No. 17-498

IN THE

Supreme Court of the United States

DANIEL BERNINGER,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.,*

Respondents.

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

BRIEF OF *AMICUS CURIAE* INTERNATIONAL CENTER FOR LAW & ECONOMICS IN SUPPORT OF PETITIONER

Geoffrey A. Manne
INTERNATIONAL CENTER FOR LAW & ECONOMICS
3333 NE Sandy Blvd.
Suite 207
Portland, OR 97232

Justin (Gus) Hurwitz
UNIVERSITY OF NEBRASKA COLLEGE OF LAW
209 Ross McCollum Hall
P.O. Box 830902
Lincoln, NE 68583-0902

Jeffrey A. Mandell
Counsel of Record
STAFFORD ROSENBAUM LLP
222 W. Washington Ave.
Suite 900
Madison, WI 53703
(608) 256-0226
jmandell@staffordlaw.com

Counsel for Amicus Curiae

November 2, 2017

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. The Circuit court was exceptionally deferential in this case. 5

II. Courts should be skeptical—not "particularly deferential"—where agencies reverse existing policy. 12

A. Empirical data suggests widespread flaws in agencies' "reasonable basis" justifications proffered to support changed policies 13

B. This Court's precedents suggest concern about agencies' changed factual and legal interpretations. 15

III. The OIO and the D.C. Circuit opinion implicate concerns about the propriety of extreme deference to agency decisionmaking involving changes of policy. 19

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

Ass'n of Am. R.R.s v. Interstate Commerce Comm'n, 978 F.2d 737 (D.C. Cir. 1992)....6

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962)....8

Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 477 U.S. 837 (1984)....3, 4, 11, 13, 14, 15 15, 16, 17, 18, 25

Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010)....24

EarthLink, Inc. v. FCC, 462 F.3d 1 (D.C. Cir. 2006)....8

Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016)....12, 17

FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009)....6, 7, 12, 16, 17, 18, 20

FERC v. Elec. Power Supply Ass'n,
136 S. Ct. 760 (2016) 6, 25

Food & Drug Admin. v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 9, 10, 11, 12, 15, 24

Gas Transmission Nw. Corp. v. FERC,
504 F.3d 1318 (D.C. Cir. 2007)................................7

King v. Burwell,
135 S. Ct. 2480 (2015) 12

Michigan v. EPA,
135 S. Ct. 2699 (2015) 24

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 12, 13, 16

Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005) 3, 4, 9, 10, 11, 12, 16, 17

New York v. United States,
342 U.S. 882 (1951) 8

U.S. Telecom Ass'n. v. FCC,
825 F.3d 674 (D.C. Cir. 2016)..........................10, 20

Util. Air Regulatory Grp. v. EPA,
134 S. Ct. 2427 (2014) 9, 10, 12, 15, 18, 24

Verizon v. FCC,
740 F.3d 623 (D.C. Cir. 2014)................................20

Whitman v. Am. Trucking Ass'ns, Inc.,
531 U.S. 457 (2001) 23

Other Authorities

Cass R. Sunstein & Adrian Vermeule,
The Morality of Administrative Law,
HARV. L. REV. (forthcoming 2018).................3, 4, 17

George S. Ford,
Net Neutrality, Reclassification, & Inv.: A Counterfactual Analysis,
PHOENIX CTR. PERSP. 17-02 (2017)........................20

In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability,
13 FCC Rcd. 24,012 (1998)...................................23

In Re Inquiry Concerning the Deployment of Advanced Telecomm. Capability to All Am. in a Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to § 706 of the Telecomm. Act of 1996, as Amended by the Broadband Data Improvement Act,
30 FCC Rcd. 1375 (2015)................................21, 22

Kathryn A. Watts,
Proposing a Place for Politics in Arbitrary and Capricious Review,
119 YALE L.J. 2 (2009)..17

Kent Barnett & Christopher J. Walker,
Chevron *In the Circuit Courts*,
116 MICH. L. REV. 1 (2016) 13, 17

L. Gordon Crovitz,
'Economics-Free' Obamanet,
WALL ST. J., Jan. 31, 2016,
https://www.wsj.com/articles/economics-free-obamanet-1454282427 22

Note, *Major Questions Objections*,
129 HARV. L. REV. 2191 (2016) 17

Preserving the Open Internet Broadband
Ind. Prac., Rep. & Ord.,
25 FCC Rcd. 17905 (Dec. 23, 2010) 20

Telecommunications Act of 1996,
47 U.S.C. § 1302 .... 20, 21, 22

Tim Brennan,
Is the Open Internet Order an "Economics-Free Zone"?,
11 FSF PERSP. 22 (2016) 22, 23

