No. 17-____

In the

Supreme Court of the United States

DANIEL BERNINGER,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional
Jurisprudence
c/o Fowler School of Law
Chapman University
One University Drive
Orange, CA 92866
(877) 855-3330
caso@chapman.edu

Counsel for Petitioner

QUESTIONS PRESENTED

In *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), the Federal Communications Commission argued that under the Communications Act of 1934, as amended by the Telecommunications Act of 1996, cable companies that sold broadband Internet service provided "information" services, rather than "telecommunications" services, and were thus not subject to regulation as "common carriers." This Court upheld that interpretation as a reasonable interpretation of the Act. *Id*. at 997. The Commission now argues that the Act should be reinterpreted to mean precisely the opposite and to classify broadband Internet access service as a "telecommunications" rather than an "information" service, thus classifying broadband Internet providers as common carriers subject to extensive regulation. This reinterpretation of "a long-extant statute" allowed the Commission to discover "an unheralded power to regulate 'a significant portion of the American economy'" (*Utility Air Group v. Environmental Protection Agency*, 134 S. Ct 2427, 2444 (2014)). This unheralded power includes the power of gate-keeper for new methods of communication over the Internet. The new regulations that accompany this change in status make it illegal for Internet access providers to sell petitioner the "priority access" required for a new channel of communication he has created, effectively prohibiting the creation of a new forum that would join "the 'vast democratic forums of the Internet' which this Court labeled "the most important place" for the exchange of views today (*Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017)). The questions presented are:

1. Does the Commission's assumption of gatekeeper power over new methods of communication, "in the most important place [] for the exchange of views … the 'vast democratic forums of the Internet'" (*Packingham*, 137 S. Ct. at 1735), violate the First Amendment?

2. Is the radical reinterpretation of the Act by the Commission entitled to deference under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and, if so, does that deference violate Article I, §1 of the Constitution?

3. Did the Commission have statutory authority to promulgate the Open Internet Order, vastly expanding regulation of the Internet, in light of policy enacted by Congress "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services [defined as services that provide access to the Internet], *unfettered by Federal or State regulation*" (47 U.S.C. §230(b)(2); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857 (1997))?

PARTIES

Parties below were:

Daniel Berninger
Ad Hoc Telecommunications Users Committee
Akamai Technologies, Inc.
Alamo Broadband, Inc.
American Cable Association
AT & T, Inc.
Scott Banister
Charles Giancarlo
Jeff Pulver
TechFreedom
Wendell Brown
David Frankel
CARI.net
CenturyLink
Center for Democracy & Technology
Cogent Communications
ColorofChange.org
Credo Mobile, Inc.
Demand Progress
Fight for the Future, Inc.
COMPTEL
DISH Network Corp.
Level 3 Communications, LLC
Netflix, Inc.
CTIA-The Wireless Association
Etsy, Inc.
Kickstarter, Inc.
Meetup, Inc.
Tumblr, Inc.
Union Square Ventures, LLC

Vimeo, LLC
Independent Telephone & Telecommunications Alliance
Free Press
Public Knowledge
New America's Open Technology Institute
Full Service Network
National Association of Regulatory Utility Commissioners
National Association of State Utility Consumer Advocates
NCTA – The Internet and Television Association
Sage Telecommunications LLC
Telescape Communications, Inc.
TruConnect Mobile
United States Telecom Association
Vonage Holdings Corp.
Wireless Internet Service Providers Association

Respondent in the court below was the Federal Communications Commission.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Daniel Berninger respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the District of Columbia Circuit is reported at 825 F. 3d 674 and is reproduced as Appendix[1] A, Volume I at page 1a. The denial of the petition for rehearing en banc with concurring and dissenting opinions is reported at 855 F.3d 381 and is reproduced as Appendix E, Volume III at page 1356a. The Declaratory Ruling and Order "Protecting and Promoting the Open Internet" of the Federal Communications Commission was published on April 13, 2015 at 80 Fed. Reg. 19738 and is reproduced Appendix B, Volumes I and II, beginning at page 188a.

