INITIAL VERSION

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 18-1051 (and consolidated cases)

IN THE

United States Court of Appeals for the District of Columbia Circuit

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MOZILLA CORPORATION, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and THE UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of an Order
of the Federal Communications Commission

BRIEF OF INTERNET ASSOCIATION, ENTERTAINMENT SOFTWARE ASSOCIATION, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, AND WRITERS GUILD OF AMERICA, WEST, INC. AS INTERVENORS IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, ORDERS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), intervenors certify as follows:

A. Parties and Amici.

Intervenors incorporate the lists of parties, intervenors, and amici appearing in this Court that were included in the briefs for the petitioners. Additional amici have filed notices of their intent to participate since those briefs were filed. The new amici are City of New York, Electronic Frontier Foundation, Professors of Communications Law, Professors Scott Jordan and Jon Peha, Consumers Union, Engine Advocacy, Members of Congress, National Association of Regulatory Utility Commissioners, Twilio, Inc., and eBay, Inc.

B. Order Under Review.

Petitioners seek review of an Order of the Federal Communications Commission (FCC) that eliminates judicially-approved rules the FCC adopted in 2015 to protect and promote net neutrality and an open internet. *See Restoring Internet Freedom*, 33 FCC Rcd. 311 (2018) (adopted 2017) ("Order") (JA____), reversing *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015), affirmed, *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

C. Related Cases.

Related cases appear listed in the brief for the non-government petitioners.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the non-governmental intervenors in support of petitioners submit the following corporate disclosure statements:

Internet Association: Internet Association (IA) is a trade association representing leading global internet companies on matters of public policy. IA does not have any parent corporations and does not issue stock.

Entertainment Software Association: Entertainment Software Association (ESA) is a trade association representing companies that publish computer and video games for video game consoles, handheld devices, personal computers, and the internet. ESA does not have any parent corporations and does not issue stock.

Computer & Communications Industry Association: Computer & Communications Industry Association (CCIA) is a Section 501(c)(6) not-for-profit trade association comprised of internet and technology firms, organized under the laws of the District of Columbia. CCIA has no parent corporation, and no publicly held corporation has an ownership stake of 10 percent or more in it.

Writers Guild of America, West, Inc.: Writers Guild of America, West, Inc. (Writers Guild) certifies that it is a California nonprofit corporation doing business as a labor organization; it does not issue stock and has no parent corporation.

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GLOSSARY

APA	Administrative Procedure Act
FCC	Federal Communications Commission
FTC	Federal Trade Commission

JURISDICTION

Intervenors adopt the Statement of Jurisdiction, Questions Presented, and applicable Standards of Review set forth in the briefs for petitioners. *See* Br. for Non-Government Pet'rs (Non-Gov't Pet. Br.) at 1, 21; Br. for Government Pet'rs at 3, 11.

STATUTES AND REGULATIONS

The text of relevant statutes and regulations is set forth in the addenda to the briefs filed by the petitioners.

INTRODUCTION

In 2015, the Federal Communications Commission adopted open internet rules preventing Internet Service Providers (ISPs) from engaging in discriminatory practices that limit consumer choice, competition, and innovation online. Recognizing that ISPs can position themselves as "gatekeepers" between edge providers and their customers, this Court upheld those net neutrality rules in their entirety. It affirmed the FCC's conclusion that net neutrality protections are needed for multiple reasons: They ensure that *consumers* have the ability "to transmit data of their own choosing to their desired destination," *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 699 (D.C. Cir. 2016) ("*USTelecom*"). They give *content providers* certainty that they can reach all Americans online. And they foster *competition* that supports economic growth and innovation by ensuring that consumers—not ISPs—pick winners and losers online.

The 2015 rules took effect on June 12, 2015. Less than two years later, the Commission proposed to abandon the rules at least in part, and soon thereafter it voted to rescind each of the substantive net neutrality rules, leaving only a reduced requirement that ISPs must disclose some of their operating practices. *See* Order ¶ 239 (JA____). That agency action must be vacated as arbitrary and capricious.

The record in this proceeding confirms the conclusion reached by the FCC in 2015 and affirmed by this Court: Rules regulating the conduct of ISPs continue to be needed to protect and promote an open internet. Especially in light of the extremely limited competitive options available to consumers—the Commission admits that nearly half of all residential consumers have no choice of wireline ISP, Order ¶ 125 (JA____)—ISPs can abuse their gatekeeper position by restricting consumer access to online content, which in turn harms edge providers. Transparency alone is not enough. Absent conduct rules, the "virtuous cycle" in which all participants in the internet ecosystem are able to prosper on account of open access to content has been replaced by a system in which ISPs have the incentive and ability to stifle both consumer choice and new online offerings.

STATEMENT OF THE CASE

Intervenors adopt petitioners' Statements of the Case and supplement them as follows.

I. THE FCC'S LONG-STANDING NET NEUTRALITY PROTECTIONS FUELED GROWTH AND INNOVATION FOR BOTH ISPS AND THE INTERNET ECONOMY.

For more than a decade, the Commission continuously took the position that net neutrality protections are consistent with its public interest mandate. *See, e.g.*, *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities*, 17 FCC Rcd. 4798, 4841–42 ¶¶ 75–79 (2002); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al*., 20 FCC Rcd. 14986, 14988 ¶ 4 (2005). The FCC found a net neutrality violation in 2008. *See Formal Complaint of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd. 13028 (2008). And it codified net neutrality protections in 2010 and again in 2015. *Preserving the Open Internet*, 25 FCC Rcd. 17905 (2010) ("2010 Order"); *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015) ("2015 Order") (JA____). Both the internet and ISPs thrived as a result of the Commission's sustained oversight over net neutrality principles throughout this period.

Investment in the edge-provider economy boomed, which, in turn, fueled broadband investment and deployment. *See* Comments of Internet Association at 6 ("IA Comments") (reporting $17 billion in edge-provider capital expenditures for data processing, hosting, and related services in 2015, an increase of 26 percent

from 2014) (JA____)[1]. Cloud-based services generated new and rapidly growing categories of economic investment, *id.* at 6 (JA____), creating new choices for consumers. The online video market, for example, expanded rapidly and began to offer consumers an alternative to cable TV service for some types of programming. *Id.* at 16 (JA____); *see also* Comments of CCIA at 10 (JA____). Subscription streaming video providers on the edges of the network, like Netflix, Amazon, and Hulu, made significant investments in programming, networks, and cloud infrastructure, while providers large and small launched over-the-top online TV services (for example, "skinny bundle[s]" of channels for online viewing). IA Comments at 16 (JA____). Consequently, consumers gained "an unprecedented number of choices of pay-TV services … at a wide variety of price points and channel offerings." *Id.* at 17 (JA____).

