ORAL ARGUMENT NOT YET SCHEDULED

No. 11-1355

In the United States Court of Appeals for the District of Columbia Circuit

VERIZON ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

On Appeal from an Order of the Federal Communications Commission

BRIEF OF INTERVENORS OPEN INTERNET COALITION, PUBLIC KNOWLEDGE, VONAGE HOLDINGS CORPORATION, AND NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties:

All parties, intervenors, and amici appearing in this Court are listed in the Brief for Respondent Federal Communications Commission.

B. Rulings Under Review:

The rulings under review are listed in the Brief for Respondent Federal Communications Commission.

C. Related Cases:

As correctly stated in the Brief for Respondent Federal Communications Commission, this case has not previously been before this Court, and we are not aware of any related case pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Rules of the United States Court of Appeals for the District of Columbia Circuit, Intervenors hereby submit the Corporate Disclosure Statements below.

OPEN INTERNET COALITION

The Open Internet Coalition ("Coalition") is a non-profit organization that represents businesses that share a common goal—keeping the Internet fast, open, and accessible to all Americans. The Open Internet Coalition has no parent corporations, and no publicly held company has a 10% or greater ownership in the Open Internet Coalition. Open Internet Coalition members and participants include Amazon.com, Ask.com, Chemistry.com, Citysearch, CollegeHumor, Computer & Communications Industry Association, Digital Media Association, DISH Network, Earthlink, eBay, Electronic Retailing Association, Facebook, Google, IAC, iWon, Match.com, Net Coalition, Netflix, PayPal, ServiceMagic, Shoebuy.com, Skype, Sling Media, Sony Electronics, Inc., StubHub, TechNet, TiVo, Twitter, Vanguard, Vonage, Writers Guild of America (West), and YouTube. More information can be found at www.openinternetcoalition.org.

PUBLIC KNOWLEDGE

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

VONAGE HOLDINGS CORPORATION

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.

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

The National Association of State Utility Consumer Advocates ("NASUCA") is a non-profit corporation incorporated in the State of Florida. NASUCA is an association of advocate offices in more than 40 states and the District of Columbia. NASUCA's members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. NASUCA member offices operate independently from the regulatory commissions in their states. Some are separately established utility advocate organizations, while others are divisions of

larger departments, such as the Office of Attorney General. NASUCA associate and affiliate member offices also serve utility consumers, but have not been created by state law or do not have statewide authority. NASUCA has no parent corporation or publicly held stock.

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GLOSSARY

2 GHz band	FCC licensed radio frequencies used for advanced terrestrial and satellite mobile telephone and data services
4G	Fourth Generation
Advanced Services Order	*Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd. 24012 (1998)
Brand X	*See Nat. Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)
CDA	Communications Decency Act of 1996
Coalition	*See* Open Internet Coalition
Computer II	*Amendment of Section 64.702 of the Commission's Rules and Regulations, Final Decision*, 77 F.C.C. 2d 384 (1980)
Computer III	*Amendment of Section 64.702 of the Commission's Rules and Regulations, Report and Order*, 104 F.C.C. 2d 958 (1986)
DISH	DISH Network Corporation
DMCA	Digital Millennium Copyright Act
FCC	Federal Communications Commission
Internet Policy Statement	*Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Policy Statement*, 20 FCC Rcd. 14986 (2005)

Intervenors	Open Internet Coalition, Public Knowledge, Vonage Holdings Corporation, and National Association of State Utility Consumer Advocates
JA	Joint Appendix
MVPD	Multichannel Video Programming Distributor
NPRM	*Preserving the Open Internet, Notice of Proposed Rulemaking*, 24 FCC Rcd. 13064 (2009)
Open Internet Rules	Refers to the rules adopted in the *Order* below
Order	*Preserving the Open Internet, Report and Order*, 25 FCC Rcd. 17905 (2010)
Rules	*See* Open Internet Rules
Section 628	Section 628 of the Telecommunications Act of 1996, 47 U.S.C. § 548
Section 706	Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302
Sling	Sling Media, Inc.
Turner I	*Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994)
Wireline Broadband Order	*Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd. 14853 (2005)

STATUTES AND REGULATIONS

Except for 17 U.S.C. § 512 and 47 U.S.C. §§ 160(c), 223(e)(1), 230(c)(1), 256(c), 549(f), which are appended to this brief, all applicable statutes and regulations are contained in the principal parties' briefs.

STATEMENTS OF THE CASE AND JURISDICTION, QUESTIONS PRESENTED, AND THE APPLICABLE STANDARD OF REVIEW

Intervenors adopt the Statement of the Case, Statement of Jurisdiction, Questions Presented, and Applicable Standard of Review set forth in the brief for the Federal Communications Commission and the United States. Resp. Br. at 1-2, 5-18.

SUMMARY OF ARGUMENT

Most of us have come to rely on the Internet to communicate, exchange ideas, engage in commerce, watch videos, and play games. The Internet's openness, however, is not a given; it is at its most vulnerable at the gate—the broadband access pipes that are controlled today by a handful of companies. The Nation sorely needs additional investment in broadband access to widen this gate. Such investment would be significantly hampered, however, if the current gatekeepers could lessen demand for the Internet experience by cherry-picking favorites among the immense Internet ecosystem. The Open Internet Rules remove barriers to additional infrastructure investment, and the Intervenors join their voices to the ample support in the record below for the existence of the link

between openness of the Internet and investment in broadband access infrastructure—a link than many of the Coalition's members and participants have themselves experienced.

Section 706 of the 1996 Telecommunications Act. Under Section 706, the Federal Communications Commission ("FCC") "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" through methods that "remove barriers to infrastructure investment." In this case, where the FCC "shall," it also follows that it may. The doubt correctly expressed by this Court in *Comcast* over the status of Section 706 as an independent source of authority evaporated when the FCC, in the *Order* below, disavowed its earlier dictum that Section 706 does not constitute such a source. That reading was questionable to begin with, and the FCC has convincingly reasoned that it was unduly broad.

The main remaining question is whether the Open Internet Rules fulfill Congress's intent to remove barriers to infrastructure investment. The answer is yes. Verizon disparages the link between Internet openness and infrastructure, but its rhetoric cleverly obscures the fact that it does not deny the link. Verizon only argues that any connection is tenuous—entering the realm of estimation, in which the agency enjoys great deference. Nor could Verizon and MetroPCS deny the connection between Internet openness and infrastructure investment; they have

both recognized it elsewhere, and indeed, Verizon owes its current dominant position to it. The impetus for the Fourth Generation ("4G") cellphone networks that Verizon and others are currently rolling out in large parts of the country is not consumers' demand for more "talk time" on their cell phones. These new networks are necessitated by the explosive demand for high-speed data services required to allow users to enjoy Internet content and services, particularly online video.

