

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

**INTERNET ASSOCIATION *AMICUS CURIAE* BRIEF
IN SUPPORT OF RESPONDENTS**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

In Case No. 15-1063, the Petitioners are the United States Telecom Association, Alamo Broadband Inc., AT&T Inc., the American Cable Association, CTIA – The Wireless Association, CenturyLink, the National Cable and Telecommunications Association, the Wireless Internet Service Providers Association, and Daniel Berninger. The Respondents are the Federal Communications Commission (“FCC”) and the United States of America. The following parties have filed a notice or motion for leave to participate as amici as of the date of this filing:

- Harold Furchtgott-Roth
- Washington Legal Foundation
- Consumers Union
- Competitive Enterprise Institute
- American Library Association
- Richard Bennett
- Association of College and Research Libraries
- Business Roundtable
- Association of Research Libraries
- Center for Boundless Innovation in Technology
- Officers of State Library Agencies
- Chamber of Commerce of the United States of America
- Open Internet Civil Rights Coalition
- Georgetown Center for Business and Public Policy
- Electronic Frontier Foundation
- International Center for Law and Economics and Affiliated Scholars
- American Civil Liberties Union
- William J. Kirsch
- Computer & Communications Industry Association

- Mobile Future
- Mozilla
- Multicultural Media, Telecom and Internet Council
- Engine Advocacy
- National Association of Manufacturers
- Phoenix Center for Advanced Legal and Economic Public Policy Studies
- Dwolla, Inc.
- Telecommunications Industry Association
- Our Film Festival, Inc.
- Christopher Seung-gil Yoo
- Foursquare Labs, Inc.
- General Assembly Space, Inc.
- Github, Inc.
- Imgur, Inc.
- Keen Labs, Inc.
- Mapbox, Inc.
- Shapeways, Inc.
- Automattic, Inc.
- A Medium Corporation
- Reddit, Inc.
- Squarespace, Inc.
- Twitter, Inc.
- Yelp, Inc.
- Media Alliance
- Broadband Institute of California
- Broadband Regulatory Clinic
- Tim Wu
- Edward J. Markey
- Anna Eshoo
- Professors of Administrative Law
- Sascha Meinrath
- Zephyr Teachout
- Internet Users

B. Ruling Under Review

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

C. Related Cases

The *Order* has not previously been the subject of a petition for review by this Court or any other court. All petitions for review of the *Order* have been consolidated in this Court, and the Internet Association is unaware of any other related cases pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. R. 26.1, the Internet Association submits the following corporate disclosure statement:

The Internet Association is a national trade association representing leading Internet companies including Airbnb, Amazon, Auction.com, Coinbase, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Gilt, Google, Groupon, IAC, Intuit, LinkedIn, Lyft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Sidecar, Snapchat, SurveyMonkey, TripAdvisor, Twitter, Uber Technologies, Inc., Yahoo!, Yelp, Zenefits, and Zynga. The Internet Association is a not-for-profit corporation and has not issued shares or debt securities to the public. The Internet Association does not have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

RULE 29(C) DISCLOSURE

Pursuant to Fed. R. App. P. 29(c), the Internet Association submits this disclosure of representation. The Internet Association's counsel, who authored the following amicus brief, also represents Intervenors Netflix, DISH, COMPTTEL, and Level 3. No person or their counsel contributed money with the intention of funding the preparation or submission of the brief. No person (other than the amicus and its members) contributed money that was intended to fund the brief's preparation or submission.

**CERTIFICATE OF COUNSEL REGARDING NECESSITY OF
SEPARATE AMICUS CURIAE BRIEF**

Pursuant to D.C. Cir. R. 29(d), the Internet Association hereby certifies that it is submitting a separate brief from the other amici in this case due to the specialized nature of its membership and its unique interests in this proceeding. To its knowledge, the Internet Association is the only amicus focusing on the subjects addressed herein. Other amici in support of Respondents may assert positions in potential conflict with the Internet Association given the divergent interests and issues facing Internet companies today. Accordingly, the Internet Association certifies that filing a joint brief would not be practicable.

/s/ _____
Markham C. Erickson

September 20, 2015

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Communications Act or Act	Communications Act of 1934, as amended, 47 U.S.C. § 151 <i>et seq.</i>
FCC	Federal Communications Commission.
ISP	An Internet service provider who offers broadband Internet access service via fixed or mobile technologies.
<i>Open Internet Order or Order</i>	<i>Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015).</i>
Petitioners	Petitioners USTelecom, NCTA, CTIA, ACA, WISPA, AT&T, and CenturyLink.

STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT

The Internet has become a ubiquitous and indispensable platform for innovation, economic activity, entertainment, and democratic discourse. It is an American success story. Yet, its central role in our lives today seemed unlikely at its commercial launch 20 years ago. In 1995, only 14% of American adults used the Internet.¹ There were only a handful of Websites to browse, and it was not uncommon for a webpage to take over 30 seconds to load.² Most content online was accessed through portals like AOL, which allowed users to browse a limited number of Websites the portal highlighted—and these were generally limited to just one or two sites per category like news, research, and entertainment.

In 2001, many consumers still accessed content on the Internet through the “walled garden” of information provided by portals. While Internet adoption in the United States had by then climbed to nearly 50%, 41% of the population still had

¹ Susannah Fox and Lee Rainie, *Part 1: How the Internet Has Woven Itself into American Life*, Pew Research Ctr. (Feb. 27, 2014), <http://www.pewinternet.org/2014/02/27/part-1-how-the-internet-has-woven-itself-into-american-life/>.

² The World Wide Web Project launched its first Website in August 1991. *See Total Number of Websites*, Internet Live Stats, <http://www.internetlivestats.com/total-number-of-websites/> (last visited Aug. 12, 2015); *How Fast is Dial Up Internet?*, Dial Up Networking Tips, <http://dialupnetworkingtips.com/how%20fast%20is%20dial%20up.html> (last visited Aug. 12, 2015).

slow dialup services, and only 6% had adopted faster “broadband” services.³ That same year, the then-FCC Chairman quipped that the gap between those who had access to the Internet and those who did not was akin to the “Mercedes divide.”⁴

The Internet can no longer be dismissed as a luxury item; it is essential to our daily lives. Today, consumers very rarely choose to access content through a portal with limited selections managed by their ISP. Instead, consumers use their ISP-provided Internet connection to access directly the myriad content of their choosing, from anywhere in the world. Websites have grown in number from about 250,000 in 1996 to nearly 1 billion today.⁵ This rapid proliferation of content and services has driven adoption of Internet access services at unprecedented rates. Over 3 billion people use the Internet today—or 40% of the

³ Pew Research Ctr., *Internet Use Over Time* (Jan. 2014) (“Pew: Internet Use Over Time”), <http://www.pewinternet.org/data-trend/internet-use/internet-use-over-time/>; Pew Research Ctr., *Broadband vs. Dial-up Adoption Over Time*, <http://www.pewinternet.org/data-trend/internet-use/connection-type/> (last visited Sept. 18, 2015).

⁴ Stephen Labaton, *New FCC Chief Would Curb Agency Reach*, *NY Times* (Feb. 7, 2001), <http://www.nytimes.com/2001/02/07/technology/07FCC.html>. The FCC classified cable modem services as information services the following year. Press Release, FCC Classifies Cable Modem Service as “Information Service,” FCC, FCC 02-77 (Mar. 14, 2002).

⁵ *Total Number of Websites*, Internet Live Stats, <http://www.internetlivestats.com/total-number-of-websites/> (last visited Sept. 17, 2015).

world's population.⁶ In the United States, nearly 90% of Americans are online, and over 80% have high-speed connections.⁷

The Internet has grown and been adopted faster than any other communications platform in history. In the United States, it took just over 5 years for the commercial Internet to reach 10% of consumers, and only another 5 years to reach nearly half the U.S. population.⁸ Today, over 300 million consumers in the United States are online.⁹ By contrast, to reach just 10% of U.S. customers,

⁶ *Internet Users*, Internet Live Stats, <http://www.internetlivestats.com/total-number-of-websites/> (last visited Sept. 17, 2015).

⁷ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment*, 30 FCC Rcd. 1375, 1378 ¶ 4 (2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-10A1.pdf (finding only 17% of consumers live in areas without fixed 25 Mbps/3Mbps broadband or higher service).

⁸ *See id.*; *United States Internet Users*, Internet Live Stats, <http://www.internetlivestats.com/internet-users/united-states/> (last visited Sept. 17, 2015); John B. Horrigan, *Broadband Adoption in the United States: Growing but Slowing*, Pew Internet & American Life Project (Sept. 24, 2005), <http://www.pewinternet.org/2005/09/21/findings/>.