Small businesses also flourished online further diversifying the market. *See id.* at 5–6 (JA____). Startups from all 50 states credit net neutrality protections for their success. Letter from Engine et al. to FCC Chairman Ajit Pai (Apr. 26, 2017).[2] Growth from big and small companies created millions of new jobs across

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[1] Unless otherwise noted, comments were filed in FCC WC Docket No. 17-108 on July 17, 2017 and are reproduced in the JA.

[2] *Available at* http://www.engine.is/startups-for-net-neutrality.

the country. IA Comments at 6 (JA____) (10.4 million internet-related jobs created in 2016).

Under the FCC's 2015 rules, consumers' broadband experiences likewise improved. Broadband availability continued to grow, just as it did before the 2015 Order. Comments of Free Press at 94 ("Free Press Comments") (JA____). Between late 2014 and mid-2016, "the number of unserved Census Blocks (those with no wired ISPs) decreased by 7 percent." *Id.* (JA____). Broadband speeds also increased, with top cable broadband speeds doubling from 2014 to 2016. Christopher Hooton, *An Empirical Investigation of the Impacts of Net Neutrality* 17 (2017) ("IA Economic Report") (JA____); Free Press Comments at 95–97 (breaking down speed increases by broadband technology type) (JA____).

Although they challenged the 2015 rules in court, ISPs continued with their business plans while the rules were in effect. In numerous public statements to investors and the Securities and Exchange Commission,[3] ISPs pointed to other factors—not the 2015 Order—as determining their investment decisions. *See* S.

[3] *See* 15 U.S.C. § 7241 (requiring that executives certify the truth of their annual and quarterly reports).

Derek Turner, *It's Working: How the Internet Access and Online Video Markets Are Thriving in the Title II Era* 66–113 (2017) (cataloging statements and actions of over 20 ISPs).[4]

II. THE FCC REVERSED COURSE AND—FOR THE FIRST TIME—ELIMINATED NET NEUTRALITY PROTECTIONS.

Twenty-three months after the 2015 Order took effect, the FCC, under a new Chairman, proposed to reverse course on the premise that the 2015 Order was harming ISP investment. *Restoring Internet Freedom*, 32 FCC Rcd. 4434, 4435–36 ¶¶ 4–5 (2017) ("NPRM") (JA____–JA____). The Commission primarily relied on (1) a blog post asserting "that capital expenditure from the nation's twelve largest Internet service providers has fallen by $3.6 billion, a 5.6% decline relative to 2014 levels," *id.* ¶ 45 (JA____–JA____), and (2) a second analysis claiming that from 2011 to 2015, "the threat of reclassification [under Title II of the Telecommunications Act, to provide legal support for net neutrality rules] reduced telecommunications investment by about 20–30%, or about $30–40 billion annually." *Id*. (JA____–JA____).

Commenters challenged that premise of diminished ISP investment attributable to the 2015 Order. *See, e.g.*, CCIA Comments at 14–21 (JA____); Free Press Comments at 129–54 (JA____). According to CCIA, for example, the

[4] *Available at* https://www.freepress.net/sites/default/files/2018-06/internet-access-and-online-video-markets-are-thriving-in-title-II-era.pdf.

two economists inadequately considered other factors affecting ISP investment decisions and analyzed inaccurate time periods. CCIA Comments at 14–21 (JA____). Internet Association's economic report revealed rising ISP investment since 2009, "no slowdown in investment in the USA compared to other OECD countries[,] and no causal impact overall from the FCC policies on investment." IA Economic Report at 3 (JA____). Free Press's study indicated that "[c]apital investments at publicly traded ISPs were 5 percent higher during the two-year period following the Commission's [2015] Open Internet vote than during the two-year period before." Free Press Comments at 131 (JA____).

Nevertheless, in its 2017 Order the Commission maintained that the 2015 Order had harmed ISP investment. Order ¶¶ 91–98 (JA____–JA____). For the first time ever, the Commission's majority, over two dissents, renounced all Commission oversight over ISP practices and eliminated all substantive net neutrality conduct protections. It rescinded the 2015 conduct rules (prohibitions on blocking, throttling, and paid prioritization and the general conduct rule) for three reasons: (1) the Order's pared-down transparency rule, combined with general antitrust and consumer protections laws and marketplace competition "obviates the need for conduct rules"; (2) "the costs of each [conduct] rule outweigh its benefits"; and (3) "the record does not identify any legal authority to adopt conduct rules for all ISPs …." *Id.* ¶ 239 (JA____).

SUMMARY OF THE ARGUMENT

In addition to radically changing its view of the Commission's own legal authority, an issue addressed in petitioners' briefs, the FCC also eliminates all ISP conduct rules protecting net neutrality. *Id.* (JA____). The Commission gives three reasons for the latter action—each of which is fundamentally flawed.

First, the FCC states that a narrowed transparency rule, in combination with broadband market competition and preexisting antitrust and consumer protection laws, is sufficient to protect net neutrality. But that conclusion is unreasoned and unreasonable, and—in the case of the transparency rule—also contrary to law. The broadband marketplace cannot effectively discipline ISP gatekeepers because a lack of competition and high switching costs prevent even fully-informed consumers from responding to unwanted ISP practices. General consumer protection laws provide no clear protection against non-neutral ISP practices so long as they are disclosed, and antitrust laws were neither intended nor designed to address the net neutrality harms at issue here. On its own, the transparency rule cannot sufficiently protect against harmful ISP practices.

Second, the FCC claims that the costs of the net neutrality conduct rules outweigh their benefits. That flawed analysis runs counter to the record and departs from the Commission's previous factual findings without explanation. It misconstrues and misunderstands the limited record evidence that credibly

addressed the 2015 Order's impact on investment by ISPs. And it fails to adequately acknowledge the benefits from enforceable net neutrality protections that were identified in the 2015 Order and established in the record.

Third, the FCC asserts that "the record does not identify any legal authority to adopt conduct rules for all ISPs"—a position that cannot be squared with this Court's two prior decisions upholding FCC net neutrality rules as adequately supported. *Id.* (JA____). Having done so, the Commission unlawfully relies solely on Section 257 for the limited transparency rule it adopted.

Because the Commission does not offer a reasoned basis for its decision to eliminate the conduct rules, the Order is arbitrary and capricious.

ARGUMENT

The Commission argues that it eliminated the conduct rules because (I) its narrowed transparency rule, combined with competition and existing consumer protection and antitrust law, "obviates the need for conduct rules," (II) the costs of the conduct rules outweigh their benefits, and (III) the record did not identify legal authority for the conduct rules. *Id.* (JA____). Each of those claims, however, fails to "consider an important aspect of the problem," "runs counter to the evidence before the agency," or "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

I. THE COMMISSION UNREASONABLY ASSERTS THAT NO NET NEUTRALITY RULES, OTHER THAN A LIMITED DISCLOSURE REQUIREMENT, ARE NEEDED TO PROTECT THE OPEN INTERNET.