STATEMENT OF JURISDICTION

The order of the court below denying the petition for rehearing en banc was filed on May 1, 2017. The Chief Justice granted the application to extend the time file this petition for writ of certiorari to September 28, 2017 (No. 17A54). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Petitioner participated in proceedings before the Federal Communications Commission that resulted in the Declaratory Ruling and Order "Protecting and Promoting the Open Internet" adopted February 26,

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[1] Petitioner joins in the three-volume appendix filed with the Petition for Certiorari filed by AT&T, Inc.

2015, and released March 12, 2015. Appendix B at 188a. The Order was published in the Federal Register on April 13, 2015. Petitioner filed a timely petition for review of the Commission's order on May 7, 2015, in the United States Court of Appeals for the District of Columbia Circuit. Jurisdiction in the Court of Appeals was founded on 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342(1) and 2344 and Rule 15(a) of the Federal Rules of Appellate Procedure.

PERTINENT CONSTITUTIONAL PROVISIONS

Article I, § 1 of the United States Constitution provides: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law … abridging the freedom of speech, or of the press."

The statutory provisions at issue are reproduced in Appendix F, Volume III, page 1469a.

STATEMENT OF THE CASE

As this Court noted in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the Internet is something unique. It has created an entire new medium of communication that spans the globe. *Id*. at 850. In 1981, there were approximately 300 "host computers" storing information for the Internet. By 1996, the number of host computers grew to 9.4 mil-

lion. *Id.* The former Chairman of the Federal Communications Commission predicted that in just a few short years, the Internet will consist of as many as 50 *billion* interconnected devices. *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 401 (D.C. Cir. 1017) (Brown, J., dissenting from denial of rehearing en banc). Appendix E, Volume III at 1396a (all further citations to the decision below and the opinions dissenting from the denial of rehearing en banc will be to the Appendix).

Congress recognized that the explosive growth of the Internet stemmed from a "'vibrant and competitive free market.'" *Id.* at 1121a (quoting 47 U.S.C. § 230(b)(2)). To protect this growing new mode of communication, Congress adopted a policy in 1996 of preserving that competitive free market "unfettered by Federal or State Regulation." *Id.* This congressional policy remains unchanged. There is, however, no sign of this policy to be found in the order of the Commission challenged in this petition.

Petitioner.

In *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), this Court identified the "vast democratic forums of the Internet" and "social media" as the most important places for the exchange of views today. 137 S. Ct. at 1735. Petitioner Daniel Berninger is one of the many innovative entrepreneurs that work to create these democratic forums. The Commission's Order at issue in this case, however, puts an end to this innovation, including projects that Mr. Berninger has in development.

As he noted in the declaration he filed with the Commission in these proceedings, Mr. Berninger is an "architect of new communications services" over the Internet. After leaving Bell Laboratories in the early 1990s, Mr. Berninger led a team for the National Aeronautics and Space Administration to deploy voice over internet protocol (VoIP) communications systems. He worked with others to develop the first domestic VoIP service in America as well as the first international VoIP company. More recently, he was involved with the development of the first multi-service provider high definition voice call. This development allowed the call to retain its high definition character even as it was passed between different service providers.

Mr. Berninger has been working on deploying this high definition voice feature in his new start-up company, Hello Digital. With this company, Mr. Berninger was creating a revolutionary new social media platform that would allow visitors to a website to talk to each other in real time and discuss the issues reported on that site. This new mode of communication requires "prioritization" over the broadband networks. Prioritization ensures that voice communications are delivered without jitter, latency, or packet loss that degrades the quality of the sound and destroys the user experience. The only way to ensure that prioritization is available, however, is to pay for priority status across the different information service providers. Mr. Berninger is the type of individual entrepreneur that the Commission claims it wants to protect. The Order of the Commission at issue in this case, however, outlaws "paid prioritization," and thus

outlaws new social media platforms like that under development by Mr. Berninger.[2]

Instead of allowing the Internet's competitive free market to continue "unfettered" by significant federal regulation, innovators must now seek permission from the Commission to innovate. Any request for a waiver of the rules, such as the rule outlawing paid prioritization, is subject to notice and comment proceedings before the Commission. Order, at Appendix B, Volume I at 207a n.22. The Commission has appointed itself as the licensing officer with authority to approve or reject applications for new channels of free speech.

History of Commission Attempts to Regulate the Internet.

