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 V. FCC, ET AL.

AT&T INC. V. FCC, ET AL.,

AMERICAN CABLE ASSOCIATION V. FCC, ET AL.,

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

BRIEF IN OPPOSITION FOR PUBLIC KNOWLEDGE, OPEN TECHNOLOGY INSTITUTE | NEW AMERICA, AD HOC TELECOMMUNICATIONS USERS COMMITTEE, CENTER FOR DEMOCRACY AND TECHNOLOGY, NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, AND VIMEO, LLC

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TECHFREEDOM, ET AL. V. FCC, ET AL.

U.S. TELECOM ASSOCIATION, ET AL. V. FCC, ET AL.

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QUESTIONS PRESENTED

1. Whether the Court should grant plenary review to decide the lawfulness of the Federal Communication Commission's Open Internet Order when the Order has since been withdrawn by the agency.

2. Whether the Court should vacate the court of appeals' decision upholding the Open Internet Order under *United States v. Munsingwear*, 340 U.S. 36 (1950), when the Court's review of the decision was prevented only because petitioners and the Commission jointly delayed proceedings in this Court for nearly a year while they worked to moot the case by repealing the Order, and when the Court would not have granted the petitions if the case had remained alive.

3. Whether the Court should vacate the court of appeals' decision even if the case does not satisfy the criteria for *Munsingwear* vacatur.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, respondents state as follows:

The **Ad Hoc Telecommunications Users Committee** ("Ad Hoc") is an unincorporated, nonprofit association of large business users of communications services. Ad Hoc has no parent corporation, nor is there any publicly held corporation that owns stock or other interest in Ad Hoc.

The **Center for Democracy & Technology** ("CDT") is a non-profit, non-stock corporation organized under the laws of the District of Columbia. CDT has no parent corporation, nor is there any publicly held corporation that owns stock or other interest in CDT.

The **National Association of Regulatory Utility Commissioners** ("NARUC") is a quasigovernmental nonprofit organization founded in 1889 and incorporated in the District of Columbia. NARUC has no parent corporation, nor is there any publicly held corporation that owns stock or other interest in NARCU.

The **Open Technology Institute | New America** ("OTI") is a program within the New America Foundation, a non-profit organization incorporated in the District of Columbia. The New America Foundation has no parent corporation, nor is there any publicly held corporation that owns stock or other interest in the New America Foundation.

Public Knowledge is a non-profit organization incorporated in the District of Columbia. Public Knowledge has no parent corporation, nor is there any

publicly held corporation that owns stock or other interest in Public Knowledge.

Vimeo, LLC is a wholly owned subsidiary of IAC/InterActiveCorp, a publicly-traded company with no parent company; no publicly-traded company owns 10% or more of IAC/InterActiveCorp.

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BRIEF IN OPPOSITION

Respondents Public Knowledge, Open Technology Institute | New America, Ad Hoc Telecommunications Users Committee, Center For Democracy and Technology, National Association Of Regulatory Utility Commissioners, and Vimeo, LLC ("Respondents") respectfully request that the petitions for writs of certiorari be denied.

INTRODUCTION

The petitions in this case seek review of the D.C. Circuit's decision upholding the Federal Communication Commission's 2015 Open Internet Order. *In the Matter of Protecting and Promoting the Open Internet,* Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015) ("Open Internet Order"). Respondents were intervenors in support of the Commission's successful defense of the Order in the court of appeals.

These petitions were filed in September 2017, almost a year ago. Why is the Court only considering the petitions now? Because petitioners and the Government collectively took more than ten months' worth of extensions. Why did they do that? Because after the 2016 presidential election, the Commission realigned itself with petitioners and worked with them not only to repeal the Open Internet Order, but also to delay this Court's review long enough for the repeal to moot the case and lay the groundwork for their present joint request for vacatur under *United States v. Munsingwear*, 340 U.S. 36 (1950).

The Court should reject that gambit and deny the petitions, for several reasons.

First, this case did not become moot through "the vagaries of circumstances," or through the unilateral action of an appeal winner seeking to preserve its victory, the ordinary reasons for *Munsingwear* vacatur. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24-25 (1994). Quite to the contrary, this Court's review was prevented through the cooperative effort of the parties seeking vacature to successfully delay the Court's consideration of the petitions until the case was moot. Respondents are unaware of any case in which the Court has rewarded such manipulation of its schedule with the equitable relief of vacatur. For equitable purposes, this case is far more akin to one mooted by a settlement, which the Court has held provides no basis for vacatur. *Id.* at 26-27.

