ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2015

In the

United States Court of Appeals

for the

District of Columbia Circuit

15-1063
(and consolidated cases)

UNITED STATES TELECOM ASSOCIATION, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

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

BRIEF OF *AMICI CURIAE* REED HUNDT, MICHAEL COPPS, NICHOLAS JOHNSON, AND SUSAN CRAWFORD IN SUPPORT OF RESPONDENTS

DAVID T. GOLDBERG
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Floor
New York, New York 10013
(212) 334-8813

J. CARL CECERE
Counsel of Record
CECERE PC
6035 McCommas Boulevard
Dallas, Texas 75206
(469) 600-9455

Attorneys for Amici Curiae

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Counsel for *Amici Curiae* certifies the following:

(A) Parties and *Amici*

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

The *amici* before this Court in support of Petitioners are:

Business Roundtable
Center for Boundless Innovation in Technology;
Chamber of Commerce of the United States of America;
Christopher Seung-gil Yoo
Competitive Enterprise Institute
FCC Commissioner Harold Furchtgott-Roth and Washington Legal Foundation;
International Center for Law and Economics and Affiliated Scholars
Mobil Future
Multicultural Media, Telecom and Internet Counsel
National Association of Manufacturers
Phoenix Center for Advanced Legal and Economic Public Policy Studies
Richard Bennett
Telecommunications Industry Association
Washington Legal Foundation
William J. Kirsch

Amici in support of Respondents are

A Medium Corporation
American Civil Liberties Union
American Library Association
Anna Eschoo
Association of College and Research Libraries
Association of Research Libraries
Automattic, Inc.

Broadband Institute of California
Broadband Regulatory Clinic
Computer & Communications Industry Association
Consumers Union
Dwolla, Inc.
Edward J. Markey
Electronic Frontier Foundation
Engine Advocacy
Foursquare Labs, Inc.
General Assembly Space, Inc.
Georgetown Center for Business and Public Policy
Github, Inc.
Imgur, Inc.
Internet Association
Keen Labs, Inc.
Mapbox, Inc.
Media Alliance
Mozilla
Officers of State Library Agencies
Open Internet Civil Rights Coalition
Our Film Festival
Professors of Administrative Law
Reed Hundt, Michael Copps, Nicholas Johnson, and Susan Crawford
Reddit, Inc.
Squarespace, Inc.
Shapeways, Inc.
Tim Wu
Twitter, Inc.
Yelp, Inc.

(B) Ruling under Review

The FCC Order challenged here is *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (Mar. 12, 2015) (the "Order").

(C) Related Cases

The Order was issued in response to a remand from this Court in *Verizon v.*

FCC, 740 F.3d 623, 659 (D.C. Cir. 2014). This case has been consolidated with Nos. 15-1078, 15-1086, 15-1090, 15-1091, 15-1095, 15-1099, 15-1117, 15-1128, 15-1151, and 15-1164. There are no other related cases.

September 21, 2015

Respectfully submitted,

/s/ J. Carl Cecere

J. Carl Cecere

RULE 26.1 STATEMENT

All *amici* are individuals.

RULE 29 STATEMENTS

The brief is filed with the consent of all parties.

Pursuant to Fed. R. App. P. 29(c)(5), *amici* state that no party or party's counsel authored this brief in whole or in part, and that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief. The Media Democracy Fund made a monetary contribution to the preparation and filing of this brief.

Pursuant to D.C. Cir. R. 29(d), *amici* state that a separate brief is necessary for the following reasons:

Amici include a former Chairman of the FCC who implemented the 1996 Telecommunications Act, a long-serving commissioner who was also Acting Chairman during the Obama Administration, and a commissioner who has been one of the most prolific commentators on communications matters of his generation. *Amici* also include a former White House telecommunications policy advisor. *Amici*'s extensive regulatory experience has made them intimately familiar with the process of formulating and implementing telecommunications policies in a manner consistent with First Amendment liberties.

Amici thus have a different perspective from any other party or *amicus*, and submit this brief with a different objective – focusing less on the particular merits of the FCC regulations at issue, and more on the distinctive harms to the

policymaking process that would flow from adopting the constitutional position urged by certain petitioners in this case.

As of this filing, we understand our brief to be one of only two *amicus* briefs explicitly addressing the constitutionality of the FCC's Rules, and of those, it will be the only *amicus* brief to take the position that the broadband transmission services impacted by those rules do not constitute Speech protected by the First Amendment. *Amici* thus understand the coverage of their brief to be significantly different from others submitted in this case.

September 21, 2015

Respectfully submitted,

/s/ J. Carl Cecere

J. Carl Cecere

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GLOSSARY OF ABBREVIATIONS

CBI	*Amicus Curiae* Center for Boundless Innovation in Technology
CDA	Communications Decency Act
DMCA	Digital Millennium Copyright Act
FCC	Federal Communications Commission
ISP	Internet Service Provider
Rules	The rules governing broadband Internet access providers issued after remand from this Court in *Verizon*, 740 F.3d at 659 published in *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (Mar. 15, 2015)
Pet. Br.	Joint Brief for Petitioners Alamo Broadband Inc. and Daniel Berninger
WLF	*Amici Curiae* former FCC Commissioner Harold Furchtgott-Roth and Washington Legal Foundation

INTRODUCTION AND STATEMENT OF INTEREST

As described more fully in the Addendum, *Amici* include individuals with long experience with the Nation's communications laws – administering, enforcing, and commenting upon the legal frameworks that govern the mediums of information exchange and connectivity vital to modern American economic, civic, and social life. *See* Add. A-1.