The history of the Commission's attempts to regulate the Internet should begin with its initial decision to refrain from regulation. In *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), the Commission argued that cable broadband providers were an "information" rather than a "telecommunication" service under the Communications Act of 1934, and thus not subject to

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[2] In May of this year the Commission issued a Notice of Proposed Rulemaking to decide whether to reverse its decision classifying broadband Internet access service providers as telecommunications rather than information services. It is not known whether the Commission will adopt that rule. It is also unknown whether any new rule could be justified by the "reasoned explanation" showing the "good reasons" required by this Court for such a change. *Encino Motor Cars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016); *see National Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983).

regulation as a common-carrier. *Id*. at 973-74. This Court upheld the Commission's interpretation of the Act and viewed the contrary interpretation pushed by the respondents as "improbable." *Id*. at 996. The Commission later applied that decision to other Internet access service providers, including mobile and DSL service providers. Appendix A, Volume I at 9a.

Not too long after the decision in *Brand X*, the Commission issued an Order regulating Internet service providers' "network management practices." The Commission relied on its "ancillary" authority for these regulations. *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010). The circuit court rejected that regulation, however. The Commission argued that the regulations were ancillary to its authority under 47 U.S.C. § 230(b) where Congress set out a policy to promote technologies that allow users to control the information that they receive. *Id*. at 652. The circuit court rejected that argument because the statement of policy gave the Commission no authority.

The Commission next proposed an "Open Internet Order," relying of 47 U.S.C § 1302 (Section 706 of the Telecommunications Act of 1996). That order included "anti-blocking" and "anti-discrimination" rules governing how Internet service providers treated communications across their networks. The District of Columbia Circuit Court of Appeals upheld the Commission's reliance on section 1302, holding that it vested the Commission "with affirmative authority to

enact measures encouraging the deployment of broadband infrastructure."[3] *Verizon v. FCC*, 740 F.3d 623, 628 (DC Cir. 2014). The court struck down the rules, however, since they treated the Internet service providers as if they were common carriers. *Id.* The Commission had previously declared, however, that Internet access service providers were not subject to common carrier regulation. *Id.* This Court upheld that ruling in *Brand X*. Under the D.C. Circuit Court's ruling in Verizon, if the Commission wished to impose "open Internet" rules on Internet service providers, it would have to reverse its decision on the meaning of the Communications Act of 1934 and rule instead that those service providers were subject to common carrier regulation.

The Commission Order at Issue in this Case.

Taking its cue from the lower court's *Verizon* decision, the Commission order at issue here reclassifies broadband Internet access as a telecommunications service, subject to common carrier regulation. Order, Appendix B, Volume I at 223a. With that barrier to regulation out of the way, the Order outlaws "paid prioritization." Order, Appendix B, Volume II at 860a. The Order also bans blocking or intereference by Internet providers. In adopting this prohibition, the Commission was not reacting to any current problem. Instead, the rule was adopted in response to commenters who expressed fear that Internet service access providers might someday use paid prioritization to "skew the playing field." *Id.*, Volume I at 263a n.140.

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[3] Whether section 1302 grants the Commission authority to enact rules is discussed in section II.C., *infra*.

The Commission noted that it did retain the power to waive the rule against paid prioritization. Those requests for waiver, however, are subject to notice and comment procedure. *Id*. Volume I at 203a n. 22. The Commission described the waiver process as "narrow." *Id*. Volume I at 293a. Under the waiver rule, the applicant must prove both that the waiver will not harm the "open nature of the Internet" *and* that the waiver would provide "significant public interest benefit." *Id*. Volume I at 324a. The Commission noted that it set a "high bar" and that waivers will only be granted in "exceptional cases." *Id*. Volume I at 325a.

The Divided Panel Decision of the District of Columbia Circuit Court of Appeals.

A divided panel of the District of Columbia Circuit Court of Appeals upheld the Commission order. Appendix A, Volume 1 at 1a. Following its decision in *Verizon*, the panel ruled that the Commission had authority to enact these regulations under 47 U.S.C. § 1302. *Id*. at 2a. The panel dismissed First Amendment concerns raised by the petitioners because the Order classified Internet access service providers as "common carriers," and common carriers had limited First Amendment rights. *Id*. at 108a.

