ORAL ARGUMENT NOT YET SCHEDULED

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOZILLA CORPORATION, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

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

BRIEF OF *AMICUS CURIAE* ENGINE ADVOCACY IN SUPPORT OF PETITIONER

Dated: August 27, 2018

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. R. 26.1, Engine Advocacy discloses that it is a non-profit corporation organized under the laws of the state of California, that it does not have any parent company, and that no publicly held corporation owns 10% or more of its stock.

Dated: August 27, 2018

/s/ Christopher T. Bavitz

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to D.C. Circuit Rules 26.1 and 28(a)(1), and Fed. R. App. P. 26.1, the undersigned counsel certifies as follows:

A. Parties and *Amici*

Parties, intervenors, and *amici* appearing before this Court are listed in the Joint Brief of Non-Government Petitioners and the Proof Brief for Government Petitioners. Those briefs also identify many of the participants before the Federal Communications Commission in the proceeding under review.

B. Rulings Under Review

The ruling under review is the FCC's 2018 order, *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018).

C. Related Cases

The ruling under review has not been, and is not, the subject of any other petition for review, aside from those actions that have been consolidated in this proceeding. Prior FCC rulings concerning protections for the open Internet have been reviewed by this Court and would be substantially eliminated by the ruling under review. The FCC's 2010 order, *In the Matter of Preserving the Open Internet*, Report and Order, 25 FCC Rcd. 17905 (2010), was affirmed in part and vacated in part in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). The FCC's 2015

order, *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015), was affirmed in *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016). This Court denied a petition for rehearing en banc. *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017).

The following cases involve pending petitions to the Supreme Court for certiorari from the aforementioned U.S. Telecom proceeding:

Daniel Berninger v. FCC, S.Ct. No. 17-498

AT&T Inc. v. FCC, S.Ct. No. 17-499

American Cable Ass'n v. FCC, S.Ct. No. 17-500

CTIA-The Wireless Ass'n v. FCC, S.Ct. No. 17-501

NCTA-The Internet & TV Ass'n v. FCC, S.Ct. No. 17-502

TechFreedom v. FCC, S.Ct. No. 17-503

United States Telecom Ass'n v. FCC, S.Ct. No. 17-504

Dated: August 27, 2018

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Administrative Materials

Other Authorities

GLOSSARY OF ABBREVIATIONS

Administrative Procedures Act	APA
Federal Communications Commission	FCC
Federal Trade Commission	FTC
Internet Service Provider	ISP

STATUTES AND REGULATIONS

Relevant statutes and regulations are reproduced in the Statutes and Regulations Addenda that accompany the Joint Brief of Non-Government Petitioners and the Proof Brief for Government Petitioners.

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

Amicus curiae, Engine Advocacy ("Engine"), is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups, working with government and a community of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship. These startups are among the most innovative and fastest growing companies in the country, fundamentally altering and challenging entrenched business models, ideas, and institutions across all industries. *Amicus* and its community of entrepreneurs have an interest in protecting the startup ecosystem that thrived under the 2015 Open Internet Order.

Engine believes that, by undermining access to an open Internet, the 2018 Restoring Internet Freedom Order threatens the startup community's ability to attract investment. *Amicus* previously expressed its concerns to the Federal Communications Commission (the "FCC") in comments submitted in 2017. *Amicus* submits this brief to highlight evidence supplied in those and other comments, which evidence was given inadequate consideration by the Commission, as well as policy arguments ignored, mischaracterized, or subverted by the agency in adopting the 2018 Restoring Internet Freedom Order.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* certifies that no party or party's counsel authored this brief in whole or in part, that no party or party's counsel provided any money that was intended to fund the preparation or submission of this brief, and no party or person—other than the *amicus curiae*, or their counsel—contributed money that was intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The success of high-technology startup companies depends on their ability to reach consumers through a free and open Internet. "To survive, a startup usually needs to be able to quickly and easily reach as wide of an audience as possible—a task made significantly easier by the Internet's ubiquity and relatively low cost of participation." Comments of Engine, WC Docket No. 17-108 (July 17, 2017) (the "2017 Engine Comments") at p. 8. "This technological innovation and economic potential is only possible because today's founders can launch their businesses at extremely low cost—often merely the expense of hard work, cloud computing tools, and off-the-shelf laptops and mobile devices." *Id.* at p. 5. "The ever-decreasing cost of launching a startup has democratized the tech sector and has allowed new startup hubs outside of Silicon Valley to flourish." *Id.*