Second, as the United States has argued for decades, the equities ordinarily do not warrant vacatur when a case becomes moot while a petition for certiorari is pending unless this Court would have granted review if the case had remained alive. After all, if the case is not certworthy, it is hard to say that review was prevented by mootness or that leaving the petitioners to the fate they would have suffered anyway is somehow unfair. And in this case, if petitioners and the Government had not contrived to delay review, the petitions would have been denied in due course.

Third, the need to "clear[] the path for future relitigation of the issues between the parties," *Munsingwear*, 340 U.S. at 40, is largely absent. If the Open Internet Order is someday reinstated, the court of appeals' decision will not prevent petitioners from

returning to this Court to press the same claims they make now.

Nor is there any other basis for vacating and remanding the case.

STATEMENT OF THE CASE

The history of this case is set forth in greater detail in the brief of respondent Free Press. We focus here on the features of the case most relevant to the request for *Munsingwear* vacatur.

1. The 2015 Open Internet Order is the culmination of more than a decade of study and administrative proceedings designed to enact limited, reasonable limits on the ability of broadband internet access service providers to interfere with their customers' free and open access to the internet. *See* Pet. App. 10a-19a.

The Order established three bright line rules. The first two prohibit providers from blocking or throttling consumers' access to lawful internet content or services. Pet. App. 300a-02a, 308a-10a (Order ¶¶ 111-12, 119-20). The third "anti-paid-prioritization" rule prevents providers from favoring internet traffic in exchange for payments from third parties or in order to benefit an affiliated entity. *Id.* 312a-14a (Order ¶ 125). The Commission further established a "General Conduct Rule" that prohibits broadband providers from unreasonably interfering with or disadvantaging end users' ability to access lawful content or service, or edge providers' ability to provide them. *Id*. 328a-29a (Order ¶ 136). And it fortified an existing transparency rule that required providers to disclose certain information to consumers about the

provider's network management practices. *Id*. 350a-81a (Order ¶¶ 154-85).

This was not the Commission's first attempt to enact reasonable open internet rules. An earlier attempt to prohibit blocking and throttling had been invalidated by the D.C. Circuit, which concluded that the rules effectively imposed common carriage obligations on broadband providers in the absence of any Commission order classifying those providers as common carriers. *Verizon v. FCC*, 740 F.3d 623, 657-59 (D.C. Cir. 2014). In response, the Open Internet Order revisited the proper classification of fixed and mobile broadband internet access service and concluded that both met the statutory requirements for common carriage treatment. Pet. App. 14a-15a. At the same time, however, the Commission exercised its statutory authority to broadly forbear from applying most of the statute's requirements for common carriers, including by expressly forbearing from rate regulation of broadband service. *Id*. 225a-26a, 679a-80a (Order ¶¶ 51-52, 441).

2. On June 14, 2016, after extensive briefing and oral argument, the D.C. Circuit upheld the Order in an exhaustive joint opinion by judges Tatel and Srinivasan. Pet. App. 1a-3a. Petitioners sought rehearing en banc.

While those petitions were pending, President Trump won the November 2016 election. Shortly after taking office, the President elevated Commissioner

Ajit Pai to become the FCC's new chairman.[1] Pai had vigorously dissented from the Open Internet Order and made repealing it a top priority. Pet. App. 941a. On April 27, 2017, Chairman Pai released a draft notice of proposed rulemaking to repeal the Open Internet Order.[2] A few days later, the D.C. Circuit denied the petitions for rehearing. Pet. App. 1356a.

3. Even though petitioners seemed guaranteed to achieve their litigation objective through administrative means, they wanted one thing more: vacatur of the D.C. Circuit's decision upholding the Order the new Commission was bent on repealing. The difficulty was that this Court would not vacate the D.C. Circuit's decision unless the case was actually moot at the time the Court considered the petitions. *See Munsingwear*, 340 U.S. at 39. And under anything like an ordinary timetable, any petition for certiorari would be up for conference well before the case was mooted – the petitions were due at the end of July, 2017, so absent extensions, this Court would have ruled on the petitions no later than early October, 2017. But the repeal rulemaking would not be finished by then (the Commission ultimately voted to

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[1] *President Donald J. Trump Announces Key Administration Posts*, THE WHITE HOUSE (March 7, 2017), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-key-administration-posts/.