Many Coalition members and participants have experienced first-hand both the explosion in the demand for Internet services and its consequences for investment in Internet infrastructure. Netflix, for example, has become an online-video stalwart in only a few years' time, now providing video services to some 21 million customers nationwide. These rapidly multiplying millions of users cannot simply show up at Netflix's doorstep; they must turn to their cable or telephone companies, which control access to the Internet. By removing a barrier to investment, the Open Internet Rules have also encouraged and facilitated the decision of Coalition member DISH, a new entrant in the access business, to make a multi-billion dollar investment in a new Internet access system.

Section 628 of the Communications Act. The FCC also has authority to promulgate the Open Internet Rules under the Congressional prohibition on unfair practices by cable operators that significantly hinder multi-channel video

distributors from providing programming to consumers. Broadband access providers such as Comcast and Verizon have the incentive and ability to favor their own cable distribution arm over their competitors' services. They can wield an additional weapon against satellite distributors, such as DISH, who depend on broadband access to offer interactive services, and so must turn to their chief competitors for a necessary input to their service. This Court confirmed the broad reach of the unfair practices prohibition last year in *Cablevision*.

Questionable Injury of the Petitioners. Verizon's and MetroPCS's central grievance appears to be that the Open Internet Rules prevent them from charging content providers for their content to be available to Verizon's and MetroPCS's customers. Such charges would, of course, mark a seismic shift in today's mode of Internet use—a shift that no company would undertake lightly. Verizon and MetroPCS do not tell the Court that they plan to institute such charges. They only vaguely talk of "two-sided pricing models"—the same "some day" type of plan found insufficient to establish sufficient injury in *Lujan*.

Comcast. Verizon's and MetroPCS's position that the prohibition on discrimination is prohibited price cap regulation is also infirm. Among other reasons, the logical corollary of that theory is that the FCC may impose no rules *whatsoever* on broadband access, because any prohibition can be restated as a price constraint. This pits Verizon and MetroPCS against not only the Supreme Court's

Brand X decision, but also against the precedent on which they primarily rely—this Court's *Comcast* decision. The *Comcast* court held only that *Brand X* does not stand for a grant of "plenary authority" over Title I-classified broadband access. No plenary authority is quite different from no authority at all.

Light-Touch Regulation. The Open Internet Rules are light compared to enhanced service regulations of the past. Common carriers and their affiliates that provide enhanced, non-common carrier services have previously been subject to much stricter treatment than the light-handed Open Internet Rules, without such services being designated as Title II services. Verizon questions the power of the FCC to impose the Open Internet Rules, but its predecessor companies had accepted the FCC's power to mandate open architecture for their networks and had even been subject to a walled-off subsidiary requirement for their provision of enhanced services.

First Amendment. Verizon's and MetroPCS's First Amendment attack on the Open Internet Rules is undermined by a fundamental tension. Even as it puts on the mantle of the suppressed speaker here, Verizon claims the protection of statutes such as the Communications Decency Act of 1996 ("CDA") as a mere passive conduit. The First Amendment is not a victim of the Open Internet Rules but rather their beneficiary; the Rules will help preserve history's largest-ever free speech forum.

ARGUMENT

I. THE INTERVENORS REPRESENT A BROAD CROSS SECTION OF INTERNET SERVICE AND CONTENT PROVIDERS, NETWORK OPERATORS, AND USERS OF INTERNET SERVICES

As the FCC's *Order* recognizes, the more than 100,000 organizations and individuals who commented in its proceeding—including Verizon and MetroPCS—"agree that the open Internet is an important platform for innovation, investment, competition, and free expression." *Preserving the Open Internet*, *Report and Order*, 25 FCC Rcd. 17905, 17909 ¶ 12 (2010) ("*Order*") (JA__). Intervenors represent a diverse range of Internet service and content providers, network operators, and Internet users who have come to rely on that openness and the fundamental "end-to-end" network architecture of the Internet. Intervenors are therefore keen to preserve that openness against threats from the broadband providers that control American consumers' and small businesss' access to the Internet. The Coalition counts among its members and participants content and Internet service providers who would not have been household names but for the platform's openness, such as Google, Amazon.com, and many other successful businesses built upon the "innovation without permission" principle. The Coalition also includes DISH, Netflix, Skype, Vonage, and other companies whose video, voice, and other services compete directly with those offered by vertically integrated broadband service providers. Among these, DISH is notable for

embarking on a multi-billion dollar investment in broadband access, an investment that was facilitated and encouraged by the Open Internet Rules. Intervenors also include Public Knowledge and the National Association of State Utility Consumer Advocates, both of which represent the interests of the Internet-user community.

The Intervenors, including all of the Coalition members and participants, share the same standing to intervene in support of the Rules. Each would be injured by the Rules' absence, and accordingly, each participated in the proceeding below. It is well-known that consumers today have only one or two broadband access choices, if they have broadband access at all. In most cases, they can buy access only from their cable or telephone (wireline or wireless) company. If a provider decides to discriminate against certain content or ban it altogether, perhaps because it favors its own content, the losers will be standing on both sides of the broadband access gate. On the one side, consumers would be deprived of their choice in content as well as the ability to disseminate their own materials—the very interactive aspect that has made the Internet a democratic communications breakthrough. On the other, content providers would be deprived of an opportunity to reach the audience of their choice, a level playing field in the provision of information and entertainment, and even their livelihood.

II. THE FCC HAS AUTHORITY TO ESTABLISH THE OPEN INTERNET RULES

A. The FCC Has Authority Under Section 706 of the Telecommunications Act of 1996

1. Section 706 Is an Independent Source of Direct Authority

Section 706 commands that the FCC "shall encourage the deployment" of broadband Internet services "on a reasonable and timely basis" through "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market or *other regulating methods* that remove barriers to infrastructure investment." 47 U.S.C. § 1302(a) (emphasis added). In this case, where the FCC "shall," it follows that the FCC may. This conclusion is buttressed by the contrast between Section 706 and two other provisions of the same statute, which specify that nothing in them "shall be construed as expanding" the agency's authority. *See* 47 U.S.C. §§ 256(c), 549(f). Section 706(a), by contrast, is not tempered by any interpretative rule that would suggest the provision does not provide the agency with additional power to do what Congress requires. *Cf. Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 710 (D.C. Cir. 2011) (finding that the lack of limiting language in the definition of "satellite cable programming vendors" indicated broad FCC authority to regulate them).

