ORAL ARGUMENT NOT YET SCHEDULED
No. 11-1355
Consolidated with Nos. 11-1356, 11-1403, and 11-1404

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

VERIZON,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

On Appeal from an Order of the
Federal Communications Commission

BRIEF *AMICI CURIAE* OF THE CENTER FOR DEMOCRACY & TECHNOLOGY AND LEGAL SCHOLARS IN SUPPORT OF APPELLEE

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November 15, 2012

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties and intervenors have consented to the filing of this brief. *Amici Curiae* filed their notice of intent to participate on October 31, 2012.[1]

Pursuant to D.C. Circuit Rule 29(d), *amici curiae* the Center for Democracy & Technology (CDT) and Legal Scholars Marvin Ammori, Jack M. Balkin, Michael J. Burstein, Anjali S. Dalal, Rob Frieden, Ellen P. Goodman, David R. Johnson, Dawn C. Nunziato, David G. Post, Pamela Samuelson, Rebecca Tushnet, Barbara van Schewick, and Jonathan Weinberg certify that they are submitting a separate brief from other *amici curiae* in this case due to the specialized nature of each *amici*'s distinct interests and expertise. This is a brief of First Amendment and Internet law professors focused solely and directly on rebutting Appellants/Petitioners' First Amendment arguments in the context of the most current and relevant precedents, including significant discussion of the implications of the landmark case of *Reno v. ACLU*, 521 U.S. 844 (1997), and with

[1] Pursuant to Fed. R. App. P. 29(c), *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Fellows of the Information Society Project at Yale Law School Nicholas Bramble, Anjali Dalal, Erica Newland, Joshua Weinger, and Albert Wong helped to prepare this brief *pro bono* under the supervision of *amicus* CDT's Kevin S. Bankston, counsel of record, and *amicus* Professor Jack M. Balkin of Yale Law School.

extended application of the intermediate scrutiny laid out in *Turner Broadcasting System, Inc. v. FCC (Turner I)*, 512 U.S. 622 (1994), and *Turner Broadcasting System, Inc. v. FCC (Turner II)*, 520 U.S. 180 (1997). CDT *et al.* anticipate an *amicus* brief of leading Internet engineers and technologists that will focus not on statutory and constitutional analysis but on explaining the technology of the Internet, the benefits of openness, and the threat to the Internet's openness that the FCC order under review seeks to address. We also anticipate an *amicus* brief on behalf of former FCC Commissioners including Reed Hundt and other telecommunications policymakers that will in part address the First Amendment issue, but will not address the two specific aspects of the issue mentioned above, and will also address Fifth Amendment issues not discussed in this brief; that brief will focus on the implications of this case for vital policy activities of administrative agencies in the future. We anticipate an additional *amicus* brief of Professor Tim Wu, but that brief will focus on the history of telecommunications law's interaction with First Amendment law, and is not expected to be duplicative of the content herein. Finally, we anticipate a brief on behalf of various venture capital investors that will focus on the Open Internet Rules' implications for broadband investment and will not address the First Amendment. Given these divergent purposes, CDT *et al*. certify that filing a joint brief would not be practicable.

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amici curiae* certify that that:

(A) Parties and Amici

In addition to the parties, intervenors, and *amici* listed Brief for Respondent Federal Communications Commission, the following *amici* may have an interest in the outcome of this case:

(on this brief) Center for Democracy & Technology, Marvin Ammori, Jack M. Balkin, Michael J. Burstein, Anjali S. Dalal, Rob Frieden, Ellen P. Goodman, David R. Johnson, Dawn C. Nunziato, David G. Post, Pamela Samuelson, Rebecca Tushnet, Barbara van Schewick, and Jonathan Weinberg;

Internet technologists Scott Bradner, Lyman Chapin, Dr. David Cheriton, Dr. Douglas Comer, Phil Karn, Dr. Leonard Kleinrock, Dr. John Klensin, Dr. James Kurose, Dr. Nick McKeown, Dr. Craig Partridge, Dr. Vern Paxson, Dr. David Reed, Dr. Scott Shenker, Dr. Don Towsley, Dr. Paul Vixie, Steve Wozniak;

Professor Tim Wu;

Former FCC Commissioners and telecommunications policymakers Reed Hundt, Tyrone Brown, Michael Copps, Nicholas Johnson, Susan Crawford, and the National Association of Telecommunications Officers and Advisors.

It is also *amici*'s understanding that an additional *amicus* brief will be filed on behalf of various venture capital investors.

(B) Rulings under Review

References to the rulings at issue appear in the Joint Brief for Petitioners Verizon and MetroPCS.

(C) Related Cases.

All related cases of which *amici* are aware are listed in the Brief for Respondent Federal Communications Commission.

November 15, 2012 /s/ Kevin Bankston

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, *amici curiae* the Center for Democracy & Technology, *et al*., hereby submit the following corporate disclosure statements:

The Center for Democracy & Technology ("CDT") is a non-profit, non-stock corporation organized under the laws of the District of Columbia. CDT has no parent corporation, and no company owns 10 percent or more of its stock.