While any new business must cope with uncertainty, technology startups are particularly vulnerable to the conduct of Internet Service Providers ("ISPs"). Such conduct is beyond the control of any young company. But, additional costs or barriers to connectivity would likely doom cash-strapped technology startups, given the importance of Internet access to their success. "If blocked by even a few ISPs," a startup "will be less likely to gain traction in the market, even if consumers would otherwise prefer their services." *Id* at 9. The exposure of high-technology startups to actions of ISPs extends beyond the threat that they will be

blocked, as ISPs—left to their own devices—may implement paid prioritization schemes and other regimes that "have the same anti-competitive effect." *Id.*

The legal and regulatory landscape that has allowed startups to flourish includes rules and principles promulgated and enforced by the Federal Communications Commission (the "FCC"). Investors and startups have depended on the FCC's fulfilling its longstanding role of preventing malfeasance by ISPs through enforcement of *ex ante* rules and principles. Rules that preceded the 2018 Restoring Internet Freedom Order that is the subject of this proceeding, *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018) (the "2018 RIFO") prevented ISPs (which provide Internet access services) from charging edge providers (which develop content and provide it to users) access fees to reach users (who consume edge provider content) and creating paid prioritization schemes that disadvantage startups. *Amicus* submits that the FCC's rescission of those rules through implementation of the 2018 RIFO represents not only bad policy but an unlawful exercise of authority by the FCC.

The 2018 RIFO rolls back important *ex ante* protections in a manner that is arbitrary and capricious. Among other things, as set forth herein, the 2018 RIFO fails to address reliance interests from venture investors and startups. And, it offers no reasonable basis for undermining existing protections against blocking,

throttling, access fees, and paid prioritization schemes. For these reasons, this Court should rule that the 2018 RIFO constitutes an improper exercise of agency authority by the FCC.

ARGUMENT

I. The 2018 RIFO Improperly Failed to Address the Significant Reliance Interests of Venture Investors and Startups.

A. The FCC Was Required to Provide an Especially Robust and Detailed Justification for a Change in Policy that, Like the 2018 RIFO, Impacted Serious Reliance Interests.

Federal agencies like the FCC do not have unfettered discretion and must provide explanations for their actions. The Administrative Procedure Act ("APA") provides that an agency may not act in a manner that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency rule is "arbitrary and capricious" if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "A long line of precedent has established that an agency action is arbitrary when the agency offer[s] insufficient reasons for

treating similar situations differently." *Transactive Corp. v. U.S.,* 91 F.3d 232, 237 (D.C. Cir. 1996).

An agency must provide an especially robust justification—"more detailed . . . than what would suffice for a new policy created on a blank slate"—when it is changing existing policy that "has engendered serious reliance interests that must be taken into account." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). "[C]hange that does not take account of legitimate reliance on prior interpretation" may be arbitrary and capricious. *Smiley v. Citibank (S. Dakota), N.A.,* 517 U.S. 735, 742 (1996) (citations omitted); *see Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) (quoting *Fox Television*, 556 U.S. at 515). In this case, the FCC failed to adequately take into consideration significant reliance interests in adopting the 2018 RIFO.

B. Venture Investors and Startups Relied on *Ex Ante* Net Neutrality Principles and Rules In Place Prior to the 2018 RIFO.

1. Investors' and Startups' Reliance Interests Developed Over a Period of Many Years, Through Several FCC Orders and a Set of Principles that Predated Them.

For venture investors and startups in which they invest, the key provisions of the various orders at issue in this case are those that ensured ISPs could not block or throttle edge providers in their efforts to reach end users, discriminate between edge providers, or implement paid prioritization schemes that allowed

ISPs to sell fast lane services to the highest bidder. The FCC's efforts to enforce these provisions date back to principles that appeared in a "policy statement" adopted by the Federal Communications Commission in August of 2005 (the "2005 Policy Statement"). The 2005 Policy Statement, as summarized in an FCC release, provides:

> The Federal Communications Commission today adopted a policy statement that outlines four principles to encourage broadband deployment and preserve and promote the open and interconnected nature of public Internet: (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers . . . .

FCC, "FCC Adopts Policy Statement" (Aug. 5, 2005), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A1.pdf.