A. The Commission's Claim that Broadband Competition Will Protect Net Neutrality Is Unreasonable and Unsupported.

The Commission concedes that ISPs can engage in conduct that would "undermine the openness of the Internet in ways that harm consumers," Order ¶ 123 (JA____), but reasons that the transparency rule and market forces "obviate[] the need for conduct rules," because ISPs will abstain from harmful (but no longer prohibited) conduct for fear of losing customers and public backlash. *Id.* ¶¶ 239–240 (JA____). That reasoning is flawed. Market forces cannot effectively discipline ISP conduct because customers cannot readily change providers if they disagree with their ISP's practices.

As this Court twice affirmed, ISPs operate as gatekeepers between customers and online content providers and have the incentive and ability to use that position to threaten internet openness. *See Verizon v. FCC*, 740 F.3d 623, 646–47 (D.C. Cir. 2014); *USTelecom*, 825 F.3d at 694–95. Indeed, *Verizon* upheld the Commission's justification that rules were necessary specifically because of ISPs' gatekeeper status, rather than based on ISPs' market power. 740 F.3d at 647–48. The new Order fails to explain how the current "state of broadband Internet access service competition," Order ¶ 239 (JA____), can overcome the fact

that ISPs have "control [over] access to the Internet for their subscribers and for anyone wishing to reach those subscribers." *Verizon*, 740 F.3d at 646 (quoting 2010 Order at ¶ 50).[5]

As the Commission previously found, and this Court affirmed, even where consumers have a choice of providers, they face high switching costs that impair their responsiveness to ISP conduct. 2010 Order ¶ 34; 2015 Order ¶ 81 (JA____); *Verizon*, 740 F.3d at 646–47. The Commission dismisses the relevance of switching costs because "the record indicates material competition for customers regardless of churn levels." Order ¶ 128 (JA____). The Commission says that "low churn rates" reflect the resources ISPs devote to attract and retain customers, not a lack of competition. *Id.* But that misses the point. Switching barriers prevent unhappy consumers from responding to an ISP's net neutrality disclosure by changing providers—if the consumer even has the option of an alternative ISP. *See Verizon*, 740 F.3d at 746–47.

Moreover, the Commission's own data reveal a widespread lack of broadband competition. Nearly 50 percent of Americans are served by only one or zero wireline broadband service providers meeting the current FCC speed

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[5] The Commission repeats the 2015 Order's finding that multi-homing (buying broadband from more than one ISP) could mitigate this gatekeeper effect, Order ¶ 136, n.488 (JA____), but cites no evidence on the extent of multi-homing or how it has changed since 2015. *Id.* (JA____).

benchmark of 25 megabits per second download and 3 megabits per second upload. Order ¶ 125 n.256 (JA____). Rural consumers are even worse off, with 87 percent having no choice when it comes to such wireline broadband service. *See Inquiry Concerning the Deployment of Advanced Telecomm. Capability*, 31 FCC Rcd. 699, 736 ¶ 86, tbl.6 (2016). It is irrational to think that transparency regarding ISP practices alone can protect net neutrality for the millions of consumers who cannot switch providers; they must either accept their ISPs' disclosed traffic management practices or go without internet access.

B. The Commission Arbitrarily and Capriciously Concludes that Other Federal Laws Fully Address Harms to Internet Freedom.

The Commission also is irrational in saying that existing consumer protection and antitrust laws "obviate[ ] the need for conduct rules" because they "achiev[e] comparable benefits at lower cost," Order ¶ 239 (JA____), and are "sufficient to protect Internet freedom," *Id.* ¶ 208 (JA____).

First, it is unclear how the Commission could conclude that general consumer protection and antitrust laws—which were not designed to protect the open internet—are substitutes for strong net neutrality protections, when it never seriously considers what those laws actually prohibit. With respect to the majority of non-neutral practices addressed by the 2015 rules, the Order simply does not engage in that inquiry. The Order merely concludes that the Federal Trade Commission (FTC) can punish ISPs that break promises made in their disclosure

statements. *Id.* ¶ 244 (JA____–JA____); *see also id.* ¶ 141 (JA____–JA____). It never resolves whether the FTC could prevent other practices, such as selective blocking and throttling of internet traffic that even the FCC agrees would be harmful. *Id.* ¶ 265 (JA____–JA____).

The Commission's review of the antitrust laws is similarly inadequate. For example, the Commission asserts that "[i]f ISPs reached horizontal agreements to unfairly block, throttle, or discriminate against Internet conduct or applications, these agreements likely would be *per se* illegal under the antitrust laws."[6] Order ¶ 144 (JA____). What might constitute *unfair* blocking, throttling, or discrimination for purposes of those laws, the Commission never investigates. Addressing paid prioritization, for instance, the Commission offers just a single example of potentially unlawful conduct: "inappropriately favoring an affiliate or partner in a way that ultimately harms economic competition in the relevant market." *See, e.g., id.* ¶ 261 (JA____–JA____). Without consideration of what types of favoritism would be "appropriate" and "inappropriate," this lone example is insufficient.

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[6] FTC staff comments take a more restrained view, explaining that such ISP practices would only be *per se* illegal if those agreements "fix prices, reduce output, or allocate customers." FTC Comments at 27 (JA____).

That threadbare analysis leaves open a critical question: what about *disclosed* ISP conduct that interferes with the long-held net neutrality principles the FCC rhetorically reaffirms in the Order? *Id.* ¶ 217 (JA____). Could an ISP block access, for example, to a third-party webpage critical of its labor practices? The new Order doesn't say—and no one seems to know—what existing law prohibits with regard to non-neutral ISP conduct that *is* disclosed to consumers. That uncertainty leaves ISPs without clear guidance about how such conduct will be treated today, edge providers without the assurances they need to invest in services that depend on unfettered customer access, and the Commission with no basis for its conclusion that existing law achieves its goal of protecting internet freedom.

The Order is not even internally consistent on this point. While concluding elsewhere that the general conduct standard in the 2015 Order creates chilling uncertainty for ISPs due to a lack of specificity, the Commission finds far less specific antitrust and consumer protection standards to be a preferable alternative. *Id.* ¶ 251 (JA____). That makes no sense.