The panel also upheld the reclassification of broadband Internet service as a telecommunication service under the Act. *Id*. at 28a. The panel reasoned that since this Court ruled in *Brand X* that the Communications Act was ambiguous, the Commission was entitled to *Chevron* deference in its choice to change the classification of broadband Internet from an information service to a telecommunication service. *Id*.

The panel further noted that the Commission identified the reason for the change in position was that consumers now "perceive Internet access service both as a standalone offering and as providing telecommunications." *Id.* at 19a. Further, the Commission concluded that absent this change, it could not legally impose the regulations that it wished to enact. According to the panel, this switch in order to enable regulation "represents a perfectly 'good reason' for the Commission's change in position." *Id.* at 39a.

Judge Williams dissented from the panel decision. He thought that the switch in classification for broadband Internet service "fails for want of reasoned decisionmaking." Concurring and dissenting opinion of Williams, J., Appendix A, Volume I at 116a. Judge Williams noted that neither the Communications Act of 1934 nor the Telecommunications Act of 1996 were designed to regulate the Internet. *Id.* at 118a. This lack of fit between congressional text and agency intent left the agency with a claim of power to regulate based on a congressional policy of reducing regulation. *Id.* Judge Williams also addressed some of the arguments raised by Mr. Berninger (*id.* at 142a), and agreed with petitioner that the Commission did not have statutory authority for these rules (*id.* at 147a).

Dissents from the Denial of Rehearing En Banc.

Judges Brown and Kavanaugh dissented from the denial of rehearing en banc. Appendix E, Vollume III at 1381 (Brown), 1430 (Kavanaugh).

Judge Brown noted the deregulatory character of the Telecommunications Act of 1996. *Id.* at 1383.

This leads to the conclusion that the Commission's order lacks congressional authorization. *Id.* at 1396. Far from following Congress' goal of deregulation, the Commission's order subjects the "innovation of modern technology" to the "regulatory labyrinth smothering the old." *Id.* Judge Brown argued that regulations that impose "a 'major question' of deep economic and political significance" require clear congressional authority—something lacking here. *Id.* at 1399a. Judge Brown concluded by hoping that "there is a clearer view of the road back to a government of limited, enumerated power from One First Street in our Capital City." *Id.* at 1429.

Judge Kavanaugh similarly expressed concern that the panel failed to follow this Court's precedent that requires "clear congressional authorization for an agency's major rule." *Id.* at 1467. According the Judge Kavanaugh, the Commission's action fails that test. *Id.* at 1467-68. Judge Kavanaugh also found the Commission Order violated the First Amendment. *Id.* at 1449a. In Judge Kavanaugh's view, the Internet service access providers were no different than cable television operators considered by this Court in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997). Judge Kavanaugh rejected the Commission's argument that the *Turner Broadcasting* cases did not apply here, terming the Commission's argument as a "mystifying" "'use it or lose it theory' of First Amendment rights." *Id.* at 1454a. According to Judge Kavanaugh, because the Commission failed to show that the broadband providers

wielded market power, the regulation could not pass intermediate scrutiny. *Id.* at 1464a.

REASONS FOR GRANTING THE PETITION

I. The Commission's Order Raises Significant First Amendment Concerns Warranting Review by this Court

This case raises important issues because of the significance of the Internet for the communication of ideas. Social media platforms on the Internet are part of the "vast democratic forums" that this Court identified as the most important places for exercise of First Amendment rights today. *Packingham*, 137 S. Ct. at 1735; *see Reno*, 521 U.S. at 850. Review by this Court is appropriate when a federal agency claims new authority to regulate such an important tool for Freedom of Speech.

From its humble beginnings, the Internet has developed into a tool that has transformed the way we communicate with each other. Government agencies rely on the Internet to deliver a variety of information, including reports on campaign donations (*Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 481 (2010) (Thomas, J. dissenting)) and whether potential employees are legally eligible to work (*Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 590 (2011)). It provides voters today with "an unparalleled opportunity to engage in the campaign and election process." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1684 (2015) (Kennedy, J. dissenting). The Internet is used by Americans to organize, petition, chat, and engage in the political processes of the coun-

try. The Court should take notice when an administrative agency seeks to assert control over such an important tool of First Amendment expression.