The only doubt over the scope and meaning of Section 706 has arisen not from the language of the statute, but from a dictum found in the FCC's *Advanced*

Services Order. *Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act, Memorandum Opinion and Order, and Notice of Proposed Rulemaking* (*Advanced Services Order*), 13 FCC Rcd. 24012, 24047-48 ¶ 77 (1998). There, the FCC had to decide whether Section 706 would authorize regulatory "forbearance" where the requirements of the specific forbearance provision, 47 U.S.C. § 160(c), were not met. *Id*. at 24046 ¶ 73. In deciding that Section 706 did not provide authority to circumvent the forbearance provision, the FCC resolved a rather ordinary conflict between two statutory provisions and reached an unsurprising conclusion, ruling that the specific one prevailed over the general. But the FCC expressed itself more broadly than was needed to resolve the question before it: "the most logical statutory interpretation is that section 706 does not constitute an independent grant of authority." *Id.* at 24047 ¶ 77. A number of years later, this Court in *Comcast* observed that, at that time, "the Commission has never questioned, let alone overruled, that understanding of section 706." *Comcast Corp. v. FCC*, 600 F.3d 642, 658 (D.C. Cir. 2010) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

This is no longer the case. In the *Order*, the FCC has explicitly addressed its prior treatment of Section 706 and just as explicitly overruled it: "[t]o the extent

the *Advanced Services Order* can be construed as having read Section 706(a) differently [than as a source of FCC authority], we reject that reading of the statute." *Order*, 25 FCC Rcd. at 17969 ¶ 119 & n.370 (JA__).

Verizon and MetroPCS discount as perfunctory the *Order*'s rejection of the more expansive reading of the *Advanced Services Order*. Pet. Br. at 32. But no more needed to be said. *Cf. Nat'l Cable & Telecomms. Assoc. v. Brand X Internet Servs.*, 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) (citing *United States v. Mead Corp.*, 533 U.S. 218, 231 (2001)) (noting that there is no specific "formality" required for an agency's interpretation to be entitled to deference). Verizon's and MetroPCS's reliance on Justice Kennedy's concurrence in *FCC v. Fox Television Stations*, 556 U.S. 502 (2009), in support of a heightened standard for a change of agency interpretation is perplexing. Pet. Br. at 32. The *majority* opinion in *Fox* found "no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subject to more searching review." *Fox*, 556 U.S. at 514. Even Justice Kennedy's concurrence recognized that "[t]he question whether a change in policy requires an agency to provide a more-reasoned explanation than when the original policy was first announced is not susceptible . . . to an answer that applies in all cases." *Fox*, 556 U.S. at 535-536 (Kennedy, J., concurring). Here, where the agency was not changing policy but simply undoing

the unintended effect of a dictum found in an unrelated order, the FCC's explanation was more than adequate.

With the only cloud over Section 706's nature as a jurisdictional grant having dissipated, all the stars guiding interpretation of Section 706 have aligned—its facial meaning, the FCC's own construction, and this Court's prior reading of it. *See Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 906 (D.C. Cir. 2009) ("The general and generous phrasing of § 706 means that the FCC possesses significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband . . . .").

2. The Open Internet Rules Remove Barriers to Infrastructure Investment by Facilitating a Virtuous Cycle of Infrastructure and Content Investment

The main remaining question about Section 706 is whether the rules do what Congress asked the FCC to do: remove barriers to infrastructure investment. Notably, Petitioners never go so far as to say that there is no relationship whatsoever between assuring that content is not treated in a discriminatory fashion by broadband providers and investing in infrastructure. Pet. Br. at 28-33. The "triple cushion shot" rhetoric of Verizon and MetroPCS artfully hides the fact that their argument is qualified. Verizon and MetroPCS argue only that any relationship between the two is tenuous. *Id.* That argument, however, collides with the great leeway accorded agencies in making predictive judgments. *See, e.g.*,

Cablevision Sys. Corp. v. FCC, 649 F.3d 695, 716 (D.C. Cir. 2011) ("Although petitioners' objections have some force, we believe they are overcome by 'the substantial deference we owe the FCC's predictive judgments.'") (quoting *Nuvio Corp. v. FCC*, 473 F.3d 302, 306 (D.C. Cir. 2006)).

Moreover, both Verizon and MetroPCS have agreed with the FCC's reasoning in the past. As the FCC's brief convincingly explains, both Verizon and MetroPCS have recognized that consumers' desire to use high-bandwidth applications, such as streaming video, leads directly to investment in infrastructure. Resp. Br. at 39. Indeed, MetroPCS put it succinctly when it told the FCC that the Internet "is the model of the virtuous cycle: innovators are creating content and application products that consumers desire, which drives consumers to purchase from service and equipment providers, which in turn drives investment in the infrastructure and new technology in response to consumer demand." MetroPCS Comments at 16 (JA__).

In addition to the examples from the record, recent pronouncements by both Petitioners confirm that they still hold a position in tension with the one they espouse here. As Verizon recently informed the FCC, "it is well documented—and unchallenged by commenters—that skyrocketing demand for wireless broadband services requires carriers to accelerate the addition of network capacity to keep pace with consumer demand." *See* Cellco Partnership d/b/a Verizon

Wireless, Joint Opposition to Petitions to Deny and Comments, at 6, *filed in Application of Cellco Partnership for Consent to Assign Licenses*, WT Docket No. 12-4 (filed Mar. 2, 2012). It is only a small step to infer that the reason for the "skyrocketing" is the exponential proliferation of Internet content. MetroPCS has taken this small step unflinchingly. In an earnings call earlier this year, Roger Linquist, MetroPCS's Chairman and Chief Executive Officer, stated that "the world of data-centric phones and service has brought about the need for substantial download and upload speeds," which MetroPCS needed to be able to provide, due to consumer demand for "YouTube and Pandora and applications as such."[1]

These inconsistencies aside, the position expressed on brief by Verizon and MetroPCS is inaccurate. There is nothing tenuous about the connection between non-discriminatory online access to content and greater infrastructure investment. Verizon and MetroPCS themselves have profited from it. And many Coalition members and participants have had first-hand experience with it. They have based decisions to embark on significant investments precisely upon the premise of non-discriminatory access to content and the other prophylactic rules made in the *Order* below. Purchasers of broadband access are not interested in empty pipes. They