Second, whatever the substance of these legal protections, *ex post* antitrust and FTC remedies were not designed to address the harms to consumers, investment, and innovation that arise in the net neutrality context. Addressing comments about the limitations of these authorities, the Commission retreats and suggests that the transparency rule will deter violations and allow consumers and

regulators to take action in the face of such behavior. *Id.* ¶ 244 (JA____–JA____). That ignores several important aspects of the problem. For example, the FCC, which Congress created to regulate communications networks, has direct expertise in overseeing providers' treatment of traffic over networks that the other regulators lack. *See* Letter from CCIA to FCC at 3 (filed Nov. 17, 2017) (JA____).[7] Furthermore, *ex post* antitrust enforcement is ill-equipped to provide the certainty needed to promote future innovation and cannot address non-economic factors, like the free speech concerns at the heart of ensuring that consumers can access internet content of their choice. *See* McSweeny Comments at 4 (JA____); *see also* 2015 Order ¶¶ 76–77 (JA____–JA____). For certain harms at issue here, the FCC found in 2015 that such "case-by-case enforcement can be cumbersome for individual consumers or edge providers, and there is no practical means to measure the extent to which edge innovation and investment would be chilled." 2015 Order ¶ 19 (JA____). The 2017 Order fails to adequately address that prior finding.

[7] The Commission's response that "any loss of expertise is outweighed" by having a single regulator oversee the internet, Order ¶ 142 n.514 (JA____), ignores the unique gatekeeper role of ISPs previously affirmed by this Court. *Verizon*, 740 F.3d at 646; *see* Comment of FTC Commissioner Terrell McSweeny at 2 ("[S]ervices provided over broadband [and the] broadband service itself … are different markets that should be governed by different rules.") ("McSweeny Comments") (JA____).

II. THE ORDER UNREASONABLY ASSESSES THE COSTS AND BENEFITS OF RETAINING THE CONDUCT RULES.

The Order rests heavily on its conclusion that costs of the net neutrality conduct rules outweighed their benefits. Order ¶ 246 (JA____). Although the Commission may depart from its own prior economic analysis of the conduct rules, it must make a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (internal quotation marks omitted). Because the Order "rests upon factual findings that contradict" the Commission's previous ones, the Commission must provide "a reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations*, 556 U.S. 502, 515–16 (2009). The Commission fails to meet these burdens. Instead, the Commission's cost-benefit analysis (A) unreasonably interprets the record on ISP investment in the presence of net neutrality rules, (B) fails to account for the rules' benefits, and (C) fails to acknowledge and explain its departure from the 2015 Order's predictions about short-term investment effects.

A. The Commission's Assessment of the Conduct Rules' Effect on Investment Is Irrational.

By its own description, the Commission began its 2017 review of the conduct rules under the preconceived belief that the 2015 Order had harmed investment. NPRM ¶¶ 4–5 (JA____–JA____). Investment effects also purportedly played a central role in the Commission's analysis of the rules' costs. Ultimately,

the Commission's majority found the record evidence exactly matched their entering assumptions. The Order concludes, for example, that the general conduct standard had hindered investment, Order ¶ 247 (JA____–JA____), and that allowing paid prioritization "leads to higher investment in broadband capacity," *id.* ¶ 257 (JA____). These findings rest on the Commission's overall conclusion that aggregate broadband investment decreased during the two years after the 2015 Order *because of that decision*. *Id.* ¶ 90 (JA____–JA____); *see also* ¶ 249 n.895 (JA____) (incorporating investment analysis). Those findings are arbitrary and capricious because (1) the Commission unreasonably discounts data and methods of economic analysis that do not support its preconceived notions and (2) the studies the Commission does credit cannot (in some cases by their own terms) support the claim that ISP investment is declining and net neutrality is to blame.

1. Contrary Evidence Unreasonably Dismissed.

Citing a blog post as proof, the NPRM asserted that the 2015 Order must be reversed because it had caused investment by broadband providers to decline. NPRM ¶¶ 4–5 (JA____–JA____). During the proceedings below, numerous commenters provided expert analysis demonstrating that the NPRM's premise was not supported by the available data and econometric methods. The Order unreasonably misinterprets—and thus wrongly dismisses—the limitations of such analyses and other record evidence contrary to its conclusion.

First, the Commission fails to address much of the economic analysis in the record. Internet Association, for its part, performed approximately 20 econometric and statistical tests and variations on those tests, using a variety of techniques and data sets (including 15 metrics for telecom investment) in an attempt to isolate impacts on investment caused by the 2015 net neutrality rules. The Commission, however, only acknowledges the two tests that relied on a forecast metric and the two tests that relied on regression discontinuity. Order ¶ 97 (JA____–JA____). All the others go unaddressed.

Second, the tests the Commission does address, it mischaracterizes. By the FCC's description, the conclusion of all of these analyses is that the Commission's 2010 and 2015 decisions "did not have measurable impact on telecommunications investment in the U.S." *Id.* (JA____–JA____). But Internet Association was not simply making a claim of "no effect." On the contrary, the point was that the FCC's attempts to identify and quantify direct causal impacts of the 2015 Order were unreasonable; any such attempt inevitably would be "marred by a lack of data, missing observations, a lack of data for appropriate controls, and insufficient counterfactuals" and, therefore, "essentially a pointless exercise." *See* Internet Association Response to Phoenix Center at 1 (filed Aug. 30, 2017) ("Response to Phoenix Center") (JA____).

Instead of acknowledging that economists might not yet be able to answer the question the Commission posed, the Order brushes past these methodological challenges. For example, it never addresses evidence that there is no real-world data specific to telecommunications infrastructure investment after 2015 that would allow for comparison or meaningful statistical analysis. *Id.* at 9–10 (JA____). Nor does it address the limitations of alternative approaches, such as using "synthetic" controls that attempt to model substitutes for the missing control-group data, rather than actual control-group data. *Id.* at 9 (JA____).

Third, the Commission relies extensively on gap-filling techniques in its favored studies such as synthetic controls yet finds "forecast" data disqualifying when used as one metric in Internet Association's study. *See* Order ¶ 97 (JA____–JA____). That is arbitrary—and ironic. In fact, Internet Association *shares* the Commission's skepticism about forecast data. It only used forecasts for a single metric among dozens of other indicators, noted the limitations of that approach, and performed many other tests to confirm its results. *See* Response to Phoenix Center at 1 (JA____); *see also* IA Economic Report at 9 (noting that the limitations of forecast data and other substitutes for real-world data "only heighten the importance of conducting multiple analyses with multiple methods and indicators.") (JA____). Instead of adopting this careful approach, the Commission simply ignores the remaining tests submitted by Internet Association that also

failed to find any evidence of a decline in ISP investment caused by net neutrality regulation.

2. Flawed Evidence of Declining Investment.

In the absence of good data, the FCC cannot reasonably fill the gap with studies that do not answer the question the Commission asked. Nonetheless, the Commission credits a variety of flawed economic analyses that do not, in fact, demonstrate that ISP investment declined, much less that the 2015 Order was the cause of any change in investment. The studies cited by the Commission either fail to address causation at all or fail to carefully control for other causes of perceived investment changes while net neutrality protections were in effect. Relying on them is arbitrary and capricious.

