

No. 18-1051 (and consolidated cases)

**In the United States Court of Appeals
for the District of Columbia Circuit**

MOZILLA CORPORATION, ET AL.,
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents

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

**BRIEF OF THE STATES OF TEXAS, ARKANSAS, AND
NEBRASKA AS *AMICI CURIAE* IN SUPPORT OF
RESPONDENTS**

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IDENTITY OF PARTIES AND COUNSEL

The identity of the parties and their counsel are correctly identified in the parties' briefs. Counsel for amici curiae are listed on the cover of this brief.

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INTEREST OF AMICUS CURIAE

Amici are the States of Texas, Arkansas, and Nebraska.¹ The States represented have an interest in the proper exercise of power delegated to administrative agencies. At the same time, States have an interest in protecting both consumers and purveyors of Internet services. Indeed, the FCC expects that States will advance consumer protection in this realm, including the enforcement of laws that allow State Attorneys General to prosecute fraud by Internet providers against their customers. The balance here between federal and State regulation is thus important to amici, independent sovereigns who seek to enforce their own laws in a manner consistent with the Constitution.

¹ As governmental entities, amici need not file a disclosure statement. Fed. R. App. P. 26.1. As States, amici file as a matter of right, Fed. R. App. P. 29(a)(2), but petitioners have consented to this filing. No party or party's counsel authored any part of this brief. No person or entity, other than amici or its counsel, has made a monetary contribution to the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

On the day President Obama took office, his administration set out to overturn at least 200 Bush-era administrative actions and executive orders.² From stem-cell research to offshore drilling policies to EPA decisions, the President sought to reverse course on several highly visible initiatives.³ And President Obama's new policies and interpretations have been largely upheld by the courts. *See, e.g., Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015); *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1609 (2014); *Sherley v. Sebelius*, 689 F.3d 776, 778 (D.C. Cir. 2012).

The latest presidential election brought a new Executive, and with his administration came another round of policy changes. And, predictably, those changes have been challenged in court, with the State of California alone filing dozens of lawsuits attacking agency action on immigration, health care, environmental actions, the

² Ceci Connolly and R. Jeffrey Smith, *Obama Positioned to Quickly Reverse Bush Actions*, WASH. POST, Nov. 9, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/11/08/AR2008110801856_pf.html.

³ Huma Khan, *In First 100 Days, Obama Flips Bush Admin's Policies*, ABC News, Apr. 29, 2009, <https://abcnews.go.com/Politics/Obama100days/story?id=7042171&page=1>; Andrew Pollack, *Milestone In Research In Stem Cells*, N.Y. Times, Jan. 23, 2009, at B1; *Bush-Era Offshore Drilling Plan Is Set Aside*, NBCNews.com, Feb. 10, 2009, <http://www.nbcnews.com/id/29119940>; John M. Broder & Peter Baker, *Obama's Order Likely to Tighten Auto Standards*, N.Y. Times, Jan. 26, 2009, at A1; Tom Goldstein, *EPA Moves to Dismiss Clean Air Act Case, Reversing Bush Administration Policies*, Scotusblog.com, Feb. 6, 2009, <http://www.scotusblog.com/wp/epa-moves-to-dismiss-clean-air-act-case-reversing-bush-administration-policies/>.

census, a border wall, sanctuary cities, and voting rights.⁴ Yet just as the new policy courses charted under the Obama presidency were upheld, the current batch of lawsuits claiming that President Trump’s policies are arbitrary and capricious (or in need of additional procedural red tape) must fail too.

