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

BRIEF *AMICI CURIAE* OF MEMBERS OF CONGRESS IN SUPPORT OF PETITIONERS UNITED STATES TELECOM ASSOCIATION, NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, CTIA – THE WIRELESS ASSOCIATION®, AMERICAN CABLE ASSOCIATION, WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION, AT&T INC., CENTURYLINK, ALAMO BROADBAND INC., AND DANIEL BERNINGER

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Dated: November 4, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The undersigned attorney of record, in accordance with D.C. Cir. R. 28(a)(1), hereby certifies as follows:

A. Parties and Amici

Except for *amici curiae* Members of Congress and any other *amici* who have not yet entered an appearance in this Court, all parties and *amici* appearing before the district court are listed in the petitioners' briefs.

B. Ruling Under Review

Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015) ("*Order*").

C. 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.

There are no other related cases.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), *amici curiae* Members of Congress have filed a motion for leave to participate as *amici curiae* contemporaneously herewith.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amici curiae* Members of Congress certifies that a separate brief is necessary. *Amici curiae* are Members of the majority party in the House and have participated in legislative oversight of the Federal Communications Commission (the "Commission"). *Amici curiae* thus are uniquely situated to provide the Court with the background and history of Congress's legislative activity concerning the Internet and how it bears upon the proper interpretation of the 1996 Act. *Amici curiae* disagree with the position of the Members of Congress who joined the Brief *Amici Curiae* of Members of Congress, No. 15-1063 (filed Sept. 21, 2015) (Doc. #1575799) (the "Markey-Eshoo Amicus Brief" or "Markey-Eshoo Am. Br."), and write this brief to provide the countervailing congressional point of view.

[1] Pursuant to Fed. R. App. P. 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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Commission or FCC	Federal Communications Commission
FTC	Federal Trade Commission
Markey-Eshoo Amicus Brief	Brief *Amici Curiae* of Members of Congress, No. 15-1063 (filed Sept. 21, 2015) (Doc. #1575799)
Open Internet Order	Report and Order, *Preserving the Open Internet*, 25 FCC Rcd 17905 (2010), *vacated in part*, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014)
Order	Report and Order on Remand, Declaratory Ruling, and Order, Protecting and Promoting the Open Internet, 30 FCC Rcd 5601 (2015)

INTEREST OF *AMICI CURIAE*

Amici curiae are Members of Congress, all of whom have participated in legislative oversight of the Federal Communications Commission (the "FCC"). *Amici curiae* thus are uniquely positioned to provide the Court with the background and history of Congress's legislative activity concerning the Internet and how it bears upon the proper interpretation of the Telecommunications Act of 1996, 110 Stat. 56 (the "1996 Act"), the statute at issue in this case.

Amici curiae have a strong interest in the proper construction of the 1996 Act and in ensuring that the FCC does not act in excess of its authority thereunder. *Amici curiae* also have a strong interest in making clear that the Markey-Eshoo Amicus Brief does not represent the views of Congress and in fact is opposed by Members of the majority party in the House.

A full listing of *amici curiae* Members of Congress appears in Appendix A.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici curiae support an "open Internet." However, they believe that whether and how to regulate Internet access are policy questions of such profound significance that they are to be answered only by Congress. Over the last decade, Congress repeatedly has considered and debated these questions. Countless proposals to authorize the FCC to enforce so-called "net neutrality" rules failed to pass, so the FCC (pushed by President Obama) took matters into its own hands. The FCC, in its own words, crafted a "modern Title II" "tailored for the 21st century," Order ¶ 38, reclassifying both fixed and mobile broadband as common-carrier services and imposing upon broadband providers all manner of Title II regulation including a novel, amorphous catch-all "Internet Conduct Standard" that will allow the Commission to stamp out any future business practices it decides that it does not like.

Amici curiae agree with the USTelecom Petitioners that the *Order* should be vacated for several reasons, including because the Order exceeds the agency's authority as conferred on it by Congress. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act … unless and until Congress confers power upon it."). *Amici curiae* write separately to highlight the post-1996 Act history of legislative activity touching on the Internet and to explain how it demonstrates that the Commission lacks the

authority it claims here and improperly bypassed the democratic process in creating a whole new version of Title II.

