ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2015

No. 15-1063 (and consolidated cases)

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

UNITED STATES TELECOM ASSOCIATION, *et al.*,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

AMICUS CURIAE BRIEF OF CENTER FOR BOUNDLESS INNOVATION IN SUPPORT OF PETITIONERS UNITED STATES TELECOM ASSOCIATION, NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, CTIA – THE WIRELESS ASSOCIATION®, AMERICAN CABLE ASSOCIATION, WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION, AT&T INC., CENTURYLINK, ALAMO BROADBAND INC., AND DANIEL BERNINGER.

William S. Consovoy*
Thomas R. McCarthy
J. Michael Connolly
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
Tel: (703) 243-9423

*Counsel of Record

Counsel for Amicus Curiae

Dated: August 6, 2014

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

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

B. Ruling Under Review

Alamo Broadband Inc. and Daniel Berninger petitioned for review of the final order of the Federal Communications Commission captioned *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, FCC 15-24, 80 Fed. Reg. 19738 (rel. Mar. 12, 2015) ("Order").

C. Related Cases

This case has been consolidated with Case Nos. 15-1078, 15-1086, 15-1090, 15-1091, 15-1092, 15-1095, 15-1099, 15-1117, 15-1128, 15-1151, and 15-1164.

There are no other related cases.

By: s/ William S. Consovoy
William S. Consovoy

Counsel for Amicus Curiae

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief. On August 4, 2015, the Court granted Center for Boundless Technology's ("CBIT") motion for leave to file this brief *amicus curiae*.

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

Pursuant to D.C. Circuit Rule 29(d), *amicus curiae* CBIT certifies that the significant constitutional issues this brief addresses are relevant to the disposition of this case and differ significantly from the issues that other *amici curiae* have sought leave to address. In light of our activities, discussed more fully in the Interest of *Amicus Curiae*, we believe we are particularly well-suited to discuss the constitutional issues implicated by the FCC's Open Internet Rules.

By: s/ William S. Consovoy
William S. Consovoy

Counsel for Amicus Curiae

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By: s/ William S. Consovoy
William S. Consovoy

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 26.1 and 29(b), the Center for Boundless Technology ("CBIT") hereby submits the following corporate disclosure statement:

CBIT is a nonprofit limited liability company incorporated under the laws of Virginia that engages in non-partisan research and policy analysis. CBIT is not a publicly held corporation, and no corporation or other publicly held entity owns more than 10% of its stock.

By: s/ William S. Consovoy
William S. Consovoy

Counsel for Amicus Curiae

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GLOSSARY

CBIT	Center for Boundless Innovation
FCC	Federal Communications Commission
ICA	Interstate Commerce Act

INTEREST OF *AMICUS CURIAE*

The Center for Boundless Innovation ("CBIT") is a highly respected think tank with significant expertise on the relationship between technology policy and the law. CBIT's executive director, Fred Campbell, is an adjunct professor and founding member of the advisory board to the Space, Cyber, and Telecommunications Law LLM program at the University of Nebraska College of Law and has formerly served as chief of the Wireless Telecommunications Bureau at the FCC. He is the author of an article entitled "*The First Amendment and the Internet: The Press Clause Protects the Internet Transmission of Mass Media Content from Common Carrier Regulation*," which analyzes the First Amendment implications of this case, as well as numerous other articles related to the FCC's Open Internet proceeding.

CBIT has a strong interest in this case. CBIT participated in the FCC's Open Internet roundtable series, participated in the Open Internet proceeding, and has a demonstrated commitment to opposing the Open Internet Rules on First Amendment grounds. CBIT therefore files this brief *amicus curiae* in support of Petitioners United States Telecom Association, National Cable & Telecommunications Association, CTIA – The Wireless Association®, American Cable Association, Wireless Internet Service Providers Association, AT&T Inc., CenturyLink, Alamo Broadband Inc., and Daniel Berninger.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This is the Federal Communications Commission's ("FCC") third attempt to impose so-called "open internet" or "net neutrality" rules on broadband Internet access providers ("broadband providers"). Having classified broadband Internet access service as an information service that cannot be regulated as a common carrier, *see Inquiry Concerning High-Speed Access to the Internet over Cable & Other Facilities*, 17 FCC Rcd. 4798, 4802 (2002), *aff'd*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), the FCC first issued non-binding policy guidance, *see Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd. 14,986 (2005), that this Court later found unenforceable, *see Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