Building on the 2005 Policy Statement, the FCC issued bright line net neutrality rules in 2010. *See In the Matter of Preserving the Open Internet*, Report and Order, 25 FCC Rcd. 17905 (2010). Among other things, the 2010 OIO required transparency (providing that "[f]ixed and mobile broadband providers must disclose the network management practices, performance characteristics, and terms and conditions of their broadband services"); prohibited blocking (providing that "[f]ixed broadband providers may not block lawful content,

applications, services, or non-harmful devices; mobile broadband providers may not block lawful websites, or block applications that compete with their voice or video telephony services"); and forbade discrimination (providing that "[f]ixed broadband providers may not unreasonably discriminate in transmitting lawful network."). 2010 OIO at ¶ 1.

The 2010 OIO remained in effect for more than three years, until January 2014, when this Court vacated anti-blocking and anti-discrimination rules in the 2010 OIO. *See Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).[1] Shortly thereafter—on May 15, 2014—the FCC adopted and released a Notice of Proposed Rulemaking ("NPRM"), in which the agency sought public input regarding the most viable approach to promote an open Internet. *See* Protecting and Promoting the Open Internet NPRM, 79 Fed Reg. 37,447 (July 1, 2014). The FCC adopted the 2015 OIO—which is the subject of the 2018 RIFO—in March of 2015, and it remained in effect until the FCC's adoption of the 2018 RIFO.

[1] Notably, the Court held that the FCC had "failed to establish that the anti-discrimination and anti-blocking rules" in the 2010 OIO did not "impose *per se* common carrier obligations" and, thus, vacated those portions of the 2010 OIO. *Verizon v. FCC*, 740 F.3d at 628. The Court rejected Verizon's challenge to the 2010 OIO's disclosure requirements and expressly found they were severable from the 2010 OIO's other provisions. *See id.* at 659.

The 2015 OIO contained a number of provisions that were vitally important to investors and the startups in which they invested. Of particular note, the 2015 OIO prohibited blocking, providing that "*[a] person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management*." 2015 OIO at ¶ 15. It prohibited throttling (providing that "*[a] person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, 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*"). 2015 OIO at ¶ 16. It prohibited paid prioritization (providing that "*[a] person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization*" and that "'*[p]aid prioritization' refers to the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity*"). 2015 OIO at ¶ 18. It prohibited unreasonable interference or disadvantage to consumers or edge providers (providing that "*[a]ny person engaged in the*

provision of broadband Internet access service, insofar as such person is so engaged, 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" and that "*[r]easonable network management shall not be considered a violation of this rule*"). 2015 OIO at ¶ 21. Finally, the 2015 OIO maintained the 2010 OIO's transparency rule (providing that "*[a] person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings*"). 2015 OIO at ¶ 23.

2. Stakeholders (Including Amicus Curiae Engine) Provided Evidence to the FCC of Startups' and Investors' Reliance Interests.

Numerous stakeholders (including commenters such as *amicus curiae*, Engine) filed comments in the 2018 RIFO docket highlighting the significant damage that the proposed policy changes would cause in light of startups' and investors' reliance interests. In particular, the 2017 Engine Comments and the

Reply Comments of Engine, WC Docket No. 17-108 (Aug. 30, 2017) (the "2017 Engine Reply Comments") highlighted these concerns expressly and in great detail. Engine provided evidence that "investors backing Internet-enabled startups did so with the expectation that ISPs would be unable to charge for access to ISP customers or to give larger competitors preferential treatment in exchange for payment." 2017 Engine Comments at p. 6. Engine noted that disrupting settled expectations of investors and startups "would undermine the continued viability of the startup market in incalculable ways and severely curtail the economic and job growth that startups provide." *Id.* Specifically with respect to paid prioritization, Engine noted that such schemes would "drive many startups out of business or prevent investors from funding them in the first place" insofar as startups would be unable to "compete with large incumbents for priority access." *Id.* at p. 14.

Engine further noted that the 2015 OIO's *ex ante* "[b]ans on [b]locking, [t]hrottling, and [p]aid [p]rioritization . . . help establish the certainty investors and entrepreneurs need to invest billions of dollars in edge providers to power the innovation ecosystem." *Id.* at pp. 25-26 (citations omitted). Engine provided evidence that angel investment experienced significant growth in the period during which bright line net neutrality rules were the law of the land, increasing from $17.6 billion in 2009 to $24.1 billion in 2014. *Id.* at p. 6. And, Engine

highlighted the fact that allowing for "individualized bargaining" between ISPs and startups would engender uncertainty that "would alone cause investors to shy away from startups that depend on the Internet to reach customers." *Id.* at p. 26 (quotation marks omitted).

