No. 17-502

IN THE
Supreme Court of the United States

NCTA – THE INTERNET AND TELEVISION ASSOCIATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONER

RICK C. CHESSEN
NEAL M. GOLDBERG
MICHAEL S. SCHOOLER
NCTA – THE INTERNET & TELEVISION ASSOCIATION
25 Massachusetts Avenue, N.W
Suite 100
Washington, D.C. 20001
(202) 222-2445

MIGUEL A. ESTRADA
Counsel of Record
THEODORE B. OLSON
KELLAM M. CONOVER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioner
[Additional Counsel Listed on Inside Cover]

MATTHEW A. BRILL
MATTHEW T. MURCHISON
LATHAM & WATKINS LLP
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004
(202) 637-2200

ROBERT E. DUNN
GIBSON, DUNN & CRUTCHER LLP
1881 Page Mill Road
Palo Alto, CA 94304
(650) 849-5300

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES *(continued)*

Page(s)

Other Authorities

TABLE OF AUTHORITIES *(continued)*

Page(s)

REPLY BRIEF FOR PETITIONER

After NCTA's petition for a writ of certiorari was filed, this case became moot as a result of respondent Federal Communications Commission's ("Commission's") actions. NCTA had petitioned for review of a 2015 Commission order that, as relevant here, imposed utility-style regulation on broadband Internet access service ("broadband") providers under Title II of the Communications Act and subjected them to a vague "Internet Conduct Standard." *See* App. B ("*2015 Order*"). The Commission has since repealed the challenged portions of the *2015 Order*. *See Restoring Internet Freedom*, 83 Fed. Reg. 7852, ¶¶ 2, 4 (Feb. 22, 2018) ("*2018 Order*").

As all parties (except Mr. Berninger) agree, the *2018 Order* mooted NCTA's petition. NCTA agrees with the Solicitor General (at 14) that this Court should therefore follow its "established practice" and grant the petition, "reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

ARGUMENT

A. This Case Is Now Moot.

The *2018 Order* mooted NCTA's petition by "abandon[ing] the 2015 Order's regulatory classifications and repeal[ing] its conduct rules." U.S. BIO 14; *see also* Public Knowledge BIO 7; Free Press BIO 14.

As even Public Knowledge acknowledges (at 7), the *2015 Order* has no "substantial lingering effects" that could conceivably prevent mootness here. The Solicitor General notes (at 14) the possibility of pri-

vate action to enforce pre-2018 common-carrier obligations under the *2015 Order*, but concedes that no such suits have been filed and there is no "reason to think" one "is likely" to be filed. *Ibid.* Were this litigation commenced today, an allegation of such speculative, hypothetical future injury would not support Article III standing, *see Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013), and it is concededly "not a circumstance" that "prevents a case from becoming moot," U.S. BIO 14.

B. The Court Should Follow Its Established Practice And Vacate The Judgment Below.

When a challenged law is repealed or amended, "'it is the duty of the appellate court to set aside the decree below.'" *U.S. Dep't of Treasury* v. *Galioto*, 477 U.S. 556, 560 (1986) (citation omitted). NCTA agrees with the Solicitor General (at 16) that this disposition is "particularly appropriate" here in light of the pending challenges to the *2018 Order*. Public Knowledge's attempt to create a made-for-this-litigation exception to this Court's established practice is meritless.

1. This Court's "established practice" when a civil case becomes moot pending appellate adjudication is "to reverse or vacate the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39. This rule "prevent[s] an unreviewable decision 'from spawning any legal consequences,' so that no party is harmed by what [the Court] ha[s] called a 'preliminary' adjudication." *Camreta* v. *Greene*, 563 U.S. 692, 713 (2011) (citation omitted).

Just last Term, the Court reaffirmed this "'established practice,'" explaining that a "clear example

where 'vacatur is in order' is 'when mootness occurs through the unilateral action of the party who prevailed in the lower court.'" *Azar* v. *Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) (alterations omitted). "'It would certainly be a strange doctrine'" if a party could "'obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment.'" *Ibid.* (citation omitted).

Vacatur is appropriate here because the Commission took "voluntary, unilateral action" to repeal the *2015 Order*. *Azar*, 138 S. Ct. at 1793. That action deprived NCTA of any possibility of obtaining review of the panel's flawed decision, which endorsed a toothless version of Administrative Procedure Act ("APA") review and an incorrect interpretation of the Telecommunications Act of 1996. *See* Pet. 13–16. Absent vacatur, that decision will be binding within the D.C. Circuit in future challenges by regulated parties to irregular agency actions. As an association representing regulated parties that have often challenged agency action—and may be forced to do so again—NCTA "ought not in fairness be forced" to suffer these consequences. *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). It would therefore be "particularly appropriate" to vacate the judgment with instructions to dismiss the case as moot. U.S. BIO 16.