BRIEF OF *AMICUS CURIAE* INTERNATIONAL CENTER FOR LAW & ECONOMICS IN SUPPORT OF PETITIONER

The International Center for Law & Economics ("ICLE") submits this brief as *amicus curiae* in support of certiorari.[1]

INTEREST OF *AMICUS CURIAE*

ICLE is a nonprofit, non-partisan global research and policy center. ICLE works with more than fifty affiliated scholars and research centers around the world to promote the use of evidence-based methodologies in developing sensible, economically grounded policies that will promote consumer welfare and enable business and innovation to flourish. ICLE's advocacy for evidence-based methodologies gives it a significant interest in helping shape the law governing judicial review of agency decisionmaking.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises significant questions about the thoroughness with which a court must review agency decisionmaking—or the extent to which a court may instead defer to that decisionmaking—when the

---

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

agency has reversed a prior policy determination in the absence of a change in applicable law.

The Open Internet Order ("OIO") issued by the Federal Communications Commission ("FCC" or "Commission") presents such a policy reversal. The FCC ostensibly rooted the OIO in sufficient factual and legal analysis, but closer examination reveals that the OIO is based upon implausible factual assertions, questionable factual reinterpretations, and the strategic disavowal of long-defended statutory interpretation, all in support of a radical change in federal telecommunications policy that raises questions of vast economic and political significance.

Nevertheless, as discussed in Part I, the D.C. Circuit opinion affirming the OIO reflexively afforded substantial deference to the FCC, declining to consider serious questions about the reasonableness or permissibility of the FCC's decisionmaking process. That decision is both in tension with this Court's precedents and, more, raises exceptionally important and previously unaddressed questions about this Court's precedents on judicial review of agency changes of policy.

As discussed in Part II, recent empirical work suggests that there are systematic problems with judicial review of agency changes in policy. These problems—respecting the substantive quality of agency and judicial decisions as well as judicial understanding of, or compliance with, this Court's precedents governing such review—have led to consistently inconsistent review of agency policy

changes in the circuit courts. Judicial review of agency policy changes thus presents a *certiorari* double-whammy: there is a need for this Court to clarify existing precedent regarding judicial review of such policy changes and to address inconsistent application of that precedent, as well as for this Court to consider whether evidence of systematically problematic decisionmaking when agencies change policies militates in favor of a more searching standard of review.

Part III discusses how the D.C. Circuit and the Commission's OIO implicate these concerns.

A new article by Professors Cass Sunstein and Adrian Vermeule highlights the exceptional significance of this issue. *See* Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, HARV. L. REV. (forthcoming 2018). In discussing empirical evidence collected by Professors Kent Barnett and Christopher Walker (discussed in Part II), Sunstein and Vermeule note that there is a "discrepancy between the law on the books and the law in action" when it comes to how courts review changes in agency policy. *Id.* (manuscript at 24) (https://papers.srn.-com/abstract_id=3050722).

In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), this Court held that an agency's alteration of policy is not grounds for heightened scrutiny. *Id.* at 981 ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and

capricious change from agency practice under the Administrative Procedure Act."). But, as Sunstein and Vermeule observe, "*Brand X* notwithstanding, the Court just isn't particularly clear or consistent about the role of consistency under *Chevron*." Sunstein & Vermeule, *supra* (manuscript at 23-24 n.159).

Indeed, "[a]t the level of individual cases, although no subsequent case has denied the rule expressly laid out in *Brand X*, opinions have occasionally adverted to consistency as a *Chevron* factor—including opinions for the Court." *Id.* (ms. at 23). Moreover, contrary to the rule laid out in *Brand X*, "[a]t the level of large-N research, recent work by Chris Walker and Kent Barnett shows that judges in fact tend to defer more heavily to consistent agency interpretations." *Id.* (ms. at 23-24).

In this instance, it seems likely that the policy under review will reverse course yet again, with the agency returning to the pre-OIO interpretation of the law and issuing new rules consistent with that interpretation. Indeed, it must be acknowledged that the FCC could reverse the OIO as soon as December of this year. Under ordinary circumstances this would appear to moot, or at least substantially lessen, the concerns raised by petitioners here.

But the foreseeability of significant administrative policy changes—in this case and elsewhere—abetted by the precedent of substantial deference established in this case, militates in favor of the Court granting *certiorari*. Should the FCC reverse the OIO, it is a foregone conclusion that supporters of the current

order will challenge that reversal in a proceeding that will raise many of the same legal concerns currently at issue. The issuance of a new rule will thus not moot the issues in this case, but simply raise the precise issues yet again. Indeed, without clear guidance from this Court, there is every reason to believe the process will become an endless feedback loop—in the case of this regulation and others—at great cost not only to regulated entities and their consumers, but also to the integrity of the regulatory process.