⁹ *United States Internet Users*, Internet Live Stats, <http://www.internetlivestats.com/internet-users/united-states/> (last visited Sept. 17, 2015).

telephony took 25 years, television took over 10 years, and cell phones took 8 years.¹⁰

The Internet's unprecedented growth and adoption are both results of its design—an open, end-to-end architecture that allows users to interact with Internet content providers seamlessly and provides an innovation-without-permission ecosystem for innovators to launch products and services with historically low barriers to entry.

The Internet Association represents a broad array of America's Internet companies. From small start-ups to industry leaders, the Internet Association's members have changed the way consumers live, travel, entertain, shop, and communicate with each other.

The Internet Association's members directly make up \$1.3 trillion of the U.S. economy.¹¹ In addition, the Internet economy has been a major driver of

¹⁰ Scott H., *U.S. Smartphone Adoption Is Faster than Any Other Major Technology Shift*, Phonearena.com (May 11, 2012), http://www.phonearena.com/news/U.S.-smartphone-adoption-is-faster-than-any-other-major-technology-shift_id30062.

¹¹ Wayne Duggan, *How Big Is PayPal Compared to Its Tech Peers?*, Yahoo! Finance (July 21, 2015), <http://finance.yahoo.com/news/big-paypal-compared-tech-peers-130623266.html>.

overall U.S. GDP growth,¹² and it accounts for over \$6 trillion of U.S. manufacturers', merchants', retailers', and service providers' sales.¹³

The open and free Internet fuels the Internet ecosystem and is essential to its success. Whether consumers access the Internet using a wireline provider at home or through a mobile device when on the go, they want—and are paying for—a connection to the online content and applications of *their* choosing.

ARGUMENT

I. AN OPEN INTERNET FUELS THE VIRTUOUS CIRCLE OF INNOVATION, INVESTMENT, AND PUBLIC ENGAGEMENT

The Internet was designed from the start to be an open, end-to-end platform.¹⁴ After its launch as a U.S. Government project, the Internet was decentralized and privatized in order to maximize the effectiveness of an open,

¹² McKinsey Global Institute, *Internet Matters: The Net's Sweeping Impact on Growth, Jobs, and Prosperity*, at 16 (May 2011), http://www.mckinsey.com/~media/mckinsey/dotcom/homepage/2011%20june%20internet%20economy/mgi_internet_matters_full_report.ashx.

¹³ U.S. Census Bureau, *E-Stats 2013: Measuring the Electronic Economy* (May 28, 2015), <http://www.census.gov/econ/estats/e13-estats.pdf>.

¹⁴ Dr. Vinton Cerf, a designer of the original Internet protocols, stated that “[t]he products and services which can be built atop the computer and communication infrastructure simply have no logical limits. It is this ceaselessly changing, growing, transmuting information resource which will fuel the economic engine of the information infrastructure.” *Hearing on Internet Security Before the H. Comm. on Science, Space, and Technology*, 103 Cong. (Mar. 22, 1994) (statement of Dr. Vinton G. Cerf).

multi-stakeholder approach. This conscious design has fostered the unprecedented growth and innovation the Internet has experienced to date.¹⁵ As a “shared information space,” the open Internet facilitates new technologies and network connections, and communication of every kind among people around the globe.¹⁶

A. The Internet’s Open Architecture Facilitates Consumer-Driven Competition and Innovation

The open architecture of the Internet creates an innovation-without-permission ecosystem. Consumers (and consumers alone) decide the winners and losers on the open Internet. Anyone with a compelling product or service can connect with a global market or audience.

The Internet Association’s member companies illustrate the point. eBay, for instance, was founded in 1995 by one man in a living room with a vision—and a software code—to connect people through e-commerce. Today, eBay has nearly 32,000 employees and more than \$14 billion in annual revenue.¹⁷ Etsy was

¹⁵ See Hearing on “International Proposals to Regulate the Internet”: Before the Subcomm. on Comm’cns and Technology, 112 Cong. (May 31, 2012), <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/Hearings/CT/20120531/HHRG-112-IF16-WState-CerfV-20120531.pdf>.

¹⁶ Tim Berners-Lee, *The World Wide Web: Past Present and Future*, W3.org (Aug. 1996), <https://www.w3.org/People/Berners-Lee/1996/ppf.html>.

