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.

CTIA-THE WIRELESS ASSOCIATION, ET AL. 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 FREE PRESS

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Additional Captions on Inside Cover

NCTA-THE INTERNET & TELEVISION ASSOCIATION
v. FCC, ET AL.

TECHFREEDOM, ET AL. v. FCC, ET AL.

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

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to decide the lawfulness of the Federal Communication Commission's Open Internet Order when the Order has since been withdrawn by the agency.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:

Free Press is a national, nonpartisan, non-profit and non-stock organization incorporated in Massachusetts. Free Press has no parent corporation, nor is there any publicly held corporation that owns stock or other interest in Free Press.

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BRIEF IN OPPOSITION

Respondent Free Press respectfully requests that the petitions for writs of certiorari be denied.

INTRODUCTION

Respondents Public Knowledge, *et al*., have explained in their brief why the Court should not vacate the judgment in this case unless it would have granted the petitions if the case had remained alive. Respondent Free Press explains in this brief why the petitions were not certworthy when they were filed and, therefore, should be denied now.

STATEMENT OF THE CASE

1. For many years, across Democratic and Republican administrations, the Federal Communications Commission (FCC) has acted to preserve the internet as a free and open forum for speech, community, and commerce, ensuring that those who control broadband internet access networks do not thereby come to control the internet's content. *See* Pet. App. 9a-10a; *id*. 230a-246a (Order ¶¶ 60-74). Users' unrestricted access to all lawful internet content has been a driving force in the rapid development and deployment of both broadband and the internet itself – users' open access to the services offered by so-called "edge providers" like Netflix, Amazon, Google, and millions of other large and small entities online, has driven demand for broadband access, which in turn has led to increased investment in broadband networks, which drives further innovation at the edge in what the Commission has dubbed a "virtuous circle" of innovation. *See id*. 3a-4a, 12a.

But over the years, broadband providers like Comcast, AT&T, and Verizon started to compete with edge providers in lucrative markets, even while these broadband providers controlled the internet connection their competitors must use to access consumers. Pet. App. 12a-13a; *id*. 253a-260a (Order ¶¶ 78-80). For example, AT&T sells "over-the-top" video service that competes directly with Netflix and Amazon. *Verizon v. FCC*, 740 F.3d 623, 645-46 (D.C. Cir. 2014). Verizon and AT&T offer voice services and text messaging that compete with internet-based telephony services like Vonage and independent messaging services like iMessage and WhatsApp. *See id.*

The Commission has repeatedly found that broadband providers have the economic incentive, and the technical means, to interfere with their customers' access to competitors' services. Pet. App. 12a-13a; *id.* 253a-270a (Order ¶¶ 78-85). They can, for example, simply block consumers' access to those sites or applications. *Id.* Or they can throttle the connection, thereby degrading video quality, for example. *Id.* And they might threaten to block or throttle sites if an edge provider refused to pay a toll for a high-quality connection to its own customers. *Id.* 12a-13a.

Over time, evidence confirmed that these risks were real. Pet. App. 10a; *id*. 254a-255a & n.123 (Order ¶ 79). In 2007, the Commission attempted to impose modest disclosure requirements on Comcast after it interfered with users' ability to use BitTorrent, a tool commonly used to download videos. *Id.* 10a. But the D.C. Circuit found that the source of authority the Commission invoked – its ancillary authority to issue such orders and regulations "as may be necessary in

the execution of its functions" under the Communications Act, 47 U.S.C. § 154(i) – was insufficient. *See Comcast Corp. v. FCC*, 600 F.3d 642, 651-61 (D.C. Cir. 2010).

The Commission went back to the drawing board. In 2010, after extensive deliberations, it enacted three rules, requiring broadband providers to disclose their network management practices, precluding blocking of lawful content and services, and forbidding unreasonable discrimination in the transmission of lawful network traffic. Pet. App. 11a.[1] As new authority for these rules, the Commission relied on Section 706 of the Telecommunications Act of 1996, which requires the Commission to "encourage the deployment" of broadband service throughout the country through "regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 1302(a); *see* Pet. App. 11a-12a.

The D.C. Circuit vacated the rules again. *See Verizon*, 740 F.3d at 628. The Court upheld the Commission's determinations that broadband providers had the incentive and means to interfere with open internet access, and that this threat interfered with rapid deployment of broadband service. *Id*. at 644-49. It further confirmed that Section 706 provided a source of authority for open internet rules. *Id.* at 649-50. But the court

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[1] The anti-discrimination rule applied only to fixed, rather than mobile, broadband services, while mobile broadband under the 2010 rules was subject to a more limited prohibition on blocking lawful websites and blocking voice or video telephony applications that competed with the mobile carriers' legacy services. *Id*.

nonetheless concluded that these specific prohibitions against blocking and discrimination were unlawful because they were tantamount to common carriage rules. *Id.* at 650-59. This was a problem because the Commission had previously classified various forms of high-speed internet access (including cable modem, DSL service, and mobile broadband service) as *not* common carriage service, a classification the Supreme Court had upheld as reasonable in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). *See* Pet. App. 12a-14a. So long as that classification remained in place, open internet rules against blocking and discrimination could not be imposed, even if otherwise authorized by Section 706. *Verizon*, 740 F.3d at 658-59.

2. In response, the Commission instituted the proceeding leading to the Order at issue in this case. On February 26, 2015, after receiving nearly four million comments, the Commission adopted its Open Internet Order. *See 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); Pet. App. 14a. The final Order exhaustively examined the changes in technology, broadband use, consumer perceptions, and internet services that had occurred since the Commission's classification decisions leading up to *Brand X*. *See generally* Pet. App. 188a-1126a. The Order concluded that in light of these changes, broadband providers were properly treated as providing a common carriage service.

a. The Order explained that the Communications Act distinguishes between "telecommunications services," which are subject to mandatory common

carriage classification and regulation under Title II of the Act, and "information services," which are not. Pet. App. 555a-56a (Order ¶ 355). The statute requires that "a telecommunications carrier shall be treated as a common carrier . . . to the extent it is engaged in providing telecommunications services." 47 U.S.C. § 153(51). A "telecommunications carrier" is defined as a "provider of telecommunications services," which is "an offering of telecommunications for a fee directly to the public." *Id.* §§ 153(51), (53). "Telecommunications," in turn, is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id*. § 153(50).