The FCC responded by formally imposed anti-blocking, anti-discrimination, and transparency rules on broadband providers. *See Preserving the Open Internet*, 25 FCC Rcd. 17,905 (2010). The anti-blocking rule prohibited fixed broadband providers from blocking lawful content, applications, services, or non-harmful devices and prohibited mobile broadband providers from blocking lawful websites or applications that compete with their own voice or video services. The anti-discrimination rule prohibited fixed broadband providers from unreasonably discriminating in the transmission of lawful network traffic. The FCC claimed these rules did not amount to common carriage regulation because they allowed for

"reasonable network management." This Court again disagreed with the FCC's attempt to circumvent the limits on its statutory authority over broadband providers, striking down the anti-blocking and anti-discrimination rules as prohibited common carriage regulation. *See Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

Unable to impose its desired regulations under Title I, the FCC suddenly decided that broadband providers were common carriers all along and reclassified broadband service under Title II. *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015) ("Order"). The new anti-blocking rule is largely the same as its invalidated predecessor but applies to all providers. *Id.* ¶ 15. The anti-throttling rule prohibits "conduct that is not outright blocking, but inhibits the delivery of particular content, applications, or services, or particular classes of content, applications, or services," or "impairs or degrades lawful traffic to a non-harmful device or class of devices." *Id.* ¶ 120. The paid-prioritization ban prohibits providers from "favor[ing] some traffic over other traffic" in exchange for consideration or prioritizing their own content without consideration. *Id.* ¶ 18. The catch-all rule bans broadband providers from "unreasonably interfer[ing] with or unreasonably disadvantag[ing] the ability of consumers to reach the Internet content, services, and applications of their choosing or of edge providers to access consumers using the Internet." *Id.* ¶ 135. Finally, "[f]or a practice to even be

considered under [the reasonable network management] exception," a broadband provider "must first show that the practice is primarily motivated by a technical network management justification rather than other business [or content-related] justifications." *Id.* ¶ 216.

These Open Internet Rules ("Rules") violate federal statutory law for many reasons, but they also suffer from a more fundamental defect: the Rules violate the First Amendment. As an initial matter, there is no doubt that broadband providers are speakers. Broadband providers produce and disseminate their own speech and exercise editorial discretion in deciding which third-party mass communications they will disseminate and on what terms they will do so. For First Amendment purposes, then, a broadband provider is indistinguishable from a printing press, a newspaper, a broadcaster, and a cable operator.

Not only do the Rules restrict speech, the total ban they impose on editorial discretion triggers strict scrutiny. The Rules restrict the ability of providers to exercise any degree of discretion over their transmission of political speech, they compel them to carry the speech of all others, and they favor the speech of other Internet companies over broadband providers' own speech. There is no antecedent for subjecting such all-encompassing restrictions on speech to anything less than strict scrutiny.

But the Court need not decide that the Rules trigger strict scrutiny because they cannot even meet intermediate scrutiny. Favoritism toward or against certain similarly situated speakers and the suppression of certain speech—the bottom line proposition of the Rules—is never an important government interest. Further, the rules do not establish that the claimed harms are substantial or that they will further the FCC's claimed interests in promoting broadband deployment, encouraging Internet innovation, and assuring a diversity of non-broadband provider Internet speech. These alleged harms are unsupported by sound economic theory and the Rules are both under- and over-inclusive in any event.

Last, that the Rules violate the First Amendment does not mean traditional common carrier regulation is constitutionally suspect. Common carrier regulation was designed to regulate the transportation of goods or private communications from point to point. Unlike the Internet, these services did not have the inherent power to disseminate political and commercial communication on a mass scale. Railroad carriage generally did not implicate speech interests, while telegraph and telephone carriers transmitted private communications. Rejecting FCC regulations that abridge editorial rights with respect to mass communications thus will not lead the Court down a slippery slope. But failing to protect the First Amendment rights of 21st Century printing presses to control their own means of communication most certainly will. The Open Internet rules should be vacated.

ARGUMENT

I. The Open Internet Rules Are Subject To Strict Scrutiny Under The First Amendment.

The Constitution is a bulwark against laws "abridging the freedom of speech, or of the press," U.S. Const. amend. I, which should give a prudent regulator pause before regulating "arguably the most important innovation in communications in a generation." *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010) (citation omitted). Yet the FCC did not seriously grapple with the First Amendment implications of the Rules before imposing their sweeping restrictions on speech. The FCC instead sought to short circuit any First Amendment inquiry by declaring that broadband providers are not speakers at all and, even if they are, the Rules are subject only to intermediate scrutiny. *See* Order ¶¶ 544-57.

The FCC's gambit should be rejected. Dissemination of mass content, and the right to make judgments about what mass content to disseminate (and on what terms), is a core part of the complementary rights to freedom of speech and press. The Open Internet Rules inhibit this core part of speech by discriminating among similarly situated speakers and eviscerating editorial discretion. If rules such as these are not reviewed under the most rigorous scrutiny possible, government favoritism and censorship masquerading as "neutrality" will soon cascade to other forms of mass communication.