¹⁷ Pierre Omidyar, *How Pierre Omidyar Turned an Idealistic Notion into Billions of Dollars*, Inc.com (Dec. 2013), <http://www.inc.com/magazine/201312/pierre-omidyar/ebay-inspiration-more-effective-than-delegation.html>.

founded in 2005 in an apartment in Brooklyn by three friends aiming to empower artists and creators to share their works with the world—they designed a site, wrote the code, and assembled the servers to launch their company. Etsy has since grown to over 20 million users from nearly every country in the world, and annual gross merchandise sales totaled nearly \$2 billion in 2014.¹⁸ Other success stories abound:

- Airbnb is a trusted community marketplace for people to list, discover, and book over 1,500,000 unique accommodations around the world—online or from a mobile phone or tablet. Soon the company will offer more rooms than the Hilton and InterContinental hotel chains.¹⁹
- Uber seamlessly connects riders and drivers through innovative apps, making cities more accessible and opening more possibilities for riders and more business for drivers. Today, Uber has over 8 million users and is valued at \$50 billion.²⁰

¹⁸ *About*, Etsy, <https://www.etsy.com/about/> (last visited Aug. 12, 2015) (noting 1.5 million active sellers and 21.7 million buyers).

¹⁹ *About Us*, Airbnb, <https://www.airbnb.com/about/about-us>; Zianab Mudallal, *Airbnb Will Soon Be Booking More Rooms than the World's Largest Hotel Chains*, Quartz, <http://qz.com/329735/airbnb-will-soon-be-booking-more-rooms-than-the-worlds-largest-hotel-chains/> (last visited Aug. 17, 2015).

²⁰ Douglas Macmillan and Telis Demos, *Uber Valued at More than \$50 Billion*, *The Wall Street Journal* (July 31, 2015), <http://www.wsj.com/articles/uber-valued-at-more-than-50-billion-1438367457>.

- Social networking sites Twitter and Facebook have become essential sources for news, information, and public engagement for nearly 2 billion users worldwide.²¹
- YouTube, Netflix, Amazon Instant Video, and Yahoo! have transformed how consumers receive and interact with video services—allowing consumers to watch, create, and share videos when and how they want.

B. The Open Internet Empowers Democratic Discourse

The Internet allows a global community of users to break news and share information about socially and politically significant events as they occur. People around the world use platforms like Facebook and Twitter to break news ahead of traditional sources and disseminate information to a global audience instantly—sometimes in the face of governments that heavily censor or seize control of other media sources.²²

In the United States, citizens increasingly use the Internet to engage in the political process, even to help choose our next President. For example, during the

²¹ See *Number of Monthly Active Twitter Users Worldwide from 1st Quarter 2010 to 2nd Quarter 2015*, Statista, <http://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/> (300 million users) (last visited Sept. 18, 2015); *Number of Monthly Active Facebook Users Worldwide as of 2nd Quarter 2015*, Statista, <http://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> (1.5 billion users) (last visited Sept. 18, 2015).

²² See Sheldon Himelfarb, *The Impact of Social Media in Egypt*, United States Institute of Peace (Jan. 31, 2011), <http://www.usip.org/publications/the-impact-social-media-in-egypt>.

2008 presidential campaign, Yahoo! and other Internet companies teamed with traditional media sources to host the first-ever online-only presidential debates. In the 2016 election cycle, Facebook partnered with FOX News to deliver the initial Republican Party presidential debate.

These partnerships give voters the opportunity to engage directly with the candidates, participate in the debate in real time, and even determine which candidate gave the best performance. Before the recent Facebook-FOX debate, for instance, citizens could pose questions of the candidates through Facebook. Some 40,000 people submitted questions this way. During the debate, citizens could chat, Tweet, and post comments in real-time. There were over 14,000 Tweets on the debate.²³ Over 7.5 million people made 20 million debate-related interactions on Facebook.²⁴ Once the formal debate was over, an informal debate began: who won based on Google searches during the debate.²⁵

²³ Joshua Tucker, *This Is the Twitter Data from Last Night's GOP Debate that You Are Not Supposed to Pay Attention to this Morning*, The Washington Post (Aug. 7, 2015), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/08/07/this-is-the-twitter-data-from-last-nights-gop-debate-you-are-not-supposed-to-pay-attention-to-this-morning/>.

²⁴ Emily Stephenson, *Trump Dominates Social Media Amid Republican Presidential Debate*, Reuters (Aug. 7, 2015), <http://www.reuters.com/article/2015/08/07/us-usa-election-republicans-socialmedia-idUSKCN0QC0ES20150807>.

