INITIAL VERSION

ORAL ARGUMENT SCHEDULED FOR FEBRUARY 1, 2018

No. 18-1051

IN THE

United States Court of Appeals for the District of Columbia Circuit

MOZILLA CORPORATION, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,

Respondents.

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

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

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GLOSSARY

APA	Administrative Procedure Act
FCC	Federal Communications Commission
FTC	Federal Trade Commission
ISP	Internet Service Provider
OECD	Organisation for Economic Co-operation and Development

INTRODUCTION AND SUMMARY OF ARGUMENT

The Order on review abandons—for the first time—all FCC net neutrality protections against harmful ISP conduct. The Commission did not stop at reclassifying broadband Internet access as a Title I service. This Court likewise must review the entire Order and not stop with reclassification. After reclassifying broadband, the Commission itself "recognize[d] that … genuine harm is possible" from ISP conduct and that the need for a regulatory "backstop" remained. *Restoring Internet Freedom*, 33 FCC Rcd. 311, 451 ¶ 244 (2018) (adopted 2017) ("Order") (JA____). Yet the Order disclaims all FCC oversight over ISP conduct. *See* Order ¶ 239 (JA____). The Commission's decision to eliminate all ISP conduct rules did not comply with the substantive and procedural protections of the APA and cannot stand.

The Commission's claim that a narrowed transparency rule, combined with antitrust law, consumer protection law, and market forces, adequately protects against any harmful ISP conduct (Order ¶ 239 (JA____)) is fatally flawed in at least three ways. First, the Commission fails to address the regulatory chasms the Order creates. The Commission has not explained how its reliance on FTC consumer protection enforcement would effectively prevent harm from conduct that has been disclosed. Nor has it provided a reasoned basis for concluding that antitrust law and market competition are adequate substitutes for net neutrality

rules, particularly when nearly half of Americans have no choice of wireline ISP. Because the Commission's neutered approach fails to address threats of harmful ISP conduct documented in the administrative record and acknowledged by the Commission, the Order lacks the required "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

Second, the Commission unreasonably assesses the costs and benefits of eliminating all conduct rules, fails to "consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, and "'disregard[s] facts and circumstances that underlay … the prior policy'" without providing a "'reasoned explanation.'" *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Television Stations*, 556 U.S. 502, 515–16 (2009)). In particular, the Commission misreads or ignores evidence contradicting its pre-determined conclusions about decreased investment and fails to adequately address arguments that it relied on unreasonable, unreliable, and inconsistent methods of economic analysis.

Finally, the Commission fails to identify a lawful source of authority for its transparency rule. Petitioners and intervenors have standing to challenge this rule, inasmuch as *no party disputes* that the transparency rule is inseverable from the Commission's harm-causing decision to eliminate all conduct rules. On the merits, the Commission (without sufficient notice) relied solely on Section 257 for the

transparency rule, but that provision affords the Commission neither direct nor ancillary rulemaking authority. *See* 47 U.S.C. § 257. Attempting to get around this problem, the Commission's lawyers now offer their own *post hoc* interpretation of the statute that appears nowhere in the Order and warrants no *Chevron* deference. Furthermore, even under FCC counsels' interpretation, the Commission erred by relying solely on Section 257 as authority for eliminating market entry barriers. Finally, Congress has since repealed Section 257(c)—the Commission's only source of authority for the rule.

ARGUMENT

I. THE COMMISSION UNREASONABLY ASSERTS THAT NO CONDUCT REGULATION IS NEEDED TO PREVENT HARMFUL ISP CONDUCT.

A. The Commission Fails to Answer How its Disclosure-Based Regulatory Regime Would Protect Against Harmful ISP Conduct.

The Commission recognizes the need to "provide adequate protection against any harmful [ISP] conduct," yet rehashes its flawed reasoning that FCC regulation of ISP conduct is unnecessary to prevent such harms. Br. for Resp. 63–75 ("FCC Br."). Although the Commission asserts that preexisting laws, together with the narrowed transparency rule and market forces, can achieve "comparable benefits" to conduct rules, Order ¶ 239 (JA____), it never seriously considered what conduct existing laws actually prohibit. Consequently, the Commission

lacked a reasoned basis to conclude that its new regulatory regime achieves its stated purpose. *See* Br. of Internet Ass'n et al. 10–16 ("IA Br.").