We agree with the FCC, together with its supporting Intervenors and *amici*, that the principal petitioners' suite of challenges in this case are without merit. The 1996 Telecommunications Act, like the 1934 Act, charged the FCC with assuring universal connectivity, and did so with full understanding that Internet technology would likely subsume all others as the dominant communication medium. The FCC properly affirmed this understanding during implementation of the 1996 Act by applying historic common carrier obligations for those who provided Internet access, and we are encouraged that the FCC has, consistent the Supreme Court's holding in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 US. 967 (2005), and *Verizon*, 740 F.3d at 659, returned to that understanding and imposed basic common carriage duties on broadband Internet access providers.

We submit this brief to respond to challenges cursorily made by two petitioners, Alamo Broadband, Inc. and Daniel Berninger (collectively "Alamo"),

who insist, along with two sets of *amici*, that the Rules not only exceed the Commission's congressional authorization, but abridge broadband Internet access providers' "Freedom of Speech," and therefore are beyond the power of Congress to impose.

These arguments are unsound as a matter of constitutional principle, and are contrary to common sense and to common understandings that broadband Internet access service providers have long encouraged and benefited from. While the very nature of communications regulations makes them likely to generate plausible-*sounding* "Free Speech" objections, it has never been the law – and it *cannot* be the law – that the mere provision of facilities over which others' constitutionally-protected communication occurs is itself "Free Speech," making basic common-carrier non-discrimination duties the constitutional equivalent of a government-compelled "pledge or oath." Nor can it be that the bare technical capacity to interfere with such communications is the equivalent of a newspaper publisher's "editorial discretion."

We are therefore encouraged that the principal petitioners here, representing the vast majority of providers governed by the Rules, have abandoned these mischievous arguments, having previously urged them in *Verizon* and, in some cases, in the Commission proceedings here.

But we still take seriously the need to respond to these arguments, if only to

prevent them from gaining a foothold. Taken seriously, these claims would imperil the entire project of communications law and Congress's longstanding, and until now unquestioned, power to regulate in this field.

ARGUMENT

I. The FCC's Common Carrier Rules Do not Implicate, Let Alone Abridge, any First Amendment Rights.

Alamo asserts that broadband Internet access providers' position along the "last mile" of the Internet, connecting their customers to the vast resources of the web, empowers them to control the dissemination of virtually *all* Internet content, conveying to them a constitutional right to ration, or even block, their customers' ability to access and transmit data and to communicate with whomever they want. They argue that *any* rule inhibiting these prerogatives violates providers' "First Amendment" right to "control … which speech they transmit and how they transmit it," and is "compel[ed]" speech, Pet. Br. at 4–5.[1]

These assertions, advanced by Alamo alone even among those who vigorously challenge the FCC's Order – and supported by *Amici* who summon

[1] Petitioner Berninger argues that his own Free Speech rights are violated by the Rules that prohibit broadband Internet access companies from selling – and thus prohibit him from buying – prioritized broadband access for his business, *id.* at 3. But his claims fail, for, *inter alia*, the same reasons Alamo's own claims fail – the business he seeks to create, offering "high-definition voice services," would merely operate as a conduit for others' expression. *Id*.

specters of "censorship," CBI Br. 6, and government efforts to "control thought," Pet. Br. 9 (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002)) – are at odds with common sense, settled First Amendment law, and with legal and societal understandings that the broadband industry has long advanced and Alamo has benefitted from.

A. Broadband Internet access companies, like other common carriers, are not engaging in constitutionally protected speech merely by transmitting communications to and from their customers.

Alamo's and *amici*'s arguments rest on a single undefended – and mistaken – premise: that because much of the data passing over broadband networks is "speech" protected under the First Amendment, *see Reno v. ACLU*, 521 U.S. 844, 849 (1997), a broadband operator's mere act of transmitting data to and from its customers is *itself* protected "speech." But the law is otherwise. "The Freedom of Speech," the Supreme Court has held, encompasses only conduct that is (1) "inherently expressive," *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. ("FAIR")*, 547 U.S. 47, 66 (2006), or (2) evinces "'[a]n intent to convey a particularized message' ... that 'would be understood [as such]'" by its audience. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)). *See generally* Stuart M. Benjamin, *Transmitting, Editing, and Communicating: Determining What "The Freedom of Speech" Encompasses*, 60 Duke L.J. 1673 (2011). And there is nothing expressive about

merely providing a facility for others' speech.

Thus, in *FAIR*, the Supreme Court rejected a "compelled speech" challenge to a statute requiring law schools and other recipients of federal educational aid to host military recruiters, notwithstanding the schools' disapproval of the recruiters' views about gay and lesbian students' fitness for service. *See* 547 U.S. at 62–64. The Court rejected petitioners' arguments because the conduct ostensibly "compelled" was not within "the Freedom of Speech": It was not enough that the *recruiters* were communicating a message, "because *the schools* [were] *not speaking* when they host[ed] interviews and recruiting receptions" at which the military expressed itself. *Id*. at 64 (emphasis added).