In the 2017 Engine Comments, Engine drew attention to an April 26, 2017 letter (the "April 2017 Letter")—which had by then been joined by more than 1,200 startups, investors, and entrepreneur support organizations, representing all 50 states—organized by Engine alongside startup accelerators Y Combinator and TechStars, supporting the 2015 OIO and adding context to the concerns of the startup and investment community. 2017 Engine Comments at p. 18 (citing Engine, Y Combinator, and TechStars, "Startups for Net Neutrality" (Apr. 26, 2017), http://www.engine.is/startups-for-net-neutrality/). Engine highlighted the fact that signatories to the April 2017 Letter had "praised the Open Internet Order's 'light touch net neutrality rules that not only prohibit certain harmful practices, but also allow the Commission to develop and enforce rules to address new forms of discrimination,' and expressed disapproval of proposals to eliminate the Order's bright-line rules, 'which would give a green light for Internet access providers to discriminate in unforeseen ways.'" 2017 Engine Comments at pp. 18–19 (quoting April 2017 Letter). The April 2017 Letter specifically noted that, "[w]ithout net neutrality, the incumbents who provide access to the Internet

would be able to pick winners or losers in the market" allowing ISPs to "impede traffic from our services in order to favor their own services or established competitors" or "impose tolls on us, inhibiting consumer choice." April 2017 Letter at p. 1.

Accompanying the 2017 Engine Reply Comments, Engine included an August 30, 2017 letter "submitted by a subset of the leading venture capitalists over the past decade" (the "August 2017 Investor Letter"), which further made a clear case for investor reliance on the FCC's prior conduct. 2017 Engine Reply Comments at p. 14. Of note, Engine highlighted the fact that "[t]he investors on this letter have invested more than $24 billion in over 3,000 startups since the FCC issued bright-line net neutrality rules in its 2010 Open Internet Order." 2017 Engine Reply Comments. *Id.* "According to some estimates, venture capital investment has increased steadily from $31 billion in 2010 to nearly $70 billion in 2016." *Id.* at p. 15 (citation omitted). The August 2017 Investor Letter itself states that the signatory venture capitalists' "investment decisions in Internet companies are dependent upon the certainty of an equal-opportunity marketplace, and the low barriers to entry that have existed on the Internet." August 2017 Investor Letter at p.1. The record clearly demonstrates that these investors—and the startups they have funded—put billions of dollars into the Internet ecosystem in

reliance on the FCC's enforcement of *ex ante* rules preventing ISPs from charging access fees or priority tolls to edge providers.[2]

3. The FCC Ignored Evidence About Legitimate Reliance Interests and Misstated or Mischaracterized The Record to Address Only Strawman Arguments About Reliance.

Despite this evidence, in adopting the 2018 RIFO, the FCC failed to adequately consider the issue of startup and investor reliance interests. Rather than responding to investors' concerns directly, the FCC misstated the record in two key respects, addressing strawman arguments without meaningfully engaging with

[2] It is notable that the FCC dismissed startup concerns about ISP discrimination as "purely speculative," and therefore insufficient to support existing *ex ante* rules barring discrimination, despite evidence regarding ISP incentives to discriminate (and notwithstanding the fact that the *ex ante* rules at issue were responsible for preventing such discrimination). But, the FCC based its decision to rescind existing rules largely on ISP claims that the mere speculative threat of future rate regulation diminished ISP investment. *Compare* 2018 RIFO at ¶ 116 (asserting that there is a "paucity of concrete evidence of harms to the openness of the Internet," that proponents of the 2015 OIO "have heavily relied on purely speculative threats," and that the Commission does not "believe hypothetical harms, unsupported by empirical data, economic theory, or even recent anecdotes, provide a basis for public-utility regulation of ISPs") (citations omitted) with 2018 RIFO at ¶ 101 (crediting providers' purported concerns that the Commission might someday "reverse course" and "impose a variety of costly regulations on the broadband industry—such as rate regulation and unbundling/open access requirements—placing any present investments in broadband infrastructure at risk") (citations omitted).

the concerns that investors and the startup community brought to the agency's attention.

