No. 15-1063 (and consolidated cases)

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

UNITED STATES TELECOM ASSOCIATION, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

AMICUS CURIAE BRIEF OF THE INTERNATIONAL CENTER FOR LAW AND ECONOMICS AND JUSTIN (GUS) HURWITZ IN SUPPORT OF PETITIONS FOR REHEARING EN BANC

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Dated: August 5, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amicus curiae* International Center for Law and Economics and Affiliated Scholars ("ICLE") certifies that:

(A) Parties and Amici

All parties, intervenors, and amici appearing before the FCC and this court are listed in the Joint Brief for United States Telecom Association *et al.*

(B) Rulings Under Review

The ruling under review is the FCC's Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015).

(C) Related Cases

This case has been consolidated with Case Nos. 15-1078, 15-1086, 15-1090, 15-1091, 15-1092, 15-1095, 15-1099, 15-1117, 15-1128, 15-1151, and 15-1164. There are no other related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 26.1 and 29(b), ICLE hereby states that:

1. ICLE is a nonprofit corporation incorporated under the laws of Oregon. ICLE is a nonprofit, non-partisan global research and policy center.
2. ICLE has no parent corporation and there is no publicly held corporation that owns 10% or more of the stock of ICLE.

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GLOSSARY

Brown & Williamson	*FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)
Chevron	*Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)
Commission/FCC	Federal Communications Commission
Encino	*Encino Motorcars, LLC v. Navarro*, No. 15-415, sl. op. (Jun. 20, 2016)
Fox	*FCC v. Fox Tel. Stations*, 556 U.S. 502 (2009)
King	*King v. Burwell*, No. 14-114, sl. op. (Jun. 25, 2015)
OIO	FCC's Report and Order on Remand, Declaratory Ruling, and Order, Protecting and Promoting the Open Internet, 30 FCC Rcd 5601 (2015)
Opinion	US Telecom v. FCC, No. 15-1063 (D.C. Cir. Jun. 14, 2016)
Skidmore	*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)
State Farm	*Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)
UARG	*Utility Air Regulatory Group v. Envtl. Prot. Agency*, 134 S. Ct. 2427 (2014)

STATEMENT OF INTEREST

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 enable businesses and innovation to flourish. ICLE is joined as *amici curiae* by Justin (Gus) Hurwitz, Assistant Professor of Law at University of Nebraska College of Law. *Amici's* interests in this case are set forth in ICLE's motion for leave to file.

ICLE filed an *amici curiae* brief on August 6, 2015 in support of petitioners United States Telecom Association, National Cable & Telecommunications Association, CTIA–The Wireless Association®, AT&T Inc., American Cable Association, CenturyLink, Wireless Internet Service Providers Association, Alamo Broadband Inc., and Daniel Berninger, but not in support of petitioner Full Service Network in case No. 15-1151.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Under Federal Rule of Appellate Procedure 29(c), ICLE states that no party's counsel authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

The central issue in this case is the extent to which a court must review the quality of an agency's decision-making process in determining how much deference (if any) to afford the agency's decisions, particularly when the agency is changing policies. By reflexively affording substantial deference to the FCC in affirming the Open Internet Order ("OIO"), the panel majority's opinion is in tension with recent Supreme Court precedent.

The level of deference afforded an agency decision is exceptionally important in cases such as this, where an agency is changing existing policy. It is incumbent upon courts to be *particularly skeptical* of agency claims of deference in such cases. The panel majority, however, was *particularly deferential*.

The court should grant *en banc* review both to ensure that this decision is consistent with those of the Supreme Court, and because the question whether to afford deference in cases such as this is exceptionally important.