Just like the law schools in *FAIR*, broadband Internet access providers do not enjoy First Amendment protection for the transmission services regulated by the Rules because these services merely provide a facility for others' expression, having no expressive content of their own.

1. Broadband Internet access providers' transmission services simply serve as a conduit permitting speech between their customers and other edge users.

The Rules regulate only broadband providers' "mass-market retail" "broadband Internet Access services," an area of their businesses where they act solely as conduits for others' speech. *See* Order ¶28. In their transmission services, broadband access providers "exercise little control over the content which

users access on the Internet," representing to the public that they will allow Internet end users to access "all or substantially all content on the Internet, without alteration, blocking, or editorial intervention." *Id.* ¶549. Indeed, even Petitioner Alamo admits that broadband access providers "do not … restrict Internet access." Alamo *Ex Parte* Letter to FCC at 1 (Feb. 17, 2014). *See* Add. A-2.

But even if broadband Internet access providers changed those business practices, they would enjoy legal protections premised on the long-settled and opposite understanding: that they are insulated from the content they carry at customers' direction. For example, the CDA provides that "[n]o provider … 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. § 230(c)(1). That provision builds upon long-standing common law rules that generally preclude liability for transmission of others' unlawful content. David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of The Communications Decency Act*, 43 Loy. L.A. L. Rev. 373, 390, 399–401 (2010) (explaining historic protections for "conduit intermediaries"). Broadband Internet access providers also enjoy protection under the "safe harbor" provisions of the DMCA, 17 U.S.C. § 512(a), which precludes "service provider" liability "for infringement of copyright by reason of [its] transmitting, routing, or providing connections" when (among other

things) the transmission is initiated and directed by an Internet user, *Recording Industry Association of America, Inc. v. Verizon Internet Services ("RIAA")*, 351 F.3d 1229, 1234 (D.C. Cir. 2003).

Indeed, broadband access providers regularly advance an understanding of themselves as mere conduits, as in *RIAA*, 351 F.3d at 1237, where Verizon contended it was "acting as a mere conduit for the transmission of information sent by others," when it sought to avoid disclosing the names of customers suspected of infringing copyrights. *Accord In re Charter Commuc'ns, Inc.*, 393 F.3d 771, 777 (8th Cir. 2005) (quashing subpoena on cable Internet access provider, because it was "acting as a conduit").

Thus, the very nature of broadband Internet access providers' businesses, together with social and legal understandings they have benefited from and actively fostered, make their transmission services entirely separate from the speech they convey; mere conduits for others' speech.

2. Broadband Internet access providers do not express any particularized message through their transmission services that could be understood as intelligible speech.

No one understands broadband Internet access providers as expressing themselves through these transmission services because broadband access providers are not understood as conveying any "particularized message" by transmitting content at their customers' direction. *Spence*, 418 U.S. 411. When an

Alamo subscriber objects to a *New York Times* editorial she reads online, she might register her objection with the newspaper, and might even mention she read it online. But she is unlikely to exclaim, "I can't believe what *Alamo* said!" So to the extent that the "medium" truly "is the message," WLF Br. 20, the relevant "medium" is the website, or perhaps the Internet, not the broadband transmission.

As the FCC recognized in classifying them under Title II, broadband Internet access providers are thus natural descendants of the telegraph or the telephone – common carriers whose services do not receive independent First Amendment protection. *See, e.g., Denver Area Educ. Telecomms. Consortium v. FCC ("DAETC")*, 518 U.S. 727, 739 (1996) (plurality opinion) (distinguishing the First Amendment rights of "newspapers or television broadcasters" from those of "common carriers, such as telephone companies"); *FCC v. League of Women Voters of California*, 468 U.S. 364, 378 (1994) ("Unlike common carriers, broadcasters are entitled under the First Amendment to exercise … journalistic freedom.") (internal quotations omitted) (emphasis added).

Indeed, no one would even be able to grasp any "message" Alamo might wish to express through degrading or interfering with transmissions across its network. An observer – even one keen to uncover messages hidden within the transmission rates of data coming into his house – would have no way of determining whether his difficulty accessing controversial content was in fact a

disapproving "message" from his provider, evidence that the speaker had not paid for priority access, or simply a technical glitch. It would take further explanation to convert these into intelligible communications, strong evidence that this conduct "is not so inherently expressive that it warrants protection." *FAIR*, 547 U.S. at 66.

Alamo and *Amici* nonetheless insist otherwise, asserting that the broadband Internet access providers governed by the Order are First Amendment speakers, invoking the constitutional protection afforded to newspaper publishers and cable providers, and appealing to precedents recognizing a "liberty of circulation," *Ex Parte Jackson*, 96 U.S. 727, 733 (1877). CBI Br. 8-10; WLF Br. 19-21.