A. The First Amendment Protects Broadband Providers.

It is difficult to take seriously the FCC's assertion that broadband providers are not speakers within the meaning of the First Amendment. *See* Order ¶¶ 546-51. The First Amendment protects the editorial discretion of the "press," a protected category that embraces all operators of mass media communications systems, including newspapers, *see, e.g.*, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257-58 (1974), and broadcast and cable television, *see, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994) (*Turner I*); *FCC v. Pacifica Found.*, 438 U.S. 726, 748-51 (1978). Broadband providers are clearly members of the press as well. *See Reno v. ACLU*, 521 U.S. 844, 867-68 (1997).

It follows that those who provide such content through broadband networks are similarly entitled to constitutional protection. As anyone with a computer or mobile phone understands, broadband service is an increasingly indispensable method of delivering mass communications to the public. Like the printing press, broadband enables the widespread dissemination of speech—core political speech, literary interpretation, humor of varying merit, even annotated photographs of cats—to a public audience. *See Verizon v. FCC*, 740 F.3d 623, 654-55 (D.C. Cir. 2014). Indeed, traditional newspapers now reach more readers through the Internet

than they do in paper form.[1] And like other providers of video and audio programs, broadband services ensure that audio and video content—be it news broadcasts, music videos, sports highlights, or sharks leaping out of the ocean—can be accessed and enjoyed any place that has an Internet connection. "[W]hatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011). Like any other mass media enterprise that disseminates "the content of third parties," *Verizon*, 740 F.3d at 654-55, broadband providers are entitled to the protections of the First Amendment.

There is no merit to the FCC's claim that there is a constitutional difference between the mere dissemination of ideas (*i.e.*, serving as a "conduit") and "exercising editorial discretion." Order ¶ 549. The freedom of press protects publishing of speech. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Ex parte Jackson*, 96 U.S. 727, 733 (1877). The Supreme Court thus

[1] According to the Newspaper Association of America, 137 million U.S. adults read a hardcopy newspaper in a typical week while Internet dissemination reached more than 145 million unique visitors in January 2014 alone. *See* Newspaper Association of America, *The Evolution of Newspaper Innovation* (Apr. 9, 2014), http://www.naa.org/innovation.

has consistently invalidated, under the First Amendment, attempts to regulate the dissemination of expressive material irrespective of whether the disseminating party authored or altered the communication. *See, e.g.*, *id.* at 734-37 (upholding a carrier's right to exclude materials related to lotteries from the mail)*; see also City of Lakewood v. Plain Dealer Publ'g. Co*., 486 U.S. 750, 768 (1988) (restrictions on the placement of newsracks goes to "the circulation of newspapers, which is constitutionally protected"); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (noting that freedom of press "comprehends every sort of publication which affords a vehicle of information and opinion" and that a city ordinance "cannot be saved because it relates to distribution and not to publication"); *Grosjean v. American Press Co.*, 297 U.S. 233, 249 (1936) (invalidating tax specifically targeting newspapers because the First Amendment "was meant to preclude the national government . . . from adopting any form of previous restraint upon printed publications, *or their circulation*") (emphasis added). In sum, "there is no fundamental distinction between expression and dissemination." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 800 (1978) (Burger, C.J., concurring).

The FCC's attempt to treat these concepts as divisible by asserting that a "conduit" for disseminating mass communications can be freely regulated without impacting speech itself ignores over a century of First Amendment jurisprudence to the contrary. Indeed, at least one court has squarely rejected the argument in this

precise setting. *See Comcast Cablevision of Broward Cty., Inc. v. Broward Cty.*, 124 F. Supp. 2d 685 (S.D. Fla. 2000). There, the court invalidated an ordinance designed to impose "equal access" regulations on cable providers of broadband service. The court rejected the "conduit" argument because, "[n]ot only the message, but also the messenger receives constitutional protection." *Id.* at 693. The court recognized that, based on their experience with British censorship of printers during the Colonial era, the Framers adopted the First Amendment to prohibit restrictions "directed not only at the content of the message, but at the method of its delivery." *Id.* at 695. Put simply, the notion that the First Amendment protects only authors and not those who provide a means of disseminating speech has no legal foundation. *See id.* at 698; *see also Ill. Bell Tel. Co. v. Vill. of Itasca*, 503 F. Supp. 2d 928, 947-49 (N.D. Ill. 2007) (rejecting argument that telephone company seeking to upgrade broadband capabilities "merely sells transmission, rather than offering a collection of content, and therefore, falls outside of First Amendment protection").