Consumers use telecommunications services to reach an "information service," defined as an "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." *Id*. § 153(24). [2] Information services "are not subject to mandatory common-carrier regulation under Title II." *Brand X*, 545 U.S. at 976.

b. The Commission had little difficulty finding that broadband providers sell their customers a bundle of services that includes the telecommunications service consumers use to access information services (like Netflix or

[2] The telecommunications management exception to the definition excludes "any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(24)

SupremeCourt.gov), as well as directly providing consumers information services themselves, such as email and online storage. Pet. App. 556a-57a, 564a-75a (Order ¶¶ 356, 361-64). A critical initial question was whether those services should be lumped together and given a single classification, or treated as separate offerings, with the broadband internet access component classified as a telecommunications service and thus common carriage. *Id*. 556a (Order ¶ 356). Consistent with longstanding Commission precedent, the Order answered that question by asking how consumers view the offer. *Id*. 539a-40a (Order ¶ 342); *see also Brand X*, 545 U.S. at 977, 990.

The Commission explained that, although it had concluded otherwise a decade ago, today, consumers reasonably perceive broadband providers as offering two distinct kinds of services, one essential and the other largely ignored. Pet. App. 543a-550a (Order ¶¶ 346-50). The reason consumers sign up for broadband, the Commission found, is to obtain a high-speed pipeline to the internet and the various services and destinations offered there by edge providers. *Id.* 550a (Order ¶ 350). While broadband providers also may offer their own information services like email or online storage, consumers view those services as distinct and secondary. *Id.* 545a-50a (Order ¶¶ 347-50). Indeed, most consumers simply ignore them, using instead the competing services of other edge providers (like Gmail, Facebook, and Dropbox). *See id*. 547a-48a, 593a-98a (Order ¶¶ 348, 376-81).

It made sense, therefore, to subject those distinct sets of services – the pipeline versus the broadband provider's bundle of independent information services – to their own classifications. And applying the

statute's classification scheme, the Commission easily determined that the broadband service – which it called "Broadband Internet Access Service" or BIAS – constitutes a "telecommunications service" because it involves transmitting packets of information of a user's choosing to and from internet destinations she selects. Pet. App. 564a-72a (Order ¶¶ 361-63). The Commission acknowledged the roles of Domain Name Service (DNS) and caching in facilitating broadband access. *Id.* 576-77a (Order ¶ 366). But it concluded that both fell within the "telecommunications management" exception to the "information services" definition. *Id.* 576a-84a, 587a (Order ¶¶ 366-69, 372). The Commission further explained that even if they did not, "DNS functionality is not so inextricably intertwined with broadband Internet access service so as to convert the entire service offering into an information service." *Id*. 584a (Order ¶ 370); *see also id*. 587a-90a (Order ¶¶ 372-73) (same for caching and certain security-related functions).

The Commission acknowledged that it had previously decided that broadband providers did not offer a telecommunications service. Pet. App. 221a-22a (Order ¶ 43). That was because in the mid-2000s, when broadband was in its infancy, the Commission had viewed the telecommunications pipeline and all the broadband provider's adjunct information services as a single, inextricably intertwined "offer" that was best classified at the time as an information service. *Id*. 514a-15a (Order ¶¶ 319-20). But in the years since, the marketplace had evolved, broadband had expanded and displaced dial-up, an entirely new industry of edge providers had developed and flourished, and consumer perceptions and uses of

broadband had changed. *See id*. 221a, 538a-555a, 596a-97a (Order ¶¶ 43, 341-54, 379-80).

c. The Order also changed the prior classification of mobile broadband. The Act creates two mutually exclusive categories of mobile services: "commercial mobile service," which must be treated as common carriage, and "private mobile service," for which the statute forbids common carriage classification. *See* 47 U.S.C. §§ 332(c)(1)(A), (c)(2). A "commercial mobile service" is defined as one "interconnected with the public switched network (as such terms are defined by regulation by the Commission)." 47 U.S.C. § 332(d)(1)-(2). Any mobile service that "is not a commercial mobile service" or its "functional equivalent" is classified as a "private mobile service." *Id*. § 332(d)(3).

Cellular voice service has long been classified as a commercial mobile service. Pet. App. 54a-55a. The archetypal private mobile service is a private taxi dispatch radio system. *Id*. 608a (Order ¶ 391).

The Open Internet Order rejected as outdated an earlier regulation that restricted "commercial mobile service" to services that are part of the regular telephone network, which uses the "North American Numbering Plan" (NANP). Pet. App. 607a-10a (Order ¶¶ 390-91). Instead, the Commission concluded that the "emergence and growth of packet switched Internet Protocol-based networks" warranted expanding the definition to include networks that use NANP or internet protocol (IP) addresses. *Id*. 609a (Order ¶ 391).

In the alternative, the Commission held that even if the "public switched network" were limited to the NANP system, mobile broadband was interconnected

with that network because it provides its users the "capability . . . to communicate with NANP numbers using their broadband connections through the use of" Voice over Internet Protocol (VoIP) applications. Pet. App. 626a (Order ¶ 400) (internal quotation marks omitted).

