ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1063 (and consolidated cases)

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

JOINT BRIEF FOR INTERVENORS COGENT COMMUNICATIONS, INC., COMPTEL, DISH NETWORK CORPORATION, FREE PRESS, NETFLIX, INC., OPEN TECHNOLOGY INSTITUTE | NEW AMERICA, PUBLIC KNOWLEDGE, *ET AL.*, IN SUPPORT OF THE FCC

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Intervenors in support of Respondents the FCC and the United States certify as follows:

A. Parties and Amici

Except for the following, all parties, intervenors, and amici appearing in this Court are listed in the briefs for Petitioners United States Telecom Association et al. and Respondents the FCC and the United States.

The following parties have filed a notice or motion for leave to participate as amici as of the date of this filing:

- Internet Association
- 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. Rulings 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 FCC's *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 Intervenors are unaware of any other related cases pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. R. 26.1, intervenors in support of Respondents the FCC and the United States submit the following corporate disclosure statements:

Ad Hoc Telecommunications Users Committee: The Ad Hoc Telecommunications Users Committee ("Ad Hoc") is an unincorporated, non-profit association of large business users of communications services. Ad Hoc represents the interests of its members in proceedings before the Federal Communications Commission (the "FCC") and the federal courts on issues related to the regulation of interstate telecommunications. Ad Hoc is a "trade association" as defined in Circuit Rule 26.1(b).

Akamai: Akamai is a publicly traded company that has no parent company, and no publicly held company owns 10% or more of its stock.

Cogent: Cogent Communications, Inc. ("Cogent") is a subsidiary of Cogent Communications Holdings, Inc. There are no publicly held companies, other than Cogent Communications Holdings, Inc., that have an ownership interest of 10% or more in Cogent. With respect to Cogent Communications Holdings, Inc., only FMR LLC (also known as Fidelity Investments) holds an ownership interest of greater than 10%.

The "general nature and purpose, insofar as relevant to litigation," Circuit Rule 26.1(b), of Cogent is twofold. First, Cogent is an Internet transit provider, meaning that Cogent facilitates the transmission of data between content providers and Internet service providers as well as between other transit providers. Second, Cogent is an Internet service provider through its sale of Internet access to mostly small- and medium-sized businesses.

Center for Democracy & Technology: The Center for Democracy & Technology ("CDT") is a non-profit, non-stock corporation organized under the laws of the District of Columbia. CDT has no parent corporation, nor is there any publicly held corporation that owns stock or other interest in CDT.

ColorOfChange: ColorOfChange.org is a national, nonpartisan, nonprofit organization. ColorOfChange.org has no parent corporations, and no publicly held company has a 10% or greater ownership in ColorOfChange.org.

COMPTEL: COMPTEL is the leading national trade association representing competitive communications service providers and their supplier partners. COMPTEL is a not-for-profit corporation and has not issued shares or debt securities to the public. COMPTEL does not have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Credo Mobile: Working Assets, Inc., is the parent company of Credo Mobile, Inc. No publicly held corporation owns stock or any other interest in either Credo Mobile, Inc. or Working Assets, Inc.

Demand Progress: Demand Progress is a non-profit corporation. It has no parent corporation. No publicly held company has any ownership interest in Demand Progress.

DISH: DISH Network Corporation has issued publicly traded equity. Based on a review of Form 13D and Form 13G filings with the Securities and Exchange Commission, no publicly held corporation (which for clarity does not include publicly-issued mutual funds) owns 10% or more of DISH Network's stock. DISH Network L.L.C. is a wholly owned subsidiary of DISH DBS Corporation, a corporation with publicly traded debt. DISH DBS Corporation is a wholly owned subsidiary of DISH Orbital Corporation. DISH Orbital Corporation is a wholly owned subsidiary of DISH Network Corporation. As of June 30, 2015, DISH Network L.L.C. has approximately 14 million TV customers.

Etsy: Etsy, Inc. is a publicly traded company that has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Based in New York, it is an online marketplace for buying and selling hand-crafted goods, with over a million sellers.

Fight for the Future: Working Assets, Inc., is the parent company of Fight for the Future, Inc. No publicly held corporation owns stock or any other interest in either Fight for the Future, Inc. or Working Assets, Inc.

Free Press: Free Press is a national, nonpartisan, nonprofit organization. Free Press has no parent corporations nor is there any publicly held corporation that owns stock or other interest in Free Press.

Kickstarter: Kickstarter, PBC is a privately held company that has no parent company, and no publicly held company owns 10% or more of its stock. Based in New York, it is a global platform for bringing creative projects to life.

Level 3: Insofar as relevant to the litigation, Level 3 is a Tier 1 Internet Service Provider, providing Internet services, including content-delivery and transit services, to customers in the United States and globally. Level 3 is a wholly owned subsidiary of Level 3 Financing, Inc., which is a wholly owned subsidiary of Level 3 Communications, Inc., a publicly traded company incorporated in the State of Delaware. No publicly traded company owns 10% or more of Level 3 Communications, Inc.

Meetup: Meetup, Inc. is a privately held company that has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Based in New York, Meetup is an online network of local community groups, enabling people across the world to find an existing group or start a new group.

National Association of Regulatory Utility Commissioners: The National Association of Regulatory Utility Commissioners ("NARUC") is a quasigovernmental nonprofit organization founded in 1889 and incorporated in the District of Columbia. NARUC is a "trade association" as that term is defined in Local Circuit Rule 26.1(b). NARUC has no parent company. No publicly held company has any ownership interest in NARUC. NARUC represents those government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, *inter alia*, the regulated telecommunications and electric utilities within their respective borders.

National Association of State Utility Consumer Advocates: The National Association of State Utility Consumer Advocates ("NASUCA") is a voluntary association of advocate offices in more than forty states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). NASUCA's

associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

NASUCA has no parent company, subsidiary, or affiliate that has issued securities to the public. No publicly traded company owns any equity interest in NASUCA.

Netflix: Netflix is a publicly held corporation with its headquarters in Los Gatos, California. Netflix is an Internet subscription service providing consumers access to movies and television shows. Netflix has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

New America's Open Technology Institute: New America is a non-profit organization incorporated in the District of Columbia. New America has no parent corporation, nor is there any publicly held corporation that owns stock or other interest in New America.

Public Knowledge: Public Knowledge is a non-profit organization incorporated in the District of Columbia. Public Knowledge has no parent corporation, nor is there any publicly held corporation that owns stock or other interest in Public Knowledge.

Tumblr: Tumblr, Inc. ("Tumblr") is not a publicly held corporation. Its parent corporation, Yahoo! Inc., owns 100% of its stock. Yahoo! Inc. is a publicly

held corporation and does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock. Tumblr is an online media platform.

Union Square Ventures: Union Square Ventures, LLC is a privately held company that has no parent corporation, and no publicly held company owns 10% or more of its equity. Based in New York, it is a venture capital firm that has invested some of the Internet's most influential and widely used web properties.

Vimeo: Vimeo, LLC is a wholly owned subsidiary of IAC/InterActiveCorp, a publicly-traded company with no parent company; no publicly-traded company owns 10% or more of IAC/InterActiveCorp. Based in New York, Vimeo provides Internet-based video sharing and hosting services to consumers.

Vonage: Vonage Holdings Corp., through its wholly owned subsidiary Vonage America, Inc., provides low-cost communications services connecting individuals through broadband devices worldwide. Vonage Holdings Corp. is a publicly held corporation, traded on the New York Stock exchange under the symbol VG. No publicly held corporation holds a 10% or greater interest in Vonage Holdings Corp., directly or indirectly.

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GLOSSARY

1994 Section 332 Order	*Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, *Second Report and Order*, 9 FCC Rcd. 1411 (1994)
2010 Order	*Preserving the Open Internet*, *Report and Order*, 25 FCC Rcd. 17905 (2010), *aff'd in part and vacated in part*, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014)
APA	Administrative Procedure Act, 5 U.S.C. §§ 701-706
Broadband Internet Access Service	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 endpoints," *Order* ¶ 187 (JA___).
Cable Modem Order	*Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd. 4798 (2002)
Caching	Process of "storing of copies of content at locations in the network closer to subscribers than their original sources," *Order* ¶ 372 (JA___).
CDN	Content Delivery Network
Communications Act or Act	Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq*.

Computer II	*Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, *Tentative Decision and Further Notice of Inquiry and Rulemaking*, 72 F.C.C.2d 358 (1979) (*Tentative Decision*), 77 F.C.C.2d 384 (1980) (*Final Decision*), *aff'd sub nom. Computer and Commn'cs Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983)
Computer III	*Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III)*, *Report and Order*, 104 F.C.C.2d 958 (1986)
DNS	Domain Name System, a function that "matches the Web site address the end user types into his browser . . . with the IP address of the Web page's host server," *Nat'l Cable & Telecomms Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).
DSL	Digital Subscriber Line; an early broadband technology utilizing copper telephone lines to transmit data, which is limited by the physical constraints of the material resulting in a decrease in data rate as distance from the telephone company hub increases.
Edge providers	Third parties providing ISPs' users content, applications, and services over the Internet.
FCC or Commission	Federal Communications Commission

General conduct standard	No-unreasonable interference/disadvantage standard: "Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule." *Order* ¶ 136 (JA___).
IP	Internet Protocol
ISP	Internet Service Provider
NPRM	*Protecting and Promoting the Open Internet*, *Notice of Proposed Rulemaking*, 29 FCC Rcd. 5561 (2014) (JA___)
Open Internet Policy	*Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, *Policy Statement*, 20 FCC Rcd. 14986 (2005)
Order	*Protecting and Promoting the Open Internet*, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601 (2015) (JA___)
Petitioners	Petitioners USTelecom, NCTA, CTIA, ACA, WISPA, AT&T, CenturyLink, Alamo Broadband, and Daniel Berninger
Section 706	Section 706 of the 1996 Act, Pub. L. 104-104, §706, 110 Stat. 153, codified at 47 U.S.C. § 1302

Telecommunications Act of 1996 or 1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56
Title I	Title I of the Communications Act, codified as amended at 47 U.S.C. §§ 151–162
Title II	Title II of the Communications Act, codified as amended at 47 U.S.C. §§ 201–276
VoIP	Voice over Internet Protocol; voice telephone service provided via the Internet.
Wireless Broadband Order	*Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, *Declaratory Ruling*, 22 FCC Rcd. 5901 (2007)

JURISDICTION

Intervenors adopt the Statement of Jurisdiction, Questions Presented, and Applicable Standard of Review set forth in the brief for Respondents the FCC and the United States. FCC Br. at 7-8, 45.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the addendum to this brief.

INTRODUCTION

Today, tens of millions of Americans purchase Broadband Internet Access Service from an Internet Service Provider ("ISP") and face substantial obstacles in switching to another provider. These American consumers consider the information, content, and applications they want to receive or generate online as separate from the access service they buy from their ISP. That is the essence of today's Internet and the basis for the FCC's *Order*.

The agency has recognized the enormous importance to the public of the Internet remaining open. No Internet user today wants to be steered by her ISP to content providers who have paid the ISP for the privilege of faster access. No one wants to be greeted with the frustrating revolving "buffer" circle on her screen when she tries to access the content provider she chooses, just because that provider has not paid, or cannot pay, for preferred access into and through the ISP's pipes. No one wants to find it difficult or impossible to create her own content because the bits she creates would be relegated to the slow lane in the ISP's system. Internet users feel that, for the 60, 70, or 90 dollars they pay the ISP each month, they ought to be free to do as they like online.

