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GLOSSARY

1996 Act	Telecommunications Act of 1996
Communications Act	Communications Act of 1934
Edge Provider	Any individual or entity that provides content, applications, or services over the Internet, and any individual or entity that provides a device used for accessing any content, application, or service over the Internet.
End User	Any individual or entity that uses a broadband Internet access service.
FCC	Federal Communications Commission
Order	*Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, FCC 15-24, 80 Fed. Reg. 19738 (rel. Mar. 12, 2015)
WLF	Washington Legal Foundation

Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427 (2014). WLF also regularly

Amici submit this brief 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.[2]

STATEMENT OF THE CASE

In the final order under review, *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, FCC 15-24, 80 Fed. Reg. 19738 (rel. Mar. 12, 2015) ("Order"), FCC

networks, the Order reclassifies mobile broadband Internet access as a "commercial mobile radio service" (or its functional equivalent) under 47 U.S.C. § 332—a prerequisite for subjecting such services to common carrier regulation under Title II.

Although FCC claims that it will forbear from applying some Title II statutory provisions and regulations, *id.* at ¶ 59, the Order expressly declines to forbear from enforcing §§ 201 and 202 of the Communications Act, which create the basis of common carriers' consumer protection obligations. *Id*. at ¶¶ 441–44. The Commission also declines to forbear from applying other statutory provisions and regulations in order to, in the Commission's view, better "protect end users," "facilitate competition," and "increase broadband Internet access." *See id*. at ¶¶ 453, 456–57, 462, 468, 478, 486.

The Order adopts three bright-line rules prohibiting all blocking, throttling, and paid prioritization by broadband Internet service providers. Claiming that broadband providers have an economic incentive to grant edge providers better access to end users for a fee, FCC seeks to prevent the creation of Internet "fast lanes" and "slow lanes." *Id*. at ¶ 126. The "no-blocking" rule prohibits broadband providers from blocking access to *all* lawful Internet content, applications, services, and non-harmful devices. *Id*. at ¶ 115. The "no-throttling" rule reinforces the blocking ban by prohibiting providers from inhibiting the delivery of particular

(and particular classes of) Internet content, applications, services, or lawful traffic to non-harmful devices. *Id*. at ¶ 120. The "no-paid-prioritization" rule forbids broadband providers from accepting payment to manage their

While the Commission claims myriad sources of statutory authority to impose the new regulations, one unusual statute it purports to rely on is § 706 of

American public. As demonstrated below, FCC lacks *any* authority for the extraordinary power it now seeks to wield.

Contrary to FCC's claims, nothing in § 706 of the Telecommunications Act of 1996 grants the Commission sweeping authority to regulate the Internet. Indeed, the text, structure, and history of § 706 all mutually reinforce the view that the statute is not an affirmative grant of independent regulatory authority. Rather than vest FCC with broad, independent authority to regulate the Internet, § 706 directs FCC to use its preexisting authority to *deregulate* information services in order to "encourage the deployment … of advanced tele-communications capability to all Americans." 47 U.S.C. § 1302(a). Other statutory provisions enacted alongside § 706 demonstrate Congress's desire to insulate all information services, including the Internet, from regulatory burdens. And subsequent actions of Congress—granting FCC discrete, limited authority over certain aspects of the Internet—confirm even further that Congress does not view FCC as already empowered to impose the net neutrality rules at issue here.

Even if authorized by statute, the Open Internet Rules must nonetheless be vacated because they run afoul of the First Amendment. More than a century ago, the Supreme Court recognized that the decision to act as a mere conduit for the dissemination of information triggers the protections of the First Amendment. By denying broadband providers their editorial discretion and by compelling them to

independent regulatory authority.[3] Rather, § 706 simply encourages FCC to promote certain *deregulatory* policies in its decision-making, and nothing more. *See* Order, *Dissenting Statement of Comm'r Ajit Pai*, at 370 ("The text, statutory structure, and legislative history all make clear that Congress intended section 706 to be hortatory—not delegatory—in nature.").

A. Nothing in the Text of § 706 Authorizes the Open Internet Rules

FCC contends that the new Open Internet Rules are within the scope of "express, affirmative grant[s]" of regulatory authority found in § 706(a). Order ¶¶ 274–75. Section 706(a) directs FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." 47 U.S.C. § 1302(a). The Commission suggests that its new rules "promote the policies" of § 706(a) because they encourage broadband investment by prohibiting undesirable interference by providers. But *nothing* in the administrative record or the Order explains how the Commission's burdensome new regulatory regime will "encourage the deployment" of—*e.g.*, increase capital