Special concern is warranted where that administrative agency appoints itself the gate-keeper, "with broad discretion," to decide who will be permitted to create new social media platforms and under what circumstances. As noted above, the Order effectively outlaws Mr. Berninger's new social media platform. His only option for bringing that new method of communication to market is to beg permission from the Commission to allow him to pay broadband providers for prioritization across their servers. As with the speech licensing schemes struck down by this Court in the past, the Commission claims vast discretion in how it will review requests for waivers from the ban on paid prioritization and other aspects of the Order. Opinion of Williams, J., dissenting, Appendix A, Volume I at 143a; Order, Appendix B, Volume II at 876a. "Even if the issuance of [waivers] by the [Commission] is a ministerial task that is performed promptly and at no cost to the applicant, a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition." *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 166 (2002). But the Commission's consideration of waivers is not ministerial and the process of applying for a waiver is not without cost.

A. The fact that the Commission's Order covers so much speech activity justifies review in this case.

Regulations that affect a significant amount of speech activities are of special concern. *Watchtower*, 536 U.S. at 165 (2002). In *Watchtower*, this Court considered a municipal ordinance requiring a permit for door-to-door advocacy activities. *Id.* at 153. Although the petitioner in *Watchtower* was only concerned with the ability to go door-to-door to discuss religion, this Court noted that the ordinance also governed door-to-door efforts to solicit votes in political campaigns, to raise money for charitable causes, and a wide variety of other causes protected by the First Amendment. *Id.* at 165-66. It was this vast scope of protected activity that caught the Court's attention, noting that the ordinance required government permission for a vast scope of speech activity. *Id.*

The Commission Order challenged in this petition raises similar concerns. The court below simply brushed aside First Amendment concerns, noting that the Order converted Internet providers into "common carriers" and "common carriers" have significantly reduced First Amendment liberties. Appendix Volume I at 108a. The Commission Order similarly dismissed concerns of potential First Amendment claims by Internet providers. Order, Appendix B, Volume II at 822a-23a. Yet this fails to grapple with the real First Amendment problems inherent in the Order and raised by Mr. Berninger.

In its Order, the Commission has appointed itself the "mayor" of the Internet. Like the mayor in *Watchtower*, the Commission claims power to determine who

will be allowed to create new social media platforms that might require "paid prioritization" or other innovative tools. *See* opinion of Kavanaugh, J., dissenting from denial of rehearing, Appendix E, Volume III at 1455a. According to the Commission, its power to waive the new regulations is discretionary. Individuals, like petitioner here, will be required to demonstrate that their innovation "would provide some significant public interest benefit and would not harm the open nature of the Internet." Order at ¶130 in Appendix B, Volume 1 at 324a. It is not enough to prove that the innovation would not harm the "open Internet" that is the basis for the Order; Mr. Berninger would also have to hire lawyers to argue to the Commission that his new method of communication will also provide, in the eyes of the Commission, some "significant public interest benefit." *Id.* The applicant who seeks a waiver "faces a high bar." *Id.* at ¶132, Appendix B, Volume I at 325a. The Commission acknowledges that it has "broad discretion" to determine the standards for even considering a waiver to allow a new social media platform or method of communication. *Id.* at ¶19 n. 22, Appendix B, Volume I at 207a. This discretion and burden is far broader than that exercised by the Village of Stratton in the *Watchtower* case. Either element, discretion or burden, is by itself reason enough for this Court to grant review. Either element raises the danger that the Commission has usurped too much authority to regulate First Amendment activity, including the creation of new methods of communication on the Internet. The presence of both elements make the need for this Court's review even more urgent.

For his current project, Mr. Berninger seeks to purchase priority access on network servers to deliver a new platform for communications. The fact that the regulation at issue here blocks a third party—broadband Internet service providers—from selling that access does not alter the First Amendment analysis. The Order imposes the "heavy hand" of regulation on petitioner's ability to purchase the resource necessary for this new mode of communication. The Commission's "unbridled discretion" under the Order affects petitioner's First Amendment liberties. *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 813 n. 13 (1988); *see Meyer v. Grant*, 486 U.S. 414, 422-23 (1988) (prohibition on paying petition circulators interfered with First Amendment rights of petition proponents).

B. This Court's precedents demonstrate that the First Amendment protects privately owned channels of communications.

This Court has noted that government entities need not permit speech activities on all properties that they own. *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992). Nor is there a First Amendment right to compel access to private channels of communication. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). When a government agency seeks to control speech activities across private channels, however, this Court has been more skeptical. *Hurley v. Irish-American Gay Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573-75 (1995). This case raises the issue of a federal agency interfering with speech across private channels.