So long as an agency acts within its realm of authority, its decision to alter a policy decision—or even reverse course—is not subject to a special, enhanced standard of review. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009); *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1036-37 (D.C. Cir. 2012) (describing the argument that agency reversal is subject to more searching review as “largely foreclosed” by *FCC v. Fox Television Stations*). This flows from the APA’s narrow scope of review that limits the judicial inquiry. *Fox Television Stations, Inc.*, 556 U.S. at 513. Critically, courts are not to impose substantive judgments on the contested issue and may only review those policy shifts narrowly for fidelity to APA procedures—even when reliance interests are at issue. *Mortgage Bankers Ass’n*, 135 S. Ct. at 1207 (“Beyond the APA’s minimum requirements, courts lack authority ‘to impose upon [an] agency its own notion of which procedures are “best” or most likely to further some vague, undefined public good.’” (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Resources Def. Council, Inc.*, 435 U.S. 519, 549 (1978))).

The petitioners now before the Court overlook that core principle. They ask the Court to hold the FCC’s decision to a higher standard than the APA contemplates.

⁴ Adam Liptak, *Trump v. California: The Biggest Legal Clashes*, N.Y. Times, April 5, 2018, <https://www.nytimes.com/2018/04/05/us/politics/trump-california-lawsuits.html>.

But petitioners misunderstand the law. Properly applying *Fox Television*, the FCC's decision to reverse the previous administration's decision merits no special scrutiny. Under APA scrutiny, the FCC's decision prevails.

The petitions for review should be denied.

ARGUMENT

I. Agencies Need Not Jump Through Extra Procedural Hoops In Order To Reverse Policy Determinations.

A federal agency is not obligated to engage additional processes when reversing course from a previous administration. Decisionmakers can reconsider the same data and come to a different conclusion resulting in another interpretation and decision. *Fox Television Stations, Inc.*, 556 U.S. at 519 (rejecting view that agency could not regulate more broadly in absence of new evidence: "As explained above, the fact that an agency had a prior stance does not alone prevent it from changing its view or create a higher hurdle for doing so."); *Nat'l Ass'n of Home Builders*, 682 F.3d at 1037. All that is required of the agency is proper procedural implementation of the new position and a reasoned explanation for its decision, not additional procedure. *See Fox Television Stations, Inc.*, 556 U.S. at 514 (recognizing that neither the APA nor Supreme Court precedent calls for a heightened standard to review agency change).

As the Supreme Court admonished in *Perez v. Mortgage Bankers Association*, courts have no authority to impose procedural requirements beyond those stated in the APA. 135 S. Ct. at 1207 (abrogating *Paralyzed Veterans* doctrine insofar as it required additional notice and comment process by agency for changing its interpretation of a regulation). The Court rejected the notion that procedural fairness prevents

an agency from “unilaterally and unexpectedly” adopting a different interpretation of a regulation the agency is charged with implementing. *Id.* at 1209. Specifically, while an agency cannot simply ignore when the new policy “rests upon factual findings that contradict those which underlay its prior policy,” it need only provide a reasoned explanation and justify the change. *Id.* The APA sets the maximum procedural obligations for which agencies must adhere; reviewing courts are not permitted to impose additional requirements. *Id.* at 1207.

Fundamentally, an agency’s change in policy must only satisfy the standard it would be held to in the first instance under the APA. *Fox Television Stations*, 556 U.S. at 515. Stated differently, “[t]his means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.” *Id.* The Supreme Court has repeatedly held that heightened review is not called for under the plain language of the APA. “We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard.” *Id.* at 514; *see also Inv. Co. Inst. v. U.S. Commodity Futures Trading Comm’n*, 891 F. Supp. 2d 162, 187 (D.D.C. 2012), as amended (Jan. 2, 2013), *aff’d sub nom, Inv. Co. Inst. v. Commodity Futures Trading Comm’n*, 720 F.3d 370 (D.C. Cir. 2013). Precedent does not impose such a requirement either. *See Fox Television Stations*, 556 U.S. at 514 (“And our opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.”).

Importantly, an incoming administration's actions should be emblematic of the system working properly, not a point of failure. Even among scholars, the legitimacy of agency action to finalize regulations in opposition to the incoming administration's announced preferences is questionable and illustrates a disregard for the expressed will of the national electorate. *See* Mendelson, Nina A., *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. Rev. 557, 564-65 (2003) (recognizing the undemocratic and potentially illegitimate efforts of agencies to finalize agency action in light of the administration change illustrating a disregard for public's choice in president).