Pointedly, the Commission's brief sidesteps the problem of *disclosed* harms. It argues that Section 5 of the FTC Act authorizes the FTC "'to enforce any commitments made by [ISPs] regarding their network management practices,'" including their transparency rule disclosures. FCC Br. 65 (quoting Order ¶ 141 (JA____–JA____)). This fails, however, to address how Section 5 authority would protect against harmful conduct, such as blocking or throttling, that an ISP forthrightly discloses. *See* Comment of Terrell McSweeny, Commissioner, FTC at 4, Docket No. 17-108 (filed July 17, 2017) (JA____) ("If these disclosures are truthful, there is no deception for the FTC to police.").

All the FTC cases the FCC cites invoke Section 5 of the FTC Act against ISPs' false claims or failures to provide adequate notice. *See* Order ¶ 141 n.501 (JA____). All but one involved the FTC's "deceptive practices" authority. The sole FTC case invoking "unfair practices" authority relies on the company's failure to provide adequate, timely notice before reneging on its agreement with consumers, thereby causing unavoidable injury. *See Orkin Exterminating v. FTC*, 849 F.2d 1354, 1365–67 (11th Cir. 1988). Regarding potentially "unfair" ISP conduct, the FCC only supposes that the FTC might in the future consider non-neutral conduct "without notifying consumers and obtaining their consent" to be

unfair. Order ¶ 141 (JA____). The FCC fails to consider how adequate notice and disclosure may shield harmful ISP conduct from an "unfair practices" claim.

In this Court, the FCC expressly contends that it can rely on FTC enforcement powers without ever resolving whether harmful ISP conduct actually would be held "unfair" under Section 5. FCC Br. 67 n.14. Not so. Having based its own rulemaking action on an expectation of FTC enforcement, the FCC needs—and fails—to establish the rationality of that expectation.

Indeed, the FCC argues only that blocking and throttling "*without notifying consumers* may violate the FTC Act." FCC Br. 65 (emphasis added). Similarly, the FCC's reliance on state laws against "*deceptive* trade practices" omits what protections, if any, exist against *disclosed* harms. *Id.* (citing Order ¶ 142 (JA____)) (emphasis added). ISP intervenors similarly cite FTC and state enforcement against "*deceptive* conduct," Br. for Intervenors USTelecom et al. 29 n.11 (emphasis added) ("ISP Br."), revealing their view that, as long as ISPs disclose their practices, harmed parties have no recourse.

The Commission and ISP intervenors suggest no such recourse is needed because ISPs are "unlikely to block or throttle." FCC Br. 72; ISP Br. 26. Yet ISPs repeatedly engaged in those behaviors before the FCC adopted its 2015 net neutrality rules. *See Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, 5628 ¶ 79 n.123, 5639 ¶ 96 (2015) ("2015 Order") (JA____, JA____)

(listing incidents). Nor does that claim square with the reality that ISPs have fought not just Title II classification of broadband, but also the substance of no-blocking and no-throttling rules. *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) ("*USTelecom*"); *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

B. The Commission Unreasonably Concluded that Antitrust Laws and Market Forces Offer Sufficient Protection.

The Commission also lacks a reasoned basis for relying on both antitrust laws and "consumer backlash" as adequate substitutes for conduct rules. It claims that antitrust rule-of-reason analysis is ideal for addressing net neutrality harms. FCC Br. 67–68, 71. But the rule-of-reason analysis focuses on a narrow set of anticompetitive effects. It is not designed to remedy harms that do not translate into provable price or output effects. *See* Hal J. Singer, *Paid Prioritization and Zero Rating: Why Antitrust Cannot Reach the Part of Net Neutrality Everyone Is Concerned About*, Antitrust Source, 2, 5 (Aug. 2017). Consequently, antitrust laws are ill-suited to address harms to consumers, free speech, investment, and innovation in the net neutrality context. *See* Br. of Professors of Admin., Commc'ns, Energy, Antitrust, and Contract Law and Policy 7–8.