Finally, the Commission held that in all events, mobile broadband falls outside the definition of a "private mobile service" because it is at least the "functional equivalent" of a commercial mobile service. Pet. App. 631a-32a (Order ¶ 404); *see also* 47 U.S.C. § 332(d)(3) (excluding from definition of "private mobile service" any service that is the "functional equivalent of a commercial mobile service, as specified by regulation by the Commission"). The Order reasoned that "like commercial mobile service, it is a widely available, for profit mobile service that offers mobile subscribers the capability to send and receive communications on their mobile device to and from the public." *Id*. 632a (Order ¶ 404).

d. The Commission then used these sources of authority to adopt three bright line rules. The first two prohibited broadband providers from blocking or throttling consumers' access to lawful internet content or services. Pet. App. 301a-02a, 308a-09a (Order ¶¶ 112, 119). The third anti-paid-prioritization rule prevented broadband 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 prohibited broadband providers from unreasonably interfering with or disadvantaging end users' ability to access lawful content or services, or edge providers' ability to

provide them. *Id*. 328a-29a (Order ¶ 136). And it fortified an existing transparency rule that required broadband providers to disclose certain information to consumers about the provider's network management practices. *Id*. 350a-80a (Order ¶¶ 154-84).

Beyond this, the Commission exercised its responsibility under 47 U.S.C. § 160(a) to forbear from "27 provisions of Title II" and "over 700 Commission rules and regulations." Pet. App. 195a-96a (Order ¶ 5). This included "expressly eschew[ing] the future use of prescriptive, industry-wide rate regulation." *Id*.

e. The Commission acknowledged, but rejected, broadband providers' objections that the new rules would discourage investment. *See* Pet. App. 39a-40a; *id.* 639a-54a (Order ¶¶ 411-20). Instead, it found that the "key drivers of investment are demand and competition," with internet traffic and demand "expected to grow substantially in the coming years." *Id.* 639a-40a (Order ¶ 412). It also found that despite the dire predictions in the filings before the Commission, major broadband providers like Sprint and Verizon had been telling investors "that they will in fact continue to invest under the [Title II] framework" the Commission adopted. *Id*. 647a (Order ¶ 416).

The Commission also rejected claims that reclassification upset the industry's reasonable reliance on the prior classification. Pet. App. 561a (Order ¶ 360). "As a factual matter," the Commission found, "the regulatory status of broadband Internet access service appears to have, at most, an indirect effect (along with many other factors) on investment." *Id*. Nor, in any event, would any reliance have been reasonable. *Id*. 562a (Order ¶ 360). The status of

cable modem service was unsettled between 2000 and the Supreme Court's decision in *Brand X* in 2005. *Id.* 562a-64a (Order ¶ 360). That same year, the Commission issued an Internet Policy Statement, which included precursors to the no-blocking or throttling rules. *Id.* 233a (Order ¶ 64). The Commission did not classify other wireline and wireless broadband as information services until 2005 and 2007, respectively. *Id.* 562a-64a (Order ¶ 360). And by 2010, the Commission had begun the process of attempting to find an appropriate legal grounding for the rules eventually adopted in the 2015 Order, including by raising the possibility of Title II classification in 2010 and 2014. *Id*. 233a-37a, 562a-64a (Order ¶¶ 64-67, 360).

3. Petitioners, largely broadband providers and their industry groups, filed petitions for review of the Open Internet Order in the D.C. Circuit. After extensive briefing and extended oral argument, the court of appeals upheld the Order in a lengthy and thoughtful joint opinion by Judges Tatel and Srinivasan. *See* Pet. App. 1a-115a.

a. The court held that there was "extensive support in the record" to justify the Commission's conclusion that in the years since *Brand X*, consumers have come to "perceive broadband service both as a standalone offering and as providing telecommunications." Pet. App. 19a. Indeed, "[e]ven the most limited examination of contemporary broadband usage reveals that consumers rely on the service primarily to access third-party content." *Id*. 20a.

The panel further rejected petitioners' argument that broadband service unambiguously qualifies as an

"information service" because it offers a means of accessing the information services offered by third party edge providers. Pet. App. 29a. This argument, the court explained, "ignores that under the statute's definition of 'information service,' such services are provided 'via telecommunications.'" *Id*. (quoting 47 U.S.C. § 153(24)). An offering of a bare telecommunications service cannot meet the definition because it *is* telecommunications, not a service that is offered "via telecommunications." *Id*.

The court also held that the Commission reasonably decided that DNS and caching fell within the "telecommunications management" exception to the definition of an "information service" because both "services facilitate use of the network without altering the fundamental character of the telecommunications service." Pet. App. 35a-36a.

Some petitioners argued the so-called "major rules" doctrine prevented the Commission from imposing the new regulations on broadband providers unless Congress clearly authorized it to do so. Pet. App. 33a. But the court pointed out that this assertion could not be squared with *Brand X*, which held that ambiguity over whether the Act regulates broadband providers as common carriers creates agency discretion, not a presumption against regulation. *Id*.

b. The court also rejected various APA challenges to reclassification. Pet. App. 24a-26a, 37a-46a.

To start, the court held that the Commission provided adequate notice. The Notice of Proposed Rulemaking (NPRM) "expressly asked for comments on whether the Commission should reclassify broadband." Pet. App. 25a (internal quotation marks

omitted). Given that *Brand X* itself had made clear that "classification under the Communications Act turns on 'what the consumer perceives to be the . . . finished product,'" the NPRM put petitioners on notice that the agency's findings on consumer perceptions would be important when it raised the possibility of reclassification. *Id.* 25a-26a (some quotation marks and citations omitted). The court likewise rejected U.S. Telecom's objection that the NPRM failed to give sufficiently specific notice that the Commission might reconsider whether DNS and caching fell within the telecommunications management exception, explaining that the relevance of the exception also would have been obvious given *Brand X*'s discussion of those services. *Id*. 26a.

The court further upheld the Commission's rejection of petitioners' claim that reclassification would undermine investment in broadband, Pet. App. 39a-40a, or result in undue regulatory uncertainty, *id*. 40a-41a. The Commission also adequately took account of petitioners' claimed reliance interests, *id*. 44a-45a, and sufficiently acknowledged and explained its change in position. *See id.* 38a-39a, 42a-44a.

c. The court of appeals also upheld the Order's reclassification of mobile broadband service. Pet. App. 51a-79a. The court first rejected as "wooden" and "counterintuitive" petitioners' claim that the statute limited "commercial mobile service" to services interconnected with the traditional telephone system. *Id*. 58a-59a. Congress had expressly delegated responsibility for interpreting the key statutory phrases – "public switched network" and "interconnected service" – to the Commission, *id*., and that delegation reflected Congress's expectation that

the Commission would update the definitions as technology evolved, *id*. 61a.