This is not to say an agency should act beyond the scope of its statutorily defined authority or that such actions can never be reviewed. If an agency's policy was "not in accordance with the law" in the first place, it is owed no deference. Courts, however, are not permitted to broadly apply heightened standards of review to pass on an agency's policy decisions. The scope of review is narrow and, in reviewing agency action, a court is prohibited from substituting its judgment for that of the agency. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016); *Fox Television Stations*, 556 U.S. at 514. Ultimately, an agency's change in policy must be sustained when it passes muster under the same standard it would have been held to in the first instance under the APA. *Fox Television Stations*, 556 U.S. at 514.⁵

⁵ Indeed, such agency reversals can be accomplished as an exercise of the same authority the first action was taken. Similarly, if the agency lacked the authority to act in the first instance then undoing that agency action cannot be impermissible.

II. The FCC's Decision Satisfies APA Review.

Under the appropriately narrow scope of review, the agency's action in this case is within both the scope of the APA and the guidelines set forth by the Supreme Court for changing course. Here, the Agency engaged in reasoned decision making by repealing the recently-enacted guidance from the FCC that classified broadband Internet service providers (ISPs) under Title II (telecommunications service), rather than Title I (information service), of the Telecommunications Act—the so-called “Net Neutrality” rules. *See United States Telecom Ass'n v. FCC*, 825 F.3d 674, 689 (D.C. Cir. 2016). The policy being repealed, in place since 2015, offered threats to investment and creative problem solving within the ISP community; those rules had also sought to regulate private business activity as a public utility. The new Administration, both to address these specific policy concerns as well as cut back on regulatory red tape in general, rescinded the prior guidance and returned ISPs to Title I, the state they were in before 2015. *See Nat'l Cable & Telecoms. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 974 (2005) (upholding, under *Chevron*, FCC's determination that Internet service providers should be “exempt from mandatory common-carrier regulation under Title II”).

This is consistent with the Supreme Court's determination in *FCC v. Fox Televisions Stations* that the Commission's decision to depart from prior practice and implement a new enforcement policy to find even so-called “fleeting expletives” actionably indecent was neither arbitrary nor capricious. 556 U.S. at 517. The Commission acknowledged that its course of action represented a shift in policy. *Id.* In deciding to expand the scope of its enforcement activity, the FCC examined and expressly

disavowed inconsistent past practice and dicta supporting the “prior Commission and staff action.” *Id.* The Court analyzed the Commission’s reasoning to find it entirely rational. *Id.* Thus, the Second Circuit’s reversal of the Commission’s orders was erroneous. *Id.* at 518-21. There was no basis in the APA or Supreme Court precedent authorizing a more probing review to undermine the agency’s decision making. *Id.* at 513-15. Accordingly, undoing or reversing agency action is permissible so long as the agency demonstrates awareness of the change and offers a satisfactory reason for it. *Id.*; see also *Electric Power Supply Ass’n*, 136 S. Ct. at 782 (confirming that reviewing court is tasked only with ensuring agency engaged in review of relevant data and provided reasoning for the action taken).

All this explains why many legal challenges arising from the transition from the Bush to Obama-led executive failed. Courts upheld the new policy directives against challenges that these policy decisions were arbitrary and capricious departures from prior policy. See *EME Homer City Generation*, 134 S. Ct. at 1609 (upholding EPA Transport Rule); *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 382 (D.C. Cir. 2017) (per curiam) (refusing rehearing en banc of panel decision upholding the FCC’s 2015 Open Internet Order); *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (per curiam) (rejecting challenges to EPA Endangerment Finding and Tailpipe Rule); *Sherley*, 689 F.3d 776 (regarding policy reversal in embryonic stem-cell research directives of NIH); *Nat. Resources Defense Council v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009) (per curiam) (upholding Reasonably Available Technology Certification provision of Clean Air Act while invalidating elimination of attain-