Aggregate investment trend data. The Commission leads with the conclusion that broadband providers' aggregate capital investments declined in 2015 "for the first time since the end of the recession in 2009" and "fell again in 2016." Order ¶ 90 (JA____–JA____). Those assertions are based primarily on investment trend data collected and analyzed by USTelecom, *id.* ¶ 90 n.335–36 (JA____), as part of its arguments against net neutrality. The FCC's reliance on those data is misplaced.

First, it is far from clear that the data identify a real trend. As Free Press explained, publicly available data from publicly traded ISPs show that most ISPs

increased their spending over the same time period, Free Press Comments at 130 (JA____), and "[c]apital investments at publicly traded ISPs were 5 percent higher during the two-year period following the Commission's Open Internet vote than during the two-year period before it." *Id.* at 131 (JA____). The aggregate numbers the FCC uses also fail to recognize that investment is, by AT&T's description, "lumpy" and may not be steady year-to-year even if investment conditions are stable. *See* Letter from Free Press to FCC at 2 (filed Sept. 19, 2017) (JA____). Nor do they properly contextualize the out-sized impact of one large ISP. For example, during the relevant period, the decrease in wireless telecom investment is "almost identical to the estimated decline at AT&T's wireless segment during 2015, which AT&T directly attributed to the 2014 completion of its nationwide 4G LTE deployment." Free Press Comments at 135 (JA____). AT&T "typically accounts for nearly 30 percent of all publicly traded ISPs' capital expenditures." *Id.* at 148 (JA____). That the Commission's conclusion could be swung in a different direction based on one company's completion of a particular project underscores the problem with relying on a single aggregate investment number.

Second, the Commission fails to address explanations for changes in capital spending *that the ISPs themselves provided.* In their communications to investors, the ISPs "uniformly attributed any declines to completion of prior cyclical

upgrades." *Id.* at 131 (JA____). The Commission dismisses these statements as "selective" and "ambiguous." But they cannot be so easily ignored when the Commission identifies absolutely no contemporaneous statements from ISPs that support the Commission's finding of a reduction in ISP investment due to the 2015 Order.

Third, aggregate capital spending by ISPs is, at best, mildly informative. The Commission itself acknowledges that investment trends cannot "establish the cause of directional movements" in investment. Order ¶ 90 (JA____–JA____). Even USTelecom—a strong critic of the 2015 Order—could not bring itself to agree with the FCC's assertion that the 2015 Order is the cause of the decline it imagined, but instead merely took the position that the possibility of a causal connection warranted additional "investigation." *See* Patrick Brogan, *Broadband Investment Continues Trending Down in 2016* 1–2 (2017).[8]

Comparisons of investment before and after the 2015 Order. The Commission next credits a blog post by Hal Singer that compares investment in 2014 and 2016, the years before and after the 2015 Order. Singer adjusts that comparison by subtracting investments that were "clearly not affected by the regulatory change," including "investments in Mexico." Order ¶ 91 (JA____).

[8] *Available at* https://www.ustelecom.org/sites/default/files/documents/Broadband%20Investment%20Trending%20Down%20in%202016.pdf

Here again, the Commission puts more weight on its preferred evidence than the evidence can bear. Singer's analysis relied on simple year-on-year, 6-month period comparisons, drew only on data for a small set of companies, and made no attempt to incorporate trends over time, statistical significance, or context. IA Economic Report at 5 (JA____). Yet the Commission credits it while ignoring more sophisticated analyses in the record that *did* account for those factors, *see supra* at 17–20, and admitting that comparisons like Singer's "can only be regarded as suggestive" and "fail to control for other factors that may affect investment." Order ¶ 92 (JA____–JA____). Choosing to rely on less rigorous analysis—instead of either admitting that the data was insufficient to support its preferred conclusion or properly evaluating competing analyses—is arbitrary and capricious.

Similarly, the Commission unreasonably relies on the Free State Foundation's comparison of actual investment to "a trend extrapolated from pre-2015 data." *Id.* (JA____–JA____). The Commission recognizes that the Free State Foundation failed to control for key factors affecting investment, including the overall state of the economy. Those omissions should be no surprise: the Free State Foundation's "analysis" is just a blog post with no author, no data sources, and no statistical analysis. Nonetheless, the Commission finds it to be

"suggestive" and "consistent with other evidence" of a decline in ISP investment caused by the 2015 Order. *Id.* (JA ____–JA____).

Counterfactual analysis. The Order also relies on a Phoenix Center study that compared real-world investment levels with a "counterfactual estimate" of what investment might have been without "the threat of Title II regulation." *Id.* ¶ 95 (JA____). According to the Commission, the Phoenix Center's analysis "suggests" a causal connection between regulating net neutrality and declining ISP investment. *Id.* (JA____). This difference-in-difference estimation of net neutrality's impacts on investment, which compares changes over time between a group affected by a policy and a control group that is not, does not reasonably support the FCC's conclusion.

The Commission ignores serious concerns about the Phoenix Center paper's methodology. It has no response to criticisms that the paper "includes no control terms for the numerous confounding factors that exist (e.g. interest rates) and approaches the experiment with a theoretically incoherent counterfactual strategy that uses inappropriate control groups such as 'Plastic and Rubber Products Manufacturing' to gain insight on telecommunications infrastructure investment." IA Economic Report at 6 (JA____). Nor does it address the paper's failure to consider "any other regulations, incentives, or business cycles that may be

affecting [the] selected treatment group and controls" or any treatment year other than 2010.[9] *Id.* (JA____).

Like its embrace of other cherry-picked data points, the FCC's handling of this counterfactual analysis reveals its flawed decision-making: piling suggestion on suggestion does not add up to a reasoned conclusion. None of the tools employed in these studies can support the empirical claim that the 2015 Order caused investment to decline.

B. The Commission Unreasonably Assesses the Benefits of the 2015 Rules.

The Commission also fails to properly account for another "important aspect of the problem": the benefits of net neutrality rules to innovation and growth in online applications and services. *State Farm*, 463 U.S. at 43. While stretching the evidence concerning the 2015 Order's impact on ISP investment, *see supra* Section II.A, the Order additionally fails to appropriately consider the positive effects of net neutrality protections on non-ISP investment, including edge-provider investment. The Commission recognizes, correctly, that "there is tremendous investment occurring at the edge." Order ¶ 107 (JA____–JA____). Nonetheless, the Commission concludes that the conduct rules' benefits are "approximately zero" or "small to zero." *Id.* ¶¶ 317, 320, 323 (JA____–JA____). According to the

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[9] The paper does not even address the enactment of the 2015 Order, an important milestone for the kinds of rules it purports to analyze and key to this review. *See id.* (JA____).