ARGUMENT

I. The Circuit court was exceptionally deferential in this case.

The level of deference afforded an agency decision is particularly important where, as here, an agency has reversed established policy. In affirming the OIO, however, the D.C. Circuit evinced mechanical and exceptional deference to both legal and factual determinations by the FCC, and, at the same time, was notably dismissive of arguments challenging those determinations. As addressed in Part II, an analysis of cases where courts review changes in agency policy suggests that, in such instances, agencies employ systematically problematic decisionmaking. Such flawed agency process militates in favor of more searching judicial review. As discussed in Part III, there is reason to be particularly concerned that these problems infected the FCC's decisionmaking with respect to the OIO.

The D.C. Circuit adopted an unflinchingly deferential posture, dutifully articulating the well-

worn legal principles of judicial deference to a fault. The panel decision parrots this Court's most restrictive language about judicial review without acknowledging the necessary nuances implicit in these bedrock standards. Thus the D.C. Circuit admonished that the judiciary's "role in reviewing agency regulations…is a limited one," insisting the panel was "*forbidden* from substituting our judgment for that of the agency." App. A at 17a-18a (quoting *Ass'n of Am. R.R.s v. Interstate Commerce Comm'n*, 978 F.2d 737, 740 (D.C. Cir. 1992)) (emphasis added).

With respect to factual assertions, the D.C. Circuit opined that, "[p]rovided that the Commission has articulate[d]…a rational connection between the facts found and the choice made, we will uphold its decision." App. A at 38a (internal quotation marks omitted). Nominally, this conditioned affirmance on a showing that the agency "weighed competing views, selected [an approach] with adequate support in the record, and intelligibly explained the reasons for making that choice." App. A at 38a (quoting *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 784 (2016)). The panel majority made clear that, so long as the agency satisfied this condition, "it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." App. A at 38a (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis in original)).

But the D.C. Circuit then affirmed the OIO even though the FCC did not satisfy the requisite condition. In reviewing the agency's factual assertions, the panel often required merely that the agency articulate *any*

factual support for its position. The court neither assessed the reasonableness or adequacy of support for those facts on its own, nor did it meaningfully consider the petitioners' challenges to the reasonableness or adequacy of support for those facts.

For example, in rejecting petitioners' concern that the OIO failed to account for reliance interests, as required by *Fox*, the court expressed satisfaction that the Commission "expressly *considered*" and rejected those claims. App. A at 44a (emphasis added). The court failed, however, to inquire whether the Commission's consideration was *adequate* or its rejection *reasonable*. Only Judge Williams, dissenting in part, considered these questions. App. A at 120a. By contrast, the majority, "defer[ing] to policy determinations invoking the [agency's] expertise in evaluating complex market conditions," App. A at 46a (quoting *Gas Transmission Nw. Corp. v. FERC*, 504 F.3d 1318, 1322 (D.C. Cir. 2007)), accepted without analysis the Commission's factual determination that reclassification of broadband under Title II did not deviate from ISPs' reasonable expectations.

In other words, the panel majority held that the Commission's decision was reasonable because an agency's expertise renders its decisionmaking *inherently* reasonable, regardless of process. Of course that cannot be the case. As this Court has noted, "[e]xpert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with

no practical limits on its discretion.'" *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962) (quoting *New York v. United States*, 342 U.S. 882, 884 (1951) (Douglas, J., dissenting)). To do as the D.C. Circuit did here—merely accepting the agency's decisionmaking as reasonable by virtue of the agency's presumed expertise—abdicates the judiciary's asserted responsibility to ensure not only that the agency justifies its policy decisions, but also that the proffered justifications are reasonable.

Similarly, petitioners below argued that the OIO would undermine investment in broadband networks, contrary to the Commission's assertion that it would enhance investment. The D.C. Circuit evaluated this under a "particularly deferential" standard: "An agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to *particularly deferential* review, as long as they are reasonable." App. A at 91a (quoting *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006) (emphasis in original)). Without analysis, the D.C. Circuit declared that "[t]he Commission has satisfied this highly deferential standard." App. A at 40a. This passive acceptance of the FCC's assertions—without evaluating their merits based on the record evidence or weighing them against the challenges raised by petitioners—abdicated the court's responsibility to defer only "as long as [the agency's judgements] are reasonable." App. A at 91a.