In the proceeding below, the FCC agreed, and decided to bar such threats to our Internet freedom, as well as subtler, more nuanced ways of interfering with the open Internet. It did so based on the most voluminous record ever compiled in an

FCC proceeding. Millions of organizations, businesses, and individuals told the FCC that an open and free Internet is an essential platform for innovation, investment, competition, and democratic discourse. The agency found that this open platform is subject to very real threats from ISPs, which have the incentive and means to interfere with their customers' choices of content. It acted consistently with its historic recognition that, for consumers to benefit from competition and innovation in Internet edge services, those consumers must be able to access and use the services of their choice, even when buying Internet access from network operators who offer competing services. The FCC's *Order* will help preserve an Internet unfettered from interference from the gatekeeper power of the companies that provide consumers with access to it.

COUNTERSTATEMENT

Intervenors represent a diverse group of Internet stakeholders—public interest groups, consumer advocates and state regulatory commissioners, Internet content and transit providers, and competitive communications companies—that are bound together by a common interest in maintaining the Internet as an open forum. They are partners in the "virtuous circle" of Internet growth and innovation thanks to their access to the Internet's open platform. As they have in the past, Petitioners, largely representing the interests of gatekeepers, challenge the FCC's most recent attempt to protect this virtuous circle and the openness on which it

depends. Understanding the technological and historical context in which the *Order* arises helps explain why the challenges must fail.

1. *How the Internet Works*. The Internet is built to be an open, general-purpose network of networks that allows the transmission of information. As put by one of the Internet's pioneers: "By placing intelligence at the edges rather than control in the middle of the network, the Internet has created a platform for innovation."[1] This architecture echoes the definition of telecommunications in the Act: "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received." 47 U.S.C. § 153(50).

The basic unit of Internet communication is the "packet," which is much like an envelope containing a letter. As with a letter, the envelope contains information—information generated by a user and directed for delivery to a recipient. To reach the recipient, the packet must also contain routing information, akin to the address on an envelope. Transmission does not change the information within the envelope. An email or video created on a user's computer is divided

[1] Letter from Vint Cerf to Rep. Joe Barton and Rep. John Dingell (Nov. 8, 2005), http://googleblog.blogspot.com/2005/11/vint-cerf-speaks-out-on-net-neutrality.html; *see also* PETER HUBER, MICHAEL KELLOGG, & JOHN THORNE, FEDERAL TELECOMMUNICATIONS LAW, § 11.8.1 (2d ed. 1999) (describing cable modem's "promise . . . to originate and deliver data traffic encoded and addressed [for] the Internet," as "the purest form of 'common carriage' ever devised").

into multiple packets, given appropriate routing information, and sent through the Internet to a destination, where the packets are reassembled "without change in the form or content of the information as sent." 47 U.S.C. § 153(50).[2]

Ordinarily, the first step into the Internet is the connection between a computer, phone, tablet, or other Internet-connected device and the broadband access provider.[3] Each provider operates a network consisting of connections between its customers and its own computers. In order to offer its customers access to the broader Internet, the provider must "interconnect" its network with other networks, which, in turn, ultimately connect to every destination on the Internet. To perform its basic function as a pipeline for user-requested or generated information and services, providers' computers engage in a variety of operations that are largely invisible to the user. For example, providers' computers review the routing information on packets and determine the best network to which the packet should be delivered for transportation to the recipient. Providers may

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[2] *See generally* Rus Shuler, *How Does the Internet Work*, http://web.stanford.edu/class/msande91si/www-spr04/readings/week1/InternetWhitepaper.htm.

[3] Intervenors use the term "Broadband Internet Access Service" as it is defined by the FCC and use "broadband access" to refer more generally to the mix of services and functions that an ISP may perform, including Broadband Internet Access Service and any information services such as cloud storage and email. *See Protecting and Promoting the Open Internet*, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601, 5682-83 ¶¶ 187-88 (2015) ("*Order*") (JA__-_). The providers, either of Broadband Internet Access Service or of broadband access more generally, are sometimes referred to as ISPs.

also save copies of a frequently accessed web page (*e.g.*, the home page of the Washington Post) on their own servers, a process called "caching," *Order* ¶ 356 n.973 (JA___),[4] which localizes content near end users, thus making it faster for them to access their desired content. And they may run Domain Name System ("DNS") servers that translate the easier-to-remember text of an email or web address into the numerical Internet Protocol address (or "IP address") actually used for Internet routing (*e.g.*, translate "Google.com" to "216.58.208.36"). *Id.* ¶ 366 (JA___).

This architecture laid the groundwork for the development of increasingly sophisticated services delivered by third parties over the Internet.

2. *Early Internet Access and Regulation*. The FCC has never attempted to regulate the Internet, and the *Order* in this case does not do so either. *Id.* ¶ 382 (JA___). However, from the beginning, the user *pathway to* the Internet has been subject to regulation by the FCC in order to ensure fair and open access to this increasingly important pipe.

Early data communications used ordinary telephone lines and service, which the FCC has long treated as a common carrier offering subject to the requirements

[4] Caching is also done by content providers and independent content delivery networks ("CDNs") who interconnect with ISPs in order to cache content close to end users.

of Title II of the Communications Act. However, as carriers began to offer new services like voicemail that went beyond simple transmission of communications, it became necessary for the FCC to draw a line between the transmission services that were subject to more extensive regulation under Title II of the Communications Act, and "those computer services which depend on common carrier services in the transmission of information." *Amendment of Section 64.702 of the Commission's Rules and Regulations*, *Final Decision*, 77 F.C.C.2d 384, 417 ¶¶ 86 (1980), *aff'd sub nom. Computer & Commn'cs Indus. Ass'n v. FCC*, 693 F.3d 198 (D.C.Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) ("*Computer II*"). In its 1980 *Computer II Order*, the FCC declared that Title II applied to carriers' provision of "basic" service, "a pure transmission capability" including "analog or digital transmission of voice, data, video, etc." *Id.* ¶ 93. The fact that computers might be involved—for example, to apply "bandwidth compression techniques, circuit switching, message or packet switching, error control techniques, etc., that facilitate economical, reliable movement of information"—did "not alter the nature of the basic service." *Id.* ¶ 95. "[E]nhanced services," on the other hand, were defined as "any offering over the telecommunications network which is more than a basic transmission service," *id.* ¶ 97, 104, including voicemail, time-share services on a mainframe computer, and email, *id.* ¶ 97 & n.34.

In the *Computer Inquiries* decisions, the FCC regulated both the provision of basic services and the provision of enhanced services by the telephone companies based on the agency's fear that the telephone companies would favor their own enhanced service offerings over those of independent providers. Thus, under *Computer II*, the telephone companies were allowed to offer enhanced services only through an entity that was structurally separated from the one offering basic services. *Computer II* ¶ 99. In *Computer III*, the Commission required the companies to offer other enhanced service providers "comparably efficient interconnection" and "unbundle" key components of their basic services for them. *Amendment of Sections 64.702 of the Comm'n's Rules and Regs*., *Report and Order*, 104 F.C.C.2d 958, 1019-20 ¶¶ 112-13(1986) ("*Computer III*").

Early Internet access developed under this regime. Consumers accessed the Internet through dial-up modems connecting to ISPs such as America Online, Prodigy, and CompuServe, which did not control their own transmission facilities. *Order* ¶ 315 (JA___). Using the access guaranteed by *Computer II* and *III*, these ISPs offered Internet access to their subscribers over ordinary telephone lines provided by their subscribers' telephone carriers. Thus, without *Computer II* and *III*, the early development of the commercial Internet might never have happened.

Internet access in that era was dramatically different from common Internet use today. Early ISPs were themselves frequently the source of many of the

services and much of the information enjoyed by their users. ISPs offered their customers a portal that provided proprietary email, chatrooms, news, software downloads, and other content. While consumers could reach the relatively few other Internet sites, that function was largely secondary, due in part to the relative dearth of useful destinations on the broader Internet (commercial use of the Internet was not fully permitted until 1995). America Online's curated service was typical. An ad from the 1990s proclaimed: "On America Online, I get Compton's Encyclopedia, Barron's Book Notes, *even the entire Internet*."[5] Witness also the difficulty of even finding the Internet in this 2001 home screen[6]—it is the tiny globe on a tab near the upper middle:

[5] AOL Commercial – Homework, Youtube.com, https://www.youtube.com/watch?v=_SVXqvrFtOM (emphasis added).

[6] Joe Manna, Lessons Learned from AOL & Facebook on Unbundling, JOE MANNA BLOG (July 9, 2014), https://blog.joemanna.com/unbundling-aol-facebook/ (AOL Welcome Screen, circa 2001); *see also* Press Release, America Online Launches New Version – AOL 7.0, Time Warner (Oct. 16, 2001) (describing service), http://www.timewarner.com/newsroom/press-releases/2001/10/16/america-online-launches-new-version-aol-70.

Roadrunner and Excite@Home, two other popular ISPs at the time, similarly marketed access to the Internet as only one of the myriad services available.[7]

Over time, as Internet usage grew, so did the development of third-party Internet content and services, which attracted more users to the Internet. The

[7] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp. Transferee*, *Memorandum Opinion and Order*, 15 FCC Rcd. 9816, 9863 ¶ 107 (2000) ("AT&T and MediaOne each provide to households passed by their cable systems Internet services that combine (a) broadband transport through their cable systems and (b) Internet access and proprietary content through their affiliated ISPs.").

explosion in Internet content, along with the advent of innovative search engines that allowed users to find that content, made it less important that ISPs provide their customers an Internet portal populated with content. At the same time, "edge providers"—third parties providing ISPs' users with information and services over the Internet—began to create substitutes for some of the services previously provided primarily by the early ISPs. For example, the development of the World Wide Web and web browsers in the early-to-mid 1990s facilitated third-party email services by the end of that decade. *Order* ¶¶ 347-49 (JA___-__).

In the midst of this transition—a year after Microsoft debuted its Internet Explorer browser and a year before the launch of Yahoo! email—Congress enacted the Telecommunications Act of 1996. In the Act, Congress plainly recognized the importance of fostering the growth of the Internet. *See* Telecommunications Act of 1996, Pub. L. 104-104, § 706(a), 110 Stat. 153, codified at 47 U.S.C. § 1302(a). But Congress did not declare Internet access service off-limits to federal regulation, as it easily could have done. Instead, the Act delegated to the FCC responsibility for implementing a basic policy framework established by the statute. Congress defined telecommunications service and information service by "substantially incorporating [the] meaning" of the "Commission's traditional distinction between basic and enhanced services." *Nat'l Cable & Telecomms. Ass'n v. Brand X Servs*., 545 U.S. 997, 992 (2005).

3. *Advent of Broadband Access*. Within the half-decade after Congress enacted the 1996 Act, the Internet was transformed again by the increasing availability of broadband access.

Starting around the turn of this century, broadband access made feasible the deployment of a range of new services and technology, such as online sales and sharing of music and video, Internet telephony and videoconferencing, virtual private networks, and the "cloud." *Order* ¶¶ 347-48 (JA__-__). Although broadband access providers sometimes offered some of these new services themselves (such as cloud storage), most were created by third-party innovators (like Amazon Web Services and Dropbox).

In this new world, consumers perceive broadband "access" as a pipeline securing access to the Internet. *Id*. ¶ 350 (JA___).

4. *Mobile*. Like early desktop use, early mobile Internet access was largely an experience controlled by the Internet access provider (in the case of mobile, the wireless carrier). *Id*. ¶¶ 8, 345 (JA__,__). But with the advent of smartphones, like the iPhone introduced in 2007, mobile users gained the capacity to run ordinary web browsers on their wireless devices, thereby accessing the broader Internet. That was quickly followed by the development of apps for navigation, messaging, entertainment, and myriad other services, using the phone or tablet's mobile broadband connection.

While there are technical differences between mobile and fixed broadband access, mobile broadband users also now experience broadband simply as a pipeline to the Internet, albeit on a smaller screen. For example, to view a web page from a smartphone, users open a web browsing app and enter a web address or use a search engine to locate content.[8]

5. *Economic, Social, And Political Consequences*. Like the advent of the railroads in the 19th century and the spread of telephone service in the 20th, the explosion of services on the edge of the Internet has transformed the American economy and had profound consequences for the broader society and our democracy. Among its chief achievements has been allowing small businesses, local artists, and ordinary citizens to bypass institutional gatekeepers that previously controlled access to markets, information, audiences, and institutions of government.

