ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2015

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

BRIEF OF FORMER FCC COMMISSIONER HAROLD FURCHTGOTT-ROTH AND WASHINGTON LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), the undersigned counsel of record for *amici* certifies as follows:

1. Parties and Amici

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

2. Rulings Under Review

References to the Order at issue appear in the Briefs for Petitioners. Petitioners seek review of the Federal Communications Commission's final 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. 19739 (rel. Mar. 12, 2015).

3. 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. *Amici* are unaware of any other related cases.

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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

INTERESTS OF *AMICI CURIAE*[1]

Harold Furchtgott-Roth is a widely recognized authority on issues related to the economic impact of federal regulation in the communications sector. He served as a commissioner of the Federal Communications Commission ("FCC" or "Commission") from 1997 through 2001. Before his appointment to FCC, Mr. Furchtgott-Roth was chief economist for the House Committee on Commerce and a principal staff member behind the Telecommunications Act of 1996. He is the author of several books, including *A Tough Act to Follow?: The Telecommunications Act of 1996 and the Separation of Powers Failure* (AEI Press 2005), which chronicles FCC's institutional failure to implement many of the reforms Congress mandated in the 1996 Act.

Washington Legal Foundation ("WLF") is a public interest law firm and policy center with supporters in all 50 states. WLF devotes substantial resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law. In particular, WLF routinely litigates to ensure that federal administrative agencies adhere to the rule of law and do not exceed their statutory authority. *See, e.g.*, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015);

[1] Pursuant to Fed. R. App. P. 29(c), *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Pursuant to D.C. Cir. R. 29(a), *all* petitioners, respondents, and intervenors to this dispute have consented to the filing of this brief.

Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427 (2014). WLF also regularly appears as *amicus curiae* before this and other federal courts in cases raising important First Amendment issues. *See, e.g., Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011); *United States v. Philip Morris USA Inc.*, 786 F.2d 1014 (D.C. Cir. 2015); *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012).

Amici are concerned that the rule of law and the American economy both suffer when federal agencies single out a segment of the economy for regulatory interference without any congressional mandate to do so. FCC's approach to net neutrality is especially disturbing given the agency's lack of political accountability to the American people, who will be most directly affected by the slower Internet speeds and higher broadband prices that will undoubtedly result from implementation of the Commission's new rules.

Amici believe it is not up to FCC to write laws that Congress will not pass. However noble FCC's intentions may be, the search for "good" policy must not be allowed to trump adherence to the rule of law. FCC's proper role is not to promote what it considers to be good policy, but to write, enforce, and adjudicate rules that faithfully implement laws entrusted to the agency. A contrary view would not only permit regulatory agencies to essentially rewrite federal law, but it would leave their administrative powers unchecked.

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 establishes new rules for providers of "broadband Internet access service," which it defines as a "mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet end points." Order ¶ 187.

The Order reclassifies broadband Internet access service as a Title II telecommunications service subject to common carrier regulation under the Communications Act of 1934, 47 U.S.C. § 201 *et seq.* (the "Communications Act"). *Id.* at ¶¶ 328, 363. In addition to extending Title II regulation to the terms on which broadband providers interconnect their networks with other Internet

[2] *Amici* do *not* file in support of Petitioners Full Service Network, TruConnect Mobile, Sage Telecommunications LLC, and Telescape Communications, Inc. in Case No. 15-1151.

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 networks in a way that prioritizes any particular traffic over other traffic. *Id*. at ¶ 125.

For conduct not covered by these three rules, the Order adopts a standard that prohibits broadband providers from "unreasonably interfering" or "disadvantaging" end users' ability to access the Internet. *Id*. at ¶¶ 135-37. The same standard also prohibits interfering or disadvantaging edge providers' ability to supply Internet content, applications, services, and devices to end users. *Id*.

The Order also expands FCC's transparency rules. In 2010, the Commission required broadband providers to disclose information about their network management practices, performance, and the commercial terms of their Internet services. *See Preserving the Open Internet*, Report and Order, 25 F.C.C.R. 17905, 17937, ¶ 54 (2010), *aff'd in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); *see also* 47 C.F.R. § 8.3. The Order requires that broadband providers also must now disclose promotional rates, fees or surcharges, data caps and data allowances, network performance data, and whether a network practice will likely affect consumers' use of the service. *See* Order ¶¶ 24, 164–69.