All other *amici* are individuals.

November 15, 2012 /s/ Kevin Bankston

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GLOSSARY OF ABBREVIATIONS

ACLU	American Civil Liberties Union
CDT	*Amicus* Center for Democracy & Technology
DSL	Digital Subscriber Line (a broadband data transmission technology)
FCC	Federal Communications Commission
ISP	Internet Service Provider

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Respondent Federal Communications Commission.

INTEREST OF *AMICI CURIAE*

The Center for Democracy & Technology (CDT) is a non-profit public interest organization focused on free speech and other civil liberties issues affecting the Internet, other communications networks, and associated technologies. CDT represents the public's interest in an open Internet and promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

CDT here represents itself and the following individual legal scholars with expertise in the First Amendment, the Internet, and telecommunications law, who have a shared interest in preserving a neutral and open Internet:

Marvin Ammori is a Bernard L. Schwartz Fellow at the New America Foundation and an Affiliate Scholar at Stanford Law School's Center for Internet & Society.

Jack M. Balkin is Knight Professor of Constitutional Law and the First Amendment and the founder and director of the Information Society Project at Yale Law School. He specializes in First Amendment, telecommunications, and Internet law.

Michael J. Burstein is Assistant Professor of Law at the Benjamin N. Cardozo School of Law, Yeshiva University, where he specializes in intellectual property law and innovation policy. *See, e.g., Towards a New Standard for First*

Amendment Review of Structural Media Regulation, 79 N.Y.U. L. Rev. 1030 (2004).

Anjali S. Dalal is the Google Policy Fellow at the Information Society Project at Yale Law School, specializing in the First Amendment and Internet law. *See, e.g., Protecting Hyperlinks and Preserving First Amendment Values on the Internet*, 13 U. Pa. J. Const. L. 1071 (2011).

Rob Frieden holds the Pioneers Chair and serves as Professor of Telecommunications and Law at Penn State University where he specializes in how converging markets and technologies affect law and policy.

Ellen P. Goodman is Professor of Law at Rutgers University – Camden, specializing in communications policy. She was also recently a Distinguished Visiting Scholar at the FCC.

David R. Johnson has served as Visiting Professor of Law at New York Law School and specializes in Internet law. He co-authored *Law and Borders: The Rise of Law in Cyberspace*, 48 Stanford L. Rev. 1367 (1996).

Dawn C. Nunziato is Professor of Law at the George Washington University Law School and an internationally recognized expert on free speech and the Internet. She recently published her book *Virtual Freedom: Net Neutrality and Free Speech in the Internet Age* (2009).

David G. Post is Professor of Law at the Beasley School of Law, Temple University, specializing in Internet law, intellectual property law, and the First Amendment. *See, e.g., In Search of Jefferson's Moose: Notes on the State of Cyberspace* (2009).

Pamela Samuelson is the Richard M. Sherman Distinguished Professor of Law & Information at the University of California, Berkeley, where she teaches and writes about intellectual property and cyberlaw issues. She is a coauthor of *Software & Internet Law* (4th ed. 2010).

Rebecca Tushnet is a Professor of Law at the Georgetown University Law Center, specializing in intellectual property and the First Amendment.

Barbara van Schewick is an Associate Professor of Law and Director of the Center for Internet and Society at Stanford Law School. She is the author of the book *Internet Architecture and Innovation* (2010) on the science, economics, and policy of network neutrality. Her research focuses on Internet architecture, innovation, and regulation.

Jonathan Weinberg is a Professor of Law at Wayne State University, with specialization including First Amendment, telecommunications, and Internet law, and was formerly Scholar in Residence at the FCC.

SUMMARY OF ARGUMENT

When it comes to the First Amendment, the Appellants' argument is exactly backwards. The order under review, *Preserving the Open Internet*, 25 FCC Rcd. 17,905 (Dec. 23, 2010), 76 Fed. Reg. 59,192 (Sept. 23, 2011) (hereafter "Order", "Open Internet Rules", or "Rules"), does not violate the First Amendment rights of Verizon or MetroPCS (hereafter "Verizon") as they claim, but instead protects the First Amendment interests of Internet users. As described in the introductory Part I, Verizon's claim that it has a First Amendment right to edit its customers' access to the Internet, in combination with new ability and incentives to do so, threatens to undermine the fundamental features of the Internet that have made it "the most participatory form of mass speech yet developed." *Reno v. ACLU*, 521 U.S. 844, 863 (1997) (internal quotation marks omitted).

Verizon's First Amendment arguments are incorrect as a matter of law. As explained in Part II, the Rules do not restrict or compel Verizon's own speech, but only regulate its conduct as a *conduit* for others' speech. Certainly, Verizon often does speak via the Internet, using websites, blogs, email, social media, and the like. But its separate conduct in transmitting the speech of others should not be confused with Verizon's own speech. Rather, as Verizon itself has repeatedly claimed in other contexts, it acts as a passive conduit for its users' speech.

