ORAL ARGUMENTS NOT YET SCHEDULED
NO. 18-1051 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOZILLA CORP., ET. AL.
PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA
RESPONDENT.

ON PETITIONS FOR REVIEW OF REGULATIONS PROMULGATED BY
THE UNITED STATES FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF PROFESSORS OF ADMINISTRATIVE, COMMUNICATIONS, ENERGY, ANTITRUST, AND CONTRACT LAW AND POLICY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

CATHERINE J.K SANDOVAL
Santa Clara University School of Law
Broadband Institute of California
500 El Camino Real
Santa Clara, California, 95050
(408) 551-1902
csandoval@scu.edu
Counsel for Amicus

ANTHONY R. CHASE
University of Houston Law Center
4604 Calhoun Rd, Houston, Texas, 77004
(713) 874-5801

ALLEN S. HAMMOND, IV
Santa Clara University School of Law
Broadband Institute of California,
500 El Camino Real
Santa Clara, California, 95050
(408) 554-7078

CAROLYN M. BYERLY
Howard University
Cathy Hughes School of Communications
2400 Sixth Street NW
Washington, D.C. 20059
(202) 806-5121

Certificate of Parties, Rulings, and Related Cases

Parties and Amici Except for the following, all parties, intervenors, and amici appearing before this Court are listed in the Brief for Petitioners. Amici appearing in this Court include Catherine J.K. Sandoval, Allen S. Hammond IV, Carolyn M. Byerly, and Anthony Chase.

Rulings Under Review References to the rulings at issue appear in the Brief for Petitioners.

Related Cases References to related cases before this court appear in the Brief for Petitioners.

Dated: August 27, 2018

Respectfully Submitted,

/s/ Catherine J.K. Sandoval
Santa Clara University School of Law
500 El Camino Real
Santa Clara, California, 95050
(408) 551-1902
csandoval@scu.edu
Counsel for Amicus

Certificate Regarding Consent, Authorship, and Separate Briefing

All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a). No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the Amici Curiae and the ordinary salary their university employers pay them, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief,. *See* Fed. R. App. P. 29(c)(5).

Counsel for Amici certify that a separate brief is necessary, because no other amicus brief of which Amici are aware addresses in detail the F.C.C.'s Congressionally mandated obligation to consider rulemaking's impact on public safety, critical infrastructure, and democracy. Nor does any other amicus brief discuss in detail how the F.C.C.'s rulemaking process, in particular the commission's disregard of public comments and tolerance of identity theft in the comment process, violates the Administrative Procedures Act, as Amici argue.

Amici understand that other briefs will be filed in support of Petitioners. While the interests and arguments raised by other Amici are broad, there is no overlap of arguments to the best of Amici's knowledge. In light of the different, important, and complex issues presented in these briefs, counsel for Amici certify

that filing a joint brief is not practicable and that it is necessary to submit separate briefs.

Dated: August 27, 2018

Respectfully Submitted,

/s/ Catherine J.K. Sandoval
Santa Clara University School of Law
500 El Camino Real
Santa Clara, California, 95050
(408) 551-1902
csandoval@scu.edu
Counsel for Amicus

Corporate Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Amici state that none of the Amici has a parent corporation and no publicly held corporation owns 10% or more of the stock of any Amicus.

Dated: August 27, 2018

Respectfully Submitted,

/s/ Catherine J.K. Sandoval
Santa Clara University School of Law
500 El Camino Real
Santa Clara, California, 95050
(408) 551-1902
csandoval@scu.edu
Counsel for Amicus

Table of Contents

Certificate of Parties, Rulings, and Related Cases ii

Certificate Regarding Consent, Authorship, and Separate Briefing..... iii

Corporate Disclosure Statement v

Table of Contents vi

Table of Authorities vii

Glossary of Terms xiii

Interest of Amici 1

Summary of Argument 2

Argument.....3

I. The FCC Violates its Statutory Mandate and the APA by Failing to Consider the 2015 Open Internet Order's Protection of Public Safety, Critical Infrastructure, and Free Expression. 3

II. The FCC Violates the APA and Distorts the Record by Failing to Adequately Respond to Public Comment 13

III. The FCC's Tolerance of Allegedly Criminal Identity Theft in its Rulemaking Distorts the Record, Undermines Democratic Decision-making, and Violates the APA.....19

IV. Conclusion 23

Certificate of Compliance 25

Certificate of Service 26

Table of Authorities

Cases

ACLU v. F.C.C., 823 F.2d 1554 (C.A.D.C.1987) 15

Allied-Signal, Inc. v. United States Nuclear Regulatory Comm'n, 988 F.2d 146 (D.C.Cir.1993) 22, 23

American Radio Relay League, Inc. v. F.C.C., 524 F.3d 227 (D.C. Cir. 2008) 14

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 8

Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330 (D.C. Cir. 1968). 14

BASF Wyandotte Corp. v. Costle, 598 F.2d 637 (1st Cir. 1979) 15

Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc., 429 U.S. 477 (1977) 2

California v. Health and Human Services, 281 F.Supp.3d 806 (N.D. Cal. 2017) ... 13

Center for Biological Diversity v. U.S. Fish & Wildlife Service, 807 F.3d 1031 (9th Cir. 2015) 10

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 13

Council Tree Comm., Inc. v. F.C.C., 619 F.3d 235 (3rd Cir. 2010) 18

Dickinson v. Zurko, 527 U.S. 150 (1999) 10

Dist. Hosp. Partners, L.P. v. Burwell, 786 F.3d 46 (D.C. Cir. 2015) 10

Encino Motorcars, LLC v. Navarro, __U.S.__, 136 S.Ct. 2117, 2126 (2016) ... 4, 5, 12

F.C.C. v. Fox Television Stations, Inc. 556 U.S 502, (2009) 4, 5, 7, 12, 15, 18

F.E.R.C. v. Electric Power Supply Ass'n., __U.S.__, 136 S.Ct. 760 (Jan. 28, 2016) 6

FBME Bank Ltd. v. Mnuchin, 249 F.Supp.3d 215 (D.D.C. 2017), *appeal dismissed sub nom.* FBME Ltd. v. Mnuchin, 709 Fed.Appx. 4 (D.C. Cir. 2017).....17

Fox Television Stations, Inc. v. F.C.C., 280 F.3d 1027 (D.C. Cir. 2002), *opinion modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002)..... 5, 22, 23

Horsehead Res. Dev. Co., Inc. v. Browner, 16 F.3d 1246 (D.C.Cir.1994) 18

Huntco Pawn Holdings, LLC v. U.S. Department of Defense, 240 F.Supp.3d 206 (D.D.C. 2016).....14

International Snowmobile Mfrs. Ass'n v. Norton, 340 F.Supp.2d 1249 (D. Wyo. 2004).....13

Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007) 18

Michigan v. E.P.A., __U.S. __, 135 S.Ct. 2699 (2015)..... 2, 7, 8, 12

Motor Veh. Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983). 5, 10, 16

Nat'l Black Media Coal. v. F.C.C., 791 F.2d 1016 (2d Cir.1986) 18

National Ass'n of Manufacturers v. E.P.A., 750 F.3d 921 (D.C. Cir. 2014) 16

National Cable & Telecomm. Assn. v. Brand X, 545 U.S. 967 (2005) 12

North Carolina v. F.A.A., 957 F.2d 1125 (4th Cir. 1992) 16

Nuvio Corp. v. F.C.C., 473 F.3d 302 (D.C. Cir. 2006). 4, 12

Office of Communication of United Church of Christ v. F.C.C., 425 F.2d 543 (D.C. Cir. 1969) 16, 23

Perez v. Mortgage Bankers Ass'n, __ U.S. __ 135 S.Ct. 1199 (2015) 5, 7, 13, 16

Prometheus Radio Broad. v. F.C.C., 652 F.3d 431 (3d Cir. 2011) 18, 23

Prometheus Radio Project v. F.C.C., 373 F.3d 372 (3rd Cir. 2004)..... 18, 22

Pub. Citizen, Inc. v. F.A.A., 988 F.2d 186 (D.C. Cir. 1993).....17

Reytblatt v. Nuclear Regulatory Comm'n, 105 F.3d 715 (D.C. Cir. 1997).....17

S.E.C. v. Chenery Corp. 318 U.S. 80 (1943).....5, 7

Small Refiner Lead Phase-Down Task Force v. E.P.A., 705 F.2d 506 (D.C. Cir. 1983).....15

Thompson v. Clark, 741 F.2d 401 (D.C. Cir. 1984).....17

United States Telecom Ass'n v. F.C.C., 825 F.3d 674 (D.C. Cir. 2016) 4, 5

United States v. Mead Corp., 533 U.S. 218 (2001)).....12

United States v. Nixon, 418 U.S. 683 (1974) 18

Vermont Public Service Board v. F.C.C., 661 F.3d 54 (D.C. Cir. 2011).....16

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978)..... 16, 17, 20

Statutes

5 U.S.C. § 553..... 1, 2, 13, 16, 22

5 U.S.C. § 706.....1

15 U.S.C. § 45.....8

16 U.S.C. § 824d.....6

42 U.S.C. § 5195c.....2, 3

Electricity Modernization Act of 2005, 42 U.S.C. § 15801, Pub. L. No. 109-58, § 1211, 119 Stat. 594 (2005).....6

47 U.S.C. § 151.....4

47 U.S.C. § 553.....22

47 U.S.C. § 615.....4

CAL. PUB. UTIL. CODE § 451.....6

Other Authorities

Brief for Gov. Petitioners, U.S.C.A. Case 18-1051 (2018)..... 3, 9, 11

CAL. PUB. UTIL. COMM'N, DECISION UPDATING THE WATER ENERGY NEXUS COST CALCULATOR, PROPOSING FUTURE INQUIRY, AND NEXT STEPS, Decision 16-12-047 (Dec. 15, 2016). 11

Catherine J. K. Sandoval, *Disclosure, Deception, and Deep-Packet Inspection: The Role of the Federal Trade Commission Act's Deceptive Conduct Prohibitions in the Net Neutrality Debate*, 78 FORDHAM L. REV. 641 (2009) 8

Catherine J.K. Sandoval, Reply Comments, In the Matter of Restoring Internet Freedom, WC Docket No. 17-108, Aug. 30, 2017..... 4, 8, 9, 15, 19, 20, 21, 22

Comments of AT&T Services Inc., In the Matter of Restoring Internet Freedom, 17-208 (July 17, 2017).....8

Countering America's Adversaries Through Sanctions Act Pub. L. No. 115-44, 131 Stat 886, Title II (211) (2017).....22

CPUC, Comments, In the Matter of Restoring Internet Freedom (WC Docket No. 17-108) (July 17, 2017).....3, 7

F.C.C., Amicus Brief in Support of Neither Party, USA v. AT&T, Inc.; DIRECTV Group Holdings, LLC; and Time Warner, Inc., U.S.C.A. Case # 18-5214 (Aug. 13, 2018). 21

Letter from Catherine J.K. Sandoval, Commissioner, California Public Utilities Commission, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, 10-127 (filed Oct. 14, 2014)..... 5, 6, 7

Office of Attorney General Schneiderman, State of New York, A.G. Schneiderman Releases Open Letter To FCC: Net Neutrality Public Comment Process Corrupted By "Massive Scheme," Nov. 21, 2017, https://ag.ny.gov/press-release/ag-schneiderman-releases-open-letter-fcc-net-neutrality-public-comment-process. 19

Regulations

47 C.F.R. § 1.17 22

Constitutional Provisions

Cal. Const., art. XII.....4

Administrative Proceedings

Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to Commission, GN Docket No. 02-37, Report and Order, 18 FCC Rcd 4016 (2003).....21

FCC, In the Matter of Restoring Internet Freedom, 33 FCC Rcd. 311 (WC Docket No. 17-108) (2018) 1, 2, 3, 4, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 20, 21, 22

In the Matter of Protecting & Promoting the Open Internet, 30 F.C.C. Rcd. 5601 (2015)..... 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 16, 23

In the Matter of Restoring Internet Freedom, Notice of Proposed Rulemaking, 32 F.C.C. Rcd. 4434 (2017).....21

Glossary of Terms

2018 *Internet Freedom Order*	FCC, In the Matter of Restoring Internet Freedom, 33 FCC Rcd. 311 (WC Docket No. 17-108) (2018).
2015 Order	*In re Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015), *aff'd sub nom. United States Telecom Association v. FCC*, 825 F.3d 674.
Communications Act	Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq.
CPUC	California Public Utilities Commission
Critical infrastructure	Systems and assets, whether physical or virtual, vital to the United States economy and national security as designated under 42 U.S.C. § 5195c, the Critical Infrastructures Protection Act of 2001.
Fire District	Santa Clara County Fire Central Fire Protection District
ISP	Internet Service Provider, a company that provides access to the Internet.
Net neutrality rules	Rules adopted in the 2015 Order, 30 FCC Rcd. 5601, prohibiting Internet Service Providers from blocking, throttling, paid priority, and unreasonable interference with or disadvantage to Internet users, with some exceptions for reasonable network management.
Paid Priority	Deals with Internet Service Providers that allow fast access to the Internet or priority over other transmissions with no safeguards for other Internet transmissions or users.