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 the Telecommunications Act of 1996, codified at 47 U.S.C. § 1302 (the "1996 Act"). Not only does the Commission claim that § 706(a) and (b) both confer authority to regulate broadband providers, it asserts that each subsection is an "independent, complementary" source of authority. Order ¶ 279. "Thus, even if the Commission's inquiry were to have resulted in a positive conclusion such that [its] section 706(b) authority were not triggered, this would not eliminate the Commission's authority to take actions to encourage broadband deployment under section 706(a)." *Id*.

SUMMARY OF ARGUMENT

For more than 20 years, a strong bipartisan consensus has existed in favor of a free and open Internet—one unfettered by government regulation. Indeed, in only the last decade, Congress has squarely rejected at least a *dozen* legislative proposals to give FCC authority to enact net neutrality regulation. And on more than one occasion, FCC has publicly embraced the view that it lacks such authority under preexisting law. Nonetheless, in the Order under review, FCC now claims virtually unlimited power to regulate the Internet. The Open Internet Rules, among other things, reclassify broadband providers as common carriers, regulate both Internet content and delivery, and dictate what service plans will be available to the

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

convey *all* Internet content—even that with which they may disagree—the Open Internet Rules traduce broadband providers' First Amendment rights. The Commission's rules are particularly pernicious because they apply to only *some* Internet speakers. By singling out broadband providers without imposing similar requirements on the speech of other Internet entities that also may act as gatekeepers, the rules discriminate among speakers. The Order is therefore subject to strict scrutiny, which it cannot survive.

ARGUMENT

I. THE TEXT, STRUCTURE, AND LEGISLATIVE HISTORY OF § 706 OF THE 1996 ACT DO NOT AUTHORIZE FCC TO REGULATE THE INTERNET

The 1996 Act was a bipartisan bill, passed by vast majorities in both houses of Congress. The Commission claims that § 706 of the 1996 Act grants two freestanding sources of regulatory authority for the Open Internet Rules contained in the Order. Not so. Rather, as FCC has conceded previously to this Court, it "has no express statutory authority" over broadband providers' network management practices. *See Comcast Corp. v. FCC*, 600 F.3d 642, 654 (D.C. Cir. 2010) (noting that FCC acknowledges "it has no express statutory authority" over such practices). As demonstrated below, the text, structure, and history of § 706 all mutually reinforce the view that the statute is *not* an affirmative grant of

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 § 706 is not a binding interpretation of the statute, and the Court remains perfectly free to construe §706 consistent with the text, structure, and history of the statute.

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. ECON. 237, 247 (2010). Accordingly, § 706(a) cannot possibly be the basis for FCC's new investment-killing regulations on broadband providers.

The FCC also relies on § 706(b), Order ¶ 277, which requires FCC to conduct annual investigations "concerning the availability of advanced telecommunications capability to all Americans," and, if the Commission does not find such availability, to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." 47 U.S.C. § 1302(b). Once again, none of the rules imposed by the Order could conceivably "accelerate deployment of such capability." Rather than "remove[] barriers to infrastructure investment," the Order erects them—in spades. While the Commission may possess a great deal of expertise, it surely does not have the ability to invert the basic laws of economics. Because the Open Internet Rules are far more likely to *reduce* innovation in the development of broadband infrastructure by burdening providers

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 and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, Title VII, 110 Stat. 56 (Feb. 8, 1996). Likewise, § 230 explains that "[i]t is the policy of the United States … to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*." 47

[4] At most, § 706(a) authorizes FCC only to "encourage the deployment" of broadband services "by utilizing … regulating methods that remove barriers to infrastructure investment." Section 706(b) directs FCC, after making a finding that broadband is not "being deployed to all Americans in a reasonable and timely fashion," to accelerate deployment in the "unserved areas" described in § 706(c). So, any authority § 706 confers would apply only in geographic areas where deployment has been deemed inadequate; it obviously does not confer general authority to impose nationwide rules.

U.S.C. § 230(b)(2) (emphasis added). Such deregulatory goals would be wholly undermined if the simultaneously-adopted § 706 granted FCC virtually unlimited authority to regulate the Internet.

