ORAL ARGUMENT NOT YET SCHEDULED

No. 11-1355

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

VERIZON, *ET AL.*,

Appellants/Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Appellee/Respondents.

On Petitions for Review and Notices of Appeal of an Order of the Federal Communications Commission

FINAL BRIEF OF *AMICUS CURIAE* TIM WU FOR AFFIRMANCE IN SUPPORT OF APPELEE/RESPONDENTS

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STATEMENT REGARDING CONSENT TO FILE, SEPARATE BRIEFING, AUTHORSHIP AND MONETARY CONTRIBUTIONS

All parties have consented to the filing of this brief. *Amicus curiae* filed notice of his intent to participate on November 9, 2012.

Pursuant to Rule 29(c), Federal Rules of Appellate Procedure, *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 his counsel made a monetary contribution to its preparation or submission.

Pursuant to D.C. Circuit Rule 29(d), *amicus curiae* certifies that no other brief of which he is aware addresses the historical framework of telecommunications technologies or applies that framework to historical jurisprudence of telecommunications or to the constitutional issues which have been presented in this case. To the best of the knowledge of *amicus curiae*, there will be three other briefs *amicus curiae* supporting Appellee/Petitioners, but none of them overlap with the arguments presented herewith. *Amicus curiae* believes that former FCC Chairman Reed Hundt and others will submit a brief largely addressing different aspects of the First Amemdent issues, as well as Fifth Amendment concerns. *Amicus curiae* believes that Internet engineers and technologists will focus upon the details of broadband technology in their brief. *Amicus curiae* believes that the Center for Democracy and Technology, *et al.* will present a detailed analysis of contemporary First Amendment jurisprudence.

In light of the different foci of these briefs, and the importance and complexity of this case, *amicus curiae* certifies that filing a joint brief is not practicable and that it is necessary to submit separate briefs.

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties

All parties are listed in the Brief of Appellee/Respondents.

B. Rulings Under Review

References to the ruling at issue appear in the Brief for Appellee/Respondents.

C. Related Cases

Amici curiae adopt the statement of related cases presented in the Brief for Appellee/Respondents.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae is the Isidor and Seville Sulzbacher Professor of Law at Columbia University, and former senior advisor to the Federal Trade Commission. He is the author of two books on the history of the Internet and earlier media technologies: *The Master Switch* (2010) and *Who Controls the Internet* (2006) (with Jack Goldsmith).

SUMMARY OF ARGUMENT

Verizon and MetroPCS (hereinafter, "Verizon") argue that *Preserving the Open Internet*, 25 F.C.C.R. 17905 (2010), 76 Fed. Reg. 59192 (Sept. 23, 2011) (the "Order") violates their rights under the First Amendment. Should it reach the question, the Court should reject the argument.

"To comprehend the scope of Congress' power ... 'a page of history is worth a volume of logic.'" *Eldred v. Ashcroft*, 537 U.S. 186, 200 (2003) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.)). When laws stand unchallenged for most of American history, there is reason to presume their Constitutionality. Transmitters similar to Verizon have been subject to non-discrimination duties similar to those imposed by the Order since the 1840s. There is no way to hold the Order unconstitutional without implying the same for much of more than a century and a half of similar regulations, including many, like the Order, that

imposed non-discrimination rules but not full common carriage duties. To suggest that laws in force for most of the Republic's history were actually unconstitutional would be a dramatic outcome indeed.

The critical legal distinction here is that between publishers and distributor / transmitters, which crosses multiple legal regimes. Publishers are firms that actively choose a "repertoire" of content they wish to present to their audiences, bear public and legal responsibility for it, and are protected under the First Amendment based on their exercise of editorial judgment in the selection of their repertoire. *Turner Broad. Sys., Inc., v. F.C.C.,* 512 U.S. 622, 636-637 (1994). A transmitter, in contrast, primarily moves information according to the direction of its users, has only vague knowledge of what it carries, is not usually identified with the content, and is not held criminally or civilly responsible for any crimes or torts it facilitates. While a transmitter typically does have the technical capacity to block or prioritize content, that capacity alone has never created a protected speaker under the First Amendment.

There is no factual dispute that Verizon, as broadband provider, falls within the transmitter category. It provides a service that moves content from one place to another, without actual knowledge of what it makes available, and it takes full advantages of the lack of legal responsibility

thereby conferred. Even if Verizon performed much more prioritization, it would not resemble a publisher, but merely begin to resemble Fedex, not the Wall Street Journal.