These arguments turn on a multifaceted misunderstanding of the century-old decision in *Jackson*. First, when the Supreme Court said that "delivering the mail 'necessarily involves the right to determine what shall be excluded'" (quoting *Jackson*, 96 U.S. at 732), it was not, as WLF posits (Br. 22), recognizing a "Free Speech" right of editorial discretion on the part of the Postal Service. On the contrary, it sustained the power of the *government* to censor the content of the mails, upholding, over the defendant's Free Speech challenge, a criminal conviction under a federal statute that imposed punishment for depositing indecent publications or contraceptive materials in the mail. 96 U.S. at 733.

The "liberty of circulation," which the *Jackson* Court honored only in the breach, belongs to speakers themselves, not transmitters, protecting those who

wish to transmit their expression from one place to another free of content-based governmental interference. As the Supreme Court made clear in modern decisions following *Jackson*'s dictum rather than its speech-restrictive holding, the First Amendment right to "*use* of the mails is almost as much a part of free speech as the right to use our tongues," *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305 (1965) (internal quotations omitted) (emphasis added). But the Supreme Court has not held that a carrier expresses itself when it delivers "communist political propaganda," *id.* at 304, or "Nazi hate speech," Pet. Br. 7, sent from one customer to another.

Of course, the settled understanding that transportation of others' speech is not in itself expressive does not mean that laws regulating broadband Internet access providers *never* implicate Free Speech. On the contrary, as *amici* CBI's other authorities reflect, the First Amendment prohibits government efforts that seek to suppress protected speech by imposing restrictions on those who transmit it.[2] The teaching of those cases is not, as CBI (Br. 9) suggests, that the act of

[2] *See* CBI Br. 9, citing *City of Lakewood v. Plain Dealer Publ'g. Co.*, 486 U.S. 750, 763, 772 (1988) (invalidating a law giving unbridled discretion to the mayor to determine whether to approve licenses for news racks because it "raises the specter of content and viewpoint censorship"); *Lovell v. City of Griffin*, 303 U.S. 444, 447, 452–53 (1938) (invalidating an ordinance prohibiting distribution of "circulars, handbooks, advertising, or literature of any kind," without "permission" because of its potential to "restrict circulation" of protected expression).

transmitting is itself expressive, but instead that government may not pursue constitutionally forbidden ends – inhibiting protected speech – through indirect regulatory means – regulating transmission. CBI Br. 9; *cf. RAV v. St. Paul*, 505 U.S. 377, 382 (1992) (First Amendment prohibits viewpoint-based regulation of even *unprotected* "fighting words").

That broadband providers' *conduit* activities lack constitutional protection does not deprive them of protection when they *actually* speak. As Alamo and *amici* point out, broadband Internet access providers engage in a variety of potentially expressive activities, including posting content on their homepages, or hosting their own "news website[s]." Pet. Br. 5; CBI Br. 7; WLF Br. 10. But the Rules do not regulate them in these *expressive* capacities, and their entitlement to protection for that expression does not transmute their non-expressive network practices into protected speech. *Cf. Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) ("[O]ne can be a common carrier with regard to some activities but not others.").

In sum, "the basic principles of freedom of speech and the press," which "do not vary when a new and different medium for communication appears," *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (internal quotations omitted), protect broadband providers just like everyone else. *Speech* over the Internet is fully protected, and was nearly two decades ago. *See Reno*, 521 U.S. at 849. What

Alamo invites the Court to do is *change* the long-settled understanding of speech simply to suit their commercial interests.

B. Broadband Internet access providers enjoy no constitutionally protected "discretion" to block or deprioritize others' Internet communications

Alamo's and its *amici's* claims that broadband Internet access providers should be protected as enjoying "editorial discretion" akin to newspaper publishers, *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), or the cable system operator in *Turner Broadcasting, Inc. v. FCC*, 512 U.S. 622 (1994), *see* Pet. Br. 4–8, *e.g.*, CBI Br. 7,13, WLF Br. 20–21, likewise blink reality. Even leaving aside salient market differences, newspaper publishers are speakers because their publication *is* "inherently expressive," and understood to be so. A subscriber to the *Miami Herald* – unlike one who signs up for broadband Internet access – does not seek unmediated, uninhibited access to "content … as diverse as human thought." *Reno*, 524 U.S. at 852 (internal quotation omitted). She expects to access content that has been developed, selected, and edited from the publisher's perspective.

Newspapers, unlike broadband Internet access providers, are also not legally insulated from the expressive messages they convey. Indeed, it is because newspapers "exercise …. Journalistic judgment as to what shall be printed," *Tornillo*, 418 U.S. at 259, that their publishers remain legally responsible for

unlawful content they publish.[3] A "newspaper may not defend a libel suit on the ground that the falsely defamatory statements [it published] are not its own," *Pittsburgh Press Co. v. Pittsburgh Human Relations Commission*, 413 U.S. 376, 386 (1973).

No more plausible are Alamo's claims to the mantle of the cable operators who challenged the "must carry" provisions in *Turner*. Contrary to what Petitioners imply, *Turner* did not hold that every "transmission" over a cable company's wires is protected Free Speech. Rather, the Court concluded that cable system operators "communicate messages" of their own, either through "original programming" or by "exercising" the "editorial discretion" necessary for them to determine "which stations to include in [their channel] repertoire." 512 U.S. at 636 (internal quotations omitted). And protection for the message is exhausted "[o]nce the[y] … select[] the programming sources," because at that point, "the cable system functions, in essence, as a conduit for the speech of others," *id.* at 629.