Interest of Amici

This *amicus curiae* brief is filed by Professors of Administrative, Communications, Energy, Antitrust, and Contract law and Policy: Associate Professor Catherine J. Kissée-Sandovál and Professor Allen S. Hammond, IV at Santa Clara University School of Law ("SCU Law") for the Broadband Institute of California, an unincorporated SCU Law technology regulation and public policy research and education institute; Dr. Carolyn M. Byerly, Professor and Chair, Department of Communication, Culture & Media Studies, Howard University, and; Anthony Chase, Associate Professor, University of Houston Law Center.

In the Internet Freedom rulemaking, Professor Hammond filed Reply Comments for the BBIC and Professor Sandoval filed Reply Comments in her capacity as a law professor and former Commissioner of the California Public Utilities Commission (CPUC). Professors Sandoval and Hammond authored this amicus brief, assisted by SCU Law student Research Assistant, Luke Batty and research from SCU Law's Broadband Regulatory Clinic course. No party, counsel, or person contributed money toward the preparation and submission of the brief, apart from the ordinary salaries SCU pays the authors as law professors and a student research assistant.

Summary of Argument

This amicus brief submitted in support of Petitioners argues that the Federal Communications Commission (FCC) 2018 *Internet Freedom Order* violates the agency's statutory mission under the Communications Act which requires the FCC to consider the effects of its decisions on public safety. The FCC failed to offer sufficient consideration of the values the FCC's 2015 *Open Internet Order* ("*2015 Order*") protected including critical infrastructure such as the energy sector,[1] national security, and democracy.[2] The *Internet Freedom Order* consigns aggrieved users to antitrust and deceptive conduct laws which remedy only harms to competition and a limited class of consumer harms, and to insufficient disclosure rules. The Administrative Procedures Act (APA), 5 U.S.C. § 553, 5 U.S.C. § 706, requires the FCC to analyze the legal limits of those laws and harms left without a remedy.[3]

The FCC's tolerance of alleged identity theft in its rulemaking comment process and failure to announce the methodology it use to classify public

[1] 42 U.S.C. § 5195c (West) ("critical infrastructure" means systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters).

[2] FCC, In the Matter of Restoring Internet Freedom, 33 FCC Rcd. 311, at n. 943 (WC Docket No. 17-108) (2018) (hereinafter *FCC, Internet Freedom Order*).

[3] Michigan v. E.P.A., __U.S. __, 135 S.Ct. 2699, 2706 (2015) ("Federal administrative agencies are required to engage in "reasoned decision making."). *See also*, Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc., 429 U.S. 477, 489 (1977) (requiring an antitrust plaintiff to prove injury arising from anticompetitive acts or reflecting anticompetitive effect).

comments as "non-substantive" distorts the record before this court, undermines democratic decision-making, and violates the APA. These omissions and the FCC's abysmal conduct of its rulemaking merit the *Internet Freedom Order's* vacatur, reversal, and remand.

Argument

I. The FCC Violates its Statutory Mandate and the APA by Failing to Consider the 2015 Open Internet Order's Protection of Public Safety, Critical Infrastructure, and Free Expression.

The FCC's *2015 Order* prohibited Internet Service Provider ("ISP") blocking, throttling, paid priority, and unreasonable interference with or disadvantage to Internet users, with some exceptions for reasonable network management ("net neutrality rules") to safeguard against harms to public safety including electric and gas reliability, environmental sustainability, universal service, free expression, injuries to competition and the market, and to protect consumers.[4] Energy and water utilities, designated "critical infrastructure" vital to national security and the nation's economy under the Critical Infrastructures Protection Act of 2001, increasingly depend on the open Internet.[5] Despite growing

[4] In the Matter of Protecting & Promoting the Open Internet, 30 F.C.C. Rcd. 5601, ¶ 22, n. 289-292 and accompanying text (2015) (hereinafter *FCC, 2015 Order*).

[5] 42 U.S.C. §5195c. *See*, CPUC, Comments, *In the Matter of Restoring Internet Freedom*, at 27 (WC Docket No. 17-108) (July 17, 2017) ("a free and open Internet is critical to areas such as energy, education, medicine, and public safety.") Brief for Gov. Petitioners, U.S.C.A. Case 18-1051, at 10 (stating the CPUC regulates under the California Constitution, Cal. Const., art. XII,

cybersecurity threats Congress detailed in the Countering America's Adversaries with Sanctions Act, and Homeland Security warnings, the FCC failed to consider the impact of net neutrality repeal on public safety, national security, and democracy.[6]

The *Internet Freedom Order* dismisses national security concerns through a footnote proclaiming "[n]or do we think we need to address assertions that paid prioritization would endanger U.S. national security as they are vague and lack any substantiation whatsoever."[7] Ellipsis obscure the *Internet Freedom Order's* failure to "analyze whether its proposals increase threats to national security or democracy,"[8] values the *Open Internet Order* protected. "The Commission is required to consider public safety by both its enabling act," Communications Act of 1934, 47 U.S.C. § 151, and by the Wireless Communication and Public Safety Act of 1999, 47 U.S.C. § 615.[9] The FCC's disregard for the facts, circumstances, and statutory duties that supported its prior policy violates the APA.[10]

"industries deemed critical to the public welfare, including gas, electricity, telecommunications, and water" and oversees "California's energy grid, public utility infrastructure, and universal service programs" affected by the *Internet Freedom Order*.).

[6] Catherine Sandoval, Reply Comments, *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Aug. 30, 2017, at 28, 46-47, 57 (hereinafter *Sandoval, Reply Comments*).

[7] *FCC, Internet Freedom Order*, *supra* note 2, at n. 943 (citing *Sandoval Reply Comments*, *supra* note 6, at 25).

[8] *Id.*

[9] Nuvio Corp. v. F.C.C., 473 F.3d 302, 307 (D.C. Cir. 2006). See *Sandoval Reply Comments*, *supra* note 6, at 47.

[10] United States Telecom Ass'n v. F.C.C., 825 F.3d 674, 708–709 (D.C. Cir. 2016).

The Supreme Court in *Encino Motorcars, LLC v. Navarro* held that the APA requires that "the agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'"[11] When reversing existing policy, the APA requires an agency to provide more substantial justification "when its new policy rests upon factual findings that contradict those which underlay its prior policy..."[12] An agency rescinding a rule "is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[13] "[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[14] "Put another way," the D.C. Circuit stated in *USTA v. FCC*, "[i]t would be arbitrary and capricious to ignore such matters."[15]

The FCC adopted net neutrality rules in 2015 to protect democratic values including free expression, public safety, and a range of Internet users and uses.[16]

---

[11] Encino Motorcars, LLC v. Navarro, __U.S.__, 136 S.Ct. 2117, 2126 (2016) (citing S.E.C. v. Chenery Corp. 318 U.S. 80, 87 (1943)).
[12] Perez v. Mortgage Bankers Ass'n, —— U.S. ——, 135 S.Ct. 1199, 1209 (2015) (quoting Fox Television, 556 U.S. at 515; Fox Television Stations, Inc. v. F.C.C., 280 F.3d 1027, 1047 (D.C. Cir. 2002), *opinion modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002) ("the Commission failed to explain its departure from its previously expressed views," rendering its decision "arbitrary and capricious" and contrary to law) (quoting Fox Television, 556 U.S. at 515)).
[13] Motor Veh. Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 42 (1983).
[14] United States Telecom Ass'n, 825 F.3d. at 708-709 (quoting Fox Television, 556 U.S at 515-516).
[15] *Id.* (quoting Fox Television, 556 U.S. at 515).
[16] *FCC, 2015 Order*, *supra* note 4, ¶ 22, n. 291, 292 and accompanying text (citing Letter from Catherine J.K. Sandoval, Commissioner, California Public Utilities Commission, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, 10-127, Attach. at 2 (filed Oct. 14, 2014)) [hereinafter *CPUC Commissioner Sandoval Ex Parte Letter*].