Moreover, the key issue in a net neutrality case alleging harmful blocking, for example, would be whether that blocking constitutes *reasonable network management*—a technical determination falling squarely within the FCC's expertise and jurisdiction and outside the expertise of the FTC or Department of

Justice as currently constituted. *See* Reply Comments of Internet Association at 19–20, Docket No. 17-108 (filed Aug. 30, 2017) (JA____–JA____); Letter from CCIA to FCC, Docket No. 17-108, at 3 (filed Nov. 17, 2017) (JA____).

Illustrating this problem, the Commission argues that antitrust laws could have addressed Comcast's prior blocking of peer-to-peer file-sharing traffic. Order ¶ 145 (JA____). The central issue there, however, was whether Comcast's intentional interference constituted reasonable network management designed to address network congestion. *Formal Complaint of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd. 13028, 13054 ¶ 45 (2008). Resolving that question required the FCC's "expert judgment" on Comcast's network infrastructure and whether the blocking conformed to industry standards and network management goals. *See id.* ¶ 48–51. Antitrust enforcers are not positioned to perform this function.

Lastly, the FCC maintains that transparency rule disclosures would suffice because public outcry would deter harmful conduct. FCC Br. 72; ISP Br. 28–29. But as the Commission itself has long recognized, consumers cannot vote with their feet where they lack competitive choices or face prohibitive switching costs. *Preserving the Open Internet*, 25 FCC Rcd. 17905, 17924 ¶ 34 (2010); 2015 Order ¶ 81 (JA____–JA____). The FCC claims that low churn evidences robust

competition, rather than consumers' limited broadband options or high switching costs. Order ¶ 128 n.470 (JA____). But it fails to adequately examine how—even when there is choice—switching barriers, like multiyear contracts, prevent customers from leaving in protest of harmful ISP conduct. Offering an incomplete analysis, the Commission fails to establish that the purported ability for consumers to switch actually would counter harmful ISP conduct. And it fails to adequately consider the lack of competitive options available to consumers.

II. THE ORDER ARBITRARILY AND CAPRICIOUSLY WEIGHS THE COSTS AND BENEFITS OF ELIMINATING CONDUCT RULES.

An agency may decide "'which evidence to believe,'" but it must choose "'rationally.'" FCC Br. 85 (quoting *Citizens Telecomms. of Minn. v. FCC*, 901 F.3d 991, 1011 (8th Cir. 2018)). Here, the FCC flunked that test. It mischaracterized evidence that did not support its hypothesis and failed to acknowledge the limitations and errors undergirding the evidence it chose to credit. Criticisms of the Commission's cost-benefit analysis are not mere disagreements about how to interpret competing evidence, as the FCC would have this Court believe. *See, e.g.*, *id*. They are failures of reasoned decision-making that cannot survive APA scrutiny.

A. The Commission Unreasonably Dismissed Analyses that Contradict its Pre-Determined Conclusion.

The FCC began this proceeding with a factual conclusion, based on a blog post and one study, already in mind: the 2015 Order, then effective for less than two years, had reduced ISP investment. *Restoring Internet Freedom*, 32 FCC Rcd. 4434, 4448–49 ¶¶ 45 (2017) ("NPRM") (JA____–JA____). Months later, the Order credited only those analyses consistent with its thinking. In ratifying its foregone conclusion, however, the Commission neglected a necessary threshold inquiry: whether investment effects could be reliably discerned at all for that brief period.