[3] *Tornillo* implicated further fundamental First Amendment principles entirely absent here: the right-of-response law challenged there was triggered by, and therefore, explicitly regulated, the content and viewpoint of newspaper editorials, raising a real danger that the statute would "'dampe[n] the vigor and limi[t] the variety of public debate' by deterring editors from publishing controversial political statements," and it was truly compelled speech, requiring that newspapers post editorials to *contradict* the effect of the newspapers' chosen expression. *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 88 (1980) (quoting *Tornillo*, 418 U.S. at 257).

Indeed, Justice O'Connor's concurring opinion in *Turner* emphasized that First Amendment concerns over the "must-carry" legislation the Court invalidated would be obviated if Congress had instead "obligate[d] cable operators to act as common carriers for some of their channels," *id.* at 684, explaining that "if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies." *Id.* So too for broadband Internet access providers.

Moreover, unlike broadband Internet access providers offering unfiltered access to the entirety of the Web, cable providers provide subscribers with access to only a small subset of potentially available programming, and thus necessarily exercise editorial judgment in their choices. And even then, not all conduct of the cable companies is considered expressive: When "providing public access channels under their franchise agreements, cable operators" are not seen as "exercising their own First Amendment rights. They serve as conduits for the speech of others." *See DAETC*, 518 U.S. at 793 (Kennedy, J., concurring and dissenting); *accord Cartoon Network v. CSC Holdings, Inc.*, 536 F.3d 121, 133 (2d Cir. 2008) (for copyright purposes, subscribers, not the cable system implementing their directions, "made" unauthorized recordings).

Nor, contrary to the emphatic assertions of Alamo's *amici*, does the Commission's desire to put controls on broadband Internet access providers'

technical capacity to block or throttle content prove that capacity to be protected "*editorial* discretion." CBI Br. 11. *Every* duty of nondiscrimination or open access enacted by law has been imposed on parties who previously had either technical or practical ability to exclude disfavored others: the law schools in *FAIR* had the *ability* to exclude military recruiters before the Solomon Amendment; the Heart of Atlanta Motel had the *capability* to deny accommodations to African Americans before the 1964 Civil Rights Act, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964); and AT&T fatefully used its power over the telephone network to throttle or block calls seeking to be connected to Western Union, the phone company's affiliate. Susan P. Crawford, *Transporting Communication*, 89 B.U. L. Rev. 871, 924–25 (2009). The nonsensical logic of this argument is that imposing open access and antidiscrimination duties is only possible where they would not be needed.[4]

C. Non-Interference is not "compelled speech"

FAIR also forecloses any argument that a conduit's act of refusing transmission is expression protecting it from government efforts that would

[4] Indeed, while the hotel owner in *Heart of Atlanta Motel* protested that the Civil Rights Act amounted to "involuntary servitude," 39 U.S. at 261, even he was not so bold as to suggest that his physical ability – and previous legal entitlement – to prevent African Americans from using his premises was constitutionally protected "editorial discretion."

"compel" it to transmit, even if providers might wish to block content as a means to register disagreement. The schools in *FAIR* advanced precisely that argument: they sought to refuse access to recruiters to convey their opposition to the military's discriminatory policies. But the Supreme Court unanimously rejected it, making clear that a legislative mandate that law schools "host" those whose speech they disapprove did not warrant any First Amendment scrutiny – because the conduct "compelled" was not itself speech. 547 U.S. at 49.

The FCC's rules similarly do not compel any expression that anyone would understand to be speech. The public does not understand broadband Internet access providers to be endorsing the messages they convey, so inhibiting their capacity to block content does not force them into making false endorsements or pledges. This is all the more true when the assertive act being regulated – the choice to block content – is not even recognizable as intelligible speech. Accordingly, even more than in *FAIR*, there is simply no lawful basis here for the heightened judicial scrutiny applicable to genuine First Amendment claims.

* * *

Petitioners invite a constitutional rule that would permit broadband Internet access providers to use the constitutionally protected speech they transmit *as a basis* for their own constitutional right to interfere with expression. This not merely "trivializes" the protections of the First Amendment, *FAIR*, 547 U.S. at 62, it

inverts them, and is in derogation of the core First Amendment principle "that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner*, 512 U.S. at 641.

The "constitutional immunity" Petitioners seek raises echoes of the similarly "strange" and misconceived argument the Supreme Court rebuffed decades ago in *Associated Press v. U.S. Tribune Co.*:

> 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. Freedom to publish is guaranteed by the Constitution, but freedom to … keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

326 U.S. 1, 20 (1945) (footnote omitted).

II. Alamo's Arguments Would Undermine the Legality of Regulations Governing Telecommunications Companies and Other Common Carriers Long Understood to be Constitutional.