²⁵ Tessa Berenson, *Here's Who Won Google Searches During the Debate*, TIME (Aug. 6, 2015), <http://time.com/3988239/gop-debate-google-donald-trump/>.

This new way of engaging in public debate allows candidates for public office to “bypass[] the filter of traditional media” and speak directly to voters.²⁶ They engage voters—through the likes of Facebook, Twitter, and YouTube—in a kind of conversation: one that was “more dynamic, more of a dialogue, than it was in the 20th century.”²⁷ At the same time, Internet companies offer the public access to an increasingly vast array of traditional and non-traditional new sources alongside digital tools to help them engage on the issues important to them.

C. Innovation and Competition Online Have Spurred the Virtuous Circle of Innovation, Investment, and Deployment by ISPs

The open Internet fuels a virtuous circle of innovation. It creates an innovation-without-permission ecosystem that permits innovators to release products and services with few barriers to entry. In turn, these innovations increase consumer demand for more bandwidth and a faster Internet, which encourages ISPs to further invest in broadband infrastructure. No one today—and certainly not the ISP petitioners who benefit directly from it—seriously contests the existence of this virtuous circle.

²⁶ Pew Research Ctr.: Journalism & Media Staff, How the Presidential Candidates Use the Web and Social Media (Aug. 15, 2012), <http://www.journalism.org/2012/08/15/how-presidential-candidates-use-web-and-social-media/>.

²⁷ *Id.*

The FCC identified the importance of the virtuous circle when it first adopted rules to protect an open Internet.²⁸ Less than two years ago, this Court confirmed the FCC’s determination, recognizing that “Internet openness fosters the edge-provider innovation that drives this ‘virtuous circle.’”²⁹ Petitioners themselves acknowledge the vital role of the virtuous circle to preserving the Internet economy.³⁰

The virtuous circle has spurred wireline ISPs to invest billions of dollars to innovate and deploy new network technologies to keep pace with consumer demands. Users who considered 56 kbps modems to be state-of-the-art now consider 25 Mbps services (a 44,600% increase in speed) as mere “table stakes,”

²⁸ See *Preserving the Open Internet, Report and Order*, 25 FCC Rcd. 17905, 17910-911 ¶ 14 (2010) (“*2010 Order*”) (“The Internet’s openness is critical . . . because it enables a ‘virtuous circle’ of innovation in which new uses of the network—including new content, applications, services, and devices—lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses.”).

²⁹ *Verizon v. FCC*, 740 F.3d 623, 644-45 (2014).

³⁰ See, e.g., American Cable Association, Reply Comments, GN Docket Nos. 14-28, 10-127, at 2 (Sept. 15, 2014) (supporting FCC action to “preserve and protect the ‘virtuous circle’ of Internet innovation at the edge, that leads to consumer demand for Internet services and broadband access, which in turn stimulate service improvements, broadband network investment and deployment by broadband ISPs.”); Time Warner Cable Inc., Comments, GN Docket Nos. 14-28, 10-127, at 3 (July 15, 2014) (advocating for “baseline protections” to ensure “that the virtuous circle that drives the Internet’s success will remain in force”).

and widespread gigabit broadband as the inevitable future.³¹ As a result, the FCC last year increased the benchmark speed of “broadband” from 4 Mbps to 25 Mbps. Analysts project wireline broadband speeds will keep increasing—nearly doubling by 2019³²—assuming the virtuous circle is allowed to continue.

Like providers of residential Internet access, mobile broadband providers are deploying faster speeds and improved technologies to keep pace with increasing consumer demand for faster, better online experiences through their mobile devices. For instance, some years ago Verizon began rolling out a 4G LTE technology that was ten times faster than its previous wireless technology.³³ Only a few years later, Verizon announced XLTE technology, which offers consumers double the capacity of 4G to support the faster downloads and higher quality

³¹ In 1994, consumers were using 14 to 28 Kbps modems; 56 Kbps modems did not arrive until 1997. *See* Omnibus Broadband Initiative, FCC, Broadband Performance: OBI Technical Paper No. 4, at 11 (Aug. 16, 2010), <https://transition.fcc.gov/national-broadband-plan/broadband-performance-paper.pdf>; Jim Davis, *56-kbps Modems Top Study*, CNET (Oct. 17, 1996), http://news.cnet.com/56-kbps-modems-top-study/2100-1001_3-238991.html; Remarks, The Facts and Future of Broadband Competition, Chairman Tom Wheeler, FCC at 1 (Sept. 4, 2014), https://apps.fcc.gov/edocs_public/attachmatch/DOC-329161A1.pdf.