The court further held that the "Commission permissibly exercised [its] authority to determine that – in light of the increased availability, use, and technological and functional integration of VoIP applications – mobile broadband should now be considered interconnected with the telephone network." Pet. App. 68a.

Finally, the court held that any notice problems in the NPRM with respect to mobile reclassification were harmless because petitioners had "actual notice of the final rule" and "cannot show prejudice" given that they raised before the Commission all the objections they asserted in the litigation. Pet. App. 76a; *see id*. 75a-79a.

4. The full court of appeals subsequently denied petitioners' multiple petitions for rehearing en banc, with two judges writing dissents. Pet. App. 1354a.

REASONS TO DENY THE WRIT

As the Solicitor General and respondents Public Knowledge, *et al.*, explain, the repeal of the Open Internet Order eliminates any basis for plenary review in this case. The Government and petitioners nonetheless ask the Court to grant the petitions anyway, in order to vacate the judgment below under *United States v. Munsingwear*, 340 U.S. 36 (1950). Public Knowledge, *et al.* have explained why the Court should not entertain that suggestion unless it would have granted the petitions absent the intervening mootness. Respondent Free Press explains in this brief why that standard is not met here. Petitioners do not seriously contend that review is warranted to

resolve any circuit conflict. Nor does the court of appeals' decision conflict with *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). That leaves the claim – commonly asserted in petitions destined for denial – that the decision was wrong and will lead to harmful consequences. But those assertions are baseless as well.

I. There Is No Circuit Conflict.

Petitioners allege no circuit conflict on the principle questions presented by the petitions, for good reason: although the lawfulness of the Open Internet Order could be challenged in a variety of contexts and circuits,[3] they seek review of the first and only court of appeals decision to consider the question.

Likewise, although some petitioners raise other general questions that could easily arise in other circuits – *e.g.*, about the scope and validity of the so-called "major rules" doctrine or the role of reliance in APA review – they do not plausibly claim that the

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[3] Initial petitions for review of an FCC rulemaking are channeled to a single court, 28 U.S.C. § 2112(a), but the lawfulness of the rules can arise in a variety of contexts outside that process. For example, even after the time for a petition for review has expired, an affected party can bring a new action challenging the substantive validity of the order, assert invalidity 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 Commc'ns, 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). Those challenges need not be brought in the D.C. Circuit. *See* 28 U.S.C. §§ 2342(1), 2343.

decision below conflicts with any other circuit precedents on those issues. *See, e.g.*, ACA Pet. 19-23; NCTA Pet. § II; TechFreedom Pet. 9-15; U.S. Telecom Pet. 24-31.[4]

NCTA makes a brief attempt to allege a circuit conflict with respect to the adequacy of notice. *See* NCTA Pet. § III. But its argument amounts to nothing more than the claim that the D.C. Circuit failed to follow settled APA law, while other circuits faithfully apply it. *Id*. That is a request for fact-bound error correction, not an assertion of a genuine circuit split.

II. Petitioners' Speculation That The Commission Would Use Its Title II Authority To Issue Harmful Orders In The Future Provides No Basis For Certiorari Now.

Petitioners nonetheless insist that review is warranted because of the allegedly catastrophic effects the Open Internet Order would have on their industry. *See, e.g.*, AT&T Pet. § III; ACA Pet. 14-15; NCTA Pet. 16-17; TechFreedom Pet. § II; U.S. Telecom Pet. 19-23. As the court of appeals held, the Commission reasonably rejected those assertions as unfounded. Pet. App. 44a-46a. But perhaps even more importantly, the principal harm petitioners foretell arises not from anything the Open Internet Order itself required, but from what petitioners *fear* the Commission *might* do at some unspecified point in the future with its Title II authority. *See, e.g.*, AT&T Pet. 28-29; CTIA Pet. 23-25. Such speculation is no basis

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[4] Berninger asserts that there is "confusion," not conflict, "amongst the circuits" regarding the major rules doctrine, citing dicta in two cases. Berninger Pet. 19-22.

for certiorari, particularly in the absence of any circuit conflict. The remedy for future harmful regulatory action is an APA challenge to *that* order and, if necessary, appeal to this Court at *that* time.

1. Petitioners mainly decry the Commission's decision to classify their services as common carriage under Title II of the Communications Act. *See, e.g.*, AT&T Pet. 3; CTIA Pet. 23-25; NCTA Pet. 17. But the main effect of reclassification here was to provide a source of authority for rules like the bans on blocking, throttling, and paid prioritization that the Order adopted. Notably, petitioners do not seriously claim that any of those rules create certworthy harm. In fact, in later repealing the Open Internet Order, the current Commission noted that major players in the industry have publicly and repeatedly disclaimed any intent to engage in these practices. *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311, ¶¶ 117, 142 & n.511 (2018) (Restoring Internet Freedom Order).

Instead, petitioners argue that this Court's immediate intervention is needed because of what the Commission *might* do with its expanded Title II authority, *someday*. *See, e.g.*, AT&T Pet. 28-29; CTIA Pet. 23-25; U.S. Telecom Pet. 21-22. They claim, for example, that reclassification "sets the stage" for rate regulation "in the future." CTIA Pet. 23; *see also, e.g.*, ACA Pet. 14 (raising the "*spect[re]* of rate regulation" (emphasis added)). And they hypothesize other actions the Commission might take in enforcing the General Conduct Rule that they believe would be harmful. *See, e.g.*, AT&T Pet. 28-29; U.S. Telecom Pet 21-22.