That conduct is not sufficiently expressive to merit First Amendment scrutiny under the test first established in *Spence v. Washington*, 418 U.S. 405, 410–411 (1974). As in the case of the shopping center in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) or the law school in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), no one could mistake the mere fact that Verizon allows speech to occur over its property as an expression of Verizon's endorsement of that speech. The competing analogies offered by Verizon are wholly inapt: broadband internet access service providers do not and need not exercise editorial discretion as newspapers or cable companies do. Verizon and other broadband providers are more akin to telephone companies. Like the anti-discrimination obligations that apply to those companies, the Rules do not restrict or compel anyone's speech but instead protect everyone's speech by requiring that it be transmitted without interference. To hold otherwise would call into question all of common carriage law, and threaten to give any actor with the physical or technical ability to block speech—be it a telephone company or FedEx—a First Amendment right to do so.

However, in case this Court disagrees and concludes that First Amendment scrutiny is warranted, the concluding Part III demonstrates how the Open Internet Rules easily satisfy the intermediate scrutiny applied to the cable must-carry rules in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*) and

Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997) (*Turner II*) (collectively, *Turner*). Even more than the rules at issue there, the Open Internet Rules are unquestionably content neutral, because unlike must-carry rules, the Rules don't force broadband providers to forego the carriage of any speech in order to carry particular speech. But like the cable companies in *Turner*, Verizon possesses unique "bottleneck" or "gatekeeper" control over the content that leaves or enters the home, further making intermediate (rather than strict) scrutiny appropriate. The Open Internet Rules promote an important government interest—"assuring that the public has access to a multiplicity of information sources," promoting "the widest possible dissemination of information from diverse and antagonistic sources," *Turner I*, 512 U.S. at 663 (internal quotation mark omitted)—while restricting no more speech than necessary. Indeed, they impact broadband providers' speech even less than the rules in *Turner* impacted cable companies'.

In its capacity as a broadband provider, Verizon is not a speaker but a conduit for others' speech, and *Turner* scrutiny of the Open Internet Rules is not necessary or appropriate. Even so, the Rules easily satisfy such scrutiny. *Amici* urge this Court to reject Verizon's claim that the Rules violate the First Amendment.

ARGUMENT

I. Introduction: Verizon's First Amendment Arguments Threaten the Internet as an Open Platform for Free Speech.

The Internet is a uniquely open communications platform with unprecedented power to promote First Amendment rights, as the Supreme Court first recognized in the landmark case of *Reno v. ACLU*. Yet the Internet's unique capacity to empower individual speakers could be irrevocably damaged if this Court accepts Verizon's argument that the Open Internet Rules violate Verizon's own purported First Amendment interest in exercising unfettered "editorial discretion" over the Internet content that its customers choose to send or receive.

When the *Reno* Court concluded that the Internet deserved "the highest protection" under the First Amendment as "the most participatory form of mass speech yet developed," *id*. at 863 (quoting *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996)), it was the speech of Internet *users*—the individuals, businesses, and content providers connected at the network's endpoints—that the Court intended to protect. The Court stressed that Internet content is "available to anyone, anywhere in the world, with access to the Internet," *id*. at 851, and that "the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers," *id.* at 863 n.30 (*quoting ACLU*, 929 F. Supp. at 877). The Court described the Internet as "open to all comers," *id*. at 880, and its content "as diverse as human thought," *id*. at 852 (quoting *ACLU*,

929 F. Supp. at 842), and situated the Internet firmly within the historical goals of the First Amendment: "[A]ny person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox." *Id*. at 870.

Of course, Verizon and other broadband Internet access service providers are among the speakers the Internet empowers. They, like countless others, create and publish content via their websites, social media accounts, and other online speech platforms. But for the millions of customers who rely on them for Internet access, these providers are also the sole pathway through which *all other* Internet content is sent and delivered. In this latter capacity, a broadband provider is no more the publisher or speaker of third-party content than is the postal service delivering letters or the maker of the soapbox on which a speaker stands. To conclude otherwise would threaten the revolutionary characteristics of the Internet that were recognized by the *Reno* Court, speech-fostering features based on the basic design of the Internet as a network with low barriers to participation that does not distinguish between the diverse applications, content, and services running over it. *See id.* at 863 n.30 (quoting *ACLU*, 929 F. Supp. at 877); *see also* Barbara van Schewick, *Network Neutrality and Quality of Service: What a Non-Discrimination Rule Should Look Like*, Center for Internet & Society, 1 (June 11, 2012), http://cyberlaw.stanford.edu/downloads/20120611-NetworkNeutrality.pdf (describing the Internet's application-neutral, "end-to-end" architecture); Brief of

Amici Curiae Internet Engineers and Technologists in Support of Respondents (hereafter "Engineers' Br.") 12–16 (same).