2. Public Knowledge argues (at 10–12, 15–16) that Petitioners are not entitled to vacatur because they supposedly mooted this case by participating in the *RIF* proceeding and consenting to the Solicitor General's requests to extend the time to respond to the numerous petitions filed in this case. That argument is factually and legally erroneous.

a. Petitioners' participation in the *RIF* proceeding did not moot this case. Petitioners did not control the outcome of the 2016 election, the appointment of Chairman Pai, or the Commission's decision to repeal the *2015 Order*. The Commission promulgated the *2018 Order* on its own initiative and authority. A change in public policy after an election is a byproduct of democratic accountability, not an equitable consideration that somehow disentitles a party benefiting from the changed policy from obtaining vacatur of a mooted judgment.

Public Knowledge identifies no case where this Court (or any other) declined vacatur merely because the losing party had successfully obtained a change to the challenged law. "Victory in the legislative forum makes judicial proceedings moot"—it does not set a lower-court judgment in stone. *Miller* v. *Benson*, 68 F.3d 163, 164 (7th Cir. 1995) (per curiam) (vacating summary judgment for the government even though amendment to the challenged statute "g[a]ve plaintiffs exactly what they sought in th[e] litigation").

Public Knowledge nevertheless argues (at 14–15) that vacatur is not warranted because the Commission repealed the *2015 Order* not "to preserve the D.C. Circuit's decision," but because it agreed that the *2015 Order* "should be eliminated." That is a non sequitur. The Commission's change of heart—which NCTA did not control—does not eliminate the prejudice to NCTA of leaving intact the D.C. Circuit's erroneous decision.

In similar circumstances where a government entity had mooted a case by voluntarily terminating the challenged proceedings, this Court vacated the lower-court judgment precisely because the federal litigation "played no significant role in [that] termination." *Alvarez* v. *Smith*, 558 U.S. 87, 96–97 (2009). Here,

too, the Commission's voluntary repeal of the *2015 Order* "more closely resembles mootness through 'happenstance' than through 'settlement'" because, as concededly happened here, "a desire to avoid review in this case played no role" in the Commission's decision. *Id.* at 94, 97 (citation omitted).

Nor is there any evidence that the Commission repealed the *2015 Order* to provide NCTA "relief as part of a settlement." Public Knowledge BIO 15. Rather, the Commission concededly repealed the *2015 Order* because a new Administration believed it fundamentally ill-conceived. *Ibid.* Although NCTA agrees with the Commission's conclusions, NCTA did not "settle" with the Commission. Indeed, the *2018 Order* departed from NCTA's proposals in important respects and, unlike with a settlement, NCTA has no protection against a future Commission promulgating regulations similar or identical to those in the *2015 Order*.

b. Petitioners' consent to the Solicitor General's requests for extensions to respond to the petitions does not change the analysis.

The Commission initiated the *RIF* proceeding on May 23, 2017—months before NCTA's petition was due. Because that proceeding could have "alter[ed] the relief" sought by Petitioners—and because they needed to "coordinate" with other challengers to the *2015 Order*—Petitioners sensibly requested and obtained an extension. Pet'r's Application for Extension of Time 5, No. 17A54 (July 10, 2017). NCTA's petition expressly noted the pendency of the rulemaking, but suggested that the case would remain cert-worthy despite it unless and until the case became moot, at which point vacatur would be appropriate. Pet. 18–19.

The Solicitor General then received a customary 30-day extension, followed by a second extension until January 3, 2018, due to "heav[y] engage[ment]" on other cases. Resp't's Mot. for Extension of Time, No. 17-502 (Nov. 22, 2017). These extension requests were routine—and Public Knowledge does not argue otherwise.

Thus, as Public Knowledge concedes (at 11 n.7), the earliest this Court would likely have reviewed the *petition* was "early spring"—well *after* the *2018 Order*'s release on January 4, 2018. Had the Court granted certiorari then, the case undoubtedly would have become moot before any decision could be rendered. Regardless, there is nothing untoward in a new Administration's seeking additional time to decide how to respond to petitions filed before the Administration took office. No respondent objected at any time, and none was prevented from filing a brief in opposition sooner or opposing the Solicitor General's requests. Private respondents' belated complaints that mootness supervened are self-serving but insincere, and cannot change what the law requires.

Besides, this Court recently vacated a judgment even where the losing party conceded that its litigation conduct could cause the case to become moot "before this Court [could] issue[] a decision on the merits." Reply in Support of Application for Stay 15, *Trump* v. *Int'l Refugee Assistance Project*, 138 S. Ct. 353 (2017) (No. 16A1190); *see also Trump* v. *Hawaii*, 138 S. Ct. 377 (2017) (per curiam) (vacating judgment because the challenged Executive Order had "expired by [its] own terms'"). There, as here, vacatur was warranted because, even though the losing party did not

seek expedited review, the "appeal no longer present[ed] a 'live case or controversy.'" *Hawaii*, 138 S. Ct. at 377.