The Order of the Commission prohibits Mr. Berninger from creating a new method of communication unless he first applies to the Commission for a waiver. That cost alone is likely enough to kill any new modes of communication not owned by the largest corporations. Individual entrepreneurs are not likely to convince investors to finance a risky venture through the Commission's maze of red-tape.

More significant than the cost of the application process is the requirement that Mr. Berninger and other individual innovators prove to the Commission that their proposed new mode of communication provides a *significant* public benefit. This vague standard, coupled with administrative deference doctrines, grants the Commission unlimited discretion in deciding whether to grant permission for any new modes of communication. Claiming control over who speaks and how they speak over privately owned networks implicates significant First Amendment concerns. This Court has rejected much more modest schemes of government control of speakers in private communications.

One such case was *Consolidated Edison v. Public Services Commission*, 447 US 530 (1980). At issue there was whether the New York Public Services Commission could bar the utility company from including articles advocating policy positions in its billing envelopes. *Id.* at 532. The Commission justified its position with the argument that consumers benefitted only from "useful" information. *Id.* at 537. That is not much different from the Commission's claimed power in this case to only allow new modes of communication it finds provide a significant public benefit.

In both cases, a benevolent dictator claims the power to determine what types of speech and how people speak–all in service to how the Commission sees the public interest.

Just as a state commission cannot forbid a private message in a billing envelope, it cannot require such a message either. That was the ruling in *Pacific Gas & Electric Company v. Public Utilities Commission*, 475 U.S. 1 (1986). In that case, this Court considered the order of the California Public Utilities Commission that PG&E deliver the newsletter of an anti-utility advocacy group in its billing envelope. The plurality opinion noted that the state commission required the utility to use its private property to deliver the message of a third party. *Id.* at 17-18 (plurality opinion). Concurring, Justice Marshall noted that the legal effect of the order was to redefine a property right in order to enhance the speech of one group while burdening the speech of another. *Id.* at 25 (Marshall, J., concurring in the judgment). In Justice Marshall's opinion, this was something that the First Amendment did not allow. *Id.* Here, the Commission has laid claim to the technology behind the Internet, and claims the authority to decide what new modes of communication will be allowed.

A similar dynamic was involved in this Court's decision in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The Florida law involved in that case ordered newspapers to provide political candidates "equal space" to reply to the paper's criticisms of the candidate. *Id.* at 243. The Court rejected the claimed power of the state to dictate who may or may not speak in a privately-owned newspaper. *Id.* 255-

57. Even if there was only a single newspaper in a city, thus giving the publisher a monopoly position for expressing viewpoints, the First Amendment does not allow the government to control who speaks or how they speak over a privately-owned channel of communication.

That Mr. Berninger seeks to purchase the required priority access for his new communications platform "is as immaterial in this connection as is the fact that newspapers and books are sold." *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964). This Court has consistently rejected the notion that First Amendment liberties are lost simply because the speaker must pay for access. *See*, *e.g.*, *Hurley*, 515 U.S. at 570; *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975). This is true even if the parties to the transaction are motivated by financial gain. *Bigelow*, 421 U.S. at 818; *Thomas v. Collins*, 323 U.S. 516, 531 (1945).

The Commission's assumption of power to regulate the Internet raises significant First Amendment issues. Review is warranted because of the important role that the Internet plays in modern communication. When a federal agency decides to assume the role of "mayor" of the Internet and claim vast discretion on whether to issue permits for new modes of communication over the Internet, this Court should take note and review the decision to determine whether the assumption of such vast new powers interferes with First Amendment rights. As noted below, review is also necessary to determine whether Congress even authorized the assumption of this new authority.

II. Review Is Necessary to Determine Whether *Chevron* Deference Is Appropriate in Situations where the Agency Radically Reinterprets the Statute and Assumes Vast New Powers in the Face of Doubtful Congressional Authority.