The Circuit court was also overly deferential in its review of the FCC's legal conclusions, where, as with fact issues, it was dismissive of challenges to the

reasonableness of the agency's decisionmaking. As characterized by Judge Brown in her dissent from the D.C. Circuit's denial of the petition for rehearing *en banc*, "[o]n issue after issue, the Court puts agency *ipse dixit* where reasoned analysis should be" and "fails to fairly engage this standard of review, both overrating the role of the statutory ambiguity here and underrating the application of the clear statement rule to major questions." App. E at 1406a, 1401a.

This is clear in the Circuit court's handling of arguments that the OIO's reclassification of Broadband Internet Access Service as a Title II telecommunications service presents a "major question" under *Food & Drug Administration v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120 (2000), and *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014). To be sure, this Court's major-questions precedents do not clearly establish that the reclassification of Broadband Internet Access Service—a composite service distinct from the standalone transmission component at issue in *Brand X*—is a major question. But the D.C. Circuit dismissed the arguments that reclassification does present a major question without even considering their merits.

Contrary to the panel majority's blithe assertion that "[t]his case is nothing like *Utility Air*," App. A at 37a, Judge Williams (concurring in part and dissenting in part from the panel decision) and both Judges Brown and Kavanaugh (dissenting from denial of rehearing *en banc*) assert that it is. App. A at 115a (Williams, J.); App. E at 1413a-14a (Brown, J.); App. E at 1429a-30a (Kavanaugh, J.). To avoid the question,

the majority mischaracterized the teaching of *Utility Air*. The majority focused on whether the FCC is legally authorized to "tailor" the statute, *see* App. A at 37a, and, in so doing, it sidestepped the more important issue that "the need to rewrite clear provisions of the statute [whether or not statutorily authorized] should have alerted [the agency] that it had taken a wrong interpretive turn," *Util. Air*, 134 S. Ct. at 2446. The agency's "tailoring" of the statute to conform to its policy preferences was not facially impermissible, but it was certainly questionable and demanding of careful review. Or, as articulated by Judge Brown, *Utility Air* "cited generally-applicable tenets of administrative law and the separation of powers…. If the FCC is to possess statutory forbearance authority, it should conform to forbearance's statutory conditions and the overall statutory scheme. Neither is the case here. The FCC's abuse of forbearance amounts to rewriting the 1996 Act…." App. E at 1413a-14a (Brown, J. dissenting from denial of rehearing *en banc*).

Similarly, the panel blithely dismissed related arguments under *Brown & Williamson* that the Commission's reclassification decision exceeds the scope of its delegated authority. *See* Br. for Intervenors for Pet'rs TechFreedom, Cari.net, Jeff Pulver, Scott Banister, Charles Giancarlo, Wendell Brown & David Frankel at 15-21, *U.S. Telecom Ass'n. v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (No. 15-1063). Again, the court sidestepped a fundamental legal question, asserting simply that the argument "ignores *Brand X*," without responding to the extensively briefed arguments to the

contrary. App. A at 33a. The majority instead rested, without elaboration, on a contested characterization of *Brand X* as “expressly recogniz[ing] that Congress, by leaving a statutory ambiguity, had delegated to the Commission the power to regulate broadband service.” App. A at 33a.

Amicus takes no position here whether the *Brown & Williamson* argument is correct. *Amicus*’s point is that there *is* a dispute, and that the D.C. Circuit failed to consider and evaluate reasonable arguments contrary to its own. Those arguments have at least some force. *See* App. E at 1401a-02a (Brown., J., dissenting from denial of rehearing *en banc*) (“The Court fails to fairly engage this standard of review, both overrating the role of the statutory ambiguity here and underrating the application of the clear statement rule to major questions. After jumping right into *Chevron*’s two-step deference analysis, the Court’s opinion treats *Brand X* as the *coup de grace* for any requirement of clear congressional authorization. Yes, *Brand X* did uphold the FCC’s determination that the ‘offering’ of ‘telecommunications service’ in Title II of the Communications Act is ambiguous. But this ‘statutory ambiguity’ does not allow the FCC to reclassify broadband Internet access without any serious judicial scrutiny.” (internal citations omitted)); App. E at 1431a (Kavanaugh, J., dissenting from denial of rehearing *en banc*) (“If the Supreme Court’s major rules doctrine means what it says, then the net neutrality rule is unlawful because Congress has not clearly authorized the FCC to issue this major rule.”).

The D.C. Circuit need not have—and as argued below *should not have*—afforded the FCC the degree of deference that it did. This Court's decisions in *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), *Fox*, and *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016) (decided after the panel opinion was issued and before consideration of petitions for *en banc* rehearing), all require a more thorough vetting of the reasons underlying an agency change in policy. Similarly, *Brown & Williamson*, *Utility Air*, and *King v. Burwell,* 135 S. Ct. 2480 (2015), all present circumstances in which an agency construction of an otherwise ambiguous statute is not due deference, including when the agency interpretation is a departure from longstanding agency understandings or when the agency is not acting in an expert capacity (*e.g.*, its decision is based on changing policy preferences, rather than changing factual or technical considerations).