First, in the 2018 RIFO, the FCC mischaracterized the nature of the reliance interest that Engine and others had cited in their comments. Specifically, the 2018 RIFO provides that, "[w]hile there is tremendous investment occurring at the edge, the record does not suggest a correlation between edge provider investment and *Title II regulation*, nor does it suggest a causal relationship that edge providers have increased their investments as a result of the [2015 OIO]." 2018 RIFO at ¶ 107 (emphasis added) (citations omitted).[3] But, Engine and others did not provide evidence that investors and startups merely relied on Title II reclassification, or even on considerations that were limited to the 2015 OIO itself. Rather, the reliance interests described in the submissions at issue are based on FCC rules and principles barring ISP discrimination, including bright-line rules that existed under the 2015 OIO, the 2010 OIO, and principles set forth in

[3] The 2018 RIFO further attempts to cast investors' and startups' concerns as concerns about classification, providing that "[a]ssertions in the record regarding absolute levels of edge investment do not meaningfully attempt to attribute particular portions of that investment to any reliance on the [2015 OIO]. Nor are we persuaded that such reliance would have been reasonable in any event, given the lengthy prior history of *information service classification of broadband Internet access service*, which we are simply restoring here after the brief period of departure initiated by the [2015 OIO]." 2018 RIFO at ¶ 159 (emphasis added) (citations omitted).

the 2005 Policy Statement adopted by the FCC well more than a decade ago. Nowhere in the 2018 RIFO does the Commission squarely address startup and investor reliance on the FCC's years of enforcing rules and principles preventing ISP discrimination. As noted above, Engine was clear about the nature of this reliance interest in its comments to the FCC. The FCC chose to miscast the argument as one about statutory authority rather than one about underlying rules and the FCC's role in enforcing them.

Second, the FCC misstated the timeframe during which rules and principles on which investors relied were in effect. The 2018 RIFO provides that "the Commission did not establish any rules until 2010— just seven years ago—and did not establish enforceable bright-line rules until 2015—just two years ago." 2018 RIFO at ¶ 159 n. 587. This timeline ignores the FCC's prior net neutrality principles. It further suggests that investors could not have relied on bright-line rules between 2010 and 2014, because the 2010 OIO was vacated by court order in 2014. In fact, outside a brief period from 2014-15, the FCC has always asserted the authority to prevent ISPs from blocking access to lawful content.

4. By Refusing to Address Legitimate Reliance Interests, the FCC Failed to Properly Exercise its Authority in Adopting the 2018 RIFO.

In light of the strong reliance interests that investors and startups identified in the FCC's policy of preventing ISPs from blocking lawful traffic and charging

edge providers for priority access to end users, the FCC was obligated to provide a robust explanation for its decision to eliminate those protections. By avoiding evidence provided about genuine reliance by venture investors, by mischaracterizing the reliance debate as one about statutory authority, and by misstating the timeline over which startups' and investors' reliance interests developed, the FCC failed to satisfy the legal requirements that apply to any exercise of agency authority. *See Fox Television Stations, Inc.*, 556 U.S. at 515.

II. The FCC Failed to Provide an Appropriate Basis for Rescinding Restrictions on Blocking, Throttling, Access Fees, and Paid Prioritization.

A. An Agency Action Is "Arbitrary and Capricious" Where, as Here, the Agency Ignores Key Aspects of the Problem Being Addressed and Offers Explanations Contrary to Evidence.

The FCC failed to satisfy the APA's standards with respect to its rescission in the 2018 RIFO of pre-existing rules against blocking, throttling, access fees, and paid prioritization. Startups and investors provided ample evidence demonstrating the need for such rules in advance of the FCC's adoption of the 2018 RIFO. The FCC ignored this evidence and relied upon tortured and non-sensical policy rationales to reach its conclusions that *ex ante* rules against blocking and paid prioritization are unnecessary to prevent ISPs from undermining the openness of the Internet ecosystem.

B. The FCC Acknowledges Significant Harms Caused by Blocking, Throttling, and Access Fees, But Measures Embodied in the 2018 RIFO to Prevent Such Harms are Wholly Inadequate.

The 2018 RIFO notes explicitly that there exists a "consensus" against ISPs' engaging in blocking and throttling practices and that the FCC itself "[does] not support blocking of lawful content, consistent with long-standing Commission policy." 2018 RIFO at ¶¶ 263, 265.[4] Despite recognizing the threat that ISP blocking presents to startups and the broader Internet ecosystem, the FCC nevertheless decided to eliminate existing rules against ISP site blocking. Instead, the FCC claimed that a combination of a transparency rule, "market forces," and the availability of *ex post* enforcement by the Federal Trade Commission ("FTC") is sufficient to prevent ISP site blocking, rendering *ex ante* FCC rules unnecessary. *See id.* at ¶¶ 263-265. These conclusions defy logic for several reasons, based on evidence previously provided to the FCC.