[2] *In the Matter of Restoring Internet Freedom*, Draft Notice of Proposed Rulemaking, WC Docket No. 17-108, FCC-CIRC1705-06 (released April 27, 2017), https://docs.fcc.gov/public/attachments/DOC-344614A1.pdf.

repeal the Order on December 14, 2017, and did not put the repeal into effect until June 11, 2018).[3] Petitioners needed to stall.

So they obtained a 60-day extension, the most permitted by law. *See* 28 U.S.C. § 2101(c). The Solicitor General, representing the Commission, then followed suit, taking the traditional first 30-day extension in late November 2017, and then another in December. And then another. And another. For more than eight months, the Solicitor General took extension after extension, – each requiring, and receiving, petitioners' consent – until the repeal became effective.[4]

The Solicitor General has now finally filed his brief and, to no surprise, requests that the Court vacate the prior Administration's victory in the D.C. Circuit, citing *Munsingwear*. U.S. Br. 15-16.

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[3] *See In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018) (Restoring Internet Freedom Order); *FCC's Restoring Internet Freedom Order*, FED. COMMC'N COMM'N (June 11, 2018) (Restoring Internet Freedom Implementation Announcment), https://docs.fcc.gov/public/attachments/DOC-351481A1.pdf.

[4] The extensions are reflected in this Court's electronic docket, a representative sample of which is available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-498.html.

REASONS TO DENY THE WRIT

I. Repeal Of The Challenged Order Removes Any Basis For Plenary Review.

As the Solicitor General explains, the repeal of the Open Internet Order removes any basis for plenary review. U.S. Br. 14. This Court routinely denies petitions asking the Court to decide the lawfulness of repealed laws and regulations, even when there are substantial lingering effects (which are absent here). *See, e.g.*, *SKF USA, Inc. v. U.S. Customs & Border Prot.*, 560 U.S. 903 (2010) (No. 09-767); *Gen. Elec. Co. v. Comm'r, N.H. Dep't of Revenue Admin.*, 552 U.S. 989 (2007) (No. 06-1210); *see also Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 77 (1955). There is no basis for a different result in this case.

II. *Munsingwear* Vacatur Is Not Justified.

The Government nonetheless asks this Court to vacate the court of appeals' decision under *United States v. Munsingwear*, 340 U.S. 36 (1950). We assume petitioners will take the same position, although most are apparently waiting to explain why until they file reply briefs.[5] In any event, vacatur is

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[5] Only NCTA briefed the *Munsingwear* issue in its petition. NCTA Pet. 17-19 (No. 17-502). U.S. Telecom stated that if the FCC repealed the Order, "petitioners will file a supplemental brief explaining why the Court should grant the petition and vacate the D.C. Circuit's opinion on mootness principles." U.S. Telecom Pet. 3 (No. 17-504). It never did. The American Cable Association (ACA) likewise promised that "[w]hen the FCC acts, petitioners will apprise the Court both of the FCC's actions and

unwarranted.[6]

The Solicitor General starts by claiming that it is this "Court's 'established practice' where 'a civil case from a court in the federal system * * * has become moot while on its way [to this Court]" to "vacate the judgment below and remand with a direction to dismiss." U.S. Br. 15 (quoting *Munsingwear*, 340 U.S. at 39). But this Court later repudiated that statement as incorrect dicta. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'Ship*, 513 U.S. 18, 23-24 (1994). Justice Scalia explained that from "the beginning we have disposed of moot cases in the manner 'most consonant to justice' . . . in view of the nature and character of the conditions which have caused the case to become moot." *Id*. (citations omitted). In this case, multiple equitable factors weigh decisively against vacatur.

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how, in their view, that affects the appropriate disposition of these petitions." ACA Pet. 24 (No. 17-500). The FCC acted more than eight months ago, but ACA has filed nothing. AT&T similarly promised that "[i]f the FCC follows through on its proposal," "we will submit a further brief explaining why the Court should grant certiorari and vacate the court of appeals' decision under well-accepted mootness principles." AT&T Pet. 30 (No. 17-499). No further brief has yet been filed by AT&T or anyone else.

[6] The Government rightly does not contest respondents' standing to oppose its position on the proper disposition of the petitions. *See, e.g.*, *Mausolf v. Babbitt*, 125 F.3d 661, 666-67 (8th Cir. 1997) (private defendant-intervenor may appeal decision on validity of agency regulation even if Government declines to); *League of United Latin Am. Citizens Council No. 4434 v. Clements*, 999 F.3d 831, 844-45 (5th Cir. 1993) (same); *Nat'l Wildlife Fed'n v. Lujan*, 928 F.3d 453, 456 & n.2 (D.C. Cir. 1991) (same).