But the Order "expressly eschew[ed] the future use of prescriptive, industry-wide rate regulation," and other aspects of "utility-style" regulation petitioners say they fear. Pet. App. 196a, 216a (Order ¶¶ 5, 38); *see also id.* 180a (citing Order ¶ 38); *id*. 692a (Order ¶ 451). Any reversal of that forbearance, or enforcement of the General Conduct Rule, would require a new agency action, subject to judicial review at that time. In any such proceeding, the Commission would have to square its decision with the Act's direction that "the Commission must forbear from applying" Title II's rules "if it determines that the public interest requires it." *Brand X*, 545 U.S. at 975 (citing 47 U.S.C. § 160(a) (providing that "the Commission *shall* forebear" in such circumstances (emphasis added)); *see also* Pet. App. 80a; *id*. 673a (Order ¶ 437). And the Commission's ultimate decision would be subject to judicial review.

2. Petitioners nonetheless insist that they are entitled to immediate review because the uncertainty of whether the Commission would use its Title II powers reasonably in the future will lead the industry to withhold investment in the present. *See, e.g.*, ACA Pet. 15; TechFreedom Pet. 17-25; U.S. Telecom Pet. 21-23. If such predictions of speculative and self-inflicted injury were enough to make a case certworthy, this Court's docket would be overflowing.

In any event, the claims are difficult to take seriously when members of the industry have repeatedly told their investors and the public a very different story. During the proceedings, Sprint told the Commission that it did "not believe that a light touch application of Title II, including appropriate forbearance, would harm continued investment." Pet.

App. 648a (Order ¶ 416) (internal quotation marks omitted). After the Order came down, Comcast Cable CEO Neil Smit told investors that "[o]n Title II, it really hasn't affected the way we have been doing our business or will do our business." Comcast Corp., Q1 2015 Earnings Call Transcript at 16 (May 4, 2015);[5] *see also* Shalini Ramachandran & Michael Calia, *Cablevision CEO Plays Down Business Effect of FCC Proposal*, WALL STREET J., Feb. 25, 2015.[6]

These public statements are far more credible than the apocalyptic claims in the petitions. The regulatory classification for BIAS has been in a degree of flux for more than ten years, during which time the industry has undertaken massive investments. *See* Pet. App. 44a.; *id*. 562a-65a (Order ¶ 360). Moreover, as the Commission observed, cellular voice services have been subject to Title II for decades without "frustat[ing] investment in the wireless marketplace" or leading "to *ex ante* regulation of rates." *Id*. 687a (Order ¶ 447). The reality is, whatever marginal effect regulatory uncertainty may have on investment, the far greater driver is the inexorable command of supply and demand. *Id*. 44a.

In any event, a ruling in petitioners' favor would not have granted them any regulatory clarity. They bemoan the alleged indeterminacy of the General Conduct Rule, which prohibits practices that "unreasonably interfere with or unreasonably disadvantage" users' access to lawful internet content

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[5] *Available at* https://www.cmcsa.com/static-files/785af0f7-9fa7-4141-983a-556de09b8a71.

[6] *Available at* https://www.wsj.com/articles/cablevision-net-neutrality-fcc-proposal-earnings-subscribers-1424872198.

and services. Pet. App. 328a-29a (Order ¶ 136). But they neglect to mention that absent classification under Title II, they are subject to the Federal Trade Commission Act's (FTCA) even broader prohibition against "[u]nfair methods of competition" and "unfair or deceptive acts or practices." 15 U.S.C. § 45(a)(1); *see id*. § 45(a)(2) (common carriers exempted from FTCA). Petitioners can hardly claim that the FTCA is materially more determinate than the Open Internet Order's General Conduct Standard, much less the Order's bright-line rules against blocking, throttling, and paid prioritization.

III. The D.C. Circuit's Opinion Is Correct And Otherwise Unworthy Of Review.

Finally, petitioners say review is warranted because the decision below was wrong. *See, e.g.*, AT&T Pet. 11-12; CTIA Pet. 19. That is rarely a basis for certiorari. It is a particularly weak argument in a straight-forward administrative law case like this one, which falls squarely within the D.C. Circuit's wheelhouse. Petitioners were given a full and fair hearing before that court (which, it should be noted, had ruled in the industry's favor in two prior net neutrality cases). The court then upheld the Open Internet Order in an extended and thoughtful opinion. We will not repeat the court's refutation of petitioners' complaints in detail here, but respond only to a few of their central points.

A. The Court Of Appeals' Decision Does Not Conflict With *Brand X*.

Petitioners argue that the ruling below conflicts with this Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet*

Services, 545 U.S. 967 (2005). *See, e.g.*, AT&T Pet. 11-21. Quite to the contrary, that decision strongly supports the D.C. Circuit's conclusions in this case.

1. In *Brand* X, the Court explained that the only question before it was whether the Commission's classification decision was "a lawful construction" of the statute. 545 U.S. at 974. The Court held "that it is," *id.*, because "the Communications Act is ambiguous about whether cable companies 'offer' telecommunications with cable modem service," *id*. at 992, and because the "Commission's construction was a reasonable policy choice for the Commission to make at *Chevron*'s second step," *id*. at 997 (internal punctuation and citation omitted). Nothing in the decision suggested that the Commission was precluded from reaching a different decision.

To the contrary, the Court upheld the Commission's decision because it concluded that classification turned on three questions, each of which had been left to the Commission's discretion, subject, of course, to review for reasonableness at *Chevron* step two and compliance with the APA.

First, the Court explained that the statutory definition of a "telecommunications service" depends on the nature of the provider's "offer" to consumers. *Id*. at 987. The Court then held that the word "offer" was ambiguous. *Id*. at 989-92. When a company provides multiple services as part of a bundled package, one could conceive of each component as a separate "offer," subject to its own classification. Or one could treat the bundle as a unitary "offer," to be given a single classification. *Id*. Given this ambiguity, the Court held that the Commission had discretion to

treat "functionally integrated" services as comprising a single "offer." *Id*. at 991; *see also id*. at 989-91.

Second, although the Court recognized that broadband internet access service includes a telecommunications component, [7] it held that the Commission had discretion to decide "whether the transmission component of cable modem service is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering." *Id*. at 990; *see also id*. at 992. Based on the record at the time, the Court held that the Commission exercised that discretion reasonably in concluding that the telecommunications component was so "functionally integrated" with other bundled information services, like email and webhosting, that the Commission could lawfully treat the services as a single offer. *Id*. at 990-91.