First, the FCC suggests that "market forces" and "stakeholder consensus" are sufficient to prevent blocking and throttling. *See* 2018 RIFO at ¶ 265 (citations omitted) ("This consensus is among the reasons that there is scant evidence that end users, under different legal frameworks, have been prevented by

[4] The 2018 RIFO further provides, "[t]his consensus is among the reasons that there is scant evidence that end users, under different legal frameworks, have been prevented by blocking or throttling from accessing the content of their choosing." 2018 RIFO at ¶ 265.

blocking or throttling from accessing the content of their choosing. It also is among the reasons why providers have voluntarily abided by no-blocking practices even during periods where they were not legally required to do so."). This conclusion ignores the fact that the ISPs themselves have said that they would have charged access fees but for the FCC's past practice of policing such practices. Of particular note, ISPs have repeatedly and explicitly expressed their desire to charge websites for access to end users and block those that cannot pay. *See* 2017 Engine Comments at p. 23 (citing Oral Argument at 1:54:48, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (Nos. 11–1355, 11–1356), https://www.c-span.org/video/?314904-1/verizon-v-federal-communications-commission-oral-argument). Counsel for Verizon specifically argued to this Court that it is entitled to charge edge providers for priority access, to block or throttle those who refuse (or are unable) to pay. *See id.* The FCC's additional claim that a no-blocking rule is unnecessary because ISPs have promised not to block is illogical in light of the fact that such commitments are non-binding and contrary to previous statements.[5]

[5] It is worth noting that at least one ISP has already withdrawn a previous promise to abide by a net neutrality pledge with respect to paid prioritization upon release of the 2018 RIFO. *See* Jon Brodkin, "Comcast deleted net neutrality pledge the same day FCC announced repeal," ArsTechnica (Nov. 29, 2017), https://arstechnica.com/tech-policy/2017/11/comcast-deleted-net-neutrality-pledge-the-same-day-fcc-announced-repeal/.

The notion that market forces will constrain ISP blocking and related activities is further belied by basic facts about the nature of the Internet service market in the United States. According to statistics that the FCC proffers in the 2018 RIFO, almost half of Americans have access to zero providers or one provider of broadband service. See 2018 RIFO at ¶ 125 (citations omitted). The FCC claims in the 2018 RIFO that "ISPs have long-term incentives to preserve Internet openness, which creates demand for the Internet access service that they provide." See 2018 RIFO at ¶ 264 (citations omitted). But, that argument is inapplicable for the households that have access to only one provider of high-speed broadband. If a user's sole choice in ISP blocks access to the site, the choice is between Internet access or no Internet access.

The FCC further argues that a rule against blocking is unnecessary, because the FTC can police bad ISP behavior. 2018 RIFO at ¶ 265 ("To the extent that these incentives prove insufficient and any stakeholder engages in such conduct, such practices can be policed *ex post* by antitrust and consumer protection agencies. ") Enforcement by the FTC will, similarly, be insufficient to protect startups, because an FTC action will take far longer to resolve than a startup can afford to live without access to users. *See* 2017 Engine Reply Comments at p. 10 ("Any net neutrality rules that either require a startup to initiate an action to challenge abusive ISP conduct or depend on the FTC reacting to marketplace

harms after they have occurred are functionally useless for startups and innovators that depend on the existing net neutrality regime."). A move from bright-line *ex ante* rules at the FCC to *ex post* enforcement by the FTC "would impose impossible costs on the startups that will be most harmed by anticompetitive activities." *See* 2017 Engine Reply Comments at p. 9 ("Under an FTC enforcement regime, the agency can only address anticompetitive ISP practices after the damage to innovation and startup investment has already occurred. Startups operate on incredibly short runways and thin margins. By the time the FTC or DOJ Antitrust Division can initiate an action to remedy abusive practices, those abusive practices will have already put affected startups out of business.") Antitrust enforcement actions are long, costly, and thus unlikely to provide meaningful recourse for startups harmed by the anti-competitive conduct of ISPs. *See* 2017 Engine Reply Comments at pp. 9-10 ("Considering how lengthy and expensive antitrust cases can be, it is impossible to imagine any startup having the resources to survive long enough for an FTC proceeding to end, must less initiating and winning an antitrust action. Even net neutrality opponents concede that 'antitrust litigation imposes significant costs on private litigants, and it does not provide timely relief.'") (citation omitted).[6]

[6] The FCC's deference to FTC enforcement, and to antitrust law more generally, further ignores the limits of the FTC's antitrust authority and the skepticism