The Internet's openness was further enabled by the fact that at the time *Reno* was decided, non-discriminatory transmission of Internet content was a given. The reason was simple: people used to "dial up" to their Internet service providers (ISPs) over telephone lines provided by common carrier phone companies (hence the Supreme Court's conclusion that "any person *with a phone line* can become a town crier," *Reno*, 521 U.S. at 870 (emphasis added)). There were a wide variety of dial-up ISPs, including many "major national 'online services' . . . [that offered] access to their own extensive proprietary networks as well as a link to the much larger resources of the Internet." *Id.* at 850. In fact, at the height of the market for dial-up Internet access in the late 1990s, there were more than 9,000 dial-up ISPs in the US, with residents of most major metropolitan areas having hundreds of accessible local options. Eli M. Noam, *Media Ownership and Concentration in America* 275–78 (2009). Therefore, in the *Reno* era, the phone company providing "first and last mile" transmission service between a household and its dial-up ISP was a common carrier that could not discriminate, while if a dial-up ISP engaged in discriminatory practices, Internet users could easily switch to competing providers.

Now, as dial-up service has been replaced by digital subscriber line (DSL) modem Internet service offered directly by telephone companies and cable modem Internet service offered by cable companies, most consumers face very few options for broadband Internet access. As of June 30, 2011, 66% of US households had two or fewer options for high-speed Internet service (*i.e.*, throughput greater than 3 megabits/sec downstream and 768 kilobits/sec upstream), and 96% of households had two or fewer options for higher-speed service (throughput of at least 6 Mb/sec downstream and 1.5 Mb/sec upstream). FCC, Internet Access Services: Status as of June 30, 2011, at 8 (2012), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-314630A1.pdf. Abundant consumer choice therefore no longer serves as an effective check against discriminatory behavior by a user's chosen Internet provider. Meanwhile, a variety of economic and technical factors have given broadband providers new ability and incentive to engage in just such behavior. Brief for Appellee/Respondents Federal Communications Commission and the United States of America (hereafter "FCC Br.") 13–14; *see also* van Schewick, *supra*, at 42 (describing providers' new ability and incentive to block or discriminate against particular applications and content). Considering those incentives and the often duopolistic nature of the market for broadband Internet service, the possibility (and actuality, FCC Br. 9–10, 15) of discrimination by broadband providers presents a clear and present danger to the

key features that make the Internet "far more speech-enhancing than print, the village green, or the mails." *ACLU*, 929 F. Supp at 882.

II. The Open Internet Rules Do Not Restrict or Compel Verizon's Own Speech, But Only Regulate Its Conduct as a Conduit for Others' Speech.

Verizon is in the business of providing a conduit for end users, be they individuals or businesses, to speak to each other. But Verizon's conduct in transmitting the speech of others should not be confused with Verizon's own speech.

When deciding whether particular conduct is expressive enough to warrant First Amendment scrutiny, the Supreme Court has considered whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Spence*, 418 U.S. at 410–411. Verizon's conduct as a conduit for others' speech fails this test.

Verizon fails the first prong of the *Spence* test because there is no intent to convey any message through the transmission of others' content. Rather, Verizon explicitly disclaims any endorsement of the content users receive or send through its service. *See Verizon Online Terms of Service* 11(5), (Dec. 31, 2011), http://my.verizon.com/central/vzc.portal?_nfpb=true&_pageLabel=vzc_help_policies&id=TOS ("Verizon assumes no responsibility for . . . any Content . . . and . . . Verizon does not endorse any advice or opinion

contained therein."). Similarly, Verizon has argued in past litigation it does not endorse or take responsibility for the content it transmits between Internet users:

> [T]he Internet service provider performs a pure transmission or "conduit" function. . . . This function is analogous to the role played by common carriers in transmitting information selected and controlled by others. Traditionally, this passive role of conduit for the expression of others has not created any duties or liabilities under the copyright laws.

Brief for Appellant at 23, *Recording Indus. Ass'n of Am. v. Verizon Internet Serv.*, 351 F.3d. 1229 (D.C. Cir. 2003) (Nos. 03-7015 & 03-7053). With regard to its conduct as a broadband provider, however, Verizon cannot have it both ways; it cannot be a speaker when it suits its purposes and a conduit when it does not. *See generally* Rob Frieden, *Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status as Both Content Creators and Neutral Conduits*, 12 U. Pa. J. Const. L. 1279 (2010) (cataloguing the alternating First Amendment positions of broadband providers). Either Verizon is expressing itself by its choice to transmit certain content, or it is a passive conduit for the expression of others. Based on Verizon's own representations, it is merely a conduit.

Verizon's conduct as a conduit also fails the second prong of the *Spence* test: there is little likelihood that anyone would think that Verizon endorses all of the content accessible online, or disapproves of that which cannot be accessed. A broadband provider transmits a variety of messages that often contradict each other, and no reasonable user could impute all of these various conflicting views to

the provider. This is why the Supreme Court concluded that a state could constitutionally require a privately owned shopping center to allow high school students to distribute pamphlets and seek petition signatures inside the mall: when a private property owner opens that property to others' use, the owner's First Amendment rights aren't violated by other speakers' use of the property precisely because the views expressed by speakers who are granted a right of access "will not likely be identified with those of the owner." *PruneYard*, 447 U.S. at 87.