Third, the Court held the Commission had discretion whether to classify that combined service as a telecommunications or an information service. *See id*. at 997, 1000. The Court concluded that the Commission's classification decision at the time was reasonable as well. *Id*. at 1003.

Throughout, the Court went out of its way to emphasize that it was deciding only that the Commission's choice was "lawful," [8] "permissible," [9] and "reasonable." [10] It never even hinted that the classification was compelled. At the same time, the

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[7] *See, e.g.*, 545 U.S. at 988, 994-95 & n.2.

[8] *Id.* at 974, 985.

[9] *Id*. at 986.

[10] *Id*. at 986, 990, 997, 1000.

Court emphasized that such discretionary determinations are "not instantly carved in stone." *Id.* at 981 (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863-64 (1984)). "On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id*. (internal quotation marks omitted).

2. Petitioners nonetheless insist that *Brand X* only decided the lawfulness of the Commission's treatment of what they call "the last mile" of the telecommunication pathway, connecting a subscriber's house to the beginning of the provider's network. *See, e.g.*, AT&T Pet. 13. And they insist that "all nine Justices decided the case on the premise that the statutory language forecloses" classifying any other part of the telecommunications pathway as a segregable telecommunications service. *Id*. at 12; *see also* NCTA Pet. 31-32. That is incorrect.

Nothing in *Brand X* turned on the length of the telecommunications pathway. *See* Pet. App. 28a-29a. The Court repeatedly acknowledged that internet access service as a whole, not just any "last mile" of it, provided a telecommunications pathway from the user to internet destinations (such as email and web servers). *See, e.g.*, *Brand X*, 545 U.S. at 994, 995 n.2. The relevant questions were whether that transmission service (however long) was reasonably viewed as integrated with a broadband provider's information services, and whether that combined service was then reasonably classified by the Commission as an information, rather than telecommunications, service. *Id*. at 990. The Court was clear that these were questions the statute leaves

to the agency's discretion, subject to review for reasonableness. *Id.* at 989-92.

B. The Commission Lawfully Reclassified Fixed And Mobile BIAS As Telecommunications Services.

1. As discussed above, there can be no question that broadband service contains a transmission component that meets the Act's definition of "telecommunications." Indeed, the essential function of broadband is to transport packets of information between the user's computer and internet destinations of her choice without change in the packets' content. *See* Pet. App. 3a-4a; *id.* 564a-569a (Order ¶¶ 361-62).

Rather than dispute the indisputable, or argue that the telecommunications component is inextricably intertwined with broadband providers' own information services, petitioners insist that the bare telecommunications function by itself *also* meets the definition of an "information service." *See, e.g.*, AT&T Pet. 11-12. They point out that an information service is defined as "an offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(24); *see* AT&T Pet. 11-12. Those capabilities are provided by various websites and other services offered by edge providers. So there is no dispute that *edge providers* offer an information service, or even that broadband providers may offer *other* information services, like email. But petitioners argue that anyone who provides a communications pathway designed to reach even third-party edge providers is *also* providing an information service simply by virtue of that data

transport, because one cannot use edge providers' services without a means of communicating with them. AT&T Pet. at 11-14. In other words, petitioners reason, the bare communications pathway *itself* can be seen as providing the "capability for generating," etc. information on the internet, in the same way that a city bus provides its customers the "capability" of "acquiring information" when it has a stop at the library. *See id.*

That position runs counter to the plain text of the statute and common sense. By statutory definition, an "information service" offers a "capability . . . *via telecommunications.*" 47 U.S.C. § 153(24) (emphasis added). BIAS does not meet this definition because the service *is* telecommunications, not a service offered *via* telecommunications. *Id.* If it were otherwise, *every* telecommunications service – even an ordinary telephone line – would qualify as an information service because telecommunications is, by definition, what gives users the "capability" of reaching and then using information services.

Moreover, even if petitioners' view were correct, that would simply mean that BIAS meets *both* the definition of an "information service" *and* the definition of a "telecommunications service." They seem to assume that such a service *cannot* be classified as common carriage under Title II. But the text of the Act says exactly the opposite – it unambiguously requires that a "telecommunications carrier *shall* be treated as a common carrier . . . to the extent that it is engaged in providing telecommunications services." *Id.* § 153(51) (emphasis added). It says nothing about the proper classification of an information service. *See id*. § 153(24).

2. The court of appeals was also right to uphold the Commission's classification as reasonable. Indeed, given the information in the record and the realities of the modern internet, no other classification would have been sustainable.

Brand X confirmed the Commission's historical approach of deciding classification questions on the basis of consumer perception of the offer. 545 U.S. at 990-91. And today, consumers use broadband access overwhelmingly for one thing – accessing the websites and services of edge providers. It is no longer plausible to call broadband service an "information service" simply because it may be bundled with broadband providers' own email and personal webpage hosting services. Indeed, in its recent order repealing the Open Internet Order, the Commission didn't even really try to justify its decision on that ground, relegating this theory to a half-hearted footnote with no reasoning. *See* Restoring Internet Freedom Order ¶ 33 n.99. Petitioners' briefs say even less.

In the Cable Modem Order, the Commission also pointed to DNS and caching as information services that were inextricably intertwined with the data transport aspect of broadband service. *See Brand X*, 545 U.S. at 987. But the Open Internet Order explained why those services are better viewed as falling within the "telecommunications management" exception to the definition of an information service. Pet. App. 575a-88a (Order ¶¶ 365-372). Petitioners do not seriously challenge that conclusion in this Court – only two petitioners even mention it, mostly in footnotes. *See* AT&T Pet. 15 n.7; U.S. Telecom Pet. 29 nn.26-27.

One begins, then, to understand why petitioners are so insistent on arguing that providing a bare telecommunications pathway to third-party websites and services counts as offering an information service – they *have* to make that argument because they cannot plausibly take the position the Commission took in *Brand X,* given modern changes to the internet, the marketplace, and consumer perceptions.

