IN THE
Supreme Court of the United States

AMERICAN CABLE ASSOCIATION,
AND
CTIA–THE WIRELESS ASSOCIATION,
AND
UNITED STATES TELECOM ASSOCIATION
AND CENTURYLINK, INC.,
Petitioners,
v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONERS USTELECOM, CTIA, AND ACA

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STATEMENTS PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, petitioners American Cable Association, CTIA–The Wireless Association, and United States Telecom Association state as follows:

Petitioners' Statements pursuant to Rule 29.6 were set forth at page iii of the petition for a writ of certiorari in No. 17-500, page iv of the petition for a writ of certiorari in No. 17-501, and page iv of the petition for a writ of certiorari in No. 17-504, and there are no amendments to those Statements.

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GLOSSARY

1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56
2015 Order	Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015)
2018 Order	Declaratory Ruling, Report and Order, and Order, *Restoring Internet Freedom*, 33 FCC Rcd 311 (2018)
2018 Wireless Infrastructure Order	Second Report and Order, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, FCC 18-30 (rel. Mar. 20, 2018)
FCC	Federal Communications Commission

The United States and the FCC correctly urge this Court to vacate the D.C. Circuit's judgment and remand for that court to dismiss the petitions for review of the *2015 Order*[1] as moot. Vacatur of the lower court's decision is this Court's standard practice when a case becomes moot before the Court can review it, whether or not the Court has already granted certiorari. By adopting the *2018 Order*, the FCC superseded the *2015 Order* in every respect relevant to petitioners' challenges. As a result, no justiciable controversy remains, and vacatur is appropriate.

Equitable principles favor vacatur as well. It was the action of the FCC, which prevailed below, that deprived petitioners of their opportunity to have this Court rule on their challenges. Petitioners believe the FCC acted lawfully in superseding the *2015 Order*, and they endorsed the return to the pre-*2015 Order* approach in FCC administrative proceedings. But petitioners had no control over either the FCC's decision to reverse course on the *2015 Order* or the Solicitor General's decision to seek extensions so that the Court need not waste time reviewing the merits of a soon-to-be-voided order. Petitioners lost the opportunity to challenge the decision below because of those actions, not because they settled the case with the FCC or otherwise forfeited review.

Vacatur is especially appropriate because various parties challenging the *2018 Order*, including the private party respondents here, are currently attempting to use the D.C. Circuit's decision upholding the *2015 Order* to support their challenges to the *2018 Order*. As that fact demonstrates, absent action by this Court, the D.C. Circuit's unreviewed and now unreviewable

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[1] See Glossary for full citations of orders and definitions of terms.

decision upholding the *2015 Order* threatens to have ongoing consequences in the litigation of highly significant legal and policy issues.

ARGUMENT

I. THIS COURT'S ESTABLISHED PRACTICE IS TO VACATE DECISIONS IN CASES THAT BECOME MOOT BEFORE THE COURT CAN GRANT CERTIORARI

This Court ordinarily vacates the decision of a court of appeals when the case becomes moot before the Court can dispose of it. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Doing so "clears the way for future relitigation of the issues" and eliminates any effect of "a judgment, review of which was prevented through happenstance." *Id.* at 40.

"The equitable remedy of vacatur ensures that 'those who have been prevented from obtaining the review to which they are entitled [are] not . . . treated as if there had been a review.'" *Camreta v. Greene*, 563 U.S. 692, 712 (2011) (quoting *Munsingwear*, 340 U.S. at 39) (alterations in *Camreta*). Vacatur also prevents the party whose unilateral action has mooted the case from "retain[ing] the benefit of that favorable judgment." *Azar v. Garza*, 138 S. Ct. 1790, 1793 (2018) (per curiam); *see also* Gov't Br. 15 (recognizing vacatur is proper when a respondent's voluntary, unilateral action moots the case). In this regard, the Court "also take[s] account of the public interest," which generally "is best served by granting relief when the demands of 'ordinary procedure' cannot be honored." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26-27 (1994) (quoting *Munsingwear*, 340 U.S. at 41).