Just as no Internet user would assume that Verizon endorses all available Internet content, an Internet user who "encounters a slow or inaccessible website or application has no way of knowing whether that content is being slowed down or blocked by her Internet access provider" and therefore no reason to perceive any message of disapproval of that content from the provider. Nicholas Bramble, *Ill Telecommunications: How Internet Infrastructure Providers Lose First Amendment Protection*, 17 Mich. Telecomm. Tech. L. Rev. 67, 89 (2010). Such a slowdown or interruption might be caused by another entity's network congestion or decision to block the website, or the website provider's own failure to maintain the site or its decision not to transmit content at that time and location. *See id*. Without some additional speech from the provider to express an opinion about the content and applications it does or does not transmit, the mere inability of a user to access some content or applications communicates nothing at all. *See Rumsfeld,*

547 U.S. at 66 ("The fact that . . . explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection.").

Because the conduct being regulated is not properly understood as broadband providers' own speech, Verizon's argument that the Rules unconstitutionally compel it to speak by transmitting the speech of others fails. In determining what constitutes compelled speech, the Supreme Court has traditionally treated entities that carry or host the traffic of others differently than entities that organize and select particular speech. For example, following its ruling in *PruneYard*, the Court held that a federal requirement for law schools that regularly allow campus visits by recruiting employers to allow visits by military employers on the same basis did not unconstitutionally compel speech. *See Rumsfeld,* 547 U.S. at 65 ("Nothing about recruiting suggests that law schools agree with any speech by recruiters.").

In contrast to its treatment of shopping centers and law schools, the Supreme Court in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* did not treat the annual St. Patrick's Day Parade as a mere conduit for others' speech. 515 U.S. 557 (1995). Instead, the Court recognized that parades are pageants staged by their organizers "to mak[e] some sort of collective point," such that the state could not require parade organizers to accommodate marchers seeking to

communicate a viewpoint that diverged from their own. *Id*. at 568–70. As the Court reiterated in *Rumsfeld*, the constitutional violations in past compelled speech cases such as *Hurley* "resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld*, 547 U.S. at 63. But Verizon is not organizing a parade intended to communicate a point with which the Open Internet Rules interfere; its users are not participating in a pageant staged by Verizon. They are simply trying to speak with each other using Verizon as a conduit, and requiring Verizon to transmit their speech evenhandedly in no way compels Verizon to speak.

The conclusion that broadband providers like Verizon aren't conveying a message when they transmit someone else's speech—and the related conclusion that a requirement to transmit others' speech without discrimination is not compelling the providers' speech—is further supported by Supreme Court precedent on the First Amendment rights of cable television providers. "Given cable's long history of serving as a conduit for broadcast signals," the Supreme Court has noted, "there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." *Turner I*, 512 U.S. at 655; *see also Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 761 (1996) (stating that because cable operators have not "historically exercised editorial control" over the content

of public access channels, their "First Amendment interest [in exercising such editorial control] is nonexistent, or at least much diminished"). Similarly, there appears little risk that Internet users would assume that broadband providers endorse all of the content available on the Internet, considering that providers have historically served only as a conduit.

Indeed, any risk of assumed endorsement is far smaller here than in *Turner I* because unlike broadband providers, cable providers and newspapers necessarily exercise editorial judgment due to a scarcity of cable channels and newspaper pages. *See Turner I*, 512 U.S. at 636 (explaining that a cable operator "exercis[es] editorial discretion over which stations . . . to include in its repertoire") (internal citations omitted); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256, 258 (1974) ("the compelled printing of a reply . . . tak[es] up space that could be devoted to other material," and "[t]he choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment"). This is not how broadband providers operate. Verizon does not, and needs not, select and host all of the websites, applications, or services its subscribers may choose to access. There is no limit to the applications, content, and services available over the Internet, and Verizon simply provides a connection to it all. Verizon's business is not to provide access to some curated body of Internet "greatest hits" but to give customers a connection over which they can select for themselves which content to

send and receive. *See generally* Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 Yale L.J. 1619 (1995).

Unlike newspapers and cable companies, and like telephone companies, broadband providers do not and need not exercise editorial control in order to decide how to fill a limited number of newspaper column inches or television channels. Like telephone companies, they are not speakers under the First Amendment simply because they transmit their users' speech; they only serve as a conduit for speech. Therefore, and like the non-discrimination rules that apply to telephone companies as common carriers, the Rules are constitutional.[1]

Supreme Court precedent supports this view: "*Unlike common carriers*, broadcasters are 'entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public [duties].'" *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378 (1984) (emphasis added)(citation omitted); *see also Denver Area*, 518 U.S. at 741–42 (recognizing differing First Amendment status among "broadcast, common carrier, [and] bookstore"); *Turner I*, 512 U.S. at 684 (O'Connor, J., dissenting) (assuming constitutionality of telephone common carriage rules). As one scholar has summed up the academic