Commission, all evidence about increased edge-provider investment can be discounted because (1) the record does not include "an estimate as to what would have happened in the absence of" the 2015 Order and (2) "one could argue" that edge-provider investment would have been "even higher" absent the 2015 rules. *Id.* ¶¶ 107–108 (JA____–JA____).

Here, the Commission arbitrarily applies a high standard of proof to evidence of increased edge-provider investment that it declines to apply to evidence of decreased ISP investment. Though the Commission repeatedly relies on the "suggestive" conclusions of non-causal analyses of ISP investment, *see supra* at 20–25, it dismisses similar evidence of investment in the broader internet ecosystem—including evidence of increasing investment by data processing, hosting, and related businesses—all while asserting that edge providers should have provided studies like the deeply flawed ISP investment counterfactual analyses described above.[10]

This is also problematic because the Commission ignores—without explanation—its previous conclusion that edge-provider innovation "'depends

[10] The Commission also dismisses evidence of increasing edge-provider investment after the 2015 Order because 2013 investment was even higher. Order ¶ 108 (JA____). Whatever the cause of the difference between 2013 and 2015 investment, the change cannot be attributed to the absence or presence of net neutrality rules because they were in effect in 2015 and, under the 2010 Order, in 2013 as well.

upon low barriers to innovation and entry by edge providers,' and thus restrictions on edge providers' 'ability to reach end users … reduce the rate of innovation.'" *Verizon*, 740 F.3d at 645 (quoting 2010 Order ¶ 14). As this Court previously found, that "conclusion finds ample support in the economic literature on which the Commission relied … as well as in history and the comments of several edge providers." *Id.* Whatever the merits of the Commission's new finding, it does not relieve the Commission of the requirement to provide "a more detailed justification" when contravening its previous factual findings. *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (quoting *Fox*, 556 U.S. at 515).

C. The Commission Fails to Acknowledge or Explain Its Departure from the 2015 Order's Predictions About Short-term Investment Effects.

The Order is also arbitrary and capricious because it presents a thinly substantiated investment trend as a new crisis justifying a regulatory "U-turn," even though the 2015 Order had predicted and discounted the significance of such an effect. 2015 Order ¶ 410 (JA ___); *see also USTelecom*, 825 F.3d at 707. As explained above, the Commission relies on insufficient evidence to find a decline in ISP investment. But even if there were such a decline, it would not follow, as the Commission now asserts, that the 2015 Order's "regulatory predictions have not been borne out." Order ¶¶ 157–158 (JA____–JA____).

In fact, the 2015 Order concluded that any effects on ISP investment were "likely to be short term and will dissipate over time as the marketplace

internalize[d]" the new rules; furthermore, any such effects "are far outweighed by positive effects on innovation and investment in other areas of the ecosystem that [its] core broadband policies will promote." *USTelecom*, 825 F.3d at 707 (quoting 2015 Order ¶ 410 (JA____)).

The Order offers no explanation for the discrepancy between the 2015 Order's predictive judgment and its new policy, even though the issue was raised specifically in the record. *See* CCIA Comments at 27–37 (JA____–JA____). The Commission arbitrarily and capriciously fails to address those comments.[11] *See Ass'n of Private Sector Colleges v. Duncan*, 681 F.3d 427, 441 (D.C. Cir. 2012). In doing so, the Commission also "disregard[s] facts and circumstances that underlay … the prior policy" without providing a "reasoned explanation." *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Fox*, 556 U.S. at 515–16); *see Judulang v. Holder*, 565 U.S. 42 (2011) (reviewing courts must "examin[e] the reasons for agency decisions [or] the absence of such reasons."). An agency's latitude to change policies is not boundless; it "cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate." *Fox*, 556 U.S. at 537 (Kennedy, J., concurring). The Order does exactly that.

[11] The Order only once mentions the 2015 Order's prediction in the context of the general conduct standard. *See* Order ¶ 247 (JA____–JA____).

III. THE COMMISSION IGNORES ITS AUTHORITY TO ADOPT CONDUCT RULES YET RELIES ON INVALID AUTHORITY FOR THE NARROW TRANSPARENCY RULE IT ADOPTED.

The Commission's third and final reason for eliminating the conduct rules fares no better. According to the Commission, the conduct rules have to be repealed because it has no authority to adopt them. Order ¶ 239 (JA____). That rests on a fundamental misreading of the Commission's authority. The Commission entirely disclaims authority it possesses under this Court's precedent, while exceeding its authority under the only source of authority the Order recognized—the now-repealed Section 257(c) of the Communications Act.

A. The Commission Has Authority to Regulate ISP Conduct.

The 2017 Order claims that the Commission lacks authority to adopt net neutrality rules regulating ISP conduct. *See id.* (stating that "the record does not identify any legal authority to adopt conduct rules for all ISPs.") (JA____). Although the current Commission might not *want* authority for such rules, it cannot rationally jettison the rules for *lack* of such authority; sufficient authority exists. In *USTelecom*, this Court affirmed the Commission's authority to adopt rules regulating ISP conduct under Title II of the Communications Act. 825 F.3d at 689. In addition, two appellate courts in three different cases have upheld Section 706 as a substantive source of authority. *See id.* at 734–35; *Verizon*, 740 F.3d at 637; *In re FCC 11-161*, 753 F.3d 1015, 1053 (10th Cir. 2014). This Court

has specifically held that net neutrality rules fall within the scope of Section 706. *See Verizon*, 740 F.3d at 643; *USTelecom*, 825 F.3d at 734. The Commission's assertion that it lacks authority to regulate ISP conduct thus cannot withstand review. That alone requires a remand to the agency.[12]

B. The FCC Erroneously Relies on Section 257 for the Pared-Down Transparency Rule.

The Commission's assessment of its own authority is also fatally defective in a second respect. After disclaiming all other sources of authority, the Commission relies on a single statutory provision, Section 257, to adopt the transparency rule. Order ¶ 232 (JA____–JA____). That transparency requirement is the lynchpin of the 2017 Order; without it, the FCC could not have relied on the possibility of consumer switching in response to public disclosure of unwanted ISP policies, or of FTC enforcement against ISPs for misrepresenting network practices. *See id.* ¶¶ 142, 150, 153, 244 (JA____, JA____, JA____, JA____). But the Commission's adoption of that relaxed transparency rule is itself unlawful for several reasons. Section 257—by its own terms—is not an independent source of rulemaking authority. Even if it were, the Commission failed to provide the

[12] In their brief, the non-government petitioners argue in detail that the Commission erred by disclaiming these sources of authority. Non-Gov't Pet. Br. at 31, 47–50.

requisite notice of its intent to rely on Section 257. And, in any event, Section 257(c), on which the Commission relies, has since been repealed by Congress.