C. Any Other Disposition Would Conflict With This Court's Teachings.

The Solicitor General and Public Knowledge suggest two alternative dispositions to vacatur. Neither has merit.

1. Despite agreeing that vacatur with an instruction to dismiss is warranted here, the Solicitor General suggests (at 16) that the Court could, alternatively, grant, vacate, and remand "to allow the court of appeals to consider … the effect of the [*2018 Order*] on this litigation." But this Court has remanded for a lower court to consider mootness only where there was a substantial question whether there was still a live case or controversy. *See*, *e.g.*, *United States* v. *Chesapeake & Potomac Tel. Co. of Va.*, 516 U.S. 415 (1996); *Vitek* v. *Jones*, 436 U.S. 407 (1978). There is no such question here because the *2018 Order* flatly *repealed* the *2015 Order*. *See 2018 Order* ¶ 1; *cf.* Public Knowledge BIO 22–25.

Neither of the two cases the Solicitor General cites involved mootness; both involved, rather, a remand for the lower court to determine to what extent a change in law had altered the basis for its decision. *See Gloucester Cty. Sch. Bd.* v. *G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (remanding "for further consideration in light of" agency's withdrawal of guidance document to which the lower court had deferred); *Douglas* v. *Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 616 (2012) (remanding for lower court to decide whether Medicaid providers could still bring suit asserting preemption of state Medicaid statutes, given

federal agency's change in position on whether those statutes conflicted with federal Medicaid law). A similar remand would be pointless here. The *2018 Order* did not affect the basis of the decision below: it eliminated any basis for NCTA's petition for review.

2. Public Knowledge contends (at 16–19) that the petition is not cert-worthy and thus should be denied. But this Court has never endorsed a "cert-worthiness" requirement for vacatur, and any such requirement would not defeat vacatur here because NCTA's petition *was* cert-worthy.

a. Public Knowledge's view derives from a 1977 brief by the Solicitor General. *See* Public Knowledge BIO 16 (citing U.S. BIO 5–8, *Velsicol Chem. Corp.* v. *United States*, 435 U.S. 942 (1978) (No. 77-900) ("*Velsicol* BIO")). In *Velsicol*, the Solicitor General argued that vacatur is not warranted where certiorari would have been denied, because mootness would not deprive the losing party of any review and would unfairly "deprive[] the respondent of any collateral benefits" of a favorable judgment. *Velsicol* BIO 6.

As the Solicitor General recently acknowledged, however, this Court "has never expressly endorsed that approach" in the four decades since *Velsicol*. Int'l Trade Comm'n BIO 8, *LG Elecs., Inc.* v. *InterDigital Commc'ns, LLC*, 134 S. Ct. 1876 (2014) (No. 13-796). Rather, the Court has concluded that it would be "totally at odds" with its precedent to allow a lower-court judgment "to remain in effect" in a case mooted by circumstances outside the petitioner's control. *Great W. Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979) (per curiam).

Contrary to Public Knowledge's suggestion (at 18), a "cert-worthiness" requirement is not necessary

to prevent "unfairness" to any party. Far from prejudicing the prevailing party, vacatur "preserve[s]" the parties' rights. *Munsingwear*, 340 U.S. at 40. "None is prejudiced" by vacatur because an appellate court's decision remains "only preliminary" while still subject to this Court's review. *Ibid.* Indeed, the Court has rejected the argument that "vacatur motions … should be more freely granted" where review is "as of right." *Bonner Mall*, 513 U.S. at 28. Whether appellate review is guaranteed or merely possible "has no bearing upon" the equities of vacatur. *Ibid.*

This Court's teachings make clear that "*Munsingwear* is satisfied" when vacatur would "expunge[] an adverse decision that would be *reviewable* had [the] case not become moot." *Camreta,* 563 U.S. at 713 n.10 (emphasis added). So long as the losing party "*may* obtain … review of an adverse" judgment at the time the case becomes moot, vacatur is appropriate. *Ibid.* (emphasis added). Public Knowledge does not (and cannot) dispute that the D.C. Circuit's decision would have been *reviewable* absent the *2018 Order*.

b. Public Knowledge nevertheless suggests (at 17) that this Court has tacitly endorsed a "certworthiness" requirement. Not so.