In addition, *amici curiae* write in order to make clear that the Markey-Eshoo Amicus Brief does not speak for Congress. Like *amici curiae*, the Members of Congress who joined the Markey-Eshoo Amicus Brief have direct experience with the history of Congress's legislative activity concerning the Internet.[2] The Markey-Eshoo Amicus Brief, however, focuses primarily on the technical aspects of broadband service, *see, e.g.*, Markey-Eshoo Am. Br. at 15-20, 24-27 (discussing technical workings of broadband service including details about internet caching and Domain Name Service (DNS)), even though the Members who joined that brief acknowledge that this is not their strong suit, *see id.* at 20 ("[T]he Commission is in a far better position ... to address this technical complex and dynamic subject.") (internal quotation omitted). They undoubtedly avoided grappling with the history of statutory enactments in this arena—and particularly the failures of their own proposed legislation to regulate the Internet—because it undermines their (and the Commission's) position.

As explained below, the extensive history of congressional enactments and proposed legislation following the 1996 Act demonstrates that the Commission

[2] Indeed, several Members who joined the Markey-Eshoo Amicus Brief sponsored or supported much of the proposed legislation discussed herein.

lacks the authority over the Internet that it asserts here. Moreover, this same legislative activity helps illustrate that whether and how to regulate the provision of Internet access are profound "question[s] of deep economic and political significance" that Congress never would have left to the FCC. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

ARGUMENT

I. The Post-1996 Act History Of Legislative Activity Concerning The Internet Demonstrates That Congress Never Delegated To The FCC The Unprecedented Authority To Regulate The Internet That The Agency Asserts Here.

The legislative activity undertaken by Congress since the 1996 Act demonstrates that Congress never intended the Title II-type "net neutrality" obligations the FCC imposes on broadband providers in the *Order* and certainly never imagined the radical step of reclassification, which goes far beyond even the legislative proposals for rules that were repeatedly rejected by Congress. Since 1996, Congress considered and rejected numerous bills that would have conferred power upon the FCC to promulgate so-called "net neutrality" or "open Internet" regulations—many of which were sponsored or supported by Members who joined the Markey-Eshoo Amicus Brief. During the same time period, Congress has enacted numerous targeted statutes vesting the FCC and other entities with narrow, circumscribed authority with respect to the Internet—limited grants of power that would make no sense if the FCC already possessed generous authority to regulate

broadband providers. Taken together, all of this legislative activity "preclude[s] an interpretation" of the 1996 Act that would afford the FCC those powers that Congress has expressly withheld from the agency. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000).

A. Congress's repeated rejection of bills that would have authorized the FCC to enforce "net neutrality" rules confirms that the FCC lacks such authority.

Over the last decade, the questions whether and how to regulate the Internet have attracted substantial attention and have been the subject of ongoing debate in Congress. Indeed, since the outset of the "net neutrality" policy debate, Congress has considered at least a dozen different bills that would have conferred upon the FCC the authority to enforce so-called "net neutrality" rules but not one passed. *See* H.R. 5252, 109th Cong. (2006); H.R. 5273, 109th Cong. (2006); H.R. 5417, 109th Cong. (2006); S. 2360, 109th Cong. (2006); S. 2686, 109th Cong. (2006); S. 2917, 109th Cong. (2006); S. 215, 110th Cong. (2007); H.R. 5353, 110th Cong. (2008); H.R. 5994, 110th Cong. (2008); H.R. 3458, 111th Cong. (2009); S. 74, 112th Cong. (2011); S. 3703, 112th Cong. (2012).

In the Communications Opportunity, Promotion and Enhancement Act of 2006, H.R. 5252, 109th Cong. (2006), a bipartisan group of representatives sought to authorize the FCC "to enforce its Broadband Policy Statement," H.R. Report 109-470, at 2 (May 17, 2006); *see also id.* at 4, 26, 27, but only through

adjudication, *see id.* at 47. The bill expressly declined to grant the FCC rulemaking authority, *see id.* at 5, 27, 29, 47, as its proponents sought to avoid subjecting broadband providers to Title II-type regulation, *see id.* at 5, 29. Indeed, an amendment proposed by Representatives Markey, Boucher, Eshoo, and Inslee to impose a nondiscrimination requirement on broadband providers never made it out of committee.[3] *See id.* at 17, 29, 61.