Erasing the line between publishers and transmitters, by granting Verizon the First Amendment protections reserved for publishers, would break sharply with more than a century of historical practice, and have unpredictable consequences. Historically and to this day, states and Congress have regulated firms that move information and have the technical capacity to decide how they do so, including physical carriers like Fedex and UPS, local and long distance telephone companies, and others. To hold that all of these entities are now First Amendment speakers would open the proverbial can of worms.

Instead, the proper mode of analysis for Verizon's business model is to examine it as a form of conduct. Under well-established First Amendment precedent, its transportation business is protected speech only if it is "inherently expressive," which is to say if "[a]n intent to convey a particularized message was present" and "the likelihood was great that the message would be understood by those who viewed it." *Spence v. State of Wash.,* 418 U.S. 405, 410-11 (1974).

I. DISTRIBUTION OF INFORMATION IS DISTINCT FROM PUBLISHING UNDER THE FIRST AMENDMENT.

A. Transmitters do not become protected speakers based on the potential power to block or prioritize content.

A longstanding line in First Amendment jurisprudence and other areas distinguishes between publishers and distributors / transmitters of information.[1] A publisher actively and knowingly selects the content it provides its audience, is identified with its choices, and bears legal responsibility for those choices: paradigmatic examples are book publishers, newspapers, and television broadcasters. A transmitter, by contrast,

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1 In the criminal law, the transmitter / publisher distinction is reflected by the interpretation of the mens rea requirement in conspiracy and accomplice liability to exempt firms like Verizon from liability for its material contributions to crimes such as fraud, illegal drug sales, and any other crime that is facilitated by an internet connection. *See e.g. People v. Lauria*, 251 Cal. App. 2d 471, 480 (1967). ("[A] supplier who furnishes equipment which he knows will be used to commit a serious crime may be deemed from that knowledge alone to have intended to produce the result."); *United States v. Peoni*, 100 F.2d 401, 403 (2d Cir. 1938). ("[A] seller, knowing the buyer's criminal purpose, is a conspirator with him."). In information law outside of the First Amendment, the publisher / transmitter line is reflected in the necessary element of volition for liability under the copyright law, e.g., *Religious Tech. Ctr. v. Netcom On-Line Commc'n Services, Inc.*, 907 F.Supp. 1361, 1370 (N.D. Cal. 1995) ("Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party.");17 U.S.C. §512(a); 512(k)(1)(A) (transmitters, defined as those who move information at user specification, generally have no secondary copyright liability, with rare exceptions).

operates by moving information, for a fee, according to the direction of its users, and is neither identified with, or even knows what it is carrying, nor is held legally responsible for what it carries. Traditional private transmitters include the telegraph, private courier services (like Fedex or UPS), local and long distance phone companies.

As a matter of First Amendment law, publishers are protected based on the editorial discretion exercised in the selection of their repertoire. *Turner,* 512 U.S. at 636-637; *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). It is true that most transmitters, like Fedex, or a local phone company, do have the *potential* power to block a given transmission. But the mere technical ability to block transmissions is of no significance by itself. It is not the same thing as fully curating or selecting the content the audience receives, and has never been the basis for First Amendment protection.

Turner makes clear what triggers the protections afforded a publisher. A cable operator is protected because it "exercises editorial discretion over which stations or programs to include in its repertoire." *Turner,* 512 U.S. at 636 (quoting *City of Los Angeles v. Preferred Communications, Inc.*, 476 U. S. 488, 494 (1986)). As this makes clear, the knowing selection of a "repertoire," or a curated selection of content, is how a cable operator does business, and this makes it a protected speaker.

The newspaper is the quintessential example of a protected First Amendment publisher / speaker, but not simply because a newspaper moves information. The articles a newspaper runs are understood to be part of, and the responsibility of, the newspaper – it makes sense to say something like "look what the Washington Post said about X yesterday." That is because the very nature of a newspaper reflects a knowing selection and arrangement of the entirety of the articles that make up the final product. It is that process that the Supreme Court has protected, in cases like *Miami Herald,* which recognized a right in newspapers not "to print that which it would not otherwise print." 418 U.S. at 256 (citing *Associated Press v. United States*, 326 U.S. 1 (1945)) ; *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U. S. 376, 391 (1973) ("reaffirm[ing] unequivocally the protection afforded to editorial judgment and to the free expression of views….").