[8] *See* Letter from Harold Feld et al., Public Knowledge, to Marlene Dortch, FCC, GN Docket No. 14-28, at 11-12 (Dec. 19, 2014) (explaining there is no longer a clear distinction between the mobile broadband services and the traditional public switched network services, especially from a consumer's perspective) (JA___); Letter from Michael Calabrese, Open Technology Institute, to Marlene Dortch, FCC, GN Docket No. 14-28, at 8-9 (Jan. 27, 2015) (JA___).

Edge providers and producers of smartphone apps have directly contributed billions of dollars and hundreds of thousands of jobs to the economy.[9] Often, these online businesses have provided direct, and much needed, competition to established companies, *e.g.*, Netflix, Vimeo, Slate, Tumblr, and Yelp for entertainment and information, or Amazon, Etsy, and Uber for commerce. At the same time, through crowdfunding sites like Kickstarter, the open Internet has allowed new and small business alternatives to traditional banks and investor networks that allocate much of the nation's capital investments.

Strengthened by the growth of broadband access, the Internet has also loosened the grip many traditional institutions have long held over public discourse and culture. With access to the open Internet, artists can now bypass established record labels and studios by posting their music, written work, and videos directly to iTunes, Tumblr, or Vimeo. Traditional news media now face competition to improve their reporting from online sources ranging from news sites like Slate.com to citizen reporting on thousands of blogs and other sources. And social networks

[9] *See*, *e.g.*, Tumblr, Inc., Comments, GN Docket No. 14-28, at 3, 5-7 (Sept. 9, 2014) (JA___); Meetup, Inc., Comments, GN Docket No. 14-28, at 3-6 (July 14, 2014) (JA___); Christina Voskoglou, *Sizing The App Economy*, DEVELOPER ECON. (July 17, 2013), http://www.developereconomics.com/report/sizing-the-app-economy/.

connect likeminded individuals both online (*e.g.*, through Facebook and Twitter) and in person (*e.g.*, through sites like Meetup.com).

While the open Internet has created and expanded communities generally, one of its most profound consequences has been the empowerment of individuals and small groups to actively participate in democratic governance in ways that were previously available only to those able to afford lobbyists and media campaigns. As one group of organizations told the FCC, the Internet "is our library, our printing press, our delivery truck and our town square."[10]

The spread of mobile broadband in particular has had an especially empowering effect on the most disenfranchised groups in America. Rural populations, the poor, and people of color—groups with the least access to the traditional (expensive) tools of political power—were also among the groups least likely to have access to the high-speed, wired broadband subscriptions that could help even the playing field.[11] But increasingly these groups *have* gained access to mobile broadband.[12]

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[10] Letter from Free Press et al. to Chairman Tom Wheeler, FCC, GN Docket No. 14-28, at 1 (Mar. 20, 2014) (JA___).

[11] Open Technology Institute at New America, Reply Comments, GN Docket No. 14-28, at vi, 23 (Sept. 15, 2014) (JA___).

[12] *Id*.

6. *Emergence of Threats to Internet Openness*. Providers of broadband access have experienced themselves disruptive competition to their legacy services from edge providers. Originally, the major non-facilities-based ISPs like America Online had little economic incentive to interfere with their customers' access to third-party websites and services. But much of broadband access today is provided by vertically integrated companies that, through cable and telephone packages, compete with some of the third-party edge services their broadband customers wish to use. *Order* ¶¶ 78-101 (JA__-__). Witness the threat from online video to Comcast's cable and on-demand television services, and from Voice over Internet Protocol ("VoIP") telephony and i-messaging to AT&T's and Verizon's traditional voice and very lucrative "SMS" text messaging services.

Over the past decade, despite the FCC's longstanding Open Internet Policy, broadband access providers have attempted in various ways to block, throttle, or otherwise impair their users' access to some Internet content, often because it competed with these providers' own services. *Id*. ¶ 79 & n.123 (JA__&__). Examples abound from the record. A mobile wireless provider blocked customers' access to competing mobile payment systems. *Preserving the Open Internet*, *Report and Order*, 25 FCC Rcd. 17905, 17925 ¶ 35 (2010) ("*2010 Order*"), *aff'd in part and vacated in part*, *Verizon v*. *FCC*, 740 F.3d 623 (D.C. Cir. 2014). A telephone company ISP was accused of blocking access to competing VoIP

applications. *Id*. An ISP secretly disrupted certain file sharing services used by its subscribers to distribute video (in potential competition with the ISP's own video offerings). *Id*.

Providers have also taken, or threatened to take, other actions that have the same effect on consumers as blocking or throttling. In an effort to demand access fees from backbone[13] or edge providers, certain ISPs have restricted the capacity of their networks at the point where those networks interconnect with the broader Internet. One such dispute in 2013-2014 led to drastic reductions in millions of Americans' access to Netflix and other content. *See, e.g.*, *Order* ¶¶ 30, 80 & n.128 (JA__,__&__).

SUMMARY OF ARGUMENT

The issue in this case is not whether Congress delegated to the FCC discretion to classify Broadband Internet Access Service as a telecommunications service—*i.e.*, the "transmission, between or among points specified by the user," of information chosen by the customer ("telecommunications"), offered to the public "for a fee" ("telecommunications service"). 47 U.S.C. § 153(50), (53). The Supreme Court established that discretion in *Brand X*. To evade that decision, Petitioners now say that *Brand X* was only about a thing they call the "last mile,"

[13] Backbone providers are entities, like Cogent or Level 3, that, among other things, provide a transmission path between edge providers and Broadband Internet Access Service providers.

and that the FCC has now erroneously included other, presumably "previous" miles, too, in its classification. But that last mile goes unmentioned in *Brand X*. This is a taxonomy used by Petitioners, not by the Supreme Court, for the expediency of winning here. In fact, none of them had previously contested the agency's authority to classify the transmission component of broadband access as a telecommunications service, and some had emphatically advocated it.

Rather, the question is whether the FCC exercised its classification discretion reasonably. This is the unusual Administrative Procedure Act ("APA") case where the agency followed a detailed roadmap charted by both the Supreme Court and this Court. In particular, this Court has already upheld the FCC's conclusions that open Internet rules foster broadband deployment and that a lack of an open Internet threatens not only investment in edge services but broadband access networks as well. *Verizon*, 740 F.3d at 649. It has also upheld the FCC's finding that "broadband providers' incentives and ability to restrict Internet traffic could produce '[w]idespread interference with the Internet's openness' in the absence of [FCC] action." *Verizon*, 740 F.3d at 649 (citing *2010 Order* ¶ 38). The *Verizon* court had remanded the previous open Internet rules on a single ground: they looked too much like common carrier rules, and the FCC had not classified ISPs as common carriers. *Id*. at 628. The FCC has done so now, curing that sole defect.

The remaining question is simple: whether the FCC reasonably found that Broadband Internet Access Service is separable from any information service that ISPs make available when they sell broadband. The answer is yes.

The Petitioners remarkably claim that they lacked adequate notice of the Title II classification. The FCC was so successful in publicizing the possibility of that classification, for fixed and mobile services alike, that it attracted nearly four million comments (including substantial comments from Petitioners themselves, on both fixed and mobile broadband questions) and became fodder for cartoons and talk shows, leaving a claim of ignorance open perhaps to hermits, but not to Petitioners.

Only two of the Petitioners attempt a First Amendment challenge, and they lack standing. It seems obvious why the others have abstained. The rules safeguard the freedom of speech of Internet users, and they do not implicate any speech interest for the providers of the pipe that accesses the Internet.

ARGUMENT

I. THE FCC'S AUTHORITY TO CLASSIFY BROADBAND INTERNET ACCESS SERVICE AS A TELECOMMUNICATIONS SERVICE IS WELL ESTABLISHED AND HAS BEEN ACKNOWLEDGED BY PETITIONERS

The first sentence of Petitioners' brief does not portend well for the rest, as it is replete with inaccuracies: "In the *Order*, the FCC claims for itself unprecedented authority to regulate the Internet—authority that Congress expressly

withheld and that the FCC for decades had rightly disclaimed." USTelecom Br. at 2. The FCC has not claimed authority to regulate the Internet. *Order* ¶ 382 (JA___). And what authority the agency has claimed is not withheld, unprecedented, or previously disclaimed. This is the first time anyone has seriously argued that the FCC lacks the authority to classify Broadband Internet Access Service—the transmission component of the service offered by ISPs—as a telecommunications service. Indeed, the Supreme Court and Petitioners themselves have consistently recognized that authority.

A. *Brand X* Supports The Agency's Actions Below

1. *Chevron* Step 1

Petitioners rely principally on the contention that the plain meaning of the Communications Act precludes the FCC's classification of Broadband Internet Access Service as a telecommunications service. *See*, *e.g.*, USTelecom Br. at 23 (referencing Step 1 of the *Chevron* analysis); *id*. at 33 (discussing the "plain meaning of the statutory text"). They can point to no words in the statutory text expressing such a preclusion. And they do not even attempt to deny that Broadband Internet Access Service, as defined by the *Order*, meets the definition of a telecommunications service. Nor could they, as it plainly provides "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and

received" ("telecommunications"), offered to the public for a fee ("telecommunications service"). 47 U.S.C. § 153(50), (53); *Order* ¶ 355 (JA___). Conveniently disregarding this precise correspondence between the service and these two definitions, Petitioners claim that Broadband Internet Access Service cannot be classified under Title II because it meets the definition of an "information service." USTelecom Br. at 30.

But the argument that Congress unambiguously directed the proper classification of Broadband Internet Access Service has already been rejected by no less an authority than the Supreme Court. In *Brand X*, the agency had concluded that cable modem services should not be classified under Title II. Although that service included a telecommunications component, the FCC found that consumers perceived the transmission component as "part and parcel" of a broader integrated offering that included information services, such as email and DNS. *Brand X*, 545 U.S. at 988 (internal citations omitted). In evaluating the agency's interpretation under *Chevron* Step 1, the Supreme Court concluded that the term "offer" was ambiguous and that the statute did not compel the FCC to classify the offering of Broadband Internet Access Service as either a "telecommunications service" or an "information service." *Id*. at 992.

Brand X is thus the beginning and end of the *Chevron* Step 1 analysis. As this Court recently held, the Supreme Court's prior finding that a statutory

provision was ambiguous under *Chevron* Step 1 is binding in subsequent proceedings in which the same or similar provision is at issue. *See Home Care Assoc. v. Weil*, No. 15-5018, 2015 WL 4978980 (D.C. Cir. Aug. 21, 2015).

That holding, moreover, is incompatible with Petitioners' claim that, even stripping aside additional services like email and DNS, simply offering a transmission pathway to the Internet unambiguously qualifies as an "information service," because it offers the "capability to obtain and manipulate the information stored on the millions of interconnected computers that comprise the Internet." USTelecom Br. at 30. Had the Court accepted that proposition in *Brand X*, there would have been no need to decide whether email, DNS, and other bundled information services were severable from bare transmission service because that transmission service would, itself, constitute an information service. Moreover, by definition, an information service is a service provided "via telecommunications." 47 U.S.C. § 153(24). Telecommunications itself cannot be an information service, even if it is possible to say that the pure transmission pathway provides a means of acquiring information. Otherwise, a basic telephone line—the quintessential telecommunications service—would constitute an information service because it offers the capability for acquiring information over the Internet when used with a modem.