The *2015 Order* considered critical infrastructure sector needs in rejecting proposals to allow paid priority or individualized negotiations for fast Internet access with a "minimum speed" guaranteed.[17] The *Open Internet Order* cited then-CPUC Commissioner Sandoval's comment that paid priority would increase "barriers to adopting Internet-based applications," such as Internet-enabled demand response deployed to "prevent power blackouts, forestall the need to build fossil-fueled power plants, promote environmental sustainability, and manage energy resources."[18]

Energy reliability has been a federal priority since Congress adopted the Electricity Modernization Act in 2005.[19] The Federal Power Act requires wholesale energy market participants to provide reliable service at just and reasonable rates.[20] Energy, water, and many telecommunications utilities face state law duties to provide safe, reliable service, at just and reasonable rates.[21]

---

[17] *FCC, 2015 Order*, *supra* note 4, at n. 254 and accompanying text (citing *CPUC Commissioner Sandoval Ex Parte Letter*, *supra* note 16, Attach. at 14 ("[A]ny of the minimum level of access standards the FCC proposes would be insufficient to support the needs of a diversity of Internet users including Critical Infrastructure.")).

[18] *Id.* at 55, n. 291. *See* F.E.R.C. v. Electric Power Supply Ass'n., _U.S._, 136 S.Ct. 760, 768–69, as revised (Jan. 28, 2016) ("Wholesale demand response…pays consumers for commitments to curtail their use of power, so as to curb wholesale rates and prevent [electric] grid breakdowns.")

[19] Electricity Modernization Act of 2005, 42 U.S.C. § 15801, Pub. L. No. 109-58, § 1211, 119 Stat. 594, 941-46 (2005).

[20] 16 U.S.C. § 824d(a-b) ("[a]ll rates and charges . . . by any public utility for or in connection with the transmission or sale of electric energy . . . and all rules and regulations affecting or pertaining to such rates or charges" must be "just and reasonable" and not "undu[ly] preferen[tial]").

[21] *See, e.g.* CAL. PUB. UTIL. CODE § 451 ("Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities,

The CPUC's *Internet Freedom Order* comments warned "as the *2015 Order* discusses, the absence of strong anti-discriminatory rules could undermine critical infrastructure and public safety."[22] "[W]ithout non-discriminatory rules, providers of emergency services or public safety agencies might have to pay extra for their [Internet] traffic to have priority"; consequently, "their ability to provide comprehensive, timely information to the public in a crisis could be profoundly impaired."[23]

Rather than address these concerns, the *Internet Freedom Order* concludes "[t]o the extent that our approach relying on transparency requirements, consumer protection laws, and antitrust laws does not address all concerns, we find that any remaining unaddressed harms are small relative to the costs of implementing more heavy handed regulation."[24] The FCC's assumption that paid priority's harms would be "small" does not satisfy the Communications Act's requirement that FCC decision-making consider public safety.[25] "[C]omplete absen[c]e of any discussion of a statutorily mandated factor renders an agency decision arbitrary and

---

including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.").

[22] CPUC, Comments, *In the Matter of Restoring Internet Freedom*, at 29 (WC Docket No. 17-108) (July 17, 2017) (citing *2015 Order*, *supra* note 4, at 114, 126, 150).

[23] *Id.* at 29 (citing *2015 Order*, *supra* note 4, ¶ 126 (citing *CPUC Commissioner Sandoval Ex Parte Letter*, *supra* note 16, "asserting that paid prioritization undermines public safety and universal service….")).

[24] *FCC, Internet Freedom Order*, *supra* note 2, ¶ 116.

[25] *Nuvio Corp. v. FCC*, 473 F.3d at 307–08.

capricious."[26] Neither did the FCC analyze the facts that motivated the 2015 paid priority ban adopted to safeguard public safety, universal service, and free expression,[27] or the contemporary record on those issues. The FCC's failure to articulate a reasoned basis for disregarding the *2015 Order* violates the APA.[28]

The *Internet Freedom Order* fails to examine the limits of antitrust and unfair competition law which remedy only harm to competition,[29] or deceptive conduct such as gaps between ISP promises and practices.[30] The *Internet Freedom Order* leaves without a remedy non-competition harms which the *2015 Order* protected against, a gap the APA requires the FCC to analyze.[31]

---

[26] *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004) (citations omitted).

[27] *Cf. FCC, 2015 Order*, *supra* note 4, 2015, ¶¶ 68, 125-129.

[28] Michigan, 135 S.Ct. at 2710 ("a court may uphold agency action only on the grounds that the agency invoked when it took the action") (citing SEC v. Chenery Corp., 318 U.S. 80, 87); Perez, 135 S.Ct. at 1209 (quoting Fox Television, 556 U.S. at 515).

[29] *Sandoval, Reply Comments*, *supra* note 6, at 45 ("antitrust and unfair competition law remedies are available *only for injuries to competition*") (emphasis in original) (citing Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990) ("antitrust injury" claims and remedies are limited anti-competitive injury)).

[30] *Id.* ("Antitrust and unfair competition regulations possess no authority to address harms to national security and democracy.") (citing Catherine J. K. Sandoval, *Disclosure, Deception, and Deep-Packet Inspection: The Role of the Federal Trade Commission Act's Deceptive Conduct Prohibitions in the Net Neutrality Debate*, 78 FORDHAM L. REV. 641, 662 (2009) ("An act has been held to be deceptive [under the FTC Act] if it involves a material representation, omission, or practice that is likely to mislead consumers acting reasonably under the circumstances.")); F.T.C. Act, 15 U.S.C. § 45 (2006) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").

[31] Michigan, 135 S.Ct. at 2706 ("Federal administrative agencies are required to engage in 'reasoned decisionmaking.'").

