discretion of the mayor, vesting such discretion in the mayor to restrict this one mode of distributing the newspaper violated the First Amendment. *Id.* at 772.

This feature of unbridled discretion exists in this case as well. The order challenged in the Petition outlawed paid prioritization as a general matter but allowed exceptions on a case-by-case basis. Order, App. Vol. II at 876a. As was the case in *City of Lakewood*, the FCC gave itself unbridled discretion to grant or deny permission for this mode of communication. This unbridled discretion to permit or deny a method of communication – a method to deliver content – violates Berninger's First Amendment rights and ought to be reviewed by this Court.

Moreover, as noted above, the new order continues to infringe on Berninger's First Amendment

rights. Under the new order, Internet Service Providers must now report and disclose any time they provide paid prioritization. This reporting and disclosure requirement sets up a natural disincentive to providing paid prioritization that Berninger needs for his new mode of communication, thus burdening the exercise of his First Amendment rights. The Court should grant review to resolve these claims.

B. Berninger Has Standing to Raise the First Amendment Violation of His Rights.

Mr. Berninger's standing to assert his First Amendment claim are set out in a declaration that was filed with his opening brief in the court below. There, he identifies *two* communications projects that were disrupted by the FCC's declaratory ruling outlawing paid prioritization. Intervenors below conflate the two projects in order to present a shockingly disingenuous argument on standing.

Mr. Berninger's declaration clearly states that his new mode of communication requires high definition voice capability and further that "the implementation of high-definition "HD voice requires IP interconnection agreements with network operators to support the type of paid prioritization options the Order prohibits." Declaration at ¶ 5. Again, in paragraph 6 of his Declaration, Mr. Berninger states that the rule's prohibition on paid prioritization renders his business impossible. *Id*. at ¶ 6.

It does not matter that the declaratory order is not directly aimed at him. *Bond v. United States*, 564

U.S. 211, 223 (2011) (collecting cases). It is undisputed that the order cuts off his access to a channel of communication, and thus the order has real world effects on Petitioner. *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 794 (1988); *see Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 954, 967-68 (1984).

Further, the 2015 Order's ban on paid prioritization, followed by a case-by-case permitting process, is no different from the speech licensing schemes that this Court has reviewed. "In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office." *Freedman v. State of Maryland*, 380 U.S. 51, 56 (1965).

III. The Conflict Between the Circuits Has Deepened Since the Petition Was Filed.

The 2015 Order vastly expanded the jurisdiction of the Commission to give it control over "'a unique and wholly new medium of worldwide human communication.'" *Reno*, 521 U.S. at 850. By any definition, the declaratory order and accompanying rules qualify as a "major rule" under *Utility Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014), requiring closer scrutiny and less deference. Yet the court below simply deferred to the Commission, citing *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Panel decision, App. Vol. I at 27a. As pointed out in the petition, this created a conflict with the Third, Ninth, and Tenth Circuit Courts of Appeal that have all recognized the "major rules doctrine"

and its call to limit deference to agency decisions for rules that fall within the doctrine.

Since the Petition for Writ of Certiorari was filed in this case, the conflict has deepened. In March of this year, the Fifth Circuit applied the doctrine to withhold deference from a Department of Labor rule. *Chamber of Commerce of the United States of America v. United States Department of Labor*, 885 F. 3d 360, 380 (5th Cir. 2018). The Court should grant review to resolve these conflicts.

IV. If the Court Determines that the Commission's Unilateral Action Renders this Petition Moot, Equity Demands that the Challenged Order and Accompanying Regulations Be Vacated.

As noted above, Mr. Berninger's petition states a live controversy. The unilateral action of the FCC in issuing a new declaratory order after a change in the composition of the Commission does nothing to prevent the FCC from re-imposing the unconstitutional order and rules. Further, the new declaratory order itself continues to infringe on Petitioner's First Amendment rights.[4]

Nor is there any basis for remanding the action to the Circuit Court that issued the ruling that is challenged in this petition. That court has already ruled on (or declined to consider) the issues raised by Mr. Berninger in his petition. The full court below declined rehear the matter en banc over the dissent of two members of that court noting the errors in the

[4] It should be clear from this Reply that the conspiracy theories floated by intervenors below cannot apply to Mr. Berninger.

panel decision raised by Petitioner. There is nothing left for that court to do in this case.

If, however, the Court finds this petition is now moot, it is not enough to vacate the Circuit Court decision. Such an action leaves the challenged declaratory order and rules unreviewed and in place to take effect should either Congress or the court below strike down the new declaratory order and accompanying rules. At that point, the declaratory ruling and order could no longer be challenged. 47 U.S.C. § 402 (establishing a 30 day time limit following adoption of a rule by the Commission for filing an appeal).

This Court in *A. L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324 (1961), held that in situations such as this case where a ruling that the action is moot would leave the administrative action unreviewed and unreviewable in the future, the administrative body must vacate the challenged order. *Id*. at 329-30.; *see, e.g., NTA Graphics, Inc. v. N.L.R.B*., 511 U.S. 1124 (1994); *Board of Governors of the Federal Reserve System v. Security Bancorp & Security National Bank*, 454 U.S. 1118 (1981); *American Family Life Assurance Co. of Columbus v. F.C.C.*, 129 F.3d 625, 630 (D.C. Cir. 1997) (collecting cases).

This is a matter of equity. *US Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 9, 25 (1984). Where mootness is caused by the unilateral action of the FCC, the party who prevailed below, the unreviewed declaratory order should be vacated. *Id*.

These authorities compel vactur of the Commission declaratory ruling and regulations in this case as well should the Court find this action moot.

CONCLUSION

This petition does not present a clash between Internet giants such as Google or Facebook or Netflix against AT&T or Comcast or Verizon. Instead, this petition is on behalf of an entrepreneur who is responsible for the development of many of the innovative technologies that make the Internet such a powerful vehicle for free communication. This innovation flourished under the stated policy of Congress that the Internet should be allowed to develop free from federal and state regulation. That innovation will now be crushed by the claim of the FCC of power to impose new, heavy regulation on the Internet. The petition should be granted.

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Respectfully submitted,

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