Petitioners' efforts to invent categorical "Free Speech" rights warrant rejection not only because they lack doctrinal foundation, but also because they disregard and threaten to disrupt settled understandings of Congress's power to regulate (and authorize agency regulation) consistent with the protections of the First Amendment. Alamo's claims – that a broadband Internet access provider's transmission of its customers' communication is "speech"; that protecting end

users' access to the Internet is "compelled" speech; and simple nondiscrimination obligations are presumptively unconstitutional incursions on its "editorial discretion" – collectively draw into question historic pillars of communications law and other well-settled common carrier regulations.

Anticipating this argument, *amici* CBI suggest that century-old common carrier measures would not be at risk of invalidation if they involved telephones and telegraphs, which *amici* contend, are unprotected by their "First Amendment" rule, because they offer only a means of "private 'inter-communication'" between "individuals only." CBI Br. at 25. This argument proceeds from a *second* misreading of the Supreme Court's decision in *Ex Parte Jackson*. Citing the recognition in *Jackson* (and *Katz v. United States*, 389 U.S. 347 (1967)) that letters and telephone calls implicate constitutional privacy guarantees and decisions describing telephone networks as facilitating interpersonal communication, *amici* baldly assert that the law has "treated telegraph and telephone companies as common carriers *because* they transmitted *purely private* communications" CBI Br. 25, making common carrier treatment of telephones and telegraphs unproblematic, as affecting only speech on matters of "purely private concern," *Snyder v. Phelps*, 562 U.S. 443, 451–52, 454 (2011) (internal quotations omitted), entitled to less fulsome First Amendment protection, CBI Br. 28.

This free-form riff, drawing from many disparate uses of the word "private" in constitutional law, fails at literally every turn. First, it barely merits mentioning that the protections the *Fourth Amendment* accords "private" mailings and telephone conversation are *in addition to*, not in place of, First Amendment safeguards. Next, *amici* are wrong that traditional carriage is inherently confined to "matters of private concern," as the opinion in *Jackson* proves in vivid terms. Justice Field's opinion discussed extensively the antebellum controversy over the mailing of abolitionist materials to Southern States, communications which helped to harden the hostilities that led to the Civil War. 96 U.S. at 733–34. *See also* Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37*, 89 Nw. U. L. Rev. 785 (1995).

Unsurprisingly, the conclusions *Amici* draw from their mistaken premises are also wrong. The First Amendment does not ignore speech simply because it is communicated "privately." The contents of a letter are fully protected. *See, e.g.*, *Pickering v. Bd. of Ed.*, 391 U.S. 563, 566–67, 570-71, 574 (1968). Indeed, the Supreme Court has held that in some cases, the First Amendment imposes *more stringent* limits on the government's power to restrict the contents of private communications than public broadcasts. *Sable Commc'ns of California, Inc. v. FCC*, 492 U.S. 115 (1989); see *id.* at 119, 127–28 (contrasting *FCC v. Pacifica*,

438 U.S. 726 (1978)). (Presumably the telephonic "dial-a-porn" service therein involved expression on matters of "private concern.")

Nor is it true that the need for open access to traditional ground transportation networks – long subject to common carrier rules – "does not implicate speech interests." Before enactment of the Civil Rights Act, the Supreme Court interpreted the common carrier provisions of the Interstate Commerce Act to include "a right of unsegregated interstate travel on common carriers," securing the right of politically motivated groups of "Freedom Riders" to travel to the South to protest racial segregation when carriers might have otherwise barred passage. *See, e.g.*, *Mitchell v. United States*, 313 U.S. 80, 95 (1941); *see also* Louis Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 Colum. L. Rev. 1163, 1168 (1963).

In fact, the entities and conduct the Rules regulate are identical to these other traditional common carriers in all constitutionally relevant respects. Broadband Internet access providers possess the same potential as telegraph and telephone companies to interfere with important communications networks and to leverage that position to adversely affect the benefits of the network. *See generally Crawford*, *supra*. Thus if the Rules are invalid, and all transmission is "speech," then virtually all of carriage law is brought into question.

Indeed, the First Amendment "right" Alamo would have this Court fabricate

would cause harm far beyond telephone and telegraph regulation. Over the past century, Congress has itself imposed and authorized open access and nondiscrimination duties in response to important communications problems that have arisen outside these historic common carrier sectors. For example, cable companies obtained legislation requiring power companies to open their utility poles to them (and later to wireless carriers), on reasonable terms, *Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 330, 340 (2002), to overcome utilities' history of exacting artificially high rents for such access. Similarly, satellite customers were given the right to install receiving equipment over their landlords' objections, *see Bldg. Owners & Managers Ass'n, Int'l v. FCC*, 254 F.3d 89 (D.C. Cir. 2001), and the Telecommunications Act of 1996 required incumbent local exchange carriers to provide access to elements of their local networks to competitors at unbundled, regulated rates, *see* 47 U.S.C. § 251(c)(3). Were Alamo's logic to prevail, owners of these facilities could readily protest that these regulations, requiring them to participate in transmission of expression they found disagreeable (or on terms they would prefer not to accept), is "compelled speech," presumptively unconstitutional under the First Amendment.