[1] Seeking Alpha, MetroPCS Communications Management Discusses Q2 2012 Results—Earnings Call Transcript, *available at* http://seekingalpha.com/article/752201-metropcs-communications-management-discusses-q2-2012-results-earnings-call-transcript?page= 5&p=qanda&l=last.

pay Verizon or MetroPCS to access today's multifarious Internet content, as well as to communicate their own ideas and information. If demand for the Internet were to stop growing or to grow more slowly, this would likely deter investment in new conduits to the Internet.

a) Broadband Access Providers Have Gained Their Dominant Position Owing in Large Part to Internet Openness

The explosion of Internet content has been an important contributing factor for the success of the handful of broadband access providers existing today. The FCC's 2010 report on mobile broadband indicates that consumer demand for mobile data services is expected to "grow between 25 to 50 times" their 2010 levels by 2015, owing to increased consumer demand for information, music, video, and other multimedia content delivered wherever they are.[2] Cisco's more recent study of mobile broadband concurs, finding that "[g]lobal mobile data traffic grew 2.3-fold in 2011, more than doubling for the fourth year in a row," with video traffic being the driving force in that growth.[3] This growth originated in the exponentially increasing demand for Internet content, application, e-

[2] Federal Communications Commission Staff Technical Paper, Mobile Broadband: The Benefits of Additional Spectrum 2, 5 (Oct. 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-302324A1.pdf.

[3] Cisco Visual Networking Index, Global Mobile Data Traffic Forecast Update, 2011-2016, at 1, http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-520862.pdf.

commerce, and other service providers. As Cisco's study further notes, a "smartphone user adopting Netflix, Pandora, and Facebook will generate more than twice the volume of traffic generated by a smartphone user adopting only email and web applications."[4] By the end of June 2010, 61.2 million smartphones and other wireless-enabled devices were active on carriers' networks. CTIA Comments at 6 (JA__).

That demand has increased mobile carrier investment in infrastructure manifold. In fact, the 4G wireless systems being rolled out by Verizon and AT&T are a direct progeny of the demand for more bandwidth. This expansion would not have been undertaken simply to accommodate an increase in the number of Americans in the census rolls; nor would it be justified by people deciding to spend more time speaking on their cell phones. There would be no call for such increased capacity were it not for the need to catch up with consumers' desire to access the cornucopia of multimedia content and services on the web. Investment in 4G networks is expected to range between $25 and $53 billion during 2012-2016, assuming that the "compounded annual growth rate in mobile data traffic over the period" is a conservative 41-77 percent.[5] That investment is expected to

[4] *Id.* at 11.

[5] Deloitte Consulting, The Impact of 4G Technology on Commercial Interactions, Economic Growth, and U.S. Competitiveness 7 (August 2011), http://www.

account for $73-151 billion of gross domestic product growth and 371,000-771,000 new jobs during that period.[6] Only a few days ago, on the eve of election day, AT&T bore out the drift of these projections with a major investment announcement: To accommodate current and future demand for access to content, AT&T was spending an additional $14 billion to expand its fourth generation wireless network buildout so as to cover more than 96 percent of the U.S. population.[7]

As is clear from these recent investments, the *Order* has boosted rather than deterred infrastructure investments, in line with the FCC's predictive judgments. What Verizon and MetroPCS discount as a "daisy chain of speculative inferences" is in fact one of the levers propelling the U.S. economy out of the still-lingering economic crisis. Pet. Br. at 30.

b) Many Coalition Members and Participants Have Greatly Contributed to the Increased Demand for Broadband Access

Coalition members and participants such as Netflix, Facebook, YouTube, Twitter, and Sling Media, Inc. ("Sling") can confirm authoritatively that the

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deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/TMT_us_tmt/us_tmt_impactof4g_edited060612.pdf.

[6] *Id.* at 1.

[7] AT&T, Laying a Foundation for Growth, AT&T Analyst Conference 2012 (Nov. 7, 2012), *available at* http://www.att.com/Common/about_us/files/pdf/analyst_presentation_c.pdf

increasing demand for their services has contributed greatly to increased demand for broadband access. *Order* ¶ 14 n.23 (JA__). Netflix's online video subscription service, only four years old, now has more than 21 million users.[8] The growth of online video distribution has led to innovation in the market for IP-enabled televisions, video game consoles, and other devices. When it filed its initial comments, Netflix estimated that by the end of 2010 its service would be available on more than 100 different devices. Netflix Comments at 2 (JA__). By 2012, the number was 700.[9]

These millions of viewers cannot knock on Netflix's door directly. Nor can they rely on antiquated dial-up access to receive high-quality video. They must turn to their phone, cable, or cell phone provider for broadband access. Demand for Netflix and similar services has thus translated *directly* into increased demand for and investment in broadband deployment. *See* John Horrigan, Home Broadband Adoption 2009, Pew Internet & American Life Project, June 2009, at 23 (noting that residential broadband users are increasingly opting for higher-speed service); Comcast Comments at 7 (JA__) ("Comcast has invested tens of billions of dollars in network infrastructure, improvements, and upgrades.").

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[8] *The Video Viewer Privacy Protection Act: Protecting Viewer Privacy in the 21st Century: Hearing on H.R. 2471 Before the S. Subcomm. on Privacy, Technology, and the Law*, 112th Cong. 1 (2012) (statement of David Hyman, General Counsel of Netflix, Inc.).

[9] *See id.*

The success of Facebook, Twitter, YouTube and many others tells the same story. Facebook's user base has grown exponentially, reaching 955 million monthly active users worldwide in June 2012.[10] Of those users, 543 million access Facebook through mobile devices, with 102 million users relying exclusively on mobile broadband access.[11] Twitter has likewise experienced phenomenal growth. Started only six years ago, the service now has 140 million monthly active users in the United States sending 340 million "tweets" each day.[12] YouTube officially launched in December 2005, a few months before Twitter. At that time, users watched eight million videos each day.[13] By May 2010, that number exceeded two billion.[14] Today, users watch more than four billion hours of video on YouTube each month and upload 72 hours of video every minute.[15]

The open Internet also permits interaction between services like Facebook and YouTube, which in turn creates significant value for Internet users. Each day,

[10] Facebook, Inc., Quarterly Report (Form 10-Q) at 20 (Jul. 31, 2012).

[11] *Id.* at 22.

[12] Angela Moscaritolo, Twitter Turns Six with 140 Million Active Users, PC Magazine (Mar. 21, 2012), http://www.pcmag.com/article2/0,2817,2401955,00.asp.

[13] YouTube, Timeline, http://www.youtube.com/t/press_timeline.