II. Courts should be skeptical—not "particularly deferential"—where agencies reverse existing policy.

In the particular circumstance of agency decisionmaking at issue here—where an agency has reversed a long-established course of action and justified its decision with reference to changed factual and legal predicates—courts have rightly demanded somewhat-heightened justification. Indeed, despite this Court's nominal indifference to changed agency policies or interpretations in determining the appropriate level of review, *see, e.g.*, *Brand X*, 545 U.S. 967,

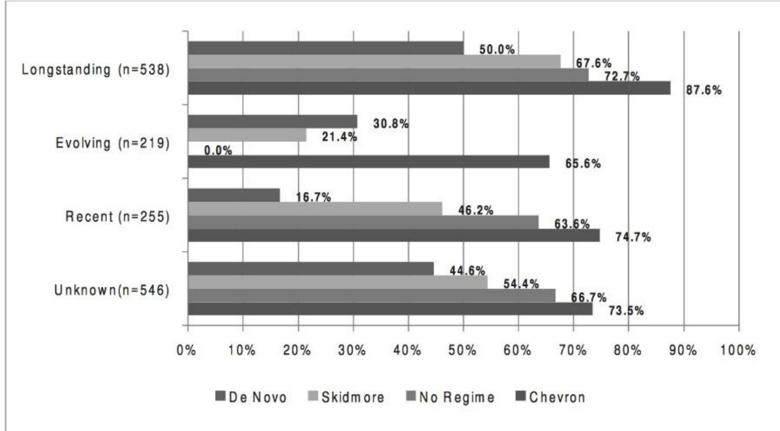
lower courts—and even this Court itself—have regularly required that agencies changing their policies provide something more to meet the requisite standard, whether under *Chevron*'s step-two "reasonableness" analysis, *see Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 477 U.S. 837 (1984), or APA arbitrary-and-capricious analysis, *see, e.g.*, *State Farm*, 463 U.S. 29.

A. Empirical data suggests widespread flaws in agencies' "reasonable basis" justifications proffered to support changed policies.

A court's decision to defer to an agency's changed policy is exceptionally important, and courts generally do not undertake the task lightly. Although the nominal analysis may not appear significantly different in any particular case, this dynamic is clearly seen at an aggregate level.

In a large-scale study of every federal appellate decision between 2003 and 2013, Professors Kent Barnett and Christopher Walker found that a court's decision of how much deference to afford agency action is uniquely determinative in cases where an agency is changing established policy. Kent Barnett & Christopher J. Walker, Chevron *In the Circuit Courts*, 116 MICH. L. REV. 1 (2016). This is illustrated in their Figure 13 (in which "Evolving" refers to cases where courts review changing agency interpretations):

FIGURE 13. AGENCY-WIN RATES BASED ON CONTINUITY OF AGENCY STATUTORY INTERPRETATION, BY DEFERENCE DOCTRINE (n=1558)



Id. at 64. In such cases, agency action is affirmed in the majority of cases in which *Chevron* deference is afforded, whereas it is rejected in the majority of cases in which courts review agency action under a less-deferential standard.

There is a stark difference in the importance of the deference regime applied to reviewing an agency's changed policies compared with reviewing consistent agency policies. Even when *Chevron* is applied, changed policies are affirmed less often (65.6% of the time) than are longstanding policies (87.6% of the time) or recent (but not inconsistent) policies (74.7% of the time). But when agency actions are reviewed under a less-deferential standard, courts have been *significantly* more likely to reject an agency's changed policy. In such cases, courts reviewing the new policy *de novo* see fit to reject it nearly 70% of the time; courts applying *Skidmore* deference find the agency's

rationale unpersuasive a remarkable near-80% of the time; and in *no* cases do courts affirm the agency's action where the court does not specify a regime.

Relative to consistent agency interpretations, and even new interpretations that do not reject prior policies, qualitative research illustrates that courts clearly find changed agency policies problematic. The data reflect that agency decisions to change established policy often present serious, systematic defects. As a result, the data also demonstrate why it is important that courts review such decisions with a skeptical eye, not a "particularly deferential" one. App. A at 40a.

Regardless of whether these data demonstrate a systematic problem with agency decisionmaking, at a minimum they show a disconcerting "discrepancy between the law on the books and the law in action" as to how courts review changes in agency policy. Sunstein & Vermeule, *supra* (ms. at 24).