The FCC removed the *2015 Order's* paid priority ban asserting "prioritizing the packets for latency sensitive applications will not typically degrade other applications sharing the same infrastructure,"[32] such as "email, software updates, or cached video."[33] The *Internet Freedom Order* neither defines the range of "typical" degradation anticipated, nor discusses paid priority's potential to degrade other Internet applications deployed by public safety agencies, critical infrastructure, courts, education, businesses, and families.[34]

In support of repealing the *2015 Order*'s paid priority ban, AT&T touted the prospect of paid priority for online video games.[35] The *Internet Freedom Order* fails to consider the dangers of ISP-video game provider paid priority deals that may delay signals to energy resources such as smart thermostats which share the same Internet infrastructure, risks the *Open Internet Order* addressed.[36] The

[32] *FCC, Internet Freedom Order*, *supra* note 2, ¶ 258 (citing Comments of AT&T Services Inc., *In the Matter of Restoring Internet Freedom*, 17-208, at 44-45 (July 17, 2017)).
[33] *Id*. ¶ 258 (citations omitted).
[34] *See* Brief for Gov. Petitioners, *supra* note 5, Declaration of Fire Chief Anthony Bowden, Add. 2-3 (during an active firefight, Verizon throttled Internet speeds of the Santa Clara County, California Fire Protection District's emergency incident support unit which "relied heavily on the use of specialized software and Google Sheets to do near-real-time resource tracking through the use of cloud computing over the Internet.") The District uses applications other than "email, software updates, or cached video" the FCC assumed paid priority would not "typically" delay.
[35] *Sandoval, Reply Comments*, *supra* note 6, at 27 (citing Comments of AT&T Services Inc., *supra* note 30, at 5 ("Suppose, for example, that ISPs began implementing isolated paid-prioritization arrangements to support quality of service … for unusually latency-sensitive applications, such as high-definition videoconferencing or massively multiplayer online gaming.")).
[36] *Id.* at 50 ("*ex parte* comments and [a] letter submitted for the 2015 *Open Internet* rulemaking discussed in detail why individualized bargaining proposals endanger critical infrastructure

Internet Freedom Order imposes no eligibility requirements for paid priority buyers – whether foreign or domestic – and fails to analyze public safety and national security consequences of authorizing paid priority without restriction or FCC jurisdiction.[37] Rejecting arguments against lifting the 2015 paid priority ban, the FCC cited but failed to define the "practical limits on paid prioritization."[38] "An agency action will be sustained if 'the agency has articulated a rational connection between the facts found and the conclusions made.'"[39] A federal agency cannot fail "to consider an important aspect of the problem" or offer "an explanation for its decision that runs counter to the evidence' before it."[40]

The *Internet Freedom Order* failed to consider the public safety consequences of repealing the *2015 Order*'s restrictions on ISP throttling or unreasonable interference with or disadvantage to Internet users including those

---

which relies on the open Internet for services such as energy demand response to prevent electrical blackouts.")

[37] *FCC, Internet Freedom Order*, *supra* note 2, ¶ 2-4 (repealing FCC 2015 rules that prohibited ISP blocking, throttling, or Internet traffic paid priority, and required reasonable network management); *Sandoval, Reply Comments*, *supra* note 6, at 4, 25, 27, 46.

[38] *FCC, Internet Freedom Order*, *supra* note 2, ¶ 258 and n. 943 (rejecting, for example, American Association of Law Libraries et al. Comments at 16 ("A world in which libraries and other noncommercial enterprises are limited to the internet's 'slow lanes' while HD movies can obtain preferential treatment undermines a central priority for a democratic society—the necessity of all citizens to inform themselves and each other just as much as the major commercial and media interests can inform them.")

[39] Center for Biological Diversity v. U.S. Fish & Wildlife Service, 807 F.3d 1031, 1043 (9th Cir. 2015) ("factual determinations must be supported by substantial evidence") (citing Dickinson v. Zurko, 527 U.S. 150, 162 (1999)).

[40] Dist. Hosp. Partners, L.P. v. Burwell, 786 F.3d 46, 57 (D.C. Cir. 2015) (quoting Motor Veh. Mfrs. Ass'n, 463 U.S. at 43).

with "unlimited" data plans.[41] In July 2018, while the Santa Clara County, California Fire Protection District ("*Fire District*") was fighting the Mendocino Complex Fire, California's largest fire, Verizon throttled the unit's "unlimited" data plan and forced the Fire District to buy a more costly plan.[42] The *2015 Order* enabled the *Fire District* to file a complaint with the FCC arguing Verizon violated net neutrality rules by slowing the unit's Internet speeds to act "more like an AOL dial up modem from 1995," no longer supporting "a modern broadband internet connection," and "hampering operations for the assigned crew."[43] The *2015 Order* shielded emergency responders through *ex ante* rules *and* an *ex post* enforcement process rooted in FCC jurisdiction.

The *Internet Freedom Order* conjectures that paid priority will not typically degrade email, cached video, and software updates, but fails to account for the range of Internet applications commonly used.[44] Modern firefighters rely on real-time geographic information system ("GIS") mapping to monitor fires and

[41] *FCC, 2015 Order*, *supra* note 4, ¶¶21, 32-34, 133, Appx. A, §8.7 (ordering ISPs "shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management"); Id., Appx. A, §8.11 (ordering ISPs "shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.")
[42] Brief for Gov. Petitioners, *supra* note 5, Add. 2-4.
[43] *Id.*, Add. 11.
[44] *FCC, Internet Freedom Order, supra* note 2, ¶ 258.

coordinate emergency response,[45] track information, and save lives. Net neutrality repeal left public safety agencies unable to rely upon GIS and other Internet applications that require more bandwidth than an email, software updates, or cached video. The *2015 Order* gave the FCC the jurisdiction and rules to consider a complaint that an ISP unreasonably interfered with and disadvantaged public safety data transmissions − whether GIS mapping or live video of a fire or flood's path – data the ISP would not have slowed had the user been watching an ISP's "zero-rated" entertainment video exempt from ISP data caps. The APA and the FCC's enabling statute require the Commission to consider the public safety implications of net neutrality's repeal.[46]

"[U]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."[47] "An "arbitrary and capricious" regulation of this sort is itself unlawful and receives no *Chevron* deference" to an administrative agency's interpretation of an ambiguous statute.[48]

---

[45] *See* CAL. PUB. UTIL. COMM'N, DECISION UPDATING THE WATER ENERGY NEXUS COST CALCULATOR, PROPOSING FUTURE INQUIRY, AND NEXT STEPS, Decision 16-12-047, 33-34 (Dec. 15, 2016).
[46] *See* Nuvio Corp., 473 F.3d at 307.
[47] Encino Motorcars, 136 S.Ct. at 2126 (citing National Cable & Telecomm. Assn. v. Brand X, 545 U.S. 967, 981 (2005)).
[48] *Id.* (citing United States v. Mead Corp., 533 U.S. 218, 227 (2001)).