ment demonstration requirement and New Source Review exemptions); *Env'tl. Integrity Project v. U.S. EPA*, 610 F. App'x 409 (5th Cir. 2015) (per curiam) (upholding EPA final rule regarding State Implementation Plans to meet NAAQS); *BCCA Appeal Group v. U.S. EPA*, 476 F. App'x 579 (5th Cir. 2012) (per curiam) (declining review of EPA rejection of Texas's Qualified Facilities Program); *Real Alternatives, Inc. v. HHS*, 867 F.3d 338 (3d Cir. 2017) (upholding ACA contraceptive mandate).

As noted previously, in addition to the challenge here, certain states and public interest groups have mounted numerous legal challenges to the policy shifts directed by the Trump administration. *See, e.g., Regents of Univ. of Calif. v. DHS*, 279 F. Supp. 3d 1011, 1026-27 (N.D. Cal. 2018) (DACA); *Trs. of Princeton Univ. v. United States*, No. 1:17-cv-2325-CRC (D.D.C. filed Nov. 3, 2017) (same); *New York v. Trump*, No. 1:17-cv-5228-NGG-JO (E.D.N.Y. filed Sept. 6, 2017) (same); *NAACP v. Trump*, No. 1:17-cv-1907-CRC (D.D.C. filed Sept. 18, 2017) (same); *Vidal v. Nielsen*, No. 1:16-cv-4756-NGG-JO (E.D.N.Y. filed Aug. 25, 2016) (same); *New York v. Pruitt*, No. 1:18-cv-1030 (S.D. N.Y. filed Feb. 6, 2018) (delaying applicability of Clean Water Rule); *Sierra Club v. Zinke*, No. 4:18-cv-00524 (N.D. Cal. filed Jan. 24, 2018) (BLM Fracking Rule); *California v. EPA*, No. 18-1114 (D.C. Cir. filed May 1, 2018) (emission standards); *Nat'l Coal. for Advanced Transp. v. EPA*, No. 18-1118 (D.C. Cir. May 3, 2018) (same); *Ctr. for Biological Diversity v. EPA*, No. 18-1139 (D.C. Cir. May 15, 2018) (same); *California v. Zinke*, No. 4:17-cv-00042 (D. Mont. filed May 9, 2017) (coal lease program); *Hawaii v. Trump*, No. 1:17-cv-00050 (D. Haw. filed Feb. 3, 2017) (travel ban); *IRAP v. Trump*, No. 8:17-cv-00361 (D. Md. filed Feb. 7, 2017) (same); *California v. Hargan*, No. 4:17-cv-05783 (N.D. Cal. filed

Oct. 6, 2017) (ACA contraception rule rollback); *Pennsylvania v. Trump*, No. 2:17-cv-04540 (E.D. Pa. filed Oct. 11, 2017) (same); *California v. Trump*, No. 3:17-cv-05895 (N.D. Cal. filed Oct 13, 2017) (ACA cost sharing); *California v. Ross*, No. 3:18-cv-01865 (N.D. Cal. filed Mar. 26, 2018) (census questionnaire); *Doe v. Trump*, No. 1:17-cv-01597 (D.D.C. filed Aug. 9, 2017) (admission of transgender troops).

And those challenges, like the ones raised in response to Obama-era policy reversals complaining that the agency's change of position is arbitrary and capricious, must fail. Even setting aside the Supreme Court's explicit approval to treat ISPs as an information service, *Brand X*, 545 U.S. at 974, the decision to reclassify Internet data under Title I rather than Title II aligns with the multitude of cases upholding shifts in agency policy based on the party residing in the White House. Because the FCC engaged in reasoned decision making and provided an explanation for its policy shift, its Order rescinding so-called "Net Neutrality" must be upheld.

CONCLUSION

The Court should deny the petitions for review.

Respectfully submitted.

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CERTIFICATE OF SERVICE

On October 18, 2018, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(g)(1) because it contains 2,378 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Kyle D. Hawkins

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