A. Review Was Not Prevented Through Happenstance Or The Unilateral Action Of A Party Trying To Preserve A Victory, But By The Concerted Efforts Of The Parties Seeking Vacatur.

In the ordinary case, *Munsingwear* is applied when appellate review is "prevented through happenstance – that is to say, where a controversy presented for review has become moot due to circumstances unattributable to any of the parties" – or when review was prevented by "the unilateral action of the party who prevailed in the lower court." *U.S. Bancorp*, 513 U.S. at 23 (internal quotation marks and citations omitted). In contrast, vacatur is usually not appropriate when "the party seeking relief from the judgment below caused the mootness by voluntary action," as when, for example, it agrees to settle the case. *Id*. at 24.

This case does not qualify for vacatur under these principles. Petitioners and the United States are able to seek vacatur only because of the extraordinary steps they jointly took after the 2016 presidential election to delay the proceedings in this Court long enough for the Commission to repeal the underlying Order. That joint effort to end the case on mutually agreeable terms, and seek vacatur of the judgment below, far more closely resembles a settlement than the kind of case warranting *Munsingwear* vacatur.

1. Review Was Prevented Only By Petitioners' And The Government's Extraordinary Joint Efforts To Delay This Court's Decision For Nearly A Year In Order To Secure Vacatur.

Shortly after the election, the Commission issued a Notice of Proposed Rulemaking proposing to embrace nearly every argument petitioners had made in the court of appeals. *See In the Matter of Restoring Internet Freedom*, Notice of Proposed Rulemaking, 32 FCC Rcd. 4434 (2017). Petitioners then sought the maximum allowable extension of time to file their petitions in this Court, explaining that the proposed repeal had "the potential to alter the relationship between the parties" and moot the case. Pet'r's Application for Extension of Time 4-5 (No. 17A54).

Petitioners were right – the rulemaking *did* alter the relationship between the parties. Through that proceeding, the Commission aligned itself with petitioners, giving them everything they sought through the litigation: repeal of the Open Internet Order, elimination of Title II reclassification, and withdrawl of all the rules (with the sole, partial exception of some disclosure requirements petitioners did not contest before the D.C. Circuit). *See* Restoring Internet Freedom Order, ¶¶ 2-4, 33.

Even more, the Government became an active participant in petitioners' attempt to vacate the D.C. Circuit's decision upholding the now-repealed order. After receiving their 60-day extensions, petitioners filed their petitions on September 27 and 28, 2017. At that point, the Commission's vote whether to repeal

the Open Internet Order was still months away, and the eventual repeal itself would not take place for more than eight months. *See* Restoring Internet Freedom Order (vote to repeal taken on December 14, 2017); Restoring Internet Freedom Implementation Announcement (repeal took effect June 11, 2018). Absent some extraordinary delay, this Court would review the petitions in the ordinary course, without any mootness impediment.[7]

The Solicitor General then came to petitioners' aid, obtaining an extraordinary *eight* extensions, totaling more than *nine* months, running out the clock until the repeal became effective and the case became moot. The Government's brief does not attempt to disclaim the obvious purpose of the delay. The final extension request was made less than two weeks before the effective date of the repeal, and the Government filed its brief about a month after the case was finally mooted.

Petitioners are not innocent bystanders to this delay. The Government's repeated extensions would

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[7] Absent extensions, the case would have gone to conference by October 6, 2017 – two months before the Commission voted on whether to repeal the Order and eight months before the repeal took effect. Extending the scheduled by 60 days on each side still would have permitted the Court to rule on the petitions by early spring, months before the repeal mooted the cases.

not have been granted absent petitioners' consent,[8] which they freely gave.[9]

Given these circumstances, the court of appeals' judgment was "not unreviewable, but simply unreviewed by [petitioners'] own choice." *U.S. Bancorp*, 513 U.S. at 25. Petitioners plainly did not *want* this Court to rule on their petitions; if they had, it was within their power to obtain a ruling while the case was still alive.