In contrast, the undisputed facts make clear that Verizon's broadband business shares almost none of the characteristics that have led the Court to protect publishers as speakers. Unlike a newspaper or cable operator, in the course of operations, the firm lacks actual knowledge of what it presents its audience: it has only a vague sense of what information it is making available to its customers. As a factual matter it would be infeasible for

Verizon, or any other broadband provider to know what selection of content it is offering, given the vast number of web sites and other Internet content available, and given that they change every day.

No one, meanwhile, associates Verizon with the Internet content it carries. If a blogger wrote something outrageous on the Internet, it would be absurd to complaint by saying "Can you believe the blog Verizon ran yesterday?" Rather, Verizon is in same position as the law schools in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,* 547 U.S. 47, 65 (2006) who, the Court held, were not speaking when merely hosting recruitment interviews. As the Court explained, "[a]ccomodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions." *Rumsfeld*, 547 U.S. at 646 Like the law schools, Verizon is a host for the speech of others, with only limited knowledge of what it carries. As we've already suggested, the firm takes full legal advantage of that fact to avoid potential legal responsibility under the criminal, defamation, and copyright laws.

Finally, the content selection process is also completely different as between Verizon and protected publishers. While a cable operator must knowingly decide (and pay) when it wants to provide its customers with a

given channel, and a newspaper editor must decide to run an article, Verizon does not "decide" to carry a new web site. That all happens by itself, as the Internet changes – Verizon, as a broadband provider, has nothing to do with it, and does not have active knowledge of what it offers its customers at any time.

The closest that Verizon comes to resembling a protected publisher comes from the fact that it has the technical, albeit unexercised, power to prioritize some Internet content or block it. Yet even if Verizon were to exercise those powers it would still be a far from active selection of a "repertoire" or a curated newspaper, or becoming understood as the responsible publisher of the content it carries. Prioritization and blocking might make Verizon more like Fedex, with its "Priority Overnight" services. But Verizon would remain in a fundamentally different position than a newspaper editor or book publisher that actively decides what content it wishes to provide its customers.

This might be a very different case were Verizon to radically alter its business model and begin only selling a highly curated internet service consisting of a selection of the "best 100 web sites," for which it would then be held legally accountable. But that is not the claim Verizon presents to this court.

In short, a serious and full comparison reveals that Verizon is fundamentally different than the firms that have been protected as publishers under the First Amendment. As a transmitter or distributor of information, Verizon's operations must be analyzed not under *Turner,* but a different First Amendment framework.

B. Verizon's Transport Business is appropriately analyzed as a form of conduct.

Verizon broadband operates primarily moving the contents of the information, at user request, like any transport or distribution company. As such, the proper First Amendment analysis is to examine Verizon's business operators as a form of conduct.

In that context, the Supreme Court has made it clear what is required to gain First Amendment protection. "[W]e have extended First Amendment protection only to conduct that is inherently expressive," wrote the Court in *Forum for Academic & Institutional Rights, Inc.,* 547 U.S. at 66. There, providing the facilities for speech, like here, was analyzed as a form of conduct. The expressiveness of conduct is determined by the familiar *Spence* test: the court asks whether "[a]n intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it." *Spence,* 418 U.S. at 410-11.

Verizon's proposed blocking and prioritization program would deliver no discernable message, and is therefore not symbolic conduct as understood by *Spence*. This might be a different case if, for example, Verizon blocked websites according to some clear ideological position, and its customers understood that fact. But Verizon is like most transportation and communication firms, who make ordinary business decisions that have nothing to do with any "particularized message." For example, no carrier will transmit the information of a customer who doesn't pay bills. Some transport companies agree to carry more, or deliver information faster, for more money (consider Fedex's "Saturday service"). In addition, many firms must follow legal requirements as to forms of information that they may not carry – such as those imposed by criminal law, national security laws or the copyright laws. See e.g., 17 U.S.C. 512(j)(1)(B) (duties of transitory carriers).

A company that follows the law, gives better service to those who pay more, or refuses to serve those who will not pay, is simply making typical business judgments. These are not the same thing as creating a "particularized message." To avoid the First Amendment applying to all business conduct, they are not protected as speech.

* * *

Erasing the publisher / transmitter line, by protecting Verizon as a publisher, would be a dramatic step, and the court must seriously consider the potential consequences. It would imply that firms like Fedex, local and long distance telephone carriers and backbone Internet carriers are granted First Amendment rights in their carriage so long as they are able to demonstrate some selection among customers, or merely a technical ability to exercise discretion in what they carry. It is true that a private mail carrier like Fedex *could* refuse to deal with this or that company, or a telephone service provider *could* only offer service to selected customers. But if that mere possibility conferred First Amendment protections, it would upend settled expectations. It would also, as discussed in Part II, *infra*, be deeply inconsistent with the history of regulating carriers of information, in place in some form since the mid-19th century.