As our opening brief explained, the Internet Association conducted a systematic examination of the available data and econometric tools. It ran numerous tests, using multiple methods, to see if any validated the Commission's claim that the 2015 Order had caused ISP investment to decline. None supported such a determination. To the contrary, the Internet Association's economic expert concluded that none of the available techniques could answer the question about ISP investment that was posed in the NPRM. IA Br. 16–19. But the Order barely acknowledges that analysis, and the FCC's brief does little more.

First, the FCC has no answer to the point that it arbitrarily accepted forecast data used in its preferred models while finding the same forecasting techniques disqualifying in models that reached contrary conclusions. The Commission's

failure to forthrightly address questions about the Phoenix Center study—the only evidence of investment decline the Commission has not discounted, *see infra* at Section II.B—was arbitrary and capricious.

Second, the Commission argues that it was free to ignore most of the Internet Association's results because the various analyses employed by the Internet Association had some common elements. FCC Br. 83 n.22. Commonality is no justification for ignoring record evidence, however. The only substantive reason the Commission gave for discounting the Internet Association's work was that it relied partially on regression discontinuity methods and forecast metrics. *Id.* 83. But that criticism does not apply to the majority of the methods the Internet Association study documented. *See* IA Br. 18. Furthermore, regression discontinuity design is a well-recognized method for identifying the causal effect of an intervention, such as a policy change, where, as here, randomization is not possible. *See* David S. Lee & Thomas Lemieux, *Regression Discontinuity Designs in Economics*, 48 J. Econ. Literature 281 (June 2010). Here, regression discontinuity analysis corroborated the findings of other studies that used other OECD countries' telecommunications investment as a control group. The Commission's refusal to consider a regression discontinuity analysis because it "eliminat[ed] the use of a separate control group," FCC Br. 83, is particularly problematic because, as discussed below, the Order credits a study that used

control groups unshielded from effects of the policy being tested and whose selection has no foundation in economic theory.

Additionally, the FCC provides no justification for requiring specificity and explicit causation in assessing edge provider investment, s*ee* FCC Br. 84–85, but not in assessing ISP investment. As discussed below, the Commission bolsters claims of declining ISP investment with analyses that do not demonstrate causation, but applies a different standard in assessing edge provider investment. That is inconsistent and arbitrary.

B. The FCC Relies on Studies Employing Unreasonable and Unreliable Methods.

Despite numerous questions about its selection and evaluation of economic evidence, the FCC asserts that "the balance of the evidence" showed that applying conduct rules to broadband providers would harm investment. FCC Br. 80. It begins by repeating the Order's arguments about investment trends. *See* Order ¶ 91 (JA____) (considering investment comparisons before and after network neutrality rules and finding that they "suggest that [2015's Title II] reclassification" of broadband "has discouraged investment"); *see also* Br. of the Georgetown Ctr. for Bus. and Pub. Policy et al. 4–9 (restating analyses of observed investment effects). But then, instead of addressing the problems with this evidence identified by petitioners and intervenors, *see, e.g.*, IA Br. 19–22, the Commission concedes that the analyses on which it relied in the Order are "not

conclusive." FCC Br. 81; *see* IA Br. 21–22 (describing the FCC's unreasonable reliance on aggregate investment data). That is unsurprising. Even the FCC's supporters at the Phoenix Center assert that "it is wholly improper to measure the investment effects of reclassification using pedantic calculations of investment effects just before and just after a Commission order" because "whether capital expenditures rise or fall says nothing about the investment effect of a regulatory intervention." Br. of Phoenix Ctr. 16–17. But the Commission cannot have it both ways. It must either defend the Order's reliance on aggregate investment comparisons or concede that these tools cannot bear the weight the Order put on them. The Commission does neither.

That leaves the Commission with just a single piece of evidence: a "counterfactual" study commissioned by the Phoenix Center. *See* FCC Br. 81. Resting so much on so little makes it even more critical that the Commission address criticisms of the Phoenix Center study. Yet the Order failed to do so. *See* IA Br. 24–25. Even before this Court, the Commission devotes merely a footnote to defending the Phoenix Center study's methods.