Petitioners' preference for *avoiding* review of the petitions, and seeking vacatur under *Munsingwear* instead, might be understandable from their strategic perspective. But giving parties the choice whether to appeal or simply agree to vacatur "would – quite apart from any consideration of fairness to the parties – disturb the orderly operation of the federal judicial system." *Id*. at 27. Indeed, vacating the decision in this case would create a template for similar strategic manipulation of this Court's processes in the future. As this case demonstrates, the temptation to resort to such maneuvers can arise whenever a new administration takes power and reverses course in a case still in litigation.

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[8] Intervenor-respondents' consent was not required and never requested.

[9] The Government could have asked for further extensions over petitioners' objection, but there is no real prospect they would have been granted when the only plausible excuse for taking more than eight months' worth of extensions was the desire to moot the case and thereby secure vacatur of a decision the new Administration disliked.

Respondents are unaware of any other instance in which this Court allowed parties to secure vacatur of a decision through similar manipulations of the Court's schedule. After all, vacatur is premised on the view that a "party who seeks review of the merits of an adverse ruling . . . ought not in fairness be *forced* to acquiesce in the judgment." *Id*. at 25 (emphasis added). Because petitioners "did not avail [themselves] of the remedy [they] had to preserve [their] rights," *Munsingwear*, 340 U.S. at 40, they have no equitable claim to the "extraordinary remedy of vacatur," *U.S. Bancorp*, 513 U.S. at 26.

2. The Case Was Not Mooted By The Unilateral Action Of The Prevailing Parties Below, But Rather By The Cooperative Efforts Of The Parties Seeking Vacatur.

For the reasons just described, petitioners cannot claim that vacatur is warranted because review was prevented by "the unilateral action of a party who prevailed in the lower court." *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-72 (1997)). Review was not prevented by mootness, but by the extraordinary delay of this Court's consideration of the petitions, which required petitioners' cooperation to achieve. Nor, in any event, was mootness the result of the kind of "unilateral action" this Court's precedents have in mind.

1. To start, the Commission was not the only prevailing party in the lower court – respondents, acting as defendant-intervenors, prevailed as well.

And we have done everything in our power to prevent the repeal of the Open Internet Order. Those efforts were opposed at every turn by petitioners, who were among the most vocal advocates for repeal. *See* Restoring Internet Freedom Order. Having achieved their preferred result through the administrative process, there is nothing inequitable about requiring them to bear the litigation consequences of that victory (particularly when, as discussed below, those litigation consequences are so minimal, *see infra* § II.C).

2. To be sure, the Commission also played a central role in mooting the case. But even if mootness caused by the repeal of regulations is attributed to the Government for *Munsingwear* purposes, it should not help petitioners in this case.[10] The "unilateral acts" rule is designed to avoid the inequity of permitting "a plaintiff to obtain a favorable judgment, take voluntary action that moots the dispute, and then

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[10] In *Munsingwear* itself, a federal agency caused the case to become moot by repealing the relevant regulations, yet this Court refused to attribute responsibility for the mootness to the Government. *See* 340 U.S. at 37, 40-41; *see also U.S. Bancorp*, 513 U.S. at 25 n.3 (noting "*Munsingwear*'s implicit conclusion that repeal of administrative regulations cannot fairly be attributed to the Executive Branch when it litigates in the name of the United States," while expressing "no view" on its correctness). Unless this Court repudiates this aspect of *Munsingwear*'s analysis, petitioners in this case likewise cannot claim that the case's mootness is fairly attributable to the Government, and therefore cannot invoke the tradition of vacating a decision when "mootness occurs through . . . the 'unilateral action of the party who prevailed in the lower court.'" *Azar*, 138 S. Ct. at 1792 (citation omitted).

retain the benefit of the judgment." *Azar*, 138 S. Ct. at 1792 (citation omitted). The rule prevents a prevailing party from insulating a judgment she wants to preserve from further appellate review.

This case is nothing like that. The FCC mooted the case not because it wanted to preserve the D.C. Circuit's decision, but because the new Administration had come to agree with petitioners that the Open Internet Order and the precedent upholding it should be eliminated. If there is any doubt, just read the Restoring Internet Freedom Order. It goes on at length describing why the new Commission majority believes that the Open Internet Order was unlawful, for precisely the reasons petitioners raised in the D.C. Circuit and repeat in their petitions to this Court. *See, e.g.*, Restoring Internet Freedom Order ¶¶ 26-85.