The FCC leaves this court unable to evaluate the basis for the agency's judgment.[49] A reviewing court is not authorized to conjecture an explanation the agency did not offer. [I]t is a "foundational principle" that "a court may uphold agency action only on the grounds that the agency invoked when it took the action."[50] Therefore, the *Internet Freedom Order* should be vacated, reversed, and remanded.

II. The FCC Violates the APA and Distorts the Record by Failing to Adequately Respond to Public Comment

The *Internet Freedom Order* violates the APA by omitting systematic analysis of more than 23 million public comments filed in this proceeding. Federal rulemaking under 5 U.S.C. § 553 requires the agency to seek and take public comment into account, and explain its reasoning relevant to those comments.[51]

[49] Fox Television, 556 U.S. at 561.
[50] Michigan, 135 S.Ct. at 2710.
[51] Perez v. Mortgage Bankers Ass'n, 135 S.Ct. 1199, 1203 ("An agency must consider and respond to significant comments received during the period for public comment") (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)); California v. Health and Human Services, 281 F.Supp.3d 806, 825 (N.D. Cal. 2017) (following an agency's rulemaking notice, 5 U.S.C. § 553(b-c) requires "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." "The agency must then consider any "relevant matter presented ...."); International Snowmobile Mfrs. Ass'n v. Norton, 340 F.Supp.2d 1249, 1265 (D. Wyo. 2004) ("a predetermined political decision that did not seriously

An *Internet Freedom Order* footnote states "the Commission devoted substantial resources to a review and evaluation of the content of the approximately 23 million express comments filed in this proceeding, which are shorter submissions that are made directly into a web form and do not require supporting file attachments."[52] The FCC reports that "Staff individually analyzed distinct form comments and standard or unique comments for substantive issues, and developed a systematic process for review of the non-form, non-standard comments, consistent with the recommendations of the Administrative Conference of the United States."[53]

The *Internet Freedom Order* contains few citations to comments filed through the FCC's Express Comment portal.[54] For example, the FCC did not discuss the 1,835 Express Comments containing the text "lack of competition."[55] Many of those comments contest the basis for the FCC's conclusion that "in this industry, even two active suppliers in a location can be consistent with a noticeable

---

consider public comments and performed mere *pro forma* compliance with NEPA [National Environmental Protection Act]" and agency rulemaking conduct that ignored the "purposes and procedures of NEPA and the APA" merited vacating the Record of Decision of the National Park Service's Final Environmental Impact report regarding a Yellowstone and Grand Teton National Park snowmobile ban).

[52] *FCC, Internet Freedom Order, supra* note 2, at n. 1182.

[53] *Id.*

[54] *See e.g. Id.* at n. 176 (rejecting commenters' assertions that the primary function of ISPs is to simply transfer packets and not process information citing comments including Harold Hallikainen Comments at 1; Ryan Blake Comments at 1-2).

[55] Search FCC, ECFS for filings with the term "lack of competition," https://www.fcc.gov/ecfs/search/filings?proceedings_name=17-108&q=%22lack%20of%20competition%22&sort=date_disseminated,DESC.

degree of competition, and in any case, can be expected to produce more efficient outcomes than any regulated alternative."[56] "Notice and comment rulemaking procedures obligate the FCC to respond to *all* significant comments, for the opportunity to comment is meaningless unless the agency responds to significant points raised by the public."[57]

Neither the *Internet Freedom* NPRM nor the FCC website inform the public that Express Comments will be treated differently than other filed comments.[58] The FCC describes its electronic comment filing system (ECFS) "as the repository for official records in the FCC's docketed proceedings from 1992 to the present.[59] "Public comments, including those filed as Express Comments are part of the FCC record, and the FCC has accorded them weight in past proceedings including the *2015 Order*."[60] The *2015 Order* was grounded in part on the 4 million public comments filed in that proceeding, including those submitted through the Express

[56] *FCC, Internet Freedom Order*, *supra* note 2, ¶ 126.
[57] Fox Television, 556 U.S. at 561 (emphasis in original) (citing ACLU v. F.C.C., 823 F.2d 1554, 1581 (C.A.D.C.1987)).
[58] *See Sandoval, Reply Comments*, *supra* note 6, at 21 ("The FCC cannot now change its policy *sub silent[i]o* and wholesale discount comments filed through the Express Comment portal or ignore the allegations of identity theft and false filings being committed in the FCC proceeding through the FCC record and comment filing system.").
[59] *See Sandoval, Reply Comments*, *supra* note 6, at 21 (citing FCC, Welcome to the Electronic Comments Filing System, https://www.fcc.gov/ecfs/browse-popular-proceedings (last visited August 29, 2017)).
[60] *Sandoval, Reply Comments*, *supra* note 6, at 21 (citing *FCC, 2015 Order*, *supra* note 4, at ¶ 13); *FCC, 2015 Order*, *supra* note 4, ¶ 206 (citing Small Refiner Lead Phase-Down Task Force v. E.P.A., 705 F.2d 506, 547 (D.C. Cir. 1983) (noting that the quality of agency rulemaking is improved as it "tested by exposure to diverse public comment") (quoting BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 641 (1st Cir. 1979))).

Comment portal.[61] The APA requires the FCC's *Internet Freedom Order* to explain its public comment analysis.[62] Instead, the *Internet Freedom Order* treats the public like an "interloper."[63]

The *Internet Freedom Order* states the "Commission focused its review of the record on the submitted comments that bear substantively on the legal and public policy consequences of the actions we take today."[64] The FCC notes "it appears that 7.5 million identical one-sentence comments were submitted from about 45,000 unique e-mail addresses, all generated by a single fake e-mail generator website. Moreover, we received over 400,000 comments supporting Internet regulation that purported to be from the same mailing address in Russia."[65] The FCC contends its "decision to restore Internet freedom did not rely on comments devoid of substance, or the thousands of identical or nearly identical non-substantive comments that simply convey support or opposition to the proposals in the *Internet Freedom NPRM*."[66]

---

[61] *FCC, 2015 Order, supra* note 4, ¶ 13 ("The Commission has considered the arguments, data, and input provided by the commenters, even if not in agreement with the particulars of this Order; that public input has created a robust record, enabling the Commission to adopt new rules that are clear and sustainable.").
[62] Perez, 135 S.Ct. at 1203.
[63] Office of Communication of United Church of Christ v. F.C.C., 425 F.2d 543, 546 (D.C. Cir. 1969).
[64] *FCC, Internet Freedom Order, supra* note 2, ¶ 344.
[65] *Id*. n. 1178.
[66] *Id*. ¶ 344.