The FCC attempts to avoid these cases by arguing that broadband providers "[l]ack[] the exercise of editorial control and an intent to convey a particularized message." Order ¶ 550. For support, the FCC relied on *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006). But *Rumsfeld* is plainly distinguishable. Offering on-campus recruitment services of law students is "not

inherently expressive" and thus not protected by the First Amendment. *Id.* at 63-64. Here, the FCC is restricting the dissemination of mass communications. *See Verizon*, 740 F.3d at 655 ("[W]hereas previously broadband providers could have blocked or discriminated against the content of certain edge providers, they must now carry the content those edge providers desire to transmit."). The differences between the two are obvious.

The FCC's own justification for the Open Internet Rules illustrates the point. The FCC claims its rules are necessary precisely *because* broadband providers may "disfavor the content that they don't like." Order ¶ 8; *see also id.* ¶ 84 (claiming "[b]roadband providers have the ability to act as gatekeepers"). The FCC cannot have it both ways; the FCC cannot justify its rules based on the need to prevent providers from favoring one message over another, yet argue that there is no editorial judgment inherent in the provision of broadband service. The Order's stated intent to curb providers' editorial discretion confirms its existence.

The fact that many broadband service providers have voluntarily refrained from exercising some of their editorial discretion to date can hardly excuse the government's desire to *require* such restraint in perpetuity. *See Verizon*, 740 F.3d at 654. It is the requirement, imposed by the government, that makes all the difference for First Amendment purposes. Regardless, broadband providers *have* made editorial decisions in an effort to appeal to their customer base, just as other

publishers do every day. *See, e.g.*, The Jewish Internet Access, http://www.thejnet.com/ (describing broadband service with particular content filtering aimed at Jewish customers). Moreover, to the extent that some broadband providers have not done so, it may be because the FCC has chilled or prohibited their speech. *See* Order ¶ 65 (footnote omitted) ("From 2005 to 2011, the principles embodied in the Internet Policy Statement were incorporated as conditions by the Commission into several merger orders and a key 700 MHz license, including the SBC/AT&T, Verizon/MCI, and Comcast/NBCU mergers and the Upper 700 MHz C block open platform requirements. Commission approval of these transactions was expressly conditioned on compliance with the Internet Policy Statement."). The First Amendment would be rendered meaningless if the People could be forced to forfeit their rights to free expression by virtue of their fear of government enforcement or compliance with pre-existing government restrictions. Silence in the face of FCC enforcement is not the forfeiture of First Amendment rights.

Regardless, voluntary silence is itself a powerful form of expression. "[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.,* 487 U.S. 781, 796-97 (1988); *see also Harper & Row, Publishers, Inc. v. Nation Enters.,* 471 U.S. 539, 559 (1985) ("There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly,

one which serves the same ultimate end as freedom of speech in its affirmative aspect.") (citation and internal quotation marks omitted). Thus, whether the decision by *some* broadband providers to refrain from engaging in the speech the FCC seeks to prohibit was based on the chill of government sanction or a voluntary choice, the answer is the same. The FCC can no more cabin the editorial right of broadband providers than it could countermand the editorial decisions of newspaper publishers. To do so "at once brings about a confrontation with the express provisions of the First Amendment." *Tornillo*, 418 U.S. at 254.

B. Strict Scrutiny Applies To The FCC's Restriction Of Broadband Providers' Speech.

Strict scrutiny applies here because the Rules (1) discriminate against the speech of a particular class of speakers, and (2) impose a total ban on broadband providers' editorial discretion over mass communications on their networks. As explained below, this kind of sweeping mass-media regulation is *always* subject to the most rigorous First Amendment scrutiny possible and is almost never upheld on judicial review.

First, the decision to regulate a particular class of speakers—broadband service providers—weighs heavily in favor of strict scrutiny. "Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." *Turner I*, 512 U.S. at 659. The First Amendment prohibits the government from "distinguishing among different

speakers, allowing speech by some but not others. As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (citation omitted). Here, the Open Internet Rules impose speech-restrictive obligations on broadband providers that would never be imposed on other forms of media. Whereas the First Amendment prohibits requiring equal access to newspapers because it "inescapably dampens the vigor and limits the variety of public debate," *Tornillo*, 418 U.S. at 257 (citation and internal quotation marks omitted), the FCC asserts authority to impose those same requirements on broadband providers.