[14] *Id.*

[15] YouTube, Statistics, http://www.youtube.com/t/press_statistics.

users watch 500 years' worth of YouTube videos on Facebook.[16] YouTube in turn drives activity on social networks, with 100 million people taking a "social action" on YouTube (likes, shares, comments, etc.) every week.[17] Unsurprisingly, Facebook and YouTube are two of the top three applications on mobile networks.[18] The popularity of those applications and "the opening up of the mobile ecosystem [to] thousands of developers who are building compelling applications and services for various mobile platforms" are main drivers of mobile broadband usage and demand.[19] The same is true for fixed broadband. As Comcast has observed in the proceeding below, "[t]he relationship between broadband ISPs and other creators of Internet content, applications, and services that benefit from broadband ISPs' networks is profoundly symbiotic." Comcast Comments at 10 (JA___).

Sling, a company under joint control with DISH, has also witnessed the close link between non-discriminatory online access and infrastructure investment. Sling Comments at 3-11 (JA__). Sling is a combination of software and equipment that connects a user's home set-top box, DVR, or DVD player to the Internet, allowing the viewing of live and recorded television from anywhere in the

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[16] *Id.*

[17] *Id.*

[18] Sandvine, *Global Internet Phenomenon Report* (2012), at 8, http://www.sandvine.com/downloads/documents/Phenomena_1H_2012/Sandvine_Global_Internet_Phenomena_Report_1H_2012.pdf.

[19] Chetan Sharma, *Managing Growth and Profits in the Yottabyte Era* (2009).

world—essentially "place shifting" the home television experience to wherever the user is. *See id.* at 1-3 (JA__). Sling was able to overcome initial resistance by Apple and AT&T for inclusion in the iPad platform, *Order*, 25 FCC Rcd. at 17925 ¶ 35 n.107 (JA__), and has been available on the iPad since 2009. Overcoming this initial barrier has promoted infrastructure investment in two ways. First, the demand for the Sling equipment has risen many times over, partly due to the product's availability on the iPad platform. Second, the consumption of content through Sling has increased commensurately, driving further demand for access and inviting greater infrastructure investment.

c) Fear of Gatekeeper Behavior Would Thwart Investment in Content

The correlation between content and demand for access is unremarkable—no one buys broadband access for the empty pipes' own sake. The prospect of slowing growth in demand, in turn, is a deterrent to new entry. Before making the substantial investments necessary to build out broadband infrastructure, new access providers must be certain that the main broadband gatekeepers will not act unilaterally to constrain artificially the availability of new "edge-based" content and services. If the main gatekeepers of broadband access prioritize their favored content, many content providers would be marginalized, stifled, endangered, or rendered extinct for failure to find funding. Thus, content would be suppressed, regardless of new entrants in the access business. That would matter little for

incumbent gatekeepers with their established customer bases. But a new network could become a sports arena without spectators if content did not flow freely through the main broadband access gatekeepers.

It is the still-burgeoning demand for higher-speed, higher-bandwidth, and more-ubiquitous broadband Internet access that has facilitated and encouraged the investment by Coalition member DISH in its own advanced terrestrial network in the 2 GHz band. As DISH's Chairman, Charlie Ergen, has said in connection with the Open Internet Rules: "The new rules give companies, including DISH Network, the framework to invest capital and manpower in Internet-related technologies without fear that our investment will be undermined by carriers' discriminatory practices." Press Release, DISH Network Corporation (Dec. 21, 2010). Additionally, DISH has declared elsewhere that "America's need for mobile broadband services, and the spectrum required to sustain and grow those services, will increase significantly during the next several years." DISH Comments at 2-4, *filed in* WT Docket No. 12-70; *see also* Andy Vuong, *DISH: FCC May Rule Quickly on Spectrum*, Denver Post, Mar. 21, 2012, at 5B (noting the increasing importance of DISH's investment "as consumers' video-viewing habits shift from the TV set to smartphones and tablets").

Removing the potential for unilateral actions by broadband gatekeepers that could chill investment in edge providers creates the regulatory certainty needed for

continued investment in both infrastructure and edge providers. It reduces risk and drives investment throughout the Internet ecosystem:

> Last-mile network providers, other broadband infrastructure hardware companies, web overlay content and applications providers and users all need to know the normative standards, mechanisms and policies that are appropriate for addressing network congestion, and which practices are impermissible because they limit the usefulness and benefits of the Internet as a whole.

Google Comments at 37 & n.117 (JA__). Indeed, with any "serious risk" of discriminatory behavior, "the capital markets will not fully fund IP-enabled services." *Preserving the Open Internet*, *Notice of Proposed Rulemaking*, 24 FCC Rcd. 13064, 13089 ¶ 63 n.144 (2009) (quoting Legacy AT&T Comments at 54, *filed in* WC Docket 04-36) (JA__). Calls to codify the Open Internet Rules grew largely from a concern that the questionable enforceability of the *Internet Policy Statement* created marketplace uncertainty. XO Reply Comments at 5 (JA__).

That concern is well placed. Although the opponents of the Open Internet Rules claim that the rules are a solution in search of a problem, discriminatory practices are no longer outliers. Cable modem service providers other than Comcast and Madison River Communications have "managed" peer-to-peer traffic. *See Order*, 25 FCC Rcd. at 17926 ¶ 36 nn.108-10 (citing allegations against Cox Communications and RCN Corp) (JA__). Similarly, Skype and Google Voice found their IP-based voice applications blocked on iPhones using

AT&T's 3G network. Skype Comments at 6 (JA__); Sling Comments at 5 (JA__). Even Verizon's brief to this Court heightens the uncertainty by arrogating to Verizon the "editorial discretion" over the content, applications, and services available on the Internet. Pet. Br. at 43.

Openness is the "highly successful status quo" on the Internet. *Order*, 25 FCC Rcd. at 17928 ¶ 39 (JA__). The FCC's high-level rules merely preserve that status quo. In so doing, the rules provide much needed certainty at a time when broadband providers have enhanced incentives and ability to act unilaterally against edge-based content, application, and service providers. Preserving the "virtuous cycle" and bringing a measure of certainty to the evolving Internet ecosystem is well within the FCC's authority under Section 706.

B. The FCC Has Regulatory Authority Under Section 628 of the Telecommunications Act

Coalition members and participants have also benefited significantly from the FCC's exercise of its authority under Section 628 of the Communications Act, the program access provision. Section 628 gives the FCC authority to impose the requirements of the *Order* on broadband access providers who are affiliated with cable operators, including Verizon, whose FiOS service is operated as a cable system. Section 628(b) prohibits cable operators, such as Verizon, from "engag[ing] in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly" the distribution

of "satellite cable programming or satellite broadcast programming to subscribers or consumers." 47 U.S.C. § 548(b). Section 628(c) prescribes the "minimum content" of regulations, including prohibitions on discrimination and exclusivity, but conversely does not set a maximum on the rules that the FCC may make to prevent unfair practices that meet the elements of Subsection (b). *Id.* § 548(c).