2. *Chevron* Step 2

Having found the statute ambiguous, the Court in *Brand X* turned to the agency's classification of cable modem service as an information service on the grounds that it was an "inextricably intertwined" mix of telecommunications and information services, *Brand X*, 545 U.S. at 968, and thus there was no "offering" of a separate telecommunications service, *see id*. at 969 ("The integrated character of this offering led the Commission to conclude that cable companies do not make a stand-alone, transparent offering of telecommunications."). The Court deferred to the agency's interpretation of the statute, the then-current facts considered by the FCC, and the policy reasons advanced by the FCC. *See id*. at 997 (finding the FCC's "construction was 'a reasonable policy choice for [it] to make' at *Chevron*'s second step.") (citations omitted). In doing so, the Court expected the FCC's determination to reflect its "expert judgment" on the "technical" and "complex" nature of the questions. *Id*. at 1003.

With three Justices dissenting, the Court decided that the FCC's view on "inextricably intertwined" made sense, if "perhaps just barely," as one concurring Justice explained. *Id*. at 1003 (Breyer, J., concurring). Petitioners try to parlay this bare tolerance into compulsion. Where the Court told the agency "you may," Petitioners recast this as "you must." They attempt this leap by two devices, neither of which makes it any less acrobatic. First, they say: "[n]o Justice in that

case doubted that services offering consumers the ability to access the Internet are 'information services.'" USTelecom Br. at 41. In fact, all the Justices doubted it, as they all believed that broadband providers offered a mix of services, and no Justice doubted that telecommunications was in the mix. *See Brand X*, 525 U.S. at 988 ("cable companies use 'telecommunications' to provide consumers with Internet service"); *id*. *at* 997 (describing the FCC's classification of a cable modem service as involving "a telecommunications input used to provide an information service that is not 'separable from the data-processing capabilities of the service'"); *id*. at 1003 (Stevens, J., concurring without caveat to the majority's description of a cable modem service); *id*. at 1003 (Breyer, J. concurring) (same); *id*. at 1005 (Scalia, J., Souter, J. and Ginsburg, J., dissenting) ("Despite the Court's mighty labors to prove otherwise, . . . the telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as being on offer . . . .").

Second, Petitioners pivot to an attempt to limit *Brand X*. They claim it was all about something that is not mentioned in the opinion at all: the last mile. Relying on a single phrase in the dissent, they argue that the only telecommunications component of cable modem service that the Court recognized was "the broadband connection between the customer's computer and the cable company's computer-processing facilities." *Id*. at 1010 (Scalia, J., dissenting);

USTelecom Br. at 14-15. According to them, that phrase means the FCC can classify only the last mile as a telecommunications service. Petitioners then contend that the FCC did more below. It classified a longer path, "all the way to edge providers," USTelecom Br. at 44, as a telecommunications service, without classifying anything as an information service. Both prongs of this argument are wrong. *Brand X* was about a service no shorter than the one considered by the agency below, and the FCC did no more than reclassify that service.

The *Brand X* Court never said that the transmission component of the broadband access provided by an ISP ends at some point close to the customer's computer, and that all contributions of the ISP beyond this last mile were an information service. First of all, the question of the existence of any such point never arose. If it had, then the Court would and should have deferred to the agency's expertise. Just as important, what the Court did say contradicts Petitioners' last-mile limitation.

To start with Justice Scalia's phrase, "the broadband connection between the customer's computer and the cable company's computer-processing facilities" appears to refer to all of the company's computer-processing facilities, not only the ones closest to the user. Internet traffic comes into the ISP's system, and leaves that system, at an ISP computer-processing facility.

The *Brand X* majority, too, understood the service as the path in its entirety, not only the last mile, describing the offering of broadband access providers as a "wire . . . used to access the World Wide Web, newsgroups, and so forth." 545 U.S. at 988. The majority further spoke of the transmission "between the Internet and users' computers." *Id*. at 976. This means the whole path that a communication traverses on the ISP's network, not some portion. How could it not? The Internet is designed specifically to ensure that packets of data sent to and from a consumer's computer make it all the way to their intended destination without alteration.

B. Petitioners Themselves Have Always Acknowledged The FCC's Discretion

Petitioners' position here is at odds with their own positions on the topic for the last 20 years. Let us first look at what Petitioners did not say. When the FCC ruled in 2002 that the data transmission component of broadband access was inextricably intertwined with the information service component, not one Petitioner claimed that the finding rested on a false premise because there was no telecommunications component in the first place. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd. 4798, 4821-23 ¶¶ 35-38 (2002) ("*Cable Modem Order*"). To the contrary, Petitioner NCTA defended the FCC's conclusions in their entirety, all the way to the Supreme Court. Brief for Cable-

Industry Pet'rs at 7, 10, *Brand X*, 545 U.S. 967 (Nos. 04-277, 04-281) (supporting the FCC's conclusion that "by definition an information service includes a telecommunications component"); Reply Brief for Cable-Industry Pet'rs at 20, *id*. (same). And when the agency classified DSL and wireless broadband Internet access as information services, Petitioners AT&T and NCTA argued that such classification was within the FCC's authority, not that the agency was compelled by statute.[14]

Even more damning is what Petitioners did say. Some of them argued emphatically that the FCC has the discretion to classify Broadband Internet Access Service as either an information service or a telecommunications service and to change that classification. Here is what USTelecom member Verizon said to the Supreme Court in *Brand X*:

> Congress *did not* dictate which services fall within each category, but rather "intended that the [FCC] would have continued flexibility to modify its definition and rules pertaining to enhanced services as technology changes."

Reply Brief of Respondents at 11, *Brand X*, 545 U.S. 967 (Nos. 04-277 & 04-281) (quoting H.R. REP. 104-458, at 115 (1996) (Conf. Rep.)) (emphasis in original).

[14] *See, e.g.*, AT&T Services, Inc., Reply Comments, GN Docket No. 14-28, at 27-30 (Sept. 15, 2014) (JA___); NCTA, Comments, GN Docket No. 14-28, at 2 (July 15, 2014) (JA___).

CenturyLink's predecessor, Qwest, and Verizon previously went even further. They argued that the FCC not only has discretion, but should use it to classify Broadband Internet Access Service as a telecommunications service. *See* Qwest Communications International Inc., Comments, GN Docket No. 00-185, at ii, 1-7 (Dec. 1, 2000); Verizon Communications, Comments, GN Docket No. 00-185, at 18-21 (Dec. 1, 2000) ("Because the Act automatically regulates cable operators offering broadband access as common carriers, the Commission cannot . . . continue its current policy of inaction"); *see also* Brief for Appellant at 23, *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Serv., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003) (Nos. 03-7015 & 03-7053) (noting that DSL providers "perform[] a pure transmission or 'conduit' function . . . analogous to the role played by common carriers in transmitting information selected and controlled by others."); *see id.* at 1233 (indicating that Verizon "act[s] only as a conduit for data transferred between" others).

In the past, including during two prior rounds before this Court, Petitioners advocated emphatically that the FCC cannot regulate broadband access at all without finding that the service is a telecommunications service. *See, e.g.*, Joint Brief for Verizon and MetroPCS at 15, *Verizon v. FCC*, 740 F.3d 623 (2014) (No. 11-1355) ("The Commission has classified wireline and wireless Broadband Internet Access Services as 'information services.' . . . Accordingly, the

Commission may not regulate broadband providers as common carriers."); *see also Verizon v. FCC*, 740 F.3d. 623, 650 (D.C. Cir. 2014). Before, they essentially said: you cannot regulate us because you have not classified Broadband Internet Access Service as a telecommunications service. Now, they say: all of those years of litigation, and all of the analysis that went into the *Verizon* decision, were for naught. The rules may not be imposed, period, whether or not the FCC has classified us as common carriers. They are wrong.

II. THE FCC'S RECLASSIFICATION OF BROADBAND INTERNET ACCESS SERVICES WAS NEITHER ARBITRARY NOR CAPRICIOUS

This is an unusual case because much of what the agency has done has already been under the APA microscope. This Court has already reviewed and approved the reasonableness of most of the agency's factual findings in *Verizon*. Petitioners remain undaunted in second-guessing these findings. They say that, "apart from a handful of stale anecdotes, . . . the *Order* relies entirely on hypothetical claims that broadband providers have 'incentives' to engage, or 'may' engage, in conduct that has the 'potential' to, or 'could,' cause harm to 'innovation.'" USTelecom Br. at 54 (internal citations omitted). What they view as stale was described by the Petitioner in *Verizon* as commercial arrangements that, "'but for [the *Open Internet Order*] rules, we would be exploring.'" *Verizon*, 740 F.3d at 645. And what Petitioners claim as hypothetical was affirmed by the

Verizon Court as "at the very least, speculation based firmly in common sense and economic reality," *id*. at 646, and was not doubted by the Court based on the record of the first Open Internet proceeding, *see id*. at 645 ("[N]othing in the record gives us any reason to doubt the FCC's determination that broadband providers may be motivated to discriminate against edge providers.").

As for Petitioners' position that "reclassification will undermine" investments in broadband infrastructure, it is not only "contrary to [the FCC's] suggestions," as they claim. USTelecom Br. at 54. It is also contrary to this Court's decision to uphold the FCC in finding that open Internet rules will "preserve and facilitate the 'virtuous circle' of innovation that has driven the explosive growth of the Internet." *Verizon*, 740 F.3d at 628. Petitioners do not point to anything in the record of the new open Internet proceeding to justify this re-litigation of *Verizon*. *See infra* II.E.

The principal remaining issue in this case is narrow: whether the FCC was reasonable in finding that Broadband Internet Access Service is a telecommunications service severable from the information service bells and whistles. The attack leveled by Petitioners relies on a crucial distortion—that the FCC indiscriminately threw everything ISPs do in the telecommunications service bucket. But the FCC never ruled that broadband access providers provide "only pure transmission," or that broadband access is "only a telecommunications

service," as Petitioners claim. USTelecom Br. at 31, 43. As the *Order* explains, "[a]lthough broadband providers in many cases provide broadband Internet access service along with information services, such as email and online storage, we find that broadband Internet access service is today sufficiently independent of these information services that it is a separate 'offering.'" *Order* ¶ 356 (JA___).

The expert agency's conclusion on the independence of transmission from information deserves deference. It is moreover consistent with the intuitive experience many of us have every day: access to the Internet is separate from what we do when we get there.

A. The FCC's Reclassification Decision Deserves Deference

The FCC's ultimate factual finding was simple and intuitive, but the analysis validating those findings was complex and informed by agency expertise. To reach its conclusion, the FCC undertook a complicated factual inquiry—both into the technical nature of the service being provided, and more importantly, into how consumers perceive that service. As the Supreme Court noted in *Brand X*, "the FCC has candidly recognized" the difficulty in determining "'whether, on the one hand, an entity is providing a single information service with communications and computing components, or, on the other hand, is providing two distinct services, one of which is a telecommunications service.'" *Brand X*, 545 U.S. at 991 (quoting *Stevens Report* at 11530 ¶ 60).

This is precisely the kind of determination that Congress intended to be made by the experts at the FCC, rather than by the courts. *See Blue Ridge Envtl. Def. League v. Nuclear Regulatory Comm'n*, 716 F.3d 183, 195 (D.C. Cir. 2013) ("To the extent that [the agency's] technical judgments and predictions are before the court for our review, we 'must generally be at [our] most deferential.'") (citation omitted); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

B. The FCC's Unchallenged Finding On Consumer Perception Is Sufficient To Support Its Decision

Petitioners try to drag this Court into the weeds of the FCC's technical analysis. But they effectively fail to challenge the FCC's crucial finding on consumer perception—that consumers today view and use broadband access primarily as a "conduit" for obtaining information of their choosing without change in form or content—not as a means of obtaining email services, web-hosting, or online storage from the ISP. *Order* ¶ 350 (JA___). That finding is neither dramatic nor controversial. It is common sense.