The Rules also favor the speech of similarly situated edge providers over broadband providers within the Internet medium. Nothing in the FCC's regulations prohibit edge providers who possess "gatekeeper" power from declining to host or disseminate speech with which they disagree. *See, e.g.*, Open Internet Reply Comments of the Center for Boundless Innovation at 27-33 (Sept. 15, 2014) (noting, *inter alia*, that Google, Apple, and Netflix all possess gatekeeper power). "Facebook, Google, and Apple have shown, overall, a pattern of viewpoint censorship, . . . often at the insistence of those holding opposing views." Open Internet Comments of National Religious Broadcasters at 9 (July 14, 2014). For example, Apple prohibits "offensive, mean spirited" speech that is "unacceptable

or inappropriate," Facebook takes down "hateful messages, . . . inflammatory religious content, or views that express politically religious agendas," and Google "disapprove[s] of hate towards groups based on religion . . . or sexual orientation, or content that advocates against any group or organization based on" those subjects. *Id*. at 11 (internal quotation marks omitted). Yet the Open Internet Rules are designed to ensure that only broadband service providers may not exercise that same discretion; as the FCC candidly acknowledges, it believes "the free speech interests we advance today do not inhere in broadband providers." Order ¶ 545. This type of differential treatment among similarly situated speakers on the same medium is subject to the most skeptical judicial review under the First Amendment. *See Turner I*, 512 U.S at 659; *Citizens United*, 558 U.S. at 340, 353-54.

Second, strict scrutiny is warranted by the fact that the Rules are expressly designed to prevent broadband service providers from exercising their right to decline to carry speech—including political speech—"that they don't like." Order ¶ 8. For example, the rules would prevent a broadband provider from prioritizing political speech with which it agrees or inhibiting access to political speech with which it disagrees. *See* FCC Stay Opp. 1 (arguing the Open Internet Rules "prevent a broadband provider from . . . blocking political speech it dislikes"). Forced expression (especially when it comes to political speech) is antithetical to First

Amendment values; "that the speaker has the right to tailor the speech[] applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995); *see also Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986) (plurality opinion). The fact that broadband providers remain free to publish their own content merely begs the question. *See Tornillo*, 418 U.S. at 256-57.

Third, the rationale for applying intermediate scrutiny to cable providers in *Turner I* is inapplicable. *Turner I* applied intermediate scrutiny to those broadcast must-carry rules because "the number of channels a cable operator must set aside depends only on the operator's channel capacity," which meant that there was no danger a cable operator could avoid or mitigate its obligations by altering the programming it offers subscribers. 512 U.S. at 630-32, 644. The Court contrasted this reasoning with its holding in *Tornillo*, which expressed concern that a newspaper could avoid its access obligations by refraining from speech critical of political candidates. This case is like *Tornillo*. The FCC admits that the Rules give broadband providers an incentive to shift content, services, and applications from the Internet to an excluded category the FCC dubs "non-broadband Internet access service[s]" in order to "evade the open Internet rules." Order ¶¶ 35, 212. The FCC's finding that its rules give broadband providers incentives to alter their

approach to content is therefore flatly inconsistent with the Supreme Court's justification for applying intermediate scrutiny in *Turner I*.

Finally, the consequences that would flow from *not* applying strict scrutiny demands adherence to the governing precedent. In no other media context has the government sought to impose such a broad restriction on private distributors of expressive content. There would be no chance, for example, that a government regulation requiring a magazine stand to carry any lawful publication submitted to it by any publisher would be upheld. Nor would a court allow the government to demand that a newspaper's pages be made available to any person who requested them. Nor could a bookstore be compelled to carry the Bible, The Complete Calvin and Hobbes, or *Mein Kampf*—no matter how virtuous a circle the government might believe would result from such open discourse in these venues. Yet the FCC claims the authority to do no less in the context of Internet speech. This Court should reject this censorious impulse, and secure speakers' rights to retain control over their dissemination of messages. *See, e.g., Comcast Cablevision of Broward Cty., Inc.*, 124 F. Supp. 2d at 697 (holding that equal access requirement imposed on cable broadband providers "threaten[s] to diminish the free flow of information and ideas . . . . and therefore strict scrutiny is required").

II. The Open Internet Rules Violate The First Amendment Under Any Applicable Level Of Review.

The Court need not decide if strict scrutiny applies because the Rules cannot even meet intermediate scrutiny. Under intermediate scrutiny, restrictions on speech must (1) further "an important or substantial governmental interest" and (2) be "no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). In other words, the Rules must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Turner I*, 512 U.S. at 662 (citation and internal quotation marks omitted). The Rules do not even come close to meeting either prong of this test.