³² CISCO, Cisco Visual Networking Index: Forecast and Methodology, 2014-2019, at 1 (May 27, 2015), http://www.cisco.com/c/en/us/solutions/collateral/service-provider/ip-ngn-ip-next-generation-network/white_paper_c11-481360.html.

³³ Verizon Wireless, LTE: The Future of Mobile Broadband Technology (2009), <http://innovation.verizon.com/content/dam/vic/PDF/LTE%20The%20Future%20of%20Mobile%20Broadband%20Technology.pdf>.

streaming consumers demand—and will make mobile broadband an even closer substitute for wired broadband connections.³⁴

This progress and deployment has spawned still more innovation by edge providers. The Internet Association’s members and other Internet companies create products and services that meet consumers’ “anytime anywhere” demands, and also change industries for the better. For example, streaming video services, like those available from Amazon.com, YouTube, Netflix, and Yahoo!, give consumers new ways to view video programming—without going through the traditional pay-TV bottlenecks.³⁵ Consumers today can watch content of their own choosing anytime and anywhere. They can watch content on their own schedule³⁶—free from the bonds of the linear TV guide. And they can create their own content. User-focused platforms like YouTube, Twitch, and Periscope have enabled consumers everywhere to launch businesses, become reporters, educators,

³⁴ Debi Lewis, *XLTE: America’s Best Network Gets Even Better*, Verizon (Nov. 20, 2014), <http://www.verizonwireless.com/news/article/2014/05/verizon-wireless-xlte.html>.

³⁵ This year—for the first time—consumers streamed content more than they viewed live programming. Press Release, Streaming Services Fuel Consumers’ Appetite, According to Latest Deloitte Digital Democracy Survey, Deloitte (Apr. 22, 2015), <http://www2.deloitte.com/us/en/pages/about-deloitte/articles/press-releases/digital-democracy-survey.html>.

³⁶ *See id.* (noting that nearly one-third of consumers engage in “binge-watching” by streaming three or more episodes at a time at least once a week).

celebrities, advocates, and entrepreneurs, all by placing control of the Internet economy in the hands of consumers.³⁷

II. THE FCC'S *ORDER* IS NECESSARY TO PROTECT THE OPEN INTERNET

A. The Continuation of the Virtuous Circle Depends on the Internet's Continued Openness

The continuation of this virtuous circle is not inevitable. The open characteristics of the Internet's architecture, on which the virtuous circle of Internet innovation and investment depends, are not immutable. ISPs have absolute control of the physical layer of their networks. That control, coupled with the fact that "all end users generally access the Internet through a single broadband provider," places them in the unique position of "'gatekeeper' with respect to edge providers that might seek to reach its end-user subscribers."³⁸ This power "distinguishes broadband providers from other participants in the Internet marketplace . . . who have no similar 'control [over] access to the Internet for their

³⁷ See Matthew Ingram, *The Attention Economy and the Implosion of Traditional Media*, Fortune (Aug. 12, 2015), <http://fortune.com/2015/08/12/attention-economy/> ("Now, the economy has shifted from being supply-based to being demand-based, and attention is the main currency.").

³⁸ *Verizon v. FCC*, 740 F.3d 623, 646 (D.C. Cir. 2014) (citing *2010 Order*, 25 FCC Rcd. at 17917 ¶ 24); see also *id.* (explaining that this unique control over access to Internet subscribers enables an ISP to function as a "'terminating monopolist'").

subscribers and for anyone wishing to reach those subscribers.”³⁹ As the FCC and this Court have found, this technical ability carries with it incentives that endanger the Internet as a whole.⁴⁰

Rather than today’s world where consumers choose the winners and losers online, ISPs could manipulate how, and even if, a consumer interacts with a Website she wants to visit. Moreover, some of the most popular Internet-based services compete with services offered by ISPs themselves. As the FCC observed in its *Order*, “[c]urrently video is the dominant form of traffic on the Internet. These video services directly confront the video businesses of the very companies that supply them broadband access to their customers.”⁴¹ Factors like this create a rational incentive for ISPs to foreclose their competitors from reaching the ISPs’

³⁹ *Id.* (citing *2010 Order*, 25 FCC Rcd. at 17935 ¶ 50).