The Order under review eviscerates the distinction between telecommunications or basic services and information or advanced services under the Telecommunications Act. In so doing, the Commission vastly expanded its jurisdiction so that it now controls "'a unique and wholly new medium of worldwide human communication.'" *Reno*, 521 U.S. at 850. The court below simply deferred to the Commission, citing *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

A. There is confusion amongst the circuits as to whether *Chevron* deference applies when an agency reinterprets an existing statute to confer significant new power on the agency.

In recent years, this Court has noted that *Chevron* deference is not appropriate where the agency rule under review is one that claims vast new powers. Rather than deference, this Court as expressed skepticism when "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'" *Utility Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014). The opinions dissenting from rehearing en banc referred to this skepticism as the major rules or major question doctrine. Although it is applied by other Circuit Courts of Appeals, members of the panel

majority rejected the idea that this Court applies any such scrutiny.

Judge Brown saw the issue as whether the Commission's order regulated a "'major question' of deep economic and political significance.'" Appendix E, Volume III at 1400a. If so, the agency needs more than an "implicit" authorization for the regulations. Thus, when faced with a major regulation of "deep economic and political significance," a court must interpret the statute "*de novo*" rather than defer to agency interpretation. *Id*. at 1401a.

In his opinion dissenting from denial of rehearing en banc, Judge Kavanaugh noted that the "major rules doctrine" helps to maintain the separation of powers. Appendix E, Volume III at 1430a. Instead of deferring to agency interpretations, this doctrine, according to Judge Kavanaugh, requires a clear indication for Congress that the agency had the power to undertake decisions of "vast economic and political significance." *Id*. (quoting *Utility Air Regulatory Group*, 134 S. Ct. at 2444.) The question for Judge Kavanaugh was whether Congress clearly authorized the "net neutrality rules" adopted by the Commission. As a means of preserving separation of powers, the major rules doctrine "*prevents* an agency from relying on statutory ambiguity to issue *major* rules." *Id*. at 1434a.

The panel decision did not engage in this analysis. In an opinion concurring in the denial of rehearing en banc, the two-member majority of the panel decision expressed skepticism regarding the existence of such a rule. Appendix E, Volume III, at 1359a. Nonetheless, the concurring opinion insisted that the Order

met any such standard because of this Court's opinion in *Brand X*. *Id*. at 1360a. The concurring opinion does not attempt to show the type of de novo interpretation of the statute that Judge Brown demonstrates is required. Nor does it show that this Court's decision in *Brand X*, upholding the Commission's decision *not* to take over control of the Internet, has anything to do with the major rules doctrine.

The two-member majority of the panel, in failing to consider the major rules doctrine, is at odds with other circuit courts of appeals. The Tenth Circuit's recent decision in *New Mexico v. Department of Interior*, 854 F.3d 1207 (10th Cir. 2017), demonstrates how other circuits approach this issue. At *Chevron* step-one, the inquiry into whether Congress intended an administrative agency to resolve an ambiguity, the Tenth Circuit noted the major rules doctrine: "We also 'must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.'" *Id*. at 1224 (citing *F.D.A, v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

The Third Circuit also examined the doctrine briefly in *Khazin v. TD Ameritrade Holding Corp.*, 773 F. 3d 488, 494-95 (3d Cir. 2014). In that case the court considered whether the anti-arbitration provisions added to Sarbanes-Oxley and Commodity Exchange Act also applied to the whistle-blower provisions of Dodd-Frank. The court resorted to the text of the Act to reject the argument. The court noted that even had the SEC and FINRA interpreted the anti-arbitration provisions as covering the whistle-blower provisions

of Dodd-Frank, it "would not be obligated to defer" to that interpretation. *Id.* Citing *Utility Air Regulatory Group*, the court noted that agencies only had discretion under *Chevron* to resolve ambiguities "in the interstices" of statutes. *Id.* The Ninth Circuit is in accord with this approach. *Sierra Club v. E.P.A.*, 762 F.3d 971, 981 (9th Cir. 2014).

As with these cases, the real question here is whether Congress delegated to the Commission the authority to assume the vast power it now claims under the Order. This Court should grant review to resolve the apparent confusion between the circuits on this issue.

B. Applying *Chevron* deference to a radical reinterpretation of the statute after this Court upheld the prior interpretation raises issues of unlawful delegation.