Petitioners quibble with the FCC over whether and how much consumers' views on broadband access have changed over the last decade, arguing that the facts relied on by the FCC are not "development[s]" and "nothing new." USTelecom Br. at 49. The first objection to this historical debate over the extent of change is one of irrelevance. The question is what consumers think now, not

how much their thinking has changed over time. The FCC has long viewed classification decisions as a matter of how consumers view the service at the time of its evaluation, *see, e.g.*, *Cable Modem Order* ¶¶ 30, 36, 38, and the Supreme Court validated that policy in *Brand X*, 545 U.S. at 969-70.

But second, even if the extent of change did matter, Petitioners are wrong. Before "web searches" became the principal method for finding content, consumers had frequently come to rely on "portals"—the ISP's "homepage" or "first screen"—to aggregate content and services for them. *Order* ¶ 343 (citing *Cable Modem Order* ¶ 18) (JA___). When the FCC originally classified cable modem services as an integrated information service, many consumers still viewed the offering as a consolidated package of content closely coupled with its means of transmission. Today, consumers almost universally view broadband access services as providing the conduit for them to retrieve the information of their choice. *Id*. ¶ 350 (JA___). The FCC's view of consumer behavior is also buttressed by the ISPs' own marketing practices, which focus almost exclusively on the speed at which they transmit data, not the superiority of their own websites or email services. *Id*. ¶ 330 (JA___).

In any event, the fact that earlier dial-up era ISPs had allowed access to third-party services beyond their walled gardens does not change the fact that they typically focused on the landscape inside the walls. The FCC is entrusted with

authority in this area precisely because it has the expertise to determine when changes in degree warrant a change in regulatory treatment.

C. The FCC Reasonably Concluded That DNS And Caching Do Not Change The Nature Of The Transmission

Focusing on consumer perception facilitates the categorization of a broadband access provider's functions into the appropriate regulatory bucket. Email and data storage fall neatly into the information service category; a broadband access provider's transportation of data from a third-party email or data storage service falls equally neatly into the telecommunications category. *Id*. ¶¶ 337, 340 (JA___,___). DNS, caching, and cyber-security related functions are not perceived by the typical consumer as an important part of what they purchase. Those functions simply help the ISP manage, control, or operate its network, and thus fall within the network management exception. 47 U.S.C. § 153(24).

With respect to DNS, the FCC reasonably concluded that Justice Scalia's view of it was correct in 2002, and remains equally correct today: "DNS 'is scarcely more than *routing* information, which is expressly excluded from the definition of "information service" by the telecommunications systems management exception set out in the last clause of section 3(24) of the Act.'" *Order* ¶ 366 (citing *Brand X*, 545 U.S. at 1012-13) (Scalia, J., dissenting) (JA___). The majority in *Brand X* did not disagree with Justice Scalia as to what DNS is—routing. It disagreed only with Justice Scalia's view about the legal implications of

that characterization. And crucially, the majority expressly "took no view" on whether such routing would qualify as a system management function if the FCC had concluded that cable modem services contained a severable telecommunications service. *See Brand X*, 545 U.S. at 999 n.3. Agreeing with three Supreme Court Justices on a matter expressly not reached by the majority does not suggest unreasoned decision-making.

As for caching, the FCC reasonably concluded that it is a "separate information service[]" when provided by third-party content delivery networks, but a telecommunications management function when provided by a broadband access provider. *Order* ¶ 372 (JA___). In the latter case, the broadband access provider offers the same transmission service when it caches as when it does not; with caching, that provider simply retains a locally stored copy of the information sought by the end user, obviating the need to reach an edge provider's server.

In any event, the availability of stand-alone DNS and caching from third parties, far from helping the Petitioners, as they claim, in fact hurts their case. Third-party performance of these functions shows that they are separable from the transmission service, just like email accounts, homepages, and free anti-virus software.[15]

[15] Petitioner USTelecom absurdly faults the FCC for not making individualized determinations that each and every provider of Broadband Internet Access Service

D. The FCC's Change In Position Was Not Arbitrary Or Capricious

That the FCC previously reached a different conclusion is no basis for reversal. As this Court recently explained, "there is no requirement that the agency's change in policy clear any heightened standard," but only that it "rest on a reasoned explanation," including an "awareness that it is changing position," and "good reasons for the new policy." *Home Care*, 2015 WL 4978980 at *10 (citation and internal quotations omitted). Here, the FCC acknowledged that it was "revisiting" its prior classifications. *Order* ¶ 308 (JA___); *see also id*. ¶¶ 355-360, 397 (JA__-__,__). And it has articulated a rationale that was not only reasoned, but compelling.

As discussed above, the FCC was right to conclude that the massive changes in the manner and degree to which Broadband Internet Access Service is used to access third-party content and services has amounted to a change *in kind* in the overall consumer perception of the offer. *Order* ¶ 347-50 (JA__-__).

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in the country holds itself out as a common carrier. USTelecom Br. at 74-75. But the FCC was right to recognize that Broadband Internet Access Service is a mass-market retail service and to define the service in this manner. If a broadband access provider were to decide to offer a bespoke service tailored to each of its customers, nothing would stop the FCC from assessing its common carrier nature under the two standards of *NARUC I*: whether that provider "undertakes to carry for all people indifferently," but also whether there should be a "legal compulsion" requiring such a service to be offered to the public as a policy matter. *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC* (*NARUC I*), 525 F.2d 630, 641-42 (D.C. Cir. 1976) (citations omitted).

In addition, the *Cable Modem Order* was premised in significant part on a policy judgment that classifying cable modem service under Title I would best serve the Act's goals of encouraging growth in deployment. *Cable Modem Order* ¶ 4. In making that judgment, the FCC considered the fact that the "technologies and business models" used to provide cable Broadband Internet Access Service were at the time "still evolving." *Id*. ¶ 32; *see also id*. ¶ 83 (noting that "the cable modem service business is still nascent, and the shape of broadband deployment is not yet clear"). In addition, edge services were then at an embryonic stage. This meant that there could be no observable virtuous circle between edge investment and broadband deployment. *Order* ¶ 76 n.116 (JA___). It also meant that the incentive and ability of broadband ISPs to harm edge providers was less apparent and less important than they have become. *Id*. ¶¶ 82, 85 (JA___).[16]

This policy calculus, too, has changed. *See Order* ¶¶ 341-54 (JA__-__). Today, the broadband access industry is far more established, edge services have blossomed and continue to proliferate, and the FCC has amassed a substantial body of experience on which to draw in designing a carefully calibrated regulatory system that is a win-win for edge and infrastructure investment. There are also

[16] Of course, the *Cable Modem Order* was also premised on the expectation that the FCC could regulate broadband access providers under Title I. *See Brand X*, 545 U.S. at 996 ("[T]he Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction.").

new threats to that virtuous circle, driven in part by advancements in technologies, such as deep packet inspection, that make interference with Internet openness more feasible. *Id*. ¶ 85 (JA___).

Petitioners disagree about the significance of these factual changes, suggesting that the *only* thing that has changed is the agency's policy judgments. USTelecom Br. at 50. But even if that were true, it would not render the decision arbitrary or capricious. *See Brand X*, 545 U.S. at 981 (noting that an agency "must consider . . . the wisdom of its policy on a continuing basis" and may change its position "in response to changed factual circumstances, *or* a change in administrations") (emphasis added); *Nat'l Ass'n of Home Builders v*. *EPA*, 682 F.3d 1032, 1038 (D.C. Cir. 2012) (agency may change position based on changed policy views even absent any factual change).

Finally, the change in position is independently justifiable because, as explained, it brings the FCC's position in line with what has always been the best interpretation of the statute and the most reasonable application of its requirements to Broadband Internet Access Service. *See supra* II.B. It would be a perverse result if the APA were construed to impede an agency's efforts to correct or improve its application of federal law to such an important segment of our economy and society.

E. Petitioners' Claims of Reliance Are Unfounded

The vagueness of Petitioners' reliance claim is telling. USTelecom Br. at 51. Although they insist that their investments in broadband infrastructure were "made in reliance on the FCC's classification of broadband as an information service," *id*. (internal quotation marks omitted), they make no attempt to identify what they were planning on doing as Title I providers that they are now prohibited from doing as common carriers under Title II.[17] Indeed, some Petitioners even *urged* the FCC to adopt general conduct standards, albeit under other authority.[18]

As the FCC has explained, the record contains no evidence to support Petitioners' vague claims of investment deterrence and infringement on reliance interests. *Order* ¶¶ 409-25 (JA__-__); FCC Br. at 85-88. In fact, the bulk of the broadband access industry's capital investments in broadband networks occurred during periods in which the legal status of broadband was either uncertain, or was subject to Title II.[19]

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[17] While Verizon suggested on its last trip to this Court that it would *consider* imposing paid prioritization costs on edge providers if the *2010 Order* were overturned, it never asserted that it had made any investments in reliance on its ability to do so. *See Order* ¶ 127 (JA___).

[18] *See infra* note 31.

[19] *See* Free Press, Comments, GN Docket No. 14-28, at 98-112 (July 17, 2014) (JA___).

For example, even after the FCC declared DSL a Title II service in 1998, investment by the Bell Companies offering DSL services continued to rise dramatically until the general economic downturn following the attacks of September 11, 2001.[20] Likewise, for the cable industry, annual network investments "were *250 percent higher* in the years before the FCC declared cable modem was not subject to Title II than it has been in the subsequent years."[21]

The three months during which the open Internet rules have been effective provide no signs of the toppling of any ISP reliance expectations. ISPs have continued to raise funds and to contract multi-billion dollar mergers.[22] Within a month after the *Order*'s announcement, AT&T and Time Warner Cable announced

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[20] *Id*. at 100-101 (JA___).

[21] *Id*. at 104 (JA___). Indeed, in the 21 months between the Ninth Circuit holding that cable Broadband Internet Access Service contained a Title II common carrier service and the Commission's contrary decision in the Cable Modem Declaratory Ruling, the cable industry invested 30 percent *more* than it invested in the 21 months *after* Title II restrictions had been lifted. *Id*.

[22] The proposed merger of Charter with Time Warner Cable and the just announced proposed acquisition of Cablevision by Altice are two examples. *See* Press Release, Charter Communications to Merge with Time Warner Cable and Acquire Bright House Networks, Time Warner Cable (May 26, 2015), http://ir.timewarnercable.com/investor-relations/investor-news/financial-release-details/2015/Charter-Communications-to-Merge-with-Time-Warner-Cable-and-Acquire-Bright-House-Networks/default.aspx; Press Release, Altice Acquires Cablevision and Creates the #4 Cable Operator in the US Market, Altice (Sept. 17, 2015), http://altice.net/wp-content/uploads/2015/09/20150917-ALT-Cablevision-Acquisition.pdf.

plans for significant network upgrades.[23] Their stock has not plummeted in value.[24] Business as usual, some prominent CEOs of Petitioners have said, similarly shrugging off any effect of the rules.[25] As recently as September 17, 2015, when asked about reclassification's effects on Verizon's business, the company's CEO gave a laconic answer: "to date none."[26] While Verizon's CEO expressed uncertainty about the future use of the FCC's regulatory "tools," he also said: "[w]hat they have put in place in and of itself the way they are talking about implementing it today doesn't have much impact on us."[27] He added that Verizon has "invested $17 billion to $18 billion over the last decade and we are going to continue to do that now."[28] In fact, it seems that the primary benefit of reversal for some large Petitioners and Petitioners' members is to be able to offer adherence to open Internet rules as a condition to merger approval. This is evidenced by the

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[23] *See* Opp'n of Intervenors to Petr's Mot. for Stay at 6 & n.2.

[24] *See id*., Zarakas Decl. ¶¶ 5, 9-10.

[25] *See*, *e.g*., Comcast Corp., Q1 2015 Earnings Call Transcript at 16 (May 4, 2015) (Comcast Cable CEO Neil Smit stating that "[o]n Title II, it really hasn't affected the way we have been doing our business or will do our business."); Shalini Ramachandran & Michael Calia, *Cablevision CEO Plays Down Business Effect of FCC Proposal*, WALL STREET J., Feb. 25, 2015.