At the same time H.R. 5252 was pending, House Democrats sponsored two competing bills that sought to impose more stringent rules on broadband providers. Representatives Markey, Boucher, Eshoo, and Inslee sponsored the Network Neutrality Act of 2006, H.R. 5273, 109th Cong. (2006), which would have imposed common-carriage requirements upon broadband providers, complete with bans on blocking or degrading access to all lawful content, applications, and devices and on paid prioritization, *see id.* at § 4. Representatives Sensenbrenner, Conyers, Boucher, and Lofgren sponsored the Internet Freedom and Nondiscrimination Act of 2006, H.R. 5417, 109th Cong (2006), which would have imposed essentially the same obligations on broadband providers, but through the

[3] Members Markey and Eshoo are the lead signatories of the Markey-Eshoo Amicus Brief. At least thirteen of the signatories to the Markey-Eshoo Amicus Brief sponsored or supported failed "net neutrality" legislation.

Clayton Act subject to enforcement by the FTC, *see id.* at § 3. All of these House bills failed to pass.

Similar Senate bills were proposed during the 109th Congress. Among them were the Internet Non-Discrimination Act of 2006, S. 2360, 109th Cong. (2006), and the Internet Freedom Preservation Act, S. 2917, 109th Cong. (2006), both of which sought to impose common-carriage obligations on broadband providers similar to the Network Neutrality Act of 2006 that was proposed in the House, *see* S. 2360, 109th Cong., at § 4; S. 2917, 109th Cong. at § 12. Neither made it through Congress. A less stringent Senate bill—the Communications, Consumer Choice and Broadband Deployment Act of 2006, S. 2686, 109th Cong. (2006)—would have conferred upon the FCC only the authority to study the provision of broadband service and report to Congress with "recommendations for appropriate enforcement mechanisms" to "ensure that consumers can access lawful content and run Internet applications and services over the public Internet subject to the bandwidth purchased and the needs of law enforcement agencies," *id.* at § 901. It too failed.

Subsequent Congresses considered numerous similar "net neutrality" bills and draft legislation that failed to pass. *See, e.g.*, Internet Freedom Preservation Act, S. 215, 110th Cong. (2007); Internet Freedom Preservation Act of 2008, H.R. 5353, 110th Cong. (2008); Internet Freedom and Nondiscrimination Act of 2008,

H.R. 5994, 110th Cong. (2008); Internet Freedom Preservation Act of 2009, H.R. 3458, 111th Cong. (2009); Internet Freedom, Broadband Promotion, and Consumer Protection Act of 2011, S. 74, 112th Cong. (2011); Data Cap Integrity Act of 2012, S. 3703, 112th Cong. (2012); *see also* W. David Gardner, *FCC Focuses On Waxman 'Net Neutrality' Framework*, Information Week (Dec. 2, 2010), *available at* http://www.informationweek.com/mobile/-fcc-focuses-on-waxman-net-neutrality-framework/d/d-id/1094569?. Congressional debate over "net neutrality" and proposed legislation on this subject continued until the Commission effectively short-circuited this policy debate by adopting the *Order*. *See* Sarah Morris, *Proposed net neutrality bill is a 'solution in search of a problem*' The Hill (Jan. 21, 2015), *available at* http://thehill.com/blogs/pundits-blog/technology/230278-proposed-net-neutrality-bill-is-a-solution-in-search-of-a (discussing Senate and House hearings on a draft bill authored by Senator Thune and Representative Upton that would have prohibited blocking, throttling, and paid prioritization).[4]

That Congress spent nearly a decade struggling with whether and how to regulate the Internet does not provide a justification for the FCC to bypass that

[4] The Thune-Upton draft bill is available at http://www.commerce.senate.gov/public/_cache/files/7a90bcad-41c9-4f11-b341-9e4c14dac91c/28D2060F1855F668A25A7959F0B4D494.oll15072-3-.pdf.

process and "contraven[e] [its] statutory limits." *Coal. for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, at *22 (D.C. Cir. Dec. 20, 2012). On the contrary, while "the legislative process can be cumbersome and frustrating …, the Framers … designed it that way" to ensure careful deliberation over important policy matters. *Id.*

What the numerous failed "net neutrality" bills do demonstrate, however, is that Congress understood that the FCC lacks the authority it claims here, *see Brown & Williamson*, 529 U.S. at 143-44. This is especially so given that the FCC "for decades had rightly disclaimed" having general regulatory authority over the Internet, USTelecom Petitioners at 2; *see also Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010).

B. Congress's post-1996 Act grants of narrow authority over circumscribed aspects of the Internet further confirm that the FCC lacks the authority it claims here.