[1] Importantly, the Rules stop well short of imposing common carriage obligations on broadband providers. FCC Br. 60–68. However, how the FCC chooses to categorize a particular service under the Communications Act has no bearing on the constitutional analysis.

consensus, "The assumption for common carriers like telephone companies generally has been that *they are not speakers*, and have no First Amendment right to discriminate against speech or speakers." Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 Geo. Wash. L. Rev. 986, 125 n.100 (2008) (emphasis added); *see also* Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What "The Freedom of Speech" Encompasses*, 60 Duke L.J. 1673, 1686–87 (2011) ("Courts have placed common carriers and *other mere conduits* at the opposite end of the spectrum from speakers, and have held that conduits do not have free speech rights of their own.") (emphasis added). To conclude otherwise and hold that mere conduits for speech are themselves speakers could thus call into question the constitutionality of all of common carriage law, and threaten to give any actor with the physical or technical ability to block speech—be it the telephone company, FedEx and UPS, or even electric companies that are required to accommodate telephone and cable lines on their poles—the First Amendment right to block such speech as an exercise of "editorial discretion".

In sum, Verizon's claim that the Open Internet Rules restrict or compel Verizon's own speech are contrary to Supreme Court precedent, the history of broadband Internet access service, its own representations of that service, and its customers understanding of that service.

III. Though Such Scrutiny is Unwarranted, the Open Internet Rules Satisfy Intermediate Scrutiny.

The Open Internet Rules do not merit First Amendment scrutiny because they do not restrict or compel speech by Verizon. However, if the Court disagrees, it is clear that the Rules would easily satisfy the intermediate scrutiny standard applied in *Turner*.[2]

Non-discrimination rules are content neutral by definition. Far more clearly than the must-carry rules at issue in *Turner*, the purposes underlying the Rules here "are unrelated to the content of speech," *Turner I*, 512 U.S. at 647, and the Supreme Court's description of the content-neutral nature of rules in *Turner* applies with even greater force to the Open Internet Rules:

> They do not require or prohibit the carriage of particular ideas or points of view. They do not penalize [broadband providers] because of the content [that they transmit]. They do not compel [broadband

[2] Notably, in regard to wireless broadband providers, it is unclear that the *Turner* standard is the applicable standard. Rather, as applied to MetroPCS and Verizon Wireless in their capacity as Title III wireless licensees, there is a strong argument that the scarcity of wireless frequencies counsels this Court to apply the standard of *National Broadcasting Co. v. United States*, 319 U.S. 190, 226–27 (1943) and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388–91 (1969), applied by this Court in, *inter alia*, *American Family Ass'n, Inc. v. FCC*, 365 F.3d 1156, 1168–69 (D.C. Cir. 2004). In *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996), this Court extended the spectrum-scarcity rationale of those cases to the new medium of direct satellite broadcasting for the same reason the scarcity rationale would apply here: wireless spectrum is scarce. *Id*. at 974–977. Under the scarcity doctrine, government action to protect the speech interests of the public is subject to a lower standard of scrutiny. *Id*. Whether television, audio radio, or mobile broadband, services licensed under Title III all use the same scarce spectrum and therefore merit the same standard of scrutiny.

> providers] to affirm points of view with which they disagree. They do not produce any net decrease in the amount of available speech.

Id. The FCC's purpose here, like Congress' in *Turner*, "was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve [the public's] access" to a key communications resource regardless of content. *Id*. at 646. Indeed, the Rules seek to protect *all* lawful Internet traffic, whatever the content. *See Time Warner Entm't Co., L.P. v. United States*, 211 F.3d 1313, 1317–1318 (D.C. Cir. 2000) (holding that subscriber limits imposed on cable operators were content neutral because Congress' concern in enacting the limits "was not with what a cable operator might say, but that it might not let others say anything at all in the principal medium for reaching much of the public.").

Therefore there can be no argument—like the one put forward by the dissenting Justices in *Turner I*, 512 U.S. at 676–78 (O'Connor, J., dissenting)—that the Rules single out particular content for carriage on broadband networks. In this regard, the Rules are more akin to the non-discrimination obligations placed on common carriers, which the same dissenters recognized do "not suffer from the defect of preferring one speaker to another." *Id*. at 684. The Rules similarly show no preference for the speech of one user over that of another, or for that of users over that of broadband providers. Nor is Verizon forced to forego carriage of any

speech, as the cable companies were in *Turner*. The Rules simply require that all content be carried equally.

Finally, the fact that the content-neutral Rules specifically apply to broadband providers does not transform them into viewpoint-based restrictions warranting strict scrutiny. As the FCC has made clear, "[o]ur action is based on the transmission service provided by broadband providers rather than on what providers have to say" (Order ¶ 145), and as previously discussed, the Rules do nothing to restrict Verizon's ability to speak online through its own websites, blogs, video services, tweets, press releases, or any other means. The Rules do not favor anyone's viewpoint over Verizon's when it speaks that way but instead are narrowly focused on Verizon's unique role as a conduit for speech.