3. This realignment of the parties' interests makes this case far more like one in which the prevailing party below agrees to provide the loser relief as part of a settlement, then joins in a request to vacate her own appellate victory. *See, e.g.*, *In re United States*, 927 F.2d 626 (D.C. Cir. 1991). And this Court has held that mootness caused by settlement is no ground for vacating a judgment. *See U.S. Bancorp*, 513 U.S. at 26-27. "That the parties are jointly responsible" for mooting the case "may in some sense put them on an even footing," but a request for vacatur "needs more than that." *Id.* "It is [petitioners'] burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur." *Id.*

Here, no formal settlement was possible, but the Commission effectively provided petitioners its equivalent: it gave petitioners exactly the relief they sought through the litigation, no less than if it had signed a settlement agreement promising to repeal (or not to enforce) the Open Internet Order. Petitioners actively advocated for that resolution, knowing that doing so would foreclose any further litigation over the Open Internet Order, just as a settlement agreement would. They have no more equitable claim to vacatur than any other party that persuades its opponent to agree to its position and thereby moot the case.

B. Vacatur Is Unwarranted Because The Petitions Would Have Been Denied Anyway.

Vacatur is further unwarranted because the petitions would have been denied even if the case had not become moot.

One wouldn't know it from reading the Government's brief, but "it has been the consistent position of the United States" since the late 1970s that "the Court should deny review of cases (or claims) that have become moot after the court of appeals entered its judgment but before this Court has acted on the petition, when such cases (or claims) do not present any question that would independently be worthy of this Court's review." Br. for the U.S. as Amicus Curiae at 9-10, *McFarling v. Monsanto Co.*, 545 U.S. 1139 (2005) (No. 04-31) (citing, *e.g.*, U.S. Br. on Mootness at 8 n.6, *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994) (No. 93-714); U.S. Br. in Opp. at 5-8, *Velsicol Chem. Corp. v. United States*, 435 U.S. 942

(1978) (No. 77-900)); *see also* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 19.4, at 968 n.33 (10th ed. 2013) (collecting further citations).

The Solicitor General reaffirmed that position as recently as last November. *See* U.S. Pet. at 23 n.4, *Hargan v. Garza*, 138 S. Ct. 1790 (2017) (No. 17-654). But he makes no mention of it in this brief, perhaps because he cannot bring himself to claim that the petitions in this case are otherwise certworthy. The Solicitor General's forgetfulness aside, the Government's longstanding position is correct and should be applied in this case to deny the petitions.

1. Vacatur Ordinarily Is Not Appropriate When The Court Would Have Denied The Petition Regardless.

The fact that a claim "became moot before certiorari does not limit this Court's discretion" regarding how to dispose of a petition. *Azar*, 138 S. Ct. at 1793. But the "Court's behavior across a broad spectrum of cases since 1978 suggests that the Court denied certiorari in arguably moot cases unless the petition presents an issue (other than mootness) worthy of review," SUPREME COURT PRACTICE § 19.4, at 968 n.33, or other "unique circumstances" justify vacatur in a particular case, *Azar*, 138 S. Ct. at 1793.

As the Government has explained, the rationale for vacating cases that become moot pending appeal as-of-right in the circuits "does not apply" when a "case becomes moot *after* the court of appeals has entered final judgment and while a petition for a writ of certiorari is pending." U.S. Br. in Opp. at 12, *Enron Power Mktg., Inc. v. N. States Power Co.*, 528 U.S. 1182

(2000) (No. 99-916) (cert. denied). When the Court would have denied review anyway, neither the mootness of the case nor the respondent's contribution to that mootness can be said to have prevented this Court's review in any meaningful sense. *Id.* Nor is there any unfairness in leaving the petitioner to the same fate as any other who files an uncertworthy petition. *See, e.g.*, *id.* 12-13; *Note, Collateral Estoppel and Supreme Court Disposition of Moot Cases,* 78 MICH. L. REV. 946, 953-58 (1980). The unlucky litigant is in no different position than thousands of others who genuinely believe their case was wrongly decided, and may fear a decision's collateral consequences, but who are denied reviewed in the normal application of the Court's certiorari criteria.[11] Indeed, affording special treatment to the random subset of uncertworthy cases that happen to become moot while the petition was pending would be a form of unfairness in itself.