[3] This Court's decision in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) does not dictate a contrary view. Although FCC attempts to rely on language in *Verizon* stating that §706 "furnishes the Commission with the requisite authority to adopt the regulations," 740 F.3d at 635, that portion of the panel majority's opinion is dicta. The majority's discussion of § 706 was not necessary to the Court's holding striking down FCC's anti-blocking and anti-discrimination rules. Neither was it relevant to the Court's decision to sustain the transparency rule (because FCC never relied on § 706 for that rule). Accordingly, *Verizon*'s discussion of

investment in—"advanced technologies capability." To the contrary, dramatically increasing regulation on broadband providers will, by economic necessity, "unquestionably result in lower broadband network construction across the board," and "deployment in high-cost areas will be harmed disproportionately." George S. Ford & Lawrence J. Spiwak, *Burden of Network Neutrality Mandates on Rural Broadband Deployment*, 4 J. APP

with costly regulation, the only plausible application of § 706 to the Order under review would be to serve as an independent basis for repealing it. Contrary to FCC's claims, *neither* provision of § 706 grants the Commission the independent rulemaking authority it purports.[4]

Other provisions of the 1996 Act emphasize the statute's deregulatory aim. It is a "cardinal rule that a statute is to be read as a whole, … since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). The statute's preamble confirms that the 1996 Act's purpose was "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers icom138.3(2-)8.2(8.Sw/t(e)12.1(-83.8(m)212ua)12.1plielmene te

regulations to implement the requirements of this section."). And in other provisions of the Communications Act, Congress granted FCC general rulemaking authority. *See, e.g.*, 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."); *id.* § 303(r) ("Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall … [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Chapter."). But similar "shall or may prescribe" and "shall establish regulations" language can be found nowhere in § 706.

Nor does § 706 contain any language authorizing FCC to prescribe or proscribe the conduct of any party. When Congress intends to empower the Commission to prescribe or proscribe certain conduct under the Communications Act, it does so expressly. *See, e.g.*, 47 U.S.C. § 205(a) ("[T]he Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge"); *id.* ("[T]he Commission is authorized and empowered … to make an order that the carrier or carriers shall cease and desist from such violation."). Yet § 706 contains no such language.

Section 706 similarly fails to grant FCC the authority to enforce compliance by requiring payment for noncompliance. Again, other provisions of the

Communications Act that impose such liability do so very clearly. *See, e.g.*, 47 U.S.C. § 209 ("[T]he Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled."); *id*. § 503(b)(1) ("Any person who is determined by the Commission … to have … failed to comply with any of the provisions of this Act … shall be liable to the United States for a forfeiture penalty."). There is no similar language in § 706 that can be read as authorizing the Commission either to enforce compliance or to penalize noncompliance.

B. The Structure of the 1996 Act Undermines FCC's Construction of § 706

The structure of the 1996 Act further undermines FCC's contention that § 706 confers independent regulatory authority for the agency's Open Internet Rules. If anything, the structure of the 1996 Act demonstrates Congress's clear intention to immunize the Internet from precisely the sort of regulations the Order imposes. Most notably, the provisions of the 1996 Act granting the FCC rulemaking

Moreover, Congress enacted the 1996 Act against the background of the long-settled understanding that both data-processing systems that preceded the Internet and broadband Internet service itself are "information services." Thus, the 1996 Act carefully differentiates between "telecommunications services" and "information services." *See* 47 U.S.C. § 153(24); (50); (53). Although the 1996 Act subjects telecommunications services to extensive regulation under Title II of the Communications Act, *see* 47 U.S.C. §§ 201 *et seq.*, it subjects information services to *no* such regulation whatsoever. *See NCTA v. Brand X Internet Services, Inc.*, 545 U.S. 967, 975 (2005) (specifying that the Communications Act "regulates telecommunications carriers, but not information service providers, as common carriers"). The 1996 Act even clarifies that information services—which FCC has repeatedly conceded include the very broadband Internet services at issue here[6]—may not be subjected to common-carrier requirements simply because they are offered by entities that also provide telecommunications services. *See* 47 U.S.C. § 153(51). It is nonsensical to suggest that the same Congress that went out of its way to protect information services from common-carrier requirements simultaneously and *sub silentio* authorized the Commission to compel information service providers to act as common carriers. As the Supreme Court has noted,

[6] *See, e.g., High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798 (2002) (classifying broadband Internet providers as "information services"); *Appropriate Framework for Broadband Access to the Internet Over Wireless Facilities*, 20 F.C.C.R. 14853 (2005) (same).

Congress does not "hide elephants in mouse holes." *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001).

C. The Legislative History Surrounding the 1996 Act and § 706 Belies FCC's Interpretation

Congress has repeatedly rejected legislation that would grant FCC authority to impose net neutrality regulations. *See* S. 3703, 112th Cong. (2011); S. 74, 112th Cong. (2011); H.R. 3458, 111th Cong. (2009); H.R. 5994, 110th Cong. (2008); H.R. 5353, 110th Cong. (2008); S. 215, 110th Cong. (2007); H.R. 5252, 109th Cong. (2006); H.R. 5273, 109th Cong. (2006); H.R. 5417,109th Cong. (2006); S. 2917, 109th Cong. (2006); S. 2686, 109th Cong. (2006); S. 2360, 109th Cong. (2006). The Commission is at a loss to explain why, after enacting the 1996 Act, Congress would expend so much valuable time and energy on repeated legislative attempts to provide the agency with the very authority it supposedly conferred years earlier under § 706. a1stoivsethrp9 0 7immong. ; ea4 Tc -004 Tc (Ac)-4.o04 Tc r7 0 Tdic

123 Stat. 115 (Feb. 17, 2009) (appropriating funds for broadband deployment and

1996 Act, even though § 10 commands otherwise. *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 F.C.C.R. 24012, 24046, ¶ 73 (1998). Such an unexplained departure by an agency from its

neutrality legislation all clearly manifest Congress's view that FCC does not enjoy the powers it now claims. This Court therefore should vacate the Order.