As the Supreme Court noted in *Turner I*, "[c]able operators … are burdened by the carriage obligations, but only because they control access to the cable *conduit*. So long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment." *Id.* at 645 (emphasis added). Rather, the Supreme Court continued, "[s]uch speaker-based distinctions are permissible so long as they are 'justified by some special characteristic of' the particular medium being regulated." *Id*. at 660–661 (quoting *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Rev.*, 460 U.S. 575, 585 (1983)).

The special characteristics of the cable conduit at issue in *Turner* mirror those of the broadband Internet conduit at issue here:

> A daily newspaper, no matter how secure its local monopoly, does not possess the power to obstruct readers' access to other competing publications. . . . [But] when an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.

Turner I, 512 U.S. at 656–657. Like cable operators, broadband providers have "bottleneck" or "gatekeeper" control over the high-speed Internet content that enters (or leaves) the home, control that is exacerbated through the usually monopolistic or duopolistic environments in which they operate. *See infra* at 28; Engineers' Br. 24–25 (describing the "terminating access monopoly" possessed by broadband providers). The Rules squarely target this special characteristic of broadband providers: the "ability of broadband providers to favor or disfavor Internet traffic to the detriment of innovation, investment, competition, public discourse, and end users." Order ¶ 146.

Here, as in *Turner I*, "[t]he First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a

critical pathway of communication, the free flow of information and ideas." *Id*. at 657. Therefore, as in that case, to the extent broadband providers' rights as speakers are implicated at all by the Open Internet Rules, intermediate scrutiny is the appropriate standard of review.[3] *Id.* at 661–62.

"A content-neutral regulation will be sustained if 'it furthers an important or substantial government interest … unrelated to the suppression of free expression' [and if] the means chosen 'do not burden substantially more speech than is necessary.'" *Turner I*, 512 U.S. at 662 (citing *United States v. O'Brien,* 391 U.S. 367, 377 (1968) and *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). The Open Internet Rules satisfy both requirements.

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[3] Verizon briefly argues in a footnote that strict scrutiny is appropriate because the Open Internet Rules purportedly favor the speech of "other similarly-situated speakers (like content providers)." *See* Joint Brief for Appellants/Petitioners Verizon and MetroPCS (hereafter "Verizon Br.") 45, n.13. But content providers, be they websites or app stores, are not at all similarly situated to broadband providers, which as previously described possess unique physical control over what content flows into or out of a subscriber's home. *See infra* at 22 and *supra* at 28–29 (further distinguishing broadband Internet service from other Internet services and content). The decision in *Comcast Cablevision of Broward County v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000), does not change this conclusion. As an initial matter, that district court case was wrongly decided. *See* David Wolitz, *Open Access and the First Amendment: A Critique of Comcast Cablevision of Broward County, Inc. v. Broward County*, 4 Yale Symp. L. & Tech. 6 (2001) (explaining at length why the case was wrongly decided under *Turner*). Moreover, the decision in *Comcast Cablevision v. Broward County* is distinguishable because it was based in part on the fact that cable operators did not have gatekeeper control over Internet access because most people used dial-up services. 124 F. Supp. 2d at 696 ("[c]able operators control no bottleneck monopoly over access to the Internet. Today, most customers reach the Internet by telephone). That fact is no longer true. *See supra* at 9–10.

A. The Open Internet Rules Further An Important Government Interest.

The Open Internet Rules further at least three important government interests: promoting infrastructure investment, promoting competition between online services, and protecting Internet users' ability to receive and share the content of their choice. FCC Br. 74. Each of these is an important interest, but *amici* here focus on the third interest highlighted by the FCC, further described in its Order as an interest in "enabling consumer choice, end-user control, free expression, and the freedom to innovate without permission—ensur[ing] the public's access to a multiplicity of information sources and maximiz[ing] the Internet's potential to further the public interest." Order ¶ 146.

Assuring that Internet users and innovators retain the ability to exercise their First Amendment rights online, to speak and receive speech without interference from the broadband providers that have bottleneck control over their high-speed access to the Internet, is not merely an important, but indeed a compelling, government interest. 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." 512 U.S. at 663. "Indeed," the Court continued, "it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Id*.

(internal quotation marks omitted); *see also* Marvin Ammori, *First Amendment Architecture*, 2012 Wisc. L. Rev. 1, 15–18 & n.68 (citing scholarship exploring the constitutionality of media and telecommunications policies furthering the speech interests of users, viewers, callers, and listeners).

The roots of this recognition that protection of First Amendment rights is itself an important government interest can be found much farther back than *Turner*. As Justice Black previously articulated,

> It would be strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment … rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. 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.

Associated Press v. United States, 326 U.S. 1, 20 (1945) ("Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."); *Red Lion*, 395 U.S. at 390 ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."). Broadband providers' ability to act as gatekeepers and discriminate against lawful content and applications that Internet users would otherwise be able to communicate to each other poses a clear and present danger to Americans'

ability to exercise their free speech rights online. Based on *Turner I*, addressing that threat is unquestionably an important and substantial government interest.