This effort to constitutionalize traditional regulatory policy disputes threatens longstanding regulatory authority, allowing private companies to effectively dictate national communications policy and the future of the Internet for

their own benefit. It must not be given a foothold here. Because this sort of distortion is especially serious in a field whose "dominant characteristic" remains "the rapid pace of its unfolding," *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943), it is important that Petitioners' errors here be explicitly rejected, and that Congress's "constitutional authority and … institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by … new technology," *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 430 (1984), be vindicated.

CONCLUSION

The Court should reject Petitioners' constitutional challenges.

Respectfully submitted,

/s/ J. Carl Cecere

David T. Goldberg
DONAHUE & GOLDBERG, LLP
99 Hudson Street, Eighth Floor
New York, New York 10013
(212) 334-8813

J. Carl Cecere
CECERE PC
6035 McCommas Blvd.
Dallas, Texas 75206
(469) 600-9455
ccecere@cecerepc.com

Counsel for Amici Curiae

ADDENDUM

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DESCRIPTION OF AMICI

Reed Hundt served from 1993 to 1997 as Chairman of the FCC. A graduate of Yale College and the Yale Law School, he snow serves as CEO of the Coalition for Green Capital, serves on several boards of directors, and has authored many articles and four books, including *You Say You Want a Revolution* (2000), *In China's Shadow* (2006), *Zero Hour: Time to Build the Clean Power Platform* (2013), and (with Blair Levin) *The Politics of Abundance* (2012).

Michael Copps served two terms as FCC Commissioner, including six months as the Commission's Acting Chairman, before stepping down in 2011. Prior to joining the FCC, he was Assistant Secretary of Commerce for Trade Development and served for over a dozen years as Chief of Staff for Senator Ernest Hollings (D-SC). He has also held positions at a Fortune-500 company and at a major trade association.

Nicholas Johnson served as an FCC Commissioner from 1966 to 1973 and was a member of the Iowa City, Iowa Broadband Telecommunications Commission from 1981 to 1987. He currently teaches at the University of Iowa College of Law. The recipient of three Presidential appointments, Johnson is the author of several books and has also served as a public television host, columnist, school board member, congressional candidate, Supreme Court law clerk, public interest advocate, administrator, manager and corporate representative.

Susan Crawford served as a Special Assistant to the President for Science, Technology, and Innovation Policy in 2009. From 2005 to 2008, she was on the Board of the Internet Corporation for Assigned Names and Numbers (ICANN) and later served on Mayor Michael Bloomberg's Advisory Council on Technology and Innovation. A professor at Harvard Law School, she is author of *Captive Audience: The Telecom Industry and Monopoly Power in the New Gilded Age* (2013) and of numerous scholarly publications, including *First Amendment Common Sense*, 127 Harv. L. Rev. 2343 (2014).

February 17, 2015

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Protecting and Promoting the Open Internet, GN Docket No. 14-28; GN Docket No. 10-127

Dear Ms. Dortch:

I am the President of Alamo Broadband Inc. On October 21, 2014, I testified at the Texas Forum on Internet Regulation at the Texas A&M University, Bush School of Government & Public Service, in College Station, Texas. I request that the Commission make my testimony, a copy of which is attached to this letter, part of the record in this proceeding.

Alamo Broadband is a wireless Internet service provider ("WISP") that serves about 500 square miles just south of San Antonio, Texas. We currently serve over 700 customers, many of whom had very limited choices for Internet service before we came along. Like most WISPs, Alamo Broadband uses unlicensed spectrum as its last mile delivery vehicle – spectrum that we share with other unlicensed users. We are completely self-funded, getting no help from the government in the way of grants, low interest loans, or any other financial support.

Alamo Broadband supports a free and open Internet. There is little debate that every Internet user should be able to access any lawful content, service, or application that they choose. Broadband providers like Alamo Broadband do not engage in blocking or similar practices that restrict Internet access because we understand that our customers want their favorite content, services, and applications, and they want to explore the many new offerings emerging every day on the Internet. Broadband providers have nothing to gain and everything to lose by preventing customers from accessing lawful Internet offerings.

While supportive of an open Internet, Alamo Broadband adamantly opposes the Commission's proposal to regulate broadband Internet access services under Title II of

the Communications Act. Title II was designed for the 1930s telephone monopoly era, and carries with it thousands of common carrier regulations that could stifle a broadband provider's ability to continue deploying the next generation of high-speed broadband networks. Taking this radical and destructive step simply makes no sense. Nor does Section 706 or any provision of the Communications Act authorize the Commission to micromanage the Internet ecosystem in the manner the Commission has proposed.

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, a copy of this letter is being filed via ECFS. If you have any questions, please do not hesitate to contact me.

Respectfully submitted,

/s/ Joe Portman
President, Alamo Broadband Inc.

**TESTIMONY OF JOE PORTMAN, PRESIDENT AND FOUNDER,
ALAMO BROADBAND INC., ELMENDORF, TEXAS
AT THE TEXAS FORUM ON INTERNET REGULATION**

TEXAS A&M UNIVERSITY, BUSH SCHOOL OF GOVERNMENT & PUBLIC SERVICE

COLLEGE STATION, TEXAS

OCTOBER 21, 2014

Hello everyone, Good Morning.

Before I start my remarks I want to say I am honored to be invited to speak here in this forum.