B. This Court's precedents suggest concern about agencies' changed factual and legal interpretations.

The data above further underscore the importance of this Court's command in *Fox* and *Encino* that agencies show good reason for a change in policy; its recognition in *Brown & Williamson* and *Utility Air* that departures from existing policy may fall outside of the *Chevron* regime; and its admonition in *King* that policies developed by agencies in areas beyond their technical expertise may fall outside of the *Chevron* regime. In such cases, this Court has indicated that

reflexive and unrelenting application of deference—to factual findings or legal conclusions—may not be appropriate. This accords with a reasonable concern that these circumstances may be particularly prone to produce agency action that is arbitrary, capricious, unreasonable, in excess of statutory authority, or otherwise unlawful. In these instances, courts must apply more probing judicial review to ensure that the agency's decisionmaking process reflects the sort of expert judgment that merits deference.

To be sure, *State Farm*, *Fox*, and *Brand X* (among others) contemplate that policies can change; *Chevron* itself was an example of a changing policy. Moreover, as this Court held in *Fox*, a changed policy or interpretation need not be demonstrably *better*; "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Fox*, 556 U.S. at 515 (emphasis in original).

Nevertheless, these requirements (*i.e.*, statutory authority, good reasons, and adequate indication of belief in improvement) demand an agency justify its change of course: "[A] reasoned explanation is needed for disregarding facts and circumstances that underlay …the prior policy." *Id.* at 516. And while it is clear that changes in agency policy do not automatically trigger a heightened standard of review, it is equally clear that changes in policy demand more than *de minimis* support to withstand judicial review. "Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.

Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act." *Brand X*, 545 U.S. at 981. Thus, for example, *Chevron* deference is not necessarily inappropriate in reviewing a changed agency interpretation, but the assessment of the reasonableness of the change under *Chevron* step-two may be more exacting.[2]

Fox, meanwhile, highlights two circumstances in particular when an agency's shift in policy demands

---

[2] There is persistent confusion over the relationship between arbitrary-and-capricious review and the application of *Chevron*. *See* Sunstein & Vermeule, *supra* (ms. at 23-24 n.159) ("*Brand X* notwithstanding, the Court just isn't particularly clear or consistent about the role of consistency under *Chevron*."); Barnett & Walker, *supra*, at 65 (noting "judicial discomfort with APA arbitrary-and-capricious review, which some decisions have folded into *Chevron* step two (as opposed to treating it as a distinct step)") (citing Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009)); Note, *Major Questions Objections*, 129 HARV. L. REV. 2191, Part III.B (2016) (discussing the Supreme Court's recent major-questions cases and relating them to arbitrary-and-capricious review, and noting that "[m]ost of the latent concerns in the cases are less about 'majorness' as such and more about 'big changes'—concerns about the destabilizing effect of an agency's changing its interpretation, usually in a charged political setting.... The Court's apparent concerns about 'big changes' are better addressed under § 706(2)(A) of the APA.... Unfortunately..., confusion surrounds the precise relationship between *Chevron* and arbitrary and capricious review, [which] the Supreme Court has done little to dispel."). *See also Encino*, 136 S. Ct. at 2126 (citing *Brand X*'s statement that "an '[u]nexplained inconsistency'

heightened justification: First, when the agency's "new policy rests upon factual findings that contradict those which underlay its prior policy"; and, second, "when its prior policy has engendered serious reliance interests that must be taken into account." *Fox*, 556 U.S. at 515. Both are applicable here.

This Court has held that sometimes agency changes in policy or interpretation demand more probing review in order to ensure that courts do not, under the guise of judicial deference to agency expertise, permit agencies to exceed the scope of their authority. Thus, for example, in *Utility Air*, this Court warned that "[t]he power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice." 134 S. Ct. at 2446. "An agency…may change its own conduct, but it cannot change the law." *Id. Utility Air* reflects the important recognition that an agency may deviate from past practice not only where doing so reflects its expert judgment that such a deviation is required to maintain *consistency* with its statutory mandate in the face of changed circumstances, but also where it seeks to *evade* statutory constraints.

---

in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice,' and adding that "[a]n arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference").

III. The OIO and the D.C. Circuit opinion implicate concerns about the propriety of extreme deference to agency decision-making involving changes of policy.

This case presents the Court with an acute example of changed agency policy demanding greater scrutiny—one in which there are strong indications that the agency's decisionmaking is suspect—and thus a compelling opportunity to clarify the proper approach to such circumstances. The panel majority afforded great deference, despite the clear and unaddressed evidence of serious flaws in the FCC's process of deciding to subvert its prior regulatory approach and reclassify broadband access under Title II. Such reflexive deference risks permitting agencies, under the guise of exercising considered expertise, to evade statutory constraints by interpreting facts and drawing legal conclusions that justify their preferred policy outcomes.