Since 1996, Congress has passed numerous statutes that vested the FCC and/or other regulatory entities with discrete areas of narrow authority with respect to the Internet. During this time, for example, Congress enacted:

- the Children's Online Privacy Protection Act, Pub. L. No. 105-277, §§ 1301-08 (1998), which vested the FTC with authority to protect the privacy of children by promulgating and enforcing rules relating to the collection of personal information over the Internet, *see, e.g.*, 15 U.S.C. § 6502(b);
- the CAN-SPAM Act, Pub. L. No. 108-187 (2003), which *inter alia* authorized the FCC to promulgate rules to protect mobile

subscribers from receiving unwanted email advertisements, including by requiring providers of commercial mobile services to enable their subscribers to opt out of receiving such advertisements, *see id.* § 14(b);

- the Broadband Data Improvement Act, Pub. L. No. 110-385, at §§ 101-06 (2008), which directed the FCC and other governmental entities to take steps to improve data collection regarding broadband deployment, the impact of broadband speeds on small businesses, and online safety, *see, e.g.*, *id.* § 106 (codified at 47 U.S.C. § 1304);

- the New and Emerging Technologies 911 Improvement Act, Pub. L. No. 110-283 (2008), which amended Title 47 to require VOIP providers to provide 9-1-1 and E-9-1-1 services to their subscribers and authorized the FCC to promulgate regulations to ensure that VOIP providers have the ability to interconnect with entities with ownership or control of such capabilities, *see* Pub. L. No. 110-283, § 101 (codified at 47 U.S.C. § 615a-1);

- Title VI of the American Recovery and Reinvestment Act, Pub. L. No. 111-5, §§ 6000-01 (2009), which allocated approximately $8 billion in stimulus funding for broadband deployment and related activities, and directed the Department of Commerce and the FCC to establish "non-discrimination and network interconnection obligations" as contractual preconditions for grants, *id.* § 6001 (codified at 47 U.S.C. § 1305); and

- the Twenty-First Century Communications and Video Accessibility Act, Pub. L. No. 111-260 (2010), which imposed accessibility requirements with respect to mobile Internet browsers, VOIP, and Internet-delivered video content, and authorized the FCC to implement those requirements via rulemaking, *see generally id.*

The "plain implication" of these repeated narrow grants, of course, is that Congress "effectively ratified" the view that the 1996 Act does not confer plenary authority on the FCC to regulate the Internet. *Brown & Williamson*, 529 U.S. at

144. On top of that, Congress made the point expressly in the Broadband Data Improvement Act, explaining that that statute "should not be construed as giving" the FCC (or any other affected entity) "any regulatory jurisdiction or oversight authority over providers of broadband services or information technology." Pub. L. No. 110-385, at § 106(j) (codified at 47 U.S.C. § 1304(j)).

II. The Commission Is Not Entitled To *Chevron* Deference.

In cases involving "question[s] of deep 'economic and political significance' that [are] central to [the] statutory scheme," agencies are not entitled to *Chevron* deference. *King*, 135 S. Ct. at 2489. Indeed, reviewing courts should be "skeptic[al]" where an agency claims to have "discover[ed] in a long-extant statute and unheralded power to regulate" a "significant portion of the American economy." *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

This is precisely that type of case. There can be no question that whether the FCC has plenary authority to regulate the Internet is a "question of deep economic and political significance." The Markey-Eshoo Amicus Brief characterizes broadband service as "*the single most important* service that Americans use to transmit information to one another," emphasizing that "fixed and mobile broadband Internet access are as central, or perhaps even more central, to the lives of millions of Americans than telephone service was when the 1996 Act was passed into law." Markey-Eshoo Am. Br. at 10. And the FCC certainly would

agree. *See* Remarks of FCC Chairman Thomas Wheeler at AEI (June 12, 2014) (stating that, within five years, "over 50 billion inanimate devices will be interconnected"), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-327591A1.pdf.

Moreover, the decade-long congressional policy debate and extensive history of legislative activity relating to whether and to what extent the FCC should be vested with authority to regulate the Internet underscores the importance of these issues. Congress certainly did not leave (and would never have left) this issue of great national importance to be decided by the FCC, as it "would bring about an enormous and transformative expansion in [the agency's] regulatory authority without clear congressional authorization." *Utility Air Regulatory Grp.*, 134 S. Ct. at 2444.

CONCLUSION

For the foregoing reasons, *amici curiae* Members of Congress respectfully request that this Court vacate the *Order*.

Respectfully submitted,

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Dated: November 4, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 2,586 words, excluding the 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 type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2015, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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