1. Section 257 Affords the Commission No Independent Rulemaking Authority.

To determine whether an agency's interpretation of an ambiguous statutory provision is reasonable, courts "employ all the tools of statutory interpretation, including 'text, structure, purpose, and legislative history.'" *Loving v. IRS*, 742 F.3d 1013, 1016 (D.C. Cir. 2014) (citing *Chevron v. NRDC*, 467 U.S. 837 (1984)). "No matter how it is framed, the question … is always, simply, whether the agency has stayed within the bounds of its statutory authority." *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013).

The Commission's interpretation of Section 257 as the source of authority for the transparency rule exceeds those bounds. Adopted in 1996, Section 257(a) authorized the Commission to conduct a proceeding "for the purpose of identifying and eliminating, by regulations pursuant to its authority under this chapter (*other than this section*), market entry barriers for entrepreneurs and other small businesses" in certain markets. 47 U.S.C. § 257(a) (emphasis added). Section 257(c) imposed an ongoing requirement to review and report to Congress on such barriers every three years. *Id.* § 257(c) (repealed 2018).

On its face, Section 257 merely imposed a congressional reporting requirement. The text not only failed to provide any basis for a transparency rule,

but also explicitly stated that it provided no rulemaking authority beyond that granted elsewhere in the statute.

The Order nevertheless claims that Section 257's congressional reporting requirement affords the Commission "direct authority" to promulgate the transparency rule. Order ¶ 232 & n.847 (JA____). Specifically, the Commission "construe[s] the statutory mandate to 'identify' the presence of market barriers" to "implicitly empower[] the Commission to require disclosures" by regulation. *Id.* (JA____). The Commission further claims authority to adopt the rule to "address" a lack of disclosure that "could constitute barriers within the scope of Section 257(a) in the future." *Id.* ¶ 233 (JA____–JA____). But Section 257 granted no such authority and actually barred the Commission from relying on this section to adopt any regulations.

Section 257 unambiguously afforded no rulemaking authority. The Order suggests that Congress did not "specify precisely how the Commission should obtain and analyze information for purposes of its reports to Congress." *Id.* ¶ 232 n.847 (JA____). That may be true. But Congress spoke precisely to what the Commission *could not* do—regulate pursuant to Section 257. Rather, with respect to the FCC's Section 257 obligations, Congress expressly directed the Commission to regulate pursuant to authority elsewhere in the Act.

The history, purpose, and structure of Section 257 are consistent with this plain reading. Congress intended Section 257 as a reporting requirement, not a source of rulemaking authority.[13] And the purpose of these reports was to promote the policies found *elsewhere in the Act*. 47 U.S.C. § 257(b). The Commission itself understood that Section 257(c) was directly tied to the language in Section 257(a). *See* Order ¶¶ 232–233 (JA____–JA____). Consistent with Section 257's heading "Market entry barriers proceeding," Section 257(a) expressly directed the Commission to conduct a proceeding to identify and eliminate market entry barriers; it did not direct the Commission to promulgate Section 257 regulations. Section 257(c) did not remove Section 257(a)'s restriction. Indeed, since its first Section 257 report in 1997, the FCC has always conducted a proceeding—not issued regulations—to fulfill this statutory mandate.

In a footnote, the Commission also cites its general rulemaking provisions, Sections 4, 201(b), and 303(r), suggesting that it has ancillary authority for the transparency rule. *Id.* ¶ 232 n.4 (JA____). Under *Comcast v. FCC*, the Commission's exercise of such authority must be reasonably ancillary to the

[13] As Representative Walden, Chair of the Communications and Technology Subcommittee of the House Energy and Commerce Committee, explained, "[r]egulating otherwise unregulated information services is not reasonably ancillary to the section 257 obligation to issue reports on barriers to the provision of information services." H.R. Res. 200, 112th Cong., 157 Cong. Rec. H2303–05 (2011).

Commission's effective performance of a statutory mandate in an expressly identified provision of the Act. 600 F.3d 642 (D.C. Cir. 2010). Having disclaimed authority under all other provisions of the Act, the Commission identifies no statutory mandate other than Section 257.[14] And, again, Section 257 provided no authority to adopt regulations. *See* 47 U.S.C. 257(a).

The Commission cannot invoke its general ancillary authority to evade Section 257's express textual limit. "It is one thing for the FCC to invoke its ancillary authority in furtherance of express congressional directives. But it is quite another when the FCC invokes its ancillary jurisdiction to override Congress's clearly expressed will." *EchoStar Satellite v. FCC*, 704 F.3d 992, 1000 (D.C. Cir. 2013).

2. Congress Subsequently Repealed Section 257(c).

Whatever Section 257(c) used to mean, it is no longer a source of authority to do anything. Congress has since repealed Section 257(c), removing the

[14] While the Commission looked to Section 257 in the 2010 and 2015 Orders, never before has it relied on Section 257—in and of itself—as a source of ancillary (let alone direct) regulatory authority over entities for which it has otherwise disclaimed authority to regulate. Nor has this Court previously addressed the issue. While both *Comcast* and *Verizon* referenced Section 257 in dicta, in both cases, the Commission had relied on multiple sources of authority. Neither decision addressed whether Section 257 *alone* affords the Commission rulemaking authority. In *Comcast*, the court expressed that disclosure requirements on "*regulated entities*" could be ancillary to Section 257 authority. *600 F.3d* at 659 (emphasis added). Under the 2017 Order, however, ISPs are not "regulated entities" other than under Section 257 itself.

transparency rule's only purported statutory basis. Congress did so in March 2018, before the Order became effective, as part of legislation consolidating several congressional reporting requirements and expressly repealing Section 257(c). H.R. 4986, 115th Cong. §§ 401, 402(f) (2018) (codified at 47 U.S.C. § 163) ("RAY BAUM'S Act"). Because Section 257(c) has been repealed, "the regulations based on that statute automatically lose their vitality." *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1575 (Fed. Cir. 1996); *Air Transport Ass'n of Am. v. Reno*, 80 F.3d 477, 481 (D.C. Cir. 1996).

In the new law, Congress rescinded Section 257(c), but retained Sections 257(a) and (b). It directed the FCC to consider market barriers for small businesses and entrepreneurs in accordance with Section 257(b) in "assess[ing]" the state of competition and entry barriers in the consolidated congressional report. 47 U.S.C. § 163(b)(3), (d)(3). While this may replace authority for Section 257(c)'s congressional report, it nowhere authorizes the transparency rule. At a minimum, the Commission must interpret this new statutory text in accordance with APA notice and comment requirements. It has done no such thing. And even if it had, any construction of the new provision as a source of rulemaking authority would be unreasonable. Nothing about the new statute suggests any change to the scope of the Commission's prior authority. Although the new provision includes a savings clause providing that "[n]othing in this title … shall be construed to

expand or contract" Commission authority, RAY BAUM'S Act § 403, that means only that the Commission continues to have a duty to report to Congress on market entry barriers and continues to have no authority to adopt transparency rules.