II. THIS CASE IS MOOT AND WARRANTS VACATUR

The certiorari petitions in this case sought review of the D.C. Circuit's decision upholding the FCC's *2015 Order* and the FCC's implementing regulations. After the petitions were filed, the FCC adopted the *2018 Order*. That order superseded the relevant parts of the *2015 Order* and repealed the regulations that petitioners had challenged below. All respondents agree that the case is therefore moot. *See* Gov't Br. 14; Public Knowledge Br. 2, 7; Free Press Br. 14.[2]

Under this Court's established practice, that mootness warrants vacatur to ensure that petitioners here, which diligently sought review, are not bound by a now-unreviewable decision. *See*, *e.g.*, *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 974 (1998) (vacating court of appeals decision where controversy was mooted by agency's revocation of permit).[3] As the government explains in its brief, the FCC made the unilateral decision to adopt the *2018 Order*, which superseded every relevant aspect of the *2015 Order*. *See* Gov't Br. 12. The *2015 Order* no longer has an effect on any petitioner (or, indeed, on

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[2] "[T]he 'mere possibility' that an agency might rescind amendments to its actions or regulations does not enliven a moot controversy." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1117 (10th Cir. 2010); *see also Quincy Oil, Inc. v. Federal Energy Admin.*, 620 F.2d 890, 895 (Temp. Emer. Ct. App. 1980) ("[t]he fact that [the agency] has the power to change its policy and could abandon its present position poses a possibility of recurrence too speculative and remote").

[3] *U.S. Bancorp* did not "repudiate" this rule, as respondents argue (Public Knowledge Br. 8, 10-13). It merely clarified that this "normal rule" is "not exceptionless." *Camreta*, 563 U.S. at 698, 712-13. As discussed in text, none of those exceptions applies here.

anyone at all). The relief sought below — invalidating the *2015 Order* — is thus no longer meaningful.

Federal courts consistently recognize that when, as here, a public body reconsiders its position after prevailing in court, vacatur is appropriate. *See*, *e.g.*, *Hall v. CIA*, 437 F.3d 94, 99 (D.C. Cir. 2006) (vacatur appropriate where agency released documents for free after prevailing on fee-payment issue below); *United States v. Jenks*, 129 F.3d 1348, 1351 (10th Cir. 1997) (vacatur appropriate where government granted defendant easements after prevailing on property rights issue below).[4]

Contrary to respondents' contention (Public Knowledge Br. 10-13), this case does not fall within the *U.S. Bancorp* exception for cases where mootness results from settlement. Petitioners consistently sought review of the decision below. They had no control over the FCC's ultimate decision — or the government's reasonable decision to seek extensions so that the Court would not be asked to review the merits of a decision that would imminently be superseded. Unlike in *U.S. Bancorp*, where settlement gave the petitioner "equivalent responsibility for the

[4] Respondents Public Knowledge *et al.* are also incorrect to suggest (at 14 n.10) that the Court needs to decide whether the actions of the FCC are attributable to the Department of Justice litigating in the name of the United States. Here, the FCC, whose action mooted the case, is itself a respondent. It would thus be irrelevant even if this Court were bound by the alleged "implicit" reasoning of *Munsingwear* that agency-caused mootness is not attributable to the "United States" as a litigant (*id.*) — which it is not, because the Court never considered the issue. Further, even if the *2018 Order* were not attributed to either the United States or the FCC, that order would still constitute "happenstance," *Munsingwear*, 340 U.S. at 40, and *Munsingwear* vacatur would still be appropriate. *See U.S. Bancorp*, 513 U.S. at 25.

mootness," 513 U.S. at 26, this case became moot as a result of the "unilateral action of the party who prevailed below," *id.* at 25.

Nor is there merit to the Public Knowledge respondents' suggestion that petitioners' consent to the Solicitor General's extension requests is comparable to a settlement that would preclude vacatur under *U.S. Bancorp*. Such consent is a professional courtesy and is *not* required for an extension request — as those respondents concede in a footnote. *See* Public Knowledge Br. 12 n.9. Regardless, petitioners' consent to extension requests did not cause the case to become moot; the FCC's *2018 Order* did.

Remarkably, the Public Knowledge respondents argue (at 21) that the government's brief did "not identify anything in the decision [below] . . . that prejudices its defense of" the *2018 Order*. But they ignore the fact that the government filed weeks *before* those respondents filed their brief in the D.C. Circuit challenging the *2018 Order*. That brief argues repeatedly that the FCC's decisions and reasoning in the *2018 Order* have "already been rejected in *USTA*." Joint Br. for Pet'rs Mozilla Corp. et al. at 23, 26, 33, 79, *Mozilla Corp. v. FCC*, No. 18-1051 (D.C. Cir. filed Aug. 20, 2018). Whatever the merits of those assertions — and petitioners here believe they lack merit and misread the D.C. Circuit's decision — respondents are seeking to benefit by preserving a decision that they agree became moot before this Court could review it.

