No. 17-498

IN THE

Supreme Court of the United States

DANIEL BERNINGER,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

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

BRIEF FOR THE COMPETITIVE ENTERPRISE INSTITUTE, CATO INSTITUTE, REASON FOUNDATION, AND THE INDIVIDUAL RIGHTS FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does the Communications Act of 1934, as amended by the Telecommunications Act of 1996, allow the FCC to control the Internet?

2. Is the radical reinterpretation of the Act by the FCC 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 FCC have statutory authority to promulgate the Open Internet Order, vastly expanding regulation of the Internet, in light of the 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) (emphasis added); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857 (1997))?

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1984, the **Competitive Enterprise Institute** is a non-profit public policy organization dedicated to advancing the principles of limited government, free enterprise, and individual liberty. CEI frequently publishes research and commentary on topics at the intersection of property rights, markets, free enterprise, and liberty. This case concerns CEI because the FCC's claims of unbridled power to regulate the Internet exceed the agency's statutory authority and threaten competition and innovation.

The **Cato Institute** is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A Levy Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. To those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Reason Foundation is a nonpartisan, nonprofit think tank founded in 1978. Reason's mission is to promote free markets, individual liberty, equal rights, and the rule of law. Reason advances its mission by publishing Reason magazine, policy reports, and commentary on www.reason.com, www.reason.org, and www.reason.tv. To further its commitment to "Free

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[1] All parties were timely notified and have consented to the filing of this brief through written consents or blanket consents filed with the Clerk. No counsel for any party authored this brief in whole or in part and no person or entity other than *amici* funded its preparation or submission.

Minds and Free Markets," Reason participates as *amicus* in cases raising significant legal, constitutional, and regulatory issues.

The **Individual Rights Foundation** is the legal arm of the David Horowitz Freedom Center. The IRF is dedicated to supporting free speech, associational rights, and other constitutional protections. The IRF opposes attempts to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights or impedes access to any form of communication.

The present case concerns *amici* because of our commitment to constitutional structure as a guarantor of liberty.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should grant certiorari because the court below incorrectly concluded that Section 706 of the Telecommunications Act of 1996 ("1996 Act"), 47 U.S.C. § 1302, empowers the Federal Communications Commission ("FCC") to promulgate rules governing broadband service providers' treatment of Internet traffic. In enacting § 706, Congress did not grant the agency a new source of regulatory authority. Rather, § 706 instructs the agency on how to use the authorities afforded to it by the Communications Act of 1934 ("1934 Act") in the context of broadband deployment.

The D.C. Circuit relied on its previous holding in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), that § 706 authorized the FCC to issue a rule requiring Internet service providers to disclose their network management practices. *Id.* at 659. The *Verizon* court deferred to the agency's interpretation of § 706. *Id.* at

635. Yet Congress did not insert § 706 into the 1934 Act, the statute that the FCC is authorized to administer. Because § 706 falls outside of that older statute, the lower court should not have deferred to the agency's interpretation. Had the court independently examined the statute, it would have likely determined that § 706 does not, by itself, confer any regulatory authority whatsoever.

Moreover, even if the courts would ordinarily defer to the FCC's construction of § 706, whether the provision authorizes the agency to regulate communications in any manner it deems appropriate to encourage broadband deployment is a question of "deep economic and political significance." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (internal quotation marks omitted). In such cases, it is the task of the courts—not the agency—"to determine the correct reading" of the statute. *Id.*

The FCC's reading of § 706 would seemingly empower the agency to regulate not only broadband providers, but also any firm to the extent that it communicates over the Internet in any manner that could affect broadband deployment. Because broadband deployment is directly linked to consumer demand for broadband, the FCC's interpretation would conceivably authorize the agency to regulate how information is transmitted by the apps, services, and websites that influence how much consumers are willing to pay for broadband access. Using § 706, the FCC could justify rules governing not only broadband providers, but also popular Internet platforms such as Netflix, YouTube, or Facebook. Had Congress "wished to assign" such sweeping powers to the FCC, "it surely would have done so expressly." *Id.* Section 706, however, does not

come close to clearly authorizing the FCC to regulate the entire Internet.