The 1996 Act's forbearance and review requirements further underscore this point. For example, § 10 of the 1996 Act requires FCC to "forbear from applying any regulation or any [statutory] provision" if those rules are no longer necessary to protect consumers or the public interest. 47 U.S.C. § 160. Likewise, § 11 requires the Commission to conduct biennial reviews of its regulations and to "repeal or modify any regulation it determines to be no longer necessary in the public interest." *Id.* § 161. The 1996 Act's unique emphasis on imposing the fewest restrictions possible through consistent review and forbearance bolsters the broader statutory goal of noninterference, a goal that simply cannot be squared with FCC's expansive reading of § 706.

Congress knows how to grant the Commission authority to promulgate regulations pursuant to the Communications Act when it wants to,[5] and it has always done so explicitly. *See, e.g.*, 47 U.S.C. § 227(b)(2) ("The Commission shall prescribe regulations to implement the requirements of this subsection."); *id.* § 251(d)(1) ("[T]he Commission shall complete all actions necessary to establish

[5] Tellingly, an earlier draft of § 706 included express rulemaking authority, but Congress chose not to adopt that proposal. *See* Christopher S. Yoo, *Wickard for the Internet? Network Neutrality After Verizon v. FCC*, 66 FED. COMM. L.J. 415, 430-32 (2013-14).

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, regulatory, and enforcement authority do so only by amending the Communications Act itself. But unlike many other provisions of the 1996 Act, Congress declined to insert § 706 into the Communications Act. As such, those authority-granting provisions of the 1996 Act simply do not apply to § 706. Because it was never made part of the Communications Act, § 706 cannot possibly serve as a freestanding basis of authority for the rules contained in the Order.

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.

Though in narrow instances Congress has granted FCC discrete authority to regulate the Internet since 1996, it has repeatedly refused to grant it any authority to enact net neutrality rules. *See, e.g.*, Twenty-First Century Communications and Video Accessibility Act, Pub. L. No. 111-260, 124 Stat. 2751 (Oct. 8, 2010) (imposing accessibility requirements for mobile browsers, voiceover protocol, and Internet-delivered video content, and granting FCC regulatory authority to enforce the requirements); American Recovery and Reinvestment Act, Pub. L. No. 111-5,

123 Stat. 115 (Feb. 17, 2009) (appropriating funds for broadband deployment and directing FCC and the Department of Commerce to establish "non-discrimination and network interconnection obligations" as grant preconditions); Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (Oct. 10, 2008) (directing FCC and other agencies to improve data regarding broadband deployment, the impact of broadband speeds on small business, and online safety); CAN-SPAM Act, Pub. L. No. 108-187, 117 Stat. 2699 (Dec, 16, 2003) (directing FCC and the Federal Trade Commission to stem unsolicited e-mail delivery).

These enactments only further confirm Congress's view that FCC lacks the plenary jurisdiction it now claims under to regulate the Internet. The Supreme Court has held that when Congress repeatedly enacts topic-specific legislation evincing its view of an agency's limited authority, and repeatedly considers and rejects potential legislation to expand that authority, such a pattern "preclude[s] an interpretation" of the law that grants the agency the very authority Congress has declined to confer. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143–56 (2000).

Until quite recently, FCC had never interpreted § 706 as an independent grant of authority to regulate broadband service. As FCC conceded in its *Advanced Servcies Order*, for example, construing § 706 as an "independent grant of authority … would allow us to forbear from applying" certain provisions in the

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 longstanding interpretation of its own statutory authority "is likely to reflect the agency's reassessment of wise policy rather than a reassessment of what [Congress] itself originally meant." *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 682 (6th Cir. 2005).

More importantly, Congress was well aware of FCC's longstanding interpretation when it amended § 706—not once, but *twice*—without disturbing that interpretation. *See* Pub. L. No. 107-110, 115 Stat. 1425, Title X, § 1076(gg) (Jan. 8, 2002); Pub. L. No. 110-385, 122 Stat. 4096, Title I, § 103(a) (Oct. 10, 2008). "[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (internal quotations omitted).

* * *

The text of § 706 itself, the structure and other provisions of the 1996 Act, subsequent Internet-related legislation, and a repeated refusal to enact net

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.