Even that meager defense is flawed. First, the FCC says that the Phoenix Center study selected control groups using "standard empirical methods." FCC Br. 82 n.19. But those groups (machinery manufacturing, computer and electronic products manufacturing, plastic and rubber products manufacturing, and

transportation and warehousing) all operate within the United States in proximity to broadband services, and therefore were not isolated from the Order's potential effects—a fundamental requirement of any control group.[1] Additionally, though the FCC uses it to draw causal conclusions about the 2015 regulations, the Phoenix Center study actually analyzes reactions to events in 2010 that were based on different legal theories and had different real-world impacts.

Finally, the Commission offers no response to arguments that it disregarded, without explanation, the 2015 Order's prediction that there potentially could be a short-term ISP investment decline. *See USTelecom*, 825 F.3d at 707 (citing 2015 Order ¶ 410). The change in the Commission's position from the 2015 Order to the 2017 Order required a reasoned explanation, *see Encino Motorcars*, 136 S. Ct. at 2126, for an agency "cannot simply disregard contrary or inconvenient factual determinations that it made in the past." *Fox*, 556 U.S. at 537 (Kennedy, J., concurring).

[1] Each control group has connections to broadband investment and is therefore not isolated from the impacts of net neutrality regulation. For example, broadband deployment requires shipping materials to installation points.

III. THE TRANSPARENCY RULE'S INVALIDITY INFECTS THE ENTIRE ORDER.

A. Petitioners and Intervenors Have Standing to Challenge the Transparency Rule.

In the hope of avoiding having to defend its transparency rule, the Commission makes a standing challenge. FCC Br. 96–97. But petitioners and their supporting intervenors have Article III standing. Where a party has standing to challenge a government action, "it may do so by identifying all grounds on which" that action is unlawful. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 n.5 (2006).

Specifically, no party contests that petitioners and supporting intervenors are injured by the conduct rules' elimination. The FCC predicated its elimination of the conduct rules on its maintenance of a transparency rule. It is *undisputed* that the revised transparency rule is inseverable from the FCC's decision to eliminate all other rules. Thus, if the transparency rule is unlawful and vacated, then the Commission's elimination of the conduct rules is also invalid and must be vacated, redressing the injury at hand. Br. for Pet'rs Mozilla Corp. et al. 54–55; IA Br. 30–41.

In sum, because the Commission's elimination of conduct rules is inseverable from the transparency rule, vacating the unauthorized transparency rule requires overturning the elimination of conduct rules. That would redress our

injury. Separate standing related specifically to the transparency rule is not required. *Sierra Club v. FERC*, 867 F.3d 1357, 1366–67 (D.C. Cir. 2017) (finding standing where a favorable decision on a non-severable provision would redress litigants' injury); *see also Catholic Soc. Serv. v. Shalala*, 12 F.3d 1123, 1125–26 (D.C. Cir. 1994). Indeed, neither standing case cited by the Commission involves inseverable provisions like those at issue here.[2]

B. Section 257 Does Not Authorize the Transparency Rule.

On the merits, the transparency rule exceeds FCC authority because it rests solely on the now-repealed Section 257(c) of the Communications Act. That provision instructed the Commission to triennially conduct a proceeding and prepare a congressional report identifying and eliminating market entry barriers. For *regulations* aimed at "identifying and eliminating . . . market entry barriers," Section 257 expressly directed the Commission to rely on "authority under this chapter (other than this section)." 47 U.S.C. § 257(a). Therefore, Section 257 itself cannot provide authority for the transparency rule. Nor can ancillary