ARGUMENT

I. THE FCC'S INTERPRETATION OF § 706 DOES NOT QUALIFY FOR *CHEVRON* DEFERENCE BECAUSE § 706 FALLS OUTSIDE THE COMMUNICATIONS ACT

The FCC is empowered to administer the Communications Act of 1934, as amended, 47 U.S.C. § 151–622. Title I of the Communications Act authorizes the agency to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Communications Act], as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Thus, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court generally defers to the FCC when the agency adopts a construction of the 1934 Act. *See, e.g.*, *Nat'l Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 974 (2005).

When Congress enacted the Telecommunications Act of 1996, it directed that some—but not all—of that law's provisions be inserted into the 1934 Act. *Compare* 1996 Act § 101 *with id.* § 601. Some of the 1996 Act's provisions are "freestanding enactment[s]" that are not part of the Communications Act. *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 n.5 (1999). One such freestanding enactment is § 706 of the 1996 Act, which, among other things, instructs the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." As the agency has acknowledged, "[S]ection 706 . . . is not part of the Communications Act."

Report and Order, *Preserving the Open Internet; Broadband Industry Practices*, 25 FCC Rcd 17905, 17950, para. 79 n.248 (2010).[2] The agency relied on this fact in *Verizon*, arguing that § 706 was not subject to the limitations of Sections 153(51) and 332(c)(2) of the 1934 Act, because § 706 was not part of that Act. Brief for Appellees-Respondents at 68, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

Congress has explicitly limited the FCC's rulemaking authority to prescribing rules to carry out the provisions of the 1934 Act. *See* 47 U.S.C. §§ 201(b), 303(r). When Congress enacted § 706, it did not authorize the FCC to administer that statute. Nor did Congress authorize the FCC to administer § 706 in 2008, when Congress codified the provision at 47 U.S.C. § 1302. Broadband Data Improvement Act, Pub. L. 110-385, 122 Stat. 4096, 4096–97 (2008).

In *Verizon*, the D.C. Circuit did not attempt to independently determine the meaning of § 706. *Id.* at 635. Instead, the court merely examined whether the "Commission's interpretation of section 706 represent[ed] a reasonable resolution of a statutory ambiguity." *Id.* The court concluded that it did. *Id.* at 637.

But the *Verizon* court erred regarding a crucial threshold question: did the FCC's interpretation of § 706 qualify for *Chevron* deference? The court found that "Congress "expressly directed that the 1996 Act . . . be inserted into the [1934 Act]." *Id.* at 650 (quoting

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[2] The FCC's 2010 Report and Order explains that "Congress enacted section 706 as part of the Telecommunications Act of 1996 and more recently codified the provision in Chapter 12 of Title 47, at 47 U.S.C. § 1302. The seven titles that comprise the Communications Act appear in Chapter 5 of Title 47." 25 FCC Rcd at 17950, para. 79 n.248.

AT&T Corp., 525 U.S. at 377). In *AT&T Corp.*, however, this Court referred to the 1996 Act in the context of its "local-competition provisions," which the 1996 Act indeed inserted into the 1934 Act. 525 U.S. at 377. As Congress explained in the first section of the 1996 Act, it modified the 1934 Act only when it expressly provided for an "amendment to, or repeal of, a section or other provision" of that Act. 1996 Act § 1(b).

Had the *Verizon* court realized that Congress did not include § 706 in the 1934 Act, it would have likely held that the task of interpreting § 706 falls to the judiciary, not to the FCC. This is because *Chevron* deference applies only when an agency adopts a construction of a statute that it administers. *City of Arlington v. FCC*, 569 U.S. 290, 301 (2013). Moreover, for *Chevron* deference to apply, Congress must have given "express . . . authorization" for the agency "to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). In selecting which provisions of the 1996 Act to insert into the 1934 Act, Congress established a "clear line" circumscribing the scope of the FCC's rulemaking authority. *Id.* at 307. Rather than "taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority," *id.*, the *Verizon* court deferred to the agency when no deference was due.

Here, the court of appeals compounded the *Verizon* court's error, relying on the earlier holding that § 706 is an independent grant of power to "reaffirm" that "the Commission's [S]ection 706 authority extends to rules governing broadband providers' treatment of internet traffic—including the anti-paid-prioritization rule." Pet. App. 95a (cleaned up). Again, the court

failed to consider Congress's decision not to insert § 706 into the 1934 Act. This Court should correct this oversight by independently examining § 706.