⁴⁰ *See id.* (“[A]s the Commission found, broadband providers have the technical and economic ability to impose restrictions”); *id.* (finding the FCC’s determination that broadband providers “have incentives to interfere with the operation of third-party Internet-based services that compete with the providers’ revenue-generating telephone and/or pay-television services” to be “based firmly in common sense and economic reality”); *id.* at 649 (“[B]roadband providers’ incentives and ability to restrict Internet traffic could produce ‘[w]idespread interference with the Internet’s openness’ in the absence of Commission action.”).

⁴¹ *Open Internet Order*, 30 FCC Rcd. at 1379-80 ¶ 9. Netflix, for instance, offers its customers many of the same films that ISPs sell through their video on demand services.

customers, or reduce the quality of those connections. Some ISPs already have done so.⁴² There is little consumers can do to protect themselves.⁴³

Left unchecked, over time ISPs could enforce a return to the “walled garden” approach that consumers have rejected in today’s well-functioning market. They might, for instance, remake the Internet into a closed delivery system like cable TV, where subscribers can choose only among the channels in their cable provider’s pre-selected lineup. Such an outcome would undo much of the progress of the last two decades. Consumers would lose the ability to choose freely among competitive services and sources of information. It would also significantly

⁴² See *Open Internet Order*, 30 FCC Rcd. at 5610-11 ¶ 30 (“[I]t is clear that consumers have been subject to degradation resulting from commercial [interconnection] disagreements”); Letter from Markham Erickson, Counsel to COMPTTEL, to Marlene Dortch, FCC, GN Docket No. 14-28, at 2 (Feb. 19, 2015); Letter from Angie Kronenberg, COMPTTEL, to Marlene Dortch, FCC, GN Docket No. 14-28, at 2-5 (Jan. 13, 2015); Letter from Christopher Libertelli, Netflix, to Marlene Dortch, FCC, GN Docket No. 14-28, at 1-2, 5-6 (Nov. 5, 2014).

⁴³ See *Open Internet Order*, 30 FCC Rcd. at 5672 ¶ 163 (“[C]onsumers continue to express concern that the speed of their service falls short of advertised speeds, that billed amounts are greater than advertised rates, and that consumers are unable to determine the source of slow or congested service. In addition, we noted that end users are often surprised that broadband providers slow or terminate service based on ‘excessive use’ or based on other practices, and that consumers report confusion regarding data thresholds or caps.”); *id.* at 5605 ¶ 8 (“The record reflects that broadband providers hold all the tools necessary to deceive consumers, degrade content, or disfavor the content that they don’t like.”).

decrease the rewards edge providers could realize from innovating, further decreasing consumer choice. Without innovators on the edge pushing the networks' abilities, there would be less reason for ISPs to continue investing in their networks.

Allowing paid prioritization would similarly dampen ISP innovation and investment.⁴⁴ In an uncongested network there is no need for prioritization. Paid prioritization, therefore, is only valuable in the face of congestion. This creates a perverse incentive for ISPs to defer investments in their network in order to create a new revenue stream. The virtuous circle would be broken.

B. The FCC Correctly Applied its Rules to Mobile Broadband Services

The FCC's application of open Internet rules to both mobile and wireline broadband was not merely appropriate; it was necessary to accomplish the FCC's goals. While today the majority of Internet traffic still flows over wired networks, mobile broadband is increasingly central to the lives of consumers.

⁴⁴ See *Verizon*, 740 F.3d at 646 (affirming FCC finding that pay-to-play agreements "would ultimately lead to a decrease in end-user demand for broadband . . . [and] any given broadband provider will 'receive the full benefits of . . . fees but [is] unlikely to fully account for the detrimental impact of edge providers' ability and incentive to innovate and invest.'" (citing *2010 Order*, 25 FCC Rcd. at 17919-20 ¶ 25 & n.68).