[26] *See* Remarks of Lowell McAdam, Chairman and CEO, Verizon Comm'ns, Inc., Goldman Sachs Communacopia Conference at 13-14 (Sept. 17, 2015).

[27] *Id*. at 14.

[28] *Id*. at 2.

recent merger applications filed by four Petitioners (or Petitioners' members).[29] The reality is that Petitioners' investment decisions have been driven principally by the prospect of generating profits from the sale of Broadband Internet Access Service to customers, a business model left undisturbed by the FCC's *Order*.

Petitioners suggest that reclassification opens the door to other kinds of rules such as rate regulation and tariffs. *See, e.g.*, USTelecom Br. at 52 n.22 (citing NCTA Comments 19). But the FCC has broadly forborne from the vast majority of Title II's requirements, including rate regulation. *Order* ¶¶ 434-543 (JA___). It will not be easy for the FCC to go back on that promise. *See* 47 U.S.C. § 160(a) (requiring forbearance when in the public interest); *id*. § 1302(a) (requiring FCC forbearance to encourage broadband deployment); *Verizon and AT&T, Inc. v. FCC*, 770 F.3d 961, 966 (D.C. Cir. 2014) (refusal to forbear subject to judicial

[29] Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement, MB Docket No. 14-57, at 3, 6-7 (filed Apr. 8, 2014); Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, Description of Transaction, Public Interest Showing, and Related Demonstrations, MB Docket No. 14-90, at 8, 51 (filed June 11, 2014); Application of Charter Commc'ns, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations, Public Interest Statement, MB Docket No. 15-149, at 3 (filed June 25, 2015).

review). Nor has "European . . . public-utility-style regulation"[30] been imposed in a myriad other similar contexts that have been subject to Title II regulation for years, including mobile voice, enterprise broadband, DSL prior to 2005, and DSL provided today by over 1,000 rural local exchange carriers. *Order* ¶ 39, 422 (JA___).

Likewise, to the extent Petitioners anticipate unreasonable application of the general conduct rule in the future, that speculation is premature and without foundation. They can seek advisory opinions from the FCC in uncertain cases, and will have ample opportunity to appeal any adverse ruling under the general conduct standard, should it come to pass. Moreover, Petitioners' attacks on the vagueness of a general conduct standard subject to case-by-case elaboration rings hollow, given that many Petitioners or their members previously advocated a case-by-case regulatory approach under other sources of authority.[31]

In contrast to Petitioners' contrived claims of reliance, the record is replete with evidence of the substantial investments edge providers and the broader public

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[30] National Cable & Telecommunications Association, Comments, GN Docket No. 14-28, at 20 (July 15, 2014) (JA___).

[31] *See, e.g.*, Verizon and Verizon Wireless, Comments, GN Docket No. 14-28, at 30 (July 15, 2014) (supporting "flexible" rule on discrimination applied through a "case-by-case (or rule of reason) approach") (JA___); CenturyLink, Comments, GN Docket No. 14-28, at 36 (July 17, 2014) (supporting an ex post process for reviewing practices "on a case-by-case basis") (JA___).

have made in reliance upon the continued existence of an open Internet. Edge providers have invested *billions* in businesses that can only exist if they are able to provide content on an unimpeded basis to broadband access customers.[32] Although their business plans take into account the costs of delivering that content to their customers' broadband access networks (*e.g.*, through transit or other arrangements), they have not factored in additional tolls broadband access providers could charge simply for *access*, or the administrative cost of negotiating access with any number of broadband access providers.[33] At the same time, countless non-profit organizations have developed in dependence on an open Internet to perform critical parts of their missions.

F. FCC Oversight Over Broadband Internet Access Service Interconnection Practices Is Proper And Necessary To Protect An Open Internet

Interconnection with other networks (or traffic exchange) is the means by which ISPs offer access to content and applications beyond their own networks. When a consumer uses her broadband connection to request data in the form of a

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[32] *See*, *e.g.*, Letter from Althea Erickson, Etsy, Inc., to Marlene Dortch, FCC, GN Docket No. 14-28 (May 8, 2014) (JA___); Tumblr, Inc., Comments, GN Docket No. 14-28, at 3, 5-7 (Sept. 9, 2014) (JA___); Meetup, Inc., Comments, GN Docket No. 14-28, at 3-6 (July 14, 2014) (JA___).

[33] *See*, *e.g.*, Letter from Althea Erickson, Etsy, Inc., to Marlene Dortch, FCC, GN Docket No. 14-28, at 2 (May 8, 2014) (JA___); Tumblr, Inc., Comments, GN Docket No. 14-28, at 3, 5-7 (Sept. 9, 2014) (JA___); Contextly, Comments, GN Docket No. 14-28, at ii, 4 (June 3, 2014) (JA___).

webpage, audio or video file, interconnection is the "door" through which the data enter the Broadband Internet Access Service provider's network for ultimate delivery to that consumer. The ISP controls whether, how, and to which Internet services that door is opened. The ISP can degrade an application by failing to open the door wide enough to accommodate the data requested by the end user.[34] It can block an application by refusing to open the door at all. In other words, interconnection is the "gate" at which ISPs can and have exercised the type of "gatekeeper power" that this court recognized in *Verizon*, and that the FCC's open Internet policies have sought to prevent.[35]

During the open Internet proceeding, companies, and consumer groups, including several Intervenors, submitted evidence showing that large ISPs were degrading consumer access to Netflix. The root of the degradation was the ISPs' refusal to provide the requisite interconnection capacity to enable end users to use

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[34] Quite literally, as Verizon put it in a recent commercial, a "better network" (Verizon's wireless network) requires a larger "door" into it. *See* Verizon TV Commercial, 'A Better Network as Explained by a Door,' iSpot.tv, http://www.ispot.tv/ad/AkON/verizon-a-better-network-as-explained-by-a-door.

[35] Indeed, Internet engineers refer to these connections as "ports," from the Latin "porta," meaning gate. *See* Port – Definition 2(5), Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/port ("a hardware interface by which a computer is connected to another device (as a printer, a mouse, or another computer)"); *id*. Port – Definition 2, Origin of Port (from Latin *porta* passage, gate; akin to Latin *portus* port) (emphasis in original).

their broadband connections to watch movies and TV shows online.[36] Not only were these users unable to receive requested data at the speeds they purchased; in some cases, the data flow into the broadband access network was so degraded as to render the Netflix application unusable.[37]

Without interconnection, there is no Internet access. And without reasonable interconnection practices, there is degraded Internet access. Confronted with this evidence, the FCC reasonably adopted a complaint process to ensure that Broadband Internet Access Service provider interconnection practices could not have the purpose or effect of circumventing its open Internet rules.[38] Doing

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[36] *See*, *e.g.*, Netflix, Inc., Reply Comments, GN Docket No. 14-28, at 5-9 (Sept. 15, 2014) (JA___); Netflix, Inc., Comments, GN Docket No. 14-28, at 10-16 (July 15, 2014) ("Netflix Comments") (JA___); Letter from Corie Wright, Netflix, Inc., to Marlene Dortch, FCC, GN Docket No. 14-28 (Mar. 20, 2014) (JA___); Letter from Joseph Cavender, Level 3 Communications, LLC, to Marlene Dortch, FCC, GN Docket No. 14-28, at 3(Oct. 27, 2014) (JA___).

[37] Netflix Comments at 13 (JA___).

[38] *See*, *e.g.*, Cogent Communications, Comments, GN Docket No. 14-28, at 2 ("[T]he only way to prevent evasion of the rules … is to remove the artificial distinction that provides a safe harbor for a conduct antithetical to an open Internet at interconnection points. Failure to correct this critical omission . . . will defeat the very purpose of this proceeding.") (JA___); Letter from Markham Erickson, Counsel to COMPTEL, to Marlene Dortch, FCC, GN Docket No. 14-28, at 8 (Feb. 19, 2015) ("If interconnection were beyond the scope of the Commission's rules, BIAS providers could evade the intended effect of the rules by harming traffic at the interconnection point onto their networks.") (JA___); Netflix Comments at 11 ("Open Internet protections that guard only against pay-for-play and pay-for-priority on the last mile can be easily circumvented by moving the discrimination upstream. As such, for any open Internet protection to be complete, it should

nothing would have gutted the no-blocking, no-throttling, and no-interference rules that the FCC had determined were necessary to protect consumers.

Petitioners also contend that the FCC was required under *Verizon* to create a separate classification for an "edge facing" service before regulating ISPs' interconnection practices. They reason that interconnection agreements "are made with parties other than retail customers and are independent agreements that often go well beyond serving the broadband provider's own retail business." USTelecom Br. at 76. This misreads *Verizon*, and ignores the statutory prescription of Section 201(b) of the Act that all activities performed "in connection with" a telecommunications service must be just and reasonable.

Verizon remanded the 2010 open Internet rules on one ground: the Act did not permit the imposition of common carrier-like rules on providers that the FCC has not classified as common carriers. This Court held that, absent this classification, the rules improperly obligated ISPs to act as common carriers with respect to edge providers. *Verizon*, 740 F.3d at 653.

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address the points of interconnection to terminating ISPs' networks.") (JA___); Mark Taylor, *Observations of an Internet Middleman*, Level 3 (May 5, 2014), http://blog.level3.com/open-internet/observations-internet-middleman/ (describing the clear link between lack of broadband competition and the ability to congest interconnection points, particularly among the top U.S. ISPs, and urging "[s]houldn't a broadband consumer network with near monopoly control over their customers be expected, if not obligated, to deliver a better experience than this?").

The FCC cured that defect when it classified Broadband Internet Access Service as a telecommunications service. The Court did not require the FCC to classify a service as telecommunications in both directions before addressing the conduct of the service provider at either end of the service's path. In short, the problem was not that the FCC had misclassified the alleged "service" between carriers and edge providers; it was that the FCC had not classified any Broadband Internet Access Service as a Title II service.

The FCC found that, whether or not the service provided to edge providers is a telecommunications service, it is subsumed within the service sold by the ISP to its end users. This is true: the record shows that providers of Broadband Internet Access Services sell access to the Internet, and all of the Internet. This necessarily encompasses the traffic that flows between edge providers and ISPs and on to consumers. Edge providers do not send data to an ISP's interconnection point unless consumers request it. In other words, the consumer causes the data transmission; the Internet content provider has no independent impetus for sending the data and has no way to send the data except through that consumer's Broadband Internet Access Service provider.

Based on that finding, the FCC in turn has found that the edge-facing service is "always a part of, and subsidiary to, the BIAS service." *Order* ¶ 338 (JA___). That conclusion is in fact supported by *Verizon*, which acknowledged that edge

providers may not be the "broadband providers' principal customers." *Verizon*, 740 F.3d at 653.

Regulation of interconnection is also proper because the Communications Act necessarily reaches services provided "in connection" with a telecommunications service—and certainly those interconnected with that service—so long as they are otherwise within the agency's jurisdictional ambit. Section 201(b) states: "[a]ll charges, practices, classifications, and regulations for and *in connection with* [a] communications service, shall be just and reasonable." 47 U.S.C. § 201(b) (emphasis added).

For purposes of Section 201(b), it does not matter whether the practice, classification, or regulation itself involves a separate telecommunications service. If it is provided "in connection" with a regulated service, then the FCC has authority over it. *See Computer and Comm'cns Indus. Ass'n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982) (holding FCC had jurisdiction over enhanced services and consumer premises equipment ancillary to its regulation of interstate wire communications services); *Rural Tel. Coal. v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988). Indeed, if the practice had to be a telecommunications service in its own right, then the "in connection with" provision would be superfluous in the first place. *See Donnelly v. FAA*, 411 F.3d 267, 271 (D.C. Cir. 2005) ("We must strive to interpret a statute to give meaning to every clause or word . . . .").