C. The Commission Lawfully Reclassified Mobile BIAS As A "Commercial Mobile Service."

Petitioners make a similarly meritless claim that the statute independently precluded classifying mobile BIAS under Title II. *See, e.g.*, AT&T Pet. § II; CTIA Pet. § I-III.

The statute requires that a "commercial mobile service" be treated as common carriage. *See* 47 U.S.C. § 332(c)(1)(A). It then defines "commercial mobile service" as a mobile service offered to the public that "interconnect[s]" with "the public switched network (as such terms are defined by regulation by the Commission)." *Id*. § 332(d)(1)-(2). A "private mobile service," in contrast, is any mobile service that is not a commercial mobile service or "its functional equivalent." *Id*. § 332(d)(3). The statute forbids classifying private mobile service providers as common carriers. *Id*. § 332(c)(2).

Petitioners challenge the Commission's exercise of this delegated authority to define the "public switched network" and what it means for a service to "interconnect" with it.

1. Petitioners first object to the Commission's interpretation of the term "public switched network"

as encompassing both the traditional telephone system using the North American Numbering Plan (NANP) and the internet. *See* AT&T Pet. 23. They don't dispute that the internet, like the NANP, is a "switched network" that is "public." But they insist that by "public switched network" Congress meant the "public switched *telephone* network" standing alone. *Id*. 24-25.

The court of appeals rightly rejected this argument. Pet. App. 58a-63a. Congress did not "unambiguously freez[e] in time" the statute's treatment of mobile services or any particular conception of the public switched network. *Brand X*, 545 U.S. at 996. Rather, by delegating to the Commission responsibility for defining the term, Congress made clear its expectation that the Commission would "consider varying interpretations and the wisdom of its policy on a continuing basis," including "in response to changed factual circumstances," *id*. at 981 (citation omitted), like the advent of the modern internet and the ubiquity of smartphone communications.

Petitioners nonetheless object that by referring to "the" (singular) public switched network, Congress unambiguously precluded the Commission from defining the term to include two distinct networks (NANP and the internet). AT&T Pet. 24-25. That puts far too much weight on this single simple word, wrongly assuming that Congress used a definite article to substantially limit the authority conveyed just four words later to update the definition of the "public switched network" as technology developed.

The argument also fails because the NANP itself is not a single network, but rather a network of

interconnected networks – *e.g.*, the cellular system and the traditional telephone network, each of which is itself a network of networks. *See AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 371-73 (1999). There is nothing counter-textual about viewing the internet as part of this network of interconnected networks, given the increasingly pervasive connections between all three systems. *See* Pet. App. 626a-28a (Order ¶¶ 400-01).

2. In any event, the Commission also reasonably concluded, in the alternative, that mobile broadband interconnects with the NANP telephone network through VoIP. Pet. App. 626a-28a (Order ¶¶ 400-02). Even under the prior regulations, "interconnected service" was defined as one that "gives subscribers the capability to communicate to or receive communications from all other users on the public switched network." 47 C.F.R. § 20.3 (2014). And petitioners acknowledge that mobile broadband and landline users can, in fact, communicate via VoIP. CTIA Pet. 26-27.

Petitioners nonetheless argue that mobile BIAS itself does not provide that capability because actual communications between NANP and mobile broadband users requires using third-party software and services like VoIP. CTIA Pet. 26-28. But on that theory, mobile voice, the archetypal commercial mobile service, is not an interconnected service either, for it too requires subscribers to use a phone running appropriate software (both the device and the software often provided by third parties, not the mobile carrier) in order to communicate with anyone. Pet. App. 65a-68a. In fact, mobile voice subscribers today overwhelmingly use *the same smart phone*, running

the same operating system, to access voice and mobile broadband. *Id.* The only difference between using mobile legacy voice services or VoIP over mobile broadband is which app the user clicks on. *See id*. 67a.

Petitioners also argue that the users are not sufficiently interconnected because when they elect to connect certain devices to a mobile broadband service – *e.g.*, a Kindle Paperwhite E-Reader or an older smartphone – they cannot use VoIP and, therefore, cannot call landline users at all. CTIA Pet. 29. But even within the traditional landline network, a person with a phone cannot communicate effectively with a fax machine, a fax machine cannot communicate with a TTY device, and two computers connected by modems over a phone line must use compatible software. The NANP nonetheless provides interconnected network service because the network provides a communications pathway to every destination, and the capability to communicate with any endpoint on the network, even if effectuating the communication may require that both parties connect compatible devices using compatible software.

The same is true of the connections between mobile broadband and NANP users. A user's choice to connect a Kindle to her broadband connection has the same kind of consequences as a landline user's decision to connect a fax machine to her phone line. Neither decision affects the nature or capabilities of the network service, which remains interconnected even if users do not exploit its full capabilities each and every time they use it.

3. Finally, although the court of appeals had no need to decide the question,[11] mobile broadband is, at the very least, the "functional equivalent" of a commercial mobile service, even under petitioners' definition of the "public switched network."

It is hard to imagine a clearer candidate for treatment as a functional equivalent. Mobile broadband provides *exactly the same* functionality as mobile voice, allowing subscribers to call any number a mobile voice user can. That mobile broadband allows its subscribers to do *more* than simply replicate the functions of a flip phone is irrelevant. *See* Pet. App. 634a-36a (Order ¶ 407). The statutory question is whether mobile broadband provides the functional equivalent of cellular service, not the other way around.

D. Petitioners' APA Challenges To Reclassification Are Meritless.

The court of appeals also ruled on the kind of basic APA objections made in virtually every challenge to an agency regulation. A few petitioners try to make a Supreme Court case out of the court of appeals' handling of some of those objections. But none has any merit.

Several petitioners complain that the Commission gave insufficient weight to their claims of reliance on the prior classification regime. ACA Pet. 21-22; NCTA Pet. 23-27. But as the court of appeals found, the Commission acknowledged those arguments and gave substantial reasons why it did not believe that those asserted interests were sufficient to warrant keeping

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[11] *See* Pet. App. 59a-60a.

in place a classification regime that prevented the adoption of open internet rules, and thus threatened the internet ecosystem that makes petitioners' businesses possible. Pet. App. 44a-46a.