A. The Open Internet Rules Do Not Advance Any "Important or Substantial" Government Interest.

As an initial matter, suppression of free speech is *never* an important or substantial interest. The "Government lacks the power to ban corporations from speaking." *Citizens United*, 558 U.S. at 347. The Rules are intended, however, to "suppress, disadvantage, [and] impose differential burdens upon speech" by imposing a categorical ban on broadband providers' editorial discretion, including with regard to political speech. *Turner I*, 512 U.S. at 642. "No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." *Citizens United*, 558 U.S. at 365. That should be the end of the matter.

In any event, the FCC has failed to show that the harms it alleges are substantial or that the Rules will in fact advance the interests it asserts: (1) promoting broadband deployment, (2) encouraging Internet innovation, and (3) assuring a diversity of non-ISP speech. Order ¶¶ 554-55. "[T]he mere abstract assertion of a substantial governmental interest, standing alone, is insufficient to justify the subordination of First Amendment freedoms." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1454 (D.C. Cir. 1985). The government must "do more than simply 'posit the existence of the disease sought to be cured'; . . . "[i]t must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner I*, 512 U.S. at 664 (plurality opinion) (quoting *Quincy Cable*, 768 F.2d at 1455). The evidence the FCC presented in support of its theories of harm falls well short of this standard.

Previous cases that have upheld restrictions on the freedom of the press under a less-than-strict scrutiny standard involved limited restrictions on editorial discretion that were supported by detailed factual findings of scarcity. For example, the Supreme Court upheld limited access rights to cable networks based on substantial evidence that cable operators possessed monopoly power sufficient to cause "significant financial hardship" to broadcasters. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 211 (1997) ("*Turner II*"). In contrast, the Rules are not limited

in scope, and the FCC refused to conduct a market power analysis. Order ¶ 11 n.12. The rules require all broadband providers, even those with no appreciable market power, to carry all Internet traffic despite FCC findings that most broadband providers' networks are incapable of carrying all traffic that consumers demand. *See* Fed'l Commc'ns Comm'n, 2015 Broadband Progress Report, https://www.fcc.gov/reports/2015-broadband-progress-report.

The FCC's theory is that permitting providers to exercise editorial discretion would reduce innovation and demand for broadband Internet access service. But the theory ignores the fact that broadband providers in competitive markets have strong incentives of their own to increase overall demand for their services, which tend to offset whatever incentives they might have to disfavor particular content. *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 15506 (1996) (noting "competition eventually will eliminate the ability of an incumbent local exchange carrier to use its control of bottleneck local facilities to impede free market competition"). The FCC did not attempt to conduct any market analysis; it merely asserted that "when a broadband provider acts as a gatekeeper, it actually chokes consumer demand for the very broadband product it can supply." Order ¶ 20. In the absence of any analysis as to whether broadband providers' incentive to increase demand for their products outweighs incentives to unreasonably disfavor content, it

is impossible to know whether the Rules are likely to produce any broadband deployment or innovation at all, let alone a direct and material increase, or cause them any harm. *See Turner I*, 512 U.S. at 664; *Quincy Cable*, 768 F.2d at 1454-59; *see also Verizon*, 740 F.3d at 663 (Silberman, J., dissenting).

Basic economic theory teaches that access regulations deter investment by imposing the highest risk on network operators while shifting the highest returns to access seekers. In the context of network unbundling, therefore, Congress and the courts have recognized that government-mandated access is not an unqualified good and have permitted its use only when "necessary" to remedy a market impairment, because mandatory access rights create disincentives to innovation and investment in networks. *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 563 (D.C. Cir. 2004). This evidence indicates that, to the extent the Rules enable content providers to extract more profit from the potentially risky network investments of broadband providers, they will "in fact" deter broadband deployment and innovation, not advance it.

The FCC's stated interest in assuring diversity of Internet speech is similarly insufficient to justify the Rules' total ban on editorial discretion. Although the Supreme Court has permitted the government to impose limited restrictions on the editorial discretion of cable television operators, it has refused to "ignore the expressive interests of cable operators altogether." *Denver Area Educ. Telecomms.*

Consortium, Inc. v. FCC, 518 U.S. 727, 747-48 (1996). Even if the FCC has an interest in assuring a diversity of speech generally, then, that purported interest cannot be deployed to justify a total ban on a particular type of speech or a particular category of speaker—especially when that type and category of speech is an essential part of the press.

In the end, the FCC's diversity analysis presumes that edge speech is more valuable than the speech of broadband providers. But the Supreme Court has repeatedly rejected the "startling and dangerous" proposition that the First Amendment permits the government to balance the social costs of suppressing the speech of some with the purported benefits it might have for others: "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *United States v. Stevens*, 559 U.S. 460, 469-70 (2010).