Again, ISPs have indicated they would engage in this conduct but for FCC enforcement, suggesting that the FTC's existing antitrust authority did not concern them. Furthermore, significant evidence suggests that the mere possibility of sanctions will not deter ISPs from testing the limits of what discriminatory practices they can deploy. After the 2015 OIO provided that it would not create a bright-line rule barring potentially anti-competitive zero-rating practices but instead would evaluate them on a case-by-case basis, ISPs quickly created a variety of zero-rating programs, some involving preferences to affiliated content (contrary to the FCC's guidance). *See* 2017 Engine Reply Comments at pp. 5-6, citing Aaron Pressman, "FCC Again Blasts Verizon and AT&T Over Net Neutrality," *Fortune* (Jan. 11, 2017), http://fortune.com/2017/01/11/fcc-verizon-att-net-neutrality-2/ ("AT&T and Verizon are hurting competition and most likely violating net neutrality rules by giving special treatment to streaming video

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expressed by at least one of the FTC's own former commissioners about the exercise of that authority in this context. *See* 2017 Engine Reply Comments at pp. 10-11 (citing J. Thomas Rosch, "Broadband Access Policy: The Role of Antitrust," Remarks Presented at the Broadband Policy Summit IV: Navigating the Digital Revolution (June 13, 2008), http://www.ftc.gov/speeches/rosch/080613broadbandaccess.pdf (noting former Republican FTC commissioner J. Thomas Rosch's expression of "doubt that antitrust can address many, if any, of the problems cited by network neutrality proponents," in part because "antitrust law does not apply to single firm conduct" like the ISP conduct net neutrality regulation is intended to address).

services they own, top federal telecommunications regulators warned.").

Critically, even if the FCC is correct that there is only a slight chance that ISPs will charge access fees to edge providers in the absence of *ex ante* FCC rules, the Commission's conclusion that it is appropriate to rescind rules prohibiting this practice is illogical, because it has failed to identify any costs associated with an *ex ante* anti-blocking rule that would warrant its rescission. While the FCC conclusorily states that "the transparency rule we adopt, combined with antitrust and consumer protection laws, obviate the need for conduct rules [preventing ISP blocking] by achieving comparable benefits at lower cost," nowhere in the 2018 RIFO does the FCC actually attempt to identify costs associated with previous no-blocking rules. 2018 RIFO at ¶ 264. Because the FCC concedes it is possible that ISPs will engage in blocking in the absence of *ex ante* rules[7] and fails to identify costs associated with such rules, its decision to abandon rules that prohibit ISPs from blocking lawful content is arbitrary and capricious.

C. The 2018 RIFO's Allowance for Paid Prioritization Flies in the Face of Logic and Is Contrary to Evidence About the Harms of Such Regimes the Startup Ecosystem.

Startups and investors depend on rules barring ISPs from selling priority access to the highest bidder. Substantial evidence in the record supports this

[7] *See* 2018 RIFO at ¶ 265.

conclusion. Yet, the 2018 RIFO allows ISPs to enter into paid prioritization arrangements, pursuant to which ISPs can prioritize packets from particular edge providers in exchange for payments. *See, e.g.,* 2018 RIFO ¶ 133 ("Moreover, those smaller edge providers may benefit from tiered pricing, such as paid prioritization, as a means of gaining entry.") (footnote omitted). Ignoring evidence in the record establishing that startups will face severe competitive disadvantages if ISPs are allowed to sell priority access to the highest bidder, the FCC justifies its decision on the basis that paid prioritization schemes will benefit startups. This defies logic.

The 2018 RIFO cites—but does not meaningfully address—commenters' submissions that underscore significant fallacies inherent in the FCC's approach. If, as the FCC suggests, paid prioritization is an effective way for edge providers to differentiate service—that is, paid prioritization has economic value—startups will not be able to access such arrangements, because large incumbents will outbid them for this treatment. Paid prioritization is necessarily zero sum; for an ISP to prioritize some packets, it must de-prioritize others. Thus, unless prioritization were more valuable to startups than to large incumbents, and unless this relative advantage were not significant enough that large incumbents would purchase priority in order to exclude startups, startups will not be able to afford these arrangements. Put simply, the 2018 RIFO assumes that paid prioritization schemes will benefit startups without addressing the evidence to the contrary. This

is the type of conclusory approach—in the face of considerable conflicting evidence—that courts have held is contrary to agency authority. *See Int'l Union, United Mine Workers v. Mine Safety & Health Admin.*, 626 F.3d 84, 94 (D.C. Cir. 2010) ("'Conclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet the deferential standards of our review.'") (quoting *AT&T Wireless Servs., Inc. v. FCC*, 270 F.3d 959, 968 (D.C. Cir. 2001)); *see also Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (affirming that an agency must follow a process that is "logical and rational" and that courts should set aside regulations that "are not supported by the reasons that the agencies adduce").