The FCC also should not be permitted to benefit from the precedential effect of the decision below, in the event that the agency in a future rulemaking were once again to reverse its longstanding policies and reclassify broadband Internet access as a telecommunications service. That possibility is not merely

hypothetical; the composition of the FCC can change with administrations. Preventing a party whose unilateral action moots an appeal from retaining the benefit of the decision below is a central purpose of *Munsingwear* vacatur. *See Azar*, 138 S. Ct. at 1793; *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-72 (1997).

III. THE IMPORTANCE OF THE QUESTIONS PRESENTED AND THE NUMEROUS ERRORS IN THE D.C. CIRCUIT'S OPINION UNDERSCORE THE NEED FOR VACATUR

This Court has never held that vacatur of a case that becomes moot while petitions are pending is proper only if the Court would otherwise have granted review. *But see* Public Knowledge Br. 16-17. The Court need not reach that issue, however, as the petitions here presented questions of exceptional national importance and as to which the court of appeals made fundamental errors.

The issues in this case are exceptionally important. The Internet is ubiquitous in American life, *see Packingham v. North Carolina*, 137 S. Ct. 1730, 1735-36 (2017), and is a critical link in the national and international economy.[5] The rapid growth of mass-market broadband Internet access has been enabled by the light-touch regulatory scheme Congress intended and the FCC restored in the *2018 Order*. That light-touch regime encouraged broadband providers to invest more than a trillion dollars in infrastructure and to continue

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[5] *See*, *e.g.*, Richard Adler, Internet Ass'n, *Towards A Better Understanding Of Internet Economics* 10-11 (June 19, 2018) (surveying estimates of value of Internet to global economy, including $2.8 trillion in the value of cross-border data flows).

investing tens of billions of dollars each year (though investment decreased after the *2015 Order*).[6]

The FCC's *2015 Order* represented a sweeping assertion of agency authority, imposing public-utility, common-carrier regulation on a critical component of the national economy. Heavy-handed common-carrier regulation, intended for legacy monopolies, threatens the hundreds of billions of dollars in annual output by broadband providers[7] and the millions of jobs that depend on them.[8] It imposes especially heavy burdens on smaller broadband providers, including rural cable providers that may serve as few as 50 customers.[9] Common-carrier classification hinders providers' ability to innovate and to extend high-speed Internet access to more Americans.

Moreover, such regulation frustrates the 1996 Act's purposes. Congress made clear that that landmark statute was intended "to preserve the vibrant and competitive free market that presently exists for the

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[6] *See* Patrick Brogan, USTelecom, *Broadband Investment Continues Trending Down in 2016* (Oct. 31, 2017) (noting that investment decreased in both 2015 and 2016); *see also* Twentieth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 32 FCC Rcd 8968, ¶ 68 (2017) (noting that wireless providers alone invested about $200 billion in the prior seven years).

[7] *See* Bureau of Economic Analysis, U.S. Dep't of Commerce, *Gross Output by Industry* (Nov. 3, 2016) (conservatively estimating 2016 annual gross output of fixed and mobile broadband providers at $645 billion).

[8] *See* Second Report and Order, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, FCC 18-30, ¶ 2 (rel. Mar. 20, 2018) ("*2018 Wireless Infrastructure Order*") (estimating that the wireless industry alone supports about 4.6 million jobs).

[9] *See* ACA Pet. 14 (No. 17-500).

Internet and other interactive computer services, unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(2), and to encourage the deployment of advanced telecommunications capabilities by "remov[ing] barriers to infrastructure investment," *id.* § 1302(a).

The petitions here thus presented a central and recurring question of FCC authority: Whether the FCC could, without explicit statutory authorization and contrary to its own prior decisions, regulate this important aspect of our economy as a public-utility service subject to common-carrier regulation — in statutory terms, whether the agency could reclassify broadband Internet access from an "information service" to a "telecommunications service," *id.* § 153(24), (53); *see National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975-76 (2005). As the petitions explained, Congress deliberately crafted the 1996 Act to preserve the existing structure, leaving "information services" like broadband Internet access free from Title II regulation. *See* ACA Pet. 16-18 (No. 17-500); AT&T Pet. 11-21 (No. 17-499); USTA Pet. 28-30 (No. 17-504). The FCC wrongly contravened that congressional determination.

The D.C. Circuit's decision, moreover, is based on a serious misreading of this Court's decision in *Brand X*. In that case, all nine Justices took it as given that broadband Internet access is an information service. *See 2015 Order* (Dissenting Statement of Commissioner Ajit Pai) (App. 1030a-1032a). The only point of disagreement was whether cable companies were "providing a 'telecommunications service' *in addition* to [that] 'information service.'" *Brand X*, 545 U.S. at 986 (emphasis added). No part of the *Brand X* majority opinion or dissent justified the FCC's determination in the *2015 Order* that broadband Internet access *in its entirety* is a telecommunications service.