A ruling that courts must defer to agencies, even when the new agency interpretation of the statute is precisely the opposite of the prior agency interpretation of the same statute, robs the congressional text of any meaning. If statutes are merely blank slates on which the agency is empowered to issue "law," then *Chevron* deference violates the nondelegation doctrine by vesting the agency with the power to "make law" unmoored from any congressionally enacted policy or law. This is a special concern here where the only explicit congressional direction on regulation of the Internet was a declaration of policy "to preserve the vibrant and competitive free market that presently exists of the Internet … unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

The Vesting Clauses of the Constitution grant exclusive power to the three branches of government to exercise specific powers. Legislative power can only be exercised by Congress, and the Court must be sensitive to executive agencies usurping this power. *Department of Transportation v. Association of American Railroads*, 135 S. Ct. 1225, 1241 (2015) (Thomas, J., concurring). Such a usurpation would be a departure from constitutional checkpoints that would destroy the separation of powers that is designed to protect liberty. *Id*. at 1237 (Alito, J., concurring).

Justice Thomas has noted that the broader practice of deference under *Chevron* also raises issues of an unconstitutional delegation of judicial power. *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring). This deference is problematice, Justice Thomas noted, because it "is the power to decide—without any particular fidelity to the text—which policy goals [the agency] wishes to pursue." *Id*.

Separation of powers is critically important to the design of the federal government. Its purpose is not to make government efficient, but rather to protect liberty. *See N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2559-60 (2014) (citing, *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring))

If *Chevron* deference applies to the radical reinterpretation of the statute by the Commission here, then this is the case for a reexamination of *Chevron* and the cases approving the ever-expanding delegation of law-making power to the executive. *See Whitman v. American Trucking Associations*, 531 U.S. 457, 486-87 (2001) (Thomas, J., concurring).

C. Review should be granted to determine whether the Commission had authority to adopt these regulations.

The Commission relied on 47 U.S.C. § 1302 (Section 706 of the Telecommunication Act of 1996) as its authority to adopt the new regulations, including the ban on paid prioritization. Section 1302, however, does not expressly grant any rulemaking power. Yet that is the section on which the rule against paid prioritation is based. This Court should grant review to decide the important question of whether congressional encouragement to the Commission and state regulators to remove barriers to infrastructure development, standing alone, vests the Commission with rulemaking authority.

In section 1302, Congress speaks both to the FCC *and* state commissions, urging them to encourage deployment of high-speed Internet services to all Americans. Appendix F, Volume III, page 1474a. That section urges the Commission "and each State commission with regulatory jurisdiction" to encourage the deployment of high speed Internet access, especially to elementary and secondary schools. The section further identifies specific strategies the Commission and State commissions can use to "remove barriers to infrastructure investment."

Because this section speaks to *both* the FCC *and* state regulatory commissions, it cannot be read as authorizing either to promulgate rules. A reading that Congress intended to authorize state regulatory commissions, with authority under state law, to adopt substantive rules simply does not make sense. Con-

gress can neither command nor authorize state agencies to do anything. *See Prinz v. United States*, 521 U.S. 898, 926 (1997); *New York v. United States*, 505 U.S. 144, 175-76 (1992). But if the section does not command or authorize state regulatory commissions to adopt rules, neither can it be read to authorize the FCC to do so. Congress address both the FCC and the state commissions in the same sentence, and the text simply does not support an interpretation that gives different commands or authorizations to either.

This section, however, is the slender reed on which the entire edifice of these regulations is built. In relying on this congressional encouragement to remove barriers to infrastructure, the Commission studiously ignores another statement of policy in the same enactment. Congress did express a policy regarding regulation of the Internet. That policy, however, was "to preserve the vibrant competitive free market … unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). This policy is nowhere to be found in the Commission's Order.

This Court should grant review because the Commission's assumption of vast power is apparently predicated on a statute that grants no rulemaking power.

CONCLUSION

This case raises significant questions of constitutional law concerning the authority of agencies to reinterpret long extant federal statutes in a manner that vastly increases the regulatory power of the agency. Further, the vast new regulatory powers exercised by the Commission at issue in this case were

used to foreclose new social media platforms, new modes of communication that are the most important places for the exercise of First Amendment rights today. The petition should be granted.

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Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Const'l Jurisprudence
c/o Chapman University
Fowler School of Law
One University Drive
Orange, CA 92866

Counsel for Petitioner