The panel majority need not have, and arguably *should not* have, afforded the FCC the level of deference that it did. The Supreme Court's decisions in *State Farm*, *Fox*, and *Encino* all require a more thorough vetting of the reasons underlying an agency change in policy than is otherwise required under the familiar *Chevron* framework. Similarly, *Brown and Williamson*, *Utility Air Regulatory Group*, and *King* all indicate 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 of a statute or when the agency is not acting in an expert capacity (*e.g.*, its decision is based on changing policy preferences, not changing factual or technical considerations). *See* 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).[1]

The panel majority failed to seriously consider *any* of these factors, instead treating this case as an ordinary application of *Chevron*. To the extent that the panel majority did consider these factors, its review was cursory and superficial — indeed, it is best described as 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*. For instance, the panel majority accepted with minimal consideration the FCC's remarkable assertion that there are no reliance interests at stake in the Commission's classification of Broadband Internet Access Service as a Title I or Title II service — an assertion that defies economic logic and contradicts

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[1] "Most 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."

the FCC's long-asserted position. *See* Opinion (Williams, J., dissenting) at 5–8; Joint petition of NCTA & ACA for *En Banc* Review, at 5.

The panel majority failed to appreciate the importance of granting *Chevron* deference to the FCC. That importance is most clearly seen at an aggregate level. In a large-scale study of every Court of Appeals decision between 2003 and 2013, Professors Kent Barnett and Christopher Walker found that a court's decision to defer to agency action is uniquely determinative in cases where, as here, an agency is changing established policy. Kent Barnett & Christopher J. Walker, Chevron *In the Circuit Courts* 61, Figure 14 (2016), *available at* ssrn.com/abstract=2808848. This is illustrated in their Figure 14:

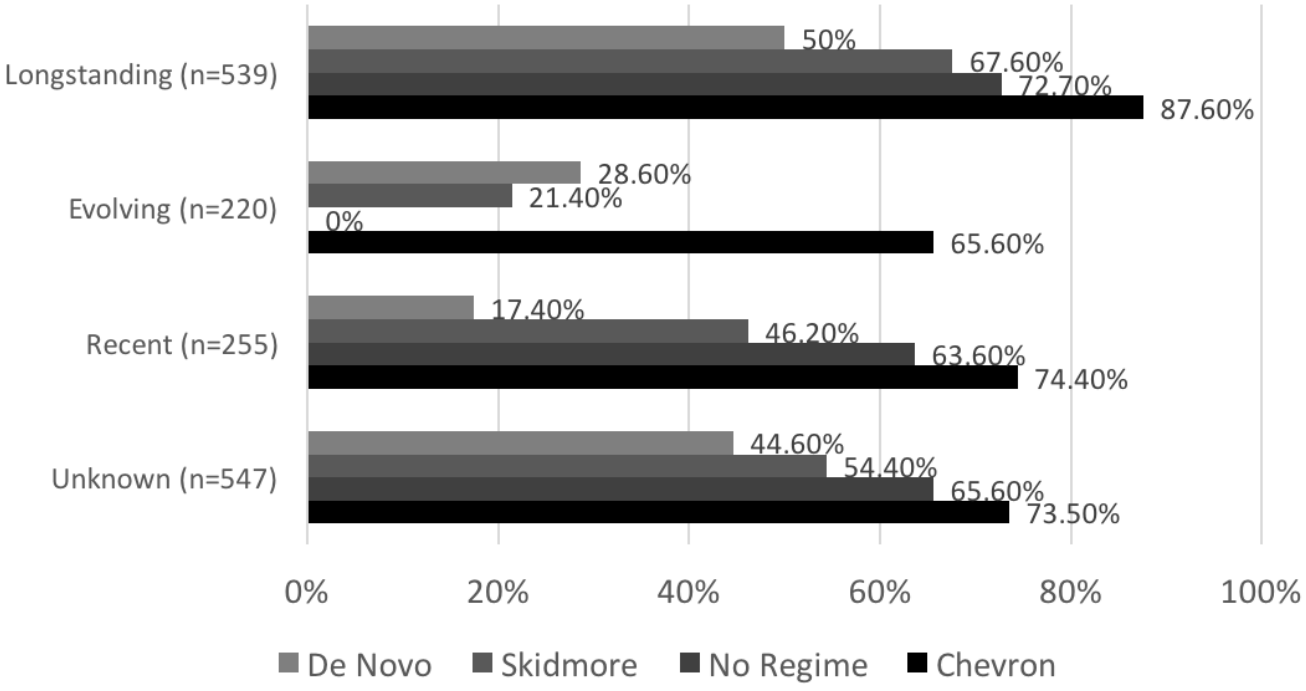

FIGURE 14. Agency-Win Rates Based on Continuity of Agency Statutory Interpretation, by Deference Doctrine (n=1561). [Note: In this figure, "Evolving" policies refer to those in which an agency changes from one policy to another.]