This Court had occasion to confirm the breadth of the catch-all unfair-practice prohibition last year. In *Cablevision*, the Court upheld the FCC's authority under that section to prohibit the withholding of programming other than the "satellite cable programming" mentioned in the provision, so long as that withholding is "unfair" and has the purpose or effect of significantly hampering an MVPD from providing satellite cable programming. *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 719-723 (D.C Cir. 2011).

This is exactly what discriminating against certain online content would accomplish—it would significantly hinder MVPDs such as DISH from providing satellite cable programming. The reason is twofold. First, online video has become a necessary complement of any MVPD service. *See Application of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses, Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4252 ¶ 33 (2011) (noting Comcast's belief that online video "is currently a complementary product" to its MVPD service and

that it "is likely to remain so in the future"); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, *Fourteenth Report*, 27 FCC Rcd. 8610, 8721 ¶ 240 (2012) (finding that "most consumers consider [online video distribution] service to be a complement to . . . their MVPD service"). The ability to provide video to consumers across platforms has become increasingly important in the video distribution market. A recent Nielsen report indicates that the average American currently watches five hours of video a week using the Internet, a trend that has been steadily increasing.[20] This should not be surprising; the Internet is awash in video content. Cisco, for example, has forecast that video content (excluding peer-to-peer distribution) will "be 55 percent of all consumer Internet traffic in 2016, up from 51 percent in 2011."[21] The lion's share of consumer data usage, therefore, stems from content that competes in one way or another with cable television services.

Second, because satellite television (in contrast with cable television) is one-way and does not allow interactivity, satellite television providers like DISH rely on broadband Internet access to provide on-demand content to their subscribers.

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[20] Nielsen, *State of the Media: The Cross-Platform Report Q1 2012*, at 2, *available at* http://nielsen.com/us/en/insights/reports-downloads/2012/state-of-the-media--cross-platform-report-q1-2012.html.

[21] Cisco, White Paper: Cisco Visual Networking Index: Forecast and Methodology, 2011-2016, at 2, *available at* http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ ns827/white_paper_c11-481360.pdf.

This broadband service is often purchased from a competing cable operator with which the satellite distributor has to compete. DISH Comments at 1 (JA _). The potential market manipulation by cable operators who wear both hats through the blocking or throttling of competing services and content is precisely the kind of unfair practice that thwarts competition and that Section 628(b) was created to prevent.

III. THE INJURY OF VERIZON AND METROPCS FROM THE RULES IS QUESTIONABLE

Verizon and MetroPCS must "demonstrate an 'injury in fact' that is fairly traceable to the challenged action and is likely to be redressed by a favorable judicial decision." *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012). While there is no question that the rules solve a real problem and prevent Internet access providers from engaging in behavior that has been observed in the past, Verizon's and MetroPCS's injuries from the Open Internet Rules remain highly speculative. Stated simply, Verizon and MetroPCS are requesting a freedom from the Rules even as the record shows no plan on their part to use the hoped-for freedom. To read Verizon's and MetroPCS's brief, their central complaint is that the Rules prevent them from charging content providers for consumers to receive their content (or, presumably, receiving it with certain priority, quality, etc.). *See, e.g.*, Pet. Br. at 17-18. But the record is devoid of any

plan by Verizon or MetroPCS to start imposing such charges. All that they say is that the rules foreclose "two-sided pricing models." Pet. Br. at 9, 17, 26.

A "pay to play" structures would be a radical change to Internet access service as we know it. Charging content providers (who range from news organizations to backroom bloggers), for example, would substantially impair the current incarnation of the Internet as a platform for the free dissemination of ideas. Neither Verizon nor MetroPCS would likely undertake such drastic measures lightly.

"'[S]ome day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).[22] Here, the "two-sided pricing models" whose unavailability due to the Rules is at the core of Verizon's and MetroPCS's grievance are no more than a "some day" intention of the kind the *Lujan* Court judged inadequate.

This is not to say that broadband access providers lack the incentive and ability to engage in the behavior that the rules prohibit. The record amply supports

[22] A party must also have standing *for each claim* it makes. *See Cobell v. Salazar*, 679 F.3d 909, 919 (D.C. Cir. 2012).

the FCC's conclusion that they have both.[23] Nor does an agency need to wait for the wrong to have been committed on a massive scale before it acts to curb it, particularly when the record contains more than enough instances of such behavior to persuade the FCC that the Rules are not guarding against mere improbabilities. Nonetheless, Verizon and MetroPCS must still describe their plans that the rules prevent them from implementing, and explain to the FCC why those plans should not be prohibited. Without such an openly avowed plan, it is not clear that Verizon and MetroPCS should be allowed past this Court's doorstep.

IV. THE OPEN INTERNET RULES ARE PERMISSIBLE LIGHT-HANDED REGULATION WITHOUT NEED TO RECLASSIFY BROADBAND ACCESS UNDER TITLE II

A. The Open Internet Rules Are Not Prohibited Title II Regulation

Verizon and MetroPCS contend that the Open Internet Rules are merely Title II regulation in disguise. Their chief argument is that, by prohibiting them from discriminating among Internet traffic, the rules effectively cap the price they can charge edge providers at zero. As the FCC's brief demonstrates, Petitioners' argument is incoherent. It suggests that edge providers, not broadband Internet subscribers, are its actual customers. Resp. Br. at 62-63.

[23] Indeed, the FCC has put forward persuasive economic models establishing that end providers such as Verizon and MetroPCS have both the opportunity and incentive to throttle broadband Internet access. *Order*, 25 FCC Rcd. at 17915-24 ¶¶ 20-34 (JA__).

Moreover, if the argument were correct, it could turn nearly any FCC prohibition on conduct into rate regulation that sets the price of not violating that prohibition at zero. For example, the FCC's use of its Title III authority to prohibit Verizon or MetroPCS from using a cellular tower to broadcast above a certain frequency suddenly becomes Title II rate regulation that sets the price for not causing interference at zero. Or the required carriage of closed captioning information could be described as mandating "zero-rate" pricing for closed captioning. Using this legerdemain, almost any rule could be contorted and recast into one resembling Title II regulation.