For example, the D.C. Circuit accepted with minimal consideration the FCC's remarkable assertion that there are no reliance interests at stake in the Commission's decision whether to regulate broadband access lightly under Title I or as common carriage under Title II of the Communications Act. This assertion defies economic logic and contradicts the FCC's long-asserted position. *See* App. A at 119a-24a (Williams, J., concurring in part and dissenting in part); Joint Pet. for Reh'g En Banc of Pet'rs Nat'l Cable & Telecomm. Ass'n & Am. Cable Ass'n at 5, *U.S. Telecom v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (No. 15-1063). *See also* George S. Ford, *Net Neutrality,*

Reclassification, & Inv.: A Counterfactual Analysis, PHOENIX CTR. PERSP. 17-02 (2017) (empirically demonstrating that ISPs' expectations of reclassification under Title II significantly affected their broadband investment decisions). The agency may have deemed such a statement necessary for the OIO to survive judicial review under *Fox*, but it cannot be justified as a reasonable characterization of the facts.

The D.C. Circuit similarly deferred to other factual Commission assertions that seem to be *post hoc* rationalizations masquerading as expert decision-making. The FCC had tried for nearly a decade to adopt or enforce any form of net neutrality regulation it could convince a court to uphold. Twice it failed, but in failing learned the superficial signals it needed to send in order to clear the very low bar of judicial deference. Key to this strategy was for the FCC to progressively tweak parts of its ancillary activities around broadband regulation in a way that would make an industry that had been deemed competitive for twenty years suddenly look like it was failing consumers.

For example, in 2010 the Commission adopted its first comprehensive set of net neutrality regulations, asserting statutory authority under Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302. *See* Preserving the Open Internet Broadband Ind. Prac., Rep. & Ord., 25 FCC Rcd. 17905, ¶8 (Dec. 23, 2010). The 2010 OIO was struck down by the D.C. Circuit in 2014. *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). Nonetheless, the court upheld the Commission's assertion of authority under Section 706 to enact some

form of net neutrality rules. *Id.* at 628. Under Section 706, "the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability." 47 U.S.C. § 1302(b).

In anticipation of the Commission's next attempt (the 2015 OIO) to enact net neutrality rules, the FCC set out to ensure that this trigger was met by arbitrarily changing the performance threshold defining broadband service, increasing it six-fold overnight. The result was to manufacture the requisite scarcity—scarcity that did *not* exist on the ground but, rather, was artificially conjured by regulatory fiat. Press Release, FCC, FCC Finds U.S. Broadband Deployment Not Keeping Pace (Jan. 29, 2015). Importantly, this determination itself was based on an almost certainly arbitrary and capricious *lack* of data: As the Commission acknowledged, it made the decision to set the performance threshold for "broadband" at 25 Mbps downstream, even though it "ha[d] data for 10 Mbps downstream and 25 Mbps downstream but nothing between those speeds." *See* In Re Inquiry Concerning the Deployment of Advanced Telecomm. Capability to All Am. in a Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to § 706 of the Telecomm. Act of 1996, as Amended by the Broadband Data Improvement Act, 30 FCC Rcd. 1375, ¶48 (2015). This lack of data results from the inadequacy of the Commission's own data collection practices, *Id.* at

n.215, and resulted in the exclusion of the many ISPs that offered 16 Mbps and 20 Mbps Internet service from the definition. By dramatically redefining broadband in a way that excluded many ISPs that offered competitive Internet access services, the Commission created the conditions necessary for it to assert the need for action under Section 706.

These deficiencies, among others, did not go unnoticed. Tim Brennan, chief economist of the FCC during the OIO's drafting, infamously declared the OIO an "economics-free zone." *See* L. Gordon Crovitz, *'Economics-Free' Obamanet*, WALL ST. J., Jan. 31, 2016, https://www.wsj.com/articles/economics-free-obamanet-1454282427. As Brennan further wrote in clarification of his assertion, "[e]conomics was in the Open Internet Order, but a fair amount of the economics was wrong, unsupported, or irrelevant."[3]

---

[3] Brennan's discussion bears quoting in full:

> Economics was in the Open Internet Order, but a fair amount of the economics was wrong, unsupported, or irrelevant. Some examples:
>
> *Wrong*. Even if broadband providers have market power because subscribers are slow to switch broadband services, as the FCC claims, the FCC incorrectly found such providers lack an incentive to provide high-quality service.…
>
> *Unsupported*. The FCC claims that a "virtuous circle" preventing broadband providers from charging content suppliers for delivery will lead to more content suppliers.… But the circle can work in reverse.… The FCC didn't use its best supporting evidence—that broadband providers

That the agency's own chief economist so characterized the OIO should have caused the D.C. Circuit at least some unease with the soundness of the FCC's purported analysis. As it was, however, only Judge Williams, dissenting in part from the panel majority, noted Brennan's concern at all. *See* App. A at 158a.