First Amendment because the "[l]iberty of circulating is as essential to that freedom [of speech] as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Ex parte Jackson*, 96 U.S. 727, 733 (1877). This "liberty of circulating" is "not confined to newspapers and periodicals, pamphlets and leaflets, but also to delivery of information by means of fiber optics, microprocessors, and cable." *Comcast Cablevision of Broward Cnty. v. Broward Cnty.*, 124 F. Supp. 2d 685, 692 (S.D. Fla. 2000). Indeed, the Supreme Court has squarely held that cable operators enjoy First Amendment protection even though they "function[]" as "conduit[s] for the speech of others." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 628-29 (1994) ("*Turner I*").

In arguing that the transmission of speech can be separated from its content, FCC ignores the symbiotic relationship that exists between the two. As Marshall McLuhan famously observed half a century ago, "the medium is the message." *See* MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSION OF MAN (1964). That observation has never been truer than in the case of broadband Internet technology, which allows for instant two-way communication via video, audio, and text transmissions. "The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas

when the Bill of Rights was adopted." *Citizens United v. FEC*, 558 U.S. 310, 353-54 (2010).

Not only is broadband Internet service the modern-day equivalent of the printing press, but broadband providers are speakers in their own right who create and transmit their own content. Because they both "engage in and transmit speech," *Turner I*, 512 U.S. at 636, broadband providers

what terms. In *Ex parte Jackson*, for example, the Court held that the routine dissemination of newspapers while delivering the mail "necessarily involves the right to determine what shall be excluded" from such carriage. *Id.* at 732. "'Since *all*

the agency's own findings elsewhere in the Order. *See, e.g.*, *id.* at ¶ 82 ("Broadband providers may seek to gain economic advantages by favoring their own or affiliated content over other third-party sources.").[8]

The right *not* to speak extends to statements of fact as well as statements of

seek to eliminate *all* editorial control that broadband providers exercise over the speech they transmit and how they transmit it.

2. The rules impermissibly discriminate among speakers

In addition to compelling speech, the Order impermissibly singles out broadband providers without imposing similar requirements on the speech of other Internet entities who also act as gatekeepers.[9] "Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." *Turner I*, 512 U.S. at 659. By imposing the no-blocking and Internet conduct rules on broadband providers but not "edge providers" (*i.e.*, those who provide content or applications over the Internet), FCC picks and chooses among speakers. Such "differential treatment cannot be squared with the First Amendment." *Citizens United*, 558 U.S. at 353.

Although a broadband provider may wish to prioritize its own affiliated content over the content of an edge provider, the Open Internet Rules flatly prohibit its doing so. Under the guise of regulating practices "that threaten the use

[9] FCC attempts to justify this discrimination on the basis that broadband providers alone exercise "gatekeeper status." But, as many observers have explained, FCC's gatekeeper theory rests on a false premise. In fact, "[t]he ability to exercise gatekeeper control is a common feature of most mass communications systems. Cable operators, broadcasters, and newspapers all have the ability to exercise gatekeeper control over their audiences, yet the Supreme Court has repeatedly affirmed that these media have a constitutional ri.7(a)3(l)0./d(l)0scriminate
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of the Internet as a platform for free expression," Order ¶¶ 137, 143, the Commission effectively favors the speech rights of edge providers over those of broadband providers. This it may not do. Indeed, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). As the Supreme Court has cautioned, "[s]ubstantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux." *Citizens United*, 558 U.S. at 326.

Effectively conceding that the rules are designed to elevate the free speech rights of edge providers over those of broadband providers, FCC opines without any legal basis that "the free speech interests we advance today do not inhere in broadband providers." Order ¶ 545. But that simply is not true. The Supreme Court has consistently refused "

market, without more, is not sufficient to shield a speech regul

speech bear absolutely no relation to the underlying rationale for giving the

CONCLUSION

For the foregoing reasons, *amici curiae* Harold Furchtgott-Roth and Washington Legal Foundation respectfully request that the Court vacate the Order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,871 words, excluding those 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 typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced serif typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: August 6, 2015

/s/ Cory L. Andrews
Cory L. Andrews

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of August, 2015, the foregoing brief was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit through the Court's CM/ECF system, which will send electronic notice of such filing to all counsel or record who are registered CM/ECF users.

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