The resulting absurdities, which Verizon and MetroPCS would have this Court validate, are the consequence of misreading the Communications Act. In defining "telecommunications," the Telecommunications Act of 1996 instructs the FCC that 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." 47 U.S.C. § 153(51). Petitioners would draw from this definition the lesson that the FCC is prohibited from instituting any regulation on non-Title II services that can be articulated, though whatever machinations, in common-carrier terms. Such a leap from the statutory text was not the intent of Congress.

Indeed, Verizon's and MetroPCS's position pits them against not only the Supreme Court's decision in *Brand X*, but also the very decision upon which the

position relies, this Court's decision in *Comcast*. In interpreting *Brand X*, the *Comcast* Court readily recognized that, under *Brand X*, some authority to impose rules on non-Title II Internet access services did exist. The *Comcast* Court distinguished *Brand X* only on the ground that the Supreme Court's decision does not afford the FCC "plenary authority" over Internet access providers. *Comcast v. FCC*, 600 F.3d 642, 650 (D.C. Cir. 2010). No "plenary authority" is vastly different than no authority at all.

B. Verizon Is Contesting the Light-Handed Treatment When It Had Previously Accepted Harsher Rules

The rules on appeal are decidedly lighter than rules imposed by the FCC on enhanced services in the past. Common carriers providing enhanced services (which both Verizon and MetroPCS are) have been subjected to much heavier rules without any need to "reclassify" Internet access service and bring it into the tent of Title II. Verizon's predecessor companies in fact had been subject to stringent regulation for years in their provision of non-common carrier ("enhanced") services, without questioning the FCC's authority to mete out that treatment.

Computer II and *Computer III* are instructive here. Those decisions did not classify enhanced services under Title II, but they nonetheless imposed heavy conditions on the provision of such services by affiliates of Title II common carriers. *Computer II* even imposed a requirement of "maximum" separation

between the portions of Verizon's business that were selling "enhanced" services from those selling "basic" services—requiring a "separate corporate entity with separate accounts, officers, personnel, equipment, and facilities." *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking* (*Wireline Broadband Order*), 20 FCC Rcd. 14853, 14867 ¶ 22 n.58 (2005) (citing *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Computer II*), 77 F.C.C. 2d 384, 391 n.2 (1980)).

While the FCC relaxed these requirements in *Computer III*, the lighter conditions were still stringent compared to the rules in question here: Verizon was required to offer to other enhanced services providers the same basic services it used in providing its own enhanced services (known as "comparably efficient interconnection"), until it was able to develop an FCC-approved open network architecture plan that offered unbundled elements of its basic service to other enhanced service providers. *Id.* at 14870-71 ¶ 28.[24] Notably, the Bell Operating Companies (including Verizon's predecessors) did not question the FCC's authority to impose that regime. Indeed, they welcomed it, precisely because it was lighter than the separation requirement that had preceded it. *See Amendment*

[24] The *Computer II* requirements were removed in 2005 in the FCC's *Wireline Broadband Order*, 20 FCC Rcd. 14853, 14876 ¶ 41 (2005).

of Section 64.702 of the Commission's Rules and Regulations (*Computer III*), 104 F.C.C. 2d 958, 993 ¶ 58 (1986) ("[The Bell Operating Companies] contend that it would be proper for the Commission to . . . replace [the *Computer II*] requirements with appropriate nonstructural safeguards.").

Verizon thus finds itself arguing that the FCC lacks the power to do much less than it had the power to do, and did, under essentially the same statutory requirement. *See Nat. Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 992 (2005) (noting that the "terms 'telecommunications service' and 'information service' substantially incorporate" the FCC's prior terms "basic" and "enhanced" services).

And this describes just what the FCC has done (and could still do if it acts in a reasoned manner) without reclassifying the service. Taking a more stringent approach by reclassifying broadband Internet access as a telecommunications service would also have been well within the FCC's authority, and a decision to do so would have enjoyed considerable deference, as the Supreme Court's decision in *Brand X* demonstrates. *See, e.g.*, *id.* at 1003 (Breyer, J., concurring) (noting that the FCC's interpretation had been upheld, "*though perhaps just barely*") (emphasis added). Indeed, the FCC has never conceded that Verizon's broadband service could not be classified as a Title II service, only that it was "eligible for a lighter regulatory touch." *See Wireline Broadband Order*, 20 FCC Rcd. at 14856 ¶ 3.

And as noted above, the difference between these classifications is merely whether the service is "subject to *mandatory* common-carrier regulation under Title II" or other, potentially lesser "regulatory obligations under [the FCC's] Title I ancillary jurisdiction." *Brand X*, 545 U.S. at 976 (emphasis added).

V. THE OPEN INTERNET RULES FACILITATE FREE SPEECH AND DO NOT IMPEDE IT

A. Comparison to Forced Speech Cases Presumes that Petitioners Make Decisions Today as to What Content Their Networks Can Access

In arguing that the *Order* violates the First Amendment, Verizon and MetroPCS rely on *Turner I* and other compelled speech cases. Pet. Br. at 42-47 (citing *Turner Broad. Sys., Inc. v. FCC* (*Turner I*), 512 U.S. 622 (1994)). As the *Order* recognizes, the "critical factor" in *Turner I* that "made cable operators 'speakers' was their production of programming and their exercise of 'editorial discretion over which programs and stations to include' (and thus which to exclude)." *Order*, 25 FCC Rcd. at 17924 ¶ 140 (quoting *Turner I*, 512 U.S. at 636) (citing *Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986)) (JA__). By invoking *Turner I*, Verizon and MetroPCS arrogate to themselves the role of the Internet's "speaker" or "editor," making decisions about what content does and does not travel over its network. Thus, their argument that the *Order* "strip[s] them of control over the transmission," Pet. Br. at 3, rests on a

presumption that they are at present making those decisions and controlling their users' traffic.

This presumption of control is inconsistent with Verizon's contention elsewhere that operating a broadband network amounts "to an ISP acting as a mere conduit for the transmission of information sent by others." *Recording Indus. Ass'n v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1237 (D.C. Cir. 2003) ("*RIAA*"). Verizon's description of its role in *RIAA* makes clear that broadband access is a conduit, not a microphone. *See* Pet. Br. at 12. Accordingly, as with the regulation at issue in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, the *Order* "regulates conduct, not speech," 547 U.S. 47, 60 (2006), making *Turner I* and other compelled speech cases inapposite.