II. WHETHER § 706 EMPOWERS THE FCC TO REGULATE THE INTERNET IS A MAJOR QUESTION THAT THE COURTS SHOULD RESOLVE

The court of appeals here deferred to the FCC's contention that § 706 "provides [the FCC] authority to promulgate open internet rules." Pet. App. 12a. The court quoted approvingly the agency's contention that "such rules encourage broadband deployment because they preserve and facilitate the virtuous circle of innovation that has driven the explosive growth of the Internet." *Id.* (internal quotation marks omitted) (citing *Verizon*, 740 F.3d at 628). But the agency did not—could not—rely on § 706 alone as the basis for its 2015 Open Internet Order. In light of the *Verizon* court's repudiation of § 706 as authorization for common-carrier treatment of Internet service providers, 740 F.3d at 650–55, the FCC also based its Order on Title II of the 1934 Act. But the court below nevertheless reaffirmed its broad conception of § 706 as an independent grant of power to the FCC, and as a sufficient basis for the 2015 Order's anti-paid-prioritization rule. Pet. App. 95a.

A. The FCC's Interpretation of § 706 Does Not Meaningfully Limit the Agency's Authority to Regulate the Internet

The FCC's interpretation of § 706, affirmed by the lower court here, empowers the agency to regulate the Internet writ large. The agency imposes only three

limits on this grant of authority—but on closer examination, these limits turn out to be practically meaningless. *First*, the FCC may not use § 706 to regulate activities that fall beyond the scope of "interstate and foreign communication by wire and radio." *Verizon*, 740 F.3d at 640 (quoting 47 U.S.C. § 152(a)). But this simply means that the agency may not regulate, among other things, products whose use does not constitute "communication by wire or radio." *Am. Library Ass'n. v. FCC*, 406 F.3d 689, 703 (D.C. Cir. 2005). Whenever someone transmits information over the Internet, it entails communication by wire, and is thus supposedly, to that extent, subject to the FCC's § 706 authority.

Second, FCC rules issued under § 706 "must be designed to . . . encourage the deployment" of broadband. *Verizon*, 740 F.3d at 630 (internal quotation marks omitted). If the agency asserts that a rule will promote broadband deployment, courts will uphold the agency's "factual determinations if on the record as a whole, there is such relevant evidence as a reasonable mind might accept as adequate to support [the agency's] conclusion." *Id.* at 643 (quoting *Sec'y of Labor, Mine Safety & Health Admin. v. Fed. Mine Safety & Health Review Comm'n*, 111 F.3d 913, 918 (D.C. Cir. 1997)). Employing this extremely deferential standard of review, the *Verizon* court accepted the FCC's "triple-cushion shot" theory by which open Internet rules would spur broadband deployment. *Id.* The court thus accepted the agency's contention that by "regulat[ing] broadband providers' economic relationships with edge providers," it would "influence[] the rate and extent to which broadband providers develop and expand their services for end users." *Id.* Any future agency action pred-

icated on § 706 will thus likely withstand judicial review so long as the agency asserts a plausible connection between its action and broadband deployment.

Third, the FCC may not promulgate regulations under § 706 that contravene the provisions of the 1934 Act. *Verizon*, 740 F.3d at 650. This purported limit is at odds with Congress's decision not to place § 706 within the 1934 Act, as discussed *supra*, Part I. Moreover, even if the FCC's § 706 authority is bound by the express prohibitions contained in the 1934 Act, the agency is otherwise free to pursue a "multiyear voyage of discovery" to decide whom to regulate and which regulatory methods to employ. *See Util. Air Regulatory Grp. v. EPA* ("*UARG*"), 134 S. Ct. 2427, 2446 (2014).

These "limiting principles" that purportedly cabin the agency's § 706 authority are "illusory." *Verizon*, 740 F.3d at 662 (Silberman, J., dissenting). Under the FCC's interpretation of § 706, as affirmed by the court of appeals, the agency has "carte blanche to issue any regulation [of the Internet] that the [FCC] might believe to be in the public interest." *Id.* Although federal agencies already possess broad powers, *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 499 (2010), this Court should not permit the FCC to seize broad new powers for itself over a vast sector of the economy.