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[2] *Lewis v. Casey* is inapposite for the additional reason that the individual injuries suffered there were too isolated to justify systemic relief. 518 U.S. 343, 409 n.6 (1996) (holding deficiencies affecting illiterate inmates did not confer standing to challenge deficiencies affecting other inmates). And unlike in *Telecommunications Research & Action Center v. FCC*, which expressly confined its holding to declaratory actions (not rulemakings), 917 F.2d 585, 587–88 (D.C. Cir. 1990), petitioners and intervenors opposed the Order's outcome before the Commission. *See, e.g.*, Comments of Internet Association at 27–30, Docket No. 17-108 (filed July 17, 2017) (JA____–JA____).

rulemaking authority save that rule. *See* FCC Br. 98–99. Ancillary authority must be tied to a statutory mandate and cannot be deployed to "override Congress's clearly expressed will," such as the express congressional directive to find authority for regulations outside of Section 257. *EchoStar Satellite v. FCC*, 704 F.3d 992, 1000 (D.C. Cir. 2013); *see Comcast v. FCC*, 600 F.3d 642, 658–61 (D.C. Cir. 2010).

The Commission also provided inadequate notice for its approach. IA Br. 36–38. The FCC does not dispute that the NPRM never cited Section 257—the *only* source of authority it ultimately relied upon for its transparency rule. *See* FCC Br. 101–02. Nor can the handful of comments mentioning Section 257 cure the Commission's flawed notice because those comments discussed Section 257 as a possible source of authority *in conjunction with other sources.*[3]

The Commission's lawyers offer—for the first time—a new interpretation of Section 257 designed to save the transparency rule. They claim that the parenthetical in Section 257(a) requiring other authorization for rulemaking applies

[3] Contrary to the FCC's assertion, FCC Br. 98–99, the Order's Section 257-alone approach breaks from the 2010 transparency rule, which was based on multiple sources of authority. For the same reason, dicta in this Court's *Comcast* decision did not address the issue here: whether Section 257 by itself could provide ancillary (let alone direct) rulemaking authority. *USTelecom* made clear that *Verizon* upheld the 2010 transparency rule under Section 706, not Section 257. 825 F.3d at 733.

only to regulations "eliminating" market entry barriers, not regulations "identifying" barriers. FCC Br. 100. That reading appears nowhere in the Order, which never mentions Congress's limiting parenthetical, let alone addresses its application to Section 257's twin purposes of "identifying and eliminating" barriers. Because it is not the product of reasoned *agency* decision-making, counsel's post-hoc statutory interpretation neither warrants *Chevron* deference nor provides a basis for upholding the Order. *See Kansas City v. Dep't of Hous. & Urban Dev.*, 923 F.2d 188, 192 (D.C. Cir. 1991) (refusing to uphold agency action based on counsel's post-hoc statutory interpretation).

In any event, counsel's new interpretation rests on a cramped reading. FCC Br. 100–01. The "structural [and] contextual evidence" here squarely rebuts the "last antecedent" canon of construction on which counsel relies. *Lockhart v. U.S.*, 136 S. Ct. 958, 965 (2016). Indeed, the FCC's brief does not dispute that Section 257's purpose, history, and structure support the plain reading of the text—as a congressional reporting requirement, not a source of independent rulemaking authority *for anything*. *See* IA Br. 33. Where the modifying clause "is applicable as much to the first … as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Paroline v. U.S.*, 572 U.S. 434, 447 (2014). Unlike the cumbersome statutory list in *Lockhart*, "identifying and eliminating" is a single, integrated, conjunctive phrase. The FCC offers no

reason why the rulemaking bar would apply to one half of that phrase, but not the other. Indeed, FCC counsel's flawed reading would permit an end-run around Congress's express limitation—which is precisely what happened here.

Even assuming the FCC's new statutory interpretation were permissible, it could not save the transparency rule because the Commission promulgated the rule to *eliminate* market entry barriers by deterring harmful ISP conduct, and even counsel concedes that the Commission must look elsewhere for authority to do that. The FCC claims that "[t]he objective of the transparency rule is simply to help identify barriers—not to eliminate them." FCC Br. 101. But the FCC's brief elsewhere makes clear that this claim is untrue. According to the FCC, the rule's disclosure requirements "discourage broadband providers from engaging in harmful practices," "promote[] competition," and empower pre-existing antitrust and consumer protection laws "'to deter … behavior that harms consumers.'" *Id.* 63–64, 65 (quoting Order ¶ 244 (JA____)).