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.

Critically, this pattern exists only in cases in which an agency has changed *already existing* policy. In such cases, courts reviewing the new policy *de novo* reject it over 70% of the time; and courts applying *Skidmore* deference find the agency's rationale unpersuasive a remarkable near-80% of the time.

These data starkly demonstrate that agency decisions to change established policy tend to present serious, systematic defects — and, as such, why it is incumbent upon this court to review the panel majority's decision to reflexively grant *Chevron* deference. Further, the data underscore the importance of the Supreme Court's command in *Fox* and *Encino* that agencies show good reason for a change in policy; its recognition in *Brown & Williamson* and *UARG* that departures from existing policy may fall outside of the *Chevron* regime; and its command in *King* that policies not made by agencies acting in their capacity as technical experts may fall outside of the *Chevron* regime. In such cases, the Court essentially holds that reflexive application of *Chevron* deference may not be appropriate because these circumstances may tend toward agency action that is arbitrary, capricious, in excess of statutory authority, or otherwise not in accordance with law. In these instances courts must apply more probing judicial

review to ensure that the agency's decision-making process reflects the sort of expert judgment that merits deference.

These concerns provide context and meaning to the Supreme Court's holding in *Fox* and subsequent cases that "a reasoned explanation is needed for disregarding facts and circumstances that underlay… the prior policy." *FCC v. Fox Tel. Stations*, 556 U.S. 502, 515-16 (2009). As the Court says, it is not enough, or even necessary, that a new policy be "better" than that which it replaces. *Id*. at 515. Rather, the purpose of requiring the agency to show changed facts is to show that there is a need to shift away from prior policy.

This is salient in this case, where the panel majority was "particularly deferential" to the Commission's *prospective* concerns that undergird its changed policy. Opinion, at 44. But *Fox* and *Encino* (decided after the panel's opinion) make clear that there must be more than prospective concern to support a change in policy. Rather, they make clear that reviewing courts should meet an agency's proffered justifications with particular *skepticism*, not deference.

The present case is a clear example where greater scrutiny of an agency's decision-making process is both warranted and necessary. The panel majority all too readily afforded the FCC great deference, despite the clear and unaddressed evidence of serious flaws in the agency's decision-making process. As we argued in our brief before the panel, and as Judge Williams recognized in his partial

dissent, the OIO was based on factually inaccurate, contradicted, and irrelevant record evidence. *See* Amicus Curiae Brief of the International Center for Law and Economics and Affiliate Scholars, US Telecom v. FCC, No. 15-1063 (Aug. 6, 2015); Opinion (Williams, J., dissenting). These concerns have recently been amplified by the FCC's Chief Economist during the drafting of the OIO (also cited in Judge Williams's dissent):

> 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 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 PERSPECTIVES 22 (2016), *available at* http://bit.ly/293nnT9.

This court's review of the OIO presents a case that lies at the nexus — or perhaps the vortex — of recent Supreme Court cases. As a whole, these cases present an issue of fundamental importance to the administrative state. The Supreme Court would not have heard this nexus of 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 the Supreme Court has not spoken definitively on this issue, the panel majority's opinion, at best, lies at the extreme edge of existing precedent, and runs counter to the direction suggested by the Court's most recent precedent. It fails to recognize the important issues that the Supreme Court has been struggling with and that are central to the present case.

For these reasons, *en banc* review should be granted.

Respectfully submitted,

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Dated: August 5, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the page limit set forth in Fed. R. App. P. 29(d) of half the petitioner's principal brief at 7.5 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2016, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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