Consumers increasingly use mobile broadband services as their primary means of connecting to the Internet. Often, mobile broadband is the only Internet access available to the most vulnerable populations—those at or below the poverty line. Over ten percent of households with low incomes or levels of education are completely “smartphone-dependent.” In other words, they own a smartphone, but they do not have a broadband connection at home. These communities depend on mobile broadband for all their online needs.⁴⁵

A growing number of consumers, moreover, rely on mobile broadband for services that are critical to daily life—such as banking, employment resources, transportation, and access to emergency services. Last year, 62% of consumers used their phone to search information on a health condition; 57% managed bank accounts online; 43% explored job opportunities; 40% searched for government services or information; and 30% took a class or accessed educational content.⁴⁶ Lower-income users are particularly likely to use their mobile broadband connection to navigate job-search tools and information.⁴⁷ Mobile broadband is

⁴⁵ Aaron Smith, *U.S. Smartphone Use in 2015*, Pew Research Ctr. (Apr. 1, 2015), <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/>.

⁴⁶ *Id.*

⁴⁷ *Id.*

becoming a fundamental tool in bridging economic, educational, and social divides.

Mobile broadband is also central to democratic discourse. Consumers ubiquitously use applications like Twitter and Facebook via mobile devices. Through social media, consumers engage in political dialogue and share real-time news and information instantaneously; this has the potential to effect social and political change.⁴⁸

C. The FCC Correctly Addressed Interconnection Practices

Consumers and innovators will benefit from the Internet openness promoted by the FCC's net neutrality *Order*. If that openness is thwarted, consumers will not care where in the ISP's network the blocking or degrading occurred. To this end, the *Order* appropriately addresses ISP interconnection practices through which ISPs could evade the FCC's prohibitions on blocking and discrimination. In doing so, the *Order* acknowledged ISPs should not be allowed to accomplish blocking, throttling, or paid prioritization further upstream in the ISP's network, so as to undermine protection of the open Internet.

ISPs control how data travels over their networks. They also control how—*or whether*—data enters their networks in the first place. ISPs can use

⁴⁸ See *supra* Section I.B.

interconnection points, where data enters their last mile networks, to create bottlenecks that degrade consumer access to online applications unless the ISP is paid a fee.

Internet Association member Netflix explained to the FCC that it experienced first-hand the harm ISPs can cause by leveraging their power over the interconnection point to their networks. In response to the *NPRM*'s inquiry regarding whether interconnection practices should be covered under the open Internet rules, Netflix stated that ISPs were effectively pushing discrimination upstream to the point of interconnection.⁴⁹ In the *Order*, the FCC took note of the negative effect that such readily achievable ISP strategies could have on consumer welfare and reasonably adopted procedures for protecting edge providers and consumers by adjudicating complaints that may arise with respect to congestion at the point of interconnection.⁵⁰

D. The FCC Properly Used its Authority

The FCC properly used its authority to adopt rules. As the Internet Association said in the proceeding below, Section 706 and Title II, among other

⁴⁹ Netflix, Inc., Reply Comments, GN Docket Nos. 14-28, 10-127, at 9-17 (Sept. 15, 2014).

⁵⁰ *Open Internet Order*, 30 FCC Rcd. at 5713 ¶ 252.

provisions, afford the FCC the tools it needs to protect and promote the virtuous circle.⁵¹

The FCC took necessary action to protect the Internet's openness. The FCC's determination that consumers today view broadband Internet access services as an offering of telecommunications for a fee is reasonable and consistent with the Supreme Court's holding in *Brand X*.⁵² Today, consumers use the Internet for much more than the few information services the ISPs provide. They enjoy literally limitless choice for news, text and voice communication, commerce, video, travel, and countless other services. The FCC's *Order* coherently and lawfully preserves consumers' expectations that they be able to reach substantially all points on the Internet without disruption or preference by ISPs.

⁵¹ See Internet Association, Reply Comments, GN Docket No. 14-28, at 2, 8-11 (Sept. 10, 2014).

⁵² *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 992 (2005).

III. CONCLUSION

For the foregoing reasons, the Internet Association respectfully urges this Court to uphold the FCC's *Order* in its entirety.

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF
APPELLATE PROCEDURE 32(A)(5)-(7)**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Cir. R. 32(e), I certify that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman. Exclusive of the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(e)(1), this brief contains 4,523 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief (Microsoft Word 2010).

/s/ _____
Markham C. Erickson

CERTIFICATE OF SERVICE

I hereby certify that, on September 20, 2015, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system. I further certify that, on September 20, 2015, service of the foregoing will be made electronically via the CM/ECF system upon the participants in the case who are registered CM/ECF users. Others, marked with an asterisk, will receive service by mail unless another attorney for the same party is receiving service through the CM/ECF system.

Dated September 20, 2015

/s/ _____
Sarah K. Leggin