Like the must-carry rules in *Turner*, the Open Internet Rules were "designed to address a real harm" and "will alleviate it in a material way." *Turner II*, 520 U.S. at 195. The Order explicitly classifies "[t]he dangers to Internet openness" as "not speculative or merely theoretical." Order ¶ 41. Verizon and the TechFreedom *amici* may harp on the FCC's description of the Rules as "prophylactic", but the FCC uses that term only to indicate that it refuses to "wait for substantial, pervasive and potentially irreversible harms" before it acts. *Id*.

Contrary to Verizon's claims, the harms the Commission seeks to prevent are far from speculative. As cited in the Order, there have already been incidents of a DSL broadband provider blocking a competing Internet-telephony service, cable broadband providers interfering with traffic using peer-to-peer file-sharing protocols, and mobile broadband providers restricting the availability of various services on their networks, particularly those that compete directly with legacy voice telephony. Order ¶ 35; *see also* Barbara van Schewick, *Start-Up Video Company Asks FCC to Improve Open Internet Proposal*, Internet Architecture and Innovation (Dec. 2, 2010), https://netarchitecture.org/2010/12/start-up-video-company-files-concerns-about-fcc-open-internet-proposal/ (describing how an

online video company had difficulty obtaining funding over fears of discrimination by broadband providers, and how this is only one example of many).

In fact, one need look no further than Verizon's own brief and the economic incentives cited therein to realize that even more discrimination by broadband providers is likely without rules to prevent it. Verizon Br. 44–45 (non-discrimination rules "limit the means by which providers can secure additional revenue," such as by providing "differential pricing or priority access" to certain content). Verizon attempts to have it both ways, arguing that the Rules violate its purported First Amendment right to exercise editorial discretion over its users' Internet access, while simultaneously arguing that it cannot and has no intent to interfere with or block particular content or services such that the Rules serve no purpose. These arguments cannot both be true; indeed, neither is true.

B. The Open Internet Rules Restrict No More Speech Than Necessary.

The Open Internet Rules are narrowly tailored to serve the government's interest in fostering online speech while restricting no more speech than is necessary. Indeed, the Rules have even *less* impact on broadband providers' speech than the must-carry rules ultimately upheld in *Turner*: there, cable operators' own speech was burdened by the fact that the must-carry rules deprived them of the use of channels that they otherwise could have used to transmit their own speech or speech chosen by them. *See Turner II*, 520 U.S. at 214. In this

case, there is no channel scarcity to consider: Verizon is free to communicate as much as it likes over the Internet. There is no speech that broadband providers must forego creating or transmitting due to the Rules. Furthermore, to the extent a broadband provider may want to provide a specialized or curated Internet experience that, unlike provision of Internet access alone, is intended to express a viewpoint—for example, by exercising editorial discretion to create a "family friendly" information portal for users who desire to access only such content—the Rules explicitly allow such "edited" services. Order ¶¶ 89, 143. Likewise, the Rules prohibit only "unreasonable" discrimination, and explicitly allow for discrimination tied to reasonable network management. Order ¶ 39.

The Rules are also narrowly tailored because they do not apply to all providers of Internet transmission services but only to providers of Internet *access*, where the lack of competition and broadband providers' physical control of the communications conduit create a clear bottleneck that would enable content gatekeeping antithetical to First Amendment values. *See supra* at 9–10 (discussing lack of competition in Internet access market); *see also* John Blevins, *The New Scarcity: A First Amendment Framework for Regulating Access to Digital Platforms*, 79 Tenn. L. Rev. 353, 380–81 (2012) (describing how most Americans can only choose between one of two broadband access providers, while many can only choose one).

Nor do the Rules burden speakers and innovators who use Internet access services to provide applications, content, and services. In these markets, a wide variety of competing services are available and the risk and impact of discrimination is much less. *See* Blevins, 79 Tenn. L. Rev. at 359–361 (2012) (distinguishing the Internet's competitive "application layer" from the less competitive "network layer"). Therefore, Verizon's claim that the Rules are underinclusive by not applying to application platforms and search engines has it backwards—the Rules are narrowly tailored precisely because they do not reach these markets, where there is no last-mile chokepoint and there is ample opportunity for (and actuality of) competition. Indeed, the Rules are narrowly tailored even at the network layer, ignoring backbone Internet providers and focusing solely on those providers with a terminating monopoly at the "last mile".

In sum, although the Open Internet Rules do not restrict or compel Verizon's speech such that First Amendment scrutiny is required, the Rules nonetheless easily satisfy the intermediate scrutiny that was applied in *Turner*.

CONCLUSION

For the foregoing reasons, this Court should reject Verizon's claim that the Open Internet Rules violate the First Amendment.

Dated: November 15, 2012

Respectfully submitted,

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November 15, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2012, I caused copies of the foregoing BRIEF AMICI CURIAE OF THE CENTER FOR DEMOCRACY & TECHNOLOGY AND LEGAL SCHOLARS IN SUPPORT OF APPELLEE to be filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users. Other counsel, marked with an asterisk below, will receive service by mail.

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