I thank everyone involved in setting this up, the folks here at Texas A&M University, and of course Commissioner Pai.

I also wish to mention that the views stated here are not necessarily the views of WISPA, an organization to which I belong and support whole heartedly.

WISPA was not asked to speak here today, I was and so I'll present my views accordingly.

My name is Joe Portman and I am the founder and President of Alamo Broadband Inc., a WISP that serves about 500 square miles just South of San Antonio Texas. We currently serve over 700 customers, many of which had very limited choices for internet service before we came along. The big names, the telcos and cable companies, when it comes to rural areas such as the areas we serve don't see the value and won't invest the capital (at least if it's their money) to build infrastructure and bring service to the people that live there.

We, and thousands others like us, have found a way to do it.

This is not my first ISP, I started another in 1994 with 6 modems in a spare bedroom and I sold that business in 2000 and 'retired' to Elmendorf TX to be near my family. Elmendorf is less than 1 mile outside the city limits of San Antonio and imagine my surprise when there was no good internet service to be had. And so, after a long and fruitless search, Alamo Broadband was born.

Like the majority of WISPS we use unlicensed spectrum as our last mile delivery vehicle. We share the spectrum with all the other WISPS and unlicensed users, such as home routers, cell phones, industrial monitoring, smart meters, etc. It's a challenge sometimes, but we always find a way.

We are completely self funded, no help from the government, no government grants or low interest loans etc. I don't have research or figures, but my conversations with other WISPs and traffic on the WISP mailing lists indicate that the vast majority of WISPS are similar.

We are not unregulated by any means, like most small business operators we face numerous challenges on a daily basis, not the least of which is complying with every entity in the local, state and federal government that wants a 'piece of the action.'

Seems if a service springs up, the very next thing that happens is someone figures out how to tax it.

Shortly thereafter, someone else will start trying to regulate it.

I support the concept of Net Neutrality, although as someone famous has said, it's a "non trivial problem."

It's a moving target.

The Internet of today is definitely not the Internet of 1994, and the Internet of 2024 will not be the Internet of today.

In 2010, the FCC adopted a "light touch" approach. While many small operators were concerned, we nonetheless complied with the new rules. One significant thing the FCC realized was that WISPs face—and I'm quoting—"unique network management challenges" because we do not have exclusive use of the last mile link. This means that what is "reasonable" for my company to do may not be so for companies that use other technologies. This has not changed. In fact, the challenges we face today are greater than those we faced in the past because customers are using more and more bandwidth for Netflix, Hulu and other video streaming services. To keep the network running efficiently a network operator needs to be free to take any necessary action to protect the integrity of the network so they can continue delivering quality service to their customers.

Internet regulation is getting a lot of attention these days, in fact, I was invited to attend a protest at this very location, all in the name of 'Net Neutrality.' I'm not big on protests.

And so, that brings us to why I am really here today. Title II regulation of WISPs. I think it's pretty much a terrible idea borne of good intentions. The phrase "unintended consequences" comes to mind. Here are a few of the problems I see with this approach:

1. Increased disclosure and reporting requirements of not just our internet practices, but every facet of our business. Small companies such as mine simply cannot bear the cost of preparing and filing these items. Our staff is pretty busy just dealing with the loads we already carry. More staff to cover regulations means less funds to run the network and provide the very service our customers depend on.

2. I am informed by an attorney, any violation of these new regulations would not only carry potential fines, but damages as well. If you've heard of patent trolling, then you can imagine some of those same people would quickly figure out a way to start trolling ISPs as well. A few successful cases would be all it takes to start a landslide in the WISP industry.

3. And here's the rub, the regulations would not really be addressing the core issue: the likelihood that the dominant companies with big market power will use that power to take advantage of small broadband providers.

4. The enforcement process must be fair to small businesses. So I think it's a good idea to eliminate expensive formal complaints and require people to negotiate in good faith with their ISP for 30 days before they can file a complaint. And, let's make sanctions specific. Under the current rules, I don't know if a violation of the net neutrality rules is a one dollar problem or a one million dollar problem. I can't accurately assess the risk, and investors can't quantify the risk. This raises a barrier to small businesses seeking capital and stifles growth.

In summary, "if it ain't broke don't fix it." The Internet has experienced massive growth since 2010, and absent any landmark changes, it will continue to do so. Title II and the more onerous and costly regulations will work against the goals of encouraging broadband deployment to all Americans. We are not common carriers and we don't operate as common carriers. We don't need to be regulated as common carriers.

The Internet is a wondrous, mysterious, beautiful thing. It's like a living breathing organism as vast as the ocean and as unknowable at times. There is simply no way to know where it will take us next. My fervent hope is that it takes us, as a species, to a new level of conscience. To a place without hunger or war. To get there, everyone will need access. Let's not make it any harder than it already is.

Thank you, I look forward to your questions.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 29(d) of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 29 because this brief contains 4,865 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(2).

This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because the brief has been prepared using Microsoft Word 2013 in 14-point Times New Roman font, which is a proportionately spaced typeface.

/s/ J. Carl Cecere

J. Carl Cecere

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECT users.

/s/ J. Carl Cecere

J. Carl Cecere