The FCC's novel and unjustified reclassification of mobile broadband Internet access to a "commercial mobile service" likewise presented issues of major national importance warranting the Court's review. *See* 47 U.S.C. § 332(c). That reclassification imposed common-carrier regulation on the most rapidly growing means to access the Internet — mobile broadband.[10] Mobile broadband speeds have increased dramatically in recent years, allowing for "more and more sophisticated" applications and greater smartphone utility.[11] The deployment of 5G wireless networks will only accelerate those trends.[12]

Departing from the FCC's and Congress's long-standing recognition that mobile broadband is a *private* mobile service immune from common-carrier regulation, the *2015 Order* deemed it a commercial mobile service, just like mobile *voice* service. To be a "commercial mobile service," however, a service must be "interconnected with the public switched network." 47 U.S.C. § 332(d)(2). The FCC has always defined (and Congress has always understood, *see id.* § 1422(b)(1)(B)(ii)) the public switched network to mean the public *telephone* network, and interconnected to mean that *every user can communicate with every other user*. But to effect its reclassification, the agency redefined "the public switched network" to include not just the public telephone network, but the entire Internet as well. *See 2015 Order* ¶ 396 (App.

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[10] *See* Patrick Brogan, *USTelecom Industry Metrics and Trends 2018*, at 16 (Mar. 1, 2018).

[11] 2018 Broadband Deployment Report, *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 33 FCC Rcd 1660, ¶ 16 (2018).

[12] *See generally 2018 Wireless Infrastructure Order*.

618a-619a). The FCC's ability to "define" the public switched network cannot be construed to allow it, as Free Press argues (at 28-29), to stitch together entirely different networks, *ipse dixit*.

The FCC further redefined the term "interconnected," *see* 47 C.F.R. § 20.3, in such a way that the Internet and the traditional telephone network could be treated as a single network, even though all users of one network cannot communicate with all users of the other. *See* CTIA Pet. 14-15 (No. 17-501). Alternatively, the FCC found the networks are "interconnected" because mobile broadband users, even without using mobile voice service, can "effectively" communicate with telephone users by employing VoIP software together with third-party arrangements that bridge the gap between the two. *See 2015 Order* ¶¶ 400-401 (App. 626a-628a).

The D.C. Circuit affirmed the FCC's reclassification, finding that the agency had permissibly redefined "the public switched network." App. 60a-63a. The court also asserted that the FCC's redefinition of "interconnected" was "immaterial[]," because mobile broadband users could employ third-party VoIP applications to reach all users of the new public switched network, including traditional telephone users. App. 71a. The D.C. Circuit reached that conclusion even though the FCC itself repeatedly declined to defend this "alternative" argument in that court and for good reason. It makes no sense to allow a user's technology, such as VoIP software, to transform mobile broadband from a service immune from common-carrier regulation into a common-carrier service — especially when many common mobile devices, such as e-readers, cannot even download VoIP software.

Equally important, in deferring to all of the FCC's attempts to arrogate new authority to itself, the

D.C. Circuit erred as to an important and recurring question of administrative law. This Court has consistently held that no deference is due to agency assertions of "jurisdiction to regulate an industry constituting a significant portion of the American economy," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000), unless Congress "speak[s] clearly" in assigning such authority to an agency, *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014). Like the rules at issue in those cases, the *2015 Order* "qualifies as a major rule" requiring *clear* congressional authorization "under any conceivable test." App. 1442a (Kavanaugh, J., dissenting from the denial of rehearing en banc). Whatever the exact contours of the major-rules doctrine,[13] this Court has repeatedly cautioned lower courts that the judiciary must be skeptical of agency claims to vast new regulatory powers.

The importance of these issues and of the D.C. Circuit's errors demonstrates why this case warrants vacatur. Petitioners should not be "forced to acquiesce in the judgment," *U.S. Bancorp*, 513 U.S. at 25, because the FCC — after prevailing below — took action that mooted any challenge to the validity of the *2015 Order*. The decision below, "unreviewable because of mootness," should not be allowed to "spawn[] any legal consequences." *Munsingwear*, 340 U.S. at 41.

CONCLUSION

The petitions for a writ of certiorari should be granted, the decision below vacated, and the case remanded for the court of appeals to dismiss the petitions for review as moot.

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[13] *See* Josh Blackman, *Gridlock*, 130 Harv. L. Rev. 241, 261-65 (2016).

Respectfully submitted,

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