B. The Open Internet Rules Are Not Sufficiently Tailored.

Even if the FCC could demonstrate that its interests are substantial, the Rules are not sufficiently tailored to further them. *See Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1311 (D.C. Cir. 2010). First, the Rules are over-inclusive because they are far broader than necessary "to further [any government] interest[]." *Turner I*, 512 U.S. at 662 (citation omitted). The FCC did not consider

how it might minimize the speech burdens imposed on broadband providers in any way, which itself warrants invalidation. *See Time Warner Entm't. Co. v. FCC*, 56 F.3d 151, 185-86 (D.C. Cir. 1995). Moreover, the Rules are broader than necessary because they compel broadband providers to carry political speech with which they may disagree. *See Stevens*, 559 U.S. at 473; *Citizens United*, 558 U.S. at 349.

Second, the Rules are under-inclusive because they apply only to a subset of speakers—broadband providers—and exclude other Internet companies, such as search portals and app store operators, which are similarly able to serve as "gatekeepers" and possess the same theoretical abilities and incentives to restrict access. *See City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (explaining that "the notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles"). For example, the FCC made no effort to explain why it should be permissible for Apple to exercise gatekeeper power over the apps that iPhone users can access while absolutely prohibiting the editorial discretion of broadband providers to do the same. *See* Open Internet Reply Comments of the Center for Boundless Innovation at 28-29 (Sept. 15, 2014).

Third, the Rules are insufficiently tailored because disclosure is a less restrictive alternative than banning "speech altogether." *Citizens United*, 558 U.S. at 319. The existence of "less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether

the 'fit' between ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993); *see also Turner I*, 512 U.S. at 662; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 529 (1996) (O'Connor, J., concurring). Indeed, the FCC admits that "disclosure requirements are among the least intrusive and most effective regulatory measures at its disposal." Order ¶ 154. To the extent it were imposed on a lawful basis, disclosure would achieve the FCC's goals without suppressing speech in the same way that service providers like Google and Facebook disclose these practices in their terms of service. In short, the rules "burden substantially more speech than is necessary to further the government's legitimate interests." *Turner I*, 512 U.S. at 662 (citation omitted).

III. The First Amendment Defects Of The Open Internet Rules Do Not Cast Doubt On Traditional Common Carriage Regulations.

The FCC and its *amici* will likely claim that invalidating the Rules on First Amendment grounds would "be at odds with centuries of traditional oversight of both transportation and communications companies," such as the regulation of railroads, the telegraph, and the telephone. Brief for Tim Wu as *Amicus Curiae* Supporting Respondents at 11, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (No. 11-1355). This Court, they will claim, should not open this "proverbial can of worms" by extending First Amendment protection to every company that "move[s] information and [has] the technical capacity to decide how [it does] so." *Id*. at 3.

This slippery slope is a red herring that ignores the constitutional distinction between common carrier and mass communications. The regulation of railroads as common carriers under the Interstate Commerce Act ("ICA") was focused on the physical transportation of good and passengers. *New York, New Haven & Hartford R.R. v. ICC*, 200 U.S. 361, 391 (1906). The ICA, however, had nothing to do with the railroad's communications or even speech at all. It did not, for example, prohibit railroads from favoring their own sidecar advertising over the advertising of others; it did not require railroads to refrain from engaging in political speech; and it did not require railroads to carry the speech of others. The First Amendment simply was not implicated.

Any analogy between the Internet and telephone and telegraphy also misses the mark. Non-discrimination obligations were applied to telegraphy and telephony because such services offered a means of private "inter-communication" between individuals only. *See Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 9 (1877). Indeed, telegraphy and traditional telephone service networks were technologically incapable of publicly disseminating speech directly to the masses in a manner similar to broadcast and cable television. The courts thus treated telegraph and telephone companies as common carriers because they transmitted purely private communications.

The Supreme Court first recognized this distinction in its constitutional analysis of mail carriage, which distinguished between the transportation of privately sealed mail that is intended to be kept free from inspection (*e.g.*, letters) and unsealed mail that is open to public inspection (*e.g.*, newspapers). It concluded that sealed mail is protected by the Fourth Amendment right against searches and seizures "as if they were retained by the parties forwarding them in their own domiciles," but that the "transportation" (*i.e.*, dissemination) of unsealed mail by the postal service was protected by the First Amendment. *See Jackson*, 96 U.S. at 728-33. The Court later applied this distinction to telephony in *Katz v. United States*, which held that government surveillance of words spoken into a telephone receiver by a person who was using an otherwise public telephone booth constituted a "search and seizure" under the Fourth Amendment. 389 U.S. 347, 352-53 (1967). Like the transportation of sealed letters in the mail, the Supreme Court held that telephone calls are inherently private communications with no public (*i.e.*, mass media) aspect.