B. Congress Did Not Assign the Task of Administering § 706 to the FCC

Whether the FCC has the authority to regulate the Internet is a question that has broad implications for a sector that accounts for "billions of dollars in spending each year" and affects "millions of people" who use the Internet. *Cf. King v. Burwell*, 135 S. Ct. 2480, 2489

(2015). It is also a "question of deep 'economic and political significance.'" *Id.* (quoting *UARG*, 134 S. Ct. at 2444). "Had Congress wished to assign [such a] question to an agency, it surely would have done so expressly." *King*, 135 S. Ct. at 2489. Yet § 706 is anything but a clear indication that Congress intended for the FCC to administer the statute governing the scope of its regulatory power over the Internet.

Indeed, until 2010, the FCC maintained that § 706 was *not* an independent grant of regulatory authority. *Verizon*, 740 F.3d at 636. In its 2010 Open Internet Order, however, the agency concluded otherwise, "claim[ing] to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'" *UARG*, 134 S. Ct. at 2444 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). This Court typically greets such an agency "announcement with a measure of skepticism." *Id.* But the lower court evinced no such skepticism in *Verizon* or here, instead deferring to the agency's newfound source of authority in § 706. Pet App. 95a; *Verizon*, 740 F.3d at 635.

III. SECTION 706 IS NOT A DELEGATION OF RULEMAKING AUTHORITY TO THE FCC

This Court should grant the petitions so that it can independently examine the meaning of § 706. *See* Berninger Pet. 24–25 (identifying reasons why § 706 is not a grant of FCC authority). To construe § 706 as giving independent agency authority violates fundamental canons of statutory construction and is inconsistent with the structure of the 1996 Act.

A. Congress Enacted the 1996 Act to Prevent Internet Regulation, Not Authorize It

Section 230 of the 1934 Act—added to that Act by Congress in the 1996 Act—says that "[i]t is the policy of the United States . . . to preserve the vibrant and competitive *free market* that presently exists for the Internet and other interactive computer services, *unfettered* by Federal or State regulation." 47 U.S.C. § 230(b)(2) (emphasis added). Section 230 further explains that the "Internet and other interactive computer services have flourished, to the benefit of all Americans, *with a minimum of government regulation*." *Id.* § 230(a)(4) (emphasis added). As the Court noted in *Reno v. ACLU*, "[n]either before nor after [1996] have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry." 521 U.S. 844, 868–69 (1997). The FCC's interpretation of § 706 contradicts the deregulatory thrust of § 230.

B. Section 706 Addresses Both the FCC and State Regulatory Commissions, but Lacks a Clear Statement Authorizing the FCC to Determine the Scope of Preemption

Section 706 says that the FCC and "each State commission with regulatory jurisdiction over telecommunications services shall encourage [broadband] deployment." 47 U.S.C. § 1302(a). To the extent that § 706 is an independent grant of authority to the FCC, therefore, it follows that it is also a grant of authority to state telecommunications commissions. Yet Congress lacks the authority to confer regulatory authority upon these state commissions, each of which is subservient to the state government that created it. *Cf. Printz v.*

United States, 521 U.S. 898, 926 (1997) (the federal government may not command the states to promulgate or enforce laws or regulations). Moreover, had Congress wished to empower the FCC to interpret § 706—and thus determine the extent to which the provision preempts states—Congress would have provided a "clear statement" authorizing such preemption. *Nixon v. Missouri Mun. League*, 541 U.S. 125, 141 (2004). Section 706 contains no such clear statement. *See Tennessee v. FCC*, 832 F.3d 597, 612 (6th Cir. 2016) (holding that § 706 contains no clear statement authorizing the FCC to preempt the states).

C. Section 706 Is Too Cryptic to Empower the FCC to Regulate the Internet

The FCC here has "asserted 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). It is highly unlikely that Congress "intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160. Just as the courts have rejected the self-aggrandizing efforts of the Federal Trade Commission to regulate the legal industry, *American Bar Association v. FTC*, 430 F.3d 457 (D.C. Cir. 2005), and the Internal Revenue Service's efforts to regulate tax preparation services, *Loving v. United States*, 742 F.3d 1013, 1021 (D.C. Cir. 2014), this Court should reject the FCC's interpretation of § 706 as empowering the agency to regulate the Internet.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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