The *Order*'s oversight of an ISP's interconnection practices is limited to the ISP's promise to its consumers that they will be able to reach all points on the Internet. An ISP's point of interconnection is merely the door by which the ISP's subscribers can reach the Internet. It would make little sense for the FCC to ban the ISP from blocking a consumer's access to the Internet but at the same time disavow the authority to intervene if, contrary to its promise, the ISP has shut the door that leads to the Internet. The FCC was right therefore to find that Internet access necessarily includes access to and from the Internet through the ISP's interconnection ports.

G. Petitioners Make No Claim Of Agency Irregularity

Petitioners make a rather opaque reference to President Obama's expression of support for reclassification, contending that "the FCC abruptly changed course" at "the President's urging." USTelecom Br. at 85. Of course, the President did not purport to order the FCC to do anything, but rather simply expressed his views on the matter, just like each of the past four Presidents,[39] and just like the hundreds of

[39] Connie Bruck, *The Personal Touch*, NEW YORKER (Aug. 13, 2011), http://www.newyorker.com/magazine/2001/08/13/the-personal-touch-3; John Lippman, *Sununu Defends White House Stand on TV Rerun Rules*, LA TIMES (Feb. 16, 1991), http://articles.latimes.com/1991-02-16/business/fi-984_1_white-house; CNN, *Text Of A Letter From The President To Reed E. Hundt, Chairman Of The Federal Communications Commission* (Apr. 1, 1997), http://www.cnn.com/ALLPOLITICS/1997/04/01/clinton.liquor/letter.html; David Ho, *Bush Admin Pushes FCC on Media Ownership Review*, GOVTECH (Apr. 25, 2003), http://

Senators and Representatives who weighed in on both sides in this proceeding.[40] Nor is there anything wrong with an agency listening to the Administration's views. *See Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of America, Inc.*, 836 F.2d 599, 609 (D.C. Cir. 1988) (explaining "*Chevron*'s rationale for deference is based on more than agency expertise" and affirming that an agency may "'rely upon the incumbent administration's views of wise policy to inform its judgments'"); *New York v. EPA*, 413 F.3d 3, 24 (D.C. Cir. 2005); *Nat. Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1382-83 (D.C. Cir. 1985).

In any event, it is unclear what Petitioners' point is. Petitioners do not try to impugn the regularity of the agency's rulemaking process—a task that would be impossible under the applicable standard anyway. *See Advanced Commc'ns Corp. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996) (noting the "strong presumption of agency regularity") (citation omitted).

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www.govtech.com/policy-management/Bush-Administration-Pushes-FCC-on-Media.html.

[40] *See, e.g.*, Brooks Boliek, *Dems Jump into Net Neutrality Mix*, POLITICO (May 9, 2014), http://www.politico.com/story/2014/05/net-neutrality-fcc-democrats-106542; Chloe Albanesius, *GOP Wants FCC to Ditch Net Neutrality Rules*, PCMAG (May 14, 2014), http://www.pcmag.com/article2/0,2817,2458063,00.asp.

III. THE FCC REASONABLY DETERMINED THAT MOBILE BROADBAND IS COMMERCIAL MOBILE SERVICE OR ITS FUNCTIONAL EQUIVALENT

In the *Order*, the FCC reclassified mobile Broadband Internet Access Service as a commercial mobile service or its functional equivalent subject to the same limited Title II requirements as fixed broadband. The FCC's reclassification of mobile broadband hinged on the definitions of "interconnected service" and "public switched network" in Sections 332(d) and the concept of "functional equivalen[ce]" with commercial mobile service in Section 332(d)(3). 47 U.S.C. § 332(d). These are all terms that Congress directed the FCC to define "by regulation." *Id*. Petitioners dispute the FCC's classification, arguing that although Congress delegated authority to the FCC to define these terms and thus draw the line between common carrier and private mobile services, that line was nonetheless carved in stone when Congress enacted Section 332.

But, "when a statute specifically authorizes an agency to define a term, there is no need to consider whether the term is ambiguous . . . ." *Rush Univ. Med. Ctr. v. Burwell*, 763 F.3d 754, 760 (7th Cir. 2014). Faced with such an "explicit delegation [the court] cannot say that the . . . regulation fails as a matter" of *Chevron* Step 1. *Id*. Petitioners' argument that Congress did not mean what it said "would give the statute a new and unintended meaning." *Id*. Indeed, the very delegation of authority to define the terms interconnected service, public switched

network and functional equivalent "necessarily suggests that Congress did *not* intend the [terms] to be applied in [their] plain meaning sense." *Women Involved in Farm Econ. v. U.S. Dep't of Agric.*, 876 F.2d 994, 1000 (D.C. Cir. 1989) (emphasis in original).

The FCC's brief demonstrates that the *Order* reasonably exercised the discretion delegated by Congress. As the FCC explains, its interpretation of each term—"public switched network,"[41] "interconnected service," and "functional equivalent"—provides an independent basis for determining that mobile broadband is a commercial mobile service. FCC Br. at 90-104.

In addition to the reasons set forth in the FCC's brief, the agency's classification of Broadband Internet Access Service as a "telecommunications service" is appropriate and indeed necessary because it eliminates any need separately to address the definitions in Section 332. The Act defines "telecommunications service" as "the offering of telecommunications for a fee

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[41] Notably, the FCC's *1994 Section 332 Order*, by construing the term "public switched network" broadly rather than narrowly tied to "the more technologically based term 'public switched telephone network,'" *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, *Second Report and Order*, 9 FCC Rcd. 1411, 1436 ¶ 59 (1994) ("*1994 Section 332 Order*"), recognized that future mobile services "hold[] the potential of revolutionizing the way in which Americans communicate with each other," *id.* ¶ 28, demonstrating the FCC's contemporaneous understanding that Congress did not intend to limit common carrier consumer protections for all time to traditional telephone services.

directly to the public . . . *regardless of the facilities used*." 47 U.S.C. § 153(53) (emphasis added). This reclassification necessarily means that mobile broadband is subject to Title II, because Section 3 of the Act requires that every telecommunications carrier "shall be treated as a common carrier . . . to the extent that it is engaged in providing telecommunications service." *Id*. § 153(51).

The FCC addressed the apparent tensions with Section 332 in the 2007 *Wireless Broadband Order*, explaining that Congress intended "the definition of 'telecommunications service' . . . to include commercial mobile service." *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, *Declaratory Ruling*, 22 FCC Rcd. 5901, 5916 ¶ 40 (2007) ("*Wireless Broadband Order*") (citing H.R. REP. 104-458, at 114). In other words, if mobile broadband is a "telecommunications service," then it must also be commercial mobile service under Section 332, independent of the definitions in Section 332(d). While Section 3 of the Act *requires* common carrier treatment of a telecommunications service, Section 332(c)(2) *prohibits* common carrier treatment unless the wireless service satisfies the definition of "commercial mobile service" in Section 332(d)(1). If a mobile carrier could offer a "telecommunications service" that was not also a "commercial mobile service," a statutory contradiction would result.

Of course, the FCC avoided any apparent statutory contradiction by using its explicit authority under Section 332 to recognize that in today's market, mobile Broadband Internet Access Service is an "interconnected service" under Section 332(d)(1) and/or the "functional equivalent of a commercial mobile service" under Section 332(d)(3). *Order* ¶¶ 388-90 (JA__-__). Congress delegated to the FCC authority to make each of these determinations as a mechanism for harmonizing the separate provisions of the Act. The FCC's classification of mobile Broadband Internet Access Service as a commercial mobile service was accordingly reasonable.

Mobile Petitioners also argue the FCC arbitrarily pursued symmetry between mobile and fixed broadband. USTelecom Br. at 57, 66-67. But one of the goals of the mobile service provisions of the Act was to "bring[] all mobile service providers under a comprehensive, consistent regulatory framework and gives the [FCC] flexibility to establish appropriate levels of regulation . . . ." *1994 Section 332 Order* ¶ 12. Congress intended that, "consistent with the public interest, similar services are accorded similar regulatory treatment." *Id*. ¶ 13 (citing H.R. REP. 103-213, at 494 (1993)). Nor did the agency sacrifice everything to symmetry either, as it preserved a mechanism for taking into account factors unique to mobile service, for example through the "reasonable network management" exception. *Order* ¶¶ 214-17.

IV. THE FCC PROVIDED SUFFICIENT NOTICE

Petitioners' notice objections to the rules also fail. There is no merit to their claims of surprise or insinuations that they would have said more if only provided clearer notice of what the FCC was considering.

1. *Reclassification*. As the FCC explains, Petitioners' claimed surprise that the *Order* reclassified Broadband Internet Access Service under Title II is utterly implausible. FCC Br. at 111-12. Among other things, Petitioners' comments to the FCC directly and copiously address reclassification, *id*., to the tune of more than 300 pages by Intervenors' count. Likewise, many of the signatories to this brief provided extensive comments addressing reclassification.[42] In fact, *approximately two thirds* of the comments submitted addressed reclassification to some degree or other.[43]

While those comments do not themselves constitute APA notice, the "volume of comments . . . addressing" a topic "is a strong indication that the

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[42] *See*, *e.g*., Free Press, Comments, GN Docket No. 14-28, at 4-5, 54-90 (July 17, 2014) (JA___); Open Technology Institute at New America, Reply Comments, GN Docket No. 14-28, at 3-10 (Sept. 15, 2014) (JA___); Public Knowledge, Benton Foundation, and Access Sonoma Broadband, Comments, GN Docket No. 14-28, at 3-22, 60-79, 97-103 (July 15, 2014) (JA___).

[43] Bob Lannon and Andrew Pendelton, *What Can We Learn From 800,000 Public Comments On the FCC's Net Neutrality Plan?*, Sunlight Foundation (Sept. 2, 2014), https://sunlightfoundation.com/blog/2014/09/02/what-can-we-learn-from-800000-public-comments-on-the-fccs-net-neutrality-plan/.

interested parties plainly understood what was at stake" and that any notice complaint "rings hollow." *Nat'l Rest. Ass'n v. Solis*, 870 F. Supp. 2d 52, 53 (D.D.C. 2012).

Petitioners claim that they were "blindsided by the *Order*'s pronouncement that features such as 'domain name service (DNS) and caching, when provided with broadband Internet access services,'" should be viewed as falling within the telecommunications systems management exception. USTelecom Br. at 88. But they were surely aware that, after the *Cable Modem Order* and *Brand X*, the status of DNS and caching, along with consumer perceptions of what Broadband Internet Access Service providers offer, would be relevant. Indeed, Petitioners insist that given this precedent, the FCC was *compelled* to address consumer perceptions and the status of DNS. USTelecom Br. at 47-48. They can hardly claim surprise when they themselves commented on these issues. *See* FCC Br. at 111 n.40.

2. *Mobile*. Petitioners separately complain that they lacked notice that the FCC might reclassify mobile broadband as a common carrier service. USTelecom Br. at 88-89. Although they acknowledge the NRPM raised that possibility at least three times, they say they did not believe the FCC was "seriously" considering it. *Id*. at 89. Petitioners do not suggest how many times the APA requires the FCC to repeat itself to be taken "seriously."