The critical distinction therefore is that telegraph and telephone services were used for *private*, *person-to-person* connections, whereas broadband providers engage in the mass dissemination of public speech through "millions upon millions of websites and webpages, spanning a limitless number of subjects and target audiences." *Caldwell v. Caldwell*, 2006 WL 618511, at *8 (N.D. Cal. Mar. 13,

2006). "One can use the Web to read thousands of newspapers published around the globe, purchase tickets for a matinee at the neighborhood movie theater, or follow the progress of any Major League Baseball team on a pitch-by-pitch basis." *Ashcroft v. ACLU*, 535 U.S. 564, 566 (2002). With its almost "infinitely complex worldwide web of strands and nodes," the Internet "is a major modern tool of free speech and freedom both here and abroad. Its reach extends as far as, and perhaps exceeds, that of newspapers and other traditional media." *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 393 (E.D.N.Y. 2007).

The Supreme Court has long recognized the First Amendment distinctions between the type of private speech facilitated by telephony and public speech, such as a blogpost available to millions. "Speech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'" *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (opinion of Powell, J.)). The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is

entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citations and internal quotation marks omitted).

At the same time, "[n]ot all speech is of equal First Amendment importance, . . . and where matters of purely private significance are at issue, First Amendment protections are often less rigorous." *Snyder*, 562 U.S. at 452 (citations and internal quotation marks omitted). That is because "restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: 'There is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas'; and the 'threat of liability' does not pose the risk of 'a reaction of self-censorship' on matters of public import." *Id*. (quoting *Dun & Bradstreet*, 472 U.S. at 760).

Given this distinction, telegraph and telephone companies offering "inter-communication" between individuals were unlikely to invite First Amendment scrutiny. *Pensacola Tel. Co.*, 96 U.S. at 9. In contrast to a broadband company, courts recognized that a telegraph company merely "receives and sends a message" to another person, and a telephone company merely "supplies the facilities by which the user may extend the compass of his own voice." *Cumberland Tel. & Tel. Co. v. Kelly*, 160 F. 316, 318 (6th Cir. 1908); *see also Olmstead v. United States*, 277 U.S. 438, 465 (1928) ("By the invention of the telephone 50 years ago, and its application for the purpose of extending communications, one can *talk with*

another at a far distant place.") (emphasis added). As *Jackson* shows, however, to the extent that traditional common carrier networks were used to distribute information of public concern, such practices received First Amendment protection. "Liberty of circulating is not confined to newspapers and periodicals, pamphlets and leaflets, but also to delivery of information by means of fiber optics, microprocessors and cable." *Comcast Cablevision of Broward Cty.*, 124 F. Supp. 2d at 692.

In sum, the First Amendment concerns at issue here simply do not extend to traditional common carriers. The FCC can regulate traditional telephone service because companies exercise no First Amendment rights in delivering an ordinary telephone call between individuals. But the telephone's relationship with free speech is not the same as that of today's broadband providers. *See Turner I*, 512 U.S. at 629. Recognizing these First Amendment protections simply will not, as some fear, lead the Court down a slippery slope. Rather, it would be the failure to strike down the Rules under the First Amendment that would lead the law down a troubling path. Irrespective of whether broadband providers are a Title I or a Title II service, the Rules violate the First Amendment.

CONCLUSION

For the foregoing reasons, *amicus curiae* CBIT respectfully requests that this Court vacate the Order.

Respectfully submitted,

By: s/ William S. Consovoy

William S. Consovoy*
Thomas R. McCarthy
J. Michael Connolly
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard
Suite 700
Arlington, VA 22201
Tel: (703) 243-9423
Fax: (703) 243-9423
Email: will@consovoymccarthy.com

*Counsel of Record

Counsel for Amicus Curiae

Dated: August 6, 2015

CERTIFICATE OF COMPLIANCE

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

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 6,716 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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By: s/ William S. Consovoy

William S. Consovoy
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard
Suite 700
Arlington, VA 22201
Tel: (703) 243-9423
Fax: (703) 243-9423
will@consovoymccarthy.com

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

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

By: s/ William S. Consovoy
William S. Consovoy
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard
Suite 700
Arlington, VA 22201
Tel: (703) 243-9423
Fax: (703) 243-9423
will@consovoymccarthy.com

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 26.1 and 29(b), the Center for Boundless Technology ("CBIT") hereby submits the following corporate disclosure statement:

CBIT is a nonprofit limited liability company incorporated under the laws of Virginia that engages in non-partisan research and policy analysis. CBIT is not a publicly held corporation, and no corporation or other publicly held entity owns more than 10% of its stock.

By: s/ William S. Consovoy
William S. Consovoy

Counsel for Amicus Curiae