II. HOLDING THE ORDER UNCONSTITUTIONAL WOULD BE AT ODDS WITH CENTURIES OF TRADITIONAL OVERSIGHT OF BOTH TRANSPORTATION AND COMMUNICATIONS COMPANIES.

"To comprehend the scope of Congress' power … 'a page of history is worth a volume of logic.'" *Eldred v. Ashcroft*, 537 U.S. 186, 200 (2003) (*quoting New York Trust Co. v. Eisner,* 256 U.S. 345, 349 (1921) (Holmes, J.)) For centuries, English and American common law, state legislatures, and the

U.S. federal government have imposed legal duties on both transportation of information and other products.[2] Some of these regimes were full "common carriage" systems, but others were, like the Order, in the nature of ad hoc non-discrimination duties. As the Supreme Court said of its regulation of telegraph transmitters, "they are not common carriers; their duties are different, and are performed in different ways; and they are not subject to the same liabilities." *Primrose v. Western Union Telegraph Co.,* 154 U.S. 1, 14 (1894). An important statutory difference was the absence of the rate regulation imposed on common carriers by the Interstate Commerce Act, Pub.L. 49-104, 24 Stat. 379 (1877). In the common law regulation of transmitters, a principle difference was that telegraph companies had greater latitude to contractually stipulate their liability in case of errors, unlike common carriers, who were held strictly liable for things like like damage to the contents of what it carried. *Primose*, 154 U.S. at 14-34. In

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2 An exclusive public postal service in England was introduced in the mid-17th century. *See* Joseph Clarence Hemmeon, *The History of the British Post Office 195 (1912)* . Before that time, some information carriage was conducted by some public carriers, and also a collection of private carriers who were subject to various common-law duties. *See id.* at 189; Douglas K. Adie, *Monopoly Mail: The Case for Privatizing the United States Postal Service 41-43* (1988). While obviously there were limited free speech rights at the time, this makes clear that the tradition of government oversight of information carriage is a tradition that predates the American revolution.

short, regulations imposing duties short of common carriage on information transmitters have been part of the Republic's legal order since the mid-19th century. To suggest that such laws were actually unconstitutional all along would be staggering decision that the court should not take lightly.

A. Common Law, State and Federal regulation of telegraph firms similar in nature to the Order were upheld against all Constitutional challenges.

In relevant American history, the first regulation of private, instantaneous information providers begins in 1848. The early laws resemble contemporary broadband regulation and are therefore worth particular attention. Importantly, the earlier regulations were *not* common carriage regulation, but rather regulations designed to prevent monopolization, create duties of non-discrimination and/or provide preferred carriage to government itself or preferred parties. Despite similarities to the regulation here contested, none were challenged under the First Amendment, and the Federal laws were upheld against other Constitutional challenges.

In speech terms, Verizon and other broadband carriers are not that different from 19th century telegraph companies. Both carry information over wires for a fee, and both have the potential to exercise judgment as to what they carry. Moreover, it is clear that the telegraph companies actually

did exercise enormous discretion with respect to the telegrams they carried, and actively favored some parties over others. Tim Wu, *The Master Switch* 22-24 (2010). To take just the most obvious historic example, Western Union, the then telegraph monopolist, discriminated against other wire news services in favor of the Associated Press. *See id.* Nonetheless, the regulation of the telegraph was never thought to be a question for First Amendment scrutiny, and no case has ever been brought, despite centuries of regulation.

The first regulation of private telegraph companies were state chartering laws in the 1840s, followed by more general state regulations, pioneered by New York in 1848. *See* Act of Apr. 12, 1848, ch. 265, 1848 N.Y. Laws 392. That law created a simple procedure for chartering a telegraph firm, and gave special transmission privileges to journalists. The first major federal scheme regulating private information carriage was the 1866 National Telegraph Act, ch. 230, 14 Stat. 221. That Act did not make the telegraph companies common carriers, but it did regulate their performance pursuant to rules set by the Post-Master General, prioritized Government transmissions, and fixed the prices Government would pay. As historian Richard John writes, after the passage of the act, "telegraph corporations operated in a quasi-regulatory political economy…." Richard R. John,

Network Nation: Inventing American Telecommunications 116-117 (2010).