II. The Open Internet Rules Cannot Withstand First Amendment Scrutiny

Even assuming what cannot be shown and what is hardly intuitive—that § 706 grants FCC independent statutory authority to regulate the Internet—the Commission's Open Internet Rules are invalid because they violate the First Amendment. By forcing broadband service providers to carry, transmit, and deliver *all* Internet content—even that with which the provider disagrees—the Open Internet Rules impermissibly compel speech and deprive providers of their editorial discretion. At the same time, by singling out broadband providers without imposing similar requirements on the speech of other Internet entities that may act as gatekeepers, the rules discriminate among speakers in violation of the First Amendment.

A. Broadband Providers Enjoy Robust First Amendment Rights

The FCC's contention that broadband service providers are undeserving of First Amendment protection because they are mere "conduits for the speech of others," *see* Order ¶ 544, is without legal precedent. More than a century ago, the Supreme Court recognized that the decision to act as a mere conduit for the dissemination of information by delivering newspapers in the mail triggers the

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 clearly qualify as "speakers" for First Amendment purposes. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011) (holding that the "creation and dissemination of information are speech within the meaning of the First Amendment"); *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("[I]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall in that category.") (internal quotations omitted); *Turner I*, 512 U.S. at 639 ("There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.").[7]

At the same time, the First Amendment also protects broadband providers' editorial discretion to decide what to transmit, how quickly to transmit it, and on

[7] Nor is this right "restricted to the press," but rather is "enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 574 (1995).

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* speech inherently involves choices of what to say and what to leave unsaid,' one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley*, 515 U.S. at 573 (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 11 (1986)).

Even FCC implicitly acknowledges that broadband providers enjoy editorial discretion to prioritize and otherwise select among the content they transmit over the Internet. After all, the Open Internet Rules are premised on the very notion that broadband providers will exercise their editorial discretion to block, throttle, prioritize, or otherwise "disadvantage" certain content. As this Court previously held in striking down nearly identical anti-discrimination and anti-blocking rules, "the Commission's regulations require[] the regulated entities to carry the content of third parties to these customers—content the entities otherwise could have blocked at their discretion." *Verizon*, 740 F.3d at 654. If broadband providers lacked the ability to exercise editorial discretion, the FCC's new diktat prohibiting them from engaging in such editorial practices would be nugatory. Therefore, FCC's curious claim that "broadband providers exercise little control over the content which users access on the Internet," *see* Order ¶ 548, is belied entirely by

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]

B. The Open Internet Rules Abridge Core First Amendment Freedoms

1. The rules unconstitutionally compel speech

The First Amendment guarantees "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Indeed, no value is more central to First Amendment doctrine than the freedom of private speakers to disassociate themselves from messages with which they disagree. For that reason, the Supreme Court has repeatedly struck down laws that seek to compel speakers to convey messages against their will. *See, e.g.*, *Pac. Gas & Elec. Co.*, 475 U.S. at 9 (holding that an electric utility could not be compelled to include in its billing envelope an advocacy group's flyer with which it disagreed); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that a newspaper could not be compelled to publish candidate's reply to a critical editorial).

[8] To the extent that broadband providers might abuse their market power to avoid competition, such actions can best be remedied through existing antitrust law—without infringing on providers' editorial discretion and free-speech rights.

The right *not* to speak extends to statements of fact as well as statements of opinion, *see Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781, 797-98 (1988) ("[F]or First Amendment purposes, a distinction cannot be drawn between compelled statements of opinion and, as here, compelled statements of 'fact.'"), and to corporations as well as individuals, *see Pacific Gas*, 475 U.S. at 12 ("For corporations as for individuals, the choice to speak includes the choice of what not to say."). These well-established restrictions on the government's ability to compel involuntary speech apply with equal force to FCC. *See, e.g., Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 154 (2d Cir. 2013) ("Nor is there any dispute that the program carriage regime regulates [Petitioners'] protected speech by restraining their editorial discretion over which programming networks to carry and on what terms.").