In the vast majority of cases where the Court has denied certiorari without vacating the judgment below, the case was not indisputably moot.[1] That is unsurprising, for mootness can be—though here is not—

---

[1] *See*, *e.g.*, Reply Br. at 1, *Electro-Voice, Inc.* v. *NLRB*, 519 U.S. 1055 (1997) (No. 96-469) (asking the Court "not to find mootness" because the order under review was "a short term order that would otherwise escape review"); Reply Br. at 2, *Liberty Cable Co.* v. *City of New York*, 516 U.S. 1171 (1996) (No. 95-953) ("[T]he

a "disputed and difficult question." Public Knowledge BIO 19. Declining to vacate the judgments in those cases was therefore consistent with the view that the cases were not moot.

The Court also has denied indisputably moot petitions where mootness arose from the *losing* party's voluntary action. *See*, *e.g.*, *Bonner Mall*, 513 U.S. at 29 (settlement); *Karcher* v. *May*, 484 U.S. 72, 83 (1987) (losing party "declined to pursue its appeal"). Vacatur was inappropriate in those circumstances not because the *Court* deemed the judgments unworthy of review, but because "the losing party ha[d] voluntarily forfeited his legal remedy." *Bonner Mall*, 513 U.S. at 25. By contrast, NCTA never "step[ped] off the statutory path" to appeal through certiorari, *id.* at 27, nor "voluntarily abandoned review," *id.* at 28.

In short, none of this Court's precedents expressly or impliedly casts doubt on the established practice of vacating the judgment below where, as here, the prevailing party unilaterally mooted the case.[2]

---

validity of the Standstill Order still presents a live controversy."); Reply Br. at 10, *Pub. Citizen* v. *U.S. Trade Rep.*, 510 U.S. 1041 (1994) (No. 93-560) (noting "substantial likelihood that the dispute between the parties will continue to recur" and had already recurred); *Velsicol* BIO 7 n.5 (citing cases supporting lack of mootness "given the realistic possibility" of collateral estoppel); *see also* U.S. Amicus Br. at 10, *McFarling* v. *Monsanto Co.*, 545 U.S. 1139 (2005) (No. 04-31) (noting that "only one claim addressed in the petition is moot").

[2] Because this case is indisputably moot, whereas Free Press vigorously disputes whether the case is cert-worthy, there are no "administrative virtues" to imposing a cert-worthiness requirement here. *Cf.* Public Knowledge BIO 18.

c. Even under Public Knowledge's incorrect view, vacatur still would be appropriate here because, as explained in the petition (at 19–36), this case would have merited plenary review.

As in *Brand X*, this case would merit review given its exceptional national importance. There, the lawfulness of the Commission's classification decision was sufficiently "important" to warrant review, even absent a circuit split. *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980, 985 (2005). Because the *2015 Order* "affect[ed] every Internet service provider, every Internet content provider, and every Internet consumer," App. 1430a, review similarly would be warranted here on that basis alone.

This case is cert-worthy for the additional reason that the decision below threatens to nullify the APA by entrenching a watered-down version of judicial review of agency action. Pet. 19–30. In reversing the Commission's long-standing information-service classification, the *2015 Order* relied on changed factual circumstances and upset massive reliance interests that the Commission's previous policy had induced. Yet rather than require a "more substantial" justification for this policy reversal, *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015), the panel endorsed the Commission's paper-thin treatment of both issues. *See* Pet. 19–27. The panel further eviscerated the APA's notice requirement—and created a conflict with other circuits—by requiring the Commission merely to announce a general intent to adopt *some* regulation in the field, rather than broadcast its views in a concrete and focused form. *Id.* at 27–30. Finally, the panel got this Court's precedents backwards in assuming that statutory ambiguity *authorized*—rather

than barred—the Commission's decision to arrogate to itself unprecedented and enormous power to become the "Department of the Internet." App. 948a-949a; *see also* Pet. 33–36.

Free Press offers no meaningful defense of these rulings. For example, it devotes just *two* sentences to the reliance issue (at 31–32)—which merely parrot the panel's reasoning—and does not even address the notice issue. Because the petition was cert-worthy when filed, vacatur is appropriate even under Public Knowledge's erroneous legal standard.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand with instructions to dismiss NCTA's petition for review as moot.

Respectfully submitted,

RICK C. CHESSEN
NEAL M. GOLDBERG
MICHAEL S. SCHOOLER
NCTA – THE INTERNET & TELEVISION ASSOCIATION
25 Massachusetts Avenue, N.W.
Suite 100
Washington, D.C. 20001
(202) 222-2445

MIGUEL A. ESTRADA
Counsel of Record
THEODORE B. OLSON
KELLAM M. CONOVER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

MATTHEW A. BRILL
MATTHEW T. MURCHISON
LATHAM & WATKINS LLP
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004
(202) 637-2200

ROBERT E. DUNN
GIBSON, DUNN & CRUTCHER LLP
1881 Page Mill Road
Palo Alto, CA 94304
(650) 849-5300

Counsel for Petitioner

October 3, 2018