Perhaps most similar to the Order, however, were the duties imposed by the courts. In the late 19th century, courts subjected telegraph firms to non-discrimination duties that were *not* common carrier duties, but like the regulations promulgated by the FCC, nonetheless imposed certain duties of care. As the Supreme Court summarized the matter in *Primrose v. Western Union Telegraph Co.,* 154 U.S. at 14 (1894):

> Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce; and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination. They have, doubtless, a duty to the public, to receive, to the extent of their capacity, all messages clearly and intelligibly written, and to transmit them upon reasonable terms. But they are not common carriers; their duties are different, and are performed in different ways; and they are not subject to the same liabilities.

The similarity between this regulation and the Order bears close inspection by any court ruling on Constitutional issues in this area.

It is also important to understand how the 19th century statutory and common law regulation of transmitters was different than common carriage regulation. For one thing, as the Court held in *Primrose*, a transmitter had greater latitude to contractually limit its damages in the case of error, unlike carriers of goods who were strictly liable for damages caused in the process of carriage. That tended to exempt a telegraph firm from damages in the

event of errors in transmission. Second, after 1887, common carriers were government by the Interstate Commerce Act, Pub.L. 49-104, 24 Stat. 379 (1887), which imposed multiple duties beyond those specified by the common law, including a blanket requirement, in Section 1, that "all charges for services rendered ... be just and reasonable." In contrast, the rates charged by transmitters were unregulated during this period.

None of these many state laws, common law cases, nor the National Telegraph Act were ever challenged under the First Amendment. Rather, the U.S. Supreme Court explicitly and carefully upheld the Constitutional power of Congress to regulate the telegraph. *See Pensacola Tel. Co. v. W. Union Tel. Co.,* 96 U.S. 1 (1877) As the Court later summarized in *Western Union Telegraph Co v. State of Texas,* 105 U.S. 460 (1881), it held that

> the telegraph was an instrument of commerce, and that telegraph companies were subject to the regulating power of Congress in respect to their foreign and inter-state business. A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself.

As this passage suggests, the basic regulation of transmission carriers – even those that exercise discretion over what they carry – has long been considered Constitutional. To hold otherwise would be a sharp break with longstanding practice.

B. Twentieth Century common carriage regulation of the telegraph, telephone, and radio were also unchallenged under the First Amendment.

Common-carrier or "public calling" style regulation of information carriers was explicitly imposed by Congress in the Mann-Elkins Act of 1910, ch. 309, 36 Stat. 539. That law subjected the telegraph, telephone and radio transmissions to non-discrimination requirements. The Mann-Elkins Act, like its predecessors, was presumed Constitutional and never challenged under the First Amendment.

The regulatory scheme that still underlies today's law, the 1934 Telecom Act, created antidiscrimination rules for carriers, including duties of non-discrimination. Communications Act of 1934, ch. 652, § 202, 48 Stat. 1064, 1070. That Act was similarly never challenged as a violation of the First Amendment, nor were its Amendments in 1996, despite multiple waves of litigation. Justice O'Connor would state the long-standing presumption that common carriage regulation was constitutional under the First Amendment when, in 1994, she wrote "it stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies…." *Turner*, 512 U.S. at 684.

* * *

To make a long story short, firms in the exact same position as Verizon

have been subject to similar state and federal regulation for most of U.S. history. As Justice Scalia suggests "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down." *Rutan v. Republican Party of Ill.,* 497 U.S. 62, 95 (1990) (Scalia, J., dissenting).

While one cannot be completely certain that all of these regulations were not actually unconstitutional all along, long-standing, settled practices must be taken into account in Constitutional adjudication. *See Eldred v. Reno,* 239 F.3d 372, 377 (D.C. Cir. 2001) *aff'd, Eldred v. Ashcroft,* 537 U.S. 186 (2003) For the court to hold such schemes unconstitutional now, after such a long period of presumptive constitutionality, would be an exercise in judicial disruption of settled expectations.

CONCLUSION

WHEREFORE, *amicus curiae* asks that this court dismiss the notices of appeal, deny the petitions for review, affirm the Order and grant all such other relief as may be just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Rule 32(a)(7), Federal Rules of Appellate Procedure, I certify that the accompanying Initial Brief for *Amicus Curiae* in this case contains 3827 words.

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CERTIFICATE OF SERVICE

I, Andrew Jay Schwartzman, certify that on November 15, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Others, marked with an asterisk, will receive service by mail unless another attorney for the same party is receiving service through CM/ECF.

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