The presumption against vacatur for uncertworthy cases also has administrative virtues. This Court has in place a system for efficiently evaluating whether a petition warrants review under

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[11] This is true whether the case is mooted completely by happenstance or by actions of the party that prevailed below. *See* U.S. Br. in Opp. at 9, *LG Elecs., Inc. v. InterDigial Comm., LLC*, 134 S. Ct. 1876 (2014) (No. 13-796) ("If the judgment below would not otherwise have been reviewed by this Court, a respondent's action in rendering the case moot does not give it any advantage that it would not have obtained if the controversy had remained live."). But in any event, this case is not appropriately seen as one in which the prevailing party mooted the case to avoid scrutiny of its victory. *See supra* § II.A.2.

established criteria that are widely accepted by its members. In contrast, deciding whether "the balance of equities weigh in favor of vacatur," *Azar*, 138 S. Ct. at 1793, is a less determinate question that requires more intensive, fact-bound consideration. And even before reaching the balance of equities, the Court would have to decide whether the case was actually moot, a sometimes disputed and difficult question.

2. The Court Would Not Have Granted Plenary Review If The Order Had Remained In Place.

For the reasons set forth in the brief of respondent Free Press, the petitions would have been denied if the cases had not been mooted. Particularly given that this Court's review was prevented only because of petitioners' and the United States' extraordinary efforts to prevent this Court from ruling on the petitions while the case was still alive, the Court should apply its normal rule and deny the petitions.

C. The Usual Reasons For Vacatur Do Not Apply In This Case.

The ordinary purposes of *Munsingwear* vacatur are served weakly, if at all, in this case.

The principle justification for vacating cases mooted on appeal is to "clear[] the path for future relitigation of the issues between the parties, preserving the rights of all parties, while prejudicing none by a decision which was only preliminary." *Alvarez v. Smith*, 558 U.S. 87, 94 (2009) (citation and internal punctuation omitted). But that concern is not significantly present in this case.

To start, the lawfulness of the Open Internet Order would only arise if the Order were reinstated at some point in the future. But if that happened, petitioners would have multiple avenues to raise the same principal objections they raise now.[12] And even if the D.C. Circuit's decision below doomed new litigation in the lower courts, petitioners could still seek review in this Court, effectively putting them in the same position they are in right now. Because the validity of the Order would arise in different cases, the court of appeals decision upholding the Open Internet Order would not present any claim preclusion barrier to this Court's review. *See, e.g.*, *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2308 (2016). And because this Court's review was prevented by mootness, the D.C. Circuit's decision should not give rise to issue preclusive effects either. *See Bravo-Fernandez v. United States*, 137 S. Ct. 352, 358 (2016) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt. a (judgment whose review is prevented by mootness does not give rise to issue preclusion)); *see also Hurd v. District of Columbia*, 864 F.3d 671, 680-81 (D.C. Cir. 2017) (same).

To be sure, *Munsingwear* rejected what has become the modern rule – that an unreviewable

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[12] Petitioners could bring a new action challenging any substantive aspect of the Order actually causing them injury, raise invalidity of the Order as a defense to any enforcement action, or petition the Commission to repeal the Order and then appeal any rejection. *See, e.g.*, *Graceba Total Comm., Inc. v. FCC*, 115 F.3d 1038, 1040 (D.C. Cir. 1997); *Nat'l Labor Relations Bd. Union v. Fed. Labor Relations Auth.*, 834 F.2d 191, 195-96 (D.C. Cir. 1987).

judgment has no preclusive effect – in favor of automatic vacatur when mootness prevents review *in the court of appeals*. *See* 340 U.S. at 39 & n.1. But as discussed above, this Court has not provided that alternative as a matter of right when cases become moot pending certiorari before this Court. *See supra* § II.B. Accordingly, when this Court declines to provide *Munsingwear* vacatur, the ordinary rule of the Restatement should apply to prevent any assertion of issue preclusion in a future case.

Finally, the United States does not identify anything in the decision upholding the Open Internet Order that prejudices its defense of the Order's repeal. *See* U.S. Br. 15-16. It does not, for example, claim that the panel held that the Open Internet Order embodied the *only* permissible interpretation of the Communications Act. Indeed, it insists the contrary is true. *See id*. 16 ("The court of appeals upheld the 2015 Order primarily because it concluded it was required to defer to the FCC's legal and factual judgments as reflected in that order."). Absent some claim that vacatur is actually necessary to clear the way for the pending challenge to the Restoring Internet Freedom Order, the traditional rationale for *Munsingwear* vacatur provides little support for the Government's request.[13]

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[13] Perhaps petitioners will take a different position, but their decision not to file supplemental briefs after the Order's repeal means that respondents will have no opportunity to address those arguments. *Cf. U.S. Bancorp*, 513 U.S. at 25 (noting that a litigant's "conduct in relation to the matter at hand may disentitle him to the relief he seeks").