The FCC also claims that a ban on paid prioritization is not required, because the FTC can block anticompetitive prioritization, and because allowing prioritization will encourage innovative pricing schemes. *See* 2018 RIFO at ¶ 253, et seq. ("[T]he incremental benefit of a ban on paid prioritization is likely to be small or zero. On the other hand, we expect that eliminating the ban on paid prioritization will help spur innovation and experimentation, encourage network investment, and better allocate the costs of infrastructure, likely benefiting consumers and competition. Thus, the costs (forgone benefits) of the ban are likely significant and outweigh any incremental benefits of a ban on paid

prioritization.").[8] This view glosses over costs to edge innovation, as the FCC asserts without support that paid prioritization somehow helps startups.

Nowhere in the record does any net neutrality opponent attempt to demonstrate that startups could afford paid prioritization schemes. On the other hand, commenters expressly noted startups would be unable to afford prioritization charges. Engine made this point explicitly in the 2017 Engine Comments:

> Startups simply do not have sufficient capital to pay access or prioritization fees of any kind. While the aggregate amount of money invested in startups is massive, the average startup launches with surprisingly little capital, making even small increases in startup costs potentially ruinous for new enterprises. According to a 2008 Kauffman Foundation survey, the average high-tech startup firm launches with around $73,000 of outside capital, with company insiders providing a similar amount. The University of New Hampshire's Center for Venture Research estimated that the average angel deal size in 2015 was $345,390, though this figure included angel deals for biotech, industrial, and energy companies which tend to have higher capital needs than Internet enabled startups.

See 2017 Engine Comments at pp. 10-11 (footnotes and citations omitted). The FCC cites this argument in a footnote in the 2018 RIFO but rejects it out of hand, without engaging with it in any meaningful way. *See* 2018 RIFO at n. 926. The

[8] *See also* 2018 RIFO at ¶ 255 ("Paid prioritization could allow small and new edge providers to compete on a more even playing field against large edge providers, many of which have [content delivery networks] and other methods of distributing their content quickly to consumers.") (citations omitted).

FCC's failure to address evidence demonstrating that startups will face ruinous competitive disadvantages if the FCC abandons longstanding rules barring paid prioritization schemes renders the Commission's deviation from prior policy arbitrary and capricious. *See* 2017 Engine Comments at pp. 15-18 (highlighting excerpts from startup submissions stating that they would not have launched without FCC rules barring ISP blocking, throttling, and paid prioritization).

CONCLUSION

The landscape for startup investment is complex, tenuous, and fraught with uncertainty. The more a startup operates in an environment of uncertainty, the less attractive that startup is for new investment opportunities. Net neutrality protections embodied in the 2005 Policy Statement, the 2010 OIO, and the 2015 OIO provided the kind of certainty that allowed online businesses to thrive. By rolling back protections, the 2018 RIFO will diminish the value of existing investments in technology startups[9] and deter future investments.[10] This is bad

[9] *See* 2017 Engine Comments at pp. 8-9 ("If, however, ISPs were permitted to block startups from accessing customers on their networks, those startups' valuations would plummet as they would be unable to reach large portions of the market and lose potential customers."); 2017 Engine Reply Comments at p. 14 ("Being put at such a competitive disadvantage to incumbents will drive down the value of early stage companies and disrupt the investments venture capital and angel investors have made.").

[10] *See* 2017 Engine Reply Comments at p. 14 ("Without the bright-line net neutrality rules in place, investors will have to consider whether a startup can afford to pay ISPs upfront for fair access to users and whether ISPs will

policy, badly implemented. For the reasons set forth herein, *amicus curiae* Engine respectfully requests that this Court rule that the 2018 RIFO represents an improper exercise of agency authority by the FCC.

Respectfully submitted,

Dated: August 27, 2018

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disadvantage a startup's access to its users because it either owns a competitor or works with a competitor who can afford to pay more.").

[11] *Amicus curiae* thanks Cyberlaw Clinic summer 2018 intern Christina Chen for her valuable contributions to this brief.

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of the Federal Rules of Appellate Procedure and the Circuit Rules. The document contains 6,382 words, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2018, I caused the foregoing Brief of *Amicus Curiae* Engine Advocacy in Support of Petitioner to be electronically filed with the Clerk of the Court using CM/ECF, which will automatically send email notification of such filing to all counsel of record.

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