The *Internet Freedom Order* discusses no factors, methodology, or staff report the FCC relied upon to classify comments as "devoid of substance" or assign them weight. The resulting gap in the proceeding's "whole record"[67] leaves the court and the public unable "to see what major issues of policy were ventilated ... and why the agency reacted to them as it did."[68]

The FCC gave no notice about the test it applied to deem a comment "devoid of substance," violating the APA's requirements.[69] The "final rule the agency adopts must be 'a logical outgrowth' of the rule proposed."[70] The FCC's *sub silentio* comment standard shift violates the APA's notice and reasoned explanation requirements.[71]

---

[67] *Cf.* American Radio Relay League, Inc. v. F.C.C., 524 F.3d 227, 243 (D.C. Cir. 2008) (Tatel, Circuit Judge, concurring) (underscoring that the FCC's failure to make public unredacted technical studies and data upon which the agency's decision-making process relied "undermines this court's ability to perform the review function APA section 706 demands.").

[68] Huntco Pawn Holdings, LLC v. U.S. Department of Defense, 240 F.Supp.3d 206, 219 (D.D.C. 2016) (citing Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 335 (D.C. Cir. 1968)).

[69] *See* Prometheus Radio Broad. v. F.C.C., 652 F.3d 431, 450 (3d Cir. 2011) (requiring under the APA that an agency "describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making") (citing Horsehead Res. Dev. Co., Inc. v. Browner, 16 F.3d 1246, 1268 (D.C.Cir.1994)).

[70] Council Tree Comm., Inc. v. F.C.C., 619 F.3d 235, 249 (3rd Cir. 2010) (citing Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007) (quoting Nat'l Black Media Coal. v. F.C.C., 791 F.2d 1016, 1022 (2d Cir.1986))).

[71] Fox Television, 556 U.S. at 515 ("An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." (citing United States v. Nixon, 418 U.S. 683, 696 (1974))); *Cf.* Prometheus Radio Project v. F.C.C., 373 F.3d 372, 412 (3rd Cir. 2004) (holding the FCC's decision to withhold from public scrutiny and not publish for notice and comment its new methodology for measuring broadcast diversity was "not without prejudice," meriting remand).

The *Internet Freedom Order* asserts the Commission complied with the APA's obligation to adequately consider "important aspect[s] of the problem,"[72] all "relevant matter" received, and to "reasonably respond to those comments that raise significant problems."[73] The FCC cites *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* to bolster its proposition that "comments must be significant enough to step over a threshold requirement of materiality before any lack of consideration becomes of concern."[74] *Vermont Yankee* interpreted under the National Environmental Policy Act (NEPA) the Atomic Energy Commission's "threshold test" for consideration of energy conservation alternatives in its environmental impact statement (EIS) for an application to construct two pressurized water nuclear reactors.[75] The *Vermont Yankee* NEPA review standard for an agency's EIS does not establish a "threshold requirement of materiality" for consideration of comments under the APA.

---

[72] *FCC, Internet Freedom Order, supra* note 2, n. 1176 (citing Motor Veh. Mfrs. Ass'n, 463 U.S. at 43).

[73] *Id.* n. 1175 (citing Vermont Public Service Board v. F.C.C., 661 F.3d 54, 63 (D.C. Cir. 2011) (refusing to credit a three-sentence comment with no supporting evidence)); North Carolina v. F.A.A., 957 F.2d 1125, 1135 (4th Cir. 1992) (noting an agency "need not respond to every comment").

[74] *FCC, Internet Freedom Order, supra* note 2, at n. 1177 (citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 553 (1978)); National Ass'n of Manufacturers v. E.P.A., 750 F.3d 921 (D.C. Cir. 2014) [cited by the FCC as 650 F.3d 821] (noting that under the Clean Air Act, National Ambient Air Quality Standards, an agency address only "the more significant comments").

[75] Vermont Yankee, 435 U.S. at 553.

FBME Bank Ltd. v. Mnuchin stated that "to respond adequately, the agency must only address significant comments "in a reasoned manner" that allows a court "to see what major issues of policy were ventilated ... and why the agency reacted to them as it did."[76] The APA requires an agency to demonstrate their "decision was ... based on a consideration of the relevant factors."[77] The FCC's derisive public comment treatment fails these requirements.

III. The FCC's Tolerance of Allegedly Criminal Identity Theft in its Rulemaking Distorts the Record, Undermines Democratic Decision-making, and Violates the APA

Identity thieves allegedly submitted millions of comments in the *Internet Freedom* docket in other people's names without their authorization.[78] The FCC "reject[ed] calls to delay adoption of this Order out of concerns that certain non-

[76] FBME Bank Ltd. v. Mnuchin, 249 F.Supp.3d 215, 222 (D.D.C. 2017), *appeal dismissed sub nom.*, 709 Fed.Appx. 4 (D.C. Cir. 2017) (citing Reytblatt v. Nuclear Regulatory Comm'n, 105 F.3d 715, 722 (D.C. Cir. 1997)); Pub. Citizen, Inc. v. F.A.A., 988 F.2d 186, 197 (D.C. Cir. 1993)).
[77] *Id.* (citing Thompson v. Clark, 741 F.2d 401, 409 (D.C. Cir. 1984)).
[78] *Sandoval, Reply Comments*, *supra* note 6, at 1-4, 6-25 (arguing material false statements allegedly filed in the FCC *Internet Freedom* proceeding violate federal and state law and constitute arbitrary and capricious decision-making); *See*, Office of Attorney General Schneiderman, State of New York, A.G. Schneiderman Releases Open Letter To FCC: Net Neutrality Public Comment Process Corrupted By "Massive Scheme," Nov. 21, 2017, https://ag.ny.gov/press-release/ag-schneiderman-releases-open-letter-fcc-net-neutrality-public-comment-process.

substantive comments (on which the Commission did not rely) may have been submitted under multiple different names or allegedly 'fake' names."[79] Many of those comments were not merely "fake," filed in the name of cartoon characters, for example, but were allegedly filed using identity theft.[80] The FCC failed to disclose what, if any, criteria it used to distinguish comments falsely filed using identity theft from authorized comments.[81]

"False filings based on identity theft hack the tools of democratic decision-making for an ulterior motive."[82] The FCC's claims that it did not rely on "fake" comments[83] do not cure the massive alleged identity theft scheme the FCC tolerated in this rulemaking as the FCC disclosed no methodology to distinguish false from authorized comments.

Professor Sandoval's *Reply Comments* recommended the FCC comment filing system "display a note informing filers that submission constitutes the filer's certification under penalty of perjury that the filer is authorized to submit the

---

[79] *FCC, Internet Freedom Order, supra* note 2, ¶ 345 (citing *See, e.g.*, Brian Fung, *FCC net neutrality process 'corrupted' by fake comments and vanishing consumer complaints, officials say*, Washington Post (Nov. 24, 2017), https://www.washingtonpost.com/news/theswitch/wp/2017/11/24/fcc-net-neutrality-process-corrupted-by-fake-comments-and-vanishing-consumer-complaintsofficials-say/.)