III. There Is No Other Basis For Vacating The Judgment Or Remanding.

The Government ends by suggesting that the Court should vacate the decision even if the criteria for *Munsingwear* vacatur are not met. U.S. Br. 16-17. That proposal is unwarranted.

1. There is no reason for a remand to decide whether the case is moot. The Government's hand-wringing about the theoretical possibility that the case may still be alive (even while asking for *Munsingwear* vacatur, which is premised on a case having become moot) seems more strategic than genuine. The Government professes to have no reason to think the case is still alive, yet worries that it might be, U.S. Br. 14, only to suggest two pages later that this uncertainty provides a reason for vacating the judgment, *id*. 16.

Nor would a remand for further deliberations on mootness serve any good purpose. While the United States muses about the possibility of future lawsuits, *id*. 13, it does not suggest that further factual development is in order, or explain how it could be conducted in the court of appeals. To the extent the Government's point is that it's not worth the Court's time to figure out whether the theoretical prospect of a future lawsuit is enough to keep the case alive, that just illustrates the wisdom of the Government's long-standing (but presently forgotten) position that the Court should simply deny uncertworthy petitions without regard to whether the case may have become moot on its way to the Court.

In any event, this case is a particularly poor candidate for vacatur-on-speculation-of-mootness. To start, one would think that this disposition should be reserved for cases in which *someone* is willing to claim that the case is actually still alive. In addition, were the D.C. Circuit to confirm the obvious mootness of the case on remand, it would then have to decide whether petitioners' and the United States' manipulation of this Court's schedule disentitled them from the equitable remedy of vacatur. That question is more appropriately resolved by this Court.

2. The Government also urges vacatur and remand so the D.C. Circuit can consider how the repeal "bears on the issues resolved by the court of appeals." U.S. Br. 16. Just how the repeal could be relevant to this appeal, other than by mooting it, is a mystery. The only question before the court of appeals was the lawfulness of the 2015 Order. The fact that a subsequent Commission repealed that Order has nothing to do with whether its predecessor acted lawfully in enacting it. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (agency change in position "is not invalidating" (citation omitted)). The Government doesn't even try to argue otherwise. This case is therefore distinguishable from the two decisions in the Solicitor General's "cf." citation, both of which involved intervening agency action that had a direct bearing on

the correctness of a lower court decision in a still-live case. *See* U.S. Br. 16-17.[14]

3. Finally, the Government suggests vacating and remanding to allow the D.C. Circuit to decide whether to simply hold this case in abeyance pending the present challenge to the repeal of the 2015 Order. *Id.* 17. It cites no precedent for that disposition, which would be a particularly adventursome exercise of the Court's GVR authority.[15] Nor, as we have discussed,

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[14] In *Gloucester County School Board v. Grimm*, 137 S. Ct. 1239 (2017), the court of appeals had relied on the Department of Education's construction of Title IX and its implementing regulations to resolve a challenge to a school's policy regarding the use of bathrooms by a transgendered student. *See G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 721 (4th Cir. 2016). When the agency changed its interpretation, this Court vacated and remanded for reconsideration. *See* 137 S. Ct. at 1239. In *Douglas v. Independent Living Center of Southern California, Inc.*, 565 U.S. 606 (2012), the Court granted certiorari "to decide whether Medicaid providers and recipients may maintain a cause of action under the Supremacy Clause to enorce a federal Medicaid law." *Id*. at 610. But while the case was pending, the federal agency in charge of the program approved the relevant state Medicaid plans, thereby opening the possibility of an APA challenge that could remove the need for implying a private right of action under the Supremacy Clause. *Id*. at 614-15. The Court remanded to the court of appeals to consider "whether these cases may proceed directly under the Supremacy Clause now that the agency has acted." *Id*. at 616.

[15] *Cf. Nunez v. United States*, 554 U.S. 911, 911 (2008) (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.) ("In my view we have no power to set aside (vacate) another court's judgment unless we find it to be in error."); *Dep't of the Interior v. South Dakota*, 519 U.S. 919, 921-22 (1996) (Scalia, J., dissenting, joined by O'Connor, J., and Thomas, J.) (objecting to GVR in light of changed agency position).

is there any need for that kind of improvisation in order to preserve an opportunity for future challenges to the 2015 Order should it be reinstated. *See supra* § II.C.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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