B. Petitioners' First Amendment Arguments Are Inconsistent with the CDA and the DMCA

Congressional intent aligns with common sense to show that broadband access providers are not the speakers of their customers' or content providers' words. The CDA clearly states that a broadband access provider is not liable for providing access that "does not include the creation of the content of the communication," and that "[n]o user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. §§ 223(e)(1), 230(c)(1). Congress explicitly created the CDA to exclude service providers from being considered

publishers who take responsibility for the content they convey. S. Rep. No. 104-230, at 194 (1996). Far from restricting speech, this distinction between speaker and service provider protects free speech. *See, e.g.*, *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003).

The safe harbor provisions of the DMCA similarly insulate providers of "digital online communications," such as Verizon, from any liability as a result of their users' infringement. 17 U.S.C. § 512. The limitation on liability is expressly conditioned upon the provider, *inter alia*, (1) not selecting the material it is transmitting, routing, connecting, or storing, and (2) not selecting the recipients of the material. Verizon qualifies for, and has notably claimed, this limitation on liability itself. *RIAA*, 351 F.3d at 1233. By availing itself of the DMCA safe harbor, Verizon distances itself from the speech of its users; it does not generate, edit, cull or select the recipients for that speech. Internet service providers can engage in conduct beyond "conduit only" functions and still enjoy protection under the DMCA. *Viacom Int'l v. YouTube, Inc.*, 676 F.3d 19, 39 (2d Cir. 2012).[25] However, the record contains no evidence of Verizon engaging in conduct that

[25] Of course, if Verizon or any other service provider were engaging in the selection of content and editorial decisions about how that content should be displayed to users when offering broadband service, then that is a very different question in terms of applicability of the First Amendment. We take no position on that question here.

would render it the "speaker" or "editor" with respect to its users' or content providers' expressive activity.

C. The *Order* Advances First Amendment Interests

The First Amendment is not the Open Internet Rules' victim; it is their beneficiary. Where the Supreme Court has considered the Internet, it has had no trouble identifying the primary First Amendment rights and interests involved as belonging to the network users. *Reno v. ACLU*, 521 U.S. 844, 862 (1997); *see also Ashcroft v. ACLU* (*Ashcroft I*), 535 U.S. 564 (2002); *Ashcroft v. ACLU* (*Ashcroft II*), 542 U.S. 656 (2004); *United States v. Am. Library Ass'n.*, 539 U.S. 194 (2003). In these cases, the Court identified the Internet as a "new marketplace of ideas" for online content providers and Internet users. *Reno*, 521 U.S. at 885. As a result, the Court has rejected statutory provisions that "effectively suppress[] a large amount of speech *that adults have a constitutional right to receive*," *id.* at 874 (emphasis added), as well as content that "noncommercial speakers" and commercial producers want to transmit, *id.* at 881.

As *Turner I* affirmed, "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[26] Threats to that access can come from

[26] *Order*, 25 FCC Rcd. at 17984 ¶ 146 (quoting *Turner I*, 512 U.S. at 662) (JA__). "Indeed, it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources

non-governmental as well as governmental entities. In either case, First Amendment interests are implicated. *See Assoc. Press v. United States*, 326 U.S. 1, 20 (1945) ("Surely a command that the government itself shall not impede the free flow of ideas does not afford *non-governmental* combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom."). By assuring that the Internet's free flow of ideas remains unimpeded, the *Order* advances the First Amendment interests of the Internet's users.

CONCLUSION

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

Respectfully Submitted,

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is essential to the welfare of the public." *Turner I*, 512 U.S. at 663; *see also FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978).

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

This brief complies with the type-volume limitation of Circuit Rule 32(a)(2)(B)(i) because it contains 8,307 words, excluding the parts of the brief exempted by Circuit Rule 32(a)(1), as determined by the word-counting feature of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to D.C. Circuit Rule 25(c), service of the foregoing will be made electronically via CM/ECF system upon the following counsels of record this 15th day of November 2012. 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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Dated: November 15, 2012

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STATUTORY ADDENDUM

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17 U.S.C. § 512

(a) Transitory Digital Network Communications.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content.

(b) System Caching.—

(1) Limitation on liability.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which—

(A) the material is made available online by a person other than the service provider;

(B) the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person; and

(C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A),

if the conditions set forth in paragraph (2) are met.

(2) Conditions.—The conditions referred to in paragraph (1) are that—

(A) the material described in paragraph (1) is transmitted to the subsequent users described in paragraph (1)(C) without modification to its content from the manner in which the material was transmitted from the person described in paragraph (1)(A);

(B) the service provider described in paragraph (1) complies with rules concerning the refreshing, reloading, or other updating of the material when specified by the person making the material available online in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available, except that this subparagraph applies only if those rules are not used by the person described in paragraph (1)(A) to prevent or unreasonably impair the intermediate storage to which this subsection applies;

(C) the service provider does not interfere with the ability of technology associated with the material to return to the person described in paragraph (1)(A) the information that would have been available to that person if the material had been obtained by the subsequent users described in paragraph (1)(C) directly

from that person, except that this subparagraph applies only if that technology—

(i) does not significantly interfere with the performance of the provider's system or network or with the intermediate storage of the material;

(ii) is consistent with generally accepted industry standard communications protocols; and

(iii) does not extract information from the provider's system or network other than the information that would have been available to the person described in paragraph (1)(A) if the subsequent users had gained access to the material directly from that person;

(D) if the person described in paragraph (1)(A) has in effect a condition that a person must meet prior to having access to the material, such as a condition based on payment of a fee or provision of a password or other information, the service provider permits access to the stored material in significant part only to users of its system or network that have met those conditions and only in accordance with those conditions; and

(E) if the person described in paragraph (1)(A) makes that material available online without the authorization of the copyright owner of the material, the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement as described in subsection (c)(3), except that this subparagraph applies only if—

(i) the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled; and

(ii) the party giving the notification includes in the notification a statement confirming that the material has been removed from the originating site or access to it has been disabled or that a court has ordered that the material

be removed from the originating site or that access to the material on the originating site be disabled.

(c) Information Residing on Systems or Networks At Direction of Users.—

(1) In general.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

(A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

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47 U.S.C. § 160(c)

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(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.

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47 U.S.C. § 223(e)(1)

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(e) Defenses

In addition to any other defenses available by law:

(1) No person shall be held to have violated subsection (a) or (d) of this section solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication.

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47 U.S.C. § 230(c)(1)

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(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

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47 U.S.C. § 256(c)

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(c) Commission's authority

> Nothing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before February 8, 1996.

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47 U.S.C. § 549(f)

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(f) Commission's authority

> Nothing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before February 8, 1996.

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