The *NPRM* directly asked whether "mobile broadband Internet access service . . . fit[s] within the definition of 'commercial mobile service.'" *NRPM* ¶ 150 (JA___). That was sufficient to put Petitioners on notice that they could not hold back on any arguments about why mobile broadband Internet access service fell outside the statutory definition of a commercial mobile service. 47 U.S.C. § 332(d)(3). And, again, Petitioners provided extensive comments on mobile reclassification, including whether mobile broadband Internet access service fell within the definition of a commercial mobile service. FCC Br. at 115-16; *Order* ¶ 394 & n.1135 (JA___&___).[44]

Petitioners further complain that the *NPRM* "did not suggest that the FCC would change the underlying regulatory requirements for what *constitutes* commercial mobile service." USTelecom Br. at 89. But the FCC had previously found that mobile Broadband Internet Access Service could not be classified as a commercial mobile service under the pre-existing regulatory definitions of

[44] *See also* Letter from Henry Hultquist, AT&T, to Marlene Dortch, FCC, GN Docket No. 14-28, at 1 (Feb. 13, 2015) (JA___); CTIA—The Wireless Association, Comments, GN Dockets No. 14-28, at 37-40 (July 18, 2014) (JA___); Letter from Scott Bergmann, CTIA—The Wireless Association, to Marlene Dortch, FCC, GN Docket No. 14-28, at 1-2 (Oct. 17, 2014) (JA___); Letter from Scott Bergmann, CTIA—The Wireless Association, to Marlene Dortch, FCC, GN Docket No. 14-28, at 1-2 (Jan. 14, 2015) (JA___); Letter from William Johnson, Verizon, to Marlene Dortch, FCC, GN Docket No. 14-28, at 2-6 (Dec. 24, 2014) (JA___); Letter from William Johnson, Verizon, to Marlene Dortch, FCC, GN Docket No. 14-28, at 2 (Oct. 17, 2014) (JA___).

"interconnected service" and "public switched network." *Wireless Broadband Ruling* ¶¶ 42-45. Petitioners therefore should have realized—and did realize, as shown by their comments[45]—that the FCC's consideration of whether, nonetheless, to reclassify mobile broadband Internet access service could involve reconsideration of those prior interpretations, particularly given the statute's emphasis on the FCC's authority to define those terms. 47 U.S.C. § 332(d)(2).

3. *Interconnection*. Petitioners also make the remarkable claim that the "NPRM *assured* the public that the Order would *not* address Internet interconnection." USTelecom Br. at 92 (emphasis added). What the *NPRM* actually said was that the *2010 Order* had not addressed interconnection and that "[w]e *tentatively* conclude that we should maintain this approach, *but seek comment on whether we should change our conclusion*." *NPRM* ¶ 59 (emphasis added) (JA___). The FCC also explained that "[s]ome commentators have suggested that we should expand the scope of the open Internet rules to cover issues related to traffic exchange. *We seek comment on these suggestions*." *Id*. (emphasis added). In response, Intervenors and others explained to the FCC how providers could engage in interconnection practices that had the same practical

[45] *See* FCC Br. at 115-16 (collecting cites).

effect as blocking or throttling.[46] For their part, many Petitioners directly disagreed. FCC Br. at 123 & n.44. The agency changed its position, sure. But it is absurd to claim that an "agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary . . . ." *Nat'l Elec. Mfrs. Ass'n v. EPA*, 99 F.3d 1170, 1172 (D.C. Cir. 1996) (citation omitted).

Even if the *NPRM* were deficient in some respect, the "APA requires petitioners to show prejudice from an agency procedural violation." *City of Waukesha v. EPA*, 320 F.3d 228, 246 (D.C. Cir. 2003) (citing 5 U.S.C. § 706).

Petitioners have not even attempted to satisfy this burden. They have not, for example, identified any objection they make in their briefs to this Court that was not already advanced (usually by Petitioners themselves) during the notice-and-comment process. Nor can Petitioners demonstrate that any additional comments would have had any prospect of changing the outcome, or even better

[46] Public Knowledge, Benton Foundation, and Access Sonoma Broadband, Comments, GN Docket No. 14-28, at 112-14 (July 15, 2014) (JA___); Open Technology Institute at New America, Reply Comments, GN Docket No. 14-28, at 11-17 (Sept. 15, 2014) (JA___); Free Press, Comments, GN Docket No. 14-28, at 144-48 (July 17, 2014) (JA___); Netflix, Inc., Comments, GN Docket No. 14-28, at 10-16 (July 15, 2014) (JA___); Netflix, Inc., Reply Comments, GN Docket No. 14-28, at 5-9 (Sept. 15, 2014) (JA___); Vimeo LLC, Comments, GN Docket No. 14-28, at 18 (July 15, 2014) (JA___); Letter from Michael Cheah, Vimeo LLC, to Marlene Dortch, FCC, GN Docket No. 14-28, at 1-5 (Feb. 19, 2015) (JA___); Tumblr, Inc., Comments, GN Docket No. 14-28, at 2 (Sept. 9, 2014) (JA___).

informing the FCC's deliberations. *United Steelworkers of Am., AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1225 (D.C. Cir. 1980) (citation omitted).

V. THE OPEN INTERNET ORDER DOES NOT VIOLATE THE FIRST AMENDMENT

Far from restricting the ISPs' freedom of speech, the rules will safeguard that of everyone else. As the FCC explains, none of the challenged rules implicates speech because a Broadband Internet Access Service provider's mere carriage of others' speech without exercising editorial discretion is not expressive conduct.[47] FCC Br. Part VI. The relevant speech interests belong to end users and edge providers, not to the conduit that carries their speech. *Cf. Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). The rule barring paid prioritization is even further removed from expressive activities, as it merely prohibits a Broadband Internet Access Service provider from charging some edge providers for delivering their user-requested content faster than other user-requested content.

Of all the Petitioners, only Alamo and Daniel Berninger raise a constitutional challenge to the *Order*. Alamo Br. at 5. They do not argue that the

[47] Among other things, there is no basis for Alamo's and Berninger's invocation of strict scrutiny. They do not argue that the rules are content-based, nor could they: the rules do not differ in application based on the particular subject matter, topic, idea, or message being transmitted through a Broadband Internet Access Service. *See Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2222 (2015) (a law is content-based, and thus subject to strict scrutiny, if it "defin[es] regulated speech by particular subject matter").

FCC's reclassification decision is unconstitutional. Rather, their First Amendment challenge focuses on the specific rules adopted in the *Order*.

But these two Petitioners lack standing for such a challenge because they do not even attempt to show that they have any plans (much less imminent plans) to engage in conduct prohibited by these rules, and fail to identify any other way in which the rules cause them an Article III injury. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (litigant must show "concrete and particularized" injury "fairly traceable to" the government's action and redressable by the court); *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2341 (2013) (same).

Alamo, a small Broadband Internet Access Service provider, lacks standing because it has never sought to engage in blocking, throttling or paid prioritization, nor has it manifested any intent to do so in the future. *See N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011) (finding no injury in fact with respect to an agency's orders relating to transmission planning process where "NYRI does not currently participate in the . . . market in any manner, either as a generator or as a transmission owning entity"). During the rulemaking, Alamo actually disclaimed such a desire: "Broadband providers like Alamo Broadband do not engage in blocking or similar practices that restrict Internet access because we understand that our customers want their favorite content, services, and

applications, and they want to explore the many new offerings emerging every day on the Internet."[48]

Berninger, for his part, lacks standing because he is not a Broadband Internet Access Service provider subject to the rules.[49] *See C-Span v. FCC*, 545 F.3d 1051, 1052, 1056 (D.C. Cir. 2008) (cable programmers, "as non-regulated parties," lack standing to challenge FCC regulation of cable operators). Berninger merely claims that he might, someday, operate an edge service that would somehow require paid prioritization. This claim to standing necessarily rests on "a hypothetical chain of events, none of which is certain to occur." *N.Y. Reg'l Interconnect, Inc.*, 634 F.3d at 587; *J. Roderick MacArthur Found. v. FBI*, 102 F.3d 600, 606 (D.C. Cir. 1997) (hypothetical "'someday' injuries are insufficient").

Even if these two Petitioners had standing, their discussion of facial unconstitutionality does not measure the rules against the correct standard. To succeed on a facial First Amendment challenge, a claimant must demonstrate "substantial overbreadth," or show that "a substantial number of [the challenged law's] applications are unconstitutional, judged in relation to [its] plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 472-73 (2010). There

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[48] Letter from Joseph Portman, Alamo Broadband, to Marlene Dortch, Secretary, GN Docket No. 14-28, at 1 (Feb. 17, 2015) (JA___).

[49] While Berninger claims to be developing certain VoIP applications, this is not a service regulated by the *Order*.

is no indication in the record that ISPs regularly offer services even arguably falling within the *Order*'s prohibitions that involve the discretionary selection of content available to end users. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50 (2008) ("[I]n determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases . . . ."); *Virginia v. Hicks*, 539 U.S. 113, 122 (2003); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988).

Finally, if Alamo (or any other Broadband Internet Access Service provider) wishes to engage in expressive activity that it believes is proscribed by the rules, and the FCC were to act to curb such activity, the propriety of that enforcement can be adjudicated in a separate, as-applied challenge.[50] *See*, *e.g.*, *Cellco P'ship v. FCC*, 700 F.3d 534, 549 (D.C. Cir. 2012). But at this time, Alamo and Berninger's First Amendment objections can only "rest on speculation" and would require "premature interpretation of [the *Order*'s rules]." *Wash. State Grange*, 552 U.S. at 450.

[50] In any such proceeding, Petitioners are free to raise First Amendment objections, including constitutional avoidance arguments. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (holding that if a proffered reading of a challenged law raises "serious doubt" about the law's constitutionality, courts must "first ascertain whether a construction of the [law] is fairly possible by which the question may be avoided").

CONLUSION

For the reasons stated herein, the petition for review should be denied.

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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), as modified by the Court's June 29, 2015 briefing order granting Intervenors in support of Respondent in No. 15-1063 15,000 words, the undersigned certifies 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 14,745 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/*Pantelis Michalopoulos*
Pantelis Michalopoulos

September 21, 2015

STATUTORY ADDENDUM

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5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

47 U.S.C. § 153

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires—

(1) Advanced communications services

The term "advanced communications services" means—

(A) interconnected VoIP service;

(B) non-interconnected VoIP service;

(C) electronic messaging service; and

(D) interoperable video conferencing service.

(24) Information service

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

(50) Telecommunications

The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(51) Telecommunications carrier

The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine

whether the provision of fixed and mobile satellite service shall be treated as common carriage.

(53) Telecommunications service

The term “telecommunications service” means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

47 U.S.C. § 160

§160. Competition in provision of telecommunications service

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed

In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for forbearance

Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for

failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a) of this section. The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

(d) **Limitation**

Except as provided in section 251(f) of this title, the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) **State enforcement after Commission forbearance**

A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a) of this section.

47 U.S.C. § 201

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. § 332

§ 332. Mobile services

(a) **Factors which Commission must consider**

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will—

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) **Advisory coordinating committees**

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of title 5 or section 1342 of title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) **Regulatory treatment of mobile services**

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that—

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) (Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed

regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this

subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under

State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this

subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C. 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C. 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of

competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph—

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

(d) **Definitions**

For purposes of this section—

(1) the term “commercial mobile service” means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term “interconnected service” means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

(3) the term “private mobile service” means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

47 U.S.C. §1302

§1302. Advanced telecommunications incentives

(a) **In general**

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) **Inquiry**

The Commission shall, within 30 months after February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) **Demographic information for unserved areas**

As part of the inquiry required by subsection (b), the Commission shall compile a list of geographical areas that are not served by any provider of advanced telecommunications capability (as defined by subsection (d)(1)) and to the extent that data from the Census Bureau is available, determine, for each such unserved area—

(1) the population;

(2) the population density; and

(3) the average per capita income.

(d) **Definitions**

For purposes of this subsection:

(1) Advanced telecommunications capability

The term "advanced telecommunications capability" is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) Elementary and secondary schools

The term "elementary and secondary schools" means elementary and secondary schools, as defined in section 7801 of title 20.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st of September 2015, I caused true and correct copies of the foregoing Joint Brief for Intervenors in Support of the FCC to be filed electronically with the Clerk of the Court using the Case Management and Electronic Case Files ("CM/ECF") system for the D.C. Circuit. Participants in the case will be served by the CM/ECF system or by U.S. Mail.

Sincerely,

/s/ Andrew W. Guhr

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