The Order likewise states that the transparency rule's mandated disclosures "directly advance [Section 257's] statutory directives" because they "help[] reduce barriers to entry" and "encourage[] entrepreneurs' and small business' ability to compete and develop and advance innovating offerings." Order ¶ 237 (JA____–JA____). Moreover, the Commission repeatedly relied on the transparency rule as the basis for eliminating conduct rules precisely because it claimed that rule would

deter harmful ISP conduct—either directly through public opprobrium or indirectly by enabling FTC enforcement and amplifying antitrust laws. *See* IA Br. 39–40 (collecting Order citations). Given that emphasis, the only fair reading is that the transparency rule was adopted to reduce specific (and already identified) market entry barriers, like harmful blocking and throttling—notwithstanding the Commission's footnote claiming that its reliance on Section 257 "centers on" identifying barriers and is not "an over-arching grant of authority to eliminate any and all barriers we might identify." Order ¶ 233 n.853 (JA____–JA____).

That the transparency rule eliminates, rather than just identifies, entry barriers is not mere happenstance. It does so by design. The rule does not require ISPs to report anything to the Commission. Instead, it requires public disclosure of ISP information—via ISP websites or the Commission's portal. 47 C.F.R. § 8.1(a). Putting aside the inadequacy of the Commission's prophylactic scheme, if the FCC really intended to "collect evidence," Order ¶ 232 n.847 (JA____), it easily could require ISPs to provide that evidence directly to the FCC. The FCC's only reason for requiring public disclosures, rather than FCC reporting, is its view (however misguided) that doing so will deter harmful ISP conduct and enable consumers and edge providers to develop work-arounds for blocking, throttling, and other non-neutral practices—in other words, to *eliminate* market barriers, not just to *identify* them. In fact, all but 32 of many thousands of ISPs have apparently

chosen to disclose via their own websites, and it is not clear that the Commission has any plan to actually "collect" that information. *Restoring Internet Freedom ISP Disclosures*, Docket 18-142 (last visited Nov. 14, 2018).

Finally, the FCC claims that Congress's recent repeal of Section 257(c) is irrelevant because Congress replaced it with a new reporting requirement, *see* 47 U.S.C. § 163, and a savings clause. FCC Br. 99–100. But the new law does not simply recodify Section 257(c). It nowhere includes the terms "identify[]" and "eliminate[]," that the Order relied upon as the basis for "implicitly empower[ing] the Commission to require disclosures." Order ¶ 232 (JA____). Instead, it directs the Commission to "consider market entry barriers" as part of a broad "assess[ment of] the state of competition." 47 U.S.C. § 163(d)(3). Moreover, like Section 257, there is no evidence that Congress intended the new law to do anything more than direct the Commission to submit congressional reports—it does not authorize rulemaking. The savings clause cannot save rulemaking authority that, as described above, never existed. To identify and eliminate any market entry barriers, the Commission must start a rulemaking proceeding based on some other grant of authority. At a minimum, the Commission must interpret the new law to determine whether it authorizes the transparency rule.

CONCLUSION

The Petitions for Review should be granted.

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November 15, 2018

CERTIFICATE OF COMPLIANCE

I, E. Austin Bonner, hereby certify that the foregoing brief contains 4,535 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman.

/s/ E. Austin Bonner
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November 15, 2018

CERTIFICATE OF SERVICE

I, E. Austin Bonner, hereby certify that on this 15th day of November 2018 I caused the foregoing brief to be filed via the Court's CM/ECF system, which caused that document to be served on all parties or their counsel.

/s/ E. Austin Bonner
E. Austin Bonner

November 15, 2018