FCC's Open Internet Rules deprive broadband providers of their editorial discretion by forcing them to convey *all* lawful content, including content with which they may disagree. The Order further forbids broadband providers from elevating their own speech above that of others. And even though broadband providers face significant capacity constraints, the Order prohibits them from selling to edge providers the ability to prioritize their speech to end users. By forcing broadband providers to allow virtually all speech at all times, FCC's rules

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 right to discriminate against the speech of others." Fred B. Campbell, Jr., Center for Boundless Innovation in Technology, *How Net Neutrality Invites the Feds to Ignore the First Amendment & Censor the Internet*, at 5 (June 4, 2015).

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 "to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate … speech from a particular speaker." *Citizens United*, 558 at U.S. 326-27. "Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.* at 341. For that reason, "the mere assertion of dysfunction or failure in a speech

market, without more, is not sufficient to shield a speech regulation from First Amendment standards." *Turner I*, 512 U.S. at 640.

C. The Open Internet Rules Cannot Survive the Strict Judicial Scrutiny the First Amendment Requires

By compelling speech and stripping broadband providers of vital editorial discretion, FCC's Open Internet Rules impose intolerable burdens on free speech and are therefore subject to strict scrutiny. *See Pacific Gas*, 475 U.S. at 12; *Wooley*, 430 U.S. at 715. That exacting standard requires the government not only to establish a compelling interest in the regulation, but also to demonstrate that the regulation is the "least restrictive means" for achieving its goal. The Commission cannot possibly satisfy either of those burdens here.[10]

First, the Order fails even to attempt to show that "preserving and protecting" an "open Internet" is a compelling government interest. Nothing in the record establishes the kind of widespread discriminatory practice on the part of broadband providers that might justify FCC's new regulatory regime. FCC claims that the rules are necessary for the Internet to remain a "forum for a true diversity of political discourse" and to "ensur[e] a level playing field." *Id.* at ¶¶ 22, 555. But

[10] The Supreme Court in *Turner I* elected not to apply strict scrutiny to the cable industry's "must carry" rules due to the "special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators." 512 U.S. at 661. But here, FCC's Order expressly declines even to "consider whether market concentration gives broadband providers the ability to raise prices." Order ¶ 84. Nor could FCC make such a finding, in light of the thousands of broadband providers operating in the United States.

the Supreme Court has squarely "rejected the premise that the Government has an interest 'in equalizing the relative ability of individuals and groups'" to have their voices heard. *Citizens United*, 558 U.S. at 350 (internal citations omitted).

Second, FCC's blanket, nationwide rules mandating nearly unfettered broadband access are not narrowly tailored. To the contrary, the rules prohibit any and all efforts by broadband providers to control traffic over their networks, without regard to whether the practices in question expand end users' access to Internet content or serve some other legitimate market purpose. But the Supreme Court has "never approved a *general* right of access to the media." *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981). By requiring broadband providers to deliver *all* Internet content *all* the time, including even speech with which they may disagree, the rules "burden substantially more speech than is necessary to further the government's legitimate interests." *Turner I*, 512 U.S. at 662.

Even if all broadband content could be classified as commercial speech, that is, "speech that does no more than propose a commercial transaction," *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (*quoting Pittsburgh Press Co. v. Hum. Rel. Comm'n*, 413 U.S. 376, 385 (1973)), "heightened judicial scrutiny" in this case is still warranted. *See Sorrell*, 131 S. Ct. at 2664 (holding that speaker-based burdens on speech warrant "heightened judicial scrutiny"). Discriminatory speaker-based burdens on *truthful* commercial

speech bear absolutely no relation to the underlying rationale for giving the Government more leniency to regulate that kind of speech. The "typical" neutral justification for "why commercial speech can be subject to greater governmental regulation than noncommercial speech" is the concern for fraudulent or misleading statements in commercial transactions. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993). But where, as here, the Government "nowhere contends that [the commercial speech] is false or misleading within the meaning of th[e] Court's First Amendment precedents," this allegedly neutral justification for avoiding strict scrutiny falls away entirely. *Sorrell*, 131 S. Ct. at 2672.

* * *

Contrary to FCC's view, "basic freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011). Because they compel speech and strip broadband providers of all editorial discretion, the Open Internet Rules violate the First Amendment and should be vacated.

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).

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Dated: August 6, 2015

/s/ Cory L. Andrews
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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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