Crucially glossed over by the panel majority, all of these changes came in the face of the FCC's longstanding view that Section 706 "does not constitute an independent grant of authority." In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, 13 FCC Rcd. 24,012, 24,047, ¶77 (1998). The changes also relied upon the notion that the Commission could extensively tailor the OIO in order to avoid applying large sections of Title II—a notion that itself brings to mind this Court's reluctance to permit agencies to discover regulatory elephants hidden in statutory mouseholes. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

> had already largely adopted net neutrality—as that would have undermined the necessity of regulation.
>
> *Irrelevant*. In arguing against "paid prioritization," the FCC cited articles on what economists call "price discrimination" to suggest possible harms when a broadband provider charges different prices to content providers that compete with each other. But paid prioritization isn't price discrimination; it's charging higher prices for better service.

Tim Brennan, *Is the Open Internet Order an "Economics-Free Zone"?*, 11 FSF PERSP. 22 (2016).

It must be noted that *nothing* significant in terms of broadband deployment or performance *actually* changed between the 2010 OIO and the drafting of the 2015 OIO, other than the agency's *characterization* of the facts and its nominal interpretation of Section 706. The only difference now is that, as a purely technical, legal matter, the FCC is in a better position to pursue its "stand-alone policy objective," *Comcast Corp. v. FCC*, 600 F.3d 642, 659 (D.C. Cir. 2010), without interference from the courts. As Justice Thomas warned, this sort of manufactured justification for a predetermined policy objective smacks of the agency impermissibly aggrandizing to itself "the power to decide—without any particular fidelity to the text—which policy goals [it] wishes to pursue." *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring).

It is difficult not to conclude, if one applies even a scintilla of skepticism, that the FCC views the Communications Act as an impediment in its path to enacting preferred policy goals. The Commission's changed interpretations and factual characterizations underlying the OIO reflect not the careful exercise of its expertise, but an effort to evade statutory limitations. As this Court has observed, "when an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism." *Util. Air*, 134 S. Ct. at 2444 (quoting *Brown & Williamson*, 529 U.S. at 159).

The D.C. Circuit failed to adequately consider *any* of these factors, instead treating this case as an unremarkable application of *Chevron*. Indeed, as discussed in Part I, above, that review was exceptionally deferential. *But the decision whether to afford an agency deference cannot itself be based upon deference to the agency's assertions that it is due deference.*

The mere acceptance of the assertion that the agency "considered" the issues, without requiring evidence of the adequacy of its consideration, negates vital safeguards that constrain agencies from operating outside the scope of effective judicial review. As this Court has explained, insisting upon such a showing "ensur[es] that [the agency] engaged in reasoned decisionmaking—that it weighed competing views, selected [an approach] with adequate support in the record, and intelligibly explained the reasons for making that choice." *Elec. Power Supply Ass'n*, 136 S. Ct. at 784. Such a showing is particularly essential where the agency's conclusions are facially questionable.

CONCLUSION

Judicial review of the OIO presents a case that lies at the nexus—or perhaps the vortex—of several recent cases in which this Court has addressed agency decisionmaking. This case presents an issue of fundamental importance to the administrative state. This Court would not have heard the previous cases, or decided them as it has, if it were not exceptionally concerned about lower courts' application of

substantial deference in cases such as this one. While this Court has not spoken definitively on this issue, the panel majority's opinion, considered in the best possible light, lies at the extreme edge of existing precedent. Moreover, it runs counter to the direction suggested by this Court's most recent decisions. It fails to recognize, much less resolve, the important issues that this Court has been struggling with and that are central to the present case.

For these reasons, the Court should grant *certiorari*.

Respectfully submitted,

Geoffrey A. Manne
INTERNATIONAL CENTER FOR
LAW & ECONOMICS
3333 NE Sandy Blvd.
Suite 207
Portland, OR 97232

Justin (Gus) Hurwitz
UNIVERSITY OF NEBRASKA
COLLEGE OF LAW
209 Ross McCollum Hall
P.O. Box 830902
Lincoln, NE 68583-0902

Jeffrey A. Mandell
Counsel of Record
STAFFORD ROSENBAUM LLP
222 W. Washington Ave.
Suite 900
Madison, WI 53703
(608) 256-0226
jmandell@staffordlaw.com

Counsel for Amicus Curiae

November 2, 2017