3. The Commission Failed to Provide Notice of Its Intent to Rely Solely on Section 257.

Even if Section 257 had provided rulemaking authority, the Commission failed to provide notice of its decision to rely on it as the authority for net neutrality rules. The APA is clear: adequate notice must include "reference to the legal authority under which the rule is proposed." 5 U.S.C. § 553(b)(2). That reference must be precise enough to apprise interested parties of the statutory section on which the agency is basing its legal authority. *See Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 900 (D.C. Cir. 1978) (finding that, for adequate notice, the agency must specify the statutory sections for its legal authority).

Here, the Commission claims that it met this requirement by asking for "comment on 'any other sources of independent legal authority we might use to support such rules,' including "the Communications Act authority cited by the Commission in its [2010] Order." Order ¶ 232 n.843 (JA____). But the NPRM never mentions or even cites Section 257. NPRM ¶¶ 101–102 (JA____–JA____). Mere reference to "any other sources of independent legal authority" is too vague to inform interested parties that the FCC may adopt Section 257 as a sole source of

authority. *Id.* ¶ 103 (JA____); *see Shell Oil v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991) (observing that "ambiguous comments and weak signals from the agency gave petitioners no [adequate] opportunity to anticipate and criticize the rules or to offer alternatives"). The NPRM cited particular paragraphs of the 2010 Order, but *specifically excluded the only paragraph discussing Section 257*. *See* NPRM ¶ 102 & n.221 (citing 2010 Order ¶¶ 124–135, 137) (JA____–JA____); 2010 Order ¶ 136 (discussing Section 257). If anything, this falsely conveyed that the FCC would *not* rely on Section 257.

Given the Commission's ultimate decision to rely on Section 257 as the *only* source of authority, this notice failure was not harmless. Deficient notice is harmless only "if the challengers had actual notice of the final rule … or if they cannot show prejudice in the form of arguments they would have presented to the agency if given a chance." *USTelecom*, 825 F.3d at 725 (citations omitted). Neither is true here.

Out of the millions of comments, the handful that discussed Section 257 largely did so in conjunction with other sources of authority. *See, e.g.*, Comments of the Entertainment Software Association at 14–17 (discussing myriad sources of authority, including Section 257, as "additional information collection authority that provides support for the transparency rule") (JA____). Such comments cannot establish actual notice that the Commission might adopt Section 257 as the *only*

source of authority for net neutrality rules because there was no indication that the Commission was "considering adoption of that proposal." *USTelecom*, 825 F.3d at 725–26.

Further, the NPRM's failure to cite Section 257 prejudiced parties by deterring them from explaining why Section 257 cannot function as the sole source of authority for the transparency rule. *See Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 202 (D.C. Cir. 2007); *see also supra* Section III.B.1–2. That explains why the Chairman's draft Order, released with just 14 days to comment before the FCC vote, could state that "there are no objections in the record to relying on [Section 257 as a] source of authority" for the transparency rule. *Restoring Internet Freedom*, Draft Declaratory Ruling, Report and Order, and Order, FCC-CIRC1712-04, WC Docket No. 17-108, ¶ 229 (rel. Nov. 22, 2017) (JA____). Far from curing the defective notice, this public draft alerted parties—for the first time, at the eleventh hour, and only after the Commission had formulated its intended conclusions—that the Commission proposed to rely on Section 257 as its rulemaking authority. The Commission's inadequate notice deprived commenters of the opportunity to raise such objections fully, violating the APA.

4. Elimination of the Conduct Rules Cannot Be Upheld Without the Transparency Rule.

The Commission's decision to rescind all of the conduct rules cannot be upheld absent the transparency rule. Because invalidation of the transparency rule thoroughly undermines the Commission's rationale for eliminating the conduct rules, that decision must be vacated as arbitrary and capricious.

It cannot be saved by severing the transparency rule. Severability requires both (1) agency intent *and* (2) workability—that "the remainder of the regulation could function sensibly without the stricken provision." *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001). The Commission's severability clause, *see* Order ¶ 354 (JA____), is not dispositive. *See Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1394 (D.C. Cir. 1990) (quoting *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968) ("[D]etermination of severability will rarely turn on the presence or absence of [a severability clause].")).

Neither severability prong is met here. First, notwithstanding the severability clause in the Order, direct evidence reveals that the Commission did not intend for the transparency rule to be severable. The Order repeatedly points to

that rule as the basis for its repeal of all the other 2015 rules.[15] *See* Order ¶¶ 142, 150, 153, 208, 239, 244, 245, 253, 263, 264, 323 (JA____, JA____, JA____, JA____, JA____, JA____, JA____, JA____, JA____, JA____). Most tellingly, the FCC deliberately delayed the effective date of the entire Order until the transparency rule became effective following Office of Management and Budget approval. *Id.* ¶ 354 (JA____). At a minimum, this creates "substantial doubt" the FCC would have gone forward absent the transparency rule. *See ACA Int'l v. FCC*, 885 F.3d 687, 708 (D.C. Cir. 2018).

Second, severing the transparency rule would make the Order unworkable. The Commission anchors its repeal of the conduct rules on the ground "that preexisting federal protections—*alongside* the transparency rule … are not only sufficient to protect Internet freedom, but will do so more effectively and at lower social cost than [the repealed] conduct rules." Order ¶ 208 (JA____–JA____) (emphasis added); *see also id.* ¶¶ 263–264 (JA____–JA____). Repeatedly, the Commission points to the transparency rule to address the concerns raised in the

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[15] *Verizon*, which severed and upheld the 2010 transparency rule, is distinguishable because of the fundamentally different structure of the 2010 Order. *See* 740 F.3d at 659. Under the 2010 Order, if one conduct rule fell, the one(s) that remain "would still afford consumers and edge providers significant protection, and thus could independently advance the goals of the open Internet." 2015 Order ¶ 575 (JA____) (analogizing to the 2010 Order). In contrast, the Order here uses the transparency rule as the basis for repealing all other protections.

record about eliminating all other rules, *id.* ¶¶ 244, 253, 264 (JA____, JA____, JA____), and claims that it would "prevent the harms that [the conduct rules] were intended to thwart." *Id.* ¶¶ 263, 323 (JA____, JA____). Without the transparency rule, which cannot be sustained, the Order's own calculus falls short.

CONCLUSION

For the foregoing reasons, the Petitions for Review should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, E. Austin Bonner, hereby certify that the foregoing brief contains 9,065 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman.

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August 27, 2018

CERTIFICATE OF SERVICE

I, E. Austin Bonner, hereby certify that on this 27th day of August 2018 I caused the foregoing brief to be filed via the Court's CM/ECF system, which caused that document to be served on all parties or their counsel.

/s/ E. Austin Bonner_
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August 27, 2018