Some petitioners also raise arguments about the so-called "major rules" doctrine. They cannot, even among themselves, settle on what the doctrine requires. Some say it operates as a one-way ratchet, "preclud[ing] agencies from undertaking regulation of 'vast economic and political significance' unless Congress provides clear statutory authority." ACA Pet. 19 (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)); *see also* NCTA Pet. 33-34; TechFreedom Pet. 12-13. Others seem to make the more modest claim that in such contexts, regulation may be permitted, but no *Chevron* deference is due the agency's interpretation. *See* AT&T Pet. 20-21; Berninger Pet. 19-21. This confusion is limited to petitioners and academia – as noted, none of the petitions credibly claims that any circuit has adopted either version of the rule. *See supra* § I.

In any event, the doctrine is not implicated in this case because even assuming it exists, and even assuming it is as broad as some petitioners say, Congress *has* clearly authorized the agency to decide whether to regulate BIAS as common carriage. Pet. App. 1359a-60a (Srinivasan, J., joined by Tatel, J., concurring in denial of rehearing en banc). As the panel majority explained, "we know Congress vested the agency with authority to impose obligations like the ones instituted by the Order because the Supreme Court has specifically told us so" in *Brand X*. *Id*. 1360a. There, the Court recognized the importance of the question before it, yet applied the ordinary

Chevron framework, concluding that the "Commission is in a far better position to address these questions than we are." 545 U.S. at 1003.

E. Petitioner Berninger's First Amendment Argument Is Meritless And Nonjusticiable.

Only one petitioner, Daniel Berninger, thinks there is a certworthy First Amendment issue lurking in the case. *See* Berninger Pet. § I. His position attracted the support of only one of the ten judges who reviewed his arguments below. *See* Pet. App. 1449a-67a (Kavanaugh, J., dissenting from denial of rehearing en banc). In any event, Berninger alleges no circuit conflict and the panel majority thoroughly explained why his First Amendment objections have no merit. *See id*. 1369a-80a.

Respondent pauses only to note an additional obstacle: Berninger lacks standing to raise his objections. Unlike most other petitioners, Berninger is not a broadband provider and therefore is not subject to the Order's rules. Instead, he claimed standing based on his allegation that he was "developing" a new "high-definition voice offering" that he believed would require network prioritization, which he would like to pay for. Alamo C.A. Br., Decl. of Daniel Berninger ¶¶ 2, 4. This speculation that the Order *might* interfere with business plans Berninger *may* create *someday* to implement a technology that is still under development does not establish standing to challenge the Order now. *See, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992) ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day

will be—do not support a finding of the 'actual or imminent' injury that our cases require."). Moreover, even if his plans were less speculative, Berninger made no claim that the specific providers he plans to deal with (which he never identifies) would be willing to offer paid prioritization if the rule were struck down. In fact, most major providers (including AT&T, Verizon, Time Warner Cable, and Comcast) disavowed before the Commission any intent to implement paid prioritization, some arguing that it is technically infeasible or competitively unsustainable. *See* Pet. App. 255a-260a & n.125, 319a & nn.301-302 (Order ¶¶ 80, 127).

In addition, the authorities Berninger relies on concern the First Amendment rights of *providers*, not customers like himself. *See* Pet. 15-18. "It is, however, a fundamental restriction on [this Court's] authority that in the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Hollingsworth v. Perry*, 570 U.S. 693, 708 (2013) (citation and internal punctuation omitted). The Court thus disfavors third-party standing, allowing it only when "three important criteria are satisfied": (1) the "litigant must have suffered an 'injury in fact'"; (2) "the litigant must have a close relation to the third party"; and (3) "there must exist some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (quoting *Singleton v. Wulff*, 428 U.S. 106, 112-13 (1976)). Berninger meets none of these requirements. First, as discussed, he offers no more than speculation of injury. Second, he has no existing relationship with any regulated provider, much less a

close one; he is, at most, a hypothetical purchaser of paid-prioritization services. Third, BIAS providers are fully capable of asserting their own rights. That they have chosen not to assert First Amendment rights speaks not to any hindrance, but to their views of the merits of such a claim. *See Kowalski v. Tesmer*, 543 U.S. 125, 132-33 (2004) (*pro se* criminal defendants not hindered from challenging practice of denying counsel in Section 1983 cases).[12]

It is perhaps, then, no surprise that the court of appeals addressed the First Amendment issues Berninger raises based on the standing of *another* party (Alamo Broadband, Inc., a broadband provider), and expressly declined to decide whether Berninger had Article III standing. *See* Pet. App. 107a-108a. Alamo, however, has not joined Berninger's petition to this Court. Before reaching any First Amendment question, then, this Court would have to address Berninger's standing in the first instance.

Accordingly, this case is a poor vehicle for addressing any First Amendment question, particularly the First Amendment rights of broadband providers.

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[12] Nor can Berninger rely on First Amendment overbreadth doctrine to surmount his standing problems. That doctrine allows "litigants *injured by a particular application of a statute* to assert a facial overbreadth challenge, one seeking invalidation of the statute because its application in other situations would be unconstitutional." *Renne v. Geary*, 501 U.S. 312, 323 (1991) (emphasis added). The doctrine thus "involve[s] not standing but the determination of a First Amendment challenge on the merits." *Virginia v. Hicks*, 539 U.S. 113, 120 (2003) (citation and internal punctuation omitted).

IV. Because The Petitions Did Not Warrant Certiorari When Filed, The Repeal Of The Open Internet Order Provides No Reason To Grant The Petitions Now Or To Vacate The D.C. Circuit's Decision.

As respondents Public Knowledge, *et al*., explain in their brief, a petition that does not warrant certiorari when filed does not become certworthy simply because it was mooted before the Court could deny the petition. Because these petitions never satisfied this Court's criteria for review, they should be denied.

CONCLUSION

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

Respectfully submitted,

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