[80] *Sandoval, Reply Comments*, *supra* note 6, at 1-3, 6-25, 58.

[81] *Id.* at 54 ("Because the FCC has taken no steps to distinguish false from authorized comments, it cannot address this problem merely through the weight it gives or denies to express comments.").

[82] *Id.* at 13 ("False filing allegations [in the FCC's *Internet Freedom* proceeding] raise additional alarm bells in light of Congressional findings of a Russian influence campaign in 2016 aimed at the United States presidential election, findings incorporated into the *Countering America's Adversaries Through Sanctions Act* Pub. L. No. 115-44, 131 Stat 886, Title II (211) (2017)).

[83] *FCC, Internet Freedom Order, supra* note 2, ¶ 344-345.

material on behalf of the named commenter."[84] The FCC cited *Vermont Yankee* for its contention that the "Commission is under no legal obligation "to adopt any 'procedural devices' beyond what the APA requires, such as identity-verification procedures."[85] *Vermont Yankee* rejected the argument that NEPA or the APA requires procedural devices such as a formal hearing, discovery or cross-examination.[86] *Vermont Yankee's* holding declining to require formal rulemaking with full hearing procedures is inapposite to the agency's duty to insure the integrity of the notice and comment rulemaking process.

The FCC's *Internet Freedom Order* stated "the Commission has previously decided not to apply its internal rules regarding false statements in the rulemaking context" because we do not want "to hinder full and robust public participation in such policymaking proceedings by encouraging collateral wrangling over the truthfulness of the parties' statements."[87] The FCC provided no notice of intent to apply this 2003 standard to the *Internet Freedom* rulemaking. Neither did the FCC reconcile its unannounced forbearance from requiring truthfulness in this

[84] *Sandoval, Reply Comments*, *supra* note 6, at 9-10.
[85] *FCC, Internet Freedom Order, supra* note 2, ¶ 345, n. 1180 (citing Vermont Yankee, 435 U.S. at 548).
[86] Vermont Yankee, 435 U.S. at 529, 548.
[87] *FCC, Internet Freedom Order, supra* note 2, ¶ 345, n. 1181 (citing *Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to Commission*, GN Docket No. 02-37, Report and Order, 18 FCC Rcd 4016, 4021-22, ¶¶ 13 (2003); 47 C.F.R. § 1.17).

rulemaking with its decision to allow "bot" filings − automated computer filings including "batch comments."[88]

The FCC's August 13, 2018 amicus curiae brief regarding the Department of Justice's appeal of the decision approving AT&T's merger with Time Warner emphasized that the "Commission's rules require *all* regulated parties—whether applicants seeking to transfer licenses in connection with a proposed merger or competitors who oppose the merger—to abide by the same standard of truthfulness in adjudicatory proceedings."[89] The *Internet Freedom Order's* conclusion that truthfulness is not required in FCC rulemakings[90] corrodes the integrity of FCC proceedings. The FCC's blind eye to criminal behavior in this proceeding achieves the opposite of the Commission's stated goal of "full and robust public participation."[91] The FCC's conduct undermines public participation and judicial review of the rulemaking process, vitiating vital tools of democracy.

Federal Rulemaking requires that "the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data,

---

[88] *Cf.* In the Matter of Restoring Internet Freedom, Notice of Proposed Rulemaking, 32 F.C.C. Rcd. 4434, ¶ 120-122 (2017) (describing Comment Filing Procedures without stating the 47 C.F.R. § 1.17 truthfulness standard does not apply or reference to 18 FCC Rcd 4016); *Sandoval, Reply Comments*, *supra* note 6, at 4, n. 16-18, 9, n. 32 and accompanying text.
[89] F.C.C., Amicus Brief in Support of Neither Party, at 3, USA v. AT&T, Inc.; DIRECTV Group Holdings, LLC; and Time Warner, Inc., U.S.C.A. Case # 18-5214 (Aug. 13, 2018).
[90] *FCC, Internet Freedom Order*, *supra* note 2, ¶ 345, n. 1181.
[91] *Id.*

views, or arguments with or without opportunity for oral presentation."[92] The notice-and-comment rulemaking statute, 47 U.S.C. § 553(c), does not provide a license to purloin other people's identities to file comments or countenance agency indulgence of such conduct.[93]

This court should vacate, reverse, and remand the FCC's Order and require a new notice and comment process.[94] The D.C. Circuit in *Prometheus Radio Broad. v. FCC* found that irregularities in the procedural conduct of an FCC rulemaking constituted arbitrary and capricious-decision making in violation of the APA.[95] The FCC's abysmal conduct of the *Internet Freedom* rulemaking flunks the APA.[96]

IV. Conclusion

For the reasons stated above, this court should vacate, reverse, and remand the *Internet Freedom Order*.[97]

---

[92] Prometheus Radio Project, 652 F.3d at 449 (citing 5 U.S.C. § 553(c)).
[93] *Sandoval, Reply Comments*, *supra* note 6, at 17.
[94] *See* Fox Television, 280 F.3d at 1048 (citing Allied-Signal, Inc. v. United States Nuclear Regulatory Comm'n, 988 F.2d 146, 150–51 (D.C.Cir.1993) ("The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.")); Prometheus Radio, 652 F.3d at 450.
[95] Prometheus Radio, 652 F.3d at 450.
[96] United Church of Christ, 425 F.2d at 547 ("The record now before us leaves us with a profound concern over the entire handling of this case following the remand to the Commission." In light of the FCC's "impatience with the Public Intervenors" and other factors, the "administrative conduct reflected in this record is beyond repair.").
[97] Fox Television, 280 F.3d at 1048; Allied-Signal, Inc., 988 F.2d at 150–51.

Dated: August 27, 2018

Respectfully Submitted,

/s/ Catherine J.K. Sandoval
Santa Clara University School of Law
500 El Camino Real
Santa Clara, California, 95050
(408) 551-1902
csandoval@scu.edu
Counsel for Amicus

Certificate of Compliance

I certify that, pursuant to Rules 29(c)(7) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,491 words excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

Dated: August 27, 2018

Respectfully Submitted,

/s/ Catherine J.K. Sandoval
Santa Clara University School of Law
500 El Camino Real
Santa Clara, California, 95050
(408) 551-1902
csandoval@scu.edu
Counsel for Amicus

Certificate of Service

I hereby certify that on August 27, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: August 27, 2018

Respectfully Submitted,

/s/ Catherine J.K. Sandoval
Santa Clara University School of Law
500 El Camino Real
Santa Clara, California, 95050
(408) 551-1902
csandoval@scu.edu
Counsel for Amicus

Addendum of Statutes and Regulations

Except for the following, listed in Addendumndix A, all applicable statutes, etc., are contained in the Joint Brief for Government and Non-Government Petitioners, in